COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 011307-09**

Jane Sullivan	Employee
Centrus Premier Home Care	Employer
American Home Assurance	Insurer

REVIEWING BOARD DECISION
(Judges Levine, Horan and Costigan[1])

The case was heard by Administrative Judge Maher.

APPEARANCES
Michael O. Smith, Esq., for the employee
Diane Cole Laine, Esq., for the insurer

LEVINE, J. The insurer appeals from an administrative judge's decision awarding the employee ongoing § 34 total incapacity benefits. We agree with the insurer that its due process rights were violated when the judge failed to notify the parties of his ruling on the insurer's motion objecting to the admissibility of portions of the employee's additional medical evidence. Because we hold that the challenged medical evidence was admissible pursuant to 452 Code Mass. Regs. § 1.11(6), we recommit the case so the insurer may conduct depositions or otherwise respond to the judge's admission of that evidence.

On August 16, 2005, while working as a visiting nurse, the employee slipped and fell, injuring her right knee, hip and back. (Dec. 6, 7.) She continued to work for the employer and a concurrent employer, while treating conservatively with physical therapy, epidural shots, acupuncture and massage therapy. On February 19, 2009, she had a spinal fusion at L5-S1. (Dec. 8.)

The insurer did not accept the employee's claim for compensation. A § 10A

[1] Judge Costigan no longer serves on the Reviewing Board.

conference order awarded § 34 benefits beginning January 11, 2009. The insurer appealed to a hearing. (Dec. 4.) On September 23, 2009, pursuant to G. L. c. 152, § 11A, Dr. Peter Anas examined the employee. (Dec. 2, 9.) At the commencement of the June 2, 2011, hearing, the judge allowed the parties' motions to submit additional medical evidence due to the complexity of the medical issues and the length of time since the impartial examination.[2] (Dec. 5, 9; Tr. 5.) However, rather than accept the medical evidence at the time of hearing, the judge asked the parties to submit their evidence by June 10, 2011. (Tr. 140-141.) The insurer's counsel reserved the opportunity to take depositions depending upon what evidence was presented, and the employee's counsel reserved the right to take the impartial physician's deposition. (Tr. 141.) The judge gave the parties until June 17, 2011, to decide whether to conduct depositions. (Id.)[3] The insurer's counsel again stated that her decision on whether to depose any of the employee's physicians would "in part rest upon the admissibility of the records my brother plans to offer." Id. The judge stated: "I'm assuming the records are going to come in, all the medical records by medical experts are going to come in." Id.

Both parties submitted additional medical evidence before the close of the record. (Dec. 9.) The employee did not object to any of the insurer's submissions. On June 10, 2011, the insurer submitted a written objection to various records and reports submitted by the employee. The insurer contended that these documents did

[2] In his decision, the judge also found that the report of the impartial examiner was inadequate for the gap period prior to the examination. (Dec. 5.)

[3] In his decision, the judge stated that he set a deadline of July 1, 2011, for the receipt of medical documentation. (Dec. 9.) However, the parties have not acknowledged this deadline in their briefs, and we have not located evidence of it in the board file. See 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 board file).

not comply with G. L. c. 233, § 79G,[4] or with 452 Code Mass. Regs. § 1.11(6).[5] In its motion to exclude these records, the insurer requested a ruling regarding their admissibility "prior to the close of evidence, with subsequent opportunity to take depositions of medical witnesses." (Ex. 14.)

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[4] Section 79G provides, in relevant part:

> In any proceeding commenced in any court, commission or agency, . . . reports . . . relating to medical . . . services . . . rendered to or prescribed for a person injured, or any report of any examination of said injured person . . . subscribed and sworn to under the penalties of perjury by the physician . . . rendering such services . . . shall be admissible as evidence of . . . the necessity of such services or treatments, the diagnosis of said physician . . . , the prognosis of such physician . . . , the opinion of such physician . . . as to proximate cause of the condition so diagnosed, the opinion of such physician . . . as to disability or incapacity, if any, proximately resulting from the condition so diagnosed; provided, however, that written notice of the intention to offer such report as such evidence, together with a copy thereof, has been given to the opposing party or parties, or to his or their attorneys, by mailing the same by certified mail, return receipt requested, not less than ten days before the introduction of same into evidence, and that an affidavit of such notice and the return receipt is filed with the clerk of the court, agency or commission forthwith after said receipt has been returned. Nothing contained in this section shall be construed to limit the right of any party to the action to summon, at his own expense, such physician . . . for the purpose of cross examination . . . .

[5] Section 1.11(6) provides, in relevant part:

> At a hearing pursuant to M.G.L. c. 152, § 11 . . . in which the administrative judge has made a fining under M.G.L. c. 152, § 11A(2) that additional testimony is required due to the complexity of the medical issues involved or the inadequacy of the report submitted by the impartial medical examiner, a party may offer as evidence medical reports prepared by physicians engaged by said party, together with a statement of said physician's qualification. The administrative judge may admit such medical report as if the physician so testified, provided that where specific facts are in controversy, the administrative judge shall, on motion by a party, strike any part of such report that is not based on:
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> (a) the expert's direct personal knowledge;
> (b) evidence already in the record; or
> (c) evidence which the parties represent will be presented during the course of the hearing. Pursuant to 452 CMR 1.12(5), any party may, for the purpose of cross-examination, depose the physician who prepared an admitted medical report. After such cross examination, the parties may conduct further examination pursuant to the rules of evidence applied in courts of the Commonwealth.

The judge did not communicate his ruling on the insurer's motion until he issued his hearing decision. (See Tr. of Oral Argument 3, 21-23.) In the decision, he stated:

> The insurer objected to the employee's medical submissions because as her motion stated they were not authenticated or provided to her within the time frame of ten days prior to the hearing as discussed in Chapter 233 § 79G. I was not persuaded by her argument to exclude the employee's submissions because with the records submitted to me had [sic] a C.V. for each physician. In addition I set a deadline for the receipt of the medical documentation in evidence to July 1, 2011 or just about thirty days subsequent to the hearing. The objection was overruled and the medicals were all considered.

(Dec. 9.) The judge credited the employee's testimony regarding her fall at work, as well as` her pain and limitations. (Dec. 7-8.) He adopted the § 11A opinion of Dr. Anas that the employee injured her lumbar spine in the fall, but that her other complaints of peripheral joint disease, peripheral arthralgia, neck pain and right knee pain were unrelated to the fall in 2005. (Dec. 9-10.) He also adopted the opinion of the employee's treating neurosurgeon, Dr. Stephen Johnson, that the employee had been totally disabled since her surgery in 2009.[6] (Dec. 10-11, 12, 13.) Based on the opinions of both physicians, the judge found her medical treatment reasonable and necessary, (Dec. 12), and awarded § 34 total incapacity benefits from January 11, 2009, and continuing. (Dec. 14.)

The insurer argues that its due process rights were violated by the judge's failure to rule on its objections to the admissibility of the employee's medical evidence prior to the hearing decision. We agree.

It is axiomatic that the parties at a hearing before the board have constitutional due process rights "to cross-examine witnesses of other parties, to know what evidence is presented against them and to an opportunity to rebut such evidence." Haley's Case, 356 Mass. 678, 681 (1972). As we have often held, a judge's failure to

[6] The judge specifically referenced Dr. Johnson's May 8, 2009, opinion that the employee had been disabled since her February, 2009 surgery, and his May 11, 2011, opinion that she was totally disabled. (Dec. 10-11.)

communicate a ruling on a challenge to the admission of evidence prior to the issuance of a decision will generally deprive a party of these rights:

> A judge must be vigilant in assuring that the parties are timely apprised of all rulings to which they might respond, and a judge must consistently provide the parties with a reasonable opportunity to respond to any material change in circumstances. When such vigilance does not prevail, due process violations frequently - if not necessarily - result.

Mayo v. Save On Wall Co., 19 Mass. Workers' Comp. Rep. 1, 4-5 (2005). In this case, vigilance did not prevail.

Although the record reveals a handwritten notation on the insurer's motion indicating that the judge denied the motion on June 15, 2011,[7] more than three months before the hearing decision issued, the parties agree that the first notice they received of the judge's decision to admit the challenged medical evidence was in the decision itself. (Tr. of Oral Argument, supra.) The insurer had made it clear at hearing, and in its motion objecting to the employee's medical evidence, that its decision regarding whether or not to conduct depositions depended on the judge's ruling on the admissibility of the challenged evidence. (Tr. 141, Ex. 14.) Even without such a clear request for a ruling, the judge was obligated not just to rule, but to communicate his ruling to the parties *prior to* the issuance of the decision. By failing to do so, the judge effectively deprived the insurer of the right to know what evidence was presented against it and to rebut that evidence through cross-examination, Haley's Case, supra, and thus to "present fairly the medical issues." O'Brien's Case, 424 Mass. 16, 23 (1996). See Godinez v. Perkins Paper Co., Inc., 22 Mass. Workers' Comp. Rep. 83, 88 (2008)(insurer's due process rights violated where judge admitted employee's gap medical evidence three months after record closed, over timely objection, and failed to rule on objection prior to filing decision); Fritz v. Living Assistance Corp., 22 Mass. Workers' Comp. Rep. 247, 257 (2008)(where judge set same date for parties' submission of additional medical evidence and close of record,

[7] The handwritten notation states: "Denied Overruled DM [judge's initials] 6/15/11." (Ex. 14.)

insurer had no realistic opportunity to address employee's evidence by deposition or otherwise); Mayo, supra (insurer's due process rights violated where judge allowed employee's additional medical evidence submitted at least ten days late, over insurer's objection, without ruling on objection). The fact that the employee's medical records were submitted prior to the close of the record does not cure the due process violation, in light of the insurer's objection to those records, and the failure of the judge to apprise the parties of his ruling on the insurer's motion. Cf. Botelho v. Department of Correction/Bridgewater, 20 Mass. Workers' Comp. Rep. 23, 24 (2006)(no due process violation where self-insurer admits it was aware of admission of additional medical evidence, and had opportunity to depose impartial physician). Similarly, to preserve its due process objection, the insurer was not obligated to follow its objection to the admission of the employee's medical records with notices of deposition of the employee's doctors. Godinez, supra at 89, citing Mayo, supra at 4 n. 6. Until it knew what medical records the judge had admitted, the insurer could not make an informed decision regarding whether to conduct depositions.

The employee suggests that the judge's statement at hearing that he was "assuming" all the medical records were coming in, (Tr. 141), put the insurer on notice that the employee's medical evidence would be admitted. (Employee br. 6.) However, since the evidence had not been submitted when the judge made that statement, and neither the judge nor the insurer had had an opportunity to review it or, in the insurer's case, to file an objection regarding its admissibility, this argument lacks merit. The judge's assumption was just that; it was not a ruling on admissibility. Accordingly, we recommit the case for the insurer to have the opportunity to cross-examine Dr. Johnson,[8] or otherwise rebut the admitted medical evidence.

[8] At oral argument, the insurer's counsel said that, had she been informed of the judge's allowance of the evidence, she would have deposed Dr. Johnson. (Tr. of Oral Argument, 19.)

The insurer also argues that the judge's ruling denying its motion was incorrect because portions of the employee's additional medical evidence were not admissible under either G. L. c. 233, § 79G, or 452 Code Mass. Regs. 1.11(6). The judge addressed admissibility only under § 79G, finding the employee's medical evidence admissible because "the records submitted to me had a C.V. for each physician." (Dec. 9.) He also appeared to overrule the insurer's objection that the records were not provided within ten days prior to the hearing. Id.

Medical reports are independently admissible at board hearings pursuant to G. L. c. 233, § 79G. Higgins's Case, 460 Mass. 50, 62 (2011). However, § 79G mandates that certain requirements be satisfied: 1) written notice of intention to offer reports in evidence, along with a copy of the reports, must be served on the opposing party or his attorney by certified mail, return receipt requested, not less than ten days before the introduction of the reports; 2) affidavit of such notice and return receipt must be filed with the clerk of the agency (here, the judge) after the return receipt is received; and 3) the report must be subscribed and sworn to under the penalties of perjury by the physician. G. L. c. 233, § 79G; see Commonwealth v. Schutte, 52 Mass. App. Ct. 796, 799 n. 2 (2001). The judge's findings do not indicate that these requirements were met; indeed, at oral argument employee's counsel conceded he had not filed with the judge an affidavit that notice of intent had been properly served on the employee. (Tr. of Oral Argument, 26.) Moreover, none of the records appear to have been sworn to under the penalties of perjury. See Rizzo, supra. Since all statutory requirements must be met for the records to be admissible, the judge erred in admitting them under § 79G.

However, the employee also submitted his challenged medical evidence pursuant to 452 Code Mass. Regs. § 1.11(6). The insurer argues that the contested medical records are not "reports" as contemplated by the regulation: "The report envisioned by the regulation is a full narrative report, which would include a complete

history, clinical findings, diagnostic study results, diagnosis, causal relationship opinion, and capacity/incapacity opinion." (Ins. br. 6.) The insurer offers no support for this contention, and certainly the regulation provides none. It merely states that "a party may offer as evidence medical reports prepared by physicians engaged by said party, together with a statement of such physician's qualifications." 452 Code Mass. Regs. § 1.11(6). We decline to read into the regulation a definition of "reports" not suggested by the regulation.[9] The regulation does not require certification, signature, specific content or length. The insurer's arguments that the medicals lack these elements essentially goes to the weight -- rather than the admissibility -- of the evidence, the determination of which is exclusively the judge's responsibility. Pilon's Case, 69 Mass. App. Ct. 167, 169 (2007); Celko v. PJ Overhead Door, Inc., 23 Mass. Workers' Comp. Rep. 7, 9 (2009). Accordingly, we hold that the records objected to by the insurer -- South Shore NeuroSpine Group; the May 18, 2011, one-sentence statement of Dr. Johnson; and the May 11, 2011, record of an office visit from South Shore NeuroSpine Group,[10] -- are "reports" within the meaning of the regulation, and, as such, are admissible.

Accordingly, we recommit this case to the administrative judge to allow the insurer an opportunity to respond to his ruling admitting the employee's medical records by taking medical depositions or otherwise.

[9] We note that G. L. c. 233, § 79G, provides that "any report of any examination of said injured person, including, but not limited to hospital medical records" are admissible when properly certified. The insurer's argument would have the subject regulation define "report" more narrowly than the statute.

[10] The insurer maintains the judge erred by failing to strike Dr. Johnson's May 11, 2011, office visit record on the ground that the history contained therein was erroneous. Dr. Johnson stated that the employee had not been able to get back to work since her accident in 2005, (Ex. 17), while the judge found the employee worked until 2009. (Dec. 8.) The regulation requires only that the judge strike *any part* of the report not based on, inter alia, evidence in the record. Furthermore, Dr. Johnson's May, 2011 opinion of disability is based on the employee's condition after the 2009 surgery, and in 2011.

So ordered.

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Frederick E. Levine
Administrative Law Judge

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Mark D. Horan
Administrative Law Judge

Filed: **November 13, 2012**