COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 047888-93**

Ella Shand	Employee
Lenox Hotel	Employer
Eastern Casualty Insurance Co.	Insurer

REVIEWING BOARD DECISION
(Judges Levine, Carroll & Maze-Rothstein)

APPEARANCES
William E. Howell, Esq., for the employee
Frank McNamara, Esq., for the insurer at hearing and first appeal
James R. O'Leary, Esq., for the insurer on appeal after recommital

LEVINE, J. This case is before us for a second time. In Shand v. Lenox Hotel, 12 Mass. Workers' Comp. Rep. 365 (1998), we reversed the decision of the administrative judge and recommitted the case directing him to rule on the employee's motion to find the medical issues complex. Id. at 369. In his decision following recommittal, the judge found the medical issues not complex, (Dec. II. 929),[1] and awarded ongoing § 34A permanent and total incapacity benefits. (Dec. II. 934-935.) The insurer appeals the administrative judge's latest decision. For the reasons that follow, we reverse the decision.

We set out only those facts necessary to this appeal. On October 29, 1993 the employee injured both knees when she fell at work. She subsequently underwent surgery on her left knee. She never returned to work. The insurer commenced weekly § 34 total temporary incapacity payments but subsequently filed a complaint to modify or discontinue those payments. At the conference on the insurer's complaint, the employee's claim for § 34A benefits was joined. Both the insurer's complaint and the

[1] The decision which was the subject of the first appeal is referred to as Dec. I. The decision issued after recommittal and is the subject of the present appeal is referred to as Dec. II.

employee's claim were denied at that conference. The employee appealed to a de novo hearing. (Dec. I. 448-449.)

Pursuant to § 11A the employee was examined by Dr. Philip Salib. In his April 26, 1996 report, Dr. Salib diagnosed longstanding, pre-existing degenerative left knee changes, status post arthroscopic surgery for a medial menisectomy, debridement and excision of a loose body. Dr. Salib opined that the employee had been temporarily totally disabled from the day of her injury until after her surgery and partially disabled thereafter. He further opined that the meniscus tear was causally related to the work injury but that her current medical disability was causally related to her pre-existing degenerative changes rather than her work injury. The employee filed a motion to introduce additional medical evidence due to the complexity of the medical issues. See G.L. c. 152, § 11A(2). She later added the ground that Dr. Salib's report and deposition were inadequate. Id. In his first decision, the judge rejected the latter argument and never ruled on the complexity motion. Shand, supra at 366. Thus, Dr. Salib's report and deposition were the sole medical evidence in the case. The administrative judge then went on in that first decision and rejected that portion of Dr. Salib's opinion causally relating the employee's current medical disability solely to her pre-existing degenerative disease; instead, the judge, without any supporting expert medical evidence, found causal relationship between the industrial injury and the employee's disability and awarded permanent and total incapacity benefits. Id. at 366-367. The insurer appealed that decision and, because of the lack of expert medical opinion supporting the judge's action, the reviewing board reversed the decision and recommitted the case for the judge to rule on the employee's complexity motion. Id. at 367-368.

As stated above, in his decision after recommital, the administrative judge

specifically found the medical issues not complex. (Dec. II. 929.)[2] However, he did find the impartial examiner's opinion inadequate on the issue of causal relationship of the employee's current disability because he found Dr. Salib's opinion not credible. (Dec. II. 931, 933.) As a result, the judge allowed the parties to submit additional medical evidence on the issue of causal relation. (Dec. II. 931). He then adopted the opinion of the employee's treating physician, (Dec. II. 934), and awarded § 34A benefits. The insurer appeals this latest decision arguing that the judge's reason for rejecting Dr. Salib's causal relation opinion was arbitrary and contrary to law. We agree.

General Laws c. 152, § 11A(2), sets out the required contents of the impartial examiner's report, including a determination of "(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." Section 11A(2) allows an administrative judge to "authorize the submission of additional medical testimony 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." While this language authorizes the administrative judge to reject the opinion of the impartial examiner, such authority is not without bounds.

In Daly v. City of Boston School Dep't., 10 Mass. Workers' Comp. Rep. 256 (1996), we said that while the probative value of the expert testimony is for the judge to assess, uncontroverted medical evidence which is beyond the judge's common

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[2] The judge stated, in part, as follows:

> I understand degenerative disease of the knee and the injury of a torn meniscus. The condition does not involve a medically controversial condition, (such as multiple chemical sensitivity), nor is it a constellation of symptoms requiring more than one medical specialty. In this case there is no medical complexity.

(Dec. II. 929.) Compare Dunham v. Western Massachusetts Hosp., 10 Mass. Workers' Comp. Rep. 818, 821-822 (1996)(complexity involves a subjective component).

knowledge and experience cannot be rejected unless sound reasons for such rejection are stated in the decision. Id. at 257. In the present case, the administrative judge gave the following explanation for rejecting Dr. Salib's causal relation opinion:

> when I expressly rejected the impartial doctor's causation opinion in my original decision at pages 453-455, I found that opinion to be not credible. A not credible opinion is an inadequate opinion. Therefore, while expressly stating that the impartial doctor's report was adequate, I implicitly found the report to be inadequate by rejecting his causation opinion.

(Dec. II. 931.)

Although expressed differently, this reason for rejecting Dr. Salib's uncontroverted opinion is fundamentally the same unsound reason the judge gave for rejecting Dr. Salib's opinion in the first decision. In Dec. I, the judge, without expert medical opinion in support, disagreed with the doctor's causal relation opinion. In the present decision, the judge found Dr. Salib's opinion not credible on the basis that he disagreed with the doctor's causation opinion. (Dec. II. 931.)[3] Once again, simply to disagree with the only medical opinion, which is otherwise without fault, is error. Shand, supra at 386.[4] The judge cannot reject the uncontradicted prima facie opinion of Dr. Salib on the basis that the judge disagrees with that opinion. "[W]ithout a rational basis for doing so," Paolini v. Interstate Uniform, 11 Mass. Workers' Comp. Rep. 322, 324 (1997), "the judge was not free to disregard the impartial's expert opinion. . . ." Id.

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[3] We note that the judge found Dr. Salib's opinion not to be "credible." (Dec. II. 931.) "We assume that the . . . judge intended to conclude that the expert opinion was 'without probative value,' since the testimony was by [report and] deposition and, generally, the ability to determine credibility has as its foundation the judge's observation of a witness during live testimony." Cook v. Somerset Nursing Home, 8 Mass. Workers' Comp. Rep. 164, 165 n.1 (1994)(judge gave no grounds for rejecting the uncontroverted medical opinion).

[4] As we pointed out in our first decision, Dr. Salib maintained his opinion even with the knowledge of the facts that the judge thought warranted a contrary opinion. Shand, supra at 368. Contrast Lorden's Case, 48 Mass. App. Ct. 274, 277-280 (1999)(where the administrative judge rejected the impartial doctor's report because the doctor's opinion was based on facts not in evidence or which the judge found not to be facts, the judge erred by not allowing additional medical evidence).

Simas v. Modern Continental Obayashi, 12 Mass. Workers' Comp. Rep. 104, 109 (1999)(must be a rational basis to reject impartial's opinion on causation). Compare, e.g., Monet v. Massachusetts Respiratory Hosp., 11 Mass. Workers' Comp. Rep. 555, 559 (1997)(a judge "could rationally determine that the impartial medical examiner's report was inadequate by the examiners' [sic] misunderstanding of the employee's history, or by a too cursory physical examination").

Since the judge erroneously found Dr. Salib's impartial report inadequate, additional medical evidence should not have been admitted. The only medical evidence properly in the record were the report and deposition of Dr. Salib, who opined that the employee's current medical disability was not causally related to her work injury. As a result, "[t]he judge was compelled to adopt this unrebutted prima facie medical opinion." Stofflet v. Wrentham Developmental Ctr., 11 Mass. Workers' Comp. Rep. 593, 595 (1997)(unrebutted impartial opinion that there was no disability).

Because the judge's reason for disregarding the impartial examiner's opinion was arbitrary and capricious, the decision is reversed and the employee's claim denied. G. L. c. 152, § 11C.

So ordered.

Frederick E. Levine
Administrative Law Judge

Martine Carroll
Administrative Law Judge

Susan Maze-Rothstein
Administrative Law Judge

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