COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 019060-15**

Jeffrey Nolette	Employee
Leahy Excavating Company, Inc.	Employer
Peerless Insurance Company	Insurer

REVIEWING BOARD DECISION
(Judges Calliotte, Koziol and Long)

This case was heard by Administrative Judge Benoit.

APPEARANCES
Paul R. Thebaud, Esq., for the employee
Jessica Bobb, Esq., for the insurer

CALLIOTTE, J. The insurer appeals from a decision ordering it to pay the employee § 34 temporary total incapacity benefits from December 11, 2015, to exhaustion, and ongoing § 34A permanent and total incapacity benefits. The insurer argues that the judge erred by relying on a nurse practitioner's vocational assessment, by failing to consider or adopt the insurer's vocational expert, and by failing to allow the insurer's Motion to Reconsider the employee's average weekly wage. Finding no reversible error, we affirm the decision.

On July 13, 2015, the employee, a heavy equipment operator, suffered an industrial injury to his right calf after jumping off an excavator. The insurer paid benefits without prejudice until December 10, 2015, after which the employee filed a claim for § 34 temporary total incapacity benefits. Following a § 10A conference on July 5, 2016, the administrative judge ordered the insurer to pay § 34 benefits from December 11, 2015, to date and continuing, at the rate of $638.40 per week based on an average weekly wage of $1,064.00. The insurer appealed to hearing, at which the judge allowed the employee's motion to join a claim for § 34A permanent and total incapacity benefits. (Dec. 2.)

The hearing was held on May 19, 2017, and the record closed September 1, 2017. (Dec. 2.) The only defenses raised by the insurer were disability and extent thereof. (Dec. 1; Tr. 4; Ex. 4, Insurer's Hearing Memorandum.) The parties stipulated, inter alia, to acceptance of liability and to an average weekly wage of $1,064.00. (Dec. 2; Tr. 4.) Dr. Fereshteh Soumekh examined the employee pursuant to § 11A on February 25, 2017, and was deposed on July 27, 2017. The judge opened the medical evidence sua sponte "because Dr. Soumekh's report was unclear on a number of points." (Dec. 2.)

In his decision, the judge found the employee, then sixty-six years old, with an eleventh-grade education and no G.E.D., to be a credible witness. The employee testified that, in addition to his work as a heavy equipment operator, he had done other jobs in the construction field, all of which involved physical work.[1] He further testified that "he always has pain in his right lower leg, which generally worsens as the day goes on," making his leg "jumpy" and causing him to be fatigued. (Dec. 4.) His leg is extremely sensitive at three points, so that touching it causes a "shock." He takes Hydrocodone/acetaminophen, Gabapentin and Baclofen, which reduce his leg pain to a 3 or 4 out of 10. He is limited to about 40 minutes of physical activity, such as yard work, before he has to rest for about the same amount of time. Driving hurts his lower leg the most, and operating heavy equipment requires the extensive use of his lower leg. (Dec. 5-6.)

The judge adopted certain specific opinions of Dr. Soumekh, including her diagnosis of "Achilles [m]yotendinous junction strain due to stretch injury on the right side," which was causally related to the July 31, 2015 work injury. The judge further adopted Dr. Soumekh's opinion that the employee was permanently and totally disabled from his job as a heavy equipment operator, as well as the restrictions Dr. Soumekh imposed, which included avoiding any strenuous activity with that leg, such as hopping,

[1] Those jobs included work as a self-employed developer of residential properties in other states, a working supervisor of an affordable housing project, a working project coordinator involved in removal, transportation and disposal of contaminated soil in Florida, and a self-employed subcontractor doing site preparation work involving bulldozers, backhoes, dump trucks and trailers. (Dec. 4.)

reaching out, jumping, or stepping on it, as well as walking for a long period of time. (Dec. 5-6.)

Turning to the employee's capacity for work, and citing Scheffler's Case, 419 Mass. 251, 256 (1994), as his "lodestar," (Dec. 6-7, 8), the judge made the following findings:

> He is now 66 years old, without any computer skills. The Employee has less than a high school education or its equivalent. His work has almost always primarily involved using heavy equipment to move soil, in one way or another, or building homes and/or traveling great distances to monitor persons who had contracted to perform that sort of work. He cannot perform any of that work now. He may be able to perform sedentary tasks, but I find that he would be unable to perform those tasks on a sufficiently consistent basis that would allow him to hold a job, even if he were able to be hired at one.
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> In her March 8, 2016 note to Liberty Mutual, the Employee's Primary Care Physician, Wendy Sergeant, NP wrote, in pertinent part, "Unfortunately, he is no longer employed at his last job, nor does he have the skills to work elsewhere. He is at the age where employers are not looking to hire, nor is he able to collect for retirement." I accept and adopt these statements of Nurse Practitioner Sergeant.
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> In a May 5, 2016 note, Janet Pearl, M.D. of Complete Pain Care, LLC wrote that she suggested ". . . modified light duty work if available for two to three hours per day following pool therapy (best to do in the morning when pain is less intense.)" That is hardly a ringing endorsement of a person's ability to be gainfully employed.

(Dec. 7.) The judge found the employee had been totally incapacitated as a result of his industrial injury from July 13, 2015, forward. Accordingly, he ordered the insurer to pay § 34 benefits based on an average weekly wage of $1,064.00, from December 11, 2015, to date and continuing, and § 34A benefits upon the exhaustion of § 34 benefits. (Dec. 8.)

On appeal, the insurer first argues that the judge erred by relying on a nurse practitioner's opinion with respect to the employee's ability to find employment in the open labor market. (Insurer br. 5-6.) The insurer argues that Ms. Sergeant, the nurse practitioner, is not a vocational expert, and does not have the qualifications and training to give such an opinion. Furthermore, the insurer maintains, her opinion "is far outside the scope of the treatment and opinions rendered by medical professionals and

providers," as she is not simply opining as to the employee's functional limitations. (Insurer br. 6.) The insurer cites no cases in support of its argument.

The employee counters that the judge acted within the scope of his authority in finding the employee permanently and totally disabled based on his adoption of the § 11A examiner's opinion, the employee's credible testimony, and the statement of Ms. Sergeant about vocational matters, and performed an appropriate analysis based on the criteria of Scheffler's Case, supra. (Employee br. 7-10.)

Although we are troubled by the judge's use of the vocational opinion of a medical expert to support an incapacity finding, we see no reversible error in the circumstances presented here. The March 8, 2016, note written by Ms. Sergeant, the nurse practitioner, was submitted by the insurer as an exhibit. (See Ex. 9, Wendy Sargent [sic], N.P. record dated 3-8-2016.) There was no objection to its admission on any grounds, or any attempt to exclude any portion of her opinion or to limit its use to a specific purpose.[2] "Once properly admitted, the probative value of the medical testimony is to be weighed by the factfinder, in this case the administrative judge." Coggin v. Mass. Parole Bd., 42 Mass. App. Ct. 584, 589 (1997), citing Robinson v. Contributory Retirement Appeals Board, 20 Mass. App. Ct. 634, 639 (1985). Thus, "[a]s [Ms. Sergeant's] opinion was properly admitted without objection, it was for the judge to determine its probative value," as he did here. Sanchez v. Industrial Polymers and Chemicals, Inc., 25 Mass. Workers' Comp.

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[2] 452 Code Mass. Regs. § 1.11(5), referring to additional medical reports admitted pursuant to § 11A(2), where the impartial report is either inadequate or the medical issues complex, states:

> 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*:
> (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.

(Emphasis added.)

Rep. 61, 65 (2011), citing Nancy P. v. D'Amato, 401 Mass. 516, 524-525 (1988); Robinson, supra at 639. Had either party sought to exclude that portion of Ms. Sergeant's report which ventured into the vocational realm on the grounds argued here, such exclusion may well have been appropriate. However, the time to object to the vocational aspect of Ms. Sergeant's report was at hearing, and that issue has now been waived. See Green v. Town of Brookline, 53 Mass. App. Ct. 120, 128 (2001), quoting Wynn & Wynn, P.C. v. Massachusetts Commn. Against Discrimination, 431 Mass. 655, 674 (2000)(" 'Objections, issues, or claims -- however meritorious -- that have not been raised' below, are waived on appeal").

We observe that if the vocational aspect of the medical opinion had been given by an impartial physician, that portion of the § 11A opinion would simply lose its prima facie effect and become ordinary evidence. In Simoes v. Town of Braintree School Dep't, 10 Mass. Workers' Comp. Rep. 772, 775 (1996), we wrote:

> Thus, wherever a § 11A opinion steps into the vocational realm and goes beyond a description of the employee's medically based physical limitations that portion of his opinion is of no special legal significance. Scheffler[']s Case, 419 Mass. 251, 257 (1996)](nonmedical matters can be relied on in proportion to their probative value but can not constitute prima facie evidence).

Simoes, supra at 775. See also Moynihan v. Wee Folks Nursery, Inc., 17 Mass. Workers' Comp. Rep. 342, 346 (2003)("the [impartial] doctor can indeed shed some light – albeit not prima facie – on the employee's vocational limitations in certain circumstances). Joseph v. City of Fall River, 16 Mass. Workers' Comp. Rep. 261, 264 (2002)(§ 11A examiner did not encroach on judge's exclusive domain to weigh vocational factors where he mentioned limited education and other health issues; at any rate any vocational determination provided by an impartial expert is of no prima facie consequence); Crosby v. Raytheon, 11 Mass. Workers' Comp. Rep. 297, 300 (1997)(§ 11A physician ventured into employee's vocational capacity when he opined the employee could perform full-time sedentary job duties, and his opinion became ordinary evidence). Even where the medical expert's opinion in question is not that of an impartial examiner, we have simply admonished the judge to carefully consider the weight to assign that opinion. See Patient

v. Harrington & Richardson, 9 Mass. Workers' Comp. Rep. 679, 683 (1995)("[I]f a medical doctor strays too far into the vocational and economic aspects of the administrative judge's responsibility for determining the degree of impairment of earning capacity, the judge must carefully consider the probative value and weight to assign to that portion of the medical opinion." Judge should "assess anew" his adoption of doctor's opinion that the employee " 'was chronically unemployable[,]'. . . and that he had 'trouble envisioning a job he could manage' ").

Most importantly, here the judge did not abdicate his role as the finder of fact. Rather, he performed his own adequate and independent vocational analysis, addressing the relevant factors of age, education, and work experience. See Scheffler, supra; Frennier's Case, 318 Mass. 635, 639 (1945)("Complete physical or mental incapacity . . . is not essential to proof of total and permanent disability. . . . It is sufficient if the evidence shows that the employee's disability is such that it prevents him from performing remunerative work of a substantial and not merely trifling character, and regard must be had to the age, experience, training and capabilities of the employee"). The judge found the employee was sixty-six years old, had no computer skills, had less than a high school education, and had always operated heavy equipment or done home-building or monitoring of such work, which required significant travel. (Dec. 7.) See Coggin, supra at 591(where judge considered employee's age, educational background and prior employment history in reaching decision, he did not err in adopting opinion of treating doctor over that of §11A physician). Consistent with Dr. Soumekh's opinion that the employee was permanently and totally disabled from his work as a heavy equipment operator, the judge concluded the employee could not do his former work. (Dec. 7.) Addressing his ability to secure and maintain another type of job, see Scheffler, supra at 256, the judge then found that, "although he may be able to perform sedentary tasks. . . he would be unable to perform those tasks on a sufficiently consistent basis that would allow him to hold a job, even if he were able to be hired at one." (Dec. 3.) This last finding is supported by the judge's earlier findings crediting the employee's complaints of constant pain and sensitivity in his right lower leg, and the resulting fatigue. (See Dec. 4.) See

Andrews v. Southern Berkshire Janitorial Service, 16 Mass. Workers' Comp. Rep. 439, 442 (2016)("judge's findings regarding an employee's pain may permit a finding of total incapacity even where the medical testimony is that the employee is partially medically impaired"). Accordingly, even if the judge erred in crediting the nurse practitioner's opinion on vocational matters, he nonetheless performed his own adequate and thorough vocational analysis supported by other facts he had found.

In addition, the insurer contends that Ms. Sergeant's note, taken as a whole, indicates that the employee is not totally disabled but is capable of sedentary work. (Insurer br. 6.) This argument does not require a different result. The judge assumed the employee may be able to do sedentary work, just not on a sustained basis, so an analysis of his "transferable skills" is unnecessary. See Smith v. DMHNS 1 North Shore Area Danvers, 31 Mass. Workers' Comp. Rep. 221, 225 (2017)(when a judge finds the employee's " 'injuries exclude him from employment,' . . . based on the employee's credible testimony and adopted medical opinion, the inquiry must end there"), citing Galdemez v. Channel Fish Co., 28 Mass. Workers' Comp. Rep. 259, 262 (2014)(when finding of total incapacity is supported by the evidence, explicit vocational analysis is unnecessary).

The insurer next argues that the judge erred by failing to consider or adopt the opinion of its vocational expert. "We have long held that a judge is free to use his own judgment and knowledge in determining whether vocational testimony is helpful." See, e.g., Casello v. Executive Glass Co., 21 Mass. Workers' Comp. Rep. 221, 223 (2007), citing Sylva's Case, 46 Mass. App. Ct. 679, 681-2 (1999), and others. Thus, while the judge must consider expert vocational evidence, he need not adopt or even discuss it. Frenier v. Hyde Manufacturing, Inc., 27 Mass. Workers' Comp. Rep. 185 (2013). Here, the judge listed the insurer's vocational expert as a witness at the hearing, (Dec. 2), and included her labor market survey, dated May 18, 2017, as an exhibit. (Dec. 3, Ex. 3.) There are thus sufficient indicia that the judge considered the expert vocational evidence, which is all he was required to do. Id. at 189.

Finally, the insurer argues that the judge erred by denying its "Motion for Reconsideration and to Re-Open the Record as to Average Weekly Wage," filed less than a month after the hearing decision was issued, but after it had filed an appeal to the reviewing board. The judge denied the motion, stating in an e-mail of June 4, 2018, that the appeal deadline was only four days away on June 8, 2018, and he did not "feel confident that such a short period of time would be adequate for the Employee to respond in a complete and thoughtful manner, and for me to give proper consideration to the two sides arguments, and [he knew] of no mechanism to stay the running of the appeal window." 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 the board file). In support of its position, the insurer relies on our decision in Howard v. Beacon Construction, 11 Mass. Workers' Comp. Rep. 290 (1997)(judge retained jurisdiction to consider employee's motion to reopen after appeal to reviewing board), and its assertion that its determination the employee was a seasonal worker with a lower average weekly wage was "newly discovered evidence." (Insurer br. 10-12.)

There are several problems with the insurer's argument. First, in Davis v. P.A. Frisco, Inc., 18 Mass. Workers' Comp. Rep. 285 (2004), we adopted the dissent in Howard, supra, effectively overruling the decision in that case. In Davis, we held that "there is no concurrent jurisdiction between the administrative judge and the reviewing board. 'Once a party enters an appeal . . . the court issuing the judgment or order from which an appeal was taken is divested of jurisdiction to act on motions to rehear or vacate." Id. at 287-288, quoting Commonwealth v. Cronk, 396 Mass. 194, 197 (1985). See also, Ramm v. Commonwealth Gas Co./NSTAR Electric & Gas, 33 Mass. Workers' Comp. Rep. ___ n.3(July 17, 2019)(due to pending appeal, judge had no jurisdiction to issue second remand decision attempting to cure inconsistencies in the first decision). Here, the insurer appealed the judge's decision on May 31, 2018,[3] *prior to* filing its Motion for Reconsideration. Thus, due to the pendency of the insurer's own appeal, the

[3] The insurer's appeal was entered into the Department's OnBase system on June 1, 2018. Rizzo, supra.

judge lacked jurisdiction to hear its "Motion for Reconsideration and to Re-Open the Record as to Average Weekly Wage." Davis, supra.

In any event, the insurer submitted no evidence that the stipulation as to average weekly wage should be vacated because it was "improvident or not conducive to justice," Loring v. Mercier, 318 Mass. 599, 601 (1945), on the asserted ground of "newly discovered evidence" or any other basis. " 'Evidence is not newly discovered, even though it was unavailable and unknown during trial, if it was anticipatable and discoverable through due diligence.' " Staff v. Lexington Builders, Inc., 31 Mass. Workers' Comp. Rep. 99, 106 (2017), quoting from Wojcick v. Caragher, 447 Mass. 200, 213-215 (2006). The insurer was at all relevant times represented by counsel. Cf. Woods v. State Board of Parole, 351 Mass. 556, 560 (1967)(if party entered into stipulation improvidently because without counsel at the time, the stipulation could be discharged as not conducive to justice). It did not challenge the claimed average weekly wage of $1,064.00 at conference, (Conference Memorandum, Form 140; Rizzo, supra), or at hearing. (Dec. 2.) The insurer does not maintain it did not have access to the employer's wage records for the employee, but simply states that, [*p]rior to the hearing decision*, it learned the employee was a seasonal worker." (Insurer br. 10; emphasis added.)

Apparently, however, the insurer had received information leading it to believe the employee was a seasonal worker, at the latest, less than a week after the record closed on September 1, 2017, because, on September 7, 2017, it filed a Form 107, "Insurer's Notification of Acceptance, Resumption or Termination or Modification of Weekly Compensation," which stated "Recalculation of AWW based upon employee's status as a seasonal employee. . . . " Rizzo, supra.[4] Over five months later, on or about February 20, 2018, the insurer filed a Form 108, "Insurer's Complaint for Modification, Discontinuance or Recoupment of Compensation," seeking recalculation of AWW based

[4] Because the insurer was no longer within the pay without prejudice period and was paying § 34 weekly benefits pursuant to a conference order, the filing of such form had no effect. See G. L. c. 152, § 8.

upon employee's status . . . as a seasonal employee."[5] Rizzo, supra. The Form 108 complaint did not generate a proceeding because the case was pending hearing decision. Id. Nonetheless, the insurer did not file a timely motion seeking to re-open the record, with the administrative judge who had jurisdiction of the case. Instead, the insurer waited until after the decision issued on May 9, 2018, and after it filed an appeal to the reviewing board dated May 31, 2018, to file its Motion, dated June 4, 2018. The timeline discussed here offers no support for the insurer's contention that the evidence it relied on in the June 4, 2018, motion was "newly discovered." See Staff, supra ("as a matter of law, the pay checks produced at trial do not fit the definition of "newly discovered evidence").

Even though the judge's reason for denying the motion was different from that discussed in this opinion, we nonetheless affirm his denial. See Lupa v. United Parcel Service, 30 Mass. Workers' Com. Rep. 27, 31 n.5 (2017), and cases cited (reviewing board will affirm decision with right result, although judge gave wrong reason).

Accordingly, we affirm the decision. Pursuant to G. L. c. 152, § 13A(6), the insurer shall pay the employee's counsel a fee in the amount of $1,705.66.

So ordered.

Carol Calliotte
Administrative Law Judge

Catherine Watson Koziol
Administrative Law Judge

Filed: ***February 28, 2020***

Martin J. Long
Administrative Law Judge

[5] Attached to the complaint were earnings reports from 7/11/14 – 7/11/15, stamped, "Liberty Mutual Insurance Received July 27, 2015." Rizzo, supra.