COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 032050-93**

Estella Tejada	Employee
Copley Square Hotel	Employer
Eastern Casualty Insurance Co.	Insurer

REVIEWING BOARD DECISION
(Judges Wilson, McCarthy and Smith)

APPEARANCES
Arthur G. Zack, Esq., for the employee
John E. Coyne, Esq., for the insurer

WILSON, J. The employee appeals from a decision in which the administrative judge allowed the insurer's complaint to discontinue payments of partial incapacity benefits under G. L. c. 152, § 35. The employee argues that her due process right to present necessary medical evidence in support of her claim was abridged by the judge's adoption of the § 11A physician's opinion, when that doctor failed to make himself available for cross-examination at deposition. We agree with the employee that the judge erred in adopting the opinion of the § 11A physician under these circumstances. We vacate the decision and recommit the case to the judge for further findings based on competent medical evidence.

The insurer paid § 34 benefits without prejudice on the employee's claim of an industrial accident, which occurred on July 31, 1993. The employee claimed entitlement to further compensation benefits, and liability was established in an October 19, 1995 hearing decision. The decision ordered the insurer to pay § 35 benefits based on an earning capacity of $200.00. (Dec. 5-6.) The insurer requested a discontinuance, which complaint ultimately came on for a hearing on August 5, 1997. (Dec. 2.)

The employee underwent a § 11A impartial examination on December 19, 1996. (Dec. 6-7.) In his report, the impartial examiner set out his diagnosis as resolved low

back pain. The doctor found no objective evidence of pathology causally related to the employee's work injury, and could not correlate her symptoms with his findings on examination. He opined that the employee was not medically disabled and had no limitations on her activities. (Dec. 7.)

Because the impartial physician cancelled the deposition scheduled by the employee several times over the course of seven months, the judge determined that the doctor was unavailable for cross-examination. She ruled the impartial report inadequate, and allowed the parties to submit their own medical evidence. The employee introduced medical reports of Dr. Jacques, the employee's treating physician. (Dec. 6.) Dr. Jacques opined that the employee suffered from chronic pain syndrome causally related to her work injury, which totally disabled her from any gainful employment. (Dec. 7.) The insurer did not offer any medical evidence. Following 452 Code Mass. Regs. § 1.12 (5)(c), the judge allowed the impartial report to remain in evidence, retaining its prima facie effect in the proceeding. See id. (Where doctor ruled unavailable, report "shall be admitted into evidence at the hearing and shall retain its prima facie character notwithstanding the finding of inadequacy"). (Dec. 3.)

The judge did not credit the employee's testimony that she remained in constant pain at the time of the hearing, four years after her industrial accident, (Dec. 6), and therefore adopted the opinions of the impartial physician over those of Dr. Jacques. (Dec. 7.) As a result, the judge concluded that the employee was no longer incapacitated as of the time of the impartial examination on December 19, 1996, discontinuing § 35 benefits as of that date. (Dec. 7-8.)

This case is governed by Martin v. Colonial Care Center, 11 Mass. Workers' Comp. Rep. 603 (1997). In Martin, the employee's incapacity benefits were terminated in a hearing decision, in which the judge adopted the opinion of a §11A physician, who had moved out of the Commonwealth and was unavailable to be deposed. We analyzed the issue in the following manner:

> One of the safeguards to due process is the right to depose the § 11A examiner for purposes of cross-examination. O'Brien's Case, [424 Mass.] at 23; G.L. c. 152,

> § 11A(2). Fairness requires that the report of the § 11A examiner "is open to . . . thoroughgoing challenge" by means of "the deposition and cross-examination procedure [which] gives a party the . . . 'opportunity to attack, discredit or refute the report.' " O'Brien's Case, supra at 24. "In any case where that opportunity [to depose and cross-examine the § 11A examiner] is insufficient, the statutory scheme may work a deprivation of due process as applied." Id. at 24.
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> Where there is an inability to cross-examine a medical witness, absent statutory exception, such physicians' reports are not admissible in evidence. See Grant v. Lewis/Boyle, Inc., 408 Mass. 269, 274 (1990). . . . Accordingly, we exclude the § 11A report from the evidence.

Martin, supra at 606-607 (footnote omitted).

The present case is indistinguishable from Martin. In that case, employee's claim could not be denied on the basis of the § 11A medical report, which went unchallenged due to the doctor's unavailability to be deposed. Here, too, the judge should have ruled that the § 11A report was inadmissible.[1] Following Martin, we strike the § 11A report from the record evidence, although it should be marked for identification only. As for the judge's finding on the additional medical evidence submitted by the employee, she rejected that evidence solely on the basis that she was "persuaded by . . . the more convincing opinion of Dr. Berenson [the impartial physician] over those of Dr. Jacques [the treating doctor]." (Dec. 7.). As the report of the impartial physician was

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[1] As we did in Martin, supra, we once again decline to apply the regulation, 452 Code Mass. Regs. § 1.12 (5)(c), in our disposition of this appeal, and report same to the Commissioner. See Appendix A. That regulation states in pertinent part that upon a finding of the impartial physician's unavailability, the judge shall declare the report inadequate, but that the report shall nonetheless "be admitted into evidence at the hearing and shall retain its prima facie character notwithstanding the finding of inadequacy."

> The regulation directly contradicts the statutory right to cross-examination set forth in § 11A(2). Because application of the statutory right to depose the § 11A examiner is contravened by enforcement of the regulation, we are prohibited from applying it in this case. See G.L. c. 152, § 5. Therefore, we report the contradiction between the regulation and the statute to the Commissioner. See Appendix A; G.L. c. 152, § 5; see also Corriveau's Case, 43 Mass. App. Ct. 924 (1997), 10 Mass. Workers' Comp. Rep. 92 (1996).

Martin, supra at 607 (footnote omitted).

inadmissible, this reason for rejecting Dr. Jacques' opinion was arbitrary and capricious and contrary to law.

We vacate the decision and recommit the case for further findings of fact on the medical component of this case. In her discretion, the judge may allow the parties to supplement and update their medical evidence.

So ordered.

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Sara Holmes Wilson
Administrative Law Judge

Filed: August 9, 2000

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William A. McCarthy
Administrative Law Judge

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Suzanne E.K. Smith
Administrative Law Judge

August 9, 2000

James J. Campbell, Commissioner
Department of Industrial Accidents
600 Washington Street
Boston, MA 02111

Re: Application of 452 Code Mass. Regs. § 1.12 (5) (c)

Dear Commissioner Campbell:

In accordance with G.L .c. 152, § 5, we report a contradiction between 452 Code Mass. Regs.
§ 1.12 (5) (c) and the Workers' Compensation Act in the circumstances of Tejada v. Copley Square Hotel, 14 Mass. Workers' Comp. Rep. __ (August 9, 2000), a copy of which we attached hereto. The regulation directly contradicts the statutory right to cross-examination conferred by G. L. c. 152, § 11A, making application of the regulation impossible.

Very truly yours,

_____
Sara Holmes Wilson
Administrative Law Judge

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William A. McCarthy
Administrative Law Judge

_____
Suzanne K. Smith
Administrative Law Judge

Appendix A.