

# COMMONWEALTH OF MASSACHUSETTS

## DEPARTMENT OF INDUSTRIAL ACCIDENTS

BOARD NO.: 001871-05

Gregory Serabian  
Herb Chambers Ford  
Universal Underwriters

**Employee**  
**Employer**  
**Insurer**

### **REVIEWING BOARD DECISION**

(Judges Koziol, McCarthy and Horan)

The case was heard by Administrative Judge Dike.

### **APPEARANCES**

Robert L. Noa, Esq., for the employee at hearing  
James N. Ellis, Esq., for the employee on brief  
Gerard A. Butler, Esq., for the insurer

**KOZIOL, J.** The insurer appeals from a decision awarding the employee § 34 total incapacity benefits from January 17, 2005 to August 2, 2006, and §35 partial incapacity benefits from August 3, 2006 to date and continuing, for an accepted left elbow injury and an unaccepted left shoulder rotator cuff injury, which the judge found to be causally related to the work-related accident of January 17, 2005. (Dec. 8.) Because the judge committed reversible error in his handling of the medical evidence pertaining to the employee's left shoulder condition, we vacate the §§ 34 and 35 awards and recommit the case.

On January 17, 2005, the employee, an auto mechanic or service technician, slipped and fell on ice at work, landing on his left elbow. He was unable to return to work following the incident and sought medical treatment for the left elbow injury. In August 2005, the employee underwent arthroscopic surgery on his left elbow to remove bone chips. (Dec. 4.) In the interim, the employee's left arm had been placed in a sling and was "immobilized for a significant period of time." (Dec. 4.) Although the employee did not report left shoulder pain initially following the accident, at some point he began to complain of left shoulder problems. (Dec. 4.)

The employee filed a claim seeking § 34 benefits from January 17, 2005 to date and continuing. Both parties appealed a § 10A conference order requiring payment of § 34 benefits from December 3, 2005 and continuing, and denying the claimed left shoulder injury. The employee was examined pursuant to § 11A(2) by Dr. Steven N. Graff, and the case proceeded to a hearing where the parties stipulated that the insurer accepted liability for a January 17, 2005 left elbow injury. (Dec. 2, 4.) However, the insurer contested causal relationship regarding the left shoulder condition and raised the issue of § 1(7A); it also generally contested disability and the extent thereof. (Dec. 2.)

On the record at the hearing, the judge made the following findings regarding Dr. Graff's report:

I find this report to be adequate and therefore retain its prima facie status but for the period between the date of the accident on January 17, 2005 up to the date of the examination on August 3, 2006. For this gap period I allow additional medical evidence.

(Tr. 5.)

On April 5, 2007, the employee took Dr. Graff's deposition. Neither party filed a motion for a finding of inadequacy or medical complexity. The parties submitted the additional medical records and reports of their respective physicians who treated or evaluated the employee during the gap period identified by the judge, and the record closed.

In his decision, the judge noted Dr. Graff opined the employee had recovered from his accepted left elbow injury, and concluded the employee's left elbow problems "resolved no later than the § 11A on August 3, 2006." (Dec. 9.) The judge found the employee attempted a return to work in February 2006, but after working three weeks, he left work because of increasing left shoulder pain. (Dec. 5.) Finding the employee's pain symptoms had increased upon his return to work, and that he "was ultimately left unable to engage in meaningful employment," the judge concluded, "I do not find that this return to work attempt reflects that the employee had an ongoing partial work capacity but for the three week return to work period." (Dec. 9.) As a result, with the exception of that three week period in February 2006, the judge concluded the employee was totally disabled from the date of the accident to

the date the impartial physician found the employee's left elbow condition resolved, awarding § 34 benefits from January 17, 2005 through August 2, 2006. (Dec. 9, 11.)

The judge adopted Dr. Graff's opinions regarding the specific physical limitations resulting from the employee's left shoulder rotator cuff condition. (Dec. 9.) Despite his earlier ruling finding the § 11A report adequate, but for the gap period, the judge then expressly rejected Dr. Graff's opinions that the employee's left shoulder condition pre-existed the industrial accident, and that although the left shoulder condition could be aggravated by excessive immobilization and use of a sling, the industrial accident was not a major cause of the employee's ongoing disability and need for treatment. (Dec. 5.) Relying on the gap medicals submitted by the employee, the judge adopted the employee's treating physician's opinions, finding a causal relationship between the left shoulder condition and the industrial accident, and determining the employee had no pre-existing left shoulder condition. (Dec. 6, 8.) Based on the adopted medical opinions, the judge concluded § 1(7A) did not apply to this case. (Dec. 8.) The judge then awarded a second period of incapacity benefits, pursuant to § 35, for the period "after the [sic] August 3, 2006 when the employee was, and continues to be, hampered only by the rotator cuff injury. . . ." (Dec. 9.)

The judge's original ruling on the record shows he solicited and admitted additional medical evidence solely for the purpose of addressing the issue of disability during the gap period prior to the impartial medical examination.

" 'Gap' medicals, when allowed for that reason of providing evidence in the retrospective pre-examination period, may not then be used for other medical issues in the case. . . ." Mims v. M.B.T.A., 18 Mass. Workers' Comp. Rep. 96, 100 (2004). By changing the scope of his § 11A ruling, and using the gap medicals to support his findings on issues of causal relationship, without notifying the parties of his decision to do so, the judge "procedurally cut off the parties' opportunity to develop their cases" by "tak[ing] depositions, both to challenge their opponent's medical evidence and to bolster their own." Gulino v. General Elec. Co., 15 Mass. Workers' Comp. Rep. 378, 381 (2001); Behre v. General Elec. Co., 17 Mass. Workers' Comp. Rep. 273, 277 (2003). Moreover, the issue of § 1(7A) was removed from the case as a result of the judge's reliance on medical evidence that

the parties understood was admitted for the sole purpose of determining disability during the "gap period."<sup>1</sup>

We reverse so much of the decision as finds a causal relationship between the employee's left shoulder rotator cuff condition and his work-related injury of January 17, 2005, the findings regarding the issue of § 1(7A), and the findings regarding disability and incapacity resulting from that condition. We leave undisturbed the judge's findings regarding the left elbow condition, including his conclusion that disability connected to that condition had resolved as of the August 3, 2006 impartial medical examination.

Because the judge expressly found the employee left work after a brief return in February 2006 due to an increase in his left shoulder pain, and the pain played a role in his disability and incapacity analysis for the time period during which he awarded § 34 benefits to the employee, we vacate the award of § 34 benefits from January 17, 2005 through August 2, 2006.<sup>2</sup> Because the judge's causal relationship findings also served as the basis for the order of payment of § 35 benefits from August 3, 2006 to date and continuing, and because the order of payment of medical benefits under §§ 13 and 30 encompasses treatment relating to the left shoulder, those orders are also vacated. Recommittal is necessary under the circumstances.

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<sup>1</sup> The error is not rendered harmless by the judge's additional finding that the employee's treating physician's opinion on "but for" causation was supported by Dr. Graff's deposition testimony that a causal relationship "could" exist "if one found the employee credible." (Dec. 8-9.)

<sup>2</sup> Although the judge found the employee's left shoulder pain worsened after he returned to work in February 2006, he also found the employee complained of left shoulder pain during his first visit with his treating physician on May 10, 2005. (Dec. 6.) There are no findings of fact stating when the shoulder pain began or, more importantly, when it became a factor contributing to the employee's claimed disability.

Accordingly, we transfer the case to the senior judge for reassignment to another administrative judge for hearing de novo on the disputed issues;<sup>3</sup> specifically the issues of causal relationship between the employee's left shoulder condition and the accepted injury, § 1(7A), and the employee's entitlement, if any, to medical benefits and weekly incapacity benefits.

So ordered.

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Catherine Watson Koziol  
Administrative Law Judge

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William A. McCarthy  
Administrative Law Judge

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Mark D. Horan  
Administrative Law Judge

Filed: ***March 4, 2009***

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<sup>3</sup> Because the administrative judge no longer serves on the industrial accident board, the recommittal proceedings must be de novo.