COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS	**BOARD NO. 025339-96**
Diane Murmes	Employer
Gambro Health Care	Employer
CIGNA Companies	Insurer

REVIEWING BOARD DECISION
(Judges Smith, Wilson and McCarthy)

APPEARANCES
Nicholas A. Felici, Esq., for the employee
James E. Ramsey, Esq., for the insurer

SMITH, J. Claiming entitlement to ongoing weekly incapacity benefits, the employee appeals the administrative judge's award of a closed period of § 34 temporary total incapacity benefits. Because we are not assured that the judge applied the correct law to facts that could properly be found, when she concluded that the employee did not prove her disability after July 24, 1997 was causally related to the work injury, we find it appropriate to recommit the case for further findings.

Diane Murmes, a thirty-two year old registered nurse, began working for Gambro Health Care as a dialysis nurse in February 1996. She had previously worked as a secretary and as a nursing assistant in the emergency ward and dialysis unit of a hospital. Her work for the employer required that she connect patients to dialysis machines and monitor them. It also required that she move the machines and assist patients who needed help ambulating. She worked very busy 10-12 hour shifts. In addition to her taxing work schedule, Murmes was active in working out in a gym with a stationary bicycle and weights. In May of 1995, prior to beginning work for the employer, she had injured her neck and lower back in a motor vehicle accident for which she received medical treatment, and claimed lost wages and medical expenses under the personal injury protection

provisions of her automobile liability insurance policy. (Dec. 3.)

On June 17, 1996, while at work, Murmes was "reinfusing" a patient when he started to fall. She leaned over to help the patient stand, and felt a sharp pain in her low back radiating down her left leg. (Dec. 4.) After being in and out of work for a brief period of time, Murmes's schedule was adjusted so that she had a longer break between working days. She worked for approximately six months, and then stopped. (Dec. 4.)

Murmes filed a workers' compensation claim, which resulted in a conference order awarding payment of § 34 temporary total incapacity benefits. The insurer appealed to a hearing de novo. (Dec. 2.) Pursuant to § 11A, Murmes was examined by an impartial medical examiner, Dr. Girgis. (Dec. 4.) Due to the complexity of the medical issues, the judge allowed Murmes's motion to submit additional medical evidence. (Dec. 2.) Murmes submitted reports from her treating neurosurgeon, Dr. Rachlin (Dec. 5-6) and from a chiropractor, Dr. Rosen (Dec. 6.) The insurer submitted reports from three orthopedic surgeons: Dr. Haffenreffer, Dr. Pollock, and Dr. Donahue. (Dec 6.)

In her decision, the judge found that Murmes had injured her back at work on June 17, 1996 (Dec. 9), and awarded § 34 temporary total incapacity benefits from December 29, 1996 until July 24, 1997. (Dec. 10, 11.) In support of her award, the judge adopted aspects of the various medical reports submitted. Significantly, she adopted the opinion of Dr. Haffenreffer, who concluded that Murmes suffered a work-related injury on June 17, 1996 and remained unable to return to work as of the date of his examination, February 18, 1997, although she would be able to return to work in six weeks after a stretching and strengthening program. She further adopted the opinion of Dr. Pollock, who stated that by July 24, 1997, Murmes was able to work full-time as long as she avoided recurring or prolonged squatting and kneeling, and that she would benefit from a work conditioning program on a short-term basis. Dr. Pollack also stated that the low back pain was of questionable etiology and he could not say that it was causally related to work. The judge also adopted the opinion of Dr. Girgis, the impartial examiner, that Murmes needed a work hardening program to become able to fully work again as of October 21, 1997 (the date of

his examination). Finally, the judge adopted the opinion of Dr. Donahue that on March 17, 1998, Murmes had no significant disability but would need to get back to her regular work initially in a light duty program. (Dec. 9.) The judge specifically rejected the opinion of Dr. Rachlin, Murmes's treating neurologist, writing:

> I find that his opinion that the employee is in need of an L5-S1 fusion is not supported by the other physicians whose reports are in evidence and therefore do not find it more likely than not correct. Moreover, Dr. Rachlin did not offer any opinion on causation. In addition, Dr. Rachlin's refusal to make himself available for deposition somewhat lessens the weight I give his opinion.

(Dec. 9-10). She further rejected the opinion of Dr. Rosen, Murmes's chiropractor, stating, "His opinion of causation was so summary that I am not persuaded that the employee's complaints after July 24, 1997 were causally related to the incident at work." (Dec. 10.) The judge concluded that after July 24, 1997,

> . . .[S]he remained unable to perform the physically demanding job of dialysis nurse, but I have no persuasive medical evidence that any ongoing disability was causally related to her injury at work. Indeed, Dr. Rachlin's report suggests that something else affected the employee's condition in February 1997. The employee has not presented any persuasive medical evidence on causation and I rely on the insurer's medical examiners as a basis for finding any causation at all.

(Dec. 10-11.)

Murmes appeals, making several arguments. First, she contends that the administrative judge erred by refusing to allow her to submit medical reports of the neurologist and orthopedic surgeons with whom she treated prior to seeing Dr. Rachlin. Murmes maintains that these reports would have clearly established a causal connection between her injury at work and her ongoing incapacity. The employee does not identify these reports in her brief. The brief does not comply with the board's regulation that the statement of facts and argument contain references to those portions of the record on which the party relies. See 452 Code Mass. Regs. § 1.15(4)(a)(2) and (3). We cannot be certain which medical reports the employee claims were excluded. There was no offer of proof and no ruling on the record denying the admission of any proferred exhibits. "Errors that are not

disclosed on the record afford no basis for reversal." Arch Medical Associates, Inc. v. Bartlett Health Enterprises, Inc., 32 Mass. App. Ct. 404, 406 (1992).

The employee claims the administrative judge, in an off-the-record ruling, excluded medical records as exhibits, reasoning that § 11A(2) only allowed the submission of one doctor's medical report, that being Dr. Rachlin. (Employee's Brief at 4.) The limited record that we do have belies this contention. The employee moved to submit as additional medical evidence, in addition to the records of Dr. Rachlin, the report of Dr. James Sarni dated February 4, 1997 and the report of Martin G. Rosen, a chiropractor, dated February 9, 1998. (Employee's Motion to Submit Additional Medical Testimony.) At the February 12, 1998 hearing, the judge granted the motion, contingent on the submission of curriculum vitae[1] for the doctors. (Tr. 3; handwritten approval, dated 2-12-98, on Motion.) By letter dated February 25, 1997, the employee's counsel acknowledged the order allowing additional medical evidence and submitted the curriculum vitae of Dr. Rosen. Dr. Rosen's report was marked as part of "Employee's Additional Medical Evidence" and admitted as exhibit 3. (Dec. 1.) The record does not contain a curriculum vitae from Dr. Sarni, nor does the decision indicate that his report was admitted. The employee does not contend that she complied with the precondition to the admission of Dr. Sarni's report. See n. 1, supra. By letter dated March 10, 1998, the insurer's attorney also recognized the order allowing additional medical evidence and submitted three physicians' reports, which were admitted as exhibit 5. (Dec. 2.) At the February 12, 1998 hearing, the judge also granted the employee "14 days to submit the most recent radiology MRI report and a treating report of the doctor which refers to the examination that took place . . . February 11th in which some recommendations for treatment which the employee believes is germane to this proceeding were made." (Tr. 3.) After some exhibits were marked, employee's counsel asked for clarification about the exhibits attached to his motion. The judge responded: "That's your additional medical evidence. I said they were attached to the mo-

[1] See 452 Code Mass. Regs. § 1.11(6), which requires a curriculum vitae for admission of medical reports prepared by physicians engaged by the offering party.

tion. And, in addition, I went into what else you're going to be submitting to me. It's all in the record, counsel." The employee's attorney responded: "Fine. I just wanted to make sure if that was indicated, if it was put in as an exhibit or not." The judge responded: "It's not an exhibit, it's additional medical evidence. It goes with the motion. That's how I do it. I just have a list of what it is, put employee's additional medical evidence, insurer's additional medical evidence. When I get it, I sort of put it together in a package." (Tr. 8.)

We have no doubt, based on the recitation of the medical evidence contained in the decision, that the judge admitted the report of Dr. Rosen in addition to Dr. Rachlin, (Dec. 1, 6, 10), and three medical reports offered by the insurer, those of Dr. Haffenreffer, Dr. Pollock and Dr. Donahue. (Dec. 2, 6-9.) Thus the employee's contention that the judge limited the additional medical evidence to one additional medical report appears baseless.

As a corollary to her first argument, Murmes contends that it was arbitrary and capricious, and contrary to the evidence, for the administrative judge to find "no credible evidence of causal connection." (Employee's Brief at 4.) We repeat the language of the court in Coggin v. Massachusetts Parole Bd., 42 Mass. App. Ct. 584, 589 (1997):

> General Laws c. 152, § 11A, provides that the impartial physician's report "shall constitute prima facie evidence of the matters contained therein." "Prima facie evidence, in the absence of contradictory evidence, requires a finding that the evidence is true." Anderson's Case, 373 Mass. 813, 817 (1977). See Thomes v. Meyer Store, Inc., 268 Mass. 587, 588 (1929). Nothing in § 11A, however, requires the administrative judge to adopt the conclusions of the report or precludes him from considering additional medical evidence once it becomes part of the record. Indeed, "prima facie evidence may be met and overcome by evidence sufficient to warrant a contrary conclusion." Anderson's Case, supra at 817. Once properly admitted, the probative value of medical testimony is to be weighed by the fact finder, in this case, the administrative judge. Robinson v. Contributory Retirement Appeal Bd., 20 Mass.App.Ct. 634, 639 (1985). Barbieri v. Johnson Equip., 8 Mass. Workers' Comp. Rep. 90, 93 (1994). Thus, it is "within the province of the [administrative judge] to accept the medical testimony of one expert and to discount that of another." Fitzgibbons's Case, 374 Mass. 633, 636, (1978).

That is what the judge did here when she explicitly adopted some physicians' opinions and rejected others. (Dec. 9.) It was not improper to do so, as long as the reasons given by the judge for her choice were not arbitrary or capricious, or contrary to law.

Murmes's related contention, that the impartial examiner's report necessarily established ongoing causal relationship, is without merit. In her brief, she quotes Dr. Girgis as reporting that "cause of relationship of pain is related to her initial injury in June 1996." (Employee's brief at 3.) However, Dr. Girgis indicated that, "Initial cause of relationship of pain is related to her initial injury in June, 1996." (Statutory Ex. 1, 3, emphasis added.) The impartial examiner did not indicate how long Murmes's pain remained related to her work injury.

Murmes' second major argument is that the judge erred in finding her no longer medically disabled after July 24, 1997, despite the opinion of her treating physician, Dr. Rachlin, that she needed disc fusion surgery. (Employee's Brief at 6.) Murmes argues that the judge's reasons for rejecting Dr. Rachlin's opinion were arbitrary and capricious. We agree that two of the three reasons cannot withstand appellate scrutiny.[2]

The judge rejected Dr. Rachlin's total disability opinion because "Dr. Rachlin did not offer any opinion on causation." (Dec. 9-10.) Dr. Rachlin treated the employee throughout the period of her claim. He opined that Murmes had been under his medical care since 1996 for lumbar spondylosis and "in February 1997, she had an acute exacerbation of her lower back pain." (Employee's Ex. 3, Rachlin report dated February 14, 1998.) He further opined the employee's spondylosis condition required surgical treatment, with-

[2] The judge's first reason, that the surgical recommendation "is not supported by the other physicians whose reports are in evidence," (Dec. 9), was rational and supported by the record evidence. The judge adopted the opinion of Dr. Pollock that on July 24, 1997, the employee was "not substantially disabled," that there were "no unusual objective physical findings which would substantiate a current disability." (Ins. Ex. 5; adopted in Dec. 8-9.) Additionally, the judge adopted a similar opinion from Dr. Donahue, who examined the employee seven months later. Id. These medical opinions directly contradicted the need for surgery. However, the judge's termination decision does not turn on an assessment that the employee's medical disability had ended, but upon a judgement that her ongoing disability was not causally related to her injury at work. (Dec. 10.)

out which she remained totally incapacitated. The judge correctly noted that none of Dr. Rachlin's reports explicitly related the employee's diagnosed condition to the claimed June 16, 1996 work injury. (Dec. 6, 10.) However, we do not understand why the lack of a causation opinion should diminish the weight to be assigned an opinion about the extent of medical disability.

Even more troublesome is the judge's statement that "Dr. Rachlin's refusal to make himself available for deposition somewhat lessens the weight I give his opinion." (Dec. 10.) [3] Where there is an inability to cross-examine a medical witness, absent statutory exception, such physician's reports are not admissible in evidence. Martin v. Colonial Care Center, 11 Mass. Workers' Comp. Rep. 603, 607 (1997). A judge should exclude from evidence a report authored by a physician not available for cross-examination. See Cupid v. Epsco, Inc., 6 Mass. Workers' Comp. Rep. 110, 112 (1992); but see 452 Code Mass. Regs. 1.12(5)(c) (a special rule for the impartial medical examiner's report).[4] Such a ruling would put the offering party on notice that the proferred evidence would not be considered. The proponent could then provide substitute medical testimony. See Stacey v. North Shore Children's Hospital, 8 Mass. Workers' Comp. Rep. 365, 373 (1994). However, admitting and then discounting the evidence places responsibility for a witness's lack of cooperation in scheduling a deposition on the party who offered the report. In effect, it deprives the party of the opportunity to present evidence relevant to the claim. Here, as in Stacey, there is no indication that the employee had control over the uncooperative physician. Nor did the judge make any findings of bad faith or unreasonable conduct on the

[3] Although the doctor's refusal to make himself available for the insurer to depose him does not appear in the hearing record, it is conceded by the insurer. (Insurer's Brief at 13.)

[4] "Where an impartial medical examiner who has submitted his or her report is rendered unavailable, or makes him or herself unavailable for deposition, either party may file a motion seeking a ruling that the impartial medical examiner is unavailable. A ruling of unavailability shall mean the impartial medical examiner's report is inadequate and that additional medical evidence shall be allowed. Upon such a ruling, the administrative judge shall allow a reasonable extension of time for submission of such additional medical evidence, not to exceed 45 days. The impartial physician's submitted report, however, shall be admitted into evidence at the hearing and shall retain its prima facie character notwithstanding the finding of inadequacy." (Emphasis supplied.)

part of the employee. Under these circumstances, this reason for discounting the doctor's disability opinion appears arbitrary and capricious and contrary to law.

Finally, Murmes contends that the judge based her decision to terminate benefits on July 24, 1997 on two findings, which lack evidential support. We have examined with care all of the evidence, including the medical testimony, records, and reports to see whether it rationally supports the judge's findings. See Marconi v. Crusader Paper Co., 10 Mass. Workers' Comp. Rep. 609, 611 (1996) (in reviewing a judge's factual findings, the test is not what we would find from the cold appellate record, "but is instead limited to whether there is sufficient evidence, including all rational inferences therefrom, to support the judge's decision"). We conclude that one finding requires further clarification: "Around January 3, 1997 the employee injured her back while working out on her own." (Dec. 4.) There is no direct evidence in the record supporting this finding. The impartial report does comment that "the patient was somewhat overzealous in an attempt to rehabilitate herself." (Statutory Ex. 1 at 2.) However, the time frame appears to be after January 3, 1997 as the doctor refers to New England Medical Center, where the employee treated in February 1997. (Employee Ex. 1, medical data; see Tr. 59, 86-87.) The impartial physician assumed that "she was overdoing her own exercise program and they asked her to cut back." (Statutory Ex. 1 at 2.)[5] This evidence does not rationally support the judge's finding of an injury on January 3, 1997. We could find no other evidence that such an injury occurred.

In addition, the judge's reliance on this "fact" makes us unsure that she applied the

[5] Although the decision indicates that the impartial physician was deposed, (Dec. 2), there is no deposition in the Board file, the decision does not further refer to the impartial's deposition and it is not mentioned in either brief. We assume that the reference to a deposition is a clerical error and that one did not occur.

proper law. An employee who aggravates a work injury when doing prescribed physical therapy is entitled to compensation for the effects of the aggravation. See Burns's Case, 218 Mass. 8 (1914) (blood poisoning incurred during hospital stay); Luongo's Case, 313 Mass. 440, 442 (1943) (consequences of operation to treat work injury, even if operation negligently performed); Rochon v. Copi Labs, 10 Mass Workers' Comp. Rep. 509, 510 (1996) ("When an employee is injured in the course of treatment, the new medical problem relates back to the original date of injury"). The judge said she was unpersuaded that continuing causation existed in part because "Dr. Rachlin's report suggests that something else affected the employee's condition in February 1997." (Dec. 10.) If she was finding that the employee's prescribed physical therapy aggravated her work injury, as a matter of law that fact will not support a conclusion that the chain of causation was broken. Because we are not sure that the judge properly applied the law of intervening cause, we recommit the case for further factual findings on the question.

Moreover, we do not understand how a non-work injury on January 3, 1997 supports the conclusion that causation ended six months later, on July 24, 1997. If the judge had believed that a January 3, 1997 injury was an intervening incident breaking the chain of causation between Murmes's work injury and subsequent incapacity, there would be no basis for the award of total incapacity benefits beyond that date.

For these reasons, we conclude that it is appropriate to recommit the case to the administrative judge for further findings of fact on these questions. See G.L. c. 152, § 11C. On recommittal, the judge may take such additional evidence, including medical evidence, as she deems necessary to do justice.

So ordered.

_____

Suzanne E.K. Smith
Administrative Law Judge

_____
William A. McCarthy
Administrative Law Judge

_____
Sara Holmes Wilson
Administrative Law Judge

Filed: <u>February 8, 2000</u>