COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 039096-05**

Nancy J. Pasquale	Employee
Benchmark Assisted Living, LLC	Employer
Transportation/CNA Insurance Company	Insurer

REVIEWING BOARD DECISION
(Judges Horan, Levine and Harpin)

The case was heard by Administrative Judge Maher.

APPEARANCES
Teresa Brooks Benoit, Esq., for the employee at hearing
James N. Ellis, Esq., for the employee on appeal
Martin T. Sullivan, Esq., for the insurer

HORAN, J. The insurer appeals from a decision discontinuing the employee's § 34 benefits as of May 10, 2007, but awarding § 35 benefits from that date forward.[1] We affirm the decision in part, and recommit the case for further findings concerning the employee's earning capacity.

This case has a long and complex history, which we summarize as follows.[2] On November 8, 2005, the employee injured her right knee at work; thereafter, the insurer commenced payment of § 34 benefits based on her average weekly wage of $1,258.67. (Dec. 5-6.) In 2007, the employee filed a claim for mileage reimbursement, which was the subject of a May 10, 2007 conference before Administrative Judge Catherine Watson Koziol. At that conference, Judge Koziol also joined the insurer's complaint to discontinue or modify the employee's compensation as of May 10, 2007. Judge Koziol issued a conference order the

[1] The judge also awarded the employee §§ 13 and 30 benefits, a § 8(1) penalty, and an enhanced attorney's fee pursuant to § 13A(5). The insurer does not challenge these awards on appeal.

[2] Three hearings before three different administrative judges were held. We refer to the transcripts of those hearings chronologically as Tr. I, Tr. II, and Tr. III.

following day, denying the insurer's complaint and ordering it to reimburse the employee at the rate of thirty cents per mile. Both parties appealed.

On August 31, 2007, pursuant to § 11A, the employee was examined by Dr. Thomas P. Goss. Dr. Goss's report was entered into evidence at the April 9, 2008 hearing. (Tr. I, 4.) On May 16, 2008, he was deposed. The record closed. Shortly thereafter, Judge Koziol was appointed to the position of administrative law judge; accordingly, she lacked the authority to issue a hearing decision.

The case was reassigned to Administrative Judge Omar Hernandez, who presided at the second hearing on October 31, 2008. (Tr. II.) Judge Hernandez did not issue a decision, and after being appointed to senior judge in November, 2011, he reassigned the matter to Administrative Judge Dennis Maher.

On April 3, 2014, the matter was scheduled for a third hearing, with Judge Maher presiding. He joined the employee's § 34A claim for benefits from September 8, 2008, and continuing, as well as her claim for a psychiatric injury owing to her work-related physical injury.[3] (Dec. 4.) Prior to swearing in the employee to testify for the third time, the judge stated:

> Dr. Goss['s examination] . . . was in 2007, and it is now 2014. For that I apologize to the parties for the length of time it has taken. However, it also makes me want to . . . open up the meds, if it was just for that reason alone, but I think we have some additional complexities . . . the age of the case, the 1(7A) defense, and . . . a psychiatric claim. . . .

(Tr. III, 6.) The insurer objected to the judge's decision to permit the parties to introduce additional medical evidence, noting that Judges Koziol and Hernandez had previously denied such motions.[4] (Tr. III, 8-9.) The judge maintained his ruling, and both parties submitted additional medical evidence. (Dec. 3; Exs. 11-12.)

[3] At the third hearing, the parties stipulated, inter alia, that the insurer had paid the employee "§ 34 benefits from November 9, 2005 past the expiration to April 30, 2009." (Tr. III, 5.)

[4] We note, however, the employee's § 34A and psychiatric injury claims were not before Judges Koziol or Hernandez.

At hearing, the insurer argued the employee's work as a notary public following her work-related injury demonstrated her capacity to earn wages. The employee admitted she was a notary, but testified she worked for the family business, and that her husband generated most of its income performing other services. (Tr. III, 27-32, 48-49.)

In his decision, the judge found the income generated from the employee's family business "was substantial." (Dec. 8.) He continued:

> The employee testified that her husband generated the income all on his own. I do not find [it] credible that she was not involved. She was the only notary and started the business. The notary business generated income, including taxable income reported by the employee during the year 2007 and every year since.

(Dec. 8.) The judge also discredited the employee's testimony regarding her emotional condition, and denied her psychiatric injury claim. (Dec. 8, 11, 14.) However, he adopted medical opinions supportive of the employee's assertion that her work-related right knee injury restricted her to sedentary work, assigned her an earning capacity of $314.67, and awarded her the maximum partial incapacity benefit of $566.40 per week from May 11, 2007, to date and continuing.[5] (Dec. 13, 16.) The judge also opined the employee's $314.67 earning capacity "may exceed her actual earning capabilities working within her limitations." (Dec. 13-14.)

On appeal, the insurer argues that because the medical opinion of Dr. Goss was adequate, the judge erred by allowing the parties to submit additional medical evidence. However, the adequacy of the impartial medical examiner's report does not end the inquiry. Under § 11A(2), judges are also free to act sua sponte and request additional medical evidence on the grounds of medical complexity.

[5] The judge rejected the insurer's § 1(7A) defense, finding the employee's work injury was a major cause of her disability and need for medical treatment. (Dec. 14-15.)

The insurer argues the judge's finding of complexity cannot stand. We disagree. As the court stated in O'Brien's Case, 424 Mass. 16, 22 (1996),

> § 11A (2) provides explicitly that "the administrative judge may, on his own initiative or upon a 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." Thus, if the judge performs this function correctly, the parties will be granted the . . . right [to submit additional medical evidence] . . . *in any case where this additional testimony would serve some legitimate function.*

(Emphasis added.) We think the rationale expressed by the judge sufficiently justified his exercise of discretion to allow for the submission of additional medical evidence. (Tr. III, 6.) On this record, the fact that two other judges previously refused to consider additional medical evidence is irrelevant. Murphy's Case, 81 Mass.App.Ct. 1117 (2012) (Memorandum and Order Pursuant to Rule 1:28), affirming Murphy v. American Steel & Aluminum Corp., 25 Mass. Workers' Comp. Rep. 71 (2011). Faced with a significant passage of time, and the joinder of new issues, the judge's decision to allow for the submission of additional medical evidence served a legitimate function. O'Brien, supra at 22. Stated differently, given the unique circumstances of this case, we cannot say the judge abused his discretion by permitting the parties to supplement the medical record.[6] And it has been held repeatedly that a judge's decision to seek additional medical evidence should be reviewed under that standard. See, e.g., Coggin v. Massachusetts Parole Bd., 42 Mass.App.Ct. 584, 588 (1997); Hollup's Case, 79 Mass.App.Ct. 1124 (2011) (Memorandum and Order Pursuant to Rule 1:28); Gargan's Case, 75 Mass.App.Ct. 1109 (2009)(Memorandum and Order Pursuant to Rule 1:28); Tavano's Case, 74 Mass.App.Ct. 1126 (2009)(Memorandum and Order Pursuant to Rule 1:28);

[6] We also, once again, reject the argument that the law requires a judge to base his finding of medical complexity on a medical opinion to that effect. The statute contains no such requirement. See Benabed's Case, 85 Mass.App.Ct. 1111 (2014)(Memorandum and Order Pursuant to Rule 1:28); Adams v. Coca-Cola Enters., Inc., 23 Mass. Workers' Comp. Rep. 13, 20 (2009).

Thiboult's Case, 74 Mass.App.Ct. 1120 (2009)(Memorandum and Order Pursuant to Rule 1:28).

Lastly, the insurer argues the judge's assessment of the employee's earning capacity was arbitrary, as the $314.67 amount lacks an evidentiary basis. We agree. The judge set the employee's earning capacity below the minimum wage for full-time work, while adding that the amount assigned "may exceed her actual earning capabilities. . . ." (Dec. 13.) But he did not provide an explanation as to why the employee was unable to work on a full-time basis, and he discredited the employee's testimony that she was uninvolved in a family business that generated substantial earnings. See Dalbec's Case, 69 Mass.App.Ct. 306, 317 (2007)("A monetary figure cannot emerge from thin air and survive judicial review as a mystery.").

Accordingly, we recommit the case for further findings of fact respecting the employee's earning capacity. Because the employee has prevailed on the first issue raised on appeal, we order the insurer to pay the employee an attorney's fee of $1,596.24 pursuant to G. L. c. 152, § 13A(6). Modica v. Suffolk Co. Sheriff's Dept., 27 Mass. Workers' Comp. Rep. 149, 153 (2013).

So ordered.

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Mark D. Horan
Administrative Law Judge

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Frederick E. Levine
Administrative Law Judge

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William C. Harpin
Administrative Law Judge

Filed: ***March 13, 2015***