COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 010289-99**

Richard P. Zoschak	Employee
Leggett & Platt	Employer
CNA Insurance Company	Insurer

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

APPEARANCES
John F. Trefethen, Jr., Esq., for the employee
Michael F. Ashe, Esq., for the insurer at hearing
Carey Hugh Smith, Esq., for the insurer on appeal

LEVINE, J. The insurer appeals an administrative judge's decision denying its complaint to modify or discontinue the employee's § 34 temporary total incapacity benefits. The insurer contends that, although the judge allowed its motion to submit additional medical evidence, he erroneously stated in his decision that the motion had been denied, and consequently failed to consider the additional medical evidence submitted by both parties. The records contained in the board file support the insurer's position.[1] We therefore vacate the decision and recommit the case to the judge for reconsideration, taking into account all the medical evidence which was properly admitted.

Richard Zoschak, fifty-two years old at the time of the hearing, is a high school graduate with a prior work history of heavy manual labor. He began work for the employer in 1977 as a machine operator and, at the time of the injury, was safety director

[1] We take judicial notice of the contents of the board file. Rizzo v. M.B.T.A., 16 Mass. Workers' Comp. Rep. 160, 161 n.3 (2002).

and manager of ISO quality systems.[2] Those positions required much walking, standing, wire testing, and computer and keyboard work. (Dec. 4.)

On January 19, 1999, Mr. Zoschak sustained an industrial injury to his back which resulted in two lumbar surgeries. After each surgery, he attempted to return to work, but was unable to continue working due to severe low back pain and burning and numbness in his left leg. (Dec. 4-5, 6.) The insurer accepted liability for the injury, (Dec. 3), and paid § 34 temporary total incapacity benefits. (See Dec. 8; Tr. 4.) The insurer's complaint for modification or discontinuance was denied following a § 10A conference. (Tr. 4; Board file.) The insurer appealed to a de novo hearing. (Tr. 4-5; Board file.)

Dr. Vernon Mark,[3] a neurosurgeon, examined the employee pursuant to § 11A, and his report and deposition testimony were admitted in evidence. (Dec. 2, 3.) Dr. Mark diagnosed the employee with failed back syndrome causally related to the accepted industrial accident. He restricted the employee to sedentary work with no lifting over five pounds, but was uncertain whether Mr. Zoschak could perform even that limited activity. (Dec. 6.)

In his decision, the judge stated that he had denied the insurer's motion to submit additional medical evidence. (Dec. 3.) He credited the employee's testimony regarding his pain and limitations, and found that he was no better at the time of hearing than when he left work in October 2000. (Dec. 6-7.) The judge found the employee unable to work and ordered the insurer to continue paying § 34 benefits. (Dec. 7, 8.)

As previously pointed out, the insurer argues that the judge erroneously stated in the decision that he had denied the insurer's motion for additional medical evidence when, in fact, he had allowed it. As a result, the insurer contends that the judge failed to consider additional medical evidence submitted by both parties. We agree with the

[2] ISO is the abbreviation for "International Organization for Standardization." (See also Tr. 35.)

[3] The judge incorrectly identifies the impartial examiner as "Mark Vernon."

insurer that the judge erred in failing to consider medical evidence appropriately admitted. The employee has not filed a brief on appeal.

A judge may allow the parties to submit additional medical evidence, either on his own initiative or on motion of a party, when he finds that it is required due to the inadequacy of the impartial report or the complexity of the medical issues. G.L. c. 152, § 11A(2). In the present case, by date of April 12, 2002, the insurer filed a "Motion for the Allowance of Additional Medical Evidence." (Board file.) The judge scheduled a hearing on the motion for May 22, 2002. (Id.) The judge allowed the motion by endorsing the following on the motion: "Allowed[;] [name omitted;] Administrative Judge[;] 5/22/02[;] Additional Medical Evidence due 6/10/02." Both parties thereafter submitted additional medical records and reports. (See letter from employee's attorney to Administrative Judge dated June 20, 2002, with attached records and reports; see also faxed and first class letter from insurer's attorney to Administrative Judge dated June 10, 2002, with attached records and report.) Based on these documents, it is clear that additional medical evidence was both authorized and submitted.[4]

In his decision, the judge contradicted his ruling allowing additional medical evidence by stating that he had denied the insurer's motion for such. (Dec. 3.) In addition, he failed to list these documents as exhibits, and he failed to discuss or otherwise acknowledge the medical evidence submitted by the parties in response to his ruling.[5] This case is governed by our decision in Rodgers v. Massachusetts Dept. of Pub. Works, 14 Mass. Workers' Comp. Rep. 310 (2000). There, we held that the judge erred

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[4] It appears that the employee did not comply with the deadline set by the judge. However, there was no objection.

We also note that on June 28, 2002, the insurer filed a closing argument in which it pointed out that additional medical evidence had been admitted in the case. It also argued that the additional medical evidence militated in favor of its position that the employee's weekly benefits should be discontinued. Presumably, the judge received and read this document. See Leppo v. Rusco Steel, Co., 17 Mass. Workers' Comp. Rep. _____ (October 16, 2003).

[5] The judge did describe some of the employee's treatment, (Dec. 4-5), but this information appears to have come largely from the employee's testimony, (Tr. 15-21; 27-28; 36-41), and biographical data sheet. The only medical opinion discussed in the decision was that of Dr. Mark. (Dec. 5-6.)

when he allowed additional medical evidence at a status conference due to the impartial report's inadequacy; but then inaccurately stated in his decision that the impartial report and deposition were adequate; and failed to list the employee's extensive medical documents offered in response to his allowance of the motion. Id. at 311-312. See also Richard v. Edibles Restaurant, 8 Mass. Workers' Comp. Rep. 122 (1994)(failure to consider medicals is a denial of due process). In the circumstances, the case must be recommitted for consideration of all the medical records in evidence.[6]

We address one other matter raised by the insurer. The judge here simply allowed the insurer's motion, which was grounded on both inadequacy and complexity, with a handwritten endorsement on the motion.[7] The judge did not make a specific finding on whether the impartial report was inadequate or the medical issues complex or both. See Dunham v. Western Massachusetts Hosp., 10 Mass. Workers' Comp. Rep. 818, 822 (1996)(discussing rulings on motions brought pursuant to § 11A(2)). It is not reversible error that the judge allowed the motion by handwritten endorsement on the motion itself. See Coggin v. Massachusetts Parole Bd., 42 Mass. App. Ct. 584, 588-589 (1997) (although it would have been preferable for the judge to give the reasons to support his finding of inadequacy made by handwritten endorsement on the motion, the record supports the judge's determination); Norton v. Bureau of State Office Bldgs., 13 Mass. Workers' Comp. Rep. 122, 127 (1999)(judge's handwritten notation on the face of the claimant's motion, combined with her verbal ruling at hearing and her reaffirmance of

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[6] Of course, the § 11A impartial opinion loses its prima facie status upon the admission of additional medical evidence warranting a finding to the contrary. Silverman v. Department of Transitional Assistance, 15 Mass. Workers' Comp.Rep. 176, 179 (2001), citing Cook v. Farm Servs. Stores, 301 Mass. 564, 566 (1938). As a result, all medical opinions hold equal status; the judge is free to determine the probative value of the medical evidence and may adopt any of the medical opinions before him, including that of the impartial examiner. See Silverman, supra at 179-180.

[7] The insurer's motion argued that the § 11A physician's report and deposition testimony were inadequate because Dr. Mark failed to express an opinion on extent of disability as required by § 11A(2). In addition, the insurer claimed that Dr. Mark's uncertainty as to what was causing the employee's pain highlighted the complexity of the medical issues.

that ruling in her decision, made it clear that she allowed claimant's motion for additional evidence because of the inadequacy of the impartial report). However, in order that we may perform our appellate function, see Praetz v. Factory Mut. Eng'g & Research, 7 Mass. Workers' Comp. Rep. 45, 46-47 (1993), the judge should specify the basis or bases for allowing the motion. See 452 Code Mass. Regs. §1.12(5)("The administrative judge's authorization of additional medical testimony must be in the form of a written finding that such testimony is required due to the complexity of the medical issues involved or the inadequacy of the report of the impartial physician").

Accordingly, we vacate the decision and recommit the case to the judge for him to list the parties' additional medical evidence as exhibits and to assess the probative weight of that evidence. In addition, he should also indicate on what grounds he allowed the insurer's motion for additional medical evidence.

So ordered.

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Frederick E. Levine
Administrative Law Judge

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Susan Maze-Rothstein
Administrative Law Judge

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Patricia A. Costigan
Administrative Law Judge

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Filed: **November 18, 2003**