COMMONWEALTH OF MASSACHUSETTS

DEAPRTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO.:** 040302-04

Dianne L. Fritz	Employee
Living Assistance Corp.	Employer
A.I.M. Mutual Insurance Co.	Insurer

REVIEWING BOARD DECISION

(Judges Costigan, Horan and Fabricant)

APPEARANCES

William J. Doherty, Esq., for the employee
Ronald C. Kidd, Esq., for the insurer

COSTIGAN, J. The employee and the insurer cross-appeal from a decision in which the administrative judge awarded the employee a closed period of § 34 total incapacity benefits, followed by ongoing § 35 partial incapacity benefits. The employee challenges the judge's assignment of an earning capacity as of April 6, 2006. We summarily affirm the decision in this regard.[1] The insurer raises several arguments with respect to the judge's handling of the medical evidence. For the reasons that follow, we recommit the case for further proceedings and a decision anew.

The employee, age fifty-five at the time of the hearing, had been employed as a home health care aide by the employer since 2002. On November 12, 2004, she transferred a patient, who was considerably taller than she, from a bed to a chair and then immediately started opening the patient's lunch. She felt tingling in two fingers of her right hand and, as she continued working her shift, numbness began moving up the side of her right arm.

[1] In her "Appellant's Brief on the Cross-Appeal," the employee also argued that the insurer had not preserved the issue of liability, and the judge erred in allowing the insurer to raise liability at hearing. The judge's decision reflects that both parties appealed his 10A conference order, and the insurer raised the issue of liability at hearing. (Dec. 2.) The "Insurer's Hearing Memorandum" likewise reflects that it raised liability as an issue to be addressed at hearing. (Ins. Ex. 1.) Accordingly, we likewise reject this aspect of the employee's argument on appeal.

(Dec. 4-5.) Although experiencing pain in her right arm and hand, the employee continued to work until November 24, 2004. (Tr. 22.) The parties agree the insurer paid the employee § 34 benefits on a without-prejudice basis through May 17, 2005. (Employee br. 1; Ins. br. 1.)

The employee filed a claim for workers' compensation benefits, which the insurer resisted. (Dec. 2.) In his conference order of July 19, 2005, the judge awarded § 34 benefits from and after May 18, 2005, and both parties appealed. (Dec. 2.) On September 20, 2005, the employee underwent a § 11A impartial medical examination by Dr. Eugene W. Leibowitz, a neurosurgeon. In his report, the doctor diagnosed the employee as having a herniated cervical disc with nerve root compression on the right at C6-7, and right carpal tunnel syndrome. Under the heading, "Causal Connection," the impartial physician opined:

> The herniated cervical disc remains symptomatic and since there is no prior history of these symptoms, it may have occurred at the time of the incident of November 12, 2004. I believe there is a direct causal connection between the herniated cervical disc and the episode of 11/12/04. The carpal tunnel syndrome I do not believe is related to that incident.

(Stat. Ex. 1, p. 2.)

Neither party mounted any challenge to the adequacy of the impartial medical report contemporaneous to its filing in September 2005, nor even after the March 24, 2006 hearing, at which the employee testified to a somewhat different history of injury than reflected in the § 11A report. Not until some five weeks after the insurer deposed the impartial physician on April 5, 2006 did the employee file a motion that the impartial doctor's report be declared inadequate, and/or the medical issues complex, and for the admission of additional medical evidence.[2] The insurer filed its opposition to the

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

> Notwithstanding any general or special law to the contrary, no additional medical reports or depositions of any physicians shall be allowed by right to any party; provided, however, that the administrative judge may, on his own initiative or upon a motion by a party, authorize the submission of additional medical testimony when such judge finds that said testimony is required due to the

employee's motion, but on June 1, 2006, the judge allowed the motion for the stated reason that "the opinion of the 11A physician was found to be inherently contradictory as to the history and inadequate." (Dec. 2.)[3] Both parties were given a deadline of June 30, 2006 for the submission of additional medical evidence.[4] (Dec. 3.) That same date was

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> complexity of the medical issues involved or the inadequacy of the report submitted by the impartial medical examiner.

As amended by St. 1991, c. 398, § 30.

"The statute plainly requires the judge to rule on the 'inadequacy of the report,' not on the doctor's deposition testimony," Brackett v. Modern Cont'l Constr. Co., 19 Mass. Workers' Comp. Rep. 11, 15 (2005), but in this case, the employee did not file her motion for inadequacy until well after the insurer voluntarily deposed Dr. Leibowitz for the purpose of cross-examining him on the contents of his report. Cf. LaGrasso v. Olympic Delivery Serv., Inc., 18 Mass. Workers' Comp. Rep. 48 (2004)(when impartial report inadequate as a matter of law, judge may not force party to depose impartial physician to cure inadequacy).

[3] The judge's actual written ruling on the motion, as contained in the board file and of which we take judicial notice, Rizzo v. M.B.T.A., 16 Mass. Workers' Comp. Rep. 160, 161 n.3 (2002), states:

> In response to the Employees [sic] Motion for Inadequacy or Complexity, I find that the doctors [sic] opinion in his report and deposition to be inadequate. I base this decision on the fact that the history listed in the report does not coincide with the history he testified to at deposition, and the doctor indicated he had no independent memory of Mrs. Fritz other than what is in the report. (See deposition page 7) In addition, whatever notes he took during the examination were destroyed.

Consequently, the parties will have the opportunity to present additional evidence and the new close of evidence date will be June 30, 2006.

(Administrative Judge's ruling on motion dated June 1, 2006.)

[4] The employee submitted additional medical evidence which included a report by her treating neurosurgeon, Dr. Richard P. Anderson, who diagnosed a C6-C7 radiculopathy, causally related to her lifting incident at work, and resulting in a total medical disability. (Dec. 5-6.) The insurer did not submit additional medical evidence. (Dec. 2-3.) The judge

set for the close of the record, (Dec. 3), and here lies the insurer's second challenge to the judge's decision.

The insurer first contends the judge's reason for declaring the § 11A evidence inadequate was error. It argues that Dr. Leibowitz simply changed his opinion on causal relationship, when he was presented at deposition with a hypothetical question asking him to assume a history based on the employee's testimony at the March 24, 2006 hearing. That history, the insurer insists, varied substantially from that which the employee recounted to Dr. Leibowitz when he examined her on September 20, 2005. In his report, Dr. Leibowitz recounted the history of injury he received from the employee:

> This is a 55-year old right-handed female who dates the onset of her present complaints from November 15, 2004[5] at which time while employed as a nursing assistant she needed to lift her patient out of bed at which time she felt numbness in the thumb, index and middle fingers of her right hand. She went to the Mercy Medical Center's Emergency Room, where it was noted that she was complaining of right neck and shoulder pain, and first, second and middle finger numbness of her right hand.

(Stat. Ex. 1, p. 2.) On the basis of this history, the doctor concluded there was a causal relationship between the employee's herniated cervical disc and the lifting incident at work, but the finger numbness was a symptom of right carpal tunnel syndrome not causally related to the work injury. (Id. at p. 3.)

Under cross-examination by the insurer at his deposition, Dr. Leibowitz seemingly stepped back from his opinion that the work incident caused the employee's neck symptoms:

> Q: Doctor, it's my understanding that it's your testimony that if the [employee] testified that she was lifting someone and she had the onset of neck pain radiating

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adopted Dr. Anderson's opinions, except as to the extent of the employee's disability. The judge adopted the impartial physician's opinion, expressed at his April 5, 2006 deposition, that the employee could then start to return to restricted work. (Dec. 5-7.)

[5] At the doctor's deposition, it was agreed that November 12, 2004 was the correct date of injury claimed and that November 15, 2004 was the first date on which the employee sought medical treatment for her complaints. (Dep. 28.)

into the arm, then you would be satisfied that there was a causal relationship between the diagnosed herniated disc and the incident at work?

A: Yes.

Q: And if the history she testified to was not that but that she had the onset of the first three finger tingling and numbness while unwrapping a food package and that *the arm and neck pain started subsequently*, then you would have difficulty establishing in your mind a causal relationship between work and the herniated cervical disc?

A: Yes.

(Dep. 42-43; emphasis added.)

A medical expert's change of opinion can indeed support a judge's ruling of inadequacy based on internal inconsistency. See Brooks v. Labor Mgmnt. Srvcs., 11 Mass. Workers' Comp. Rep. 575, 579-580 (1997)(where § 11A doctor rendered two different opinions on *same* history of injury, neither can be prima facie under the statute, and finding of inadequacy is necessary result). When, as here, however, the medical expert's opinions differ based on *his assumption of differing histories of injury*, there is no such internal inconsistency. That a medical expert renders causation opinions in the alternative is not, per se, a proper basis for a judge to declare that doctor's opinion inadequate, because it is the exclusive province of the judge to find as a fact which, if either, of the assumed histories is accurate. The history on which a medical expert relies is crucial to his opinion. Silverman v. Department of Trans. Assistance, 17 Mass. Workers' Comp. Rep. 111 (2003).

That said, it is axiomatic that no medical expert, not even a § 11A impartial medical examiner, is the arbiter of an employee's credibility or the finder of fact. Moynihan v. Wee Folks Nursery, 17 Mass. Workers' Comp. Rep. 342 (2003). It is the judge's responsibility to assess the employee's testimony and make findings of fact as to the mechanism of injury and the chronology of symptoms. Here, the judge found: "She accomplished the physically demanding patient transfer, and immediately started opening up the patient's lunch when she felt tingling in two fingers of the right hand. As her shift continued the numbness began moving up the side of her arm." (Dec. 2-3.)

The insurer insists that because the judge found as fact one of the histories assumed by Dr. Leibowitz -- which did not include the employee experiencing neck pain radiating down her right arm contemporaneous to the lifting incident at work -- the impartial medical evidence was adequate as a matter of law, and the judge erred in declaring it otherwise. We disagree, because that was not the doctor's only testimony on the subject. Insurer's counsel pursued the following line of inquiry:

> Q.: Now, I want you to assume, Doctor, that the history that [the employee] testified to at hearing was that she had lifted a patient, that she was then unwrapping some food packages that the patient was going to eat, and that the only thing she felt at that point in time was the tingling and numbness in the first three fingers of her right hand. I want you to assume that that is the only history here, Doctor, and that *subsequently* she began to have the insidious onset of the neck and back pain which she particularly noticed after she would awake in the morning.
>
> Assuming that to be the history here, Doctor, would it be fair to state that there was no causal relationship that you could make between any employment incident and the herniated disc at C6-7 level?. . .
>
> A.: The discomfort - - the symptoms of primarily numbness in the first three fingers of her right hand when doing fine movements is consistent with carpal tunnel syndrome. If she cannot directly relate the incident at work with the onset of the pain in her neck *within a short period of time after the incident*, then there may not be a relationship between the incidents at work and the herniated cervical disc.
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> Q.: It's possible it is?
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> A.: It is possible it is.
>
> Q.: And it's possible it isn't?
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> A.: That's correct.

(Dep. 21-22; emphasis added.) We need not decide whether the equivocal nature of this causation opinion would have worked a denial of the employee's due process rights, had the judge denied her motion for additional medical evidence. See O'Brien's Case, 424

Mass. 16 (1996). When asked by employee's counsel to assume the employee's cervical pain and right shoulder pain radiating down her arm "happened shortly after feeling the tingling in her fingers," Dr. Leibowitz pressed employee's counsel to define the phrase "shortly after," and he replied, "[s]ame shift."[6] (Dep. 43.) Dr. Leibowitz then testified that assuming such a history, "[i]t would be easier for me to make a direct association between a lifting incident and that herniated disc." (Dep. 43-44.) Moreover, the impartial physician confirmed that the employee gave him a history of the onset of neck and radiating arm pain at the time of the lifting incident, "or somewhere thereabout." (Dep. 44-45.) The doctor also stated: " *The history I obtained* and my examination led me to believe that there was a direct causal relationship between the work incident and my findings on the examination of the herniated cervical disc," and that no medical evidence had been presented to him at his deposition that would cause him to change the opinions contained in his report. (Dep. 38.)

Our dissenting colleague properly notes that an administrative judge has broad discretion in determining that an impartial medical report is inadequate. That discretion, however, is not unfettered. Shand v. Lenox Hotel, 14 Mass. Workers' Comp. Rep. 152 (2000). To the extent the dissent seems to suggest the provisions of § 11 -- allowing the judge to "make such inquiries and investigations as . . . necessary," and to "require and receive any documentary or oral matter not previously obtained as shall enable him to issue a decision with respect to the issues before him," -- give the judge virtual *carte blanche* in assessing the adequacy of an impartial medical report, we disagree.

It is well-established that when two statutes address the same subject, one in general terms and the other in more specific terms, the more specific statute must govern. Cabot Corp. v. Baddour, 394 Mass. 720 (1985); Murphy v. Cowperthwaite, 18 Mass. Workers' Comp. Rep. 102, 108 (2004), *aff'd* Murphy's Case, 63 Mass. App. Ct. 744 (2005). The general authorization to "require and receive any documentary or oral matter not

[6] Insurer's counsel objected to the question, as he did to all other hypothetical questions posed by employee's counsel. (Dep. 32-33, 39, 44.) The judge overruled all such objections, (Dec. 8), but the insurer has not renewed or preserved its objections on appeal. Therefore, we consider the insurer's challenges to the histories Dr. Leibowitz was asked to assume waived. Green v. Town of Brookline, 53 Mass. App. Ct. 120, 128 (2001), citing Wynn & Wynn, P.C. v. Massachusetts Comm'n Against Discrimination, 431 Mass. 655, 674 (2000).

previously obtained as shall enable him to issue a decision with respect to the issues before him," simply does not trump the provisions of § 11A(2). See footnote 2, supra.

"An impartial physician's opinion is not rendered inadequate by the judge's subjective reactions upon reviewing the doctor's testimony. 'Inadequacy' 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).

Thus, as a preliminary matter, the judge must consider the statutory criteria against which the § 11A report is to be tested:

> 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.

General Laws c. 152, § 11A(2). We agree that even if the impartial report satisfies the statutory criteria, as Dr. Leibowitz's does, the judge may find inadequacy for other reasons, but the reasons cannot be invalid or incorrect as a matter of law, as they are here.

The Supreme Judicial Court has held that the statutory provision conferring prima facie status to the impartial medical examiner's report is not unconstitutional on its face because the due process rights of the parties are protected by allowing them to submit *to the impartial physician* their own medical records relevant to the issues to be decided. O'Brien's Case, supra. The Court did not hold that an administrative judge permissibly may declare the impartial medical report inadequate simply because the judge favors a different expert opinion contained in those records, submitted at the § 10A conference and forwarded to the impartial physician, but not otherwise in evidence. In our view, this approach is tantamount to judicial nullification of the statute which, after all, was intended by the legislature to minimize the "duelling doctors" aspect of litigating medical issues.

We do not agree with our dissenting colleague that the Appeals Court's decision in DiCostanzo's Case, 2007−P−997, Rule 1:28 Memorandum and Order (2008), authorizes such an approach. It is noteworthy that in DiCostanzo, the employee's motion for additional medical evidence alleged, *inter alia*, that the § 11A report expanded the scope of the medical dispute and thus was inadequate under Ruiz v. Unique Applications, 11 Mass. Workers' Comp. Rep. 399 (1997). Indeed, DiConstanzo's motion quoted excerpts from her medical experts' opinions of total disability, the insurer's medical experts' opinions of partial disability, and the §11A examiner's opinion of no disability.[7] Although the judge did not mention Ruiz as a basis for his inadequacy finding, DiCostanzo, supra at n.1, the employee's motion itself placed before him the gist of the other expert medical opinions for comparison with those of the impartial physician. Under these circumstances, it cannot be said, as the dissent posits, that the Appeals Court has endorsed a judge's wholesale review of the parties' respective medical reports *before* a ruling on inadequacy.

This case does not involve any such Ruiz challenge to the impartial medical report. Moreover, contrary to the employee's argument, (Employee br. 5), Dr. Leibowitz's testimony was a far cry from the "hydra-headed testimony" of the § 11A impartial medical examiner in Libby v. National Restaurants Corp., 20 Mass. Workers' Comp. Rep. 37, 39 (2006), held to be inadequate as a matter of law. Dr. Leibowitz offered causation opinions in the alternative, depending on how close in time to the work incident the employee experienced the onset of neck pain and radiating right arm pain. The crucial deficiency in the judge's decision is that he made no factual finding as to when the employee first experienced neck pain.[8] On recommittal, the judge must make that factual determination, based on the evidence of record, exclusive of so much of the employee's additional medical evidence as represents expert opinions from other physicians.[9] He

[7] We take judicial notice of the contents of that board file. Rizzo, supra.

[8] It was established that at least by November 15, 2004, when the employee presented to the Mercy Medical Center emergency room, her chief complaints were "right neck, right shoulder pain, first and second index finger right hand, numb." (Dep. 26; Employee Ex. F-3.) The parties disagreed as to whether that record reflected a one-week history of neck pain, which would place the onset before the work incident, and whether it contained a reference to the employee lifting at work. (Dep. 27, 34-36.)

[9] Specifically, the medical reports and office notes of Drs. Richard P. Anderson and Kamal L. Kalia. The employee's other proffered medical evidence -- the Mercy Medical

must then revisit his ruling that the § 11A impartial medical evidence was inadequate. Should the judge stand by his inadequacy ruling, he must clarify his reason(s) for that ruling.[10]

Lastly, we agree with the insurer's second argument -- that because the judge set the same date for both the parties' submission of additional medical evidence and the close of the record, "the insurer had no realistic opportunity to address the employee's evidence by deposition, or by the submission of countervailing medical evidence." Mayo v. Save On Wall Co., 19 Mass. Workers' Comp. Rep. 1, 4 (2005). Since there was no reasonable time afforded the insurer to respond to the employee's proffered medical evidence, a due process issue emerged.

We realize the insurer might have followed its objection to [the employee's additional medical evidence] by noticing the depositions of the employee's doctors, thereby possibly bringing the matter to a head before the judge wrote his decision. However, the failure to do so, particularly after the close of the record, does not cure the due process violation.

Center records of November 15, 2004, including diagnostics report, and the Holyoke Medical Center records of May 20, 2004 through January 10, 2005 -- are independently admissible under G. L. c. 152, § 20, and/or G. L. c. 233, §79G.

[10] The other stated basis for the judge's declaration of inadequacy was, "whatever notes [the § 11A physician] took during the examination were destroyed." (Administrative Judge's ruling on motion dated June 1, 2006.) This information was provided by Dr. Leibowitz at his deposition, *taken by the insurer* for the purpose of cross-examining the doctor on the contents of his report. G. L. c. 152, § 11A; 452 Code Mass. Regs. § 1.12(5)(a). The insurer does not argue that its due process rights were compromised by the unavailability of the doctor's notes. Cf. Begin's Case, 354 Mass. 594, 597 (1968).

" 'It is not a judge's function to be the trial strategist for any litigant[,]' any more than it is a judge's duty 'to interfere with trial counsel's strategy.' " MacEachern v. Trace Construction Co., 21 Mass. Workers' Comp. Rep. 31, 37 (2007), quoting Draghetti v. Chmielewski, 416 Mass. 808, 815 (1994).

Id. at n.6. On recommittal, if the judge stands by his ruling of inadequacy, he must allow the insurer the opportunity to challenge the employee's medical evidence, upon which he relied in concluding that benefits were due.

We therefore recommit the case for further proceedings consistent with this opinion, and for a decision anew.

So ordered.

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Patricia A. Costigan
Administrative Law Judge

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Bernard W. Fabricant
Administrative Law Judge

Filed: **October 10, 2008**

HORAN, J., (concurring in part, dissenting in part). I would affirm the judge's decision *in toto*. Thus, I agree with the majority's decision to summarily affirm on the issue of the employee's earning capacity. However, I disagree with the majority's decision to recommit the case.[11]

The judge's decision to request, receive, evaluate and adopt additional medical evidence was well within his statutory authority; it was not arbitrary, capricious or contrary to law. Our workers' compensation act empowers judges, on their " *own initiative* or upon motion by a party," to "authorize the submission of additional medical testimony when such judge finds that said testimony is required due to the complexity of the medical

[11] In light of its rejection of the judge's rationale for finding the § 11A medical examiner's opinion inadequate, I remain curious as to why the majority feels the need to recommit the case. What happens if the judge's "now, for something completely different" rationale is also viewed, at least by the majority, as insufficient to support an "inadequacy" finding? Do we recommit the case once more? If, on recommittal, the judge finds the matter is sufficiently medically complex to warrant the consideration of additional medical evidence, do we substitute our judgment for that determination, as the majority does in this case, as well?

issues involved or the inadequacy of the report submitted by the impartial medical examiner." G. L. c. 152, § 11A(2) (emphasis added).[12]

In rejecting a challenge to the facial constitutionality of § 11A's impartial medical examiner scheme, the Supreme Judicial Court, in O'Brien's Case, 424 Mass. 16 (1996), held: "[w]e know of no rule of due process that gives a party . . . an unrestricted right [to admit evidence] in an administrative proceeding even in the face of testimony *deemed wholly sufficient to present fairly the issue in controversy*." Id. at 22 (emphasis added). The O'Brien court also took note of the procedural safeguards contained in § 11A(2), including the right to present additional medical evidence to the impartial medical examiner, and the right of cross examination. Id. at 22-23. However, the court also acknowledged that:

> Certainly a decision by the administrative judge to foreclose further medical testimony *where such testimony is necessary to present fairly the medical issues* would represent grounds either for reversal or recommittal. In any case where these procedures still failed to offer a party an opportunity to present testimony necessary to present fairly the medical issues, there then might well be failure of due process as applied in that case.

Id. at 22-23 (emphasis added). How does a judge determine whether additional medical testimony is "necessary to present fairly the medical issues"? The court hinted it would approve of the admission of additional evidence in a broad range of circumstances: "[t]hus, if the judge performs this function correctly, the parties will be granted the very right they seek in any case *where this additional testimony would serve some legitimate function*." Id. at 22 (emphasis added). In sum, it is the administrative judge's duty to decide whether the impartial medical examiner's testimony is "wholly sufficient to present fairly the issue in controversy" or whether "some legitimate function" would be served by the introduction of additional medical evidence.

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[12] The judge's power to act *sua sponte* under § 11A is perfectly consistent with the judge's right, under G. L. c. 152, § 11, to "make such inquiries and investigations as . . . necessary," and to "require and receive any documentary or oral matter not previously obtained as shall enable him to issue a decision with respect to the issues before him." G. L. c. 152, § 11.

In Lorden's Case, the Appeals Court vacated the decision of this board, which had affirmed a decision denying the employee's claim. 48 Mass. App. Ct. 274 (1999). The administrative judge in Lorden "rejected the impartial medical examiner's opinion, ruling that it was based on facts which either were not in evidence, or which the judge did not find to be facts." Id. at 277. The judge "also considered specific aspects of [the § 11A report], indicating the discrepancies which the judge believed caused the report to be inaccurate. . . ." Id. at 278. The judge denied motions by both parties to submit additional medical evidence and dismissed the employee's claim. Id. at 275. The Lorden court noted that the "judge's rejection of the impartial medical examiner's report coupled with his refusal of both parties' motions to submit additional medical evidence resulted in no medical evidence whatsoever being before the administrative judge." Id. at 280. Citing O'Brien, the court held that, under these circumstances, the judge "should have allowed the parties to submit additional medical evidence. . . ." Id. Here, the judge was obviously troubled by the impartial examiner's opinion that, based on the passage of time between the incident at work and the onset of the employee's symptoms, "there *may not* be a relationship between the incidents (sic) at work and the herniated cervical disc." (Dep. 22; emphasis added.) Perhaps wishing to avoid a situation analogous to the circumstances presented in Lorden, the judge, in the exercise of his discretion, wanted at least a second opinion. We need not second guess his desire to obtain a more definitive medical opinion on the causation issue.

Recently, in DiCostanzo's Case, 2007−P−997, Rule 1:28 Memorandum and Order (May 28, 2008), the Appeals Court squarely addressed the issue of a judge's power to authorize the submission of additional medical evidence under § 11A(2) on "inadequacy" grounds. There, the judge found the § 11A report inadequate after comparing the opinion contained in the report with the opinions contained in the physician's reports previously forwarded to the impartial medical examiner - which reports were not in evidence. Id. Relying on O'Brien, the court affirmed the right of a judge to deem a § 11A report inadequate based on his own view of other relevant medical opinions.[13] Id.

Here, the judge did allow additional medical evidence, but did not reject entirely, as the judges did in Lorden and DiCostanzo, the § 11A examiner's opinion. The judge expressly

[13] Contrary to what the majority suggests, the DiCostanzo court ignored the insurer's Ruiz argument, ruling instead that "the [administrative judge's] decision on the § 11A report is supported by the well-known principles stated in the appellate authorities cited above." supra at n.1.

relied on Dr. Leibowitz' opinion to find "that the employee could return to work with restrictions. . . ." (Dec. 5.) But the judge also found Dr. Leibowitz' causation opinion lacking. (Dec. 2.) In response to the employee's motion to submit additional medical evidence, the judge explained that Dr. Leibowitz' opinion was inadequate because:

> [T]he history listed in the report does not coincide with the history testified to at deposition, and the doctor indicated he had no independent memory of Mrs. Fritz other than what is in the report. (See deposition page 7) In addition, whatever notes he took during the examination were destroyed.[14]

Judge's letter of June 1, 2006; see Rizzo v. M.B.T.A., 16 Mass. Workers' Comp. Rep. 160, 161 n.3 (2002)(judicial notice taken of documents in board file).The decision states that Dr. Leibowitz' opinion is "inherently contradictory as to the history and therefore inadequate." (Dec. 2.) Consequently, the judge allowed both parties to submit additional medical evidence, and adopted the causal relationship opinion of Dr. Anderson because, as the judge saw it, the history given to Dr. Anderson "coincides with the employee's testimony." (Dec. 5.) The admission and adoption of Dr. Anderson's opinion thus served a "legitimate function" as it, in the judge's estimation, more fairly and accurately addressed the causation issue in dispute with an opinion based precisely on the employee's credited hearing testimony. O'Brien, supra; Lorden, supra.

It was well within the province of the judge, as fact-finder, to so interpret the opinions of Drs. Leibowitz and Anderson; his decision to authorize, consider and adopt additional medical evidence was well within his discretion. G. L. c. 152, §§ 11, 11A(2); O'Brien, supra; Lorden, supra; DiCostanzo, supra; See also 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.")[15]

The insurer advances no argument that the judge's admission of additional medical evidence constitutes an abuse of his statutory discretion, and we are not at liberty to substitute our judgment on such matters. G. L. c. 152, § 11C. In any event, the facts do

[14] Although he did not state so explicitly, the judge may have been concerned that the inability of counsel to question Dr. Leibowitz with the doctor's examination notes might itself violate due process. See Begin's Case, 354 Mass. 594, 597 (1968).

[15] These recent appellate decisions have, arguably, overruled our holding in Shand, supra. In any event, unlike the judge in Shand, here the judge's rationale does not support a finding that he abused his statutory discretion.

not support such a claim. Finally, no due process violation results, under these or similar circumstances, when a judge exercises his discretion to authorize the submission of *additional*[16] medical evidence; such a violation may only occur with the *denial* of such a motion where the § 11A examiner's opinion does not, as a matter of law, "present fairly the medical issues" in dispute.[17] O'Brien, supra at 22.

I also disagree the judge erred by issuing a decision wherein he ruled upon the insurer's motion to strike the employee's additional medical evidence. Without a request by the insurer to extend the time for the submission of additional medical evidence, the judge was not required to grant the insurer an extension. Examination of the board file, along with the decision, reveals that the facts of this case are materially different from the facts in Mayo, supra. In Mayo, the employee submitted additional medical evidence *after the close of the evidence*, the insurer objected to the late submission of that evidence, and the judge issued a decision awarding benefits to the employee *relying on the evidence submitted after the record closed*. Here, the board file reveals that the insurer, on June 14, 2006, had noticed the deposition of its medical expert, Dr. Robert Levine, for June 26, 2006. On June 22, 2006, the insurer cancelled the deposition. On June 29, 2006, the employee submitted her additional medical evidence. Instead of asking for an extension of time for the close of the evidence, the insurer adopted another strategy. On July 6, 2006, after the record closed, insurer's counsel filed a motion objecting to the employee's medical evidence. The judge ruled on the motion in his decision, excluding some, but not all, of the employee's medical evidence.[18] (Dec. 3.) At no point in time did the insurer request more time to submit its own evidence, or to depose the employee's medical expert. The judge issued his decision on July 11, 2006. He committed no error of law in

[16] The majority's "dueling doctors" argument ignores the fact that the legislature has expressly authorized judges to seek additional medical evidence even when the parties may not ask, nor desire, to have such evidence considered. G. L. c. 152, §§ 11, 11A(2).

[17] It has been established that, in the absence of such a motion, the judge may, but is not required to, solicit additional medical evidence. Viveiros's Case, 53 Mass. App. Ct. 296 (2001).

[18] I note that nothing in the statute or case law obligated the judge to rule on the insurer's motion, which was filed after the record closed. See Mayo, supra (error for judge to rely on evidence submitted after the record closed). That being the case, it cannot be said that the judge committed reversible error when he ruled on the insurer's motion - to the *employee's* detriment - in the decision. (Dec. 3.)

doing so. To find otherwise, as the majority does, it to permit counsel, and not the judge, to manage the docket. How much time was the judge supposed to wait for the insurer to request more time to do what it could have done on time? Accordingly, I dissent.

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Mark D. Horan
Administrative Law Judge

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