COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 073259-01**

Kenneth Anderson	Employee
Lucent Technologies	Employer
Liberty Mutual Insurance Co.	Insurer

REVIEWING BOARD DECISION
(Judges McCarthy, Costigan, and Horan)

APPEARANCES
John F. Trefethen, Jr., Esq., for the employee
Mary Ann Calnan, Esq., for the insurer

McCARTHY, J. The insurer appeals an administrative judge's decision awarding the employee § 34A weekly permanent and total incapacity benefits and § 30 medical benefits for a low back work injury, right knee symptomology and emotional depressive sequelae. Because the insurer was deprived of its due process right to rebut medical evidence relative to the employee's claimed emotional illness, we vacate the decision and recommit the case for further proceedings consistent with this opinion.

On May 25, 2001, Mr. Anderson sustained an industrial injury to his low back when he attempted to adjust a lathe while welding glass fiber optic cable. Conservative treatment did not relieve his pain, so spinal surgery was eventually performed. A second course of conservative treatment including steroid injections, physical therapy, spinal electrical stimulation and narcotic medication was also not helpful. (Dec. 4.)

The insurer voluntarily paid § 34 benefits from the date of injury. Then, on March 12, 2003, the insurer filed a complaint for modification or discontinuance, which was denied at conference; the insurer timely appealed. Thereafter, the insurer withdrew its appeal, resumed payment of § 34 benefits until statutory exhaustion, and then voluntarily paid weekly partial incapacity benefits under § 35.[1] The employee then filed a claim for

[1] We take judicial notice of documents in the board file. See Rizzo v. M.B.T.A., 16 Mass. Workers' Comp. Rep. 160, 161 n.3 (2002).

§ 34A benefits which was denied at conference and he appealed to a full evidentiary hearing. (Dec. 2.)

Dr. Eric K. Chung performed the § 11A exam. He diagnosed lower lumbar instability at L4-5, post surgical left lumbar radiculopathy with probable arachnoiditis, and internal derangement of the right knee. (Statutory Ex. 1.) The judge found that the § 11A examiner's report regarding all orthopedic issues was adequate; however he permitted the parties to submit additional medical evidence for the so-called "gap period" prior to the exam. (Dec. 2.) Then, in response to the employee's motion, he also allowed the parties to submit additional medical evidence for any period to address the employee's claimed emotional disability arising subsequent to the industrial injury. (Dec. 3.)

The lay testimony concluded on August 12, 2005 and the hearing record was scheduled to close on September 12, 2005, but an extension requested by the employee's attorney moved that date to October 27, 2005. (Tr. 4; Dec. 2.) On October 26, 2005, employee's counsel mailed the judge, and insurer's counsel, medical evidence which included a September 7, 2005 psychiatric evaluation conducted by Dr. Mark Cutler.[2] Due to an oversight acknowledged by employee's counsel, the medical evidence was forwarded to the insurer's attorney's previous address, thereby delaying its receipt until November 16, 2005.[3] On that date the insurer asked the judge for permission to cross-examine Dr. Cutler and the opportunity to have the employee examined by its own expert.[4]

One day earlier, on November 15, 2005, the judge filed his decision. (Dec. 9.) The judge found the employee permanently and totally incapacitated and awarded § 34A

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[2] See Rizzo, supra.

[3] We note that the employee's attorney, by correspondence dated November 16, 2005, apologized for the mailing error. See Rizzo, id.

[4] The insurer's initial request was made via facsimile transmission and subsequently by first class mail. Id.

benefits as well as § 30 medical benefits for the right knee injury, the low back injury and the "diagnosed emotional depressive illness." (Dec. 8, 9.)[5]

On November 21, 2005, the insurer filed a "Motion for Reconsideration," and, after a hearing on December 9, 2005, the judge denied the motion, asserting a lack of jurisdiction. (Judge's "Motion Conference" dated December 12, 2005.)

We have the insurer's appeal in which a denial of due process is contended. We agree that the insurer has a due process right to address by deposition, or by the submission of countervailing medical evidence, Dr. Cutler's September 12, 2005 psychiatric medical evaluation.

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. 667 (1972). (Emphasis ours). 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). This includes depositions and discovery authorizations, granting of continuances and enforcement of reasonable deadlines, and even the discretion to dismiss a claim for lack of prosecution in appropriate circumstances to facilitate administrative efficiency. Ackroyd's Case, 340 Mass. 214, 218-219 (1960). Judicial discretion to conduct and control proceedings is not unbridled, however, and is subject to appellate review. Ackroyd's Case, supra at 219; Meunier's Case, 319 Mass. 421 (1946).

[5] The judge adopted the September 12, 2005 report of Dr. Cutler in which he opined that the employee requires outpatient psychiatric treatment to include psychotherapy and pharmacotherapy. The doctor also opined that the employee is totally disabled because of his pain and depression from meeting the demands of any employment for which he has trained. Dr. Cutler also causally related this disability to the work injury. His prognosis for alleviation of the employee's pain disorder was guarded, but more optimistic for alleviation of his depressive symptoms if outpatient treatment is provided. (Dec. 7.)

We need not address the content of all the medical evidence adopted by the judge as it is only the timing of its receipt of, and its inability to respond to, the report of Dr. Cutler to which the insurer specifically takes issue. At hearing, the insurer objected to the joinder of the § 30 claim for work related depressive illness, arguing that neither of the supporting medical notes provided by the employee rendered an opinion on disability or causation. (Tr. 6.) Although the judge granted the employee's joinder motion, he addressed the insurer's contention as follows:

> I still don't have anything, but you're not going to be foreclosed. Any evidence, should it come in and you choose to take the deposition of any physician that presents such evidence, you're going to have the opportunity to do so. And you will have the opportunity to collect records that you think that you need to as well.

(Tr. 8.)

Given the insurer's receipt of Dr. Cutler's report the day *after* the judge's decision was filed, the insurer had no realistic opportunity to rebut the employee's medical evidence that the judge specifically relied on to award benefits related to any depressive sequelae. (Dec. 7-9.) Failure of due process results from foreclosing the "opportunity to present testimony necessary to present fairly the medical issues." O'Brien's Case, 424 Mass. 16, 23 (1996). Clearly, under these circumstances, due process commands an order permitting the insurer a reasonable time to respond to this post-hearing medical evidence.

The insurer makes one additional argument on appeal. It contends that the judge failed to assess the probative weight of the testimony and video surveillance evidence of the insurer's investigator. The decision lists the investigator as a witness and the surveillance video is marked as Exhibit 4 in the hearing record. We are satisfied that the administrative judge considered both. "An administrative judge is not expected to comment on each and every scintilla of testimony or evidence presented, but only on that which he deems persuasive." Hilane v. Adecco Empl. Srvcs., 17 Mass. Workers' Comp. Rep. 465, 471 (2003). Moreover, we do not agree with the insurer's assertion that the

§ 11A impartial medical examiner changed his opinion in the course of his deposition. See Dep. Dr. Chung 22-25, 37-39. Based on the adopted medical evidence and his credibility determinations, the judge's ultimate findings on physical disability and total incapacity are fully warranted.

We recommit the case to allow the insurer an opportunity to respond to the medical opinion of Dr. Cutler.

So ordered.

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William A. McCarthy
Administrative Law Judge

Filed: ***March 29, 2007***

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Patricia A. Costigan
Administrative Law Judge

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Mark D. Horan
Administrative Law Judge