

COMMONWEALTH OF MASSACHUSETTS

**DEPARTMENT OF
INDUSTRIAL ACCIDENTS**

BOARD NO. 009419-07

Robert A. Blanchette
Town of Marblehead
MIIA Workers' Compensation SIG

Employee
Employer
Insurer

REVIEWING BOARD DECISION
(Judges Fabricant, Horan and Koziol)

The case was heard by Administrative Judge Jacques.

APPEARANCES

Rickie T. Weiner, Esq., for the employee at hearing
James N. Ellis, Esq., for the employee on appeal
Joseph J. Durant, Esq., for the insurer at hearing
John J. Canniff, Esq., for the insurer on appeal

FABRICANT, J. The employee appeals from the administrative judge's denial and dismissal of his claim for § 36 loss of function benefits and § 30 medical benefits. Because we disagree with the judge's rationale, and because the record is unclear as to the basis for the introduction of additional medical evidence, we vacate the decision and recommit the case for further findings of fact.

The employee continues to receive § 35 partial incapacity benefits for an April 10, 2007 work injury to his back, neck and left shoulder. (Dec. 3.) He filed a claim for § 36 benefits, alleging losses of function in each of those body parts. The insurer did not appeal the conference order awarding § 36 benefits for the left shoulder. The neck and back claims for § 36 benefits were denied at conference, and the employee appealed to an evidentiary hearing. (Dec. 4.) At hearing, the employee was also allowed to join a claim for § 30 medical benefits for \$15,000 in out of pocket prescription drug costs. (Dec. 8.)

The employee submitted to a § 11A impartial medical examination by Dr. Victor Conforti, who had examined him in conjunction with a prior hearing before another administrative judge.¹ Dr. Conforti opined that the employee's neck sprain had resolved, and that he suffered no loss of function in that area. The judge found that an earlier hearing decision, which determined that the work injury had ceased to be a major cause of the employee's lower back disability as of July 27, 2007, barred the employee's claim for loss of function attributable to that body part on res judicata grounds. See G. L. c. 152, § 1(7A).² (Dec. 9.) Dr. Conforti's opinion that the employee had suffered a work-related aggravation of his lumbar degenerative disc disease, causing a five percent whole person loss of function attributable to his low back injury, was not adopted by the judge. (Dec. 11; Conforti Dep. 17.) The judge also made findings adopting the opinion of the employee's treating physician, Dr. Yoon, that his low back pain was related to degenerative disc disease, and not the work-related lumbar strain. (Dec. 11-12.) The judge ultimately denied the employee's claims for § 36 benefits and § 30 medical benefits for prescription medicines. (Dec. 13-14.) The employee appeals.

The employee contends that the judge erred in denying his § 36 claim on res judicata grounds. We agree. The earlier finding, that the employee was no longer disabled due to his work injury, did not address the issue of loss of function. "[M]edical disability and impairment are different. . . . 'Impairment is the loss of a particular body function. The disability is the inability of that patient

¹ Section 36 was not an issue in the first hearing, however, we note Dr. Conforti opined, "[b]ased on my examination on May 6, 2009 in comparing it to my examination on October 10, 2007, I felt the examination was pretty much the same." (Dep. 26.)

² General Laws c. 152, § 1(7A), provides, in pertinent 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 such compensable injury or disease remains a major but not necessarily predominant cause of disability or need for treatment.

to do things as a result of that loss.’ ” Tran v. Constitution Seafoods, Inc., 17 Mass. Workers’ Comp. Rep. 312, 318 (2003). A medical opinion that the employee is no longer disabled due to his work injury simply does not address whether the employee might have sustained an impairment -- loss of function -- as a result of his work injury. We therefore vacate the finding that the employee’s § 36 back claim was barred by the application of res judicata.

The employee further argues the judge erred in adopting the causation opinion of Dr. Yoon, in support of her denial of § 36 benefits for the back injury. The employee asserts that this additional medical evidence was introduced only to address the employee’s § 30 claim for prescription pain medication reimbursement. The decision states the employee’s motion was allowed due to the complexity of the medical issues. (Dec. 5.) However, the employee asserts the judge’s account is mistaken, and that the parties were permitted to introduce additional medical evidence only for the limited purpose of addressing the claim for medical benefits. (Employee br. 3.) The insurer, in turn, denies the employee’s account. (Ins. br. 8-9.) Unfortunately, reference to the record and the board file leaves us unable to determine the actual reason for the allowance of additional medical evidence.

Because the impartial report of Dr. Conforti failed to address the § 36 issue, the judge incorrectly ruled, on the first day of hearing, that the report was adequate. (Stat. Ex. 1.) However, her error was harmless, because Dr. Conforti articulated his opinion as to the employee’s whole body loss of function, attributable to his lower back, at his subsequent deposition on November 6, 2009. (Dec. 5; Conforti Dep. 17.) Moreover, upon the opening of the record, the judge reserved ruling on the employee’s motion to join the claim for medical benefits.³

³ We are not persuaded by the insurer’s claim that employee counsel’s October 5, 2009 letter to the judge memorialized the parties’ intention that additional medical evidence was to be allowed for consideration on all issues. (Ins. br. 8.) That letter indicates only that the parties would depose the impartial physician, and that a determination of whether

At some point that motion was allowed. However, because the record indicates discussions regarding the mechanics of handling that claim were conducted “off the record,” we have no way of knowing what was discussed.⁴

Because we cannot determine what the judge’s ruling on additional medical evidence encompassed, and whether it was appropriate for the judge to use Dr. Yoon’s causation opinion to address the § 36 issue, recommittal for clarification is appropriate.⁵ See Brzezinski v. Aerotek Energy, 24 Mass. Workers’ Comp. Rep. 273 (2010)(use of additional medical evidence to address issue for which evidence was not allowed raises due process concerns requiring recommittal).

The decision is vacated and the case recommitted for further findings consistent with this opinion.

So ordered.

Bernard W. Fabricant
Administrative Law Judge

Mark D. Horan
Administrative Law Judge

Catherine W. Koziol
Administrative Law Judge

Filed: **October 4, 2011**

“further testimony was to be taken” would follow. Rizzo v. MBTA, 16 Mass. Workers’ Comp. Rep. 160, 161 (2002) (judicial notice of contents of board file).

⁴ See October 1, 2009 Tr. p. 27, and March 23, 2010 Tr. p. 35.

⁵ To the extent whole body loss of function assessments are routinely converted to individual body parts at the conciliation level, the parties should supply such information to the judge based upon the AMA conversion chart.