**COMMONWEALTH OF MASSACHUSETTS**

**DEPARTMENT OF INDUSTRIAL ACCIDENTS** **BOARD NO. 020557-16**

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| John R. Gravallese | Employee |
| General Electric Aviation Co. | Employer |
| Electric Insurance Company | Insurer |

**REVIEWING BOARD DECISION**
(Judges Long, Fabricant and Calliotte)

This case was heard by Administrative Judge Bean.

**APPEARANCES**
Sean Flaherty, Esq., for the employee at hearing and on appeal
Griffin F. Hanrahan, Esq., for the employee on appeal
Thomas P. O'Reilly, Esq., for the insurer at hearing
Paul M. Moretti, Esq., for the insurer on appeal

**LONG, J.** This appeal is from a decision ordering the insurer to pay § 34A permanent and total incapacity benefits from April 11, 2017, to present and continuing and medical benefits pursuant to §§13 and 30. The insurer alleges the administrative judge mischaracterized medical evidence, failed to conduct a proper vocational analysis, erred by denying the insurer's motion to strike the § 11A report of Dr. Frank Graf, and deprived the insurer of due process by not ruling on that motion prior to the filing of the decision. We affirm the decision as to all issues on appeal.

The employee's claim for § 34A permanent and total incapacity benefits was the subject of a hearing on July 10, 2018.[1] At hearing, the parties stipulated as to employment, an average weekly wage of $1,900.00, the occurrence of an industrial injury on June 20, 2016, and a previous industrial injury occurring on April 26, 2007, resulting

[1] The employee was receiving § 34 temporary total incapacity benefits pursuant to a § 10A conference order by the same judge dated June 9, 2017. The insurer had appealed the conference order but withdrew its appeal prior to a hearing taking place.

in a cervical spinal fusion surgery. (Tr. 3-6; Dec. 512.) The employee was examined pursuant to § 11A by Dr. Frank Graf on April 11, 2017, as part of prior litigation, and was examined again by Dr. Graf on April 10, 2018, as part of the current litigation. The parties agreed that the medical issues were complex and additional medical evidence was allowed by the judge.[2] The parties also agreed upon the additional medical records to be admitted, and that no depositions would be required. (Tr. 34-35.) The employee submitted notes and reports of treating orthopedic surgeon, Dr. Michael Ackland, notes from Boston Pain Specialists, MRI reports, and a report authored by Dr. George Whitelaw. The insurer's additional medical evidence consisted of reports authored by its expert, Dr. Michael DiTullio, dated October 17, 2016, and August 11, 2017, and a report of Dr. Mary Ezzo dated September 21, 2017. The employee was the only witness to testify at the hearing. (Dec. 512-513.)

In the hearing decision, the administrative judge relied upon the credible testimony of the employee, and the persuasive medical opinions of Doctors Graf and Ackland, and found the employee to be permanently and totally disabled. The judge rejected the opinions of the insurer's expert, Dr. DiTullio, and found as follows:

> Dr. DiTullio wrote confusing reports.…[I]n his long and dependent clause ridden sentence near the end of his report that is quoted above, he wrote that the "underlying disease process" was not "causally related to any of (the employee's) work activities of June 2016" without any discussion of what effect, if any, the employee's industrial injuries of 2007 and 2016 had on the "underlying disease process". He does not appear to expressly answer the question of --- was this underlying disease process caused, influenced or exacerbated by the industrial accidents of 2007 and 2016? I do not find Dr. DiTullio to be persuasive.

(Dec. 515.)

[2] On July 9, 2018, one day prior to the hearing, insurer's counsel filed two motions: Insurer's Motion to Open the Medical Record on Grounds of Inadequacy/Complexity, and Insurer's Motion to Strike the Impartial Examiner's Report. In its cover letter accompanying the motions, the insurer requested an opportunity to be heard on the motions at the time of the hearing. See Rizzo v. M.B.T.A., 16 Mass. Workers' Comp. Rep. 160, 161 n.3(2002)(reviewing board may take judicial notice of contents of board file).

The insurer's first argument contends that the judge mischaracterized Dr. DiTullio's opinions since "a full reading of Dr. DiTullio's report provides an easily understood opinion that does address the items raised by the judge." (Insurer br. 15.) We find no error in the judge's rejection and characterization of Dr. DiTullio's reports and opinions as "confusing" since Dr. DiTullio specifically refutes that a work injury even occurred on June 20, 2016, despite the insurer's acceptance of liability for the injury. In his August 11, 2017, report[3] Dr. DiTullio states, in pertinent part:

> Although he had an exacerbation of his symptomatic complaints in June of 2016, *I am still unable to find or document any records, which serve to verify that this was a work-related episode*. I do still believe this opinion is consistent with and supported by Nurse Practitioner Cotter's note of 07/18/2016, in which he reported that the employee declined to file an injury and illness form and "stated that he did not feel the need to complete that, as he had not experienced any recent injury."

(Ex. 4; emphasis added.)

Dr. DiTullio's challenge to the initial causal relationship issue runs afoul of our holding in Adams v. Town of Wareham, 21 Mass. Workers' Comp. Rep. 207, 209 (2007) where we held that, in an accepted case, it was error to permit an insurer's challenge of the causal relationship of the employee's present disability based on a medical opinion rejecting liability for the initial causal relationship between the industrial injury and the employee's disability. See also Kareske's Case, 250 Mass. 220, 224 (1924); Grant v. Fashion Bug, 27 Mass. Workers' Comp. Rep. 39 (2013); and Mariano v. Town of Needham, 33 Mass. Workers' Comp. Rep. __ (January 15, 2019). Despite the insurer's assertion that "a full reading of Dr. DiTullio's report provides an easily understood opinion," (Insurer br. 15), the report could not have been relied upon by the judge in any manner, and he was correct to reject it.

The insurer next asserts that the judge failed to conduct a proper vocational analysis by not addressing the employee's residual capacity to earn wages and failed to

[3] Dr. DiTullio's October 17, 2016, report contains an almost identical statement. (Ex. 4)

follow the mandates of G. L.c. 152, § 35D[4]. (Insurer br. 19-21.) We disagree. The judge outlined the employee's education and heavy-duty work history, including the positions he held at this employer. The judge credited the employee's testimony with respect to his ongoing pain, physical limitations and activities as well as his ongoing medical treatment. (Dec. 513-514.) The judge also adopted the medical opinions of Drs. Graf and Ackland, each of whom opine that, from a medical standpoint, the employee is permanently and totally disabled. (Dec. 514.)[5]

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[4] General Laws c. 152, § 35D provides in relevant part:

> For purposes of sections thirty-four, thirty-four A and thirty-five, the weekly wage the employee is capable of earning, if any, after the injury, shall be the greatest of the following:-
>
> (1) The actual earnings of the employee during each week.
> (2) The earnings that the employee is capable of earning in the job the employee held at the time of the injury, provided, however, that such job has been made available to the employee and he is capable of performing it. …
> (3) The earnings the employee is capable of earning in a particular suitable job; provided, however, that such job has been made available to the employee and he is capable of performing it. …
> (4) The earnings that the employee is capable of earning.
>
> …

[5] The judge found:

> John Gravallese, hereinafter the employee, is a 59-year-old vocational high school graduate and the father of three children, one of whom is still a minor. … From 1980 to 1988 he worked as a meat cutter for the Hilltop Butcher Shop. From 1988 to 1996 he worked for an excavation company. He began working for General Electric Aviation Company, the employer in this action, in 1996. For the employer he has worked as a bench hand, pipe fitter and mechanic.
>
> The employee suffered an industrial injury on April 26, 2007 that resulted in a spinal fusion surgery. He was out of work collecting workers' compensation benefits for a time and returned to work on a full duty basis.
>
> The employee suffered a second industrial injury on June 30, 2016. He was pulling on a wrench when he felt significant neck pain. He had been experiencing neck pain in the months before the accident, but this accident substantially increased his pain. He left work that day and has not returned. He has treated conservatively since that time.

The insurer appears to imply that the provisions of § 35D and its various methods of computing an employee's post-injury weekly wage, must be applied with every vocational analysis undertaken by an administrative judge. However, "[w]hen 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." See Smith v. DMHNS 1 North Shore Area Danvers, 31 Mass. Workers' Comp. Rep. 221, 225 (2017), citing Galdamez 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). See also Jeffrey Nolette v. Leahy Excavating Company, Inc., 34 Mass. Workers' Comp. Rep. __ (February 28, 2020.) The judge's decision that the employee is permanently and totally incapacitated is amply supported by the evidence; therefore § 35D does not apply.

The insurer next argues that the administrative judge erred by denying the insurer's motion to strike the § 11A report of Dr. Graf and deprived the insurer of due process by not ruling on its motion to strike prior to filing a decision. (Insurer br. 23.) The insurer argues,

> At conference on the Section 34A claim, the insurer objected to [sending] the medical dispute over the employee's claim for permanent and total incapacity [to Dr. Graf.] Notwithstanding the insurer's objection, Dr. Graf

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> Today the employee complains of constant neck pain and right shoulder pain that runs down his arm. He [sic] pain hurts like a toothache. He quantifies his pain as an 8 on the 0 to 10 scale most of the time. It can increase to a 9 at times. On a good day it falls to a 6. He continues to treat at a pain clinic. A spinal cord stimulator has been recommended. He would like to try it as he has been told that it could reduce his pain by half. He wants to avoid surgery. He is depressed and has trouble concentrating. He sleeps three hours a night. He collects social security disability benefits.
>
> The employee's daily routine often includes going for a walk and watching television. He recently rode his motorcycle a short distance.
>
> The employee believes that he cannot return to any type of work. He has constant pain, has difficulty concentrating and [h]as never worked in a job where he had to deal with the public. Much of his past work experience has been heavy duty in nature.

(Dec. 513-514.)

> was selected by the impartial unit as the Section 11A examiner. The selection of Dr. Graf on the Section 34A claim was to essentially ask Dr. Graf to resolve a medical dispute between the insurer's medical examiners and himself.

(Insurer br. 24.) We see no prejudice nor perceive any impropriety or appearance of impropriety with the use of the same impartial physician to examine an employee over the course of the same claim. The insurer has offered no legal precedent for its position, and a review of the record reveals no objection, written or otherwise, to the selection of Dr. Graf as the impartial physician prior to his second examination on April 10, 2018. The judge acted well within his authority pursuant to § 11A when he selected Dr. Graf from the roster of impartial medical examiners. Parenthetically, we note that where the employee is examined multiple times, it has become the custom and practice at the DIA for those examinations to be done by the same impartial physician.

The insurer's other point - that Dr. Graf was asked to resolve a medical dispute between the insurer's examiners and himself - is likewise specious. The impartial examiner, like all impartial examiners, was asked to perform an independent medical evaluation of the employee by way of a clinical examination and review of medical records submitted by both the insurer and employee at conference. A review of the employee's submissions reveals that in addition to the prior report of Dr. Graf, the reports of Drs. Ackland and Whitelaw were submitted, as well as treatment notes from Sports Medicine North and two MRI reports. The insurer submitted two medical reports of Dr. Michael DiTullio and a report authored by Dr. Mary Ezzo, all for consideration by Dr. Graf. (Exs. 3-11.) With multiple and differing opinions from both parties "on the table" for consideration by the impartial physician, there is simply no basis for the insurer's characterization of the impartial process as biased in this instance. Regardless, "even if there was a legitimate concern of []partiality or bias in this matter due to Dr. Graf examining the employee twice, there is little doubt that the administrative judge acted appropriately and cured any potential bias by admitting additional evidence as a remedy." (Employee br. 16.) See Howell v. Norton Co., 11 Mass. Workers' Comp. Rep. 161, 165

(1997)(where, amid bias allegation, we found the administrative judge fashioned an appropriate remedy and preserved the integrity of the judicial process when he allowed the self-insurer's motion to submit additional medical evidence).

The insurer also alleges it was deprived of due process because the judge did not rule on its motion to strike at the hearing. "Here, the insurer did not know the evidence against it before the decision was filed. The insurer did not have an opportunity to rebut such evidence. Had the Motion to Strike been denied rather than not ruled upon, the insurer could have deposed Dr. Graf." (Insurer br. 25-26.) However, the hearing transcript reveals that insurer's counsel did not advance an argument in support of its motion to strike at that time. Rather, the insurer and employee stipulated to the judge opening the medical record (Tr. 5), and agreed that *no depositions would be required*. (Tr. 34-35.) At the beginning of the hearing, the following colloquy took place:

> Mr. O'Reilly (Ins. Counsel): Should we address the impartial?
> Mr. Flaherty (Emp. Counsel): Oh, sure.
> The Judge: Oh, the impartial. I'm sorry, usually I do that without needing to be reminded.
> The parties have stipulated that the medical issues in this case are complex and that issue and that medical evidence should be entered into evidence. The complexity is due at least in part to the employee's neck and shoulder injuries and the fact that he now is receiving treatment for pain, and correct me if I'm wrong, he's seeing a pain management specialist?
> Mr. Flaherty: Yes.
> The Judge: So for those reasons, I'm allowing the additional medical evidence as agreed to by the parties. All right.
> Mr. Flaherty: Your honor, lastly if my brother is ok with this, we can for purposes of I guess record keeping, just stipulate that there was a work – an accepted work-related injury that took place on or about April 26th of 2007. That might be in the interest of all parties.
> Mr. O'Reilly: Yes. Yes.
> The Judge: Okay.
> Mr. O'Reilly: All in the cervical spine with fusion.
> The Judge: Industrial accident cervical spine fusion surgery.
> Mr. Flaherty: Thank you.
> The Judge: So that stipulation is made and entered on the record. Anything else?
> Mr. Flaherty: I think that will be it, your honor.
> The Judge: Very good. Mr. Flaherty you may begin with your witness.

Mr. Flaherty: Thank you.

(Tr. 4-6.)

The insurer's counsel did not mention its motion to strike at the very time he requested that the judge address the impartial opinion, and presumably any issues concerning the impartial examiner. Likewise, at the end of the hearing the insurer failed to advance its motion to strike as revealed by the following colloquy:

> The Judge: Any other witnesses Mr. Flaherty?
> Mr. Flaherty: No.
> The Judge: Mr. O'Reilly?
> Mr. O'Reilly: No, your honor. I do, subject to the court's approval if we can get a couple of weeks, we were going to agree to the medicals without a deposition. And the parties have, I believe, waived curriculum vitae certification. So if we could get a couple of weeks to get those packages to you.
> The Judge: All right. So once we go off the record we will choose a date to close the record. Anything else that needs to be put on the record?
> Mr. Flaherty: Nothing that I can think of, your honor.
> Mr. O'Reilly: No. Thank you.
> The Judge: Very well, we are off the record.

(Tr. 34-35.)

In essence, the parties agreed to submit additional medical evidence, and that such evidence would not include depositions. At no time did insurer's counsel advance an argument in support of its motion to strike at the hearing, nor did it cry foul in any closing argument brief. The time to pursue its motion to strike or to object to not receiving a ruling on its motion 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"). See also Nolette, supra.

Accordingly, the decision of the administrative judge is affirmed. The insurer is ordered to pay employee's counsel an attorney's fee pursuant to § 13A(6), in the amount of $1,705.66, plus necessary expenses.

So ordered.

Martin J. Long
Administrative Law Judge

Bernard W. Fabricant
Administrative Law Judge

Carol Calliotte
Administrative Law Judge

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