COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 014275-95**

Gillian R. Ragucci	Employee
Jo-Ann Fabrics Store	Employer
Lumberman's Mutual Casualty Ins. Co.	Insurer

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

APPEARANCES
William H. Murphy, Esq., for the Employee at hearing
Paul M. Moretti, Esq., for the Employee on brief
Matthew F. King, Esq., for the Insurer

LEVINE, J. The employee appeals from the decision of an administrative judge authorizing the insurer to discontinue the payment of § 34 benefits and awarding the employee a closed period of § 35 benefits. After review, we reverse and recommit the decision of the administrative judge.

Gillian Ragucci, the employee, was a married, fifty-one year old mother of three adult children at the time of the hearing. (Dec. 4.) Since graduating from high school, she has mostly been employed in customer service type positions. In 1994, Mrs. Ragucci commenced employment with Jo-Ann Fabrics as an interior decorator/consultant. Id.

On April 18, 1995, while reaching for a box of tacks, the employee was approached by a customer. As the employee turned toward the customer, she felt a sharp stabbing pain in her back that caused her to fall to the ground. (Dec. 4-5.) The employee was taken to her primary care physician who gave her Tylenol with codeine. The employee underwent physical therapy without improvement. (Dec. 5.)

Subsequently, the employee underwent several diagnostic studies including two MRIs, a CAT scan, an EMG and nerve conduction studies. These studies were negative with the exception of a tiny left paramidline T12-L1 disc herniation. Id. Thereafter, the employee came under the care of Dr. Douglas Howard. Dr. Howard provided various medication, physical therapy and chiropractic care -- again with no improvement. The employee also had epidural steroid injections. Id.

Initially, the insurer accepted the case. Thereafter, it filed a complaint to modify benefits and the employee filed a claim for § 34A benefits. The claims were joined at a conference held pursuant to § 10A. At the conference, the administrative judge denied both the employee's claim for § 34A benefits and the insurer's complaint for modification. Both parties appealed to a hearing de novo. (Dec. 2.)

Pursuant to § 11A, on June 25, 1998 the employee underwent an impartial examination by Dr. Joseph Abate. The impartial physician opined that the employee had suffered a contusion/strain to the cervical, dorsal, lumbar spine. (Dec. 6; Statutory Ex. 1.) He also opined that the employee was totally disabled from April 18, 1995 until November 13, 1995, the date of the EMG. The impartial examiner reported examination inconsistencies and stated that, despite subjective complaints, there were no objective diagnostic studies or physical findings to warrant continued disability. (Dec. 7; Statutory Ex. 1.) Dr. Abate concluded that the employee was at a medical end result and that the employee had no permanent residual loss of function or work restrictions. (Dec. 6-7; Statutory Ex. 1.) Neither party deposed the impartial physician. The employee's motion for additional medical evidence, which relied on Ruiz v. Unique Applications, 11 Mass. Workers' Comp. Rep. 399 (1997), was denied. (Dec. 7.)

The administrative judge found the § 11A report adequate and adopted the medical opinions of the § 11A impartial physician in total. Id. Both parties were

allowed to submit additional medical records to address the time period prior to the impartial examination. Id. The medical report and deposition testimony of Dr. John C. Molloy was submitted by the employee. (Dec. 3, 7.) The medical reports of Dr. Lawrence T. Shields were submitted by the insurer. (Dec. 7.)

Dr. Molloy opined that the employee was permanently and totally disabled from all forms of employment. (Dec. 7; Employee's Exs. 3 & 4.) Dr. Shields opined in his September 4, 1997 report that the employee had a permanent, five percent residual impairment of the whole person. (Dec. 8; Insurer's Ex. 2.) Although Dr. Shields opined that the employee could return to her work as a home decorator, he also restricted the employee from lifting more than five pounds and from any heavy pushing, pulling or repetitive bending. (Dec. 8; Insurer's Ex. 2.)

The administrative judge rejected Dr. Molloy's medical opinions in their entirety. (Dec. 7.) With reference to Dr. Shields, the administrative judge adopted the opinion that the employee was partially incapacitated as of the September 4, 1997 examination. (Dec. 7-8.) However, the judge did not adopt that portion of Dr. Shields' opinion that the employee was capable of returning to her normal job with the employer as of that date because the judge found Dr. Shields' five pound lifting restriction to be "inconsistent with the actual requirements of her job." (Dec. 8.) Additionally, the judge "d[id] not find [the employee] to be entirely credible regarding her complaints of disabling pain and inability to perform many of the activities of daily living." Id.

The administrative judge found that as of June 28, 1998, the date of the impartial examination,[1] the employee was no longer incapacitated from her usual employment. (Dec. 9.) The judge further found that the employee was partially disabled from November 20, 1997, the date the insurer filed its complaint for modification benefits, through June 28, 1998. (Dec. 11.)

[1] According to the impartial examiner's report, the examination took place on June 25. (Statutory Ex. 1.)

Accordingly, the judge assigned an earning capacity for the closed period of partial disability beginning on November 20, 1997 and ordered the insurer to pay § 35 benefits for the remaining closed period of partial disability. (Dec. 12.) The judge also determined that the employee failed to "prevail" with regard to her claim for § 34A benefits and therefore was not entitled to attorney's fees and expenses. (Dec. 10.) The employee appeals.

The employee contends that it was error for the administrative judge to accept the report of the impartial examiner and further error to deny the employee's motion to allow additional medical evidence. (Employee's brief, 12.) We agree that additional medical evidence should have been allowed for all time periods, not just the period preceding the § 11A exam date. The present case is similar to Ruiz v. Unique Applications, supra. In Ruiz, as here, the parties, as well as their medical experts, agreed that the employee continued to be medically disabled as a result of a work-related injury. Ruiz, supra at 402; Dec. 2, 7-8. However, as in Ruiz, the impartial examiner found no medical disability whatsoever and thus "offered an opinion which stepped outside the boundaries of the medical dispute framed earlier." Ruiz, supra at 402; Dec. 6.[2]

In Ruiz, "we recognize[d] that medical conditions are dynamic and passage of time [could] render earlier opinions obsolete in certain cases." Ruiz, supra at 402. As the evidentiary record in Ruiz did not suggest that the employee's medical condition had changed, we did not address that issue in Ruiz. Here, the

[2] The fact that Dr. Shields opined that the employee could return to her normal job, (see p. 3, supra), does not take the case out of the Ruiz doctrine. This is because Dr. Shields also opined that the employee was partially medically disabled and was restricted from lifting more than five pounds and from heavy pushing, pulling or repetitive bending. (See p. 3 supra.) Thus, unlike the impartial physician, Dr. Shields agreed that the employee was partially medically disabled. Hence, on the medical issues, the impartial physician's opinion "stepped outside the boundaries of the medical dispute" of the parties. Ruiz, supra at 402. Moreover, Dr. Shields opined that the employee could return to her normal job "if it does not involve heavy lifting [more than five pounds], pushing, pulling and repetitive bending." (Insurer's Ex. 2.) The judge found that the employee's

administrative judge attempted to create such a suggestion: "I find that Dr. Abate's opinion, which was based on an examination nine months later than that of Dr. Shields, reflects a reasonable progression in medical improvement from that earlier date and is not inconsistent with Dr. Shields' opinion of partial disability as of that earlier date." (Dec. 9.) This statement, however, is merely an *assumption* by the judge. It is not the impartial examiner's opinion. Although the impartial report addresses examination inconsistencies, there is no discussion of progression in the employee's medical condition resulting from the passage of time.

The judge's assumption is further undermined by the impartial examiner's determination that the employee was no longer totally disabled as of November 13, 1995, the date of an EMG nerve conduction examination. (Statutory Ex. 1.) Like Ruiz, the impartial examiner here rendered his differing medical opinion based on earlier objective diagnostic testing (and physical findings) rather than the passage of time. Ruiz, supra at 403; Statutory Ex. 1. Nor does the record suggest that the employee's medical condition had changed between Dr. Shields' examination of September 4, 1997 and Dr. Abate's examination of June 25, 1998. Compare Insurer's Ex. 2 with Statutory Ex. 1; Ruiz, supra. Accordingly, the judge should have allowed the employee's motion for additional medical evidence, Id. at 403, and we must therefore recommit the decision for that purpose.

Additionally, the employee argues that the evidence required a finding that the employee was permanently and totally disabled. (Employee's brief, 19.) There is no merit to this argument. Although evidence was presented indicating that the employee suffered total and permanent incapacity, there was also ample expert medical opinion in the record to support a finding of partial incapacity. (Insurer's Ex. 2.) Furthermore, as the judge did not entirely credit the employee's complaints of pain nor her testimony regarding inability to perform common daily

---

normal job required the employee to lift more than five pounds, so that the employee could not return to it. (Dec. 8.)

activities, (Dec. 8), we cannot rule that a finding of partial disability would be unwarranted.

A final issue raised by the employee is that the judge erred in determining that the employee had not prevailed and was therefore not entitled to fees and expenses. (Employee's brief, 24.) Because the case is being recommitted, the employee's entitlement to attorney's fees and expenses cannot now be finally determined. We comment, however, should the issue arise after recommittal. Where compensation is ordered or is not discontinued at a § 11 hearing as a result of a modification request made by an insurer, the employee has "prevailed" and is entitled to attorney's fees. 452 Code Mass. Regs. § 1.19(4); Columbo v. Persona Mgmt., 11 Mass. Workers' Comp. Rep. 459 (1997). The exception is where the employee appeals a conference order, without an appeal by the insurer, and the administrative judge does not direct payment of benefits exceeding that being paid by the insurer prior to the judge's decision. 452 Code Mass. Regs § 1.19(4); Columbo, supra at 460. In the circumstances of the decision appealed from, the employee would have been entitled to attorney's fees and legal expenses.

The case is reversed and recommitted to the administrative judge to readdress the issue of incapacity after allowing additional medical evidence covering all periods in dispute.

So ordered.

_____
Frederick E. Levine
Administrative Law Judge

_____
Susan Maze-Rothstein
Administrative Law Judge

_____
Martine Carroll
Administrative Law Judge

FEL/kai
Filed: **July 24, 2000**