COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO.:** 026024-02

Patricia Babbitt	Employee
Youville Hospital	Employer
A.I.M. Mutual Insurance Co.	Insurer

REVIEWING BOARD DECISION

(Judges Costigan, Horan and Koziol[1])

The case was heard by Administrative Judge Bean.

APPEARANCES

Seth J. Elin, Esq., for the employee

Michael K. Landman, Esq., for the insurer

COSTIGAN, J. Adopting two expert medical opinions that the employee's accepted low back injury was no longer a major cause of her disability, the administrative judge discontinued weekly incapacity benefits as of the date of the § 11A impartial medical examination. The employee appeals, arguing the judge mishandled the medical evidence. We agree, and therefore recommit the case.

In 1981, the employee was involved in a non-work related automobile accident in which she suffered some physical injuries, for which she treated for two months. Twenty years later, in 2001, the employee developed back pain, allegedly due to repetitive bending, crouching, stooping, lifting and climbing ladders in her job as a telecommunications manager. Her back pain increased over time until she slipped and fell at work on August 7, 2002, further injuring her back. She has not worked since. (Dec. 202.)

In 2006, a different administrative judge adjudicated the employee totally incapacitated for a closed period, and partially incapacitated thereafter. (Ex. 6.) The employee then filed the present claim for § 34 or § 34A benefits, which claim was joined with the insurer's complaint for discontinuance of compensation. The current judge's § 10A conference order maintained the status quo, and both parties appealed to an evidentiary hearing. (Dec. 201.)

[1] Administrative Law Judge Bernard W. Fabricant was originally assigned to the panel but recused himself from this case.

On April 10, 2007, the employee underwent a § 11A impartial medical examination by Dr. Peter B. Germond, who diagnosed a resolved right ankle sprain, and a low back strain and pain superimposed on pre-existing, severe osteoarthritis of the lumbar spine. The doctor causally related the employee's back pain to her arthritic spine and obesity, opining that the work-related low back strain would have resolved by the time of his examination. Dr. Germond considered the employee partially disabled, with a sedentary work capacity, noting that the disability was permanent but only "minimally related to the accident of 8/7/02 and maximally related to advancing osteoarthritis of her lumbar spine which had been noted prior to the work related injury." (Ex. 3; Dec. 203.)

At hearing, the employee contended the impartial medical report was inadequate because Dr. Germond assumed an incorrect history of her 1981 motor vehicle accident,[2] and also relied on an earlier impartial medical report which had been declared inadequate in prior litigation.[3] (Dec. 203-204.) She moved for additional medical evidence and, after lengthy oral arguments, (Tr. 7-27), the judge allowed the motion:

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[2] The doctor identified the employee's 1981 motor vehicle accident as occurring "approximately 30 years ago," (Ex. 3, p. 2), when, in fact, it occurred approximately twenty-six years prior to his impartial medical examination. Given the remoteness in time established by either history, we fail to see how this discrepancy, by itself, rendered Dr. Germond's report inadequate. As to the employee's contention that the doctor wrongly assumed she had sustained a low back injury in that accident, the judge noted:

> The employee testified that she did not sustain any significant low back injury at the time, although she did not rule out any low back injury. She concedes that she "thought she had injured her lower back" in that accident. See employee's closing argument, page 5. Dr. Germond and others may have received this "bad history" from the employee herself.

(Dec. 204.)

[3] Dr. Robert Pennell examined the employee pursuant to § 11A on May 1, 2003. The administrative judge in that litigation found the impartial medical report inadequate and allowed the parties to submit additional medical evidence. (Ex. 6, p. 5.)

> This case has more than the ordinary issues having to do with an inadequacy motion. I am going to open it up and allow additional medical evidence. I'm going to offer a few comments as to why I'm doing this.
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> The reason I am allowing additional medical evidence is really a very straightforward and elementary reason, and that is, [the impartial physician] relies on a bad history. No matter how competent and intelligent a doctor can be, if he's not given the right history, he can be lead [sic] astray. And the bad history I rely upon at this point is his characterization of the 1981 car accident. . . . But, my understanding of the 1981 car accident is that the employee suffered injuries to her knee, elbow and face but not to her back. And Dr. Germond relates at least some of the employee's current complaints, back to this 1981 car accident. . . . What kind of go [sic] hand in hand with this is the fact that Dr. Germond relied upon a discredited doctor's opinion. Now, I don't mean to suggest that Dr. Pennell is a discredited doctor. I have relied upon him many times in the past, and I have chosen not to rely upon him many times in the past. . . . But, Judge Dike expressly found Dr. Pennell's opinions to be flawed, conclusory and inconsistent. I find that on Page 6 of his decision, which is entered into evidence here as Exhibit 6. That leaves open a question as to whether that standing by itself can result in a report being found inadequate. Thankfully, I don't have to reach that because it was a bad history.[4]

(Tr. 26-29.) With that ruling as the backdrop, both parties submitted additional medical evidence, and neither elected to depose the impartial physician. (Dec. 201.)

The employee's medical evidence was that she was permanently and totally disabled due to her 2002 work-related back injury. (Dec. 206-207.) The insurer's medical expert, Dr. Steven Sewall, diagnosed pre-existing mild spondylolisthesis at L4-5, unrelated to the employee's work injury. He characterized the employee's August 7, 2002 work injury as causing a "temporary flare-up of pre-existing mild spondylolisthesis where she has diffuse facet joint arthritic changes to go along

[4] Employee's counsel agreed with, and seemingly relied on, the judge's analysis: "Only that, to clarify, that I think, certainly, in me telling you and I think on your reliance as well, I'm not saying with absolute certainty that Dr. Germond got that analysis from Dr. Pennell, I suspect it strongly, because it was in Dr. Pennell's report. But, certainly, it's the failed history that ultimately lead up to that analysis, which is really my primary argument and I think also your primary justification for the ruling that you've made." [Sic.] (Tr. 31.)

with her exogenous obesity." The doctor further opined that the employee "has long since reached her pre-accident level of function and medical end result," and he released the employee to return to unrestricted work. (Dec. 206, quoting Ex. 3.)

The judge adopted the opinions of Drs. Germond and Sewall, and authorized the insurer to discontinue payment of incapacity benefits as of the April 10, 2007 impartial medical examination. (Dec. 207.) However, prefatory to his adoption of the impartial physician's opinions, the judge explained:

> I am no longer confident that I made the correct ruling. I find no inadequacy due to the listing of Dr. Pennell's report in Dr. Germond's. . . . If I were ruling on the employee's motion for the first time as I write these words, I would find that the dissimilarity of the two accounts of such a distant event is not a sufficient reason to strip the impartial of its prima facie weight. However, having made the ruling and having received the additional medical evidence, it would be improper for me, at this later date, to reverse my ruling and exclude the additional medical evidence provided by the parties.

(Dec. 205.) The employee argues that although the judge professed he was not reversing his ruling as to the inadequacy of the § 11A opinion, that is effectively what he did, thereby depriving her of her due process rights. We agree.

According to the above-quoted explanation, the judge considered that if he did not exclude the additional medical evidence previously offered by both parties, his reassessment of Dr. Germond's opinion was permissible. What the judge apparently did not consider was that his initial ruling of inadequacy as to Dr. Germond's report, particularly in light of his stated reasons, (see Tr. 26-31), may have induced the employee to forgo her statutory right to depose the impartial physician for the purpose of cross-examination, and to instead rely on her own additional medical evidence, introduced pursuant to that ruling. This is not a trifling matter.

> A judge must be vigilant in assuring that the parties are timely apprised of all rulings to which they might respond, and a judge must consistently provide the parties with a reasonable opportunity to respond to any material change in circumstances. When such vigilance does not prevail, due process violations frequently - if not necessarily - result.

Mayo v. Save On Wall Co., 19 Mass. Workers' Comp. Rep. 1, 4-5 (2005). See also, Godinez v. Perkins Paper Co., Inc., 22 Mass. Workers' Comp. Rep. 83 (2008).

"[T]he deposition and cross-examination procedure gives a party the . . . opportunity 'to attack, discredit or refute the report.' " O'Brien's Case, 424 Mass. 16, 24 (1996), quoting Meunier's Case, 319 Mass. 421, 423 (1946). In Ortiz v. Boston Bagel Company, 17 Mass. Workers' Comp. Rep. 579 (2003), we concluded that the judge's denial of the employee's request to depose the impartial physician a second time, after he had authored an addendum to his report, necessitated a recommittal to correct the faulty application of § 11A procedures. Id. at 581. Similar reasoning applies here, because the employee understandably chose not to depose the impartial physician, once the judge had declared his report inadequate because it was based on a "bad history." The judge should have communicated his change of view of the impartial medical opinion to the parties *prior* to the issuance of his decision, and allowed the employee sufficient time to reconsider her decision not to depose Dr. Germond. The judge's failure to do so adversely affected the employee's due process rights and prejudiced the prosecution of her claim, and is therefore arbitrary and capricious under § 11C.

Accordingly, we recommit the case for further proceedings consistent with this opinion. We summarily affirm the decision as to the other issues argued by the employee on appeal.

So ordered.

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Patricia A. Costigan
Administrative Law Judge

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Mark D. Horan
Administrative Law Judge

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Catherine Watson Koziol
Administrative Law Judge

Filed: **June 23, 2009**