COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 006313-00**

John Hilane	Employee
Adecco Employment Services	Employer
Insurance Co. of the State of PA	Insurer

REVIEWING BOARD DECISION
(Judges Maze-Rothstein, Costigan and Wilson)

APPEARANCES
Daniel C. Finbury, Esq., for the employee
Alicia M. DelSignore, Esq., for the insurer

MAZE-ROTHSTEIN, J. The employee appeals from a decision awarding a closed period of G. L. c. 152, § 35, weekly partial incapacity workers' compensation benefits and §§ 13 and 30 medical expenses. The employee makes three arguments on appeal. First, he contends that the judge erred in denying his motion to submit additional medical evidence based on the inadequacy of the § 11A report. We disagree. Next the employee makes a weight of the evidence and credibility argument relevant to his testimony at hearing. We remind him that since the 1991 amendments, § 11C does not allow us to weigh the evidence. And, we disagree with the employee on his credibility point as well. Finally, the employee asserts that the judge mischaracterized the opinion of the treating chiropractor admitted for the so-called "gap period," and relied on that mischaracterization in determining the issue of continuing medical disability. Because the subsidiary findings regarding duration of incapacity depart from the evidence, we recommit the matter to the judge for further consideration of this key piece of medical evidence and the general findings that flow therefrom. G. L. c. 152, § 11C.

At hearing, John Hilane was a thirty-nine year old, married father of two. He holds a business degree from a community college and a gemologist certification. (Dec.

3.) During his career, Mr. Hilane worked as a quality control inspector for McDonnell-Douglas, as a monitor technician for Sun Microsystems, and in electronics related fields at Raytheon and General Electric. He has most recently worked in jewelry sales/management for a family business. (Dec. 4.)

In January 2000, the employee began working for Adecco Employment Services as a monitor repair technician, a job that involved repairing, lifting and moving computer monitors weighing between thirty and seventy pounds each. (Dec. 4.) On February 18, 2000, while carrying a monitor, he felt back pain. He nevertheless completed his duties with assistance that day, and for one week thereafter. (Dec. 5.)

The employee then saw his primary care physician, who diagnosed a low back strain, and advised him to stay out of work. He also referred Mr. Hilane to a physiatrist, who prescribed medication and physical therapy. (Dec. 5.) Additionally, he treated with a chiropractor. Id.

By August 2000, the employee's condition had so improved that his physiatrist released him for part-time, light duty work. Id. After relocating to Florida with his family in November 2000, Mr. Hilane obtained part-time employment serially at one or more jewelry stores, earning approximately $11.00 per hour. (Dec. 5-6.)

The insurer paid the employee weekly compensation benefits under § 34 without prejudice from February 25, 2000 through August 6, 2000. Thereafter the employee claimed entitlement to ongoing weekly benefits. (Dec. 1.) A § 10A conference yielded an order to pay a closed period of § 35 partial incapacity benefits from August 7, 2000 through April 7, 2001. Aggrieved, the employee appealed to a full § 11 evidentiary hearing. Id.

On June 15, 2001, the employee was examined under the provisions of § 11A.[1] The § 11A doctor concluded that the employee suffered a low back strain with neuralgia, causally related to his work injury, but that as of the examination date, he was not medically disabled. (Dec. 7.) He noted further that the employee should then have been

[1] The § 11A examiner testified at deposition on September 28, 2001.

able to return to his usual occupation with no restrictions and no need for further testing or treatment. Id. At hearing, the employee filed, and the judge allowed, a § 11A(2) motion to submit additional medical evidence covering the "gap period" prior to the date of the § 11A examination.[2] (Dec. 1.) See G. L. c. 152, § 11(2); Berube v. Massachusetts Turnpike Auth., 12 Mass. Workers' Comp. Rep. 172, 174 (1998), citing George v. Chelsea Hous. Auth., 10 Mass. Workers' Comp. Rep. 22 (1996)(where a case involves a period of incapacity preceding the date of the impartial examination, additional medical evidence may be admitted for the limited purpose of filling the "gap period" between the time of alleged incapacity and the date of the impartial examination).

The employee submitted notes and records from his treating physiatrist. That doctor released the employee to return to work, light duty and part-time, as of August 7, 2000. By September 6, 2000, the doctor noted a marked improvement in the employee's level of function, but advised that he should continue with light duty restrictions. (Dec. 7-8.) The employee also provided notes from his treating chiropractor, and a report dated January 4, 2001, opining that the employee continued to be partially medically disabled with a light duty capacity not to exceed twenty hours per week. (Dec. 8.)[3]

The judge adopted the latter two opinions, concluding that the employee remained partially incapacitated from gainful employment from August 7, 2000 through January 4, 2001. (Dec. 8.) The judge also adopted the § 11A examiner's opinion, and found that the employee was no longer medically disabled as of the June 15, 2001 examination. (Dec. 9.) The judge concluded that the employee had an earning capacity of $220.00 per

[2] The judge had denied the employee's pre-hearing motion to submit additional medical evidence based on medical complexity or inadequacy other than for the "gap period." The employee's counsel also argued that the § 11A examiner was biased. However, the judge, unconvinced, ruled that if the testimony from the employee at hearing, and/or from the § 11A examiner at deposition, should produce something significant on the issue of bias, he would reconsider the motion for additional medical evidence for timeframes other than the "gap period." (Dec. 1, Tr. 5-11.)

[3] The insurer offered the July 27, 2000 examination report of its medical expert who opined that the employee could return to work at that time without restriction. The judge rejected that opinion. (Dec. 8.)

week and awarded a closed period of temporary partial incapacity benefits from August 7, 2000 and ending on January 4, 2001. Id. He found that the employee's partial incapacity ended on that latter date because, according to the judge "[t]he employee provided no evidence from any medical expert that he was disabled after January 4, 2001." Id.

On appeal, the employee contends it was error to deny his motion to submit additional medical evidence based on the inadequacy of the § 11A medical report. His argument mirrors that made to the judge at hearing -- that the report fails because, at its foundation, it does not reveal a firm grasp of the medical history; i.e. length of physical therapy regimen, duration of treatment with doctors and prescription situation. (Employee brief, 5.) We disagree.

Section 11A(2) provides that the physician's report shall constitute prima facie evidence of the matters contained therein. Section 11A sets out the factors that the examiner's report must address, including medical disability and extent thereof, causal relationship, medical end result and loss of function, if applicable. In addition, the § 11A report must address the above factors with regard to all of the disputed medical issues in the case. Mendez v. The Foxboro Co., 9 Mass. Workers' Comp. Rep. 641, 646 (1995). Although it is well settled that administrative judges have broad discretion in allowing additional medical evidence due to inadequacies in the § 11A report or complexities in the medical issues, judges also have a duty to resist challenges that are tenuous, baseless or frivolous. Tallent v. M.B.T.A., 9 Mass. Workers' Comp. Rep. 794, 799 (1995); see also G. L. c. 152, § 11A(2). Judicial discretion involves " 'the exercise of discriminating judgment, within the bounds of reason' . . . 'controlled by sound principles of law', '. . . combined with the courage and calmness of a cool mind' . . . 'moved only by the overwhelming passion to do that which is just.' " Saez v. Raytheon Co., 7 Mass. Workers' Comp. Rep. 20, 22 (1993), quoting Davis v. Boston Elevated Ry, 235 Mass. 482, 496-497 (1920). Additionally, neither the statute nor the regulations explicitly require the judge to give reasons for allowing or denying a motion for additional medical evidence. Dunham v. Western Mass. Hosp., 10 Mass. Workers' Comp. Rep. 818, 822

(1996); Lebrun, supra at 694, n.3 (power to rule on adequacy makes the judge the gatekeeper of the accuracy of the medical evidence).

Here, in his report dated June 15, 2001, the § 11A examiner diagnosed the employee with a low back strain and neuralgia, causally related to the work injury. (Statutory Exh. 4.) When the doctor's physical examination of the employee did not show any significant physical findings, he drew the conclusion that the employee's strain had healed, and that he could return to his usual occupation without restriction. Id. at 5.[4] At hearing, on the employee's § 11A motion for additional medical evidence, the judge inquired as to what further evidence would be offered if the motion were granted. (Tr. 8.) Counsel's response was that there was not much to give as the employee had relocated to Florida and had not treated since his move. The judge then denied the motion but allowed the parties to revisit the issue after the § 11A examiner's deposition. (Tr. 11.)

At deposition, the § 11A examiner testified that, although he found diminished reflexes, he did not agree that they were positive findings and characterized them as acceptable normal variations. (Dep. 56.) He further noted that the diminished reflexes finding did not fit into any medical picture that would lead to any other diagnosis than that which he previously made, based on a reasonable degree of medical certainty. Id.[5]

That said, we do not conclude, as a matter of law, that the § 11A examiner's report did not fulfill the requirements of § 11A(2), or that the administrative judge failed to scrutinize the doctor's opinion, or that he abused his discretion. The record reveals that the judge carefully weighed the parties' arguments on inadequacy and did not find further evidence was required for any time other than the "gap period." (Tr. 4-8.) His ruling denying the motion was not beyond the scope of his authority, arbitrary, capricious or contrary to law. G. L. c. 152, § 11C.

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[4] In addition to his examination, the § 11A examiner took an extensive history from the employee and reviewed and commented on the medical records identified by the parties at conference. Id. at 3-4, 5.

[5] On October 29, 2001, the judge formally denied the motion for additional medical evidence.

Next, the employee makes weight of the evidence and credibility arguments. Without providing authority to support his argument, he contends that the judge neither credited nor discredited his testimony and made no mention and/or comment about the employee's good faith efforts to find work after the accident. (Employee brief 7.) He further asserts that the silence as to the employee's minimal treatment in Florida and his difficult parental decisions due to his medical disability was error. Id. We disagree that this is reversible error.

Arguments as to the relative weight of the evidence have not been in our purview since the 1991 amendments to the Act.[6] Where it is the duty of the administrative judge to weigh the evidence and find the facts, we have no power to find facts or revise findings of fact made by the judge unless they are infected with error or wholly lacking in evidentiary support. Murphy's Case, 53 Mass. App. Ct. 424, 430 (2001)(the exercise of discretion requires fact finding, a task that neither the reviewing board nor the Appeals Court is authorized to undertake); Phillips v. Armstrong World Ind., 5 Mass. Workers' Comp. Rep. 383, 384 (1991); Ottani v. Ottani Tree Serv., 9 Mass. Workers' Comp. Rep. 633, 637 (1995). Moreover, in his decision, the judge does make direct reference to the employee's testimony on his physical limitations, his work history in Florida and his minimal treatment while there, (Dec. 5-6), succinctly and cogently integrating that testimony with his reasoning as to the employee's physical limitations and his capacity to earn. (Dec. 8-9.)[7] Nor do we agree that the judge's election not to comment further on this hearing testimony resulted in an exclusion of pivotal factual findings amounting to a substantial risk of injustice. Guzman v. Town and Country Fine Jewelry, 12 Mass. Workers' Comp. Rep. 50 (1998)(evidentiary error going to a pivotal issue warrants

[6] Compare G. L. c. 152, § 11C, amended by St. 1991, c. 398, § 31, and G. L. c. 152, § 11C, as amended by St. 1987, c. 691, § 7. See also Goodsell v. Nashoba Painters, Inc., 16 Mass. Workers' Comp. Rep. 104, 105 (2002)(administrative judge's weight of evidence findings on liability summarily affirmed on insurer's weight of evidence argument).

[7] Although the judge does not use the term credibility, his direct findings establish that he credited the testimony on medication, physical therapy while living in Florida, his complaints of pain, his child-care duties and employment experiences. Id.

reversal and recommittal for further findings). An administrative judge is not expected to comment on each and every scintilla of testimony or evidence presented, but only on that which he deems persuasive. To require otherwise would not only infringe upon the judge's assessment and weighing of the evidence but also detract from his ability to reach a fair and just conclusion.

The employee's final argument centers on three subsidiary findings on duration of incapacity. Referring to the January 4, 2001 report regarding the employee's condition and ability to work, the judge wrote: "Adopting the opinions [of the employee's physiatrist and chiropractor] . . . I find and conclude that the employee remained partially disabled from gainful employment from August 7, 2000 through January 4, 2001. . . . *The employee provided no evidence from any medical expert that he was disabled after January 4, 2001*." (Dec. 8-9, emphasis added.) That last observation is a misstatement of the employee's medical evidence. In his January 4, 2001 report, the employee's chiropractor opined that a full recovery was not likely in the foreseeable future and that the employee's present partial medical disability "should continue indefinitely." (Employee Ex. 7.) Having adopted that opinion, it was error for the judge to conclude that the employee had failed to provide evidence that he remained partially medically disabled after January 4, 2001.

Findings must be based on the record evidence, and inferences drawn therefrom must be reasonable. Kakamfo v. Hillhaven West Roxbury Manor Nursing Home, 14 Mass. Workers' Comp. Rep. 195, 198 (2000); Emde v. Chapman Waterproofing Co., 12 Mass. Workers' Comp. Rep. 238, 242 (1998). Otherwise, such findings are arbitrary and capricious and cannot stand. Emde, supra at 242; O'Rourke v. Town of West Bridgewater, 13 Mass. Workers' Comp. Rep. 415, 420 (1999). Findings that mischaracterize medical testimony are, thus, arbitrary and capricious. Ata v. KGR, Inc., 10 Mass. Workers' Comp. Rep. 56, 57 (1996). The judge's finding that the employee's partial incapacity ended on January 4, 2001 is unsupported by the medical evidence he adopted.

Therefore, we must recommit the case to the administrative judge for a review and reconsideration of the medical evidence and for additional findings on the extent of the employee' s incapacity from January 4, 2001 to June 15, 2001. The decision is otherwise affirmed.

So ordered.

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Susan Maze-Rothstein
Administrative Law Judge

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Patricia A. Costigan
Administrative Law Judge

Filed: September 30, 2003

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Sara Holmes Wilson
Administrative Law Judge