COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS	**BOARD NO. 012379-97**
Janice Silverman	Employee
Department of Transitional Assistance	Employer
Commonwealth of Massachusetts	Self-insurer

REVIEWING BOARD DECISION
(Judges Carroll, Levine and McCarthy)

APPEARANCES
Ronald D. Malloy, Esq., for the employee
Daniel P. LePage, Esq., for the self-insurer

CARROLL, J. The self-insurer appeals the decision of an administrative judge in which the employee was awarded ongoing § 34 temporary total incapacity benefits. One of the issues raised by the self-insurer is that the judge's reliance on the impartial examiner's report to establish causal relationship was error. (Self-insurer's brief, 4.) After a review of the evidentiary record, we recommit the decision to the administrative judge for further findings.

Janice Silverman was a part-time employee at the time of the April 3, 1997 work injury.[1] On April 3, 1997, Ms. Silverman slipped on melting snow and fell backwards. As a result of the fall, she impacted the area from the base of her skull down her spine. The employee injured her neck, back, left shoulder, right wrist and left elbow. (Dec. 5.) Ms. Silverman reported to the emergency room at the Salem Hospital following the incident. (Ex. 3.) Several weeks later she began treating with Dr. John J. Greenler. (Dec. 5.) The employee has not returned to work since the April 3, 1997 event.

[1] Ms. Silverman, who was sixty-seven years of age at the time of the judge's decision, holds a bachelor's degree in social work and had earned a year's credit toward a master's degree. In addition, she had attended one year of law school. (Dec. 4.) Although she had been employed by the Commonwealth full-time from 1984 through 1989, she left work in 1989 due to cardiac problems. In 1995, she returned to part-time work. Id. The parties stipulated that the April 3, 1997 incident was work-related. (Dec. 5.)

The self-insurer paid § 34 temporary total incapacity benefits without prejudice until February 28, 1998. (Dec. 2-3.) Thereafter, the employee filed a claim for further benefits. (Dec. 3.) On October 16, 1998, a conference order was entered in which the employee was awarded ongoing § 35 temporary partial incapacity benefits following a closed period of § 34 temporary total incapacity benefits. Both parties appealed to a hearing de novo.

Pursuant to § 11A, Dr. James S. Hewson examined the employee. (Dec. 4.) Doctor Hewson's report was deemed inadequate and the parties were authorized to submit additional medical evidence. (Dec. 1, 2, 4.) The employee submitted medical records from North Shore Medical Center and Aquatic Therapy of New England, in addition to the medical reports of Drs. John J. Walsh, Dave Hollander and John J. Greenler. (Dec. 1, 2.) The self-insurer submitted the medical report of Dr. Sidney McPherson. (Dec. 2.) At hearing the parties stipulated to the April 3, 1997 industrial injury involving the employee's neck, back, left shoulder, right wrist and left elbow. The dispute arose over whether the employee remained disabled as a result of the work injury following February 1998.[2] (Dec. 3.) In particular, the self-insurer disputed the occurrence of an alleged right shoulder injury. Id.

The § 11A examiner diagnosed traumatic cervical and lumbar ligament strain with contusions of the left elbow, left shoulder and right wrist, all causally related to the work injury. (Ex. 1; Dec. 7.) He further opined that the employee's pre-existing osteoarthritis was "seriously aggravated" by the incident and had become more severe with time. The impartial examiner considered the employee medically disabled as a result of the work incident and imposed physical restrictions that included no lifting, no forced standing and no forced sitting. (Ex. 1; Dec. 7-8.)

Doctor John J. Walsh, one of the employee's treating physicians, opined that the employee was totally disabled as a result of the work injury.[3] (Ex. 5; Dec. 7.)

[2] The parties stipulated that the employee was totally disabled from April 3, 1997 through the end of February 1998. (Dec. 3-4.)

[3] Dr. Walsh opined that the employee's disability was causally related to the work injury despite her pre-existing spondylosis. (Ex. 5; Dec. 7.)

Doctor Dave Hollander, a treating neurologist, likewise opined that the employee was totally disabled due to the work injury. (Ex. 6; Dec. 7.) Doctor McPherson, however, opined that the injury had no lasting effect on the employee's right or left shoulder. (Ex. 4; Dec. 5.) Nonetheless, there was a general consensus among the medical experts that aquatic therapy was a reasonable and necessary treatment. (Dec. 6.) Despite the numerous medical opinions submitted into evidence, not one medical expert causally related a right shoulder condition to the work incident. Id.

The judge adopted the medical opinions of Dr. Walsh, Dr. Hollander and the § 11A examiner that the employee remained totally disabled from all work.[4] (Dec. 9.) Additionally, the judge determined that the employee failed to sustain her burden as to the issue of the right shoulder claim. (Dec. 6, 9.) Accordingly, the judge ordered the self-insurer to pay ongoing § 34 temporary total incapacity benefits from the date of the work injury; medical benefits for treatment to the employee's neck, back, left shoulder, right wrist and left elbow; interest pursuant to § 50; and a fee to the employee's counsel. (Dec. 10.) The self-insurer appeals and we list its issues in the order raised.

First, the self-insurer contends that there is no medical evidence to support the judge's finding of a present and continuing work related incapacity. (Self-insurer's brief, 3.) Next, the self-insurer proffers that the administrative judge's decision with regard to the § 11A medical opinion is based upon errors of law that affected her conclusion. (Self-insurer's brief, 4.) Finally, the self-insurer maintains that the decision should be reversed, as the evidence and all inferences therefrom support the

---

[4] The administrative judge was careful to point out that although Dr. Walsh and the § 11A examiner did not use the specific words "a major" when addressing the significance of the work-related injury to the employee's ongoing incapacity, (see G.L. c. 152, § 1(7A) for the legal standard when a compensable injury combines with a pre-existing, non-compensable condition to cause disability), the totality of the medical opinion rendered by each expert persuaded her that the work injury remained a major cause of the employee's disability. (Dec. 7-8.) To support these findings, the judge cited Robles v. Riverside Mgmt., Inc., 10 Mass. Workers' Comp. Rep. 191, 198 n.6 (1996) (doctor need not incant particular magic words). (Dec. 7, 8.) We see no error in the judge's reasoning and reject the self-insurer's argument on this point.

conclusion that the employee has failed to prove a compensable injury beyond May 1998. (Self-insurer's brief, 5.) The self-insurer's second issue is dispositive of the case.

Footnote 1 on page five of the administrative judge's decision is the source of concern. In that footnote, the judge states "As to his [Dr. McPherson's] opinions on [the employee's] work sequelae condition, I find them unpersuasive compared to the opinion of the G.L. c. 152, § 11A examiner, which has *prima facie* weight in this case." (Dec. 5, n.1., emphasis in original) This is an erroneous statement of law. Prima facie evidence remains evidence throughout the trial and is entitled to artificial legal force which compels the conclusion "that the evidence is true." Coggin v. Massachusetts Parole Bd., 42 Mass. App. Ct. 584, 589 (1997). However, it retains this artificial legal force only until other "evidence appears that warrants a finding to the contrary." Cook v. Farm Servs. Stores, 301 Mass. 564, 566 (1938); see also Norton v. Bureau of State Office Bldgs., 13 Mass. Workers' Comp. Rep. 122, 126-127 (1999). Once such additional medical evidence is admitted, due to the inadequacy of the § 11A medical report or due to the complexity of medical issues involved, see G.L. c. 152, § 11A(2), [5] the § 11A medical opinion loses its artificial legal force. Norton, supra. In such an event, all medical opinions properly admitted into evidence hold equal status. Id. The judge is then free to determine the probative value of the medical evidence before her and, ultimately, may or may not adopt one or more medical opinions over the § 11A opinion. Coggin, supra at 589.

Here, the administrative judge erred where she found that the § 11A opinion maintained its "*prima facie*" weight even after additional medical opinions were allowed into evidence. Norton, supra. The judge stated that she adopted the impartial examiner's opinion over Dr. McPherson's because of prima facie weight. This is

---

[5] General Laws c. 152, § 11A, gives an impartial medical examiner's report the effect of "prima facie evidence with regard to the medical issues contained therein," and expressly prohibits the introduction of other medical evidence unless the judge finds that additional medical testimony is required due to the complexity of the medical issues involved or the inadequacy of the report. See O'Brien's Case, 424 Mass. 16 (1996).

error because the impartial examiner's opinion did not have prima facie weight at the time that the administrative judge determined which opinion to adopt. Therefore, we must recommit the case to the administrative judge for a review and reconsideration of the medical evidence in light of the correct legal standard. See O'Neil v. E.G. & G., 9 Mass. Workers' Comp. Rep. 72, 73 (1995)(inability to determine impact of error on judge's reasoning and conclusions requires recommittal). After reviewing the medical evidence in light of what we have said, the administrative judge should make additional findings and file her decision anew.

So ordered.

_____
Martine Carroll
Administrative Law Judge

_____
Frederick E. Levine
Administrative Law Judge

_____
William A. McCarthy
Administrative Law Judge

Filed: **May 3, 2001**
MC/jdm