COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 017001-11**

Mae Roscoe	Employee
Brigham and Women's Hospital .	Employer
Partners Healthcare System, Inc.	Self-Insurer[1]

REVIEWING BOARD DECISION
(Judges Calliotte, Levine and Harpin)

The case was heard by Administrative Judge Heffernan.

APPEARANCES
Ronald W. Stoia, Esq., for the employee
Tamara L. Ricciardone, Esq., for the self-insurer

CALLIOTTE, J. The employee appeals from a decision awarding her weekly § 34 temporary total incapacity benefits until the date of the § 11A examination, but finding her ongoing partial disability was not causally related to her work injury. We agree with the employee that the impartial report is inadequate as a matter of law, and that the judge therefore erred by denying the employee's motion to submit additional medical evidence. We also agree the judge erred in relying on medical records submitted for the "gap period" to determine ongoing incapacity and causal relationship, and in relying on a report not in evidence. We therefore recommit the case to the administrative judge for the admission and consideration of additional medical evidence.

At the time of her injury, the employee was a sixty-two year old team leader/phlebotomist, who had worked for the employer for approximately twelve years. (Dec. 3-4.) On July 11, 2011, while maneuvering a heavy medical cart out of a patient's room, the employee experienced immediate pain when she struck her right knee against a device attached to the patient's bed. She reported the injury and began treating at the employer's Occupational Health Department. (Dec. 4.) On August 1, 2011, she came

[1] Although the judge refers to Partners Healthcare System as the "insurer," Partners refers to itself as the "self-insurer." We use Partners' designation.

under the care of Dr. Leo Troy, who diagnosed a torn medial meniscus. On November 18, 2011, Dr. Troy performed a partial medial meniscectomy. (Dec. 4, 9.) Following surgery, the employee underwent three Synvisc injections and engaged in physical therapy from December 2, 2011, to February 2, 2012, and from April 4, 2012, to April 11, 2012. (Dec. 4-5.) At the time of hearing, she had not returned to work. (Dec. 3.)

The self-insurer paid compensation on a without-prejudice basis from the date of injury until November 13, 2011, (Dec. 4), after which the employee filed a claim for weekly and medical benefits. Id. at 3. Following a § 10A conference, the administrative judge ordered the self-insurer to pay § 34 weekly benefits and §§ 13 and 30 medical benefits, excluding, however, payment for the partial medial meniscectomy. Both parties appealed. Id.

At hearing, the employee claimed § 34 benefits beginning on July 12, 2011. The self-insurer contested disability and extent of incapacity, causal relationship, and entitlement to §§ 13 and 30 benefits, specifically denying payment for a proposed right knee replacement.[2] (Dec. 2; Tr. 3-4.) On July 6, 2012, Dr. James T. McGlowan examined the employee pursuant to §11A. (Dec. 5.) Claiming Dr. McGlowan's report was inadequate, the employee filed a motion to submit additional medical evidence, (Dec. 7), which the judge denied except as to the "gap period" prior to the impartial examination. (Dec. 8; Tr. 46-48.) The self-insurer submitted a packet of medical records, including two reports dated October 22, 2011, and January 21, 2012, from its

[2] We find no indication, either on the employee's claim form, her conference memorandum, or in the hearing transcript that the employee specifically claimed payment for a proposed total knee replacement, as the self-insurer maintains. (Self-insurer br. 3.) On the temporary conference memorandum, the medical issue in dispute is defined as "whether 11/18/2011 surgery [for medial meniscectomy] was reasonable, necessary and causally related to industrial injury of 7/11/11." However, the employee did not object below to the insurer raising the compensability of a knee replacement, (Tr. 3-4), nor does she argue on appeal that the parameters of the dispute were impermissibly widened by the judge addressing her entitlement to that treatment. See Ruiz v. Unique Applications, 11 Mass. Workers' Comp. Rep. 399, 402 (1997)(where impartial opinion fell outside boundaries of medical dispute framed earlier, result was impermissible widening of medical conflict). Therefore, we do not address the issue of whether compensability of a proposed knee replacement was properly before the judge.

examining physician, Dr. Robert Nicoletta; records dated August 1, 2011, through March 26, 2012, from the employee's treating physician, Dr. Troy; and records from Bay State Physical Therapy. (Dec. 8.) The judge found the employee did not submit any gap medical evidence.[3] (Dec. 8.).

The judge adopted "in part the opinion of Dr. McGlowan, Dr. Troy and Dr. Nicoletta that the employee was totally disabled for a period of time and continues to be partially disabled." (Dec. 11.) However, again adopting "in part" the opinions of the same three doctors, the judge found the "[e]mployee's ongoing partial disability and incapacity [are] not related to her work injury of July 11, 2011." (Dec. 11.) Finally, the judge adopted Dr. McGlowan's opinion that the employee's "need for a knee replacement is most likely associated with the natural progression of her preexisting arthrosis rather than the injury of July 11, 2011." (Dec. 12.) Accordingly, the judge ordered the self-insurer to pay § 34 benefits from July 11, 2011, until July 6, 2012, the date of the impartial examination. The judge also awarded §§ 13 and 13 medical benefits, including payment for the November 18, 2011, medial meniscectomy, but excluding benefits for any future knee replacement surgery. (Dec. 11-12.)

On appeal, the employee first argues that the § 11A report of Dr. McGlowan was so unclear and contradictory as to be inadequate as a matter of law. We agree.

"The hallmark of § 11A medical testimony is its status as exclusive and prima facie evidence." Brooks v. Labor Mgt. Servs., 11 Mass. Workers' Comp. Rep. 575, 579 (1997). Prima facie evidence has "an artificial legal force which compels the conclusion that the evidence is true, and requires the judge to give effect to its unquestionable truth . . . ." Cook v. Farm Servs. Stores, Inc., 301 Mass. 564, 566 (1938). An " 'unexplained, internally inconsistent [§ 11A] opinion' " cannot compel the conclusion that it is true, and thus cannot be accorded prima facie status. La v. Pre-Owned Elecs. Co., 24 Mass. Workers' Comp. Rep. 199, 201 (2010), quoting Brooks, supra. Similarly, an ambiguous

[3] The employee apparently attempted to submit her gap medical evidence a day late, but it is unclear whether the records themselves actually reached the judge. At any rate, he made no ruling on her request. (Employee br. 4, Self-insurer br. 4.) See n.8, infra.

and confusing impartial opinion may not stand alone as the only medical evidence. Libby v. National Restaurants Corp., 20 Mass. Workers' Comp. Rep. 37 (2006). Such reports are inadequate as a matter of law, and additional medical evidence is mandated. La, supra at 201-202; Orlofski v. Town of Wales, 23 Mass. Workers' Comp. Rep. 175, 180 (2009), aff'd sub nom Orlofski's Case, 76 Mass. App. Ct. 1133 (2010)(Memorandum and Order Pursuant to Rule 1:28); Libby, supra at 40; Nunes v. Town of Edgartown, 19 Mass. Workers' Comp. Rep. 279, 282-283 (2009); Brooks, supra at 580. See O'Brien's Case, 424 Mass. 16, 22-23 (1996)(decision to foreclose further medical testimony where it is necessary to present fairly the medical issues is grounds for reversal or recommittal).

Here, the parties declined to depose the impartial examiner. Therefore, the adequacy of Dr. McGlowan's opinion is to be determined from the four corners of his report. Brackett v. Modern Cont'l Constr. Co., 19 Mass. Workers' Comp. Rep. 11, 14-15 (2005); LaGrasso v. Olympic Delivery Serv., Inc., 18 Mass. Workers' Comp. Rep. 48, 56-57 (2004). If the report is to be given prima facie status, it must address clearly and consistently the statutorily prescribed issues of disability and causation. Brackett, supra, and cases cited. See G.L. c. 152, § 11A. Dr. McGlowan's report does not.

Dr. McGlowan diagnosed the employee with a meniscal tear and a contusion, both of which he opined were causally related to her work injury. He also diagnosed her as having "a significant preexisting condition involving her right knee, which remains symptomatic with arthrosis. " (Stat. Ex. 1.) There is no diagnosis of knee "strain." However, Dr. McGlowan twice refers to the work injury as a "strain" in stating his disability and causation opinions. He first opines that "the ongoing discomfort is most likely associated with the degenerative arthritic condition and progressive arthritic condition rather than *strain* which was sustained on July 11, 2011 . . . ." Id. (emphasis added). Later, he attributes the employee's need for total knee replacement to "natural progression of her preexisting arthrosis rather than *strain* sustained on July 11, 2011." Id. (emphasis added). He never refers to the causally related diagnoses of meniscal tear and

contusion in stating his causation opinion, raising the question of whether he was, in fact, basing his opinion on the appropriate diagnoses.

The same paragraph in which these discrepancies appear contains further inconsistencies leading to increased confusion. After attributing the employee's discomfort and need for knee replacement to her preexisting arthrosis, Dr. McGlowan states

> that the examinee had *no previous knee condition* and that her condition on July 11, 2011, *did exacerbate the preexisting condition*, which warranted arthroscopic intervention, and now she has progressed to the point needing knee replacement. This is also documented by the Arthroscopic Association of North America and American Orthopedic Society for Sports Medicine that removal of meniscal tissue does exhibit predisposing factor for arthrosis and arthritis.

(Stat. Ex. 1; emphasis added.) The first sentence is not only inconsistent with the prior opinions expressed by Dr. McGlowan, but also internally inconsistent, insofar as it indicates that the employee had "no previous knee condition" as well as a "preexisting condition." Id. Moreover, Dr. McGlowan's statement that "her condition on July 11, 2011, did exacerbate the preexisting condition, which warranted arthroscopic intervention, and now she has progressed to the point needing knee replacement," id., suggests that the work injury played a role in the employee's ongoing disability and need for treatment. Because the self-insurer did not raise the affirmative defense of § 1(7A), see MacDonald's Case, 73 Mass.App.Ct. 657, 659-660 (2009), the employee was required to prove only simple "as is" causation; i.e., that the meniscal tear and contusion aggravated the employee's pre-existing knee condition (if one existed) and continued to play a role, however slight, in her disability. [4] See Nason, Koziol and Wall, Workers' Compensation, §§ 9.3 and 9.7 (3rd ed. 2003), and cases cited. The second sentence, which states "removal of meniscal tissue does exhibit predisposing factor for arthrosis and arthritis," also seems to offer support for a finding that the employee's medial

[4] It is not disputed that the self-insurer failed to raise § 1(7A)'s "a major cause" standard, and that the simple "as is" causation standard applies. We see no merit to the employee's argument that the judge applied the wrong causal relationship standard.

meniscectomy contributed to her arthrosis. However, it too is unclear. Dr. McGlowan's last statement on causation --"that she did have preexisting arthrosis which is significant, which has now progressed and has become symptomatic" (Stat. Ex. 1)--fails to address the issue of whether her work injury plays any role in her ongoing disability, and thus does not resolve the discrepancies within the report.

The judge apparently recognized, and attempted to resolve, the inconsistency and lack of clarity inherent in Dr. McGlowan's report, because he changed the phrases "the examinee had *no* previous knee condition" and "now *she* has progressed," in the first sentence, quoted above, to read:

> [T]he employee *had* [sic] previous knee condition and that her condition on July 11, 2011 did exacerbate the preexisting condition, which warranted arthroscopic intervention and *now* [sic] *has progressed* to the point needing knee replacement.

(Dec. 6; emphasis added.) By omitting the words "no" and "she" from Dr. McGlowan's sentence, the judge has impermissibly changed its meaning. See Gurey v. Tables of Content, Inc., 27 Mass. Workers' Comp. Rep. ___ (October 4, 2013)(judge may not mischaracterize an expert medical opinion). Although, in appropriate circumstances, a judge may resolve ambiguity in a physician's opinion, Kent v. Town of Scituate School Dep't, 27 Mass. Workers' Comp. Rep. ___ (December 10, 2013), citing Boucher v. Edward Buick, Inc., 22 Mass. Workers' Comp. Rep. 301, 303 (2008), the judge may not "select which of the contradictory testimony to credit," where an impartial medical examiner's opinion is self-contradictory. La, supra, quoting from Orlofski's Case, supra.

The impartial report should be clear enough that the reader does not come away wondering what the § 11A doctor meant on critical issues, such as causation. An ambiguous, confusing and inconsistent report, such as this one, cannot be accorded exclusive, prima facie status, and is inadequate as a matter of law.[5] Libby, supra.

[5] We acknowledge the proposition that " '[t]he testimony of a medical expert should be considered as a whole to determine whether he is expressing his professional opinion or conclusion that it is more likely than not that there is a causal relationship between' the injury and the [disability]." Stawiecki v. DPW Mass. Highway Dep't, 26 Mass. Workers' Comp. Rep. 31, 33 (2012), quoting Nason, Koziol and Wall, § 17.24, supra. See Duggan's Case, 315 Mass.

Because the employee moved for additional medical evidence, we recommit the case for the admission and consideration of such evidence. La, supra at 202.

The employee also argues the judge erred by relying on medical records submitted solely for the gap period to support his findings regarding ongoing disability and causal relationship. We agree. In finding the employee "*continues* to be partially disabled," (Dec. 11), and her "*ongoing* partial disability and incapacity [are] not related to her work injury of July 11, 2011," id. (emphasis added), the judge stated he was relying on the opinions of not only the impartial examiner, Dr. McGlowan, but also Dr. Troy and Dr. Nicoletta. (Dec. 11.) As we have previously held:

> [W]here additional medical evidence is admitted solely to address medical issues during the gap period prior to the impartial medical examination, the judge violates the parties' due process rights when, without prior notice to the parties, he uses that evidence to address other issues, such as the nature and extent of incapacity after the impartial exam.

Brzezinski v. Aerotek Energy, 24 Mass. Workers' Comp. Rep. 273, 278 (2010)(citations omitted). Similarly, gap medical evidence cannot be used to support a finding of ongoing causal relationship, Villiard v. Rogers Insulation Specialist, 27 Mass. Workers' Comp. Rep. 1, 5 (2013), citing Ward v. Frito Lay, Inc., 19 Mass. Workers' Comp. Rep. 141, 142 (2005), or, as here, the lack of ongoing causal relationship.[6]

This error was compounded by the fact that the only report from Dr. Troy to which the judge referred in his decision--the report of December 1, 2011--was not in evidence.

355, 358 (1944)(portion of medical expert's statement should not be read alone and apart from rest of sentence). However, the confusion inherent in Dr. McGlowan's report prevents drawing any particular conclusion based on an attempt to read the report "as a whole."

[6] Even if the impartial report had been adequate and had supported the gap opinions regarding ongoing disability and causation, the error in using gap medicals to determine issues outside the gap period would not be harmless because it "goes to the heart of the parties' due process rights to know the evidence against them and to have the opportunity to rebut it." Brzezinski, supra at 279-280 n.6, citing Serabian v Herb Chambers Ford, 23 Mass. Workers' Comp. Rep. 57, 60 n.1 (2009).

It was omitted from the self-insurer's gap medical evidence,[7] which was the only additional medical evidence admitted. (Dec. 8.) Thus, the judge could not rely on Dr. Troy's report for any purpose. (Dec. 9.) 452 Code Mass. Regs § 1.11(5)("The decision of the administrative judge shall be based solely on the evidence introduced at the hearing").[8]

Accordingly, because the self-insurer has not appealed the decision, and the employee has challenged only the failure to award benefits after July 6, 2012, we affirm the award of § 34 benefits. We vacate that part of the decision holding the employee's partial disability after July 6, 2012, was not causally related to her work injury of July 11, 2011. We recommit the case for the admission and consideration of additional medical evidence, and further findings consistent with this opinion.

So ordered.

Carol Calliotte
Administrative Law Judge

Filed: ***May 22, 2014***

Frederick E. Levine
Administrative Law Judge

William C. Harpin
Administrative Law Judge

[7] See Rizzo v. M.B.T.A., 16 Mass. Workers' Comp. Rep. 160, 161 n.3 (2002)(reviewing board may take judicial notice of board file).

[8] We note that the employee did include Dr. Troy's December 1, 2011 report with her conference submissions to be sent to the impartial examiner, but Dr. McGlowan did not reference the part of that report relied on by the judge. Furthermore, any documents submitted at conference are not evidence at the hearing unless independently admitted. Given our disposition of the case, we need not address the employee's arguments that the judge mischaracterized Dr. Troy's report, or that he erred by failing to consider her gap medical evidence, which was submitted a day late.