COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS

BOARD NO. 030136-02

Dean W. Clark	Employee
Longview Associates	Employer
A.I.M. Mutual Insurance Co.	Insurer

REVIEWING BOARD DECISION
(Judges Costigan, Horan and Fabricant)

The case was heard by Administrative Judge Rose.

APPEARANCES
J. Channing Migner, Esq., for the employee
Ronald C. Kidd, Esq., for the insurer at hearing and on appeal
Bradford D. Scudder, Esq., for the insurer on brief

COSTIGAN, J. The employee appeals from the administrative judge's decision denying and dismissing his claim for § 34A permanent and total incapacity benefits, and awarding instead maximum § 35 partial incapacity benefits. We affirm the decision.

On August 5, 2002, while working as an employee assistance counselor, the employee was assaulted by an African-American client of his employer and suffered multiple physical injuries. Adopting the opinions of the § 11A impartial medical examiner, Dr. Lawrence Field, a physiatrist, the judge found the employee is restricted from lifting over ten pounds, and should avoid work above shoulder level and repetitive bending and stooping. The judge also adopted Dr. Field's opinion that the employee was permanently partially disabled, with only a sedentary work capacity. (Dec. 6-7.)

Due to the nature of his injuries, the employee has suffered from nightmares, anxiety, depression and hypervigilance. (Dec. 4-5.) He claimed both psychological and physical incapacities. The judge allowed the employee's motion for additional medical evidence addressing the alleged psychological injuries. (Dec. 3; July 17,

2008 Tr. 5-7.) The judge adopted the opinions of the insurer's expert psychiatrist, Dr. Michael Rater. Doctor Rater diagnosed the employee as suffering from work-related post traumatic stress disorder and chronic depressive disorder, with pre-existing depression and anxiety. Doctor Rater opined that when he examined the employee on January 15, 2009, the 2002 work incident remained a major cause of the employee's psychological disability, and he could return only to a low stress and low production work environment. Within these restrictions, Dr. Rater opined that the employee had a part-time work capacity. (Dec. 7-8.)

The judge noted significant discrepancies between the employee's testimony about his psychological symptoms and those noted in his medical records, as outlined in Dr. Rater's report. The judge did not credit the employee's account of the severity of his physical and psychological symptoms. (Dec. 6, 8.) "While the employee does suffer from the symptoms noted by Dr. Rater, his testimony at hearing in reference to his psychological conditions was exaggerated and not credible." (Dec. 6.) The judge wrote:

> After careful consideration of all the medical evidence in regards to the employee's psychological condition, I adopt the opinion of Dr. Michael Rater that the employee's diagnosis is post traumatic stress disorder and chronic and [sic] depressive disorder. I adopt the doctor's opinion that the employee suffered from pre-existing conditions of depression or anxiety; however the assault at work remains a major contributing factor in his current psychiatric condition. I further adopt Dr. Rater's opinion that the employee cannot return to work as an EAP counselor, and would require a work environment of low demand. I infer from the doctor's opinion that the employee would need a work environment of low production and low stress. However, within these restrictions, I adopt Dr. Rater's opinion that the employee does have a part-time work capacity. I am persuaded by Dr. Rater's analysis that the employee has shown progress managing his emotions and improving his functioning as noted in his treatment records, that he can make appointments on time and travel to the grocery store, and has the concentration and attention necessary to work at a job commensurate with his previous position. He can engage appropriately with other people.

(Dec. 7-8.)

The judge concluded there were many part-time, low production, low stress, sedentary jobs in the open labor market the employee could perform, such as a security guard manning a post or monitoring security cameras, a parking lot attendant, a cashier or a motel clerk with an option to sit or stand at will. (Dec. 8-9.) He found the employee would be able to re-enter the job market at the lowest end of the wage scale, and assigned a weekly earning capacity of $160, based on part-time, minimum wage work. (Dec. 9.)

The employee first argues that in finding his testimony not credible, the judge improperly relied on medical records not in evidence to conclude there were discrepancies between the employee's testimony and the history relied upon by Dr. Rater. We disagree. The judge's reliance on Dr. Rater's medical report of January 15, 2009 was entirely proper. The fact that it contained, *inter alia*, the doctor's summary of the employee's medical records pertinent to his psychological injury does not give rise to error. See Trani's Case, 4 Mass. App. Ct. 857 (1976)(physician qualified as expert witness may rely on information contained in reports of other doctors, nurses or technicians if such reports are customarily relied on by physician in practice of his profession);[1] see also Department of Youth Servs. v. A Juvenile, 398 Mass. 516, 528-532 (1986)(proper foundational material for expert opinion includes material not in evidence, so long as it would be independently admissible if offered with proper authentication, through competent testimony and within rules of evidence); and Massachusetts Guide to Evidence, Article VII, § 703 (Bases of Opinion Testimony by Experts) (2010).

In any event, just as a party has a due process right to depose a § 11A impartial medical examiner "to inquire into the basis of the examiner's report, whether he considered the medical records and reports submitted to him by that party . . . and

---

[1] One of the employee's two psychiatric experts, Dr. Malcolm P. Rogers, evaluated the employee once, on September 9, 2008, and rendered a report dated September 15, 2008 which was admitted into evidence. (Ex. 5.) His report reflects he reviewed extensive medical records, including certain records also reviewed by Dr. Rater -- those of Shanti Shapiro, the employee's licensed clinical social worker, and Dr. Glenn S. Fagen.

how the examiner was able to reach an unfavorable conclusion in the light of such records and reports," O'Brien's Case, 424 Mass. 16, 22, 23 (1996), the employee was entitled to depose Dr. Rater for the purpose of cross-examination. See 452 Code Mass. Regs. § 1.11(6)(c). Contrary to his stated intent, the employee ultimately chose not to do so.[2]

The employee next argues the judge never specified the discrepancies he saw between his testimony and the history as recorded by Dr. Rater. (Dec. 6.) The insurer correctly counters that the judge, in fact, did so. His decision reflects the discrepancies he found stemmed from the employee's "exaggerated" claims of "problems in public, a severe fear of African-Americans, [and] concentration and memory difficulties." (Dec. 8.) Although the judge found that, "the employee does suffer from the symptoms noted by Dr. Rater," he also found, based on his direct observation at the hearing, that the employee was "able to follow questioning and provide articulate appropriate answers," "with no appreciable significant difficulty with concentration or memory." (Id.)

The employee further argues the judge failed to provide the factual source for his assigned part-time earning capacity of $160 per week. See Eady's Case, 72 Mass. App. Ct. 724, 727-728 (2008); Dalbec's Case, 69 Mass. App. Ct. 306 (2007). We disagree. The judge identified jobs at the low end of the labor market, such as security guard, cashier, clerk and parking lot attendant, which would be within the

---

[2] At the November 20, 2008 continued hearing, the judge and the parties addressed the admissibility of Dr. Rater's report:

Judge:	So Mr. Migner, what is your response to Dr. Rater's report coming in?
Mr. Migner:	I do not object. I would like to cross-examine him by way of deposition.
Judge:	We'll have time for all that. . . .

(Tr. 19.) Moreover, the employee never moved to strike any part of Dr. Rater's report, as provided in 452 Code Mass. Regs. § 1.11(6). Arguments not made at hearing are deemed waived. Anderson v. D & D Elec. Contractors, 23 Mass. Workers' Comp. Rep. 73, 81 n.6 (2009), citing Rezendes v. City of New Bedford Water Dept., 21 Workers' Comp. Rep. 47, 51 n.2 (2007), citing Green v. Town of Brookline, 53 Mass. App. Ct. 120, 128 (2001).

employee's physical and psychological capabilities. The judge's determination the employee could work a twenty-hour week at minimum wage in such low stress, low production positions, is well within the factual source rule articulated in Dalbec, supra, for earning capacity assignments within "the lower end of the wage scale". Id. at 317, n.11. See Mulcahey's Case, 26 Mass. App. Ct. 1, 3 (1988)($100 earning capacity tantamount to statement the evidence left single member "unpersuaded that the employee is precluded by his condition from doing any types of work at the lower end of the wage scale"); Pobieglo v. Department of Correction, 24 Mass. Workers' Comp. Rep. 97, 100 at n.6 (2010)(by citing to Mulcahey, Dalbec court acknowledged judges are permitted to take judicial notice of minimum wage laws as a "factual source" for earning capacity determinations without prior notice to parties).

Lastly, the employee argues the judge erred by failing to discuss all of the medical evidence in the record, implying the judge failed to consider that evidence. This argument is without merit, and contrary to case law. While it is fundamental that a judge must weigh and consider all of the evidence properly admitted, Adams v. Coca-Cola Enterprises, 23 Mass. Workers' Comp. Rep. 13, 17 (2009), citing Warnke v. New England Insulation Co., 11 Mass. Workers' Comp. Rep. 678 (1997), we have never imposed a requirement that hearing decisions contain a recitation of all of the evidence presented. To the contrary, while the decision should accurately list the witnesses and exhibits, the better practice is for the judge to make subsidiary findings based on the evidence the judge credits and adopts as persuasive. "An administrative judge is not expected to comment on each and every scintilla of testimony or evidence presented, but only on that which he deems persuasive." Anderson v. Lucent Techs., 21 Mass. Workers' Comp. Rep. 93, 97 (2007), quoting from Hilane v. Adecco Empl. Servs., 17 Mass. Workers' Comp. Rep. 465, 471 (2003). Here, the judge listed all of the medical evidence as evidentiary exhibits. That is sufficent assurance he did not discuss some of that medical evidence simply because he was disinclined to adopt it.

The decision is affirmed.

So ordered.

So ordered.

Patricia A. Costigan
Patricia A. Costigan
Administrative Law Judge

Mark D. Horan
Administrative Law Judge

Bernard W. Fabricant
Administrative Law Judge

Filed: