COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 039207-99**

Diana McEvoy	Employee
Verizon	Employer
Verizon	Self-insurer

REVIEWING BOARD DECISION
(Judges Costigan, McCarthy and Levine)

APPEARANCES
Ronald D. Malloy, Esq., for the employee
Joyce E. Davis, Esq., for the self-insurer

COSTIGAN, J. The self-insurer appeals from a decision in which an administrative judge found that the employee sustained a work-related repetitive injury to her left upper extremity, and awarded her G. L. c. 152, § 35, temporary partial incapacity benefits from and after April 14, 1999. (Dec. 15-16.)

The self-insurer challenges the judge's decision on four grounds. First, it asserts that in finding continuing causally related incapacity, the judge failed to adequately differentiate between the effect of the employee's work-related repetitive injury and the effect of her unrelated cervical disc herniations. Second, it maintains that the medical evidence is insufficient to support the judge's finding of continuing causally related incapacity. Third, the self-insurer contends that the judge ignored the issue of an intervening fall the employee allegedly sustained in October 1999 which, it argues, was sufficient to break the chain of causation between the employee's work activities and her incapacity. Fourth, it alleges error in the judge's adoption of an expert medical opinion which was not in evidence.

Finding merit in only the last of these arguments, we summarily affirm the administrative judge's liability and causal relationship findings. We agree with the self-insurer that the judge adopted an expert medical opinion which was not in evidence, but

as he also adopted other, similar medical opinions which were properly admitted, the error cited by the self-insurer is harmless. Therefore, we affirm the decision.

The employee, age forty-three at the time of the hearing, had a high school equivalency diploma and prior work experience as a bookkeeper and an administrative assistant. (Dec. 6.) In 1991, she began working for Bell Atlantic, which later became Verizon Communications. Her job as an information operator required her to wear a headset to receive incoming calls and to type names and addresses into a computer in order to find telephone numbers for her customers. She performed this job for approximately seven years, handling about one thousand calls per day. (Id.)

In 1998, the employee changed jobs and became a repair service assistant. She continued to use a headset to receive incoming calls from customers reporting problems with their telephone service or equipment. She typed the necessary information on a keyboard to enter it into a computer. Sometime around February 1999, the employee began to develop left arm weakness, neck and left shoulder pain and numbness of her left hand. She experienced a lesser problem with her right hand which felt like it was going to sleep. She left work on or about April 13, 1999. (Id.)

Procedurally, the employee's claim for § 34 temporary total incapacity benefits from and after April 13, 1999, and for medical benefits, was resisted by the self-insurer and denied by the administrative judge following a § 10A conference. The employee appealed to a hearing de novo and submitted to a § 11A impartial medical examination by Dr. Carolyn Bernstein on October 20, 2000. (Dec. 4.) At the hearing on October 9, 2001, the employee clarified that her claim was based on an alleged cervical injury and resulting surgery, thoracic outlet syndrome on the left side and bilateral carpal syndrome. (Tr. 7; Dec. 3.) The employee did not make a claim for a psychiatric injury. (Dec. 3.) The self-insurer denied liability, disability, extent of disability, causal relationship, and entitlement to medical benefits. (Tr. 6-7; Dec. 3.)

Acting favorably on a motion filed by the self-insurer, the administrative judge found the § 11A impartial medical report inadequate and the medical issues complex. (Dec. 4.) The parties were authorized to submit additional medical evidence and the

submissions were, in the judge's word, "voluminous." (Dec. 8.) His decision reflects that he carefully reviewed and considered all such evidence.[1] (Dec. 7-13.) As was his prerogative, see Moskovis v. Polaroid Corp., 13 Mass. Workers' Comp. Rep. 273, 276 (1999), citing Coggin v. Massachusetts Parole Bd., 42 Mass. App. Ct. 584, 589 (1997), the judge rejected the opinions of the self-insurer's medical experts, Dr. Milo Pulde, (Self-ins. Ex. 11), and Dr. Robert Pick, (Self-ins. Ex. 13). (Dec. 10-11.) He also rejected the opinion of the employee's surgeon, Dr. Richard Ozuna, that "within medical reasonable certainty . . . her work activities exacerbated her symptoms and therefore were the cause of surgery," although the doctor had conceded that those work activities did not cause the cervical disc herniations.[2] (Dec. 13-14; Employee Ex. 5.) The judge expressly adopted the opinions of the § 11A examiner and three of the employee's physicians, Drs. Ozuna, Ira Evans and Rose Goldman, to find that the employee's left hand pain syndrome was causally related to her work with computers. (Dec. 12.) It is with respect to the judge's adoption of Dr. Goldman's opinion that the self-insurer correctly argues error.

Both the judge's decision and the transcript of the hearing reflect that only the portion of Dr. Goldman's March 24, 2000 report, (Self-ins. Ex. 4), entitled "Occupational History," was admitted into evidence, for the limited purpose of "impeaching the employee's testimony about her representations about her workload at Verizon." (Tr. 102-103; Dec. 2.) The judge's evidentiary ruling was unequivocal:

> Just for the record, these documents don't necessarily impeach, but they are probative. They have some probative value. And that's all they have to do to get in. Could be, there are several ways for me to

[1] Citing Canavan's Case, 432 Mass. 304 (2000), the self-insurer contended that Dr. Ozuna's September 6, 2001 report, (Employee Ex. 5), was not based on an adequate and reliable scientific foundation, see Commonwealth v. Lanigan, 419 Mass. 15, 25-26 (1994), and moved that it be stricken. Following a status conference and the employee's submission of a second report from the doctor, (Employee Ex. 5), the judge denied that motion. (Dec. 4-5.)

[2] The self-insurer argues on appeal that Dr. Ozuna's exacerbation opinion could not support the judge's decision because it was based on the faulty assumption that the employee's cervical disc herniations pre-existed her departure from work at Verizon. (Self-ins. brief 15.) The judge's rejection of that opinion renders the self-insurer's argument moot.

> look at this ultimately either the doctor didn't put down the entire conversation and your client did, in fact, tell the doctor what she represented or something less than that. *But it is properly admitted as a matter of impeachment. And this is Insurer's* [sic] *Exhibit 4. The history, the part of the report that is pertinent and the part of the report that I'm entering for this purpose, falls under the subtitle occupational history on Page 3. And this is a report by Doctor Rose Goldman. The report is dated March 24th, 2000. . . .*

(Tr. 103, emphasis added.) It is apparent from his decision, however, that the judge considered the entire report and used the doctor's causal relationship opinion, in conjunction with others, to find in the employee's favor:

> In March of 2000 Dr. Rose Goldman saw Ms. McEvoy at the request of her attorney. Dr. Goldman found the symptoms and signs on physical examination to be "very suggestive of carpal tunnel syndrome. She may have a mild degree of median nerve compression which was not detected on the electrophysiology test she had in July, 1999. . . ." In addition, Dr. Goldman offered the differential diagnosis of tendonitis and a less likely diagnosis of reflux [sic] sympathetic dystrophy or thoracic outlet syndrome. It was Dr. Goldman's opinion that "hours of repetitive keyboarding was a major contributing factor[3] in the development of her upper extremity pain", *an opinion I adopt. . . .* (Self-insurer Exhibit No. 4).

(Dec. 10, emphasis added.) Were that the only expert medical opinion which supported the judge's causation findings, reliance on it would be reversible error. "The decision of the administrative judge shall be based solely on the evidence introduced at the hearing." 452 Code Mass. Regs. § 1.11(5). But that is not the case here.

The administrative judge also expressly adopted the opinions of the impartial medical examiner, Dr. Evans and Dr. Ozuna, that the employee's left upper extremity symptoms were causally related to her repetitive work activities on the computer. Having

[3] The self-insurer did not raise § 1(7A) in defense of the employee's claim because it did not assert that a pre-existing, non-compensable condition was involved in the employee's disability. To the contrary, it argued that a subsequent, intervening event -- the employee's alleged fall down stairs in October 1999 -- was the cause of her continuing disability. (Self-ins. Brief 15-17.) Thus, even if Dr. Goldman's causal relationship opinion were properly in evidence, the "a major cause" standard was not applicable to the employee's claim.

reviewed these expert medical opinions, we disagree with the self-insurer and consider them sufficient support for the judge's findings on both initial and continuing causally related incapacity.

With respect to Dr. Evans's opinion, the judge wrote:

> Dr. Ira Evans saw Ms. McEvoy on September 16, 1999 who [sic] reached a diagnosis of functional carpal tunnel syndrome. However, on March 13, 2000 Dr. Evans stated that he could not "appreciate a true carpal tunnel finding," finding her condition to be more in the nature of tendonitis. *No matter what the specific diagnosis Dr. Evans offered the opinion, which I adopt, that "there is no question that she has some symptoms of discomfort about the left wrist which would certainly be secondary to repetitive types of activities such as a computer operator which she does quite frequently and for long periods of time."* (Self-Insurer Exhibit No. 16).

(Dec. 9-10, emphasis added.)

A second expert medical opinion properly in evidence was expressly adopted by the judge -- that of Dr. Carolyn Bernstein, the § 11A impartial examiner. Contrary to the self-insurer's argument, both the doctor and the judge clearly distinguished between the employee's medical conditions that were not work-related and the left upper extremity complaints that were. In her October 20, 2000 report, Dr. Bernstein opined:

> My assessment at this point, based on a reasonable degree of medical certainty, is that this woman has a persistent pain syndrome in her left hand, the etiology[4] of which is unclear. In addition, she has some disparate neurologic complaints, including some urinary incontinence and sensory abnormalities on her exam which coupled with the white matter lesions seen on her MRI scan, would certainly raise the possibility of demyelinating disease. In addition, she appears to suffer from depression and has been evaluated and diagnosed by a psychiatrist. *I believe that based on the history and records provided to me, that there was a causal connection between her left arm syndrome, question of carpal tunnel syndrome/cervical trapezius strain and the pain syndrome on the examination at today's visit . . . I believe there is a causal relationship because she reports a slowly progressive pain syndrome and numbness developing in*

[4] The doctor explained that she used the term "etiology" to mean that no specific diagnosis, e.g., carpal tunnel syndrome vs. herniated cervical disc, had been confirmed as the source of the employee's persistent pain syndrome in her left hand. She did not equivocate on the causal relationship of that pain syndrome to the employee's repetitive work activities on the computer. (Bernstein October 24, 2001 Dep. 16-17.)

> *the left hand which was exacerbated by her continued use of the computer to the point where she was unable to do so any more.* However, with the question of demyelinating disease/migraine and the question of depression I do not believe that these are related to her left arm pain syndrome.

(Stat. Ex. 2.) The judge discussed this aspect of the § 11A opinion at length, (Dec. 11-12), and we do not agree with the self-insurer that he misconstrued the doctor's ultimate causal relationship opinion. She testified at deposition:

> Q. And, Doctor, when you – you indicated that there was a causal connection here based on those diagnoses, that is, questionable carpal tunnel, trapezius strain, left arm pain syndrome, and pain syndrome. That, you have causally related to her computer work, correct?
> A. Correct.

(Bernstein October 24, 2001 Dep. 18.) The impartial physician conceded that she could not opine, with a reasonable degree of medical certainty, as to either the extent or the causes of the employee's disability after her October 20, 2000 examination, (Bernstein December 5, 2001 Dep. 70), but the judge looked to and adopted yet a third expert medical opinion, that found in Dr. Ozuna's September 6, 2001 report, (Employee Ex. 5), to find ongoing causally related partial incapacity:

> Ms. McEvoy has had a partial disability concerning her left upper extremity from her initial visit with Dr. Evans in 1999 to the present [sic] the limitations regarding the partial disability, are directly related to her subjective symptoms. I adopt this opinion. I find that although Ms. McEvoy, who is right-handed, is unable to perform computer work as a result of her work-related left-hand syndrome, she would be capable of returning to other types of employment but for her non-work related conditions. (Report, p. 2; Deposition of October 24, 2001, pp. 29, 30).

(Dec. 12-13.) The judge was free to accept that part of Dr. Ozuna's opinion but reject his opinion that the employee's cervical disc herniations and surgery, though not caused by, were causally related to her work activities by way of exacerbation. Hicks v. Boston Medical Center, 15 Mass. Workers' Comp. Rep. 1, 9 (2001). Moreover, the judge properly excluded from his incapacity determination the employee's non-work related medical conditions. Where, as here, the employee had a work-related injury (left hand

persistent pain syndrome) followed by a disease or injury unrelated to her employment (cervical disc herniations), the judge was required to " 'narrowly focus on and determine the extent of physical injury or harm to the body that is causally related solely to the work injury.' " Cordi v. American Saw & Mfg. Co., 16 Mass. Workers' Comp. Rep. 39, 45 (2002), quoting Patient v. Harrington & Richardson, 9 Mass. Workers. Comp. Rep. 679, 683 (1995). We are satisfied that the judge did so.

Accordingly, we affirm the decision of the hearing judge. Pursuant to G. L. c. 152, § 13A(6), employee's counsel is awarded a fee of $1,273.54.

So ordered.

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Patricia A. Costigan
Administrative Law Judge

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William A. McCarthy
Administrative Law Judge

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Frederick E. Levine
Administrative Law Judge

Filed: **April 30, 2003**