COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 040484-94**

Nancy Leydon	Employee
General Electric Co.	Employer
General Electric Co.	Self-Insurer

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

APPEARANCES
Ronald D. Malloy, Esq., for the employee
Kevin Jones, Esq., for the self-insurer at hearing
Scott E. Richardson, Esq., for the self-insurer at hearing
Paul M. Moretti, Esq., for the self-insurer on brief

MAZE-ROTHSTEIN, J. The employee appeals a denial of her claim that she was incapacitated for several months in 1999 due to fibromyalgia, which allegedly migrated to her left upper extremity and lower extremities as a result of an accepted 1994 repetitive motion injury to her right upper extremity. Though flawed in one respect, upon close inspection of the decision and record, the error does not rise to the level of a required recommittal. See G. L. c. 152, § 11C. We, therefore, affirm the decision.

Nancy Leydon, who has performed assembly, bench and delivery work for the employer for over twenty years, injured her right wrist, arm, shoulder and neck on August 22, 1994 while disassembling parts. In March 1995, her treating physician diagnosed her with fibromyalgia of the right upper extremity. The self-insurer voluntarily paid weekly § 34 temporary total incapacity benefits from the date she went out of work, September 27, 1994, until March 10, 1996, when she returned to work at a modified job for less pay. Thereafter, it paid § 35 partial incapacity benefits until her pay raises wiped out the differential between her compensation benefit and her salary. By January 1999, Ms. Leydon was experiencing increasing pain, not just in the right upper

extremity, but in the other arm and her legs as well. Her physician diagnosed a flare-up of fibromyalgia in January 1999. She was out of work from January 25, 1999 until May 17, 1999, and was paid "sickness and accident benefits" during that period. (Dec. 157-158.) She has been able to perform her job since May 17, 1999, though she is essentially no better off than when she left in January 1999. She has the same level of pain, but the swelling is much reduced. Now sixty years old, she plans to retire in June 2003 because she will no longer have anyone to drive her to work after that time. (Dec. 158-159.)

The employee filed a claim for § 34 benefits for the four-month period from January 25, 1999 until May 17, 1999, when she was out of work, and for ongoing medical benefits, citing fibromyalgia due to ongoing lifting at work as the cause of her incapacity. (Dec. 153; Employee's claim dated June 4, 1999.) Following a denial at conference the employee appealed to a § 11 hearing. On February 14, 2000, she was examined by a § 11A medical examiner. The employee properly moved for additional medical evidence, on the doctor's report.[1] Following oral argument, the judge denied the employee's initial motion to submit additional medical evidence in a written ruling, stating that he had made a preliminary determination that the medical issues are "not complex and that the impartial medical examiner's report is fully adequate." (Rulings on Motions dated November 27, 2000; Dec. 156.) However, the judge indicated that the parties could file a further motion after deposing the § 11A doctor. Id.

Two days of hearing took place, on January 19, 2001 and March 7, 2001. (Dec. 153, 156.) The § 11A physician was deposed over two days in May 2001. The employee then submitted a renewed request for a finding of inadequacy and complexity, which was opposed by the self-insurer. (Dec. 156.) Upon further consideration of the report and deposition transcript, the judge found the opinions to be fully adequate, (Dec. 156), and the medical issues not complex. (Dec. 156, 163.)

---

[1] General Laws c. 152, § 11A, gives an impartial medical examiner's report the effect of "prima facie evidence [with regard to the medical issues] contained therein," and expressly prohibits the introduction of other medical testimony unless the judge finds that additional medical testimony is required "due to the complexity of the medical issues involved or the inadequacy of the *report*." (Emphasis added.) And see O'Brien's Case, 424 Mass. 16 (1996).

At issue in this case was whether the employee's incapacity in 1999 was a recurrence of her 1994 injury. The employee claimed that she originally suffered fibromyalgia in 1994 as a result of a repetitive use injury to her right upper extremity, and that the fibromyalgia "migrated" to her left upper extremity and legs to cause her incapacity in 1999. (Dec. 161; Employee brief, 1-2.) The impartial examiner diagnosed " 'a diffuse pain syndrome which may represent 'fibromyalgia,' a condition for which there is no objective diagnostic test.' " (Dec. 159, quoting Statutory Exhibit 3.) The § 11A physician did not believe that her condition was secondary to specific trauma, but opined that it was a combination of multiple body aches, depression, and a sleep disorder. (Dec. 160.) He could not correlate her " 'repetitive use discomfort to her present complaints of inability to perform her job and [did] not believe that her absence from work for five months in 1999 was in any way related to a repetitive use pain syndrome of 1994-1996.' " (Dec. 160, quoting Statutory Exhibit 3.) He suggested that her current ailments might, instead, be related to several lifestyle choices such as obesity, inactivity and cigarette smoking. (Dec. 160.) The § 11A doctor further stated that he had never seen, and did not believe, that a traumatic or repetitive use injury in one part of the body could cause fibromyalgia in other areas of the body which did not suffer the trauma, nor had he seen such a migration of symptoms. (Dec. 160-161.) The judge rejected the employee's contention that the physician had a clear bias against a diagnosis of fibromyalgia and was therefore biased in his assessment of the employee's case. Rather, the judge found that the § 11A physician offered a diagnosis of fibromyalgia "on his own terms," referring to it as "a diffuse pain syndrome." (Dec. 162.)

In his decision, the judge relied on the § 11A physician's opinion to find that "the employee was totally disabled due to fibromyalgia which effected [sic] both of her upper extremities and both of her lower extremities during the period of her claimed disability in 1999." (Dec. 163.) However, he further found that:

> The employee was not able to establish that the fibromyalgia symptoms of her right upper extremity that were causally related to her 1994 repetitive motion injury during the years 1994 to 1996 migrated to her other upper extremity and both lower extremities by 1998 and 1999 to cause a work related injury to those

> body parts. The impartial doctor provided a convincing alternative explanation that I accept and adopt, that the fibromyalgia of her left arm and both legs is causally related to several lifestyle conditions discussed above.

(Dec. 163.) The judge therefore denied and dismissed the employee's claims. (Dec. 164.)

The employee appeals, making a number of related arguments. We reject the employee's argument that the § 11A examiner was biased against the existence of the medical condition, fibromyalgia, at issue in this case, and summarily affirm the decision on that issue. See Dec. 162. Compare Mayo v. Massachusetts Bay Transp. Auth., 11 Mass. Worker's Comp. Rep. 190 (1997)(where § 11A doctor dismissive of an entire well established treatment discipline, report inadequate as a matter of law); Lebrun v. Century Mkts., 9 Mass. Worker's Comp. Rep. 692 (1995)(where doctor rejects and is unwilling to render an opinion on disputed chronic pain syndrome, report inadequate as a matter of law). We also reject her argument that the medical evidence establishes that she suffered a recurrence of her 1994 injury in 1999.

The employee further asserts that the decision should be recommitted for findings on whether the judge accepted or rejected two medical opinions listed as evidence but not discussed. Though we find error in listing these reports as evidence, its magnitude does not require recommittal.

The employee argues that the judge solicited additional medical evidence to clarify the issue of whether fibromyalgia of the right upper extremity could migrate to the employee's lower extremities, (Exhibits 14 and 15), but then ignored that evidence. The self-insurer, which at hearing contested liability on all claims relating to fibromyalgia, (January 19, 2001 Tr. 4), points out that the judge denied the employee's motions to submit additional medical evidence not once, but twice. It acknowledges that the judge "curiously" lists the reports of Dr. Gottschall and Dr. Schur as Exhibits 14 and 15, respectively, and suggests that the case could be recommitted to clarify the discrepancy between the rulings of the judge and the listing of these reports as exhibits. However, it argues that, even if Exhibits 14 and 15 were considered as evidence, the employee could

not have met her burden of proving that she experienced a recurrence of her accepted 1994 work injury in 1999. (Self-insurer brief 11-12.)

We see no need for recommittal. In so holding, we are governed by our recent decision in Strong v. John's Oil Burner Serv., 17 Mass. Workers' Comp. Rep. ___ (May 20, 2003). In Strong, the judge had specifically found the § 11A opinion adequate, the medical issues non-complex, and the doctor not biased but, citing concerns over possible due process violations, nevertheless allowed the parties to submit additional medical evidence. We held that admission of additional medical evidence, absent a finding of inadequacy, complexity or bias, violated the express provisions of § 11A. See also Schwartz v. Partners Healthcare Sys. Inc., 16 Mass. Workers' Comp. Rep. 310 (2002); Silverman v. Department of Transitional Assistance, 15 Mass. Workers' Comp. Rep. 176, 179 n. 5 (2001), citing O'Brien's Case, supra. However, since the judge adopted the § 11A opinion, the only properly admitted medical evidence, we affirm the decision.

Here, it is not clear whether the judge actually admitted the reports of Drs. Gottschall and Schur, or whether listing them as Exhibits 14 and 15, respectively, was merely scrivener's error. See Thompson v. Sturdy Memorial Hosp., 10 Mass. Workers' Comp. Rep. 133, 134 (1996)(transcribed wrong name and job title for a witness, scrivener's error); O'Rourke v. Town of West Bridgewater, 13 Mass. Workers' Comp. Rep. 415, 421 n. 4 (1999)(crediting witness who never testified, likely scrivener's error). Supporting the theory that the listing of the reports was scrivener's error is the judge's reference to the employee's reliance, in her closing argument, on contrary medical opinions which were "not in evidence." (Dec. 162-163.) The transcript for the second day of hearing reflects the admission of exhibits only up to Exhibit 13. The transcript indicates that the judge and the parties expected the hearing to resume after the § 11A deposition was taken, (March 7, 2001 Tr. 57-58), but the board file contains no further transcription of proceedings, nor does it contain the reports of the two doctors. However, it is noteworthy that while Exhibits 7-11, (medical reports, paid bills for treatment of the 1994 injury, and a letter accepting liability for the 1994 injury), were "[a]dmitted for the limited purpose of providing evidence that fibromyalgia diagnosis was accepted by the

self-insurer," (Dec. 154-155; March 7, 2001 Tr., 24-25, 31, 44), the decision reflects no such limitation on Exhibits 14 and 15.

Despite these inconsistencies, what is clear is that the judge fully considered the employee's two requests to submit additional medical evidence, and found no merit in the employee's allegations that the § 11A opinion was inadequate and the medical issues complex. (Dec. 156, 163.) In addition, he thoughtfully addressed the employee's claim that the § 11A examiner was biased, and found it baseless. (Dec. 162.) Even if the judge did not admit the two reports in question, he may have solicited them for a purpose not sanctioned by § 11A. The employee states in her brief that the judge solicited the two medical opinions to clarify whether the employee's upper extremity fibromyalgia could have migrated to her lower extremities, and that these reports were admitted as evidence. (Employee brief, 6-8.) The self-insurer, on the other hand, suggests that the two reports may have been submitted conditionally, in the event the judge found the medical issues complex after having an opportunity to review the transcript of the § 11A deposition. (Self-insurer brief, 11-12.) Thus, it appears that there was some off-the-record proceeding that transpired after the second day of hearing at which the judge requested that the parties submit additional medical evidence for some purpose.

While we do not sanction the judge's solicitation and consideration of additional medical evidence, and remind him to protect the record on such pivotal evidentiary issues, where he has found the medical issues not complex and the impartial opinion adequate and unbiased, the error does not require recommittal as he has, nonetheless, adopted the opinion of the § 11A examiner. Following our analysis in Strong, supra, even had the reports been erroneously admitted, there would be no need for recommittal since the judge adopted the § 11A opinion. Id. at ___. Contrast Rodgers v. Massachusetts Dept. of Public Works, 14 Mass. Workers' Comp. Rep. 310 (2000) (where judge failed to list or discuss additional medical evidence submitted by employee, following a finding at a status conference that the § 11A opinion was inadequate, case recommitted because " '[f]ailure to consider the employee's medical evidence would . . . foreclos[e] the employee from the opportunity to meet his burden of proof, in violation of

his right to due process' "). Id. at 312, quoting Richard v. Edibles Restaurant, 8 Mass. Workers' Comp. Rep. 122, 125 (1994).

A final point warrants discussion. The employee argues, in passing, that the case should be recommitted because the judge found the employee was incapacitated, at least in part, by both her upper extremities, but did not award any benefit for this incapacity. (Employee brief, 7.) The judge found "that the employee was totally disabled due to fibromyalgia which affected both of her upper extremities and both of her lower extremities during the period of her claimed disability in 1999." (Dec. 163.) Though the self-insurer had accepted the 1994 injury to the employee's right upper extremity, the judge adopted the § 11A physician's opinion that he could not correlate her repetitive use discomfort (relative to her right upper extremity) to her present complaints of inability to do her job because of *leg pain*. (May 16, 2001 Dep., 38; Dec. 160, citing Statutory Exhibit 3, Impartial Examiner's Report). The examiner had testified that his understanding was that the employee's repetitive use discomfort of her right upper extremity resolved in the mid-1990's, and that her complaints in 1999 were for her lower extremities. (May 16, 2001 Dep. 38.) Thus, there is no support in the medical testimony for a finding that the employee's right upper extremity pain in 1999 was causally related to her repetitive use injury of 1994. Moreover, though the employee's claim form did not specify body parts injured, but rather just alleged "fibromyalgia," the employee herself testified that she left work in 1999 because of leg pain, and that, though her arms hurt, she could still have worked. (January 19, 2001 Tr. 57.)[2] Thus, she failed to put in

[2] The employee testified on cross-examination:

> Q: Now, in his note of October 26 of 1999, talking about your treatment, Dr. Gottschall talks about your leg pain which prevented you from walking much or from kneeling, is that what your symptoms were at the time?
> A: Well, yes, basically that's why I was not in to work. See, my face was all swollen. My legs were – you wouldn't believe it, it was terrible, it was grotesque, but that will go away just like it come. See, you just need enough time, you understand?

evidence that her right arm pain incapacitated her from work.[3]

Accordingly, we affirm the decision of the administrative judge.

So ordered.

_____
Susan Maze-Rothstein
Administrative Law Judge

_____
Patricia A. Costigan
Administrative Law Judge

Filed: June 18, 2003

_____
Martine Carroll
Administrative Law Judge

> Q: Right. So, the reason you were out of work at that time was centered on your legs?
> A: Right, right. And, you know, my arms hurt and that, but still – it's – I still would work. But you can't really work if you can't walk good to get there.

(January 19, 2001 Tr., 56-57.)

[3] We note that in 1999, the employee was still performing modified work. (Dec. 157; January 19, 2001 Tr., 38-39.)