COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 031575-96**

Darlene Raymann	Employee
Massachusetts Turnpike Authority	Employer
Massachusetts Turnpike Authority	Self-insurer

REVIEWING BOARD DECISION
(Judges Costigan, Carroll and Fabricant)

APPEARANCES
Cynthia A. Spinola, Esq., for the employee
Kevin B. O'Leary, Esq., for the self-insurer

COSTIGAN, J. The self-insurer appeals from an administrative judge's decision denying its complaint for modification or discontinuance of § 34A permanent and total incapacity benefits. The self-insurer mounts four arguments against the decision. First, it contends the judge erred in requiring the self-insurer to show the employee its investigative evidence -- a surveillance video and several reports -- prior to the start of the hearing and prior to the employee's testimony. Second, the self-insurer argues the judge erred in ruling that the evidence at hearing would be limited to the period following his prior decision, of which he took judicial notice. (Dec. 2.)[1] We summarily affirm the judge's decision as to these two challenges.

The self-insurer's third argument is that the judge erred by allowing a second § 11A impartial medical examination in the same present disability hearing. Lastly, the self-insurer challenges the judge's conclusion that the employee remains permanently and totally incapacitated from gainful employment. We set forth the pertinent subsidiary findings of fact.

[1] By decision filed on January 23, 2001, the administrative judge found the employee permanently and totally incapacitated, and awarded § 34A benefits. (Dec. 2; Self-ins. br. 1-2.)

The employee, age fifty-four at the time of the hearing, sustained injuries to her low back and knees on August 12, 1996, while working as a toll collector for the Massachusetts Turnpike Authority. The self-insurer accepted her claim and paid temporary incapacity benefits to statutory exhaustion. The employee was receiving § 34A permanent and total incapacity benefits (see footnote 1, supra) when the self-insurer filed a complaint to modify or terminate weekly benefits. The complaint was denied following a § 10A conference and the self-insurer appealed to a de novo hearing, putting at issue the extent and causal relationship of the employee's disability.[2] The employee submitted to a § 11A impartial medical examination by Dr. Steven Silver on December 12, 2003, (Dep. 5-6; Stat. Ex. 1), and a re-examination on November 5, 2004. (Dep. 11; Stat. Ex. 1.)[3]

The judge found the employee continues to experience pain in her lower back which radiates into her left leg, foot and toes, and is now beginning to have pain into her right thigh. The employee's knees are more painful and she uses a cane about ninety per cent of the time. The employee can sit for only ten minutes before her back hurts, and she has trouble bending, stretching, twisting, walking more than fifteen to twenty feet, lifting more than five pounds, and sleeping. (Dec. 2-3.) The judge credited the employee's testimony that although her housemate runs a dog boarding kennel out of the home they share, the employee has no involvement in the business indicative of either actual earnings or an earning capacity. (Dec. 3, 5.)

The judge noted the diagnoses of the § 11A impartial medical examiner, Dr. Silver: degenerative arthritis of the employee's knees, possible lumbar disc,

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[2] In his decision, the judge first identified the issues at hearing as "Disability and Extent Thereof, Causal Relationship," (Dec. 1), but then stated, "[t]he only issue is the extent of disability relating to the industrial injury." (Dec. 2.) The self-insurer's hearing memorandum, (Self-ins. Ex. 1), confirms that disability, extent of disability and causal relationship were at issue.

[3] The judge's decision incorrectly identifies the dates of the reports as December 3, 2003 and October 5, 2004. (Dec. 1.)

and arthritis of her lumbar spine, all causally related to her 1996 industrial injury. The judge discussed the doctor's testimony:

> He opines that as a result, Ms. Raymann could only engage in work activities that did not involve sitting for more than two hours and no lifting of more than 20-25 pounds. She cannot stand for more than two hours. She cannot climb stairs regularly. She can only walk within a limited space. She cannot squat. She can do some bending. Her condition is permanent. He does, however, think a part-time, accommodated, light duty toll collecting job might be worth a try. Dr. Silver viewed the videotaped activities of the employee and finds that the tape "totally confirmed what my opinions were about the patient."

(Dec. 4; deposition citations omitted.) The judge concluded that given the physical restrictions imposed by the impartial physician, the employee's "physical condition has not changed in a way significant enough to make her more employable at this time." (Dec. 4.) For "reasons substantially similar to those outlined" in his decision of January 23, 2001, the judge determined the employee "would not find work in the open labor market." (Id.) Lastly, the judge found the employer's job offer warranted further investigation and "possibly even an attempt at some sort of controlled return to work," but as the employee's attorney's telephone calls inquiring about the details of the job offer had gone unanswered, the judge declined to use the offer as the basis to modify the employee's compensation. (Dec. 5.)

The self-insurer is correct that there is no statutory *right* to a second impartial medical examination in the same disability adjudication. See Oliveira v. Scrub-a-Dub Wash Center, 10 Mass. Workers' Comp. Rep. 61 (1996). This does not mean, however, that the administrative judge, in the sound exercise of his discretion, cannot authorize such an examination, particularly when, as here, it was the § 11A impartial physician who requested the opportunity to re-examine the employee. (Dec. 2.)[4] Moreover, we see no merit in the self-insurer's only

[4] The judge wrote: "(See letter of Silver dated September 29, 2004.)" (Dec. 2.) That letter is not listed among the documentary exhibits in evidence, (Dec. 1), but as both

allegation of prejudice -- that it did not have the opportunity to cross-examine the employee after the second examination.[5] In the November 5, 2004 § 11A report, the employee's physical restrictions identified by Dr. Silver were substantially the same as described in his December 12, 2003 report and, most importantly, the doctor's deposition took place on May 6, 2005, after both examinations. Thus, all aspects of the doctor's opinion, based on both examinations of the employee, were subject to unfettered inquiry and challenge by the self-insurer. The judge's handling of the § 11A medical evidence simply does not implicate, let alone

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parties have appended Dr. Silver's letter, addressed to the then director of the department's impartial unit, to their briefs, we note it reads:

> I have reviewed the evalution of Darlene Raymann performed on December 12, 2003. It's my opinion that certain things needed to be addressed and possibly added prior to doing the deposition. I liked [sic] to reevaluate Ms. Raymann in the next month with no charge to [the] Industrial Accident Board."

(Employee br., Ex. 2; Self-ins. br., Ex. A.) Notwithstanding the self-insurer's insinuation as to "the dubious nature of Dr. Silver's unprecedented request following on the heels of his conversation with employee's counsel," (Self-ins. br. 4), the judge chose to accept the impartial physician's reasons for that request, as testified to under oath, (Dep. 7-9), and to authorize the re-examination. We see no error.

[5] The evidentiary hearing before the administrative judge took place on August 23, 2004, more than eight months after Dr. Silver's first examination and report. Thus, § 11A's provision that, "[n]o hearing shall be commenced sooner than one week after such report has been received by the parties," was satisfied. We do not accept the self-insurer's argument that the generation of a second impartial medical report required there be a subsequent hearing, as a matter of law. Lastly, we note that when the employee moved to have the judge deem both of Dr. Silver's reports inadequate, so as to allow the admission of additional medical evidence, the self-insurer opposed the motion, stating:

> The § 11A reports prepared by Dr. Steven Silver are adequate because they comply with all requirements set forth in § 11A(2). As a result, there is no due process violation of the Employee's rights and therefore the reports must be deemed adequate eliminating the need for additional medical evidence.

"Self-Insurer's Oposition [sic] to Employee's Motion to Deem the Impartial Examiner's Reports Inadequate," contained in the Board file. See Rizzo v. M.B.T.A., 16 Mass. Workers' Comp. Rep. 160, 161 n.3 (2002)(reviewing board may take judicial notice of documents in board file).

violate, the self-insurer's due process rights. See O'Brien's Case, 424 Mass. 16 (1996).

The self-insurer contests the judge's finding that the employee's "physical condition has not changed in a way significant enough to make her more employable at this time." (Dec. 4.) Even if Dr. Silver considered the employee's medical disability only partial, it is apparent the judge credited the employee's testimony as to her worsening symptoms and physical restrictions in concluding she remains totally incapacitated from gainful employment for the indefinite future. This is the judge's prerogative. Cordi v. American Saw & Mfg. Co., 16 Mass. Workers' Comp. Rep. 39 (2002). See also, Yoffa v. Metropolitan Life Ins. Co., 304 Mass. 110 (1939)("permanent" means indefinite, but still allows for recovery at some unknown time).

Lastly, we see no fatal inconsistency between the judge's statement that "the job offer made by the employer bears more investigation and possibly even an attempt at some sort of controlled return to work," (Dec. 5), and his finding of ongoing permanent and total incapacity. The judge found that the job offered by the employer in 1994 was the same job offered in 1991, when the employee was adjudicated permanently and totally incapacitated. He also specifically found that follow-up phone calls from the employee's attorney to the employer in response to the job offer went unreturned by the employer. "Given this, the offer is not one on which a reduction in benefits can be based." (Dec. 5.) We see no error. There is no reason, however, that the employer cannot continue to seek an appropriate placement for the employee. G. L. c. 152, § 35D.

The decision is affirmed. Pursuant to § 13A(6), the self-insurer is directed to pay employee's counsel a fee of $ 1,458.01. We deny the employee's request for § 14 penalties relative to the self-insurer's prosecution of its appeal.

So ordered.

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Patricia A. Costigan
Administrative Law Judge

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Martine Carroll
Administrative Law Judge

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Bernard W. Fabricant
Administrative Law Judge

Filed: **December 6, 2007**