COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 037991-01**

Paul Mulkern	Employee
Massachusetts Turnpike Authority	Employer
Massachusetts Turnpike Authority	Self-Insurer

REVIEWING BOARD DECISION
(Judges Costigan, McCarthy and Carroll)

APPEARANCES
Brian C. Cloherty, Esq., for the employee
Elizabeth A. Fleming, Esq., for the self-insurer

COSTIGAN, J. The self-insurer appeals from an administrative judge's decision denying its request to modify or discontinue the employee's weekly benefits, and instead ordering it to pay the employee § 34A permanent and total incapacity benefits, and § 36 benefits for permanent loss of bodily function. On appeal, the self-insurer alleges numerous errors. Finding none warranting reversal or recommittal, we affirm the decision.

Paul Mulkern, a forty-nine year-old high school graduate, had worked for the employer since 1983, first as a toll collector, and, since 1991, as a courier. That job involved collecting revenue at various toll booths, and lifting canisters of coins weighing 40 to 100 pounds. He was required to be licensed to carry a firearm, and was always armed. (Dec. 541.)

On February 7, 2001, the employee, who had sustained several prior back injuries, both before and during his employment with the Turnpike Authority,[1]

[1] In the 1970s, the employee was hospitalized for a week and collected workers' compensation benefits for a back injury sustained while working as a hospital orderly. In 1991, he missed a couple of weeks of work due to another back injury. In December 1995, he suffered a more serious back injury for which the self-insurer ultimately accepted liability. In June 1996 the self-insurer filed a modification/discontinuance complaint. By conference order filed on October 28, 1996, the employee's weekly compensation was modified to § 35 partial incapacity benefits for a closed period from

slipped and fell at work, once again injuring his low back. The self-insurer voluntarily paid weekly incapacity benefits until August 2001, when the employee returned to a light duty position as a tourist information clerk. However, standing eight hours a day markedly increased the employee's low back and leg pain, and he left work after only a few days. (Dec. 541-542.) When the self-insurer refused to reinstate weekly benefits, the employee filed a claim which the parties voluntarily adjusted by an agreement for payment of total incapacity benefits from August 6, 2001 and continuing. (Ex. 6; Employee br. 3.)

In April 2002, the employee filed a claim for § 36 benefits for permanent loss of bodily function and disfigurement; that claim was the genesis of these proceedings. At a § 10A conference on the § 36 claim, the administrative judge joined, but denied, the self-insurer's complaint to modify or discontinue weekly benefits, and awarded the employee $18,720 in § 36 benefits. (Dec. 535.)

The self-insurer appealed to a de novo hearing, challenging the employee's entitlement to both the § 36 award and ongoing weekly incapacity benefits. Among other issues, the self-insurer raised the affirmative defense of § 1(7A). There ensued a lengthy and contentious hearing, spanning ten months and consisting of over fourteen hours of testimony, voluminous documentary exhibits, and multiple status conferences. (Dec. 531-534.) On November 19, 2003, the fourth day of hearing, the employee rested his case and, at the same time, filed a motion to join a claim for § 34A permanent and total incapacity benefits or, in the alternative, § 35 partial incapacity benefits. (Dec. 536.) The self-insurer objected on grounds that the employee did not have a medical report to support his § 34A claim, and that allowance of the motion to join that claim at the close of testimony was prejudicial to the self-insurer.

June to late November 1996, when benefits were terminated. The employee failed to perfect his appeal of that order. (Dec. 532; Ex. 20.) He returned to work in 1997. (Dec. 541.)

Because the employee was nearing exhaustion of § 34 benefits, the judge allowed the motion. (Dec. 536.) However, in response to the self-insurer's protest that it was prejudiced by the late joinder of the § 34A claim, the judge allowed the self-insurer to present further evidence. (February 25, 2004 Tr. 57-58.) The self-insurer conducted additional cross-examination of the employee and presented the report and testimony of a vocational expert. (July 2, 2004 Tr. 49-90, 98-99, 100-109, 128-133, 136; Dec. 551.)

Dr. John McConville had examined the employee pursuant to § 11A on November 1, 2002. Following the doctor's deposition on December 5, 2003, the judge, over the self-insurer's objection, granted the employee's motion for inadequacy, finding that Dr. McConville did not offer a satisfactory opinion on loss of function or causation. (Dec. 548; February 25, 2004 Tr. 57; April 12, 2004 Tr. 3.) Both parties submitted numerous medical records. (Dec. 533-535.)

In a motion filed on July 1, 2004 and argued the next day, the last day of testimony, the self-insurer asked that the judge recuse himself. The self-insurer asserted that the judge had demonstrated a pattern of bias against it by ordering a large § 36 payment at conference; granting the employee's motion at the close of testimony to join claims for § 34A or § 35 benefits; granting the employee's motion to join a claim for an enhanced attorney's fee; and making prejudicial comments. The judge denied the motion for recusal. (Dec. 536.)

The judge found that the employee has stabbing pain in his low back for which he takes oxycontin and percocet, as well as valium to help him sleep. The judge also found that at times, the employee has obtained oxycontin prescriptions from two different doctors, and has bought it on the street. He spends his days sitting in a recliner, and can ride in a car for only fifteen minutes. His sister prepares his meals and does his housework. Since his latest work injury, the employee has gained 80 pounds due to inactivity, and currently weighs 400 pounds. Suggested surgery is precluded by his weight. (Dec. 543.) The judge concluded:

> I find that the employee is totally and permanently disabled, as a result of the work injury of February 7, 2001 in combination with the several previous work injuries, as defined by relevant case law. I find that a major cause of the employee's degenerative disc disease are [sic] the accumulated effects of the several industrial injuries that the employee suffered to his back while in the employ of the Massachusetts Turnpike Authority. The work incident of February 7, 2001 and the previous injuries, including but not limited to the 1995 back injury . . . establish, pursuant to section 1(7A) that those work injuries are the major cause of the employee's current disability.

(Dec. 552.)

Contrary to his conference award, the judge found the employee entitled to only $3,720 in § 36 loss of function benefits. The judge specified that the self-insurer could recoup the additional $15,000 ordered at conference pursuant to § 11D(3). (Dec. 555.) The judge found insufficient evidence to sustain the employee's § 36(k) disfigurement claim that his limp and/or use of a cane was causally connected to his back injury rather than his unrelated knee problems or obesity. (Dec. 553.) Finally, due to the expenditure of time and effort by the employee's attorney, the judge awarded an enhanced § 13A(5) fee of $7,467. (Dec. 554.)

The self-insurer raises multiple arguments on appeal. We address each in turn.

The Joinder of § 34A and § 35 Claims

The self-insurer first argues it was prejudiced by the judge's joinder, after the close of lay testimony, of claims by the employee for § 34A or, in the alternative, § 35 benefits. We see no prejudice.

"Whether to admit additional evidence after a party has rested lies within the sound discretion of the trial judge." Saez v. Raytheon Corp., 7 Mass. Workers' Comp. Rep. 20, 22 (1993), citing Kerr v. Palmieri, 325 Mass. 554, 557 (1950). " 'By [discretion of the court] is implied absence of arbitrary determination, capricious disposition, or whimsical thinking.' " Saez, supra at 22,

quoting Davis v. Boston Elevated Railway, 235 Mass. 482, 496-497 (1920). Certainly the judge, in the rational exercise of his discretion, could have decided not to allow the joinder. See Chamberlain v. DeMoulas Markets, 14 Mass. Workers' Comp. Rep. 187, 193-93 (2000)(judge could rationally conclude that adding § 34A claim on last day of hearing, would have required further medical evidence, delaying the discontinuance decision). However, the joinder of claims for disposition in one proceeding is encouraged, see Eaton v. Blue Cross/Blue Shield, 10 Mass. Workers' Comp. Rep. 650, 651 (1996), and the judge did not abuse his discretion in determining that the interests of judicial economy and fairness to the employee outweighed any concerns about delaying adjudication of the self-insurer's modification/discontinuance complaint. He negated any potential prejudice to the self-insurer by allowing it to further cross-examine the employee; procure the opinion of a vocational expert; examine that expert at hearing; and present additional medical evidence. Thus, in our view, the judge fully protected the self-insurer's due process rights to a hearing at which it could present and rebut evidence, examine and cross-examine witnesses, know what evidence is presented against it, and develop a record for appellate review. Compare Casagrande v. Massachusetts Gen. Hosp., 15 Mass. Workers' Comp. Rep. 383, 386 (2001),[2] citing Haley's Case, 356 Mass. 678 (1970).

We likewise see no merit in the self-insurer's argument that the judge's allowance of the joinder was error because the employee, in supposed contravention of the statute and the adjudicatory rules, did not submit a medical report less than six months old stating that he was disabled from work for the foreseeable future, and causally relating that disability to the work incident

[2] In Casagrande, we held that, in order to affirm a judge's joinder of a § 34A claim brought seven months post-hearing, the judge would have had to allow further medical evidence and possibly additional lay testimony. Since he did not, both parties were denied the opportunity to fully present their evidence. Supra at 387-388.

pursuant to the applicable statute and regulations. See G. L. c. 152, § 7G,[3] and the regulations promulgated thereunder, specifically 452 Code Mass. Regs. § 1.07 (2)(f).[4] The regulations do require that claims for weekly incapacity benefits, including § 34A benefits, be accompanied by a medical report not more than six months old, describing the extent of the employee's incapacity and causally relating it to the work injury. At the time the judge reconsidered the employee's § 34A joinder motion on February 25, 2004, employee's counsel admitted that he still did not have such a medical opinion.[5] (February 25, 2004 Tr. 50.) However, G. L. c. 152, § 7G, makes medical documentation "a prerequisite for the a*cceptance of said claim* or complaint *for processing by the office of claims*

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[3] General Laws c. 152, § 7G, provides:

> The senior judge in consultation with the commissioner shall promulgate rules setting forth the required documentation to be attached to any claim for benefits or complaint for modification or discontinuance of benefits. The attachment of all required documentation shall be a prerequisite for the acceptance of said claim or complaint for processing by the office of claims administration.

[4] 452 Code Mass. Regs. § 1.07(2)(f) provides, in relevant part:

> Claims for benefits under M.G.L. c. 152, §§ 34, 34A and 35 shall be accompanied by a copy of a physician's report or record not more than six months old that describes the extent and duration of the employee's physical or emotional incapacity for work and which relates said incapacity to the claimed industrial injury.

[5] The § 11A report, the only medical opinion in evidence at the time the employee brought the § 34A joinder motion on November 19, 2003, stated that the employee's work-related back sprain had resolved, and although he was totally disabled from returning to work as a courier, the work-related injury was not the "primary cause" of this incapacity. Rather, Dr. McConville opined the primary reason for the employee's inability to return to work was "his formidable obesity and his chronic lumbar instability with degenerative arthritic changes in his lower back." (Ex. 3, p. 5.) However, the employee had not given Dr. McConville a history of his prior work-related low back injuries, though Dr. McConville noted that the medical records contained frequent references to prior low back injuries. (Id.) In his December 5, 2003 deposition, Dr. McConville could not offer an opinion as to how much of the employee's loss of function is related to his back injuries and how much is related to his non-industrial knee condition. (Dec. 547; Dep. 91.)

administration." The statute says nothing about whether such documentation is necessary where a joinder motion is made in the course of a proceeding.

Here, the administrative judge required the employee to produce, as part of his additional medical evidence, an expert medical opinion supporting his claim of causally related permanent and total incapacity, or the § 34A claim would be "off the table." (Id. at 57-58.) This was a reasonable and practical way to decide the motion. If he had it at hand, the better practice would have been for the employee to present the medical documentation with his motion, as an offer of proof. However, both the employee's claim for § 36 benefits and the self-insurer's modification/discontinuance complaint were already before the judge, and extent of incapacity and causal relationship were already at issue. We think the judge appropriately exercised his discretion and his "wide inherent power to do justice and to adopt procedures to that end," Weitkunat, Jr. v. Springfield Muffler Co., 17 Mass. Workers' Comp. Rep. 252, 256 (2003), citing Quincy Trust Co. v. Taylor, 317 Mass. 195, 198 (1944), by allowing the motion to join a § 34A claim, contingent on the employee producing supporting documentation as part of his additional medical evidence.[6]

The Inadequacy of the Impartial Medical Report

The self-insurer argues that the judge erred by finding the § 11A opinion of Dr. McConville inadequate, and by allowing additional medical evidence. The self-insurer cites our decision in Brackett v. Modern Continental Constr. Co., 19 Mass. Workers' Comp. Rep. 11 (2005), for the proposition that the judge was required to determine the adequacy of the impartial physician's opinion based on the § 11A report alone, without considering the impartial physician's deposition testimony. The self-insurer misreads Brackett. There, we held only that when a

[6] Of course, in light of the holding in Slater's Case, 55 Mass. App. Ct. 326 (2002), we note that § 34 benefits need not be exhausted before § 34A benefits may be claimed and awarded.

party files a motion for the allowance of additional medical evidence alleging the inadequacy of the impartial report, the judge may not require that party to depose the impartial physician in an attempt to "cure" the alleged inadequacy. Id. at 14.

That is not what happened here. The judge did not force either party to take the impartial physician's deposition. Rather, the employee first deposed the impartial physician, and *then* moved to have the § 11A opinion declared inadequate. (February 25, 2004 Tr. 2, 61.) After reading the deposition, the judge granted the motion, (April 12, 2004 Tr. 3-7), citing Dr. McConville's inability to comment on loss of function, his failure to give a definitive opinion on causation, and his lack of knowledge about the employee's previous work injuries to his back. (Dec. 547, 548.) There was no error in these findings and no due process infringement prohibiting either party from developing its evidence. See Casagrande, supra, citing Haley's Case, supra.

As the judge did not err in granting the employee's motion for inadequacy, it follows that his allowance of additional medical evidence was not only proper, but mandated by due process considerations. See O'Brien's Case, 424 Mass. 16, 23 (1996)(failure of due process can result when party has not had "opportunity to present testimony necessary to present fairly the medical issues"). The self-insurer further argues, however, that the employee's additional medical evidence, particularly the reports of Dr. Phull and Dr. Fishbaugh on which the judge relied, was inadmissible because it was not submitted at the time of the joinder motion. For the reasons we have affirmed the judge's allowance of the joinder, we reject that argument. We also reject the self-insurer's argument that the employee's additional medical evidence was inadmissible because the records and reports were not certified pursuant to G. L. c. 233, § 79G. Since this issue was not raised below, we deem it waived. Green v. Town of Brookline, 53 Mass. App. Ct. 120, 128 (2001); Dudley v. Yellow Freight Sys., Inc., 15 Mass. Workers' Comp. Rep. 204, 207 (2001).

Section 1(7A) and Causal Relationship

The self-insurer contends the judge failed to make adequate findings supporting his conclusion that the employee met his burden of proving his 2001 work injury was "a major cause" of his ongoing disability pursuant to § 1(7A).[7] We agree, but deem the error harmless, since the heightened § 1(7A) standard was not applicable here, and the medical evidence adopted by the judge supported a finding of simple causation.

The judge apparently believed § 1(7A)'s "a major cause" standard applied since he found, "pursuant to § 1(7A)" that "a major cause [of the] employee's present condition is the combination of the several previous industrial injuries suffered while employed by the Massachusetts Turnpike Authority and the injury of February 7, 2001." (Dec. 552-553.) As we explained in Viera v. D'Agostino Assocs., 19 Mass. Workers' Comp. Rep. 50 (2005), where § 1(7A) is raised, " 'if there is medical evidence that the *pre-existing condition continues to retain any connection to an earlier compensable injury or injuries*,' " the "a major cause" standard does not apply. Id. at 53, quoting Lawson v. M.B.T.A., 15 Mass. Workers' Comp. Rep. 433, 437 (2001). (Emphasis added.)

Here, the judge found that the employee's " 'severely compromised' low back was caused largely by previous industrial injuries suffered while in the employ of the Massachusetts Turnpike Authority. . . ." (Dec. 553.) This finding should have resulted in a causation analysis under the simple "as is" causation standard. Instead, the judge applied the "a major cause" standard, which the evidence did not actually satisfy.

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[7] General Laws c. 152, § 1(7A), provides, in relevant part:

> If a compensable injury or disease combines with a pre-existing condition, which resulted from an injury or disease not compensable under this chapter, to cause or prolong disability or a need for treatment, the resultant condition shall be compensable only to the extent that such compensable injury or disease remains a major but not necessarily predominant cause of disability or need for treatment.

The medical evidence relied on by the judge does, however, support a finding of simple causation. Dr. McConville testified it was reasonable to assume the employee's previous work injuries contributed to his pre-existing degenerative disc disease. (Dep. 64-65; Dec. 546.) Doctors Phull, Aufranc and Limke all opined that the employee is currently disabled by the February 2001 workplace aggravation of his pre-existing degenerative back condition. (Dec. 548-550, 552.)[8] Thus, the judge's error in applying the heightened § 1(7A) causation standard was harmless.[9] See Resendes v. Meredith Home Fashions, 17 Mass. Workers' Comp. Rep. 490, 491-493 (2003)(judge's error in applying § 1(7A) was harmless since he found causation and awarded benefits).

We also reject the self-insurer's argument that the judge improperly substituted his own lay opinion of causal relationship for that of the impartial examiner. Once additional medical evidence supporting a contrary finding is properly admitted, as it was here, the impartial report no longer has prima facie effect. Donegan v. Eastern Tool and Stamping, 17 Mass. Workers' Comp. Rep. 495, 497 (2003), citing Cook v. Farm Servs. Store, Inc., 301 Mass. 564, 566 (1938). The medical evidence adopted by the judge amply supports his finding of

[8] Dr. Fishbaugh, whose opinion the judge adopted, opined that the employee's lumbosacral sprain/strain, disc protrusion and chronic pain syndrome are all causally related to the February 7, 2001 work injury. He did not, as the judge found, opine as to whether the 2001 work injury aggravated the employee's degenerative disc disease. (Exs. 14 and 29.)

[9] Cf. LaGrasso v. Olympic Delivery Serv., Inc., 18 Mass. Workers' Comp. Rep. 48, 54-55 (2004)(instead of introducing evidence that prior work injuries continued to play a role in the condition of employee's knee, thereby invoking the simple "as is" standard of causation, employee explicitly accepted heightened standard of causation under § 1(7A) as part of his burden of proof). Here, the employee argued that the self-insurer had accepted responsibility for treatment of his underlying degenerative disc disease prior to the 2001 work injury, thereby establishing that the pre-existing condition was not "not compensable under this chapter." See G. L. c. 152, § 1(7A). (Employee br. 19-21.)

continuing causal relationship.[10]

The Vocational Expert's Testimony

The self-insurer argues that the judge erred by failing to credit or discredit its vocational expert's testimony. We disagree. "The judge is required neither to adopt the testimony of an expert vocational witness nor to mention that expert's evaluation in reaching a conclusion on earning capacity." Carruturo v. Springfield Wire, Inc., 16 Mass. Workers' Comp. Rep. 214, 216 (2002), citing Sylvia's Case, 46 Mass. App. Ct. 679, 681-82 (1999). Here, the judge did more than was necessary, discussing the vocational expert's testimony and her conclusions as to sedentary jobs she believed the employee could perform. (Dec. 551.) While his decision reflects the judge considered the expert's opinion, it is clear that he

[10] The judge found:

> In making these determinations, I rely on the credible testimony of the employee and the medical opinions of all of the doctors discussed above, in particular, Doctors Fishbaugh and Phull who found that the 2001 work incident aggravated an underlying condition, which continues to totally disable the employee. All of the doctors diagnosed degenerative disc disease and all found some level of disability. Doctors Au Franc [sic] and Limke found that the 2001 incident aggravated the pre-existing degenerative condition in the employee's back and that that aggravation disabled the employee. Dr. John McConville, the section 11A impartial medical examiner offered several diagnoses including a back sprain, chronic pain syndrome, lumbar instability, degenerative changes and obesity. He found the employee to be permanently partially disabled. He stated that the major cause of the employee's disability is a combination of his lumbar instability, his arthritic changes in his low back and his obesity. Deposition, page 80, line 4. He noted that the February 7, 2001 back sprain was superimposed on an already severely compromised lumbar spine. He also noted that previous back injuries could have excellerated [sic] the degenerative changes in the employee's back. Given that the "severely compromised" low back was caused largely by previous industrial injuries suffered while in the employ of the Massachusetts Turnpike Authority, a major cause [of the] employee's present condition is the combination of the several previous industrial injuries suffered while employed by the Massachusetts Turnpike Authority and the injury of February 7, 2001.

(Dec. 552-553.)

rejected it, given his finding that the employee was totally and permanently incapacitated from work.

The self-insurer also maintains that the judge did not perform an adequate vocational analysis under Scheffler's Case, 419 Mass. 251 (1994). We do not agree. The judge considered the medical opinions of Dr. Fishbaugh and Dr. Phull, who opined the employee was totally disabled, against the backdrop of the employee's testimony concerning his pain and physical restrictions, in coming to his incapacity determination. (Dec. 552-553.) The judge was required to "briefly analyze how the medical and vocational elements in combination form the foundation that supports the ultimate conclusion on extent of incapacity." Saccone v. Department of Pub. Health, 13 Mass. Workers' Comp. Rep. 280, 283 (1999). He concluded:

> The employee is a 49 year old morbidly obese man with a high school education and less than one semester of college. All of his work experience involves physical labor. He cannot stand or sit for more than a few minutes at a time, and suffers from constant low back pain.

(Dec. 553.) We are satisfied that "the judge properly made an individualized assessment of the employee's [§ 34A] claim by considering his medical condition, pain, work history, age . . . [and] education before concluding that he remained totally disabled." Fuentes v. Fries Towing, 19 Mass. Workers' Comp. Rep. 75, 77 (2005).

Findings in Conflict with the Evidence

The self-insurer argues that the judge made a number of findings which are unsupported by the evidence. We have already addressed some in the context of other arguments. We briefly address the others.

The self-insurer challenges the judge's finding that the employee's entire work experience involved physical labor. The employee testified that his work history includes parking cars and sometimes working the cash register; driving cabs; working as a toll collector and senior toll collector; and acting as an

emergency service patrol person, which involved driving emergency trucks looking for breakdowns, changing flat tires, delivering gas, and calling for tows. (July 2, 2004 Tr. 52-61.) Though there may have been sedentary aspects to some of these jobs, we see no error in the judge's finding that all involved physical labor.

We likewise reject the self-insurer's argument that the judge should have given the employee's testimony no weight because the employee takes pain medication. Credibility determinations are generally immune from appellate review as long as they are based on the evidence of record. LaGrasso, supra at 52. The judge unquestionably was aware of the employee's use of pain medication -- he made findings of fact in that regard. However, not only was there no evidence that taking pain medications impaired the employee's ability to testify accurately, the self-insurer did not raise the issue of testimonial incapacity at hearing. Therefore, we deem it waived. Green, supra at 128; Dudley, supra at 207.[11]

The Award of an Enhanced Attorney's Fee

The self-insurer posits that the judge's award of an enhanced attorney's fee of $7,467 was arbitrary and capricious because the delays in the case were primarily the fault of employee's counsel. The judge saw it differently, reasoning:

[11] For the same reasons, we reject the argument that the award of medical benefits was based on incomplete medical records, and inaccurate and untruthful information provided by the employee. The self-insurer bases this argument on the employee's testimony that he did not tell various doctors about his pre-injury use of narcotics; that he obtained narcotics from other physicians as well as off the street; and that he had been admitted to a substance abuse program. While "the weight assigned an expert's opinion is dependent upon the accuracy of the facts assumed by the expert," Patient v. Harrington & Richardson, 9 Mass. Workers' Comp. Rep. 679, 682 (1995), the ultimate probative value of the medical testimony is to be weighed by the administrative judge. Barbieri v. Johnson Equip., 8 Mass. Workers' Comp. Rep. 90, 93 (1994). Here, the judge was clearly aware of how the employee obtained and used pain medications, (Dec. 542), and nevertheless credited the opinions of the physicians who examined him as to his need for medical treatment. There is no error in the award of medical benefits pursuant to §§ 13 and 30.

> This case was tried for more than 14 hours over eight days. Thirty-five exhibits were offered into evidence. Much time and effort was expended by both attorneys on issues not usually a part of a workers' compensation hearing. While it can be said that the employee's attorney was the cause of much of the great length of this hearing the same can be said for the counsel for the self insurer. Each of the attorneys in this case provided zealous, competent and commendable representation for their clients. The counsel for the self insurer has the luxury of billing by the hour so she was able to work this case confident that her extra exertions would be compensated. The employee's attorney had no such luxury. . . . [T]he legislature recognized that in some rare cases, an additional fee would be warranted. This is one of those cases.

(Dec. 554.)

Pursuant to G. L. c. 152, § 13A(5), "[a]n administrative judge may increase or decrease [an attorney's] fee based on the complexity of the dispute or the effort expended by the attorney." Generally, a determination that an increased fee is due is a discretionary ruling with which we will not interfere, DiFronzo v. J.F. White/ Slattery/Perini Joint Venture, 15 Mass. Workers' Comp. Rep. 193, 197 (2001), as long as the judge makes findings consistent with his statutory authority to award such an enhanced fee. Thompson v. Sturdy Memorial Hosp., 13 Mass. Workers' Comp. Rep. 427, 429 (1999). The reasons given by the judge for increasing the legal fee are appropriately based on his assessment of the complexity of the litigation, and the effort expended by employee's counsel. We affirm the attorney's fee award.

Bias

The self-insurer's allegations of judicial bias are numerous, but not worthy of recount. With but few exceptions,[12] these allegations stand squarely on the

[12] The self-insurer cites the following statement by the judge as evidence of bias in favor of the employee: "He wants to get his 34A, and the sooner the better." (May 25, 2004 Tr. 5.) The self-insurer's selective manner of quotation troubles us more than what the judge actually said:

> We do have the difficulty in that the employee's Section 34 compensation has exhausted. He wants to get his 34A, and the sooner the better. Certainly, the

shoulders of the self-insurer's other arguments on appeal -- e.g, the judge demonstrated bias by allowing the joinder of the § 34A claim, by finding the impartial medical report inadequate -- and just as we deem those arguments lacking in merit, so do we view the allegation of judicial bias. "The question that must be answered is whether or not [the] administrative judge was biased . . . so as to render him incapable . . . of fairly determining the outcome of the matter[s] in dispute. [Citations omitted.] That question is usually a matter resting within the trial judge's discretion." Johnson v. Boston City Hosp., 14 Mass. Workers' Comp. Rep. 110, 112 (2000). The judge made extensive findings in his decision as to why he was not biased. (Dec. 536-539.) We agree with his determination.

For these reasons, we affirm the judge's decision. The employee's motion for an enhanced attorney's fee on appeal is denied. Pursuant to § 13A(6), the self-insurer is ordered to pay employee's counsel a fee of $1,357.64.

So ordered.

> insurer is contesting whether he's entitled to that. From my own perspective *I want the employee to know one way or the other.* We have discussed this off the record but I do anticipate writing this decision in mid July when I have a writing week.

(Id. at 5-6.) (Emphasis added.) We see no evidence of partiality or prejudgment in this statement.

The self-insurer further insinuates that the judge demonstrated bias against it when he commented on a letter from the self-insurer alleging that an ex parte communication between the judge and employee's counsel constituted fraudulent conduct actionable under § 14: "There is no way for a Section 14(2) claim to be sustained unless not only [is the employee's attorney] culpable, but I am culpable, and having gotten this letter, quite honestly it's going to stay with me for a while." (Id. at 13.) In his decision, the judge dealt extensively with the § 14 allegation, even though the self-insurer withdrew it after the employee attended a rescheduled § 45 examination. (Dec. 539.) He was clearly concerned about the allegation against employee's counsel and apparently believed that if it were found to be true, it would reflect misconduct on his part. His statement at hearing reflected that concern. While it may have been ill-advised, we do not think it reflects bias against the self-insurer.

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Patricia A. Costigan
Administrative Law Judge

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William A. McCarthy
Administrative Law Judge

_____
Martine Carroll
Administrative Law Judge

Filed: **June 6, 2006**