COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 004837-13**

Garry D. Dolan	Employee
Town of Brookline	Employer
Town of Brookline	Self-Insurer

REVIEWING BOARD DECISION
(Judges Calliotte, Fabricant and Koziol)

This case was heard by Administrative Judge Segal.

APPEARANCES
Paul S. Danahy, Esq., for the employee
Robert J. Riccio, Esq., for the self-insurer at hearing
Holly B. Anderson, Esq., for the self-insurer on appeal

CALLIOTTE, J. The self-insurer appeals from a decision awarding the employee § 34A permanent and total incapacity benefits. Finding merit in two of the self-insurer's arguments, we recommit the case for further findings.

The employee, an automotive technician with a high school diploma, injured his right major arm at work on February 21, 2013, while attempting to throw a 150-pound blade into a recycle pile.[1] (Dec. 4.) The employee was out of work for about four months, and then attempted to return to regular duty. However, his right arm "would not

[1] The judge found the employee injured his arm "while acting within the course and scope of his duties for the Employer." (Dec. 5.) This standard is inapplicable to workers' compensation cases, in which the issue is whether the employee's injury arose "out of and in the course of his employment." G.L. c. 152, § 26. Whether the employee is acting within the "scope" of his employment is "a tort principle of narrower range applied to determine whether a master is liable for the negligence of his servant," and is irrelevant in a workers' compensation case where negligence plays no role. Walsh v. Hollstein Roofing, Inc., 17 Mass. Workers' Comp. Rep. 333, 337 (2003). Although the error was harmless here because the judge found the employee's injury compensable, the use of this more restrictive standard could result in an erroneous finding of no personal injury in other circumstances.

handle the work," (Dec. 7; Tr. 13), and there were no light duty positions as a mechanic for the Town. The employee last worked for the employer in September 2013. (Dec. 8.)

A September 9, 2013, MRI revealed a "high grade partial tear of the common flexor tendon, a moderate partial tear of the common extensor tendon and a mild enlargement of the ulnar nerve." (Dec. 5; Exhs. 6.1 and 6.9.) The employee underwent two surgeries to his right upper extremity, followed by physical therapy, with little improvement in his pain. (Dec. 5-6.)

The self-insurer accepted liability for the employee's injury and paid § 34 temporary total incapacity benefits to exhaustion through December 4, 2016, and maximum § 35 partial incapacity benefits thereafter. (Dec. 3.)[2] On February 6, 2017, the self-insurer filed a complaint to modify benefits. The employee's motion to join claims for § 36 benefits and for § 34A permanent and total incapacity benefits, beginning on December 5, 2016, was allowed. A different administrative judge denied both the complaint and the § 34A claim at conference, but ordered the self-insurer to pay § 36 benefits in the amount of $6,052.99. Both parties appealed, and the case was assigned to the current administrative judge. (Dec. 2.)

At hearing, the self-insurer raised disability and extent of incapacity, and causal relationship, seeking modification of benefits as well as recoupment retroactive to the February 6, 2017, filing of its complaint.[3] (Dec. 2.) Dr. James McGlowan again examined the employee pursuant to § 11A on June 27, 2017, and submitted addenda on

[2] On November 10, 2015, prior to the filing of the instant claim, the self-insurer filed a complaint to modify the employee's § 34 benefits, which was denied by conference order filed on February 3, 2016. The self-insurer appealed, generating a March 29, 2016, § 11A examination by Dr. James T. McGlowan, in which he opined the employee could return to work with a 5-10 pound lifting requirement and no use of his right upper extremity. On October 20, 2016, the self-insurer withdrew its appeal of the conference order. Rizzo v. M.B.T.A., 16 Mass. Workers' Comp. Rep. 160, 161 n. 3 (2002)(reviewing board may take judicial notice of documents in the board file).

[3] Prior to hearing, the parties stipulated that the value of the claimed § 36 benefits was $6,052.99, as ordered at conference. (Dec. 2 n.1, 3.)

November 15, 2017, and February 9, 2018.[4] (Exhs. 1.1, 1.2 and 1.3.) The judge found, "[T]he report and addendum reports of Dr. McGlowan are adequate. No motions were made by either party with respect to the Impartial Medical Report or the accompanying Addendum Reports. The Court, sua sponte, allowed the parties to submit gap medicals. Gap medicals were timely submitted by both parties." (Dec. 3.)

The judge then adopted Dr. George Whitelaw's February 9, 2017, opinion that the industrial accident " 'remains a major contributing cause of [the Employee's] current condition, disability, loss of function and disfigurement.' " (Dec. 6, quoting Exh. 6.1.) She also adopted the opinion of Dr. Richard Fraser, who opined, on January 5, 2016, that,

> "Mr. Dolan is currently disabled from his prior work as a mechanic and from all but the basic and menial type of employment. To be gainfully employed, he would require restrictions of not pulling, pushing, grasping or lifting more than 5 to 10 pounds keeping his right elbow by his side and minimizing any repetitive motions with his right arm. He would not be able to pull, push, grasp or lift more than 5 pounds as well. [These] restrictions are reasonable, medically necessary and appropriate to avoid an aggravation of his current condition."

(Dec. 6, quoting Exh. 6.4.) The judge further adopted Dr. Fraser's opinion that the employee had reached a medical end result, and that any further treatment would be merely palliative. Finally, the judge adopted the § 11A opinion of Dr. McGlowan with respect to the employee's diagnoses,[5] the causal relationship between the injury and the diagnoses, and the reasonableness and necessity of the employee's medical treatment. (Dec. 6-7.) She did not adopt or even mention Dr. McGlowan's opinion on disability.[6]

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[4] Dr. McGlowan's prior impartial examination of March 29, 2016, was also admitted as an exhibit. (Dec. 1, Exh. 6.2)

[5] Dr. McGlowan diagnosed the employee with, 1) cubital tunnel syndrome; 2) medial epicondylitis; 3) status post ulnar nerve neurolysis, flexor pronator lengthening, and submuscular transposition; and 4) status post revision neurolysis, flexor pronator lengthening, and submuscular transposition. (Dec. 7; Exh. 1.1.)

[6] Dr. McGlowan opined,

> The examinee can work with a 5- to 10-pound lifting restriction involving the right upper extremity. He appears to have mild improvement of his range of motion. I would state

The judge credited the employee's testimony that he is in constant pain, and anything he does causes his pain to increase. He does not use his right arm often due to the pain and weakness and cannot drive for thirty minutes because his arm starts shaking while he's holding the steering wheel. He has had no improvement of the symptoms in his right arm following the two surgeries and physical therapy. (Dec. 8.) Based on these findings, and the medical opinions she adopted, the judge found the employee was permanently and totally incapacitated from the date of exhaustion of § 34 benefits, December 5, 2016, and awarded § 34A benefits from that date forward. (Dec. 9, 11.)

On appeal, the self-insurer makes several arguments regarding the judge's use of the so-called "gap medicals" admitted by the judge, specifically the January 5, 2016, report of Dr. Fraser and the February 9, 2017, opinion of Dr. Whitelaw. It argues that the judge erred by relying on that "gap" medical evidence to decide medical issues outside the gap period, without prior notice to the parties. In addition, the self-insurer maintains the judge erred by rejecting the prima facie medical opinions of the impartial examiner concerning extent of disability and need for treatment, without sufficient explanation. We agree with both arguments.

However, before we address these arguments, we are compelled to comment on a more basic error regarding the judge's admission of additional medical evidence for the gap period. "For additional medical evidence to be admissible for a 'gap period,' the judge first must make a finding that the impartial opinion is inadequate or the medical issues complex for that time period, just as [she] would where additional medical

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> that he can perform some light duty mechanical work without heavy-duty mechanical work. I would state that his maximum lifting restriction should be 10 pounds, however.

(Exh. 1.1, § 11A report 6/27/17.) To that opinion, Dr. McGlowan added,

> As stated, the examinee can work with a 5 to 10-pound lift restriction with minimal to no use involving his right upper extremity due to his right hand condition. I will state the examinee has reached maximum medical improvement, and his condition is permanent. No further treatment is warranted or recommended.

(Exh. 1.2, Addendum, Undated, Received 11/15/17.)

evidence is allowed for all periods and purposes." Cote v Federal Express Corporation, 32 Mass. Workers' Comp. Rep. 117 (2018), citing O'Brien's Case, 416 Mass. 16 (1996). For the judge to conclude that gap medicals are necessary, she must perform some analysis of the impartial medical opinion. Cote, supra, citing Mims v. M.B.T.A., 18 Mass. Workers' Comp. Rep. 96, 98-99 n. 1 (2004). Simply because a period of time has elapsed between the date of the employee's claim for benefits (or the self-insurer's complaint for modification or discontinuance) and the impartial examination, does not mean that there is a "gap" requiring the admission of additional medical evidence. Here, as in Cote, not only did the judge fail to make findings regarding the inadequacy of the impartial opinion or the complexity of the medical issues, she also specifically found the impartial opinion was adequate. (Dec. 3.) This inconsistency alone renders the decision arbitrary and capricious and requires recommittal. Cote, supra, and cases cited.

We turn now to the self-insurer's first argument. The self-insurer is correct that "gap medicals," when admitted for the purpose of providing evidence for the retrospective pre-impartial examination period cannot then be used for other medical issues, such as present disability or causal relationship, without prior notice to the parties. Villiard v. Rogers Insulation Specialist, 27 Mass. Workers' Comp. Rep. 1, 5 (2013). Doing so violates the parties' due process rights by depriving them of the " 'opportunity to present testimony necessary to present fairly the medical issues.' " Id., quoting Brezinski v. Aerotek Energy, 24 Mass. Workers' Comp. Rep. 273, 279 (2010), quoting from O'Brien's Case, 424 Mass. 16, 23 (1996). Here, although the judge did not specify the period for which gap medical evidence was admitted, (Dec. 3, Tr. 6, 32), the parties agree that the judge allowed such evidence to address the period prior to Dr. McGlowan's § 11A examination on June 27, 2017, which is the normally understood gap period.[7]

[7] The self-insurer notes that it does not dispute the statement in the employee's closing argument that the judge "*allowed a motion* for additional medical evidence to cover the gap *before* Dr. McGlowan's last examination." (Self-insurer br. 10, n.9; emphasis added.) The employee reiterates that statement in its brief on appeal. (Employee br. 2.) Thus, as the self-insurer maintains, the gap period runs from December 5, 2016, the start of the claimed period of § 34A

Indeed, although gap medical evidence may be admissible to address the period after the § 11A examination where there has been a significant change in the employee's condition after the impartial examination, see, Spencer v. JG MacLellan Concrete Co., 30 Mass. Workers' Comp. Rep. 145, 149-150 (2016), there is no evidence or allegation of such a change. In fact, Dr. McGlowan opined the employee had reached maximum medical improvement by the time of his examination, and that his condition was permanent. (Exh. 1.2, Addendum Undated, received 11/15/17.)

Thus, we agree with the self-insurer that the judge impermissibly adopted the January 5, 2016, medical opinion of Dr. Fraser to support ongoing disability after the date of the § 11A examination, June 27, 2017. The fact that Dr. Fraser opined the employee's condition was permanent or that his opinion is similar to Dr. McGlowan's, does not mean, as the employee contends, that it is permissible to use that "gap" medical evidence to support disability and incapacity findings after the end of the gap period on June 27, 2017, or that such error was harmless. Even a determination of permanent and total incapacity may be revisited as the employee's condition may change, Vass' Case, 319 Mass. 297 (1946), and allowing a medical opinion submitted for a limited purpose to support an award of permanent and total incapacity during a period for which it was not admitted, would effectively deprive the self-insurer of the "opportunity to present

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benefits, through June 27, 2016, the date of Dr. McGlowan's § 11A examination. (Self-insurer br. 18.)

The parties' understanding that the judge "allowed a motion," however appears to conflict with the judge's statement that she "*sua sponte*" allowed the submission of gap medicals, and that "[n]o motions were made by either party with respect to the Impartial Medical Report or the accompanying Addendum Reports." (Dec. 3.) Our review of the Board file reveals that the only motion for additional medical evidence was made by the employee on July 17, 2017, a year before the hearing, and alleged that the impartial report was inadequate because it failed to address § 36 loss of function, scarring and disfigurement. Rizzo, supra. (2002)(reviewing board may take judicial notice of documents in board file). There is no indication in the board file that the judge ruled on that motion, and, since the Section 36 issue was resolved prior to hearing, the rationale for the motion no longer existed. While the judge had the authority to allow additional medical evidence based on a motion by the parties, or *sua sponte*, see § 11A(2), the present record conflicts with that reported by the parties and requires further clarification by the judge on recommittal.

medical evidence to rebut the opinion[] of the employee's treating doctor[]," Brzezinski, supra at 275, a clear due process violation. "Had the [self-]insurer known, before the close of the evidence, that the judge was going to use the employee's additional medical evidence to address *ongoing* incapacity, rather than incapacity during the gap period, it could have opted to depose the employee's physicians. . . ." Id. at 279. Thus, the judge erred by using Dr. Fraser's report to address incapacity and disability after the date of the § 11A examination.

For the same reason, the judge also erred by adopting Dr. Whitelaw's February 9, 2017, report to determine "the industrial accident remains *a major contributing cause* of [his] *current* condition, disability, loss of function and disfigurement." (Dec. 10; emphasis added.) Not only did the judge adopt this "gap medical" evidence to determine ongoing causal relationship,[8] but Dr. Whitelaw applied the heightened "a major cause" standard under § 1(7A), which was not even raised. However, in light of the judge's adoption of Dr. McGlowan's simple causation opinion, the error had no effect on the outcome of the case and was thus harmless.

We also agree with the self-insurer's second, related argument that the judge erred by rejecting the opinion of the impartial examiner, Dr. McGlowan, concerning extent of disability and need for treatment, without sufficient explanation. Even if the judge had properly admitted gap evidence, the § 11A opinion was the only evidence the judge could rely on for the period subsequent to Dr. McGlowan's examination on June 27, 2017, as it was prima facie evidence. G. L. c. 152, § 11A. See Young's Case, 64 Mass. App. Ct. 903, 904 (2005); May's Case, 67 Mass. App. Ct. 209, 214 (2006); Scheffler's Case, 419 Mass. 251 (1994).[9] Thus, the judge could not reject it without clearly and sufficiently

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[8] As noted above, the parties stipulated to § 36 loss of function and disfigurement, (Dec. 3), so it was unnecessary for the judge to adopt evidence on that issue.

[9] Of course, as the court stated in Young's Case, supra,

> T]here are recognized exceptions to this rule. An [impartial] opinion does not attain the status of prima facie evidence if it goes beyond the medical issues in the case, see

stating the reasons for doing so in findings with adequate support in the record. Svonkin v. Falcon Hotel Corp., 20 Mass. Workers' Comp. Rep. 133, 137 (2006), citing Galloway's Case, 354 Mass. 427 (1968). On recommittal, if the judge rejects Dr. McGlowan's disability and incapacity opinions, she must explain her reasons for doing so.

We briefly address the self-insurer's other arguments. The self-insurer alleges that the judge erred by relying on Dr. Fraser's opinion for any period because it is stale as well as foundationally flawed. We summarily dismiss the allegations regarding the foundation of the report. With respect to the allegation of staleness, we note that a medical report is not necessarily stale simply because it is based on an examination eleven months before the gap period in question began, particularly where, as here, Dr. Fraser opined that the employee has reached a medical end result. However, on recommittal, the judge will need to revisit the question of whether additional medical evidence for the pre-impartial gap period is required, and, if she determines that it is, she may address the question of whether Dr. Fraser's report is stale.

Finally, there is no merit to the self-insurer's fourth argument that by failing to list or mention the parties' closing arguments, the judge deprived the self-insurer of the right to be fully heard. In support of its argument, the self-insurer cites Khachadoorian's Case, 329 Mass. 625 (1953), where the court observed that "a judicial or quasi judicial hearing involves more than an opportunity to present evidence; there must also be an opportunity for argument." Id. at 627. In Khachadoorian, the court held that the administrative judge did *not* err by refusing employee counsel the opportunity to argue the case on the evidence following hearing, given that the insurer had the opportunity to argue its case before the reviewing board, and any error was cured on appeal. The court stated, "We are . . . not confronted with the question whether the provisions in the act for a

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> Scheffler's Case, 419 Mass. at 259; if it is not expressed in terms of probability, see Patterson v. Liberty Mut. Ins. Co., 48 Mass. App. Ct. at 592; or if it is unsupported by admissible evidence in the record or any other proper basis, see id. at 597.

Id. at 904. As in Young's Case, these exceptions are not relevant here. Id.

hearing . . .would be satisfied where a party was compelled to submit his case without argument both before the single member and the reviewing board." Id. The self-insurer contends that because the reviewing board can no longer find facts, but may only recommit the case for further findings where necessary, due process principles require the judge to indicate she considered the parties' closing arguments by referencing them. We disagree. The judge allowed the parties to submit written closing arguments, consistent with the Department's rules,[10] distinguishing this case from Khachadoorian where the judge prohibited closing arguments. Moreover, closing arguments are not evidence. See Haley's Case, 356 Mass. 678, 681-682 (1970)(nothing can be considered evidence which is not introduced as such). Thus, the judge was not required to list or reference the closing arguments as evidence. There was no infringement of the parties' due process rights.

Accordingly, we recommit the case for further findings consistent with this opinion.

So ordered.

Carol Calliotte
Administrative Law Judge

Bernard W. Fabricant
Administrative Law Judge

[10] 452 Code Mass. Regs. § 1.11(6), provides,

> 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.

Filed: ***July 29, 2020***

Catherine Watson Koziol
Administrative Law Judge