COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 041382-96**

Lucienne Supris	Employee
Fernald Development Center	Employer
Commonwealth of Massachusetts	Self-Insurer

REVIEWING BOARD DECISION
(Judges Carroll, Levine and Maze-Rothstein)

APPEARANCES
Ronald W. Stoia, Esq., for the employee
Terence H. Buckley, Esq., for the self-insurer

CARROLL, J. Both parties appeal the decision of an administrative judge in which the employee was awarded a closed period of incapacity benefits. The self-insurer contends that the evidentiary record does not support the findings rendered by the administrative judge. The employee maintains that the § 11A examiner was not impartial. After review, we reverse the award of G.L. c. 152, § 35, partial incapacity benefits and affirm the decision in all other respects.

Lucienne Supris was a married, forty-three year old mother of two (at the time of hearing) who moved to the United States from Haiti in 1978. The vast majority of her work experience has been employment as a nurse's aide. Ms. Supris commenced employment at Fernald Development Center as a Mental Retardation Worker I in 1985. Incorporated into her duties of full care for clients, the employee was required to lift clients from the floor as needed. (Dec. 3.)

On October 22, 1996, while attempting to put an agitated client in bed using an arjo lift, the client kicked the employee in the stomach and chest area. As a result, the employee's body twisted and she fell to the floor. On her descent to the floor, the employee struck a wheelchair. She was taken by ambulance to a hospital where she received medical attention and x-rays were taken. She underwent physical therapy. Ms. Supris then treated with Dr. Emilio Jacques who prescribed medications and

advised that the employee maintain a physical therapy home program of exercise. Id. Subsequently, the employee also treated with Dr. Stanley Leitzes. Id.[1]

Initially, the self-insurer accepted the case and paid § 34 temporary total incapacity benefits without prejudice from October 23, 1996 to November 24, 1996. On March 31, 1997, the employee's claim for further benefits, i.e. §§ 34, 13 and 30, was conferenced before an administrative judge. By a "corrected" conference order, the employee was awarded a closed period of § 34 benefits as well as medical benefits pursuant to § 30. The self-insurer appealed to a hearing *de novo*. (Dec. 2.)[2]

Pursuant to § 11A, Dr. Richard E. Greenberg examined Ms. Supris on June 18, 1997.[3] (Rep. of § 11A physician, 1; Dep. of § 11A physician, 6; Dec. 4.) The doctor's report and depositional testimony were admitted into evidence. (Dec. 2.) Dr. Greenberg diagnosed contusion of the left knee, left hip and left thigh, cervical strain, and rotator cuff tendinitis all causally related and resolved. (Rep. of § 11A physician, 3; Dec. 4.) As the § 11A physician could not find any objective evidence to support the employee's subjective complaints, he cleared her to return to work in a full-duty capacity without any physical restrictions. (Rep. of § 11A physician, 3-4; Dep. of § 11A physician, 15-16; Dec. 4-5.) The administrative judge allowed the parties to submit additional medical evidence to address the "gap period" because Dr. Greenberg did not address the extent of the employee's disability for the period of time prior to the impartial examination. (Dec. 2, 5.)

The employee submitted the medical reports of Dr. Emilio Jacques. (Dec. 1, 5.) These records covered the time period from December 21, 1996 through April 24, 1997. (Employee's Ex. # 2.) In December 1996, Dr. Jacques diagnosed left shoulder

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1 Dr. Leitzes apparently saw the employee after the judge had already found the employee was no longer disabled. (Tr. 17.)

2 The employee also appealed but did not perfect her appeal. (Employee's Br. 1.)

3 The report of the § 11A physician was dated June 19, 1997; however, the actual examination took place on June 18, 1997. (Rep. of § 11A physician, 1.)

derangement, left hip traumatic trochanteric bursitis and resolving costochondritis, traumatic type, all causally related to the work incident. Additionally, the doctor stated that the employee was disabled and unable to resume work. Id. On February 24, 1997, Dr. Jacques found the employee to continue to be symptomatic and disabled. Id. As of March 24, 1997, Dr. Jacques opined that the employee was still symptomatic and disabled from any gainful employment. Id. By April 24, 1997, the doctor had two diagnoses: chronic cervical spine pain syndrome and left shoulder internal derangement, post-traumatic synovitis. Unlike his three prior exams, the doctor did not include a disability statement. (Employee's Ex. # 2; Dec. 5.)

The self-insurer submitted records from Dr. Panos G. Panagakos and Dr. John F. Coldewey. (Dec. 1, 5.) Dr. Panagakos' opinion was rejected by the judge. (Self-Insurer's Ex. # 4; Dec. 5-6.) Dr. Coldewey examined the employee on April 3, 1997. His opinion that the employee was capable of returning to full-duty work was not adopted as of that date, but was used to support the judge's read of the employee's own doctor's report to find that as of April 24, 1997 the employee was no longer disabled. (Self-Insurer's Ex. # 4; Dec. 6, 7.)

The judge adopted the medical opinions of Dr. Jacques and found the employee to be disabled when examined in December 1996 and again in February and March 1997, but no longer disabled by April 24, 1997, by which time Dr. Jacques no longer provided a disability statement. This omission was treated by the judge as expressing a medical opinion that no disability existed as of April 24, 1997.[4] The judge also adopted the opinion of the § 11A examiner, Dr. Greenberg, that at the time of his June 18, 1997 exam the employee was also not medically disabled. (Dec. 4-5, 7.)

The administrative judge found that the employee was totally incapacitated from October 22, 1996 through April 24, 1997 and awarded § 34 benefits for that period. Additionally, the judge found the employee partially incapacitated from April 25, 1997 up to the June 18, 1997 impartial examination. Accordingly, the judge

[4] The self-insurer does not specifically contest the propriety of this finding.

awarded § 35 benefits for that period of partial incapacity. Id. Pursuant to §§ 13 and 30, the judge ordered the self-insurer to pay for all reasonable and necessary medical expenses related to the October 22, 1996 work injury. Further, the self-insurer was ordered to pay fees and costs to the employee's counsel. (Dec. 7-8.) Both parties appeal the administrative judge's decision and we address each appellant's arguments in turn.

The first concern raised by the self-insurer is that there is no medical support for the judge's finding of partial incapacity beyond April 24, 1997. (Self-Insurer's brief, 3.) We agree. Although the judge adopted the medical opinion of Dr. Jacques, the doctor's opinion is silent as to any disability beyond April 24, 1997. (Employee's Ex. # 2.) In fact, the judge determined that this silence indicated no disability: "I find that omission [of a disability statement by Dr. Jacques] to be consistent with a finding that there was no disability at that time which prevented Employee from returning to her previous employment." (Dec. 7.) The date of Dr. Jacques' report, to which the judge refers, is April 24, 1997. (Dec. 7; Employee's Ex. # 2.) Despite the judge's finding of no medical disability just two short paragraphs later, the judge made the following findings:

> "as of April 24, 1997, [the] Employee was capable of returning to work on a full-time basis in a light duty capacity as a Mental Retardation Worker I and therefore, was entitled [to] § 35 temporary partial benefits from April 25, 1997, to the date of Dr. Greenberg's § 11A(2) impartial examination on June 18, 1997. Therefore, for that time period I assign an earning capacity of $200.00 per week."

(Dec. 7.) This finding is puzzling and in direct conflict with the judge's earlier finding and medical evidence relied on that there was no disability on April 24, 1997. This is an error and must be reversed. McCarty v Wilkinson & Co., 11 Mass. Workers' Comp. Rep. 285 (1997) (findings made without evidentiary support are arbitrary and capricious).

One other issue raised by the self-insurer bears comment. The self-insurer contends that the employee is not entitled to a full fee, as the only appeal from the conference order was that of the self-insurer. (Self-Insurer's brief, 5-6.) It is exactly for this reason that a full fee is merited. The applicable provision to determine whether a party has "prevailed" for purposes of an attorney's fee is 452 Code Mass. Regs. § 1.19(4).[5] Here, *all* the employee's benefits were in jeopardy as a result of the self-insurer's appeal. Therefore, the award of some benefits was the equivalent of "prevailing" for purposes of attorney's fees. See Connolly's Case, 41 Mass. App. Ct. 35, 37 (1996)(employee prevails as "all the benefits granted in the conference order were in jeopardy" due to the insurer's appeal). Accordingly, we affirm the judge's decision as to the award of attorney's fees and costs.

The employee raises one notable issue on appeal. The employee contends that the § 11A examiner was not impartial because a videotape edited by the self-insurer's investigator tainted his medical opinion. (Employee's brief, 2.) Consequently, the employee argues that the § 11A physician's medical opinions should be stricken and that she should be authorized to supplement the medical evidence for the period in question. Id. We disagree.

The reviewing board has stated that "it [is] perfectly permissible to place the videotape[] alongside medical records, oral history, medical tests and results of examination as the medical expert work[s] toward reaching an opinion on causal relationship and medical disability." Peroulakis v. Stop & Shop, 12 Mass. Workers' Comp. Rep. 93, 96 (1998). Even without the imprimatur of Peroulakis, the employee's claim, that the § 11A physician was no longer impartial because he

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[5] 452 Code Mass. Regs. § 1.19(4) in its entirety reads as follows:

> In any proceeding before the Division of Dispute Resolution, the claimant shall be deemed to have prevailed, for the purposes of M.G.L. c. 152, § 13A, when compensation is ordered or is not discontinued at such proceeding, except where the claimant has appealed a conference order for which there is no pending appeal from the insurer and the decision of the administrative judge does not direct a payment of

viewed the videotape, is undermined as the videotape was not viewed by the § 11A physician until the date of the deposition, February 23, 1998, well after the physician had completed his medical report dated June 19, 1997. (Dep. of § 11A physician, 4-5; Rep. of § 11A physician, 1.) The impartial examiner rendered his medical opinion on the basis that he could not determine any objective findings to support the employee's subjective complaints. (Rep. of § 11A physician, 3-4.) He further testified, at deposition, that review of the videotape had not changed his medical opinion. (Dep. of § 11A physician, 15-16.) This medical opinion was adopted by the administrative judge without condition. (Dec. 7.) We do not disturb this finding on appeal.

The decision of the administrative judge is reversed as to the award of § 35 benefits for the time period of April 25, 1997 through June 18, 1997. The balance of the administrative judge's decision is affirmed.

So ordered.

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Martine Carroll
Administrative Law Judge

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Frederick E. Levine
Administrative Law Judge

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Susan Maze-Rothstein
Administrative Law Judge

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weekly or other compensation benefits exceeding that being paid by the insurer prior to such decision . . . .