COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **Board No.:** 011410-06

David Adams **Employee**
Coca-Cola Enterprises, Inc. **Employer**
Coca Cola **Self Insurer**

REVIEWING BOARD DECISION

(Judges McCarthy, Costigan and Horan)

The case was heard by Administrative Judge Preston

APPEARANCES

Paul F. Applebaum, Esq., for the employee
Austin T. Powell, Esq., for the insurer

McCARTHY, J. The insurer appeals from the decision of an administrative judge awarding the employee § 34 temporary total incapacity benefits for a work-related neck and back injury. It argues the decision should be recommitted on two fronts: 1) the medical evidence does not merit the judge's *sua sponte* finding of medical complexity; and 2) once the medical record was opened, the judge failed to properly consider the additional evidence submitted. We affirm the decision.

David Adams, the employee, was forty-four years old at the time of hearing. His job with the employer required forty hours of setting up and breaking down supermarket cola displays, moving cola products within the stores with pallet jacks, climbing on, and loading and unloading displays, and making up to twenty merchandising calls a week. The employee was constantly lifting, stooping, bending, walking, climbing and pulling. (Dec. 4.)

Beginning in February 2006, the employee began to experience painful neck and back problems and, on April 13, 2006, he was no longer capable of working. Id. Following a conference on his claim, the administrative judge issued an order of payment of §§ 34 and 35 benefits, and cross-appeals were timely filed. (Dec. 2.)

The employee was examined by Dr. Daniel W. Bienkowski, the impartial physician appointed under § 11A. The doctor submitted his report on November 27, 2006. Thereafter, the parties were granted permission to depose Dr. Bienkowski. (Dec. 3.)

The employee was the sole witness to testify at the hearing. (Dec. 1.) Much of his testimony concerned his attempts to perform strenuous activities associated with his employment. (Dec. 3-5.) At the close of the hearing, the administrative judge ruled that the § 11A impartial medical report was adequate; however, *sua sponte*, the judge declared the medical issues were complex, and opened the record for additional medical evidence. (Tr. 64.) [1] The insurer submitted the § 11A report and deposition of Dr. Bienkowski and the September 18, 2006 report of Dr. Nabil Basta. The employee's additional medical evidence included the August 15, 2007 report of Dr. Michael H. Bresnahan.

The judge adopted, in part, the opinion of Dr. Bienkowski that the employee did not have any physical restrictions prior to working for Coca Cola. He also adopted Dr. Bienkowski's opinion "[T]hat the employee is unable to bend or squat, unable to lift more than 25 pounds occasionally, unable to do repetitive bending or twisting, and unable to do fine motor skills with either hand." (Dec. 5.) He also noted pre-existing conditions which developed from just daily living and aging, specifically, cervical and thoracic disc disease and lumbar facet arthritis. (Dec. 5.)

Dr. Michael H. Bresnahan started treating the employee on June 29, 1990. Dr. Bresnahan causally relates the employee's posterior neck pain radiating into both arms, his upper and lower back pain, and numbness in both forearms to the employee's heavy lifting at work. The doctor concluded the employee now suffers from cervical radiculitis, spinal spondylosis, degenerative disc disease and thoracic disc herniation. Dr. Bresnahan noted that Mr. Adams continues to suffer intractable pain. The doctor believed the employee is disabled, cannot work, and that the

[1] We note the insurer's objection by letter dated July 6, 2007 to the judge's ruling on complexity, marked as I.D. "A" along with the employee's opposition (to the objection) marked I.D. "B". The judge also went to the trouble of confirming this information with the parties via facsimile on July 10, 2007.

heavy lifting at his former work is a major cause of his disability. The judge adopted Dr. Bresnahan's opinion.

On the remaining issues before him, the judge found the employee suffered a personal injury arising out of and in the course of his employment on April 13, 2006. Further, he found the employee's disability was related in a major way to the work effort for Coca-Cola, and that the employee was temporarily incapacitated from doing any work. The judge ordered the insurer to pay § 34 total incapacity benefits of $673.43 per week beginning April 15, 2006, reasonable and related medical expenses, a legal fee and attendant expenses to employee's counsel.

On appeal the insurer contends the administrative judge erred in finding, *sua sponte*, the medical issues complex − thereby opening the record to additional medical evidence. We disagree.

The legislature has expressly permitted judges, on their "own initiative," to allow the submission of additional medical evidence upon a finding of complexity. Nothing in the statute requires the judge to base a finding of medical complexity on a medical opinion to that effect. If the legislature desired to so limit the judge's discretion, it could have required the § 11A impartial medical examiner to be heard on this issue. It did not. See G. L. c. 152, § 11A(2)(i - iii). Moreover, the statute plainly confers the power to request and receive additional medical evidence upon the judge, not the physician. What is not medically complex to a highly trained physician may very well be to the best trained and experienced jurist. Dupre v. Loomis House, Inc., 20 Mass. Workers' Comp. Rep. 341, 342 n.2 (2006) ("[T]he administrative judge may, on his own initiative . . . authorize the submission of additional medical testimony when such judge finds that said testimony is required due to the complexity of the medical issues involved or the inadequacy of the report . . .") quoting G. L. c. 152, § 11A(2). We believe the legislature intended to grant judges wide discretion to request additional medical evidence, so long as, in the judge's estimation, the impartial medical examiner's opinion is inadequate, or the case is medically complex. [2] Accordingly, on appellate review, a judge's

[2] In O'Brien's Case, 424 Mass. 16, 22-23 (1996), the court reasoned that a judge's decision to admit additional medical evidence under §11A(2) would be proper if it served "some legitimate function," or would be necessary "to present fairly the

decision to admit additional evidence on these grounds is entitled to substantial deference, and should not be reversed absent a clear abuse of discretion. McNeil's Case, 2007 − P − 954, Rule 1:28 Memorandum and Order (June 25, 2008)("[w]hether to require additional medical testimony is by statute within the discretion of the judge."); DiCostanzo's Case, 2007 − P − 997, Rule 1:28 Memorandum and Order (May 28, 2008)(rejecting challenge by insurer that judge erred by allowing additional medical evidence); Lamonica v. Boston Water & Sewer Commission, 17 Mass. Workers' Comp. Rep. 553, 552 (2003)(applying abuse of discretion standard to judge's decision to allow additional medical evidence on complexity grounds); Dupre, supra at 343-344 (2006)(same); Dunham v. Western Massachusetts Hosp., 10 Mass. Workers' Comp. Rep. 818, 822 (1996)(same); Compare Viveiros's Case, 53 Mass. App. Ct. 296 (2001)(judge under no obligation, *sua sponte*, to admit additional medical evidence).

On this record, we cannot say the judge abused his discretion. The employee had a lengthy history of pre-existing back and neck conditions, and the judge noted that complexity was present given the "medical issues involved by virtue of the employee's many ongoing symptoms and his ongoing claimed inability to work." (Dec. 2, 5.) Furthermore, the insurer put in issue the § 1(7A) elevated standard of "a major" causation. (Dec. 5.) Claims involving non-work-related pre-existing conditions are usually more complex than the garden-variety back strains at work. See Lamonica, *supra* at 555. Given the employee's pre-existing cervical and thoracic disc disease and lumbar facet arthritis, together with his testimonial accounts of an extremely strenuous job and the resulting physical impact and inability to work, we are hard pressed to find error. If the judge felt this constellation of medical circumstances combined with work-related physical exertion presented complexities, we cannot say the judge's determination in that regard was arbitrary, capricious or abusive of the discretion § 11A(2) accords.

We find no merit in the insurer's second argument. The insurer contends that a remand is required where the judge opened the record for additional medical evidence, and then failed to consider it. The insurer specifically cites to the opinion

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medical issues in dispute." On this record, we cannot say the admission of the additional medical evidence violates this standard.

of Dr. Nabil Basta, which the judge failed to discuss. It is fundamental that a judge must weigh and consider all of the evidence properly admitted. See Warnke v. New England Insulation Co., 11 Mass. Workers' Comp. Rep. 678 (1997). However an administrative judge is not required to comment on all of the testimony or evidence presented, but only on that which he deems persuasive. Anderson v. Lucent Technologies, 21 Mass. Workers' Comp. Rep. 93, 97 (2007).

By letter dated September 7, 2007 to the administrative judge, the insurer enclosed its additional medical evidence. The submission consisted of the §11A report and deposition transcript as well as the September 18, 2006 report of Dr. Nabil Basta. The first two of these submissions are duplicative of Exhibit 1 as listed in the hearing decision. (Dec. 1.) While Dr. Basta's opinions are not discussed in the decision, the insurer's cover letter and three enclosures are clipped together and marked "X-4." [3] From this, we can properly infer that the judge considered Dr. Basta's report. It would have been preferable for the judge to specifically identify the components of the additional medical evidence allowed. We see no error.

Accordingly, the decision is affirmed. We award employee's counsel a fee, pursuant to § 13A(6), in the amount of $1,495.34.

So ordered.

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William A. McCarthy
Administrative Law Judge

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Mark D. Horan
Administrative Law Judge

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Filed: January 22, 2009

[3] We take judicial notice of the board file. See Rizzo v. M.B.T.A., 16 Mass. Workers' Comp. Rep. 160, 161 n.3 (2002).

COSTIGAN, J., concurring in part and dissenting in part. I agree with the majority that the judge did not err by failing to discuss the opinions of the insurer's medical expert, Dr. Nabil Basta, as reflected in his September 18, 2006 report. (Ex. 4.)

I disagree, however, that Dr. Basta's report, and the report of the employee's treating physician, Dr. Michael H. Bresnahan, should have been admitted into evidence at all. The judge's ruling that the medical issues presented by the employee's claim were complex cannot be reconciled with his ruling that the § 11A impartial medical evidence was adequate. Therefore, in my view, his allowance of additional medical evidence constituted an abuse of his discretion.

General Laws c. 152, § 11A(2), provides, in pertinent part:

> The report of the impartial medical examiner shall, where feasible, contain a determination of the following: (i) whether or not a disability exists, (ii) whether or not any such disability is total or partial and permanent or temporary in nature, and (iii) whether such disability has as its major or predominant contributing cause a personal injury arising out of and in the course of the employee's employment. Such report shall also indicate the examiner's opinion as to whether or not a medical end result has been reached and what permanent impairments or losses of function have been discovered, if any.

Thus, as a preliminary matter, the judge must consider the statutory criteria against which the § 11A report is to be tested. Here the judge found the impartial medical report adequate, (Dec. 2), meaning that Dr. Daniel W. Bienkowski did address (i) whether or not the employee was disabled; (ii) whether such disability was total or partial, and permanent or temporary; and (iii) whether the employee had sustained a work-related injury which was, and remained, a major contributing cause of such disability. The impartial physician's diagnoses were cervical strain, lumbar strain, cervical disc disease, thoracic disc disease, lumbar facet arthrititis and bilateral carpal tunnel disease. Doctor Bienkowski causally related only the first two diagnoses to the industrial injury of April 13, 2006. The remaining diagnoses pre-existed the employee's work injury. It was the doctor's opinion that the employee's neck and back strains would have caused total and partial disability for some twelve weeks following the injury, and that any long term disability likely would

be related to the employee's pre-existing cervical and thoracic disc disease, and his lumbar facet arthritis. (Ex. 1, p. 4.) Doctor Bienkowski also opined that the employee's bilateral carpal tunnel syndrome was not causally related to his work activities or injury, but was causative of some degree of disability:

> The patient is unable to bend or squat. He is unable to lift more than 25 pounds occasionally. He cannot do repetitive bending or twisting. He is unable to [perform] fine motor activities with either hand.

(Ex. 1, p. 5.)

Tested against the judge's stated reasons for declaring the medical issues complex -- "by virtue of the Employee's many ongoing symptoms and his ongoing claimed inability to work, and the Insurer's issue of causation pursuant to § 1(7A)," (Dec. 2-3), --the impartial medical opinion addressed not only all the statutory criteria set forth in § 11A(2), but each and every reason given by the judge for declaring medical complexity.

Just as "[a]n impartial physician's opinion is not rendered inadequate by the judge's subjective reactions upon reviewing the doctor's testimony [because] '[i]nadequacy' is measured objectively against the requirements of § 11A(2)(i)-(iii)," Behre v. General Elec. Co., 17 Mass. Workers' Comp. Rep. 273, 275-276 (2003), citing Goodall v. Friendly Ice Cream, 11 Mass. Workers' Comp. Rep. 393, 395 (1997), so too should medical complexity be measured objectively. In my view, this board took something of a wrong turn in holding that complexity under § 11A(2) involves a subjective component:

> As with any qualitative concept, complexity involves a subjective component. Like beauty, it is in the eye of the beholder, because one person's complexity is another's simplicity. What one views as complex is largely dependent on individual knowledge, experience and education.

Lamonica, supra at 555, quoting Dunham, supra at 821-822. That analysis is faulty because the issue is not "complexity" per se, but *medical* complexity. It is axiomatic that a judge, in all but the simplest of cases, must rely on expert medical opinion in making findings as to, *inter alia*, causation and disability. See, e.g., Galloway's Case, 354 Mass. 427 (1968); Oberlander's Case, 348 Mass. 1 (1964);

Sevigny's Case, 337 Mass. 747 (1958); Josi's Case, 324 Mass; 415 (1949). If the medical issues are not complex to the impartial medical expert on whom the judge must rely, absent a more cogent reason than was given here,[4] that expert's opinions should govern.

Here, the impartial physician not only reviewed the medical reports and records submitted by both parties at the § 10A conference, see O'Brien's Case, supra, but also interviewed the employee as to his symptoms and complaints, and conducted a physical examination. Dr. Bienkowski unequivocally opined as to all the medical issues presented by the employee's claim and the insurer's defenses, and the judge correctly declared the impartial medical report adequate. That the legislature has expressly permitted judges, on their "own initiative," to allow the parties to submit additional medical testimony upon a finding of medical complexity, G. L. c. 152, § 11A(2), begs the question of what constitutes medical complexity. The statutory grant of discretion does not mean the judge may make such a finding for any reason or no reason or, as here, reasons that cannot be reconciled with his own ruling as to the adequacy of the impartial medical report.[5]

The majority posits that an administrative judge's ruling on medical complexity is a highly discretionary determination. "That discretion, however, is not unfettered." Fritz v. Living Assistance Corp., 22 Mass. Workers' Comp. Rep. ___ (October 10, 2008), citing Shand v. Lenox Hotel, 14 Mass. Workers' Comp. Rep. 152 (2000). Where, as here, the judge determines that the impartial medical report adequately

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[4] For example, a claim involving both an orthopedic and a psychiatric component could warrant a finding of medical complexity. Likewise, a diagnosis, the validity of which is disputed among medical experts, might warrant a finding of complexity by the judge, even if the medical expert offering that diagnosis sees the issue as medically simple.

[5] Unlike the several cases cited by the majority in support of the "substantial deference" standard of review, see pages 3-4, supra, here we have internally inconsistent and irreconcilable rulings by the judge which, in my view, do not deserve such deference.

addresses the medical issues in dispute, those medical issues do not become complex simply because the opinions of the impartial medical examiner disfavor the employee's claim.

Accordingly, I would reverse so much of the judge's decision as declared the medical issues complex, and admitted additional medical evidence from both parties. I would recommit the case for the judge to reconsider his award of benefits based solely on the impartial medical report and deposition testimony, and for further subsidiary findings of fact.

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Patricia A. Costigan
Administrative Law Judge

Filed: **January 22, 2009**