COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 056063-97 036484-98**

Marie Carelus	Employee
Four Seasons Hotel	Employer
Travelers Insurance Company	Insurer

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

APPEARANCES
Michael C. Akashian, Esq., for the employee
Richard W. McLeod, Esq., for the insurer at hearing
Beth R. Levenson, Esq., for the insurer on appeal

MCCARTHY, J. The employee appeals from a decision in which the administrative judge awarded her a closed period of § 34 weekly temporary total incapacity benefits followed by ongoing weekly partial incapacity benefits under § 35; medical benefits under § 30 and attorney's fees and costs. The first of four issues raised by the employee merits discussion. The employee contends that the administrative judge erred as a matter of law ". . . when he used medical opinions made two years prior to a prima facie opinion by an impartial medical examiner concerning level of disability." (Employee Br. 6).

Marie Carelus, who was forty-six years of age at the time of hearing, is a native of Haiti with a ninth grade education and a eight-year history of commercial laundry and hotel housekeeping work. (Dec. 5.) She was hired by the Four Seasons Hotel as a housekeeper in 1994. This was a "physically demanding job." (Id.) Ms. Carelus testified that on July 20, 1997, she was injured when she fell on a staircase while carrying linens. (Dec. 6.) She continued to work but cleaned fewer rooms each day. (Id.) On June 10, 1998, while in the course of her usual duties, the employee felt pain in her back causing her to fall to the floor. (Id.) She began treating with Dr. Paul Mendis, stayed out

of work, took prescribed medications and had physical therapy. "[O]n August 17, 1998, she attempted a return to work which lasted only four days. She has not returned to this job since then." (Id.)

A § 10A conference order directing payment of § 34 benefits from June 11, 1998 to August 16, 1998 and § 35 benefits from August 17, 1998 and continuing was appealed by both parties. (Dec. 2.) On September 17, 1999, Dr. John C. Molloy, an orthopedic physician, did a § 11A examination. He diagnosed a herniated lumbar disk at L4-5 on the left. "He found a direct causal relationship for this diagnosis to the industrial accidents of July 22, 1997 and June 10, 1998. He found the employee to be totally disabled from any gainful employment at the time of his examination and not yet at a medical end result: " 'In my opinion, her prognosis without surgery is poor.' " (Dec. 8.)

The insurer deposed Dr. Molloy and then moved to introduce additional medical testimony. The motion was allowed. Reports by treating doctors John J. Walsh and Boris Bergus were admitted into evidence. These reports totally disabled Ms. Carelus, but the judge, as was his prerogative, stated that, "I do not find their opinions at all persuasive and I reject their opinions entirely." (Dec. 9.)

Two handwritten notes dated July 13, 1998 and August 14, 1998 by Dr. Paul Mendis, who treated the employee at Harvard Vanguard Medical Associates, were also marked as exhibits.[1] The hearing record does not disclose whether Dr. Mendis ever saw

---

[1] The notes read as follows:

> 7-13-98 To Whom It May Concern:
> Ms. Marie Carelus was re-evaluated today for low back pain caused by a work related injury 6-10-98. She has made little progress and must remain out of work through 8-3-98 when she will be re-examined. Meanwhile, she will continue with her physical therapy. Sincerely, Paul Mendis, M.D. (617) 421-5804.
>
> 8-14-98 To Whom It May Concern:
> Ms. Carelus Marie has been medically cleared to return to work effective 8-17-98 on LIGHT DUTY. This means she can do single beds, but not doubles or extra beds. Please call me if you have any questions. Sincerely, Paul Mendis, M.D. (617) 421-5804.

(Employee Ex. 8.)

the employee after he released her for light duty work in his August 14, 1998 note. We, therefore, can not know whether Dr. Mendis would hold to his light duty opinion upon learning that the employee lasted only four days at adjusted work.

The final medical report relevant to this appeal is that of Dr. John F. Coldewey, a board certified orthopedic surgeon, who examined the employee on November 3, 1998, on behalf of the insurer and prepared a seven page report. (Insurer Ex. 5.) The judge's quotes from and comments on that report are as follows:

> . . . Dr. Coldeway[sic] reported that: "Ms. Carelus appears to be in rather marked discomfort. There is severe restriction of motion due to pain of the thoracolumbar spine. In addition, several rather significant inconsistencies are noted. There is evidence of abnormal pain behavior and symptom magnification." He went on at length to describe how her abnormal pain behavior was obscuring the anatomical basis for her complaints, and he felt that at least some of her symptoms were legitimate, and that she needed a neurological consultation to see if surgery was a viable option, and that she was therefore not at an end result. He opined that she "never was totally disabled as a result of the incident of June 10, 1998. She continues to remain partially disabled," and "unfit to return to any type of housekeeping duties in a hotel." He stated she could "perform only very restricted modified light duty, which essentially would be of a sedentary type, allowing frequent change of body position . . . as needed, and not requiring any lifting over five pounds." I find his opinion, particularly those portions regarding extend [sic] of disability at the time of his examination and his observations of symptom magnification, to be persuasive and I adopt those portions as they are consistent with my own observations of the employee at Hearing.

(Dec. 10.) The judge then squared to the question of whether Dr. Molloy's § 11A report constituted prima facie evidence.

> After a careful review of Dr. Molloy's report and deposition, I do not find his opinion of total disability to be at all persuasive and I do not adopt his opinion in any aspect. "Nothing in § 11A requires the administrative judge to adopt the conclusions of the report or precludes him or her from considering additional medical evidence once it becomes part of the record." Norton v. Bureau of State Office Buildings, 13 Mass. Workers' Comp. Rep. 122 (1999). Because his opinion was convincingly rebutted by those of Dr. Mendis and Dr. Coldeway[sic], both of whom I find to be persuasive and whose opinions I have adopted in the combination described

> previously, Dr. Molloy's opinion therefore loses its prima facie weight and is considered only as ordinary evidence.

(Dec. 11.) Having rejected the impartial physician's opinion that the employee was totally medically disabled from any type of gainful employment and adopted the insurer's medical expert's opinion that she could perform very restricted, modified work of a sedentary type, the judge found that the employee had an earning capacity of $240.00 per week effective August 18, 1998.

The employee on appeal argues that the opinions of Doctors Mendis and Coldewey speak only to the medical condition at the time of their examination and thus, do not contradict or disagree with the later opinions of the impartial medical examiner.[2] Therefore, argues the employee, the impartial physician's report is prima facie evidence which, in the absence of contradictory evidence, requires a finding that the evidence is true. Anderson's Case, 373 Mass. 813, 817 (1977).

The hearing judge used Dr. Mendis' reports in a way that complemented rather than contradicted the opinion of the § 11A impartial examiner. Doctor Coldewey, the insurer's orthopedic expert, opined that the employee was never totally disabled. The judge, however, found as follows:

> I do not adopt his [Dr. Coldewey's] opinion that she was not totally disabled from June 11, 1998 until August 17, 1998, as I have adopted Dr. Mendis' opinion on extent of disability for that period.

(Dec. 10, 11.)

The judge adopted Dr. Mendis' opinion as a supporting medical opinion for his finding of temporary total incapacity for the period June 11, 1998 until August 17, 1998. As thus used by the judge, Dr. Mendis' opinion does not conflict with the opinion of Dr. Molloy, who also opined that the employee was totally disabled.

[2] The employee argues that there is a two-year gap between the dates of the adopted opinions and the date of the § 11A exam. (Employee Br. 5,7.) This assertion is not borne out by the record. The handwritten notes by Dr. Paul Mendis are dated July 13, 1998 and August 14, 1998 and the comprehensive November 3, 1998 report of Dr. John F. Coldewey is based on his exam

Doctor Coldewey and Dr. Molloy both diagnosed a protrusion of the L4-5 disc causally related to the work effort at Four Seasons Hotel.[3] Doctor Coldewey found evidence of abnormal pain behavior and symptom magnification. Doctor Molloy made no such finding. Only when the two experts get to the question of medical disability, is there a divergence of opinion. Doctor Coldewey considered the employee physically unfit to return to any type of hotel housekeeping work and medically capable of only very restricted, modified light duty of a sedentary nature allowing frequent change of body position and no lifting objects weighing over five pounds. In the context of these orthopedic limitations, Dr. Coldewey concluded that the employee was never totally disabled and the duration of her persistent partial disability was unpredictable. (Insurer Ex. 5, 6.)

In his impartial report, Dr. Molloy does not identify orthopedic limitations with respect to lifting, bending, standing, squatting or the like.[4] He nevertheless concludes that Ms. Carelus is totally disabled from any type of gainful employment, (Statutory Ex. 3; Dep. Dr. Molloy, 36), and that her prognosis is poor without surgery. (Dep. Dr. Molloy, 37.)

Assuming, for the moment, that Dr. Molloy's testimony that the employee cannot be gainfully employed is a medical opinion and therefore entitled to prima facie weight, we think that the opinion of Dr. Coldewey rendered ten and one half months earlier does indeed contradict the opinion of Dr. Molloy on extent of medical disability.[5] There is

---

conducted on that date. The impartial exam took place on September 17, 1999, some ten and a half months after Dr. Coldewey's report.

[3] Doctor Molloy also describes the condition as a herniated disc (Statutory Ex. 2), but explains in his deposition that disc protrusion and disc herniation are synonymous and are used interchangeably. (Dep. Dr. Molloy, 16.)

[4] Oddly enough, the doctor is not questioned about any such restrictions by either attorney in the course of his deposition.

[5] Perhaps anticipating the ease with which the line separating medical disability and vocational incapacity can be blurred, the Supreme Judicial Court took a hard and helpful look at this issue in Scheffler's Case, 419 Mass. 251 (1994). The court quoted at length from L. Locke, Workmen's

nothing in the hearing record which would support a finding of any change in the employee's condition in the ten and one half-month interval between exams, nor does the employee argue that there was a change. On these facts then, the time intervals between the two exams is of no consequence. See Hernandez v. Crest Hood Foam Co., Inc., 13 Mass. Worker's Comp. Rep. 445 (1999)(no requirement for additional medical evidence for a gap period where there was no apparent change in condition). In these circumstances, we are satisfied that it was not legal error for the judge to adopt Dr. Coldewey's opinion over that of Dr. Molloy.

Compensation, § 321, at 375-376 (2 ed. 1981), on how the same medical disability might well have a different impact on different individuals based on what they brought to the job market by way of vocational qualifications. The court then went on as follows:

> With specific reference to the degree of disability, which is the issue in this case, the impartial medical examiner ordinarily would be expected to describe the employee's ability to perform certain tasks and state restrictions on his ability to work. [Fn 3:For example, when a back injury is involved, the physician might report on whether the employee can lift objects over a certain weight, stand for prolonged periods, drive an automobile or operate a mechanical equipment, or engage in other activities that would be required at work.] The impartial medical examiner might also relate the medical findings to the requirements of the employee's job and express an opinion that, based on the medical findings, the employee can return to work in some capacity. If that opinion is based on facts which the administrative judge (and ultimately the board) finds are complete and accurate with respect to the requirements of the employee's job, or other work available to the employee, the administrative judge would be required to accord prima facie status to that opinion as well. After giving proper weight to the prima facie and other evidence, the administrative judge would then find the facts and apply appropriate legal standards to determine whether the employee has suffered a loss of earning capacity.

Scheffler, supra at 257.

We reject the employee's contention that the hearing judge was required as a matter of law to afford prima facie weight to Dr. Molloy's opinion on medical disability and summarily affirm the hearing judge's decision on the other issues raised by the employee on appeal.

So ordered.

_____
William A. McCarthy
Administrative Law Judge

Filed: May 15, 2002

_____
Susan Maze-Rothstein
Administrative Law Judge

_____
Frederick E. Levine
Administrative Law Judge