COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS	**BOARD NOS. 009019-99 045481-95 041730-93**
Paula Eastwood	Employee
Willowood of Williamstown	Employer
T.I.G. Insurance Company	Insurer
Willowood Group, Inc.	Employer
Wausau/Liberty Mutual Insurance Company	Insurer
Willowood-Williamstown	Employer
Atlantic Charter Insurance Company	Insurer

REVIEWING BOARD DECISION
(Judges Horan, Fabricant and Levine)

The case was heard by Administrative Judge Poulter.

APPEARANCES
Teresa Brooks Benoit, Esq., for the employee at hearing
Charles E. Berg, Esq., James N. Ellis Sr., Esq., and
Robert L. Noa, Esq., for the employee on appeal
Ralph DiMeo, Esq., for T.I.G. Insurance Company at hearing
John J. Canniff, Esq., for T.I.G. Insurance Company on appeal
Patricia M. Vachereau, Esq., for Wausau/Liberty Mutual Insurance Company
Ana Mari de Garavilla, Esq., for Atlantic Charter Insurance Company

HORAN, J. The employee raises one issue on appeal. She argues the judge's refusal "to open the record for additional medical evidence in light of a facially inadequate impartial medical report . . . was arbitrary, capricious and contrary to law." (Employee br. 1.) We affirm the decision denying and dismissing the employee's claims.

The facts pertinent to the issue raised are as follow. The employee filed claims for medical benefits pursuant to §§ 13 and 30, specifically for right

shoulder surgery and weekly compensation from the date of surgery, against three insurers.[1] (Dec. 2.) After the employee's claims were denied at conference, she attended a § 11A impartial medical examination by Dr. Kuhrt Wieneke.[2] (Dec. 2, 4.) Although employee's counsel submitted voluminous medical records to Dr. Wieneke, she failed to provide him with any hypothetical questions respecting her client's proposed right shoulder surgery. See 452 Code Mass. Regs. § 1.10(2).[3]

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[1] Atlantic Charter was the insurer on the risk on November 12, 1993. Wausau/Liberty Mutual Insurance insured the employer on November 6, 1995, and on March 3, 1999, T.I.G. Insurance was on the risk. The employee also testified that in 1997, she suffered injuries to her right shoulder in a fall at home, and when she fell on ice. (Tr. 53-54.) The employee also testified she aggravated her shoulder injury when she fell at a wedding in 2002. (Tr. 62-63.) The employee did not claim that her 1997 and 2002 injuries were work-related.

[2] The doctor's report is dated January 10, 2011; the decision erroneously reports the date as March 14, 2011.

[3] 452 Code Mass. Regs. § 1.10(2), provides, in pertinent part:

> The parties shall prepare for submission at the outset of a conference a memorandum setting forth the benefits claimed and the issues in dispute. . . .
>
> Such memorandum may be amended by the parties, with the leave of the administrative judge, at or before the hearing. *At a conference involving a medical issue*, *the parties shall also identify to the administrative judge as part of the required memorandum:*
>
> (a) *the medical issue(s) in dispute. . . .*
>
> (b) a list of documents to be included in the medical records to be sent to an impartial physician; *any hypotheticals or disclosure questions to be submitted to the impartial physician upon the judge's approval. . . .*
>
> (c) any objection to the documents included in the medical records and hypotheticals to be submitted to the impartial physician.

(Emphases added.) We note that while the employee failed to submit hypothetical questions to the impartial, two of the insurers did; their questions focused primarily on the issue of causal relationship.

In his report, Dr. Wieneke opined the employee's "present disability appears related to painful arthritic knees, and exogenous obesity." (Ex. 1, p. 3.) He further opined:

> [The employee] . . . is not, in my opinion, presently disabled with regard to her right shoulder. I found no evidence, on evaluation today, that she has any more than minor impairment in her right upper extremity, on the order of 3-5%, based on mild limitation of abduction and forward flexion.

Id.[4] While Dr. Wieneke's report did not address the reasonableness of any proposed right shoulder surgery, it did reveal that the doctor had reviewed the April 23, 2010 report of Dr. Errol Mortimer, who opined therein that the employee "clearly requires *additional* surgery, and this would be necessary and appropriate."[5] (Emphasis added.) Dr. Wieneke's report states the employee "was emphatic" that she never had shoulder surgery; he also noted there were "no surgical scars on her right shoulder." (Ex. 1, p. 1-2.)

At the hearing, employee's counsel moved to have Dr. Wieneke's report declared inadequate because the doctor had failed to "address the issue of whether or not shoulder surgery is needed. . . ." (Tr. 11.) Employee's counsel did not

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[4] On clinical examination Dr. Wieneke noted as follows:

> Motion in both shoulders is surprisingly good. On the left, there is full abduction, forward flexion, posterior extension, and external and internal rotation. On the right side, there is 135 degrees flexion and 135 degrees abduction. External rotation and internal rotation are both 90 degrees, at 90 degrees abduction, and posterior extension is 45 degrees. There is no shoulder girdle atrophy, comparing right with left, to indicate disuse. There is no evidence of right shoulder or left shoulder subluxation. There is no effusion in either shoulder. There is local tenderness on palpation anteriorly on the right only, in the region of AC joint. There is, however, no local subluxation.

(Ex. 1, p. 2.)

[5] Dr. Mortimer's report was submitted by the employee to the judge at conference, and was forwarded to Dr. Wieneke prior to the § 11A examination. See Rizzo v. M.B.T.A., 16 Mass. Workers' Comp. Rep. 160, 161 n.3 (2006)(we take judicial notice of the board file).

express any other rationale in support of her contention that the doctor's report was inadequate.[6] She also advised the judge that she wished to depose Dr. Wieneke:

> Judge: Let me clarify this for the record. You're requesting that we open the medical based on the inadequacy of the 11A report?
>
> Counsel: Yes.
>
> Judge: You are also requesting to depose --- to extend your right to depose Dr. Wieneke?
>
> Counsel: Yes.

(Tr. 12.) The judge then indicated she would entertain motions "to open the record . . . after the deposition. . . ." (Tr. 21.) Employee's counsel voiced no objection to this ruling, and the judge set June 20, 2011, as the deposition deadline. At the close of the hearing, after the judge reviewed the deadlines for the filing of the deposition and the close of the evidence, she reminded the parties that if they wanted to submit additional medical evidence they could file "a motion to re-open." (Tr. 120.) Employee's counsel replied: "I will be doing a motion after the deposition." Id.

Thereafter, employee's counsel ignored the path set by the judge 羊 a path that, at hearing, all had agreed to follow. Our review of the board file,[7] reveals that after receiving permission from the judge to extend the time to take Dr. Wieneke's deposition to July 19, 2011, the employee, on May 24, 2011, filed a motion to submit additional medical evidence on inadequacy and complexity

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[6] Therefore, she waived her right to argue additional grounds on appeal. See, e.g., Green v. Town of Brookline, 53 Mass. App. Ct. 120, 128 (2001)(objections and arguments not raised below are waived on appeal).

[7] See Rizzo, supra.

grounds.[8] (T.I.G. Ins. br., appendix.) In an e-mail dated May 25, 2011, the judge rejected the motion as premature. Id. On June 15, 2011, a legal assistant from the office of employee's counsel advised the parties via e-mail that the deposition of Dr. Wieneke would not go forward as planned, but would be rescheduled. Id. It was not rescheduled. Instead, on June 30, 2011, the employee renewed her motion to open the medical evidence, which the judge denied on July 6, 2011. The employee never took Dr. Wieneke's deposition, and the evidence closed. (Dec. 3.)

In her decision the judge found, 1) that on November 12, 1993, the employee injured her right shoulder at work and was paid a closed period of total incapacity benefits, 2) that she suffered a second shoulder injury at work on November 6, 1995, and worked light duty until returning to full duty, 3) that on March 3, 1999, the employee "suffered a cervical sprain with right shoulder blade pain," 4) that she returned to work "for the next four years," and 5) that she stopped working due to her non-industrial knee injury.[9] (Dec. 4.) As Dr. Wieneke's report was the only medical report in evidence, the judge adopted the opinions contained therein to conclude that there was "no causal relationship between Ms. Eastwood's current disability, or her need for treatment and her employment."[10] (Dec. 5.) The judge denied the employee's claims. (Dec. 5-6.)

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[8] This motion also asked the judge to declare the medical issues to be complex. We reject the employee's argument that the judge erred by failing to find the medical issues complex. There was no abuse of discretion. See, e.g., Murphy v. American Steel & Aluminum Corp., 25 Mass. Workers' Comp. Rep. 71, 76-77 (2011)(and cases cited), aff'd, Murphy's Case, 81 Mass. App. Ct. 1117 (2012)(Memorandum and Order Pursuant to Rule 1:28).

[9] The employee did not claim her knee condition was work-related. The judge's findings relative to the employee's knee were, therefore, unnecessary. This harmless error may be due to the fact that the employee submitted medical reports to Dr. Wieneke concerning her knee, and he addressed the condition of her knee and right shoulder in his report. (Dec. 5; Ex. 1.)

[10] The employee does not challenge the judge's causal relationship finding on appeal. Because she does not question the judge's interpretation of Dr. Wieneke's opinion on causal relationship, we have another basis upon which to affirm the decision. This is

On appeal, the employee raises one issue. She argues the judge erred by refusing "to open the record for additional medical evidence in light of a facially inadequate impartial medical report. . . ." (Employee br. 1.) Specifically, the employee argues the judge erred by forcing her to take Dr. Wieneke's deposition prior to ruling on her motions to open the medical evidence. See Brackett v. Modern Continental Constr. Co., 19 Mass. Workers' Comp. Rep. 11, 13-15 (2005); LaGrasso v. Olympic Delivery Serv., Inc., 18 Mass. Workers' Comp. Rep. 48, 57 (2004); but see Grant v. Fashion Bug, 24 Mass. Workers' Comp. Rep. 347, 348 n.1 (2010)(where employee wishes to depose the impartial medical examiner, no error for judge to defer action on motion to open medical evidence until after doctor is deposed). We disagree. The administrative judge did not force her to take Dr. Wieneke's deposition, nor was his report inadequate on its face. That the impartial examiner did not opine regarding the proposed surgery was owing to the employee's failure to ask him to address that issue.

The employee's contention that the judge, in essence, coerced her into deposing the impartial examiner to cure an alleged inadequacy is based on a misrepresentation of the record. The judge did no such thing. Rather, employee's counsel declared that she would exercise her statutory right to depose Dr. Wieneke. (Tr. 12.) Furthermore, when the judge announced that any motions respecting the medical evidence would be entertained *after* his deposition, employee's counsel responded: "I don't have a problem with that, Your Honor." (Tr. 19.) At the close of the hearing, employee's counsel again voiced no objection to taking Dr. Wieneke's deposition prior to filing motions to open the medical evidence. (Tr. 120.)

For whatever reason, employee's counsel then filed two motions to open the medical evidence after scheduling, but not taking, the doctor's deposition [羊] in

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because any proposed surgery, a form of treatment, would be unrelated to the employee's work.

contravention of the procedural course which had been set.[11] Given counsel's willingness to depose Dr. Wieneke, it was reasonable for the judge to assume that: 1) his deposition would proceed as planned; 2) employee's counsel would ask Dr. Wieneke about whether the employee required right shoulder surgery as a result of any work-related injury; and 3) any motion(s) to open up the medical evidence would be filed after the doctor's deposition.

Not only was the judge's procedural schedule reasonable, she did not err by denying the employee's motions. This is because Dr. Wieneke's report was not inadequate; it addressed the statutory elements:

> The report of the impartial medical examiner shall, where feasible, contain a determination of the following: (i) whether or not a disability exists, (ii) whether or not any such disability is total or partial and permanent or temporary in nature, and (iii) whether or not within a reasonable degree of medical certainty any such disability has as its major or predominant contributing cause a personal injury arising out of and in the course of the employee's employment. Such report shall also indicate the examiner's opinion as to whether or not a medical end result has been reached and what permanent impairments or losses of function have been discovered, if any.

G. L. c. 152, § 11A(2). The doctor was under no statutory obligation to opine on the employee's need for surgery. Therefore, on these facts, he cannot be faulted for failing to address that issue in his report. While the judge was free to act sua sponte, she was under no obligation to compose and submit questions to Dr.

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[11] The judge was under no obligation to modify the procedural course of the case, especially given that all parties had agreed to it. See Day v. Thomas Gallagher, Co., 19 Mass. Workers' Comp. Rep. 160, 163 (2005)(where parties agreed to have impartial examiner submit supplemental report, no error in judge having parties follow this course of action), aff'd, Day's Case, 66 Mass. App. Ct. 1115 (2006)(Memorandum and Order Pursuant to Rule 1:28). The judge's decision to hold firm was not an abuse of her judicial discretion. See e.g., Davis v. Boston Elevated Ry, 235 Mass. 482, 496-497 (1920). We note there is no evidence in the record that Dr. Wieneke was unavailable to be deposed.

Wieneke that should have been asked by employee's counsel.[12] See Viveiros's Case, 53 Mass. App. Ct. 296, 299-300 (2001). Rather, it was the responsibility of employee's counsel to submit sufficient hypothetical questions to the doctor,[13] or to question him directly at deposition, concerning whether the employee's proposed surgery was reasonable and causally related to any one of her three industrial accidents. To the extent the impartial examiner's report was lacking, insofar as it failed to address these issues, the root cause was the failure of the employee's counsel to pose the necessary questions to the doctor.[14] Without answers to these questions, the employee deprived herself of the ability to carry her burden of production and proof on the essential elements of her claim. See Sponatski's Case, 220 Mass. 526, 527-528 (1915).

We draw support for our opinion from the court's reasoning in Vasilenko's Case, 76 Mass. App. Ct. 1127 (2010)(Memorandum and Order Pursuant to Rule 1:28); further appellate review denied, 460 Mass. 1106 (2011). In Vasilenko, the employee argued that because the impartial medical examiner's report failed to "make a determination that the employee was disabled or that any of her treatment was reasonable or necessary," the judge erred by refusing to admit additional medical evidence. Id. However, the court noted the doctor's failure to opine on these issues was "caused by the employee's failure to provide him with medical documentation." Id. Here, the employee failed to provide the impartial medical examiner with a list of questions addressing the specifics of her claim which,

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[12] "The fault, dear Brutus, is not in our [judge], but in ourselves. . . ." *Cassius* in Shakespeare's *Julius Caesar*, Act. I, Scene II.

[13] Once she received Dr. Wieneke's report, the employee could have asked the judge to forward a series of hypothetical questions to the doctor to address, in a supplemental report, the issues of surgery and causal relationship. She did not do so.

[14] We add that it can be fairly inferred from Dr. Wieneke's report that he would not endorse the employee's need for surgery as a result of her work injuries. (Ex. 1.) See footnote 10, supra.

unlike Vasilenko, went *beyond* the requirements of § 11A(2). Therefore, we agree with the Vasilenko court that, "[i]t would be bad public policy, and against the intent of the workers' compensation statute, to permit an employee to stonewall" the impartial medical examination process "for purposes of obtaining an order to open the medical evidence." Id.

The decision is affirmed.

So ordered.

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Mark D. Horan
Administrative Law Judge

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Bernard W. Fabricant
Administrative Law Judge

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Frederick E. Levine
Administrative Law Judge

Filed: **October 24, 2012**