COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 031399-99**

John A. Taylor	Employee
USF Logistics, Inc.	Employer
Insurance Company of the State of Pennsylvania	Insurer

REVIEWING BOARD DECISION
(Judges Costigan, McCarthy and Levine)

APPEARANCES
Stephen J. Durkin, Esq., for the employee
Susan F. Kendall, Esq., and Pamela G. Smith, Esq., for the insurer

COSTIGAN, J. The insurer appeals from a decision awarding the employee ongoing G. L. c. 152, § 35, partial incapacity benefits for an accepted injury at work. The insurer contends that the decision is arbitrary and capricious, as the sole expert medical opinion in evidence, that of the § 11A impartial examiner, was that the employee could return to his pre-injury work duties as a truck driver. We agree, and reverse the decision.

On July 6, 1999, the employee was injured when a one-ton plate struck him on his dominant right shoulder, causing extreme pain in his right side and back. The employee underwent medical and chiropractic treatments. (Dec. 3.) The insurer paid benefits without prejudice until November 25, 1999. (Dec. 2.)

The employee filed a claim for further compensation benefits, and received a conference order for a closed period of total and ongoing partial incapacity benefits. The insurer appealed to a full evidentiary hearing. (Id.) The employee was examined by an impartial physician, pursuant to § 11A(2), on August 1, 2000. Based on his review of MRI studies of the employee's right shoulder and cervical spine, the impartial doctor opined that the work injury to the employee's right shoulder did cause him to have a supraspinatous tendonitis (inflammation of a shoulder tendon), but that an observed left C5-6 herniation was not causally related to the work injury. The doctor also found that the employee had developed parasthesias of the right upper extremity which were not

related to the tendonitis, but could have represented lower brachial plexus irritation. He recommended that the employee be evaluated with nerve conduction and EMG studies to ensure correct diagnosis and treatment. The impartial physician concluded that, in light of the lack of objective findings supporting disability, the employee could return to truck driving without restrictions. (Dec. 4.) When deposed and asked to assume the employee's testimony at hearing regarding his levels of pain, the doctor reiterated that the employee could return to his former job. (Dep. 13-14; Tr. 18-19.) Neither party challenged the impartial medical evidence, which the judge found to be adequate and the medical issues not complex. (Dec. 5.) See § 11A(2).

Notwithstanding the § 11A opinion, the judge concluded that the employee could not return to truck driving, because the doctor had conceded that the employee might have difficulty reaching overhead and using both arms in strenuous lifting. (Dec. 6; Dep. 11-12.) The judge assigned the employee a weekly earning capacity of $400.00 and awarded him partial incapacity benefits under § 35 at the rate of $346.00 per week. (Dec. 6-7.)

On appeal, the insurer contends that the judge erred by awarding any incapacity benefits, where the impartial physician opined that the employee was not disabled from returning to his former employment. We agree that the exclusive medical evidence in the case, introduced pursuant to § 11A(2), does not support the judge's award.

Lacking an expert opinion attesting to medical disability, it was improper for the judge to simply substitute her own view on that medical issue. "It is well established that most questions of causation and medical disability are matters beyond lay knowledge and require expert medical opinion." Valdes v. Tewksbury Hosp., 16 Mass. Workers' Comp. Rep. 196, 198 (2002), citing Josi's Case, 324 Mass. 415 (1949). Indeed, the judge's incapacity finding was based on her own unqualified medical conclusion that the employee could not return to a job that included regular lifting of up to seventy-five pounds, use of both hands, and overhead reaching. (Dec. 3, 6.) That the impartial doctor did not render a specific opinion on the employee's ability to perform lifting of up to seventy-five pounds does not permit the judge to pinch-hit on the employee's behalf.

Just as a judge is generally not competent to fill a medical evidentiary gap on her own, based only on non-medical evidence, Crandall v. Elad Gen. Contr., 16 Mass. Workers' Comp. Rep. 51, 54 (2002), she likewise may not find an employee has work restrictions which the impartial examiner did not impose. It was the employee's responsibility to correct that omission, as he had the burden of proving each and every element of his claim. Sponatski's Case, 220 Mass. 526 (1915). He did not do so.

The decision reflects that the judge credited the employee's testimony regarding his pain. (Dec. 6). Such credibility determinations are the sole province of the hearing judge and, generally, will not be disturbed. Lagos v. Mary A. Jennings, Inc., 14 Mass. Workers' Comp. Rep. 21, 26 (2000), citing Lettich's Case, 403 Mass. 389, 394 (1988). Here, however, the judge could not properly rely on the employee's testimony alone to find that he had physical restrictions which prevented him from working as a truck driver. That is because the impartial physician was asked at deposition to assume that very testimony -- that the employee's levels of pain were as he testified -- and the doctor reiterated his opinion that the employee could return to his former job. (Dep. 13-14; Tr. 18-19.) Whether on causal relationship or medical disability, a judge cannot substitute her own lay opinion for that of the § 11A physician where the doctor had the same facts before him as did the judge, when he rendered his final opinion. Burke v. Burns & Roe Enterprises, 15 Mass. Workers' Comp. Rep. 332, 338 (2001), citing Gomes v. Bristol County House of Correction, 13 Mass. Workers' Comp. Rep. 128, 131 (1999); Shand v. Lenox Hotel, 12 Mass. Workers' Comp. Rep. 365, 368 (1998).

To the extent that the judge placed stock in so much of the § 11A opinion as suggested restrictions against the employee using both hands and reaching overhead, the doctor opined only that the employee *might* have difficulty performing a job which involved such activities. (Dep. 11-12.) Such testimony falls short of meeting the employee's burden of proving, more likely than not, that he was medically disabled from returning to truck driving with such physical demands. See Costello v. JJS Servs., Inc., 11 Mass. Workers' Comp. Rep. 620, 622-623 (1997).

The employee did not move to have the impartial medical evidence declared inadequate or the medical issues complex, which might have resulted in the introduction of his own medical evidence, potentially supportive of his claim. See § 11A(2). "Given the traditional roles of the parties," it was the employee, not the administrative judge, who had the burden of moving to expand the medical record. Viveiros's Case, 53 Mass. App. Ct. 296, 299-300 (2001). He did not do so; he chose to rely on the report and testimony of the § 11A examiner. The sole expert medical evidence in this case does not support the employee's claim and the judge's misconstruction of that evidence cannot stand. Hovey v. Shaw Indus., Inc., 12 Mass. Workers' Comp. Rep. 442, 443 (1998).

Lastly, we note that there is no authority for the proposition that a judge may add the vocational factors under Scheffler's Case, 419 Mass. 251, 256 (1994), to an expert opinion of *no* medical disability, to reach the conclusion that some loss of earning capacity exists. While the determination of incapacity to work involves *more* than a medical assessment of the employee's physical impairment, see Pappalardo v. J & A Builders, Inc., 12 Mass. Workers' Comp. Rep. 112, 114 (1998), citing Scheffler, supra, that does not mean that the medical component can fall out of the picture entirely. Some measure of medical disability is a *sine qua non* of loss of earning capacity, just as some measure of vocational deficit based on that disability is also necessary for an award of compensation benefits. Accordingly, the decision is reversed.[1]

So ordered.

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Patricia A. Costigan
Administrative Law Judge

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William A. McCarthy
Administrative Law Judge

[1] The insurer's second issue on appeal, that the judge improperly limited its right to recoup overpayments from its weekly payment of ongoing partial incapacity benefits to less than the 30% allowed under G. L. c. 152, § 11D(3), although correct, is rendered moot by our reversal of the decision.

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Frederick E. Levine
Administrative Law Judge

Filed: May 14, 2003