COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 003089-07**

Joseph D. Brooks	Employee
Hoboken Floors	Employer
United States Fire Insurance Company	Insurer

REVIEWING BOARD DECISION
(Judges Costigan, Horan[1] and Levine)

The case was heard by Administrative Judge Brendemuehl.

APPEARANCES
Bernard J. Mulholland, Esq., for the employee
Scott J. Burke, Esq., for the insurer at hearing
Byron G. Mousmoules, Esq., for the insurer on appeal

COSTIGAN, J. The insurer appeals from the administrative judge's decision awarding the employee § 34A permanent and total incapacity benefits for a work-related right minor shoulder injury. We affirm.

Liability for the employee's January 15, 2007, work injury was established by prior hearing decision filed by the same judge on April 28, 2008. (Dec. 2, 4.) Following a § 10A conference on the employee's § 34A claim, the judge awarded a closed period of § 34A benefits, from January 16, 2010 to January 16, 2011, and maximum § 35 partial incapacity benefits from January 17, 2011 and continuing. The parties cross-appealed. (Dec. 2-3.)

Pursuant to § 11A, on May 14, 2010, the employee underwent an impartial medical examination by Dr. John McConville.[2] The doctor diagnosed post traumatic brachial plexopathy affecting the right C5 and C6 nerve roots with persistent atrophy, weakness, and fasciculations involving the right shoulder girdles. (Dec. 7; Stat. Ex.

---

[1] Judge Horan recused himself and did not participate in panel deliberations.

[2] The doctor had previously performed an impartial medical examination of the employee on August 8, 2007. (Stat. Ex. A [May 14, 2010 McConville report].)

A, 3-4.) Dr. McConville noted the employee's injury basically had "neither further deteriorated nor improved over the past three years" since he had last seen the employee. (Stat Ex. A, 1.) In his report, the doctor stated:

> It [is] the opinion of the examiner that Joseph Brooks continues to remain permanently and totally disabled from entering any type of gainful employment and certainly not in his prior activity as a laborer for Hoboken Floors.
>
> I feel that he has reached a level of maximum medical improvement. I further feel there is no reasonable or optimistic outlook for further improvement either with continued conservative management or any type of invasive aggressive surgical treatment.
>
> In my opinion the outlook for any further improvement is extremely bleak and I feel that his situation is permanent and will not improve with any type of treatment in the future.

(Id., 4.)

At his deposition, however, when questioned by insurer's counsel, Dr. McConville offered that the employee might be able to perform gainful employment with his left major arm:

> Q. Okay. What kinds of work activities as of May 10th, 2010 did you feel that Mr. Brooks could do?
> A. . . . [H]e surely could handle – hold a telephone with his opposite left hand. He could operate to a limited degree a keyboard with his left hand. He could write. He could lift things with his left hand. But his abilities as a gainful employment [sic] would be in my judgment limited to his dominant left upper extremity.
> Q. So heavy physical labor that required the use of both arms would be something that he could not do?
> A. In my opinion he could not do it.

(Dep. 48-49.)

The insurer argues that the judge erred by failing to adopt the impartial physician's opinion that the employee had some capacity to perform remunerative work involving only his dominant left extremity. It is axiomatic, however, that the vocational opinions of an impartial physician are not accorded the prima facie status that the doctor's medical opinions have. See Scheffler's Case, 419 Mass. 251, 256

(1994). The judge was within her authority to reject the doctor's vocational assessment, although she found the employee was as physically limited as described by the impartial physician. (Dec. 8.) Moreover, the judge credited the employee's testimony as to the degree of pain and limitations he experiences. (Dec. 5-6, 9.) The judge found that the employee, although young and a high school graduate, has had no further education or training. His employment history is limited to heavy exertional work, and he has never worked in a sedentary or light capacity. She found "he would be unable to sustain employment given his current physical and vocational limitations," and that he is unemployable on the open labor market until he receives some type of retraining. (Dec. 9.) The judge accordingly awarded § 34A permanent and total incapacity benefits from and after January 16, 2010, when § 34 total incapacity benefits were exhausted. (Dec. 3, 10.) There is no error.

The insurer further argues that the judge erred by denying its motion for additional medical evidence due to the complexity of the medical issues. The insurer moved for such a ruling prior to the deposition of the impartial physician. The judge's denial of the motion at that time was wholly within the bounds of her broad discretion in this area of practice under § 11A(2). See Dunham v. Western Massachusetts Hosp., 10 Mass. Workers' Comp. Rep. 818 (1996). "[A] judge's decision whether or not to consider additional medical evidence is to be reviewed under the 'abuse of discretion' standard." Murphy v. AM. Steel & Aluminum Corp., 25 Mass. Workers' Comp. Rep. 71, 76 (2011), citing Coggin v. Massachusetts Parole Bd., 42 Mass. App. Ct. 584, 588 (1997); Gargan's Case, 75 Mass. App. Ct. 1109 (2009)(Memorandum and Order Pursuant to Rule 1:28); Tavano's Case, 74 Mass. App. Ct. 1126 (2009)(Memorandum and Order Pursuant to Rule 1:28); and Thiboult's Case, 74 Mass. App. Ct. 1120 (2009)(Memorandum and Order Pursuant to Rule 1:28). Moreover, inasmuch as the judge gave the insurer leave to refile its motion after the § 11A deposition, there was no abuse of discretion in her original ruling. (Dec. 4.)

The deposition took place as scheduled, and the doctor's testimony deviated in some respects from the opinions he rendered in his report. In particular, the insurer points to Dr. McConville's reference in his report to "the most unusual and highly complicated nature of [the empoyee's] work site injury," (Stat. Ex. A, 1), and his testimony that the employee's was a particularly complex and puzzling case. (Dep. 44.) These statements might have supported a renewed motion for a ruling of medical complexity, but the insurer did not file such a motion. Essentially, the insurer's argument on appeal is that it was incumbent upon the judge to allow additional medical evidence sua sponte. (Ins br. 9-11.) "Given the traditional roles of the parties, however, it was [the insurer], 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). It failed to do so.

Lastly, the insurer argues the judge erred by failing to adopt the opinion of its vocational expert that the employee has transferable skills and the capacity to perform work requiring the use of only his left arm. Again, the insurer ignores a long-established maxim -- that a judge need not adopt a vocational expert's opinion, even if uncontradicted, nor discuss the expert's opinion in her subsidiary findings. The judge is under no duty to explain her reasons for rejecting such evidence. See Martin v. Sunbridge Care and Rehab. for Hadley, 22 Mass. Workers' Comp. Rep. 1, 5 (2008). That said, the judge did discuss the testimony of the insurer's vocational expert, and explained why she did not adopt it. (Dec. 8-9.) There is no error.

Accordingly, the decision is affirmed. Pursuant to § 13A(6), the insurer is ordered to pay employee's counsel an attorney's fee of $1,517.62.

So ordered.

_____
Patricia A. Costigan
Administrative Law Judge

Filed: **July 30, 2012**

_____
Frederick E. Levine
Administrative Law Judge