COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 044190-03**

Jose Godinez	Employee
Perkins Paper Company, Inc.	Employer
A.I.M. Mutual Insurance Co.	Insurer

REVIEWING BOARD DECISION

(Judges Costigan, McCarthy and Fabricant)

APPEARANCES

David D. Bagus, Esq., for the employee
Linda C. Scarano, Esq., for the insurer at hearing
Paul M. Moretti, Esq., for the insurer on appeal

COSTIGAN, J. The insurer appeals from an administrative judge's decision awarding the employee a closed period of § 35 partial incapacity benefits. The insurer argues the judge erred by admitting additional medical evidence from the employee after the record closed, without ruling on the insurer's objection or giving it an opportunity to respond to the employee's evidence. Because we agree, we reverse the decision, vacate the award of benefits and recommit the case for further findings consistent with this opinion.

Jose Godinez, a thirty-nine year-old native of Guatemala with an eighth grade education in that country, (Dec. 5), injured his back while lifting a box at work on January 22, 2003. A co-worker took him to the hospital, and he later saw his primary care physician for back pain. (Dec. 6.) He returned to work two weeks later. (Dec. 6.) Commencing in September 2003, the employee treated conservatively with a number of doctors, some of whom prescribed pain medication. (Dec. 7.) He also underwent physical therapy for several weeks. (Dec. 2, 7.) On November 6, 2003 he left work for good, after his pain worsened. (Dec. 6.) At hearing, the employee testified he was unable to return to work for the employer or anywhere else due to continuing pain, limitations and difficulty sleeping. (Dec. 8.)

The insurer did not accept the employee's claim. The administrative judge denied the claim at a § 10A conference, and the employee appealed to a hearing de novo. On November 1, 2004, Dr. Gilbert Shapiro examined the employee pursuant to § 11A; his

report and deposition testimony were admitted as evidence. (Dec. 3; Stat. Ex. A.) Dr. Shapiro opined the employee had suffered a lumbosacral strain causally related to the lifting incident at work but, at the time of the examination, he had reached a medical end result and was able to return to unrestricted employment. (Dec. 9-10.)

At hearing, the judge denied the employee's § 11A motion to open the record for additional medical evidence, finding the impartial medical report adequate and the medical issues not complex. (Dec. 3.) However, she allowed the parties to submit additional medical evidence for the twenty-one month "gap" period between the date of injury and the impartial examination. (Dec. 4.) The insurer submitted its medical evidence on or about February 27, 2006, without objection by the employee. (Dec. 3; Ex. 5.) By letter dated May 9, 2006, the judge notified the parties the record would close on June 30, 2006. (Notice of Case Closing dated May 9, 2006.)[1]

By letter dated October 6, 2006, over three months after the date set by the judge for the close of the record, the employee submitted his medical evidence. [2] The judge allowed the employee's medical and hospital records into evidence "over the objection of the Insurer." (Dec. 3.)

The judge adopted the impartial physician's opinion that the employee had suffered a work-related lumbosacral strain which had resolved by the time of the § 11A examination. [3] (Dec. 11.) With respect to the "gap" period prior to the impartial

---

[1] We take judicial notice of this document, contained in the Board file. Rizzo v. M.B.T.A., 16 Mass. Workers' Comp. Rep. 160, 161 n.3 (2002). We also note that the June 30, 2006 closing date was the fourth given by the judge, the original date having been set as March 31, 2006. Three thirty-day extensions of time were then requested by, and granted to, the employee. Moreover, the June 30 th date was for the submission of closing arguments and close of the record. The parties were to submit their respective medical evidence, and to complete depositions, by *June 2, 2006*, with deposition transcripts due by June 16, 2006. (Notice of Case Closing dated May 9, 2006.) Thus, the employee's submission was in fact over four months late.

[2] That evidence, as contained in the Board file, is stamped as having been received by the judge on October 10, 2006. See Rizzo, supra.

[3] Although the insurer raised § 1(7A) in defense of the employee's claim, the judge found that statute's "a major cause" standard did not apply because the insurer had failed to meet its burden of producing evidence the work injury combined with a pre-existing condition. (Dec. 12-13.) Dr. Shapiro's testimony in that regard was that the work injury

examination, the judge adopted the opinion of Dr. Michael Souza, one of the employee's treating physicians, that the employee was partially disabled as a result of his work-related injuries. [4] (Id.) The judge awarded the employee § 35 partial incapacity benefits from November 7, 2003 to November 1, 2004. (Dec. 19.)

The insurer argues the judge erred by admitting the employee's "gap" medical evidence three months after the close of the record, over its timely objection, and by failing to rule on its objection prior to the filing of her decision. The insurer also argues that the judge's mishandling of the employee's proferred medical evidence deprived it of the opportunity to rebut it. Finding merit in both arguments, we vacate the judge's award of benefits and recommit the case.

"It is well settled that an administrative judge has broad discretion in setting procedure for matters assigned to [her] docket," including "broad discretion on determinations of record closure." Weitkunat, Jr. v. Springfield Muffler Co., 17 Mass. Workers' Comp. Rep. 252, 256 (2003), citing Kerr v. Palmieri, 325 Mass. 554, 557 (1950)(judge has discretion to determine whether to grant motion to permit additional evidence after trial has been closed). "[W]hether the judge acts on [her] own initiative or in response to a motion in managing the closure of the record . . . is inconsequential as long as there is no abuse of discretion . . . ." Weitkunat, supra at 257; Kerr v. Palmieri, supra. See also G. L. c. 152, § 11A(2)("[T]he administrative judge may, on [her] own initiative or upon a motion by a party, authorize the submission of additional medical testimony. . ."). Thus,

---

"may" have aggravated the employee's underlying degenerative disc disease. (Dec. 10; Dep. 12-13.) The insurer does not challenge the judge's § 1(7A) ruling on appeal.

[4] The only opinion of Dr. Souza cited by the judge was that given on August 24, 2004: "[I]t is my opinion to a reasonable degree of medical certainty that [the employee] *is* partially disabled" as a result of his work related injuries of January 22, 2003. (Dec. 11; Ex. 6; emphasis added.) The judge also cited, but did not expressly adopt, Dr. Younes's report of January 24, 2003 that the employee had been injured at work and was to stay out of work for two weeks, and Dr. Malone's opinion on December 11, 2003 that the employee was suffering from a T-12 compression fracture, in need of a bone scan, and could engage in activities as tolerated following the bone scan. (Dec. 11.)

it was within the judge's discretion to invite the parties to submit additional medical evidence, and to set a reasonable date by which they must do so. [5]

It was not within the judge's discretion, however, to accept the employee's additional medical evidence submitted a) without motion; b) over three months after the date on which the record closed; c) over the insurer's timely objection; and d) without ruling on the objection before the issuance of her decision, thereby depriving the insurer of its due process right to respond to such evidence. See Gulino v. General Electric Co., 15 Mass. Workers' Comp. Rep. 378, 381 (2001)("while the administration of [her] own courtroom is a matter within the exercise of the judge's sound discretion, such discretion does not include the authority to . . . foreclose the opportunity for the parties, at their election, to fully address the medical issues by cross-examining the expert witnesses").

The record reflects the insurer's objection to the employee's submission of medical evidence was received on October 13, 2006, approximately three days after the judge received the employee's submission, and more than a month before the judge filed her hearing decision. The grounds for objection were that the employee's records were neither certified nor submitted with curriculum vitae, and with the evidentiary record already closed, the insurer had not been afforded an opportunity to depose the providers whose records and reports were offered. (Insurer's Objection to Submission of Medical Records and Motion to Strike Those Records As Evidence, dated October 13, 2006.) The judge's decision states she overruled the insurer's objection, (Dec. 3), but there is no indication in the decision or the board file that the ruling was communicated to either party *prior* to the issuance of the hearing decision. [6] To the extent the judge did not notify the insurer of her ruling on its objection, or provide it with the opportunity to respond to

[5] At the pre-transcript conference, employee's counsel represented that the judge's office had called asking about the employee's gap medical evidence. There is no documentation in the record that such an *ex parte* communication occurred, even though an inference could be drawn that it did, given that the employee's additional medical evidence was suddenly submitted by him, and accepted by the judge, more than three months after the date the judge set for close of the record.

[6] In its cover letter to its objection, the insurer asked the judge to schedule either a motion session or a status conference to address the objection. We find nothing in the decision or the board file reflecting that such a proceeding was held.

the employee's evidence, she deprived the insurer of its constitutional due process right to know what evidence was presented against it and to rebut such evidence through cross examination.

> Fundamental requirements of due process entitle parties to a hearing at which they have an opportunity to present evidence, to examine their own witnesses, to cross-examine witnesses of other parties, *to know what evidence is presented against them and to have an opportunity to rebut it*, as well as to develop a record for meaningful appellate review. Casagrande v. Massachusetts Gen. Hosp., 15 Mass. Workers' Comp. Rep. 383, 386 (2001), citing Haley's Case, 356 Mass. [678 (1970]. . . . An administrative judge has broad discretion, and an obligation to control the conduct of hearings and related proceedings. Suez v. Raytheon Corp., 7 Mass. Workers' Comp. Rep. 20, 22 (1993). . . . Judicial discretion to conduct and control proceedings is not unbridled, however, and is subject to appellate review. Ackroyd's Case, [340 Mass. 214, 219 (1960)]; Meunier's Case, 319 Mass. 421 (1946).

Anderson v. Lucent Technologies, 21 Mass. Workers' Comp. Rep. 93, 95-96 (2007) (Emphasis original.) See also, O'Brien's Case, 424 Mass. 16, 23 (1996).

In Mayo v. Save On Wall Co., 19 Mass. Workers' Comp. Rep. 1 (2005), a case with a very similar procedural fact pattern, we held:

> The judge's allowance of the late-submitted additional medical evidence, particularly in light of the insurer's objection, should have been communicated to all parties prior to the issuance of the decision. The insurer should then have been afforded a reasonable time to respond to the new evidence of record. . . . A judge must be vigilant in assuring that the parties are timely apprised of all rulings to which they might respond, and a judge must consistently provide the parties with a reasonable opportunity to respond to any material change in the circumstances. When such vigilance does not prevail, due process violations frequently -- if not necessarily --result.

Id. at 4. (Citations omitted.) We further noted that the fact the insurer did not follow its objection to the admission of the employee's medical records with notices of deposition of the employee's doctors did not cure the due process violation. Id. at 4 n.6. Cf. Botelho v. Department of Correction/Bridgewater, 20 Mass. Workers' Comp. Rep. 23, 24

(2006)(where self-insurer was aware of judge's allowance of additional medical evidence and her extensions of the close of the record deadlines, self-insurer's due process rights were not violated).

Accordingly, we recommit this case to the administrative judge for a ruling on the insurer's motion to exclude the employee's medical evidence. We remind the judge:

> The scope of a judge's authority to admit evidence is governed by 452 Code Mass. Regs. § 1.11(5), which provides in pertinent part: "[u]nless otherwise provided by M.G.L. c. 152 or 452 C.M.R. [§]1.00, the admissibility of evidence . . . shall be determined under the rules of evidence applied in the courts of the Commonwealth." See Haley's Case, supra at 681-682. The admission of hospital records in workers' compensation proceedings is governed by G. L. c. 152, § 20, which in relevant part provides:
>
> > Copies of hospital records kept in accordance with section seventy of chapter one hundred and eleven, *certified by the persons in custody thereof to be true and complete*, shall be admissible in evidence in proceedings before the division or any member thereof.

Pinhancosv. St. Luke's Hosp., 17 Mass. Workers' Comp. Rep. 412, 418 (2003). (Emphasis in original). The hospital records offered by the employee, (Ex. 6), bear no such certification. Moreover, the records and reports of the employee's treating physicians were not offered pursuant to 452 Code Mass. Regs. § 1.11(6). [7] "An administrative judge has no power to admit evidence at a hearing in a manner contrary to the department's rules." Pavao v. Chase Collections, 13 Mass. Workers' Comp. Rep. 39, 41 (1999), quoting Flaherty v. Browning-Ferris Industries, 9 Mass. Workers' Comp. Rep. 630, 632 (1995). [8] On recommittal, should the judge overrule the insurer's objection, she

[7] 452 Code Mass. Regs § 1.11(6), provides, in relevant part:

> At a hearing pursuant to G.L. c. 152, § 11 . . . a party may offer as evidence medical reports prepared by physicians engaged by said party, together with a statement of said physician's qualifications.

[8] Contrary to the judge's finding, (Dec. 2, n.1), the insurer clearly objected to the admission of the employee's medical evidence on these grounds. (See Insurer's Objection

must afford the insurer the opportunity to respond to the employee's admitted medical evidence, by deposition or otherwise.

Accordingly, we reverse the administrative judge's decision, vacate the award of benefits, and recommit the case for her to deal with the insurer's objection to the submission and admission of the employee's medical evidence in accordance with this opinion. On recommittal, the judge shall make such additional subsidiary findings of fact and general findings as her ruling on the insurer's objection requires.

_____
Patricia A. Costigan
Administrative Law Judge

_____
William A. McCarthy
Administrative Law Judge

_____
Bernard W. Fabricant
Administrative Law Judge

Filed: May 16, 2008

to Submission of Medical Records and Motion to Strike Those Records As Evidence, dated October 13, 2006.)