COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO.:** 071465-01

Luke Day	Employee
Thomas Gallagher Company	Employer
Eastern Casualty Insurance Company	Insurer

REVIEWING BOARD DECISION
(Judges Carroll, McCarthy and Fabricant)

APPEARANCES
Ronald St. Pierre, Esq., for the employee
Thomas M. Dillon, Esq., for the insurer

CARROLL, J. This case comes to us on cross appeals from an administrative judge's decision awarding the employee § 35 partial incapacity benefits beginning on the date of the impartial examination. We affirm the judge's decision as to all issues raised by the employee, but reverse the award of an attorney's fee as argued by the insurer.

On May 24, 2001, Luke Day, a fifty-seven-year-old union welder, was struck on the head by a piece of plywood which had been blown loose by the wind. He briefly lost consciousness but, after resting for a few hours, was able to continue working without restriction until March 1, 2002, when there was a general layoff. He then applied for and received unemployment compensation. (Dec. 4.)

In June 2002, the employee underwent a cervical fusion followed by physical therapy. His physician prescribed Oxycontin for neck pain, valium, and a muscle relaxant. (Dec. 4-5.) The employee currently complains of difficulty sleeping, headaches, anxiety attacks, and needing to lie down four to five times a day for a half hour at a time. He uses a tens unit and wears a soft neck collar. (Dec. 5.)

The insurer resisted the employee's claim for § 34 benefits. Following a § 10A conference, the administrative judge filed an amended order requiring the insurer to pay § 35 benefits at the rate of $623.17 per week based on an earning capacity of $500.00 per

week, beginning on September 19, 2002. Both parties appealed the conference order, but the insurer withdrew its appeal before the hearing took place.[1] (Dec. 2.)

Dr. Robert Levine examined the employee pursuant to § 11A and causally related the employee's diagnosis (chronic cervical strain with headaches and bilateral upper extremity paresthesias, status post C5-C7 fusion) to his industrial accident. The impartial physician opined that the employee was unable to return to his regular heavy work, but could perform modified work with no lifting over twenty pounds, little overhead work, and little reaching or bending. He did not believe the employee was at a medical end result since he was considering revision surgery, which Dr. Levine opined was medically reasonable. At the request of the parties, Dr. Levine reviewed additional medical evidence and issued a supplemental report on October 28, 2003. He did not change his opinion. (Dec. 5-6.)

The hearing took place on February 2, 2004, and the parties deposed Dr. Levine on April 2, 2004. In his deposition, Dr. Levine opined that the employee's complaints of excessive fatigue and depression could be caused by problems other than his industrial injury, i.e., the serious health condition of his wife. Further, he did not believe the neck injury caused the employee to need to lie down during the day. (Dec. 5-6.)

After the close of lay testimony, but prior to the § 11A deposition, the employee was involved in a motor vehicle accident. The employee filed "several motions" to allow additional medical evidence as a result of this accident, which the judge denied.[2] (Dec.

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[1] Both the employee and the insurer indicate in their briefs that the insurer withdrew its appeal on February 4, 2003. (Employee br. 2; Insurer br. 8). However, the judge's findings on when the insurer's appeal was withdrawn are not specific, and could be read to mean that the insurer withdrew its appeal after the first scheduled hearing day, June 10, 2003, but before the impartial addendum was issued on October 28, 2003. (Dec. 2; see also Tr. 4.) Our review of the board file does not reveal *any* notification of withdrawal of an appeal of the conference order filed by the insurer. However, the employee has not argued that the appeal was not withdrawn or was withdrawn after the first scheduled hearing day, June 10, 2003. We therefore deem this issue waived, see Martinez v. Northbound Train, Inc., 18 Mass. Workers' Comp. Rep. 294 (2004), and assume the withdrawal date of February 4, 2003, as agreed by the parties.

[2] The board file contains only one motion for inadequacy based on the occurrence of the motor vehicle accident. See Rizzo v. M.B.T.A., 16 Mass. Workers' Comp. Rep.160, 161 n.3 (reviewing board may take judicial notice of documents in the board file).

2.)At hearing, the parties stipulated to the occurrence of an industrial injury, to the employee's average weekly wage, and to the employee's entitlement to weekly partial incapacity benefits awarded by the judge at conference, to the date of the first impartial examination, December 4, 2002. (Dec. 2.) Thereafter, the employee claimed entitlement to § 34 benefits. Since the insurer had withdrawn its appeal of the conference order and had stipulated to the extent of disability for the period prior to December 4, 2002, the judge addressed the employee's entitlement to weekly benefits only after December 4, 2002.

The judge specifically found Dr. Levine's opinion adequate and fully adopted it. (Dec. 6.) He found the employee capable of performing a full-time modified job within the restrictions Dr. Levine outlined. The judge discounted the employee's testimony that his reading level was an impediment to employment, and, taking into account the fact that the employee has a high school degree, and work experience as a welder, constructor and cook, assigned him an earning capacity of $500.00 per week, as he had at conference. He ordered the insurer to pay § 35 benefits from December 4, 2002 forward at the same rate he had ordered at conference. (Dec. 6-7.) Finding that the employee had prevailed within the meaning of § 13A(5), the judge awarded an attorney's fee and expenses. (Dec. 8.)

The employee raises a number of issues on appeal. The insurer alleges error only in the award of an attorney's fee. We address each issue in turn. First, the employee contends that the judge erred by failing to make findings regarding the period from September 19, 2000 through December 4, 2002. The judge did not err. The parties stipulated that the employee was disabled to the extent described in the conference order up to December 4, 2002. (Dec. 2, Tr. 5.) That stipulation is binding on the parties, Household Fuel Corp. v. Harry A. Hamacher, 331 Mass. 653 656-657 (1954), unless deemed improvident or not conducive to justice. Crittendon Hastings House of the Florence Crittendon League v. Board of Appeals of Boston, 25 Mass. App. Ct. 704, 712 (1987). The insurer has not moved to vacate the stipulation on those or any other grounds, and even seems to acknowledge its binding effect in its appellate brief. (Ins. Brief, 3-4.)[3]

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[3] The employee alleges in his brief, however, that the insurer has interpreted the judge's silence on the stipulated period as authorization to seek recoupment of amounts paid during that time by reducing the employee's ongoing benefits. If this is the case, (and we have no way of knowing if it is), the insurer has acted contrary to law, and should

Second, the employee contends that the judge erred by denying the employee's motion to submit additional medical evidence even though he found the first impartial report of December 4, 2002 inadequate. The employee alleges that the judge compounded this error by ordering the parties to submit additional evidence to the impartial examiner so that he could issue a supplemental report. There was no error in having the impartial examiner issue a supplemental report after viewing additional medical evidence submitted to him by the parties, since the parties agreed to this course of action. (Dec. 2; Tr. 4, 5-6.) Compare Brackett v. Modern Continental Constr. Co., 19 Mass. Workers' Comp. Rep. ___ (2005)(administrative judge cannot *require* parties to depose impartial examiner to correct inadequate report).

Third, the employee argues that the judge should have allowed his post-hearing motions to submit additional medical evidence because the impartial opinion was rendered inadequate by a motor vehicle accident (in which the employee allegedly fractured two cervical vertebrae) occurring after the impartial examination.[4] The employee argues that where an important event occurs months after the impartial examination, the impartial opinion is inadequate as a matter of law. Deleon v. Accutech Insulation & Construct, 10 Mass. Workers' Comp. Rep. 713, 715 (1996). As the insurer points out, in Deleon, the "important event" (the employee returning to work) was in evidence. See also Escalante v. Reidy Heating & Cooling, 17 Mass. Workers' Comp. Rep. 231 (2003)(same). Here, the "important event" (the motor vehicle accident) was not in evidence since it occurred after lay testimony was taken, nor did the employee move to re-open the hearing so that further evidence could be taken. Cf. McElhinney v. Massachusetts Bay Transp. Auth., 9 Mass. Workers' Comp. Rep. 349 (1994)(ruling on motion to reopen hearing on grounds of newly discovered evidence is generally discretionary, subject to certain limitations, and judge's action can only be overturned where discretion has been so abused as to amount to error of law). Moreover, at Dr. Levine's deposition, the judge correctly sustained objections to questions about the effect of the motor vehicle accident on grounds that the

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repay the employee any amount recouped. If necessary to resolve this issue, the employee, of course, may file a claim.

[4] The board file reveals that the impartial examination took place on December 4, 2002, with a review of additional medical records and supplemental report on October 28, 2003. Lay testimony was taken on February 2, 2004; the employee was involved in a motor vehicle accident on March 30, 2004. Dr. Levine was deposed on April 2, 2004 and the "Employee's Motion to Find Impartial Medical Report Inadequate and to Submit Gap Medicals" was filed on or about May 26, 2004.

questions assumed facts not in evidence. (Dep. 27, 35.) Since the motor vehicle accident and any medical opinion relating to it were not in evidence, the judge could not consider any testimony offered by the impartial physician regarding the effect of the non-work related accident. See Patterson v. Liberty Mut. Ins. Co., 48 Mass. App. Ct. 586, 595 (2000)(judge may not rely on a medical opinion lacking a "competent evidentiary basis").

Given these circumstances, the impartial opinion is not rendered inadequate as a matter of law by the motor vehicle accident, nor is the judge's denial of the employee's post-hearing motion to declare the impartial opinion inadequate an abuse of discretion. The employee is free to file a new claim if he believes he has evidence which would support his allegation that the work injury predisposed him to the cervical fractures.[5] (See Employee's Motion to Find Impartial Report Inadequate and to Submit Gap Medicals.) While it might have been more judicially efficient for the judge to have opened the record for further evidence, where the employee did not even make this request, we see no abuse of discretion. Cf. Dunphy v. Shaws Supermarkets, 9 Mass. Workers' Comp. Rep. 473 (1995)(judge's decision not to re-open the record, as requested, for evidence regarding deterioration of employee's condition, was not abuse of discretion, though it might have been judicially more efficient than employee filing new claim).[6]

Finally, the employee argues that the judge's findings on earning capacity are not supported by adequate subsidiary findings. We summarily affirm the judge's decision on this issue, see Mulcahey's Case, 26 Mass. App. Ct. 1, 3 (1988), as we are satisfied that he adequately assessed how the medical and vocational factors combined to support the

[5] While we express no opinion as to whether the employee's situation falls within the parameters discussed in Houghton v. Maaco Auto Paint, Inc., 17 Mass. Workers' Comp. Rep. 571, 573, 576-577 (2003), we assume the employee is basing his claim for total incapacity benefits, in part, on our holding there. In Houghton, we held that the insurer is responsible for payment of all benefits for the employee's incapacity, to the extent medical disability subsequent to the non-work-related incident was causally connected to the work injury, notwithstanding that the trigger event was non-work-related, so long as the non-work trigger was normal, reasonable and not negligent.

[6] The employee also claims that the judge ignored Dr. Levine's testimony regarding the potential role of the cervical fracture caused by the motor vehicle accident. As discussed above, however, since that testimony was not in evidence, there was no error.

assigned earning capacity. See Raczkowski v. Center for Extended Care at Amherst, 18 Mass. Workers' Comp. Rep. 289 (2004).

We agree with the insurer, however, that the judge erred in granting employee's counsel a fee. Though the conference order was originally appealed by both parties, the insurer withdrew its appeal well before the hearing on February 2, 2004. Thus, the case proceeded to hearing solely on the employee's appeal. In his decision, the judge granted the employee the same benefits he had awarded at conference-ongoing weekly § 35 benefits at the rate of $623.17.[7] Since, the employee's appeal did not result in increased benefits, the employee did not "prevail" at hearing, as that term is interpreted by the applicable statute[8] and regulations.[9] Therefore, his attorney is not entitled to a fee. Green's Case, 52 Mass. App. Ct. 141, 143 (2001)(upholding regulation, and finding that employee did not prevail on his appeal at hearing where insurer withdrew its appeal and the decision did not order any increase in benefits). Cf. Connolly's Case, 41 Mass. App.

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[7] The conference order awarded § 35 benefits beginning on September 19, 2002, (Dec. 1), while the hearing decision ordered § 35 benefits beginning December 4, 2002, (Dec.9), due to the stipulation as to extent of disability to the date of the impartial examination, December 4, 2002. (Dec. 2.)

[8] G. L. c. 152, § 13A(5), provides:

> Whenever an insurer files a complaint or contests a claim for benefits and then either (i) accepts the employee's claim or withdraws its own complaint within five days of the date set for a hearing pursuant to section eleven; or (ii) the employee prevails at such hearing the insurer shall pay a fee to the employee's attorney . . .

[9] 452 Code Mass. Regs. § 1.19(4) provides:

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

Ct. 35 (1996)(employee prevailed at hearing, even though no further compensation was awarded beyond that granted at conference level, where both employee and insurer appealed conference order, thus putting all benefits in jeopardy).

Accordingly, we affirm the decision in all respects except as to the award of an attorney's fee. As to that issue, the decision is reversed.

So ordered.

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Martine Carroll
Administrative Law Judge

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William A. McCarthy
Administrative Law Judge

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Bernard W. Fabricant
Administrative Law Judge

Filed: June 10, 2005