COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 063053-91**

Mary Whelan	Employee
Brigham & Women's Hospital	Employer
Brigham & Women's Hospital	Self-insurer

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

APPEARANCES
Mark D. Horan, Esq., for the employee
Patricia A. Costigan, Esq., for the self-insurer at hearing
John C. White, Esq., and Maya Raja, Esq., for the self-insurer on appeal

MAZE-ROTHSTEIN, J. The self-insurer appeals from a decision that awarded the employee ongoing G. L. c. 152, § 35, partial incapacity benefits for her accepted industrial injury of November 14, 1991. The numerous arguments the self-insurer makes are either meritless or insubstantial, except for one error which requires that we recommit the case.

The employee, Mary Whelan was a thirty-six year old registered nurse at the time of the hearing. She injured her lower back and left shoulder on November 14, 1991, when she attempted to catch a falling elderly patient. (Dec. 4-5.) The employee took a few days off of work, and treated for her injuries. She returned to work with restrictions, but her medical condition deteriorated until she could no longer work. She underwent a left shoulder arthroscopy in 1995, and continued treating with various specialists. She did not return to work. The self-insurer voluntarily paid indemnity benefits. As of the time of the 2001 hearing in this matter, the employee still suffered from constant pain in both arms, left shoulder, and lower back, and numbness in her hands and fingers. The judge credited her experience of pain and limitations. (Dec. 5-6.)

In an earlier proceeding, a different judge ordered the self-insurer to pay § 35 benefits at conference, based on an assigned weekly earning capacity of $350.00. The self-insurer did not appeal the order. The present proceeding was instituted by the self-insurer on a complaint requesting a modification or discontinuance. The judge at conference increased the employee's earning capacity to $500.00. Both parties appealed to a full evidentiary hearing. (Dec. 2.)

The employee underwent a § 11A medical examination on April 25, 2000. The doctor diagnosed the employee as suffering from lumbar strain, right L5-S1 radicular symptoms, a torn left rotator cuff, musculoskeletal pain in her neck and upper extremities, and pain syndrome, all causally related to the 1991 industrial injury. The doctor considered the employee to be at a medical end result. The doctor opined that the employee was partially and permanently disabled, and that she could return to nursing as long as she was restricted to no more than occasional lifting up to fifteen pounds, and no repetitive bending. (Dec. 7; § 11A Report.) The judge adopted the opinions of the § 11A physician. (Dec. 8.) Neither party moved for the introduction of additional medical evidence; the judge did not move for such introduction on his own initiative under § 11A(2) and no deposition was taken.[1] (Dec. 3.) Therefore, the § 11A report was the exclusive prima facie medical evidence in the case. Despite this the judge, nonetheless, made findings on a 1999 report of Dr. Nathaniel Katz, one of the employee's treating doctors, and a 1999 report from an independent medical examination performed by Dr. Steven Sewall for the self-insurer, neither of which were admitted in evidence. (Dec. 7-8.)

[1] General Laws c. 152, §11A(2), provides, in pertinent part:

> Notwithstanding any general or specific law to the contrary, no additional medical reports or depositions of any physicians shall be allowed by right to any party; provided, however, that the administrative judge may, on his own initiative, or upon motion by a party, authorize the submission of additional medical testimony when such judge finds that said testimony is required due to the complexity of the medical issues involved or the inadequacy of the report submitted by the impartial medical examiner.

The judge concluded that the employee was capable of earning $350.00 per week, in light of her medical restrictions and her vocational profile. (Dec. 8-9.) The judge awarded ongoing § 35 benefits accordingly. (Dec. 11.)

The self-insurer makes thirteen separate arguments on appeal. Of these, only three issues have some arguable merit, but two of the three present no reason to reverse or recommit. We discuss those first.

The standard for harmless (non-prejudicial) error is well established:

> An error is nonprejudicial only when we are sure that the error "did not influence the [judge], or had but very slight effect . . . . But if one cannot say, with fair assurance, after pondering [the decision] without stripping the erroneous action from the whole, that the [judge's conclusion] was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected."

Commonwealth v. Federico, 425 Mass. 844, 852 (1997), quoting Commonwealth v. Peruzzi, 15 Mass. App. Ct. 437, 446 (1983). We think that the judge's errors in the present case all clear the harmless error hurdle. We can, "with fair assurance," determine that the judge's conclusion was indeed "not substantially swayed by the error[s]."

The self-insurer contends that the judge erroneously shifted the burden of proof on the issue of incapacity when he found, "[T]here is no medical evidence to support that the employee's pain has subsided to the point where she is able to work full time at any position." (Dec. 9.) It is axiomatic the employee has the burden of proving every element of her claim. Ginley's Case, 244 Mass. 346, 347-348 (1923). The finding does give the impression of shifting the burden of proving extent of incapacity, by seeming to require the self-insurer to show improvement. Nonetheless, the finding accurately reflects the evidence, in that the exclusive § 11A medical opinion affirmatively indicated the medical restrictions consistent with the judge's finding and conclusions. (Dec. 2, 6-7.) An inadvertent shift in the burden of proof is not, *quod est demonstratum*, reversible error. See Commonwealth v. Whitman, 430 Mass. 746, 757 (2000)(although some instructions on self-defense, viewed in isolation, gave impression of burden shifting, court disregarded error in light of instructions taken as a whole). Taken alone, we would

see no reason for reversal or recommittal on this ground. However, since we must recommit the case on other grounds, the judge should revise and clarify this point in his decision. We do remind the judge that care must be taken to write decisions with an eye toward the evidence he finds persuasive – along with the rational inferences that can be drawn therefrom – rather than the absence of countervailing evidence.

The self-insurer takes issues with the judge's finding, "[T]he self-insurer *erred* by not finding the employee a suitable position in light of her disability restrictions." (Dec. 8; emphasis added.) We agree with the self-insurer that the choice of the verb, "erred," is unfortunate. Self-insurers, and insurers generally, do not, in the context of workers' compensation re-employment, "err" as a matter of law, and there is certainly no legal obligation for an insurer to offer a light duty job to an employee. However, we do not understand the judge's finding as indicating legal error, in any event. This is not, for example, a penalty claim under § 8 or § 14(1), in which a self-insurer's omission (error) would be the central issue. In the context of the present claim, we see the finding as merely an observation that there was no question of an earning capacity to be assigned within the scope of the job offer provision, § 35D(3).[2] We agree that the judge's comment, and one that followed, "The self-insurer, a major employer of nurses in Massachusetts, could have reexamined the employer's offerings, and expended minimal resources by rehiring her," (Dec. 8), would have been better confined to a status/settlement conference. Nonetheless, while we see no prejudice stemming from this error, the judge should revise and clarify these findings to remove any doubt as to lack of obligation for the self-insurer to make a job offer.

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[2] General Laws c. 152, § 35D(3), as amended by St. provides, in pertinent part:

> For purposes of sections thirty-four, thirty-four A and thirty-five, the weekly wage the employee is capable of earning , if any, after the injury, shall be the greatest of the following:--
>
> (3) The earnings the employee is capable of earning in a particular suitable job; provided, however, that such job has been made available to the employee and he is capable of performing it.

Finally, we must recommit the case on the self-insurer's one meritorious argument that the judge referred to and made findings on medical reports that were not in evidence; namely, reports of Drs. Nathaniel Katz and Steven Sewall. Dr. Katz causally related the employee's constellation of chronic pain to her industrial injury in his October 7, 1999 report. In his June 29, 1999 report, Dr. Sewall, on the other hand, considered that the employee's reports of pain were due to a "functional overlay," which the employee's returning to her regular work might help her to overcome. (Dec. 7.) The judge specifically discounted the opinion of Dr. Sewall. (Dec. 8.)

We agree with the self-insurer that the judge violated the provisions of § 11A by looking into the conference materials to review these two medical reports, as he had not exercised his discretion to open the case to additional medical evidence by ruling that the impartial report was inadequate or the medical issues complex. Compare Behr v. General Electric Co., 17 Mass. Workers' Comp. Rep. __ (June 2. 2002)(insufficient and irrelevant reason given for allowing § 11A(2) additional medical evidence, reversible error). We cannot discern the extent to which the judge's inappropriate review of these reports might have affected his assignment of the employee's earning capacity, particularly as Dr. Katz apparently found the employee's pain to be severe. See Berube v. Massachusetts Turnpike Auth., 12 Mass. Workers' Comp. Rep. 172, 174 (1998). On recommittal, the judge should strike the findings on these two medical reports, and reassess his assignment of the employee's earning capacity without any consideration of them.[3]

We summarily affirm the decision as to all of the other arguments the self-insurer advances on appeal.

Accordingly, we recommit the case for clarifications and further findings consistent with this opinion.

[3] We note that it is, of course, open to the parties to move for additional medical evidence should they perceive a period in dispute not covered by the § 11A medical opinion. See G. L. c. 152, § 11A(2); George v. Chelsea Hous. Auth., 10 Mass. Workers' Comp. Rep. 22(1996)(where

So ordered.

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Susan Maze-Rothstein
Administrative Law Judge

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Sara Holmes Wilson
Administrative Law Judge

Filed: June 6, 2003

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Martine Carroll
Administrative Law Judge

§ 11A doctor does not render an opinion for a period prior to the examination date, additional medical evidence appropriate for that period).