COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS	**BOARD NO. 052534-95**
Gary A. Chamberlain	Employee
DeMoulas Markets	Employer
DeMoulas Markets	Self-Insurer

REVIEWING BOARD DECISION
(Judges Smith, McCarthy and Wilson)

APPEARANCES
Roberta B. Newcomb, Esq., for the Employee
Scott E. Richardson, Esq., and Kevin P. Jones, Esq., for the Self-insurer at hearing
Paul M. Moretti, Esq., for the Self-insurer on brief

SMITH, J. The employee appeals from a decision on the self-insurer's discontinuance complaint. The judge concluded that the employee did not prevail in the case because the self-insurer was permitted to reduce benefits, and therefore denied the employee's request for counsel fees. Following the rationale in Connolly's Case, 41 Mass. App. Ct. 35, 37 (1996), we conclude that G.L. c. 152, § 13A(5), compels an award of counsel fees in this case. We therefore reverse that portion of the decision denying fees. The remainder of the decision was not arbitrary or capricious, or contrary to law; consequently we affirm it. G.L. c. 152, § 11C.

Gary Chamberlain received a personal injury to his back on December 21, 1995 arising out of and in the course of his employment by DeMoulas Markets. The self-insurer accepted the claim and began payments of § 34 temporary total compensation benefits. On February 27, 1996, Chamberlain underwent a lumbar laminectomy and excision of a herniated disc at L5-S1. A year later, alleging that Chamberlain had regained the capacity to perform full time work, the self-insurer filed the present complaint to discontinue benefits. (Dec. 6.)

At the § 10A conference, Chamberlain maintained that he remained totally incapacitated and entitled to continuing § 34 benefits. The self-insurer submitted a last best offer to modify compensation to § 35 partial benefits of $ 278.46, based upon an earning capacity of $ 200 per week. The judge declined to authorize the self-insurer to modify or discontinue payment of weekly compensation, leaving it responsible for ongoing § 34 benefits. The self-insurer appealed to a § 11 de novo hearing. (Dec. 2.)

At the hearing, the employee claimed that he was entitled to continuing § 34 benefits for total incapacity. (Employee Ex. 1; November 18, 1997 Tr. 4.) The self-insurer submitted an issues statement challenging "disability and the extent thereof." (Ins. Ex. 1.) The self-insurer did not limit its challenge to the extent of incapacity. (November 18, 1997 Tr. 4-5.) The judge admitted into evidence the impartial medical examiner's report. (Statutory Ex. 1; November 18, 1997 Tr. 4.) In his decision, the judge adopted the impartial medical examiner's opinion "in total." (Dec. 8.)

On the first day of hearings, the employee offered the report and testimony of a vocational expert. The self-insurer objected to its admission on the grounds of surprise. (November 14, 1997 Tr. 6-9.) The judge scheduled a continued hearing to permit the self-insurer's counsel to prepare for the expert's examination. On that date, the expert was permitted to testify at length. (January 14, 1998 Tr. 5-52.) At the conclusion of his testimony, the employee then offered the testimony of a second vocational expert, whose testimony had not been previously scheduled. (Id. at 52.) On the basis of surprise and that the testimony would be duplicative of that already provided by the first vocational expert, the judge would not permit the second expert witness to testify. (January 14, 1998 Continued Hearing Tr. 3-11.) The employee then presented the witness's report as an offer of proof, in support of his objection to the judge's ruling. Id. at 11-13. At the hearing, the judge clearly indicated that the exhibit was marked for that limited purpose. Id. at 12-13. However, the decision indicates that the second vocational expert's report was admitted into evidence. (Dec. 1, 4). Thus it is unclear whether the judge actually excluded the offered report.

In any case, the judge was not persuaded by the second expert's opinion that Chamberlain was essentially unemployable. (Dec. 11.) Instead, the judge adopted the competing opinion of self-insurer's vocational expert that Chamberlain could perform entry-level work in the category of dispatcher, security guard or assembler. (Dec. 10-11.) The judge did not find Chamberlain's testimony regarding the extent of his ongoing pain and discomfort to be credible. (Dec. 9.)

The judge concluded that Chamberlain had the capacity to earn the minimum wage. (Dec. 12.) Accordingly, the judge authorized the self-insurer to discontinue payment of § 34 benefits as of August 11, 1997 and to commence payment of § 35 partial incapacity benefits, based on a weekly earning capacity of $ 215.00. (Dec. 14.) The self-insurer was also authorized to credit itself for benefits previously paid and to recoup any overpayment in accordance with § 11(D). (Dec 14.) Further, the judge declined to award a legal fee to Chamberlain's attorney as he deemed that Chamberlain had not "prevailed." (Dec. 13.)

We address the employee's issues on appeal in the order that they are raised. First, Chamberlain contends that the administrative judge's rulings on vocational expert testimony were beyond the scope of his authority. (Employee's brief, 9.) In particular, Chamberlain takes issue with the judge's articulated concern for "surprise" regarding the presentation of testimony, on his behalf, by a previously undisclosed vocational expert.[1] Chamberlain states that "M.G.L. ch. 152 contains no statutory requirement that the parties disclose who their witnesses will be at hearing prior to the date of hearing." (Employee's brief, 10.) Chamberlain further asserts that the judge erroneously "assisted the Self-Insurer" by postponing the presentation of the expert's testimony. (Employee's Brief, 10.) We disagree.

The conduct of a § 11 hearing is within an administrative judge's discretion. 452

[1] The administrative judge mentioned both in his decision and at hearing that Chamberlain had failed to follow the "ground rules" in his attempt to introduce evidence via testimony from witnesses without proper notice to the self-insurer. (Dec. 3, 4; November 18, 1997 Tr. 8, 11; January 14, 1998 Continued Hearing Tr. 9, 11, 21).

Code Mass. Regs. § 1.11(7).[2] The judge has the responsibility of ensuring that the workers' compensation proceeding in its entirety proceeds fairly and properly. See Commonwealth v. Bergstrom, 402 Mass. 534, 551 (1988). The judge must balance the fair and efficient administration of justice against the need to get before the fact finder evidence that leads to the truth.

452 Code Mass. Regs. § 1.10(2) requires the parties to submit to the judge at conference a memorandum setting forth the names of witnesses to be presented, with a summary of their anticipated testimony, and provides that such "memorandum may be amended by the parties, with the leave of the administrative judge, at or before the hearing." "The rule implies that the parties have a continuing obligation to disclose witnesses, so as to avoid surprise or calculated ambush at hearing." Mendes v. Percor, Inc., 12 Mass. Workers' Comp. Rep. 487, 490 n.1 (1998). A judge may properly grant a continuance to compensate for the late disclosure of a witness. See Commonwealth v. Porcher, 26 Mass. App. Ct. 517, 519-520 (1988). Here, Chamberlain failed to reveal the identity of his expert until the actual date of the hearing. (Dec. 3.) It was not error, or improper assistance to the self-insurer, for the judge to postpone the presentation of that witness's testimony. Rather, postponement of the testimony furthered fundamental principles of fairness and was an appropriate use of judicial discretion.

Chamberlain also takes issue with the judge's ruling not to allow the testimony of his second vocational expert because it was duplicative. We agree with the employee that this testimony was not merely cumulative. The first vocational expert had relied upon medical opinions that were inadmissible under § 11A(2). His opinion was therefore subject to attack as lacking the proper factual foundation. See Patterson's Case, 48

[2] 452 Code Mass. Regs. § 1.11(7) reads in its entirety as follows:

> The administrative judge shall preside over the hearing and shall control the conduct of parties, attorneys, and witnesses. Each party at a hearing may give a brief opening statement and closing argument, and may submit briefs, motions, requests for findings of facts, and requests for rulings of law, within such time as the administrative judge may prescribe. The administrative judge, at his discretion, may require the filing of briefs in such form and within such time as he may direct.

Mass. App. Ct. 586 (2000) (impartial opinion based on inadequate foundation inadmissible). The second expert based his opinion upon the medical evidence actually admitted in the case, the impartial medical examiner's report. Thus the second expert's opinion was based on a proper medical foundation, was relevant and material, and should have been admitted.

Nevertheless, we will not reverse a case for erroneous exclusion of evidence, unless it injuriously affects the substantial rights of a party. Puopolo v. Airborne Express, 9 Mass. Workers' Comp. Rep. 733, 736 (1995), citing Indrisano's Case, 307 Mass. 520 (1940). The party seeking reversal of an administrative judge's evidentiary ruling bears the burden of demonstrating prejudice. Cohen v. Liberty Mutual Ins. Co., 41 Mass. App. Ct. 748, 752 (1996). Where evidence has been erroneously excluded, the appropriate test is whether the proponent has made a plausible showing that the administrative judge might have reached a different result if the evidence had been before him. Id. The erroneous exclusion of relevant evidence is reversible error unless, on the record, the reviewing board can say with substantial confidence that the error would not have made a material difference. See DeJesus v. Vogel, 404 Mass. 44, 48-49 (1989). In this case, therefore, we must decide whether Chamberlain makes a plausible showing that the administrative judge might have not found an earning capacity had he not excluded the live testimony of the second vocational expert.

We cannot tell from the record whether the judge actually excluded the second vocational expert's report, or admitted and discounted it. Either way, no reversible error exists. Where a judge's findings make it clear that the judge disbelieved the evidence set out in an offer of proof, the refusal to admit opinion evidence at hearing is not prejudicial error. Hutnak v. Dargan, 2 Mass. App. Ct. 825, 826 (1974). Upon reviewing the record in "a commonsense way," DeJesus, supra at 48, we can say with substantial confidence that the exclusion of the second vocational expert's live testimony would not have made a material difference in the hearing's outcome. In his decision, the judge discussed the witness's report, which had been previously marked as an offer of proof. (Dec. 1,4.) The judge considered the expert's written opinion "that Mr. Chamberlain's

ongoing experience of pain in his low back, right leg and numbness in his right foot and their sequelae, at the present time, results in significant occupational limitations that preclude him from . . . performing on a sustained basis, any . . . work in the competitive labor market." (Employee Ex. 4. at 7.) The judge did not adopt this opinion for rational reasons that would not be affected by an assessment of the expert's demeanor. The judge rejected the expert's opinion in part because he "did not find the employee's testimony of his ongoing pain and discomfort to be persuasive or credible." (Dec. 9, 11.) Under these circumstances, we are unpersuaded that the judge might have reached a different result if he had heard the expert's live testimony. Any error in the judge's improper admission of the report and refusal to hear the expert's live testimony was harmless.

Next, Chamberlain complains that the judge erred in ruling that Chamberlain would waive his § 35D(5) protection by calling a witness to testify about his unsuccessful vocational rehabilitation efforts. Section 35D(5) provides in pertinent part: "The fact that an employee has enrolled or is participating in a vocational rehabilitation program paid for by the insurer or the department shall not be used to support the contention that the employee's compensation rate should be decreased in any proceeding under this chapter." G.L. c. 152, § 35D, as amended by St. 1991, c. 398, § 65. The employee correctly asserts that this statutory language does not prohibit an employee from presenting evidence of an unsuccessful, but good faith, attempt at vocational rehabilitation to support his claim of total incapacity. However, the judge did not prevent the employee from presenting such evidence. The judge merely ruled that the witness would be subject to cross-examination within the bounds of reason and decorum. The employee then chose not to present the witness. Without the witness's testimony, we cannot determine whether the judge's ruling in any way prejudiced the employee. On this limited record, we cannot say that the judge misapplied § 35D(5).

Fourth, Chamberlain argues that the judge erred in denying his motion to join a § 34A claim. (Employee's brief, 14.) We disagree. Although Board rules permit a party to file a motion to amend his claim, the judge may deny the motion if it would undu-

ly prejudice the opposing party. 452 Code Mass. Regs. § 1.23(1). Chamberlain raised the § 34A claim on the final day of hearing, October 29, 1998. The self-insurer objected on the grounds of surprise. At that time, all the evidence, including the relevant medical evidence, had been gathered. Adding a new issue at that stage in the proceedings would have required further medical evidence, delaying the discontinuance decision. The judge could rationally conclude that such a maneuver would unduly prejudice the self-insurer. Additionally, the request for joinder was purely verbal. No § 34A claim had been substantiated by any writing filed with the department. (Dec. 4-5.) See 452 Code Mass. Regs. § 1.07(2) (claims must be in writing with appropriate documentation attached). Nor was the oral claim accompanied by a recent medical report describing the extent and duration of incapacity. See 452 Code Mass. Regs. § 1.07(2)(f) (claims for benefits "shall be accompanied by a copy of a physician's report . . . that describes the extent and duration of the employee's . . . incapacity for work and which relates said incapacity to the claimed industrial injury"). The denial of the oral motion to add the § 34A claim was not arbitrary or capricious or contrary to law.

Fifth, Chamberlain argues that the judge improperly assigned an earning capacity. (Employee's brief, 15.) "The extent of earning capacity is a question of fact solely within the province of the administrative judge to decide." Mendes v. Percor, Inc., 12 Mass. Workers' Comp. Rep. 487, 490 (1998), citing Trant's Case, 21 Mass. App. Ct. 983, 984 (1986). Both medical and expert vocational opinions adopted by the judge support the judge's earning capacity determination. The impartial examiner opined that Chamberlain could return to work with restrictions. (Statutory Ex. 1, 2; Dep. 22, 27, 40, 45-46; Dec. 8.) The judge also adopted Ms. Anastos-Stewart's expert vocational testimony that Chamberlain was suitable for entry-level work within the physical restrictions imposed. (Dec. 10-11.) We have no power to overturn the incapacity determination as it is supported by competent record evidence. G.L. c. 152, § 11C.

Finally, Chamberlain argues that the judge committed error by not granting an attorney's fee. (Employee's brief, 16.) We agree. General Laws c. 152, § 13A(5), and 452 Code Mass. Regs § 1.19(4) govern the award of counsel fees. Section 13A(5) pro-

vides that "[w]henever an insurer files a complaint . . . and then . . . (ii) the employee prevails at such hearing, the insurer shall pay an attorney's fee. . . ." 452 Code Mass. Regs. § 1.19(4) defines the statutory term "prevail" to be "when compensation is ordered or is not discontinued at such proceeding. . . ." As noted by the court in Gonzalez's Case, 41 Mass.App.Ct. 39, 41 n. 3 (1996), "Black's Law Dictionary 1188 (6th ed. 1990) defines prevail as '[t]o be or become effective or effectual, to be in force, to obtain' and defines prevailing party as '[t]he party to a suit who successfully prosecutes the action or successfully defends against it, prevailing on the main issue, even though not necessarily to the extent of his original contention. The one in whose favor the decision or verdict is rendered and judgment entered.' "

Here, the self-insurer appealed the conference order denying its request to discontinue or modify benefits. At the § 11 hearing de novo, Chamberlain had the evidentiary burden to establish that he remained incapacitated. Although the self-insurer made a last best offer at conference, which conceded some incapacity, at the de novo hearing, it did not maintain this concession but instead contested "disability and the extent thereof." (Dec. 2.) Thus, all the benefits continued by the conference order were in jeopardy. Given that the judge found that Chamberlain remained partially incapacitated, he prevailed within the meaning of § 13A(5) since, in the terms of our interpretive regulation, "compensation [was] ordered" in the sense that the previously ordered payments were confirmed in part. Conroy v. Norwood Hospital, 11 Mass. Workers' Comp. Rep. 487, 491 (1997); Sherr v. City of Peabody, 13 Mass. Workers' Comp. Rep. 43, 48 (1999). Had the administrative judge completely discontinued compensation, Chamberlain would have been exposed to a recoupment claim by the self-insurer of all the payments made by the self-insurer pursuant to the conference order. G.L. c. 152, § 11D(3). Under the decision rendered, he retained some of the payments that had been made. Because Chamberlain achieved some of the benefits that he had sought at hearing, he fell within the definition of a "prevailing party." Connolly's Case, 41 Mass.App.Ct. 35, 37 (1996); Pizzano v. Hale & Dorr, 14 Mass. Worker's Comp. Rep. ____ (June 2, 2000).

The judge's denial of Chamberlain's claim for an attorney's fee is, therefore, based on an error of law. We reverse it and order the self-insurer to pay the statutory legal fee and expenses pursuant to G.L. c. 152, § 13A (5). The balance of the administrative judge's decision is affirmed.

So ordered.

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Suzanne E. K. Smith
Administrative Law Judge

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Sara Holmes Wilson
Administrative Law Judge

Filed: July 20, 2000

MCCARTHY, J. (Concurring), For the reasons set out in the dissent in Conroy v. Norwood Hospital, 11 Mass. Workers' Comp. Rep. 487, 491 (1997), I do not believe that the rationale in Connolly's Case, 41 Mass. App. Ct. 35, 37 (1996) applies. Like Conroy, (and unlike Connolly), the case at hand is a complaint to terminate or modify weekly incapacity benefits. Here, (unlike Conroy), the judge reduced rather than totally discontinued weekly benefits.

Thus, I agree that a fee is due under the provisions of 452 Code Mass. Regs. 1.19(4) but not for all of the reasons cited by the majority.

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William A. McCarthy
Administrative Judge

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