COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 013522-05**

James G. Murphy	Employee
B & M Office Installation	Employer
Granite State Insurance Co.	Insurer

REVIEWING BOARD DECISION
(Judges Costigan, Horan and Koziol)

The case was heard by Administrative Judge Bean.

APPEARANCES
Matthew W. Gendreau, Esq., for the employee at hearing
James N. Ellis, Esq., for the employee on appeal
James Riley Hodder, Esq., for the employee on brief
Ellen Harrington Sullivan, Esq., for the insurer at hearing
William C. Harpin, Esq., for the insurer on appeal

COSTIGAN, J. The administrative judge denied and dismissed the employee's claim for § 36 benefits, based on his adoption of the § 11A impartial physician's opinion. The employee appeals, citing two errors. First, he notes the judge found the impartial medical report inadequate, and allowed additional medical evidence, but then proceeded not only to find that report adequate, but to adopt it to deny the employee's claim. Second, the employee argues, and the insurer does not dispute, that the judge completely ignored the medical evidence submitted by the parties. In fact, the judge neither listed the additional medical reports admitted into evidence, nor mentioned any medical expert other than the § 11A examiner. Because we agree with both of the employee's arguments, we reverse the decision and recommit the case for the judge to consider all admitted medical evidence.

By § 10A conference order filed on October 20, 2005, the judge awarded the employee a closed period of § 34 total incapacity benefits. Both parties

appealed but both subsequently withdrew their respective appeals.[1] The insurer thereby accepted liability for the employee's back injury of May 3, 2005.[2] In late 2006, the employee filed a claim for permanent loss of bodily function benefits under § 36 which was denied by the judge following a § 10A conference. The employee appealed. Prior to hearing, the employee submitted to a § 11A impartial medical examination by Dr. Ralph Wolf. The doctor's report of June 14, 2007 was entered into evidence at hearing. (Dec. 332; Ex. 3.) Dr. Wolf opined:

> With respect to causality the patient noted no prior lumbar injuries. The patient's lumbar strain two years ago is therefore secondary to his work injury, moving office furniture. Strains of this kind usually resolve in three – six weeks following injury. With respect to disability, no disability is assigned; no objective findings are present. With respect to work capacity resumption of normal work full time is permitted now. . . .

(Ex. 3.)

At the hearing, the employee filed a motion asking the judge to declare the impartial medical report inadequate, because Dr. Wolf had not rendered an opinion as to the percentage loss of bodily function claimed by the employee. After hearing oral argument on the motion, the judge advised the parties:

> All right. This is a tougher call than I anticipated ten minutes ago. And, in fact, I'm going to disagree with myself from ten minutes ago. I'm going to allow additional medical evidence. I'm not sure I'm right. I'm not sure I'm comfortable with it but I'm not comfortable going the other way either. . . . [T]he doctor doesn't need to use I'd concede buzz words, he doesn't have to use the magic language, and reading his report brief as it is there's quite a bit that leads me to the sense that Doctor Wolfe [sic] does not find any loss of function, or if he hadn't addressed that issue that if he were to address the issue he would find no loss of function. . . . But there are two things that are pushing me the other way and at least they are at this point, after lunch I may change my mind but again it would be too late.

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[1] We take judicial notice of the contents of the Board file. Rizzo v. M.B.T.A., 16 Mass. Workers' Comp. rep. 160, 161 n.3 (2002).

[2] General Laws c. 152, § 10A(3) provides, in pertinent part:

> Failure to file a timely appeal or withdrawal of a timely appeal shall be deemed to be acceptance of the administrative judge's order and findings. . . .

(Tr. 52-53.) The judge properly recognized he could not require either party to depose Dr. Wolf to clarify his opinion and thereby cure the inadequacy. (Tr. 57.) See Brackett v. Modern Continental Constr. Co., 19 Mass. Workers' Comp. Rep. 14-16 (2006), quoting LaGrasso v. Olympic Delivery Serv., Inc., 18 Mass. Workers' Comp. Rep. 48, 57 (2004)("when the § 11A *report* is inadequate as a matter of law, as it was here, neither party should be forced to depose the impartial physician to correct or cure the inadequacy. In this limited circumstance, due process *requires* that additional medical evidence be allowed. . . . [emphasis in original]"). The judge also correctly noted that if Dr. Wolf were deposed, and if the doctor gave an opinion on loss of function, which he had not expressly done in his report, the judge could consider that "opinion and allow that with whatever other opinions the parties choose to submit." (Tr. 57.) The hearing ended with the judge's order that the parties submit their additional medical evidence.[3] (Tr. 58.)

In his decision, filed some seven weeks after the close of the record, the judge wrote:

> I find that the employee has suffered no loss of function within the meaning of section 36. In making this determination I rely on the persuasive opinion of Dr. Ralph Wolf, the impartial medical examiner, *whose report I find to be fully adequate within the meaning of section 11A*. In his report he wrote that the employee suffers from "no residual abnormalities on physical examination nor on x-rays. . . ." In his deposition he reiterated his opinion saying that the employee has no impairment of the lumbar spine according to the criteria of the AMA guidelines and that he has "no permanent problem with a body part." The doctor's opinion is clear and unequivocal.

(Dec. 334; emphasis added.) The decision does not list the medical reports submitted by the parties, nor does the judge refer to, let alone discuss, any expert medical opinion other than Dr. Wolf's which, contrary to his earlier ruling and without prior notice to the parties, he found "to be fully adequate within the meaning of section 11A." (Dec. 334.) As a result, the judge denied the

[3] The parties have stipulated, as part of the record on appeal, that they each did submit additional medical evidence.

employee's claim, as the impartial medical opinion established no permanent impairment of the employee's lumbar spine. Id.

Standing alone, the judge's failure to list the additional medical evidence submitted by the parties, or to address it in his subsidiary findings, requires recommittal, as we are unable to determine whether the judge considered that evidence, or considered but did not adopt it. Casagrande v. Massachusetts Gen. Hosp., 12 Mass. Workers' Comp. Rep. 137, 140-141 (1998). In addition to that error, however, the decision presents a clear due process violation, in that the parties were entitled to rely on the judge's ruling that additional medical evidence could be submitted and, by implication, would be considered. Even though the employee did depose the impartial medical examiner for the purpose of cross-examination, cf. Babbitt v. Youville Hosp., 23 Mass Workers' Comp. Rep. 215 (2009)(inadequacy ruling induced employee to refrain from deposition), he still had an unequivocal due process right to have his additional medical evidence considered by the judge. Brackett, supra at 15.

Accordingly, we reverse the decision and recommit the case for the judge to consider the additional medical evidence introduced by the parties and to file a decision anew.

So ordered.

Patricia A. Costigan
Administrative Law Judge

Mark D. Horan
Administrative Law Judge

Catherine Watson Koziol
Administrative Law Judge

Filed: