COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 018968-00 039055-00**

Otto K. Weitkunat, Jr. Employee
Springfield Muffler Company Employer
Star Insurance Company Insurer

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

APPEARANCES
William J. Doherty, Esq., for the employee
Robert A. Riordan, Jr., Esq., for the insurer

MAZE-ROTHSTEIN, J. The employee, on appeal, raises three issues contesting the denial of his claim for further compensation. First, he contends that the incapacity conclusions reached as to his May 30, 2000 right leg injury are premised on the judge's own impermissible medical opinion regarding when the employee's deep venous thrombosis resolved. Next, he argues that, despite finding a September 21, 2000 work related accident, the judge erroneously awarded the employee no workers' compensation benefits. Finally, the employee alleges that the judge exceeded his authority in extending time for the submission of draft decisions and proposed findings absent a formal request to do so by the insurer. For the reasons discussed below we affirm the decision. See G. L. c. 152, § 11C.

At the time of hearing, the employee, Otto Weitkunat Jr., was a 40-year-old, married, father of two, who had graduated from high school and completed a two-year auto mechanic educational program. (Dec. 3.) The employer initially hired Mr. Weitkunat as an auto technician, though he later became an assistant manager. Id.

On May 30, 2000, the employee was struck in the right lower leg by a piece of metal from an alignment machine. He received emergency room treatment and

occupational health and rehabilitation services before his return to modified duty work on September 5, 2000. (Dec. 3-4.)[1] On September 21, 2000, while in the course of his employment, the employee was involved in a minor automobile accident. Mr. Weitkunat insisted on being taken to a hospital emergency room, where after examination and testing, he was instructed that he could immediately return to work with a restriction on heavy lifting for one week. (Dec. 5.)[2] Despite a medical release to modified duty work just after the accident, the employee stayed out of work for approximately one month and pursued conservative treatment. Id.

Shortly after returning to modified work, the employee informed the employer that he could no longer perform even light duty tasks. (Dec. 5.) When the employee would not perform the very light tasks essential to the assistant manager position, the employer could modify the work no further given the employee's self-imposed restrictions. (Dec. 6.)[3]

The employee was paid for discrete periods on a without prejudice basis from May 31, 2000 to October 23, 2000. (Dec. 4.) Subsequently, the employee filed a claim for further compensation. The matter went to a § 10A conference from which a denial of payment issued. (Dec. 1.) The employee appealed to a hearing de novo. Id.[4]

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[1] In his findings, based on testimony from the employer's representative, Nicholas Katsoulis, the judge determined that the employee was clearly capable of performing, and did perform, the duties involved in the modified duty position provided by the employer. (Dec. 4.)

[2] Medical reports from the Bay State Medical Center submitted at hearing indicated that x-rays were negative and that the employee demonstrated a full range of motion in his neck. (Dec. 5; Insurer's Exhibit 1.)

[3] The judge found that work, within the restrictions imposed by the employee's treating physicians, was always available to the employee. The judge further noted that in exchange for reduced rent, the employee engaged in fairly strenuous activity of snow plowing in the parking lot in his landlord's apartment complex in December 2000, January 2001 and possibly February 2001. (Dec. 7.)

[4] The parties opted out of § 11A medical evidence process because the matter was reduced to a dispute over closed periods of benefits. See 452 Code Mass. Regs. § 1.10(5).

Based on all the medical records submitted, the judge found that the employee sustained an injury to his right leg arising out of and in the course of his employment on May 30, 2000. Included in the medical records entered into evidence, was a November 11, 2000 venous duplex scan of the employee's right leg. (Dec. 2, 7.) As to extent of incapacity, the judge specifically adopted the results of the venous duplex scan as well as the opinion of Dr. Steven Lee that there was currently no evidence of deep venous thrombosis. The judge, thus, found that the employee had fully healed from his May 30, 2000 right leg injury by November 10, 2000. (Dec. 4, 7.)

The judge further found that the employee suffered, and rapidly recovered from, a minor neck and back strain as a result of the work related motor vehicle accident on September 21, 2000, leaving the employee capable of returning to modified light duty work with very mild restrictions by October 23, 2000. (Dec.7-8.)

On appeal, the employee contends that the judge improperly assumed the role of a medical expert in finding that the deep venous thrombosis resolved and when the employee stopped being incapacitated by his right leg injury. (Employee's brief, 7.) We disagree.

It is well settled that the ultimate probative value of the medical evidence is to be weighed by the administrative judge. Barbieri v. Johnson Equip., 8 Mass. Workers' Comp. Rep. 90, 93 (1994), citing Robinson v. Contributory Retirement Bd., 20 Mass. App. Ct. 634, 639 (1984). And, factual findings will not be reversed unless wholly lacking in evidentiary support or otherwise tainted by errors of law. Phillips v. Armstrong World Indus., 5 Mass. Workers' Comp. Rep. 383 (1991). The judge relied on an expert medical conclusion, properly admitted into evidence, with sufficient evidentiary foundation necessary to find injury cessation and for his decision not to award further compensation. The report of the venous duplex scan of the employee's right leg conducted on November 11, 2000, includes Dr. Steven Lee's impression and expert medical opinion that "No ultrasound evidence of deep venous thrombophlebitis in the right leg at this time from the upper groin throughout the calf. . . .", (Insurer's Exhibit 1),

and a notation in handwriting, presumed to be that of Dr. Lee, which states, "DVT resolved!" Id. The judge permissibly adopted that opinion. (Dec. 8.)

The employee also argues that the DVT scan is no different from an x-ray, MRI, EKG, or any other basic medical or scientific measurement, interpretation of which requires comment by a medical expert. (Employee's Brief, 7.) This contention is misguided, however, because Dr. Lee's commentary and notations provide exactly that. Medical experts may rely on information in reports customarily used by members of the profession to form opinions, and it was within the judge's authority to adopt the medical opinion that was based on the test results relevant to the period of incapacity in dispute. Trani's Case, 4 Mass. App. Ct. 857, 858 (1976); Cooks v. Boston Hous. Auth., 4 Mass. Workers' Comp. Rep. 48, 49 (1990). The decision regarding extent of incapacity was well grounded in both fact and in law.

The employee next contends that, while the judge found a work accident on September 21, 2000, he wrongly denied the claim for indemnity benefits, and for any *medical benefits* related to that injury. (Employee's brief, 8-9.) Again, we disagree. The decision denied the employee's claim for *further* medical benefits, and his claim for weekly temporary benefits from September 21, 2000 to October 24, 2000 relative to the motor vehicle accident. (Dec. 10.) The judge also found that the employee has reached a maximum medical improvement, does not require any further medical treatment for *either* claimed injury, and that any medical treatment rendered *after* March 22, 2001 did not have as "a major cause"[5] the employee's alleged industrial accidents. Id. The employee could earn his full wage at all times after September 21, 2000, and

[5] Though the administrative judge applied the higher standard of causation to § 30 eligibility for both injuries, there are no findings on how the § 1(7A) elements apply to the conditions nor is there any indication in the record that the insurer raised § 1(7A) as a causation issue. See Fairfield v. Communities United, 14 Mass. Workers' Comp. Rep. 79, 81-83 (2000)(insurer's burden under § 1(7A) as an affirmative defense). The issues triggered by § 1(7A) seem to have received no attention below nor is any concern raised on appeal. We note, however, that by decision, the employee's rights as to original liability have been established under § 16.

§ 30 medical benefits relative to both injuries was appropriate through March 22, 2001.[6]

Finally, the employee contends that the judge's decision to extend time for the submission of proposed draft decisions or findings, absent a formal request by the insurer, was error. Upon conclusion of the hearing, the judge invited the parties to submit proposed draft decisions or findings by February 14, 2000. (Tr. 90.) The employee's proposed findings of fact were received on February 11, 2000 and the insurer's draft decision was received by the Department on March 5, 2000. The insurer made no motion for extension of time nor for consideration of the late submission. On March 19, 2000, the employee objected to the judge's consideration of the draft after the close of the record. (Employee's brief, 10.) Citing no authority on point, the employee submits that the judge was required to make sufficient rulings on admissions, objections and extensions for any party to understand exactly what evidence was submitted, accepted and considered by the judge in making his decision. Id. We disagree.

Both in civil and criminal proceedings, trial judges are accorded wide inherent power to do justice and to adopt procedures to that end. Quincy Trust Co., v. Taylor, 317 Mass 195, 198 (1944). It is well settled that an administrative judge has broad discretion in setting procedure for matters assigned to his docket. Saez v. Raytheon, 7 Mass. Workers' Comp. Rep. 20, 22 (1993); Banks v. City of Brockton, 5 Mass. Workers' Comp. Rep 366 (1991). Moreover, the judge has broad discretion on determinations of record closure. See Kerr v. Palmieri, 325 Mass. 554, 557 (1950)(general proposition that granting of a motion to permit additional evidence after trial has been closed rests with discretion of the judge). Furthermore, an abuse of discretion has been defined as including an arbitrary determination, capricious disposition, or whimsical thinking. Davis v. Elevated Ry., 235 Mass. 482, 496-497 (1920).

[6] We summarily affirm the decision as to earning capacity associated with the September 21, 2000 injury in light of the proper consideration given to the medical and testimonial evidence in conjunction with the employee's vocational profile. Scheffler's Case, 419 Mass. 251 (1994); Frennier's Case, 318 Mass. 635 (1945).

At the onset, we are satisfied, after close examination of the judge's decision in conjunction with the proposed decision and proposed findings of facts submitted by the parties, that the judge rendered a decision containing independent analysis sufficient to overcome doubts as to whether there was any deficiency of the requisite "badge of personal analysis." Rutanen v. Ballard, 424 Mass. 723, 726-727 (1997); Karsaliakos v. K & L Concrete Serv., Co., 14 Mass. Workers' Comp. Rep. 285, 287 (2000). Although it would have been a better practice for the judge to respond to the employee's objection to the insurer's late draft submission and officially re-open the record, we believe the judge's exercise of discretion was permissible. Saez, supra at 22 (grant or denial of a continuance within the sound discretion of the judge). Finally, whether the judge acts on his own initiative or in response to a motion in managing the closure of the record for a case on his docket, is inconsequential as long as there is no abuse of discretion as that term is defined by the court in Davis, supra.

On this record, we see no error. The decision is affirmed.

So ordered.

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Susan Maze-Rothstein
Administrative Law Judge

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Martine Carroll
Administrative Law Judge

Filed: May 27, 2003

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Sara Holmes Wilson
Administrative Law Judge

SMR/lk