COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 000994-07**

Julio E. Echeverria	Employee
Costa Fruit & Produce	Employer
Liberty Mutual Insurance Co.	Insurer

REVIEWING BOARD DECISION
(Judges Horan, Costigan and Koziol)

The case was heard by Administrative Judge Jacques.

APPEARANCES
John J. Sheehan, Esq., for the employee
Dennis M. Maher, Esq., for the insurer at hearing
Gerald T. MacCurtain, Esq., for the insurer on appeal

HORAN, J. The employee raises two issues on appeal from a decision authorizing the insurer to discontinue his total incapacity benefits as of February 4, 2008. We affirm the decision.

On January 12, 2007, the employee, working as a truck driver, slipped and fell on ice.[1] (Tr. 12.) He claimed injuries to his back, ankle, and left shoulder.[2] (Tr. 13.) He underwent left shoulder surgery on September 7, 2007. (Dec. 5.) When the surgeon informed him that he would likely be cleared to return to work upon removal of his sutures, the employee sought a second opinion with Dr. Brian

[1] The parties stipulated the employee suffered an industrial injury on the date claimed.

[2] Our review of the board file, see Rizzo v. M.B.T.A., 16 Mass. Workers' Comp. Rep. 160, 161 n.3 (2002), reveals the employee's original claim was for injuries to his low back, ankle and shoulder. At the § 10A conference, the employee claimed an injury to his left shoulder only. A different administrative judge ordered the insurer to pay the employee § 34 benefits from June 27, 2007, to January 31, 2008, and § 35 benefits from February 1, 2008, to date and continuing. (Dec. 2.) Both parties appealed from the conference order, and at the hearing, agreed that no § 11A impartial medical examination was necessary. (Dec. 3.)

Awbrey. (Dec. 5-6). Doctor Awbrey opined the employee's surgery was a success, and that his prognosis for a return to work was excellent. (Dec. 6.)

At the behest of the insurer, on February 5, 2008, the employee was examined by Dr. Robert Pennell. (Dec. 6.) At the hearing, the employee testified he arrived at that medical examination accompanied by another person to interpret for him, but that Dr. Pennell told him it was not necessary for the interpreter to participate as he, Dr. Pennell, spoke Spanish.[3] (Tr. 20.) The employee testified the examination took "[a]pproximately an hour and a half," and that he, *and* Dr. Pennell, communicated in Spanish. Id. The employee testified, however, that the doctor didn't always understand what he was saying. (Tr. 21-22, 41.) The employee testified that during the examination, he again asked the doctor to permit his interpreter to enter the room, but the doctor denied his request. (Tr. 21-22). Following his examination of the employee, Dr. Pennell authored medical reports causally relating the employee's shoulder injury to his work, but also opining the employee was "able to return to work at the present time on a full-time, full-duty basis." (Ins. Exs. 2(a) and (b); Dec. 7.) Doctor Pennell was not deposed.

Throughout most of the hearing, the employee testified in Spanish through an interpreter. In her decision, the judge credited the employee's testimony that he was able to communicate with his customers in English. She also noted he successfully completed a written test in English to qualify for his commercial driver's license. (Dec. 3-4.)

In authorizing the insurer to discontinue the employee's § 34[4] benefits, the judge adopted Dr. Pennell's opinion that the employee could return to work, and noted, "even Dr. Awbry [sic], whose opinion I otherwise reject, allowed that the surgery had been successful. . . ." (Dec. 7-8). The judge also discredited the

[3] The record fails to identify the name of the employee's interpreter, or whether that individual was in fact bilingual in English and Spanish.

[4] We realize the judge's decision did order, on the employee's appeal, the insurer to pay total disability benefits for a period slightly in excess of the period ordered at conference.

employee's testimony that his constant pain rendered him unable to work. (Dec. 8.)

Under an argument heading asserting the decision is arbitrary and capricious because the judge adopted the opinions of Dr. Pennell, the employee advances two arguments attacking the weight of that evidence. The employee argues Dr. Pennell's examination was "flawed" given his "refusal to allow the use of a Spanish interpreter and his inability to understand the employee's statements and responses during the examination," and because Dr. Pennell did not change his opinion on the basis of an MRI taken the day after the examination.[5] (Employee br. 10.)

We are not authorized to weigh evidence. G. L. c. 152, § 11C; DeCicco v. Hapwood Globe Retinning Corp., 11 Mass. Workers' Comp. Rep. 376, 377-378 (1997). Moreover, it was entirely within the purview of the judge's fact-finding authority to adopt, in whole or in part, any medical opinion in evidence. Clarici's Case, 340 Mass. 495, 497 (1960); Luczek's Case, 335 Mass. 675, 677-678 (1957); Mercier's Case, 315 Mass. 238, 240 (1943). Furthermore, although the employee testified consistent with his first argument, he also conceded that Dr. Pennell communicated with him *in Spanish,* and his opinion that the doctor misunderstood him was only that, based on Dr. Pennell's reactions to his answers.[6] (Tr. 20-21, 40-41).

More fundamentally, we note the employee did not object to the admission of, or move to strike, Dr. Pennell's reports. Nor did the employee request the judge to squarely address whether an interpreter's participation was required at Dr.

[5] Dr. Pennell did review the MRI in question and, in an addendum to his initial report, explained why his original opinion on the employee's work capacity remained unchanged. (Ins. Ex. 2(a)).

[6] The judge was free to credit or discredit as much of the employee's testimony as she saw fit.

Pennell's examination.[7] Because the issue was never presented to the judge, we consider it waived. Green v. Town of Brookline, 53 Mass. App. Ct. 120, 128 (2001); Conrad v. McLean Hosp., 19 Mass. Workers' Comp. Rep. 292, 293 (2005); Santos v. George Knight & Co., 14 Mass. Workers' Comp. Rep. 289, 293 (2000); Martin v. Town of Swansea Sch. Dept., 12 Mass. Workers' Comp. Rep. 447, 449 (1998); See Rego v. ACT Mfg., 13 Mass. Workers' Comp. Rep. 83 (1999)(issue waived where no objection at hearing to "interpreter's competence or the adequacy of her translation").

The employee's final argument also fails. He avers the judge erred by failing to conduct a vocational analysis, and that her decision lacks sufficient subsidiary findings to support her conclusion that the employee was able, as of February 5, 2008, to earn his pre-injury wage. In light of the judge's adoption of Dr. Pennell's opinion that the employee was no longer disabled, no such analysis was required. Scheffler's Case, 419 Mass. 251, 256 (1994)(goal of disability adjudication is realistic appraisal of the medical effect of the work-related injury on the employee and award compensation for any resulting impairment of earning capacity); Taylor v. USF Logistics, Inc., 17 Mass. Workers' Comp. Rep. 182, 186 (2003)(medical disability is a *sine qua non* of the earning capacity analysis).

The decision is affirmed.

So ordered.

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[7] Had the employee so moved, the judge would have been obligated to address the issue, as it is fundamental to the employee's due process right to be provided with a reasonable means by which to be understood. The closest the employee came to bringing the issue to the judge's attention is found in his written closing argument, where he pleads that Dr. Pennell's opinion "should be disregarded entirely and given no evidentiary weight." This bit of advocacy, done at the close of the case, is not akin to a *motion to strike* the doctor's opinions, contained in his two reports, from the evidentiary record. Thus, it cannot be said the judge erred by failing to strike the opinions contained in the reports of Dr. Pennell, based on his alleged failure to understand the employee, or because of his failure to permit an *alleged* interpreter to attend the employee's medical examination, because she was never asked to do so. See footnote 3, supra.

Mark D. Horan
Administrative Law Judge

Patricia A. Costigan
Administrative Law Judge

Catherine Watson Koziol
Administrative Law Judge

Filed: