COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS	**BOARD NO. 034262-95**
Jose A. Santos	Employee
George Knight & Company	Employer
Eastern Casualty Insurance Company	Insurer

REVIEWING BOARD DECISION
(Judges Wilson, McCarthy and Smith[1])

APPEARANCES
Donald Williams, Esq., for the employee
James R. O'Leary, Esq., for the insurer

WILSON, J. The insurer appeals an award of ongoing § 34 benefits for temporary and total incapacity, contending that the impartial examiner's opinion was inadmissible because it did not meet requisite standards of reliability under the test set forth in Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993), and adopted in part by the Supreme Judicial Court in Commonwealth v. Lanigan, 419 Mass. 15, 26 (1994). We conclude that, by failing to make a timely objection to the admission of the medical opinion of the impartial examiner, the insurer failed to preserve the issue for appeal. We therefore affirm the decision of the administrative judge.

Jose Santos, a die maker with a tenth grade education in the Cape Verde Islands, was forty-one years old at the time of the hearing. (Dec. 2.) On August 22, 1995, he was rolling an oxygen tank weighing 300 or 400 pounds when it hit a bump and rolled backwards. As a result of the accident, Mr. Santos began experiencing pain in both knees and ankles and down the right side of his body. He continued to work until August 26, 1995, when his pain became so severe that he sought treatment at the Good Samaritan Hospital. A knee immobilizer was prescribed, and Mr. Santos was released. By

[1] Judge Smith no longer serves as a member of the reviewing board.

September 9, 1995, however, his symptoms worsened and he was admitted to the Good Samaritan Hospital, where he was diagnosed with juvenile rheumatoid arthritis (hereinafter "JRA"). (Dec. 3.)

Mr. Santos filed a claim for workers' compensation benefits, which was denied at a § 10A conference. (Dec. 2.) Following his appeal to a de novo hearing, a medical examination pursuant to § 11A was scheduled with Dr. Ronald J. Rapoport, a board-certified rheumatologist. (Dec. 1, 3.) Dr. Rapoport's report was admitted as Statutory Exhibit 1, without objection. (Dec. 1; Tr. 4-5, 66.) The insurer opted to depose the impartial physician, and his testimony, to which there were only minor objections, became a part of the hearing record. (Dec. 1, 4.) Dr. Rapoport noted in his report that the employee had been diagnosed with JRA, even though the findings were not "classic" for the disease, and he opined that Mr. Santos' accident at work had triggered his arthritis. (Dec. 3.) Through his deposition testimony, Dr. Rapoport stated that whether the employee was diagnosed with JRA or simply rheumatoid arthritis was unimportant to his opinion that trauma caused the disease. (Dep. 42-43; Dec. 4.) The impartial physician indicated that Mr. Santos was limited in all activities requiring motion of the joints of the upper and lower extremities and of the back, and was permanently disabled from his work as a die maker. (Dec. 3-4.) He opined, however, that the employee could do sedentary work that did not involve the use of his upper extremities and allowed him to move around once in a while. (Dec. 4; Impartial Dep. 39.)

The judge adopted Dr. Rapoport's medical opinion and found that the employee's arthritis and lower back injury were causally related to his August 22, 1995 injury at work. (Dec. 5.) She further found that the employee was totally incapacitated and had no transferable skills which would allow him to find sedentary work in the open labor market (Dec. 4). Consequently, she awarded him ongoing, temporary and total incapacity benefits. (Dec. 5.)

The insurer appeals, arguing that the impartial medical examiner's opinion was not admissible because it did not meet the reliability standards set forth in Daubert, supra,

and Lanigan, supra.[2] Specifically, the insurer maintains that the employee presented no evidence that the impartial examiner's opinion that trauma could cause juvenile rheumatoid arthritis or rheumatoid arthritis was generally accepted in the field of rheumatology. To the contrary, the insurer argues, Dr. Rapoport admitted that there were no clear conclusions within the literature and little documentation to back up his opinion. (Insurer Brief 4; Impartial Dep. 52, 20.) Regardless of the correctness of the insurer's assertions, we do not address them because, by failing to object to or move to strike the report and relevant testimony of the impartial examiner, the insurer did not preserve the issue of the admissibility of the impartial physician's testimony for appeal.[3]

Failure to make a timely objection to offered evidence constitutes a waiver to its admissibility. See Commonwealth v. Haley, 363 Mass. 513, 517 (1973). Such evidence retains its full probative value, even though it would have been excluded upon objection. See Nancy P. v. D'Amato, 401 Mass. 516, 524-525 (1988); P.J. Liacos, Massachusetts Evidence 78 (prepared by Mark S. Brodin & Michael Avery, 7th ed. 1999). To be timely, an objection must be made as soon as the error is apparent. See Commonwealth v. Baptiste, 372 Mass. 700, 706 (1977). An objection to testimony must be made before the answer is given, id., and an objection to real evidence must be made before the evidence is admitted. See Commonwealth v. Silvia, 343 Mass. 130, 136 (1961); Liacos, Massachusetts Evidence, supra at 83-84. If an objectionable answer is made, a motion to strike is the proper means of eliminating it. See Commonwealth v. Pickles, 364 Mass. 395, 399 (1973); at 79. Thus, absent a timely objection or motion to strike, an appellate body may not consider the question of whether evidence was, in fact, admissible. See Nancy P. v. D'Amato, supra at 524 ("The opinions of the plaintiffs' psychiatrist were

[2] Under the Daubert test adopted by the Supreme Judicial Court in Lanigan, "a party seeking to introduce scientific evidence in a court must lay a foundation either by showing that the underlying scientific theory is generally accepted within the relevant scientific community or by a showing that the theory is reliable or valid through other means." Canavan's Case, 48 Mass. App. Ct. 297, 299 (1999), rev'd on other grounds, Canavan's Case, 432 Mass. 304 (2000).

[3] We note that the insurer attorney on appeal is not the same as the attorney at hearing.

admitted without objection and were never subject to a motion to strike. Therefore, the defendant's challenge to the admission of those opinions and to the judge's reliance on them, on the ground that they were in part based on facts not proven on the record, may not properly be presented here."). See also Commonwealth v. Comtois, 399 Mass. 668, 674 (1987); Liacos, supra at 79-80.

The rules of evidence apply to cases before the administrative judges of the Department of Industrial Accidents. See Canavan's Case, 48 Mass. App. Ct. 297, 299 (1999), rev'd on other grounds, Canavan's Case, 432 Mass. 304 (2000). See 452 Code Mass. Regs. § 1.11(5) ("[T]he admissibility of evidence and the competency of witnesses to testify at a hearing shall be determined under the rules of evidence applied in the courts of the Commonwealth.") The department regulations further indicate that a motion to strike should be made before the administrative judge where a party contends that any part of the impartial report is not based on the expert's direct personal knowledge, evidence already in the record, or evidence which the parties represent will be presented during the course of the hearing. 452 Code Mass. Regs. § 1.11(6). In Canavan's Case, supra, where the issue raised on appeal was the same as that raised here, the Appeals Court found that the self-insurer had preserved the issue of admissibility of the opinion of the employee's expert physician for review by objecting at hearing to his opinions "relating to diagnosis, disability, and causation during [his] deposition, specifying foundation as its ground, and subsequently [arguing] to the judge that those opinions should either be stricken or excluded from evidence because they lacked the necessary reliability under the Lanigan standard." Id. at 299. On further appellate review, the Supreme Judicial Court agreed. See Canavan's Case, 432 Mass. at 309. Compare Patterson v. Liberty Mutual Insurance Co., 48 Mass. App. Ct. 586, 598 (2000) (Where the insurer had filed a motion to strike the impartial report and deposition testimony at hearing, the court, on appeal, reached the issue of whether the impartial opinion was entitled to any evidential weight).

By contrast, in the case at hand insurer counsel made no objection at hearing to the admission of the impartial examiner's report in evidence, (Tr. 4, 66), nor did he object to

the proffered opinions of the impartial examiner in his deposition. (Tr. 47, 55.) Moreover, the insurer failed to move to strike relevant parts of either the report or the deposition testimony of the impartial examiner. At the deposition, the insurer did object to the admission of Dr. Rapoport's recital of Dr. Gilson's opinion that trauma could cause rheumatoid arthritis, (Tr.45-46), but made no objection when Dr. Rapoport offered his own opinion. (Tr. 47, 55.) Since that opinion came in without objection and no motion to strike was made, the judge was entitled to give it full evidentiary weight, even if it would have been excluded had a proper objection been made. See Nancy P. v. D'Amato, supra at 524; Commonwealth v. Stewart, 398 Mass. 535, 543 (1986).

The insurer states that it objected to the submission of the impartial examiner's opinion in its Request for Findings of Fact and Rulings of Law filed on June 30, 1997, after the hearing and deposition testimony were taken.[4] However, the filing of what is essentially a brief after the close of evidence does not cure the problem caused by the insurer's failure to object to or move to strike the impartial examiner's offending testimony. See, e.g., Commonwealth v. Wood, 17 Mass. App. Ct. 304, 307 (1983) (holding that defendant waived objection to the introduction of expert testimony by

[4] The insurer mentions, in conjunction with this statement, that the judge made no finding as to complexity or inadequacy of the impartial examiner's report, but does not clearly argue that the opinion was inadequate or the medical issues complex. Neither party filed a motion to present additional medical evidence, and we see no basis for finding the impartial report and testimony inadequate as a matter of law, since the impartial examiner adequately addressed the issues set forth in § 11A(2). Cf. Wilkinson v. City of Peabody, 11 Mass. Workers' Comp. Rep. 263, 265 (1997) ("[F]aced with an inadequate impartial report and a claim he believed to be meritorious, the judge should have exercised his authority to sua sponte require additional medical evidence."). Moreover, the reviewing board has held it to be within the judge's discretion to determine whether a medical issue is complex. See Dunham v. Western Massachusetts Hospital, 10 Mass. Workers' Comp. Rep. 818, 822 (1996). The analysis in Lorden's Case, 48 Mass. App. Ct. 274 (1999), in which the court found that there was a medically complex issue requiring the admission of additional medical evidence, is inapposite. There, the judge had denied the parties' motions for additional medical evidence and then rejected the impartial medical examiner's report, thereby precluding the employee from the opportunity to fairly present his medical case. See O'Brien's Case, 424 Mass. 16, 22-23 (1996). We take the judge's adoption of the impartial physician's opinion as equivalent to a finding of adequacy and lack of complexity, and as a matter of law find no reason that she should have allowed additional medical evidence on her own motion.

failing to move to strike the testimony after it might have become apparent to him that an adequate factual basis for the testimony was lacking).

Since the insurer failed to properly object or move to strike the relevant testimony of the impartial physician, it failed to preserve the issue of admissibility of such testimony for appeal. Accordingly, we affirm the decision of the administrative judge. The insurer shall pay an attorney's fee of $1,243.36.

So ordered.

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Sara Holmes Wilson
Administrative Law Judge

Filed: October 25, 2000

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William A. McCarthy
Administrative Law Judge