COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 30761-92**

Edgardo Hernandez	Employee
Crest Hood Foam Co., Inc.	Employer
CNA Insurance Co.	Insurer

REVIEWING BOARD DECISION

(Judges Smith, Wilson and McCarthy)

APPEARANCES

Sandra J. Jenkins-Bryant, Esq., for the employee
Paul M. Scannell, Esq., for the insurer

SMITH, J. The employee appeals from a decision that awarded only one week of incapacity benefits and a reduced legal fee. The employee contends that the judge erred by failing to allow him to introduce additional medical evidence for a disputed period of incapacity prior to the date of the impartial medical examination, and by reducing his § 13A(5) attorney's fee for lack of effort. Because the impartial medical report was not facially inadequate, we conclude that the ruling to deny the motion for additional medical evidence was within the scope of the judge's authority, and was not arbitrary or capricious, or contrary to law. We affirm the decision.

Edgardo Hernandez worked as shipper, foam fabricator and laminator. (Dec. 4-5.) His stipulated average weekly wage was $240.00. (Dec. 3.) Even though he wore a protective facemask, Hernandez had trouble with the irritating fumes that emanated from the liquid foam. On July 14, 1992, while working in the laminating department, he became dizzy and sweaty, short of breath, had chest pain, and was unable to speak. His foreman called an ambulance. Hernandez was given oxygen and transported to the hospital. (Dec. 5.) Hernandez was hospitalized from July 14, 1992 until July 21, 1992. While in the hos-

pital, Hernandez underwent a series of diagnostic tests, and received medication and treatment. (Dec. 6.) Subsequently, Hernandez spent a year in prison. (Dec. 8.) Since October 4, 1994, he has treated with Dr. Sauls, a primary care physician, who has prescribed an inhaler. Since September 13, 1995 Hernandez has also been under the care of Dr. Dorris, a pulmonary specialist. (Dec. 6.) Hernandez smoked cigarettes until March 1996. (Dec. 7.) He has not worked since July 14, 1992. (Dec. 8.)

Three and one half years after his injury, Hernandez filed this claim for workers' compensation benefits. After a § 10A conference, the judge ordered the insurer to pay § 34 total compensation benefits from July 14, 1992 to October 19, 1992, plus medical benefits. Both parties appealed, and the matter went to a § 11 evidentiary hearing. At hearing, Hernandez claimed that he was entitled to the § 34 total compensation ordered at conference and ongoing § 35 partial compensation thereafter, except for the time when he was incarcerated.[1] The insurer denied the claim on the basis of liability, causal relationship, incapacity and extent thereof. (Dec. 2.)

Pursuant to G.L. c. 152, § 11A(2), Hernandez underwent an impartial medical examination on August 9, 1996. Section 11A(2) requires an employee to submit to the impartial medical examiner "all relevant medical records, medical reports, medical histories, and any other relevant information." Hernandez provided the impartial medical examiner with medical records from the time of his injury until October 19, 1992. The impartial medical examiner was not given any records for the next three years. Hernandez provided the records of Dr. Dorris from October 10, 1995 until February 12, 1996. (Ex. 1, p. 3.)

Dr. William Patterson, the impartial medical examiner, reviewed the medical records forwarded to him, consulted with standard references in Occupational Medicine, took a history and examined Hernandez. (Ex. 1, p. 1.) He reported that Hernandez has

[1] See G.L. c. 152, § 8(2)(j), which permits an insurer to unilaterally terminate weekly compensation benefits during periods when an employee is incarcerated post-conviction; Connolly's Case, 418 Mass. 848, 853 (1994) ("An employee who is incarcerated loses his ability to work because of the incarceration, not the injury").

smoked one-half to one pack of cigarettes per day for approximately twenty years. (Ex. 1, p. 2.) His impartial report contained a detailed discussion of the medical records that had been submitted to him. (Ex. 1, p. 3.) He quoted Dr. Harris's consultation report as opining that the changes found "could be secondary to his history of cigarette smoking, although certainly may be a result of acute lung injury from TDI. I would suspect the former, but certainly there is no way of confirming this. . . ." Dr. Harris suggested avoidance of further TDI exposure. The impartial report quoted the hospital discharge summary dated July 21, 1992 as saying: "He was therefore advised not to ever have any TDI exposure, not to return to his place of employment, and to therefore file workmen's comp claims." Id. The impartial report then reviewed the next medical record that the employee had submitted, Dr. Workum's October 19, 1992 Social Security Disability Report. Dr. Workum was quoted as reporting: "No longer working at his previous job. He is doing reasonably well and when I examined him in August he had scattered wheezes and in September his lungs were clear . . . . It is my impression that he has asthma and, in particular, he had an attack of asthma when exposed to TDI . . . . It is my recommendation that he should avoid exposure to toluene diisocyanate and he probably should avoid particularly dusty environments or sudden changes in temperature." Id. The next record reported by the impartial physician was the October 10, 1995 letter from Dr. Dorris, the employee's allergist, who had found that the employee's pulmonary function tests were normal. Id. Additionally, the impartial doctor reported the results of his August 9, 1996 physical examination. At that time, he found Hernandez's nose, ears and throat were normal, his chest was clear, and his pulmonary function test results were normal. (Ex. 1, p. 2.)

After this detailed recitation of the employee's medical history, and the physical examination results, Dr. Patterson reported a diagnosis of probable sensitivity to isocyanates and possible reactive airways disease. The doctor opined that there was a causal connection between the occupational exposures to chemicals used to manufacture foam and Hernandez's sensitivity to isocyanates. However, in his opinion there was only a possible causal relationship between the occupational exposure and reactive airways disease. The doctor opined that there was no objective evidence of physical limitations, and that

Hernandez could perform all work which did not involve likely exposure to pulmonary irritants. The doctor did opine that Hernandez should be completely restricted from all work involving any exposure to isocyanates. In his opinion, there were "many jobs which fall within this level of disability." (Dec. 6-7; Ex. 1, p. 4.)

Upon receipt of the impartial report, Hernandez filed a standard form motion to exclude the impartial report and motion to introduce additional medical evidence. The boilerplate language of the motion alleged that G.L. c. 152, § 11A(2), was unconstitutional, the impartial report was inadequate, the medical issues were complex and the introduction of the impartial report without additional medical evidence was contrary to law. The motion provided no specifics tying these general allegations to the facts of this case and offered no description of the evidence the employee would submit to address the alleged deficiencies in the § 11A report. (Motion dated August 26, 1996.)

At the initial hearing, Hernandez argued that the emergency room records should be allowed into evidence. (December 11, 1996 Tr. at 9.) He then testified about his medical treatment. His testimony did not reveal any treatment in addition to that reviewed in the impartial medical examiner's report, other than current treatment from Dr. Sauls, an internist, who prescribes an inhaler for him when he requests the doctor to do so. Compare December 11, 1996 Tr. at 51-53 with Ex. 1 at 3. Hernandez did not indicate that any medical information was available from his treating physicians that had not been submitted to the impartial physician. He did not testify about any change in his medical condition between his release from the hospital and the impartial examination. See December 11, 1996 Tr. 51-58.

At the conclusion of the second day of hearing, Hernandez renewed his motion for additional medical evidence. He argued that there was a gap between the date of injury and the date of the impartial medical examination, which necessitated additional medical evidence, but he did not proffer any. He admitted that he had provided his medical records to the impartial physician, who had commented on them. However, he argued that the impartial examiner did not report clearly on the extent of medical disability prior to the date of the examination. He did not assert that there was any change in his medical

condition since his release from the hospital. (February 27, 1997 Tr. 12.) [2] The judge suggested that Hernandez depose the doctor in order to clarify anything that Hernandez considered unclear in the doctor's report. Hernandez explicitly declined to do so. Id. The judge denied Hernandez's motion to submit additional medical evidence. (Dec. 3.)

The judge adopted the impartial medical examiner's opinions. (Dec. 7.) The judge found unpersuasive Hernandez's testimony that he was unable to perform full-time work. Instead he found that Hernandez could work full time without restriction in many laboring tasks. (Dec. 8.) The judge concluded that Hernandez had suffered an industrial injury on July 14, 1992, but that his period of incapacity only lasted as long as his hospitalization for the week following that incident. (Dec. 9.) The judge ordered a closed period of total compensation ending on July 21, 1992, together with reasonable and adequate medical benefits for the diagnosed condition of sensitivity to isocyanates. The judge further ordered the insurer to pay Hernandez's attorney a legal fee of $2,000, plus necessary expenses, commenting that the fee had been decreased based on the complexity of the dispute and the effort expended. (Dec. 10.)

On appeal, Hernandez raises three issues. First, he contends that the judge erred in refusing to allow additional medical evidence.

We are constrained by the standard of review contained in G.L. c. 152, § 11C, to overturn a judge's ruling only when it is beyond the scope of his authority, arbitrary or capricious, or contrary to law. Oliveira v. Scrub-A-Dub Wash Center, 10 Mass. Workers' Comp. Rep. 61, 64 (1996). A judge need not be clairvoyant in assessing the arguments made in a motion for further medical evidence. DeMetrio v. M. DeMatteo Construction Co., 11 Mass. Workers' Comp. Rep. 624, 626 (1997). "A decision is not arbitrary and ca-

[2] The colloquy between employee's counsel and the judge went as follows:

> Counsel: Well, I am concerned about the gap period. It is a 1992 injury exposure with an August 1996 impartial report. So we have a four year gap. . . .
> Judge: Didn't you have records of those four years to give to the impartial?
> Counsel: I did, and he does comment on it. But I don't think he is real clear on that four years of any extent of disability during that four years. The base of my argument is just the gap.

(February 27, 1997 Tr. 12.)

pricious unless there is no ground which 'reasonable men might deem proper' to support it." Burnette v. Command Marketing Corp., 13 Mass. Workers' Comp. Rep. 56, 60 (1999), quoting T.D.J. Development Corp. v. Conservation Commission of North Andover, 36 Mass. App. Ct. 124, 128 (1994), and Cotter v. Chelsea, 329 Mass. 314, 318 (1952). In determining the adequacy of a § 11A report, an administrative judge must consider all of the evidence offered on the question, not just the four corners of the document. There is no requirement that the impartial physician must be deposed in order for the judge to determine that the report is inadequate. However, if he is, then of course the judge must consider his deposition testimony in ruling on the motion. Considering this particular record, including the employee's testimony, we find no legal violation or abuse of discretion in the judge's denial of the motion for additional medical evidence.

Section 11A sets forth the requirements for the adequacy of an impartial medical report, to wit, "(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 or not within a reasonable degree of medical certainty any 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." The report is to 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." G.L. c. 152, § 11A(2). These requirements were satisfied by Dr. Patterson's report. He found a disability of sensitivity to isocyanates, which limited the employee against likely exposure to pulmonary irritants. He found that the employee was able to perform all other work. He further opined that there was no objective evidence of any physical limitations and that a medical end point had been reached. (Dec. 6-7; Ex. 1, p. 4.) The doctor did not say that his opinions only addressed medical disability as of the date of the exam, August 9, 1996. Significantly, the impartial opinion was consistent with the reports sent to the doctor for review. Those reports did not indicate any change in condition after the employee was discharged from the hospital. Nor did Hernandez testify to any such change. Hernandez did not claim that the impartial physician misconstrued or misunderstood his medical records. Based upon the employee's tes-

timony as well as the contents of the impartial report, the judge could rationally conclude that the impartial physician's opinion adequately covered the time period prior to the date of the impartial examination.

Section 11A(2) provides that the judge "*may* . . . authorize the submission of additional medical evidence when such judge finds that said testimony is required due to the complexity of the medical issues involved or the inadequacy of the report submitted by the impartial medical examiner." (Emphasis added.) The allowance of additional medical evidence is discretionary with the judge. G.L. c. 152, § 11A(2); Oliveira, supra, 10 Mass. Workers' Comp. Rep. at 64. However, the court has instructed us that constitutional principles of procedural due process require the allowance of additional medical evidence "where such testimony is necessary to present fairly the medical issues." O'Brien's Case, 424 Mass. 16, 22 (1996).

Under the circumstances presented here, where Hernandez did not exercise his right to depose the impartial medical examiner, no deprivation of procedural due process occurred. In O'Brien, the court emphasized the importance of the "opportunity for the claimant to develop and put before the *relevant decision makers* medical testimony []he considers favorable to [his] claim." Id. at 23 (emphasis supplied). According to the court, the first such opportunity is the submission, to the impartial medical examiner, of all relevant medical reports for his consideration. The second opportunity is the deposition and cross-examination of the impartial medical examiner. [3] The court emphasized that, at deposition, questions could be asked to bring deficiencies in the impartial report to the judge's attention. Id. The court found that the deposition and cross-examination procedures give a party the opportunity, which due process requires, to attack, discredit or re-

[3] We note that there are other, less costly opportunities, as well. Where a party believes that the employee's condition has changed between the commencement of the claim period and the date of the impartial examination, at conference, he may pose a hypothetical question to be sent to the doctor about the extent of medical disability prior to the date of the impartial examination. See 452 Code Mass. Regs. § 1.10(2). In addition, after receipt of the § 11A report, either party may ask the judge to request a supplemental report. See Ciufo v. Labor Management Servs., 11 Mass. Workers' Comp. Rep. 494, 499 (1997) (judge permitted on recommittal to request an addendum

fute the report. Id. at 24. At deposition, an employee may inquire whether the doctor disagrees with other medical opinions or is unable to comment on a key issue. The O'Brien court noted that it is the combination of the record review and deposition that gives contestants ample opportunity to be heard and to have considered the merits of their contentions. Id. Where Hernandez did not fully exercise these opportunities, the denial of the motion for additional medical evidence was not contrary to constitutional law.

Nor was the denial of the motion for additional medical evidence arbitrary or capricious. Nothing in the impartial medical examiner's report indicates that the doctor was unable or unwilling to render an opinion regarding the extent of, or the cause of, Hernandez's incapacity from the date Hernandez was released from the hospital until the date of the impartial examination. Compare George v. Chelsea Housing Authority, 10 Mass. Workers' Comp. Rep. 22, 24 (1996) (additional medical evidence compelled as a matter of law when at deposition the impartial physician was unable to render an opinion on the extent of medical disability prior to the date of his examination). On this record, the judge could conclude that there was no "gap" problem.[4] The impartial report was facially adequate. It could be rationally read to cover the entire period of claimed incapacity. It provided a detailed report of the medical records that had been forwarded for review. As reported, they were consistent with the conclusions about diagnosis and work limitations that the impartial doctor reached. None of the records indicated that Hernandez was unable to perform any work at all after he was released from the hospital on July 21, 1992. Instead the records merely indicated that Hernandez was limited against exposure to toluene diisocyanate, and should stop smoking-- limitations and recommendations with which the impartial physician agreed.

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to the impartial report on an essential element of proof). Either procedure may solve a "gap" problem, while maintaining the integrity of the § 11A impartial medical examination process.

[4] The judge's benefit award was fully supported by the impartial examiner's medical report. In that regard, it differs from those cases where the administrative judge rejected the impartial medical examiner's opinion and instead relied upon his own knowledge. See, e.g., Lorden's Case, __ Mass. App. Ct. ___ (November 26, 1999); Wilkinson v. City of Peabody, 11 Mass. Workers' Comp. Rep. 263, 265 (1997).

The judge awarded total compensation for the time period covered by the emergency room records proferred orally at the first hearing. Thus, there is no harm to the employee from not separately admitting those emergency room records.

In conclusion, this record does not establish that the judge abused his discretion in declining to admit the reports of Hernandez's treating physicians, which the impartial medical examiner had already considered and which did not demonstrate any change in the employee's medical condition after his release from the hospital. Nor can we conclude that the judge's action in excluding some unknown medical report was arbitrary and capricious. See Caira v. Raytheon, 12 Mass. 25, 26 n. 9 (1998).

As his next ground for appeal, Hernandez contends that the judge's incapacity decision fails to contain sufficient findings so as to enable the reviewing board to determine with reasonable certainty whether correct rules of law were applied to facts which could properly be found. We find the judge's incapacity analysis adequate for appellate review. Hernandez maintained that he was too medically disabled to work. (December 11, 1996 Tr. at 70.) The judge specifically refuted this contention. (Dec. 8.) The judge rested on the impartial report and found that Hernandez only had a slight medical restriction, against exposure to pulmonary irritants including isocyanates. He concluded that the medical limitation did not impair Hernandez's ability to work full time in many laboring tasks. Id. Hernandez had worked as a truck driver for 20 years. (Dec. 4.) It was a rational inference that Hernandez could perform this type of employment with his medical limitation. Hernandez presented no labor market evidence. He did not look for work. (December 11, 1996 Tr. 69-70.) Hernandez does not suggest what other findings could possibly be made on this record.

The burden of proving incapacity, whether total or partial, is on the employee. Once the judge determined that Hernandez had shown only partial medical disability, and had not produced testimony about what he could earn with his medical limitation, the judge was entitled to use his own judgment and knowledge in determining that question. The judge's finding that incapacity terminated upon Hernandez's release from the hospital is tantamount to a statement that the evidence left the judge unpersuaded that Hernandez

was precluded by his condition from doing any type of work paying at least $240 per week, his pre-injury average weekly wage. See Mulcahey's Case, 26 Mass. App. Ct. 1, 3 (1988). The judge's lack of persuasion was not arbitrary or capricious.

To be entitled to continuing partial compensation benefits, an employee must establish by a preponderance of the credible and reliable evidence that there is a difference, resulting from the injury, between his average weekly wage before the injury and the weekly wage that he is capable of earning after the injury. G.L. c. 152, § 35. Here, the judge was unpersuaded that any difference existed. Therefore the denial of ongoing benefits was not contrary to law.

As the final issue, Hernandez challenges the judge's reduction of his attorney's fee. Section 13A(5) permits a judge to decrease a hearing fee based upon the effort expended by the attorney. It is apparent that the judge found the attorney's effort was less than normal, and reduced the fee commensurately. The record rationally supports that view.

We conclude that the challenged decision is adequately supported by the evidence in this record, is untainted by error of law, and reflects rational decision making within the particular requirements of the workers' compensation act, G.L. c. 152. See Scheffler's Case, 419 Mass. 251, 258 (1994). Consequently we affirm it.

So ordered.

Suzanne E.K. Smith
Administrative Law Judge

Sara Holmes Wilson
Administrative Law Judge

Filed: December 21, 1999

MCCARTHY, J., (dissenting) Section 11A(2) of the Act allows the administrative judge, on his own initiative or upon a motion by a party, to authorize the submission of additional medical testimony where the judge finds additional medical testimony is required due to the "complexity of the medical issues involved or the inadequacy of the report submitted by the impartial medical examiner." (emphasis added). Here, Mr. Hernandez was seeking incapacity benefits from July 14, 1992 forward. (Dec. 2.) The insurer contested medical disability and extent of incapacity. The impartial exam took place on August 9, 1996, more than four years after the industrial injury! Medical reports from the date of injury through February 12, 1996 were submitted to the impartial physician.[5] In a section of his report called Medical Record Review, the examiner summarizes this material without comment or criticism. (Ex 1, p. 3). The examiner's opinion on medical disability is framed in the present tense. If the doctor had an opinion as to Mr. Hernandez' medical disability during the four years preceding his exam, he was careful not to voice it. The judge recognized that the report was limited by its language to the present when he found as follows: "I adopt the medical opinion of Dr. Patterson and find that the employee is not presently disabled." (Dec. 9.) (emphasis added).

In my view, the impartial report is inadequate on its face for the four year period preceding the examination. The report made no response to this period of contested incapacity. "This deficiency, . . . , made necessary an allowance of additional medical evidence to afford the employee an opportunity to meet his burden of proof. [citation omitted] . . . denial of the motion for allowance of additional medical testimony impermissibly foreclosed to the employee any means of meeting his burden. George v. Chelsea Hous. Auth., 10 Mass. Workers' Comp. Rep. 22, 26 (1996).

Consistent with our prior decisions, I would reverse the decision and recommit the

[5] One such report is found in a letter dated November 14, 1995, from Dr. Doris, the treating allergist, and directed to employee counsel. Doctor Dorris' ' "diagnosis is occupational asthma and chemical reaction to isocyanate (TDI) . . . He is disabled for his former occupation . . . Disability is causally related to his injuries. His prognosis depends on avoiding additional exposure to isocyanates and other chemicals, avoidance of smoking and control of asthma and bronchitis.' " (Exhibit 1, p. 3).

case for additional findings on incapacity for the entire claimed period.

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William A. McCarthy
Administrative Law Judge

Filed: December 21, 1999