COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 040538-99**

Edward J. Winarski, Jr.	Employee
Crane & Company, Inc.	Employer
Liberty Mutual Insurance Co.	Insurer

REVIEWING BOARD DECISION
(Judges Costigan, Carroll and Horan)

APPEARANCES

John F. Trefethen, Jr., Esq., for the employee
Patricia M. Vachereau, Esq., for the insurer

COSTIGAN, J. The employee appeals from an administrative judge's decision denying his claim for § 34 total incapacity benefits, and awarding continuing § 35 partial incapacity benefits for an accepted industrial injury of October 11, 1999. The employee argues that the judge erred in denying his motion for additional medical evidence for an alleged "gap" period prior to his most recent § 11A impartial medical examination. The employee also argues the judge miscontrued the expert medical opinion he adopted to find little change in his physical condition since a 2002 decision adjudicated him only partially incapacitated. Lastly, he contends that notwithstanding the testimony of two vocational experts, the judge failed to undertake the requisite analysis of his vocational factors, and to make subsidiary findings in that regard. We disagree on all counts, and affirm the decision.

The employee, fifty-seven years old at the time of the hearing, injured his low back and left upper extremity on October 11, 1999 while working as a packer for the employer. As a result of prior litigation,[1] the employee had been receiving

[1] Initially the insurer paid § 34 total incapacity benefits and then § 35 partial incapacity benefits, both during the without prejudice period. See G. L. c. 152, §§ 7 and 8. The employee filed a claim which resulted in § 10A conference award of § 35 benefits at the

§ 35 benefits at the rate of $90.32 per week, since April 23, 2001. At the hearing, the employee filed a motion for additional medical evidence for an alleged "gap" period from December 9, 2002, the initial date of his § 34 claim, to May 24, 2004, the date of Dr. Kuhrt Wieneke's third impartial medical examination. The judge denied the motion: "Let's turn to the impartial. I read through it, I don't have any particular problems with it concerning the gap period. I don't see a gap period." (Tr. 64.)

At the October 25, 2004 hearing, the employee and his vocational expert testified. The insurer called its vocational expert and an investigator. The § 11A physician was deposed on November 22, 2004, and the record closed thereafter. As to the sole medical opinion in evidence, the judge found:

> Dr. Kuhrt Wieneke, who evaluated Mr. Winarski both for the 2002 hearing and for the present hearing, testifies that Mr. Winarski's medical condition has not changed much in the years between examinations. . . . If anything there has been some slight improvement in Mr. Winarski's physical findings.

(Dec. II, 3.) The judge concluded:

> After review of the testimony and the medical evidence, I see no reason to change the earning capacity assigned to Mr. Winarski in 2002. Although

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rate of $269.12, based on an average weekly wage of $688.54 and a $240.00 assigned earning capacity. The employee appealed the order, and submitted to a § 11A impartial examination by Dr. Kuhrt Wieneke on August 8, 2000. The employee later withdrew his appeal. In December 2000 the insurer filed a complaint for further modification or discontinuance of weekly compensation. By conference order, the employee's weekly benefits were discontinued effective April 23, 2001, and the employee appealed. Pursuant to § 11A, he was examined a second time by Dr. Wieneke on June 19, 2001. By hearing decision filed by the same administrative judge on May 10, 2002, the employee was awarded § 35 benefits at the rate of $90.32 per week, based on a $538.00 assigned earning capacity. The employee appealed and on March 19, 2003, the reviewing board summarily affirmed the judge's decision. (Employee br. 1-2; Ins. br. 1-2.) In July 2003, the employee filed a claim for § 34 benefits from and after December 9, 2002. His claim was denied at conference, he appealed, and on May 24, 2004, Dr. Wieneke conducted a third impartial examination of the employee. (Stat. Ex. 1.) In the decision before us on appeal, the administrative judge took judicial notice of his prior hearing decision. Thus, references herein to the judge's 2002 decision are designated, "Dec. I," and to his 2004 decision, "Dec. II."

> [the employee] complains of increased symptoms, Dr. Wieneke suggests there is little change in Mr. Winarski's condition since 2002, and what little change there is actually shows improvement. Mr. Winarksi did not look for work since the last hearing. In 2002 I found that Mr. Winarski probably underestimated the work capacity that he did indeed have.[2] Based on the doctor's testimony and the testimony of the private investigator, I find the same today.

(Id.) The judge denied the employee's claim for total incapacity benefits. (Dec. II, 4.)

We disagree with the employee's contention that the judge erred in denying his motion for additional medical evidence. "[W]e have not adopted a per se rule regarding the adequacy or inadequacy of the § 11A medical report regarding the pre-examination period." Quarles v. USF Red Star, Inc., 20 Mass. Workers' Comp. Rep. 1, 3 (2006), quoting Cugini v. Town of Braintree School Dep't, 17 Mass. Workers' Comp. Rep. 363, 366 (2003). Here, the seventy-six week gap between the initial date of the employee's claimed total incapacity and the May 24, 2004 impartial medical examination is significant, but it is countervailed by the unusual circumstance that Dr. Wieneke had examined the employee twice before. "Not infrequently an inference is permissible that a state of affairs . . . proved to exist, has existed for some time before." Conroy v. Fall River Herald News Co., 306 Mass. 488, 493 (1940). Moreover, the doctor confirmed he had reviewed his two prior reports, as well as the most recent reports submitted to him by both parties,[3] in conjunction with his third evaluation.

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[2] "In a decision from 2002 Mr. Winarksi was found to still have a substantial earning capacity, based on his past experience as a quality control inspector, and on physical restrictions that I found to be far less than those he would have given himself." (Dec. II, 2.)

[3] Dr. Wieneke's report reflects he reviewed the December 22, 2003 report of Dr. Van Uitert, one of the employee's treating physicians. He also reviewed the January 6, 2004 report of Dr. Giles Floyd, the insurer's medical expert, and a report of Dr. John Bouillon, another of the employee's doctors. Having examined that latter document in the Board file, see Rizzo v. M.B.T.A., 16 Mass. Workers' Comp. Rep. 160, 161 n.3 (2002), we note Dr. Bouillon's report is dated December 9, 2002, and certifies the employee is

In challenging the judge's finding that his condition had not only not worsened, but it had slightly improved, the employee points to Dr. Wieneke's respective opinions as to his physical restrictions in 2001 and 2004. Based on his June 19, 2001 examination, Dr. Wieneke opined, and the judge found, that the employee was capable of medium duty work, with a restriction against lifting more than thirty pounds, and the need to change positions occasionally. (Dec. I, 3.) The employee argues that based on his May 24, 2004 examination, Dr. Wieneke opined the employee was capable of only sedentary to light work, and he identified far greater physical restrictions in a potential work setting than he had in 2001: no lifting in excess of five to ten pounds on a regular basis, (Dep. 16); avoidance of work in cramped unusual positions, repeated stair climbing and working at heights or on ladders, (Dep. 15); the ability to make some, but not necessarily frequent, position changes, (Dep. 16-17); and possibly limited bending, twisting and turning, (Dep. 17.) The employee also cites other restrictions which remained the same: avoidance of repetitive bending, stooping and crawling, (Dep. 18), and no performance of production work or work on a repetitive basis, (Dep. 19). (Employee br. 6.)

The insurer correctly points out that the employee's comparative analysis is flawed by the fact that he referenced Dr. Wieneke's opinions only as set forth in his 2001 report, and ignored the doctor's final opinions as testified to at deposition. Indeed, the same flaw affects the employee's analysis of the doctor's opinions in 2004. As it is the final conclusion of the physician at the moment of testifying which must be taken as his expert opinion, Kautz v. Sloane & Walsh, 19 Mass. Workers' Comp. Rep. 54, 64 (2005), citing Perangelo's Case, 277 Mass. 59, 64 (1931), we look to the judge's findings relative to Dr. Wieneke's deposition testimony in 2001 and in 2004.

In his 2002 decision, the administrative judge wrote:

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permanently and totally disabled from any substantial gainful employment by virtue of his lumbar spine injury.

> Dr. Kuhrt Wieneke, the impartial physician, diagnoses Mr. Winarski as suffering from a chronic degenerative L-5, S-1 disk disease with left S-1 radiculopathy. . . . He initially suggests that Mr. Winarski is limited to sedentary type work. (Stat. Ex. #1, p. 2.) *But after viewing Mr. Winarksi's activities on the [investigative] videotape, Dr. Wieneke revises his restriction guidelines to reflect a medium duty capacity, with lifting in the thirty pound range*. . . . He would still need occasional position changes as well. . . . Within these restrictions he could work an eight hour, five-day work week. . . .

(Dec. I, 3.) Likewise, to the extent that Dr. Wieneke's report of May 24, 2004 identified only a sedentary to light work capacity, with more signficant lifting restrictions than imposed in 2001, the doctor changed his opinion when testifying:

> Q. . . . And we've kind of reviewed your report and your physical findings and is it fair to say, Doctor, that your physical findings are for the most part similar and where there is [sic] changes there's actually been an improvement in your findings in your 2004 report?
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> A. Yes, that's true.
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> Q. Doctor, based on your examination of Mr. Winarksi and your review of the medicals both this time and in -- on June 19, 2001, do you as you sit here find that there was any significant change in Mr. Winarksi's condition?
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> A. Between the two evaluations?
>
> Q. Mm-hmm.
>
> A. Probably not.

(Dep. 23.) Furthermore, against the backdrop of the expert medical evidence, the judge's decision reflects that he did not fully credit the employee's testimony as to his physical restrictions. (Dec. II, 2-3.) Credibility determinations are the sole province of the hearing judge and, generally, will not be disturbed. Taylor v. USF Logistics, Inc., 17 Mass. Workers' Comp. Rep. 182, 185 (2003). See also, Lettich's Case, 403 Mass. 389, 394 (1988). We are satisfied that, coupled with the judge's assessment of the employee's credibility, the impartial medical evidence

amply supports the judge's finding that the employee continues to have a substantial earning capacity for modified work, "based on his past experience as a quality control inspector, and on physical restrictions that I found to be far less than those he would have given himself." (Dec. II, 2; Dec. I, 4.)

Finally, we see no merit in the employee's argument that the judge improperly interfered with his vocational expert's testimony, and failed to make findings on the employee's vocational profile, relative to his ability to perform gainful employment. The judge stated that he was precluding the employee's vocational expert from testifying as to medical matters.[4] (Tr. 36-40.) Even if the judge improperly curtailed the employee's questioning of his vocational expert, as the employee contends, the error was inconsequential. Ultimately, his vocational expert testified, without objection by the insurer or further interruption by the judge, that based on the restrictions identified by the impartial physician and the employee's self-described physical limitations and pain, from a vocational point of view, the employee was not employable, even in a sedentary work capacity. (Tr. 40.) Thus, the opinion was in evidence, but the judge was not bound to accept it, nor did he have to specify his reasons for rejecting the vocational expert's testimony. Schmidt v. Nauset Marine, Inc., 17 Mass. Workers' Comp. Rep. 326, 329 (2003), citing Andrews v. Southern Berkshire Janitorial Serv., 16 Mass. Workers' Comp. Rep. 439, 443 (2002). The judge correctly construed Dr. Wieneke's opinion as to the employee's physical ability to work, and he found the employee had prior experience for the medium type of work he is physically able to perform. No further vocational analysis is necessary.[5]

Accordingly, we affirm the administrative judge's decision.

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[4] The judge interrupted the employee's vocational expert as he was answering a question by employee's counsel about his testing of the employee's fine manual dexterity skills. The judge stated that it was up to the impartial medical examiner to identify the employee's physical restrictions and opine as to a sedentary work capacity. (Tr. 37-40.)

[5] Even his own vocational expert conceded the employee has numerous and excellent transferable skills. (Tr. 34-35, 43.)

So ordered.

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Patricia A. Costigan
Administrative Law Judge

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Martine Carroll
Administrative Law Judge

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Mark D. Horan
Administrative Law Judge

Filed: **August 7, 2006**