

COMMONWEALTH OF MASSACHUSETTS

**DEPARTMENT OF
INDUSTRIAL ACCIDENTS**

BOARD NO. 30815-97

James Matlock
Stop & Shop Company
Stop & Shop Company

Employee
Employer
Self-Insurer

REVIEWING BOARD DECISION
(Judges Wilson, McCarthy and Smith)

APPEARANCES

Thomas J. Donoghue, Esq., for the employee
William J. Doherty, Esq., for the self-insurer

WILSON, J. The employee appeals the decision of an administrative judge in which his claim for weekly incapacity benefits was denied and dismissed. The employee argues that the judge erred by disregarding parts of the medical opinion of the § 11A physician. We agree that the judge's explanation for his rejection of the prima facie opinion is inadequate and recommitment is appropriate. G. L. c. 152, § 11C.

The employee, thirty years old at the time of hearing, left school after the tenth grade, but later earned a G.E.D. certificate. He recalls that he was employed by this employer as a selector from May 1991 to August 1993, and returned to the same position in March 1996. (Employee Ex. 1; Dec. 3.) On July 23, 1997, after bending over to lift a case of baby food, he felt a sharp burning sensation in his back and numbness down his right leg. (Statutory Ex. 1; Dec. 3.) He was seen that day at the Business and Health Occupational Medicine Center and placed on light duty. He returned to the Center on August 20, 1997. On that date he continued to exhibit low back pain but no longer complained of symptoms in the lower extremities. The employee also received physical therapy at the Return to Work Center, and the physical therapist released him to full duty work on October 20, 1997. (Dec. 3; Tr. 16.) Dr. Barry Magnus of the Business and Health Center released the employee for full duty on October 21, 1997. The employee

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returned to work on October 28, 1997, but missed time from work on October 29, 1997 and November 3, 1997, and then was suspended from work on November 4, 1997. (Dec. 3-4.)

The self-insurer paid weekly incapacity benefits from July 24, 1997 to October 28, 1997. (Dec. 3, 5; Tr. 15-16.) Thereafter, the employee filed a claim for additional weekly benefits, which the self-insurer resisted. Following a § 10A conference, the employee's claim was denied and his appeal gave rise to a hearing de novo.

The insurer contested incapacity and extent thereof, causal relationship and liability for medical benefits. (Dec. 1.) Pursuant to § 11A, the employee was examined by Dr. Vincent Giustolisi on July 22, 1998. A deposition of Dr. Giustolisi was conducted on November 3, 1998. (Dec. 2, 4.) Dr. Giustolisi diagnosed the employee as suffering from a soft tissue injury to his low back with persistent low back pain and radiation to the lower extremities, causally related to his work injury. Although it was his opinion that the employee could not return to his pre-injury job, he determined that the employee could work in a light duty capacity, with limitations on prolonged standing, stooping, squatting or lifting over twenty-five pounds. (Dec. 4; Statutory Exhibit 1, 4) No other medical testimony was admitted into evidence, as the judge denied the self-insurer's motion for a finding of inadequacy of the § 11A report. (Dec. 2; Tr. 4.)

In his decision, the administrative judge adopted the opinion of the § 11A physician as to his diagnosis and causal relationship of the employee's physical disability from the date of injury until his return to work on October 28, 1997. However, the judge denied and dismissed the employee's claim for ongoing weekly benefits after November 1, 1997. (Dec. 5.) The judge concluded "that beyond October 28, 1997 [the return to work date] the Employee was not disabled from work with the Employer and that his testimony asserting such is not persuasive and his presented medical history and ongoing pain complaints to the impartial physician was [sic], in part, flawed." (Dec. 5.) The employee appeals the decision, arguing that the judge erred by disregarding Dr. Giustolisi's opinion.

The judge's conclusion, quoted above, has scant support in his subsidiary findings of fact. The judge found that "[t]he Employee was released by the Return to Work Center on October 20, 1997 to return to his full duties as a selector. On October 21, 1997, the Employee was released to his usual work activities by Dr. Barry Magnus of the Business and Health Center." (Dec. 3.) The impartial physician was examined during his deposition concerning the release to work as well as a November 12, 1997 report by Dr. Magnus indicating that the employee reported a recurrence of pain after his short return to work. Although the impartial examiner acknowledged these medical records, (Dep. 10-17), we find it significant that he based his opinion on the employee's physical status and objective findings on his examination. At that July 22, 1998 examination, the doctor found limitations in the employee's range of motion and imposed restrictions on physical activity. (Dep. 23-28.)

Regarding the employee's present physical disability, the judge also found, "the employee's testimony as pertains to his reasons for missed work after October 28, 1997 because of his work injury unpersuasive and not credible." (Dec. 4.) The judge explicitly discredited the employee's testimony that he missed work in November 1997 due to his back injury (Tr. 16): "[I]t is the finding of this Administrative Judge that any lost time from work after October 28, 1997 is due to a labor/management dispute and a pending grievance/arbitration issue unrelated to the work injury of July 23, 1997." (Dec. 5.)

The judge's findings stand in contrast to the opinion of the impartial physician, who concluded that, as of the July 1998 physical examination date, the employee remained medically disabled from working in his former capacity with the employer, but could perform light duty work with limitations on prolonged standing, stooping, squatting or lifting over twenty-five pounds. (Statutory Ex. 1.) The judge's reasons for rejecting the exclusive prima facie medical evidence provided by the § 11A physician are legally insufficient, as the sole medical opinion is at odds with the judge's conclusion that the employee was physically capable of returning to his job. "In the absence of competent contradictory evidence, this prima facie status requires the judge to find that the impartial opinion is true." Streit v. Friendly Ice Cream Corp., 11 Mass. Workers' Comp. Rep. 500,

503 (1997). “[W]here, as here, there is uncontradicted testimony concerning a subject which is beyond the common knowledge and experience of the [administrative judge], that testimony may not be rejected without a basis for such rejection in the record.” Robinson v. Contributory Retirement Appeal Board, 20 Mass. App. Ct. 634, 639 (1985). The judge’s findings in support of his rejection of the § 11A opinion are not sufficiently specific to enable us to determine whether his denial of the claim was proper and “whether [he] applied the correct principles of law.” Ballard’s Case, 13 Mass. App. Ct. 1068 (1982). “In these circumstances more complete findings on the issue of [extent of incapacity] are required for appropriate judicial review.” Robinson, supra, at 641. Specifically, the judge must refrain from substituting his lay opinion for that of the medical examiner and address the matter of how the uncontradicted medical limitations established by the § 11A examiner, together with the employee’s vocational profile, affect the employee’s ability to find work in the open labor market from the time of his claim. If he rejects the impartial medical examiner’s opinion on medical disability, for legally sufficient reasons, that rejection is tantamount to a finding that the opinion is inadequate or the medical issues are complex. Hence, he should allow the parties to submit additional medical evidence. See O’Brien’s Case, 424 Mass. 16, 22-23 (1996); Lorden’s Case, 48 Mass. App. Ct. 274, 280 (1999).

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

So ordered.

Sara Holmes Wilson
Administrative Law Judge

Filed: April 14, 2000

James Matlock
Board No. 030815-97

William A. McCarthy
Administrative Law Judge

Suzanne E.K. Smith
Administrative Law Judge