COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO:** 045514-04

Michelle Grant	**Employee**
Fashion Bug	**Employer**
American Casualty Company of Reading PA	**Insurer**

REVIEWING BOARD DECISION

(Judges Fabricant, Horan and Levine)

The case was heard by Administrative Judge Bean.

APPEARANCES

Daniel C. Finbury, Esq., for the employee
John J. Canniff, III, Esq., for the insurer

FABRICANT, J. The insurer appeals from a decision in which the administrative judge awarded the employee ongoing § 34 benefits for an accepted work injury to her right foot. The insurer argues that the judge failed to consider the deposition testimony of the § 11A impartial physician, thereby depriving it of evidence favorable to its case. We agree, and recommit the case.

Noting the impartial medical report did not comment on the issue of whether the employee's work injury aggravated the underlying arthritic condition in her foot, the judge allowed the employee's motion to declare the § 11A impartial report inadequate, and opened the record for additional medical evidence. (Dec. 145, 149.) The judge, however, continued:

> I make this ruling despite having the doctor's opinion on the employee's aggravation theory, which he offered on pages 40-44 of his deposition. Brackett [v. Modern Continental Constr. Co., 19 Mass. Workers' Comp. Rep. 11 (2005),] expressly forbids me, or any administrative judge, from considering the doctor's opinions expressed in a deposition, until after I

> make an irrevocable finding on the adequacy of the doctor's medical opinions.

(Dec. 149.) The judge then continued further with a four page essay on his disagreement with Brackett, ending:

> I have not conducted a new analysis of [the impartial physician's] medical opinion taking into consideration his deposition testimony, because, under the holding of Brackett such an exercise is a waste of time. However, I note that the doctor's opinions as expressed on pages 40-44 of his deposition appear to fully address one area of the doctor's opinion that I found inadequate on June 15, 2009. Had an inadequacy analysis been performed considering the doctor's cross-examination testimony my ruling may very well have been different and this decision may ultimately have favored the insurer.

(Dec. 153.) The judge ultimately adopted the opinions of the employee's treating physicians, and awarded § 34 total incapacity benefits. (Dec. 157-159.)

In Brackett, supra, we held that judges must rule on motions to submit additional medical evidence on inadequacy grounds based on the contents of the impartial medical report alone, and cannot *compel* a party to depose the impartial physician prior to acting on said motions.[1] If the motion is allowed before a deposition is taken, additional medical evidence is authorized. Additional evidence does not render the impartial doctor's deposition opinions irrelevant, however, and review of that evidence is certainly not a "waste of time." Quite the contrary, the judge may still adopt the impartial physician's deposition opinions because *they are evidence.*

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[1] We stress that Brackett places no limitations on the election of the parties, or the discretion of the judge, to handle the issue of § 11A inadequacy at any appropriate juncture in the proceedings. A judge may elect to defer a ruling on a motion for inadequacy until after the impartial physician's deposition is taken. Likewise, a motion presented after the deposition is often appropriate. See Orlofski v. Town of Wales, 23 Mass. Workers' Comp. Rep. 175, 180-181 (2009)(in absence of a post-deposition motion for inadequacy, the employee failed to preserve issue of the impartial physician's contradictory testimony).

Therefore, although a § 11A report loses its prima facie effect upon being declared inadequate, it "remains evidence throughout the trial, and is entitled to be weighed like any other evidence upon any question of fact to which it is relevant." Cook v. Farm Serv. Stores, Inc., 301 Mass. 564, 566 (1938). The judge is free to adopt the deposition opinions of the impartial physician if he finds them to be the most persuasive. See Fitzgibbons's Case, 374 Mass. 633, 636 (1978)(within province of judge to accept one medical expert over another). The deposition testimony of the § 11A physician was simply evidence of equal stature to the parties' additional evidence addressing the employee's medical condition.

When does prima facie evidence, such as [the § 11A physician's medical opinion] lose its artificial legal force and compelling effect and retain only its inherent persuasive weight as a piece of evidence to be considered with other evidence in finding the fact? … [U]ntil, and only until, evidence appears that warrants a finding to the contrary. Cook, supra. See Coggin v. Massachusetts Parole Bd., 42 Mass. App. Ct. 584, 589 (1997)(§ 11A evidence may be met and overcome by additional medical evidence, but probative value of all medical evidence is to be weighed by judge).

Accordingly, it was arbitrary and capricious for the judge to fail to consider the impartial physician's deposition testimony. See Morrissey v. Benchmark Assisted Living, 20 Mass. Workers' Comp. Rep. 303, 304-305 (2006)(error for judge to fail to consider deposition testimony of impartial physician).

The decision is reversed, and the case recommitted for further findings of fact consistent with this decision.

So ordered.

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Bernard W. Fabricant
Administrative Law Judge

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Mark D. Horan
Administrative Law Judge

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Frederick E. Levine
Administrative Law Judge

Filed: **December 28, 2010**