COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS	**BOARD NO. 015045-98**
Edward H. Armstrong	Employee
Commercial Air Technology	Employer
Star Insurance Co.	Insurer

REVIEWING BOARD DECISION
(Judges McCarthy, Carroll and Levine)

APPEARANCES
Frank E. Antonucci, Esq., for the employee
Robert A. Riordan, Jr., Esq., for the insurer

MCCARTHY, J. The insurer appeals the decision of an administrative judge which denied the insurer's complaint to terminate or modify weekly incapacity benefits and directed the insurer to continue payment of weekly § 34 benefits, medical expenses under § 30 and counsel fees and costs. Finding merit in the insurer's appeal, we recommit the case to the administrative judge for further findings.

Edward Armstrong was thirty years old at the time of the hearing, single and a resident of Lenox Massachusetts. He is a high school graduate whose entire work background since 1989 consists of heavy labor. (Dec. 3.) As a sheet metal worker for Commercial Air Technologies, the employee lifted items weighing from twenty up to fifty pounds and had to bend and twist frequently. (Dec. 4.)

In December 1997, the employee was injured while lifting ductwork. He received chiropractic treatment and returned to work in January 1998. Id. On April 20, 1998, the employee felt a sharp pain in his lower back while bending a piece of sheet metal. He reported the incident and sought treatment at a nearby emergency room. Thereafter, Mr.

Armstrong received conservative medical treatment from several health care providers. He has not returned to work since the accident. Id.

After accepting the case and paying weekly benefits, Id., the insurer filed a complaint to terminate or modify weekly benefits. The complaint was denied after a § 10A conference and the insurer's appeal brought the matter back for hearing de novo before the same administrative judge. (Dec. 1.)

On November 10, 1999, the employee was examined by Dr. Vincent R. Giustolisi, the § 11A impartial medical examiner. Doctor Guistolisi opined that the employee was totally disabled and unable to perform the functions of a sheet metal worker and had physical limitations which would interfere with his ability to engage in manual labor. (Dec. 5.) Additionally, the § 11A examiner opined that the employee suffered from a work related herniated disc and was a surgical candidate. Id. The judge specifically adopted the medical opinion of the impartial examiner " . . . and the credible testimony of the Employee's daily pain and limited physical activities that continues [sic] to disable him from any meaningful employment." (Dec. 6.)

In its appeal of the denial of its complaint, the insurer raises three issues. First, it contends that the administrative judge erred where he ignored the testimony of its vocational consultant in finding that the employee continued to be totally incapacitated. (Insurer's brief, 4.) This testimony was introduced by way of a written report which was listed as an exhibit in the decision. (Dec. 2.) So long as the judge recognized this exhibit in his decision, there is no requirement that he discuss every bit of evidence, including this exhibit. Contrast Keefe's Case, 15 Mass. Workers' Comp. Rep. 129, 133 (2001). Accordingly, we summarily affirm the judge's decision as to this issue.

Next, the insurer contends that the administrative judge acted arbitrarily by identifying and considering facts not properly in evidence. (Insurer's brief, 6.) The employee concedes that the judge " . . . mentions a 'fact' not directly testified to . . . ," (Employee brief, 13), but argues that it cannot be said that the judge relied on this "fact" in coming to his ultimate conclusion. Id. The finding under scrutiny appears in two

places in the decision. The judge makes a subsidiary finding that,

> Due to the Utilization Review Guidelines being unable to be met by qualified physicians and the unwillingness of the insurer to negotiate above Board rates, the Employee has been unable to obtain a surgical consultation recommended by his examining neurosurgeon, Dr. Wepsic.

(Dec. 4.) Later in his general findings the judge notes that he considered "[The employee's] unsuitability for vocational rehabilitation due to his inability to obtain a surgical consultation and possible surgery. . . ." (Dec. 6.)

The insurer argues that there is no evidence to support a finding that the insurer was unwilling to negotiate to pay for a surgical consultation at a rate in excess of the so called "board rates." While it cannot be said that the judge relied on his findings about a surgical consultation, the flip side is also true. It is impossible to know from the decision whether the judge gave this "finding" any weight in reaching his ultimate conclusion.

The contested finding violates a Department of Industrial Accidents regulation which provides that: "The decision of the administrative judge shall be based solely on the evidence introduced at the hearing." 452 Code Mass. Regs. § 1.11(5). Constitutional due process requirements apply to hearings and decisions at the department. Haley's Case, 356 Mass. 678 (1970); Roszak's Case, 10 Mass. Workers' Comp. Rep. 793 (1996). The consideration of matters outside the evidentiary record violated the insurer's right to administrative due process.

While it may be in the insurer's ultimate best financial interest to make a payment in excess of the established rates, it would be error to draw a negative inference from the insurer's election not to do so. Section 13 of the Act is clear. It provides in pertinent part that,

> . . . no insurer shall be liable for hospitalization expenses judged compensable under this chapter at a rate in excess of the rate set by said division, or for other health services in excess of the rate established for that service by the said division, regardless of the setting in which the service is administered . . . ."

The insurer may negotiate, but clearly is not required to do so. Because we cannot determine what weight, if any, the judge gave to information which was not in evidence before him, we must recommit the case. The judge should review all of the evidence which is properly before him and then make new findings on the issues in dispute.

So ordered.

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William A. McCarthy
Administrative Law Judge

Filed: **March 11, 2002**

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Martine Carroll
Administrative Law Judge

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Frederick E. Levine
Administrative Law Judge