COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 002722-96**

Robert Slight	Employee
Hyannis House Apartments	Employer
State Farm Fire & Casualty	Insurer

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

APPEARANCES
Deborah G. Kohl, Esq., for the Employee
David C. Williams, Esq., for the Insurer

LEVINE, J. The insurer appeals the decision of an administrative judge which awarded the employee weekly incapacity benefits pursuant to § 34, payment of medical bills pursuant to §§ 13 and 30, and legal fees and expenses. After review of the administrative judge's decision, we reverse and recommit the case to the administrative judge for further findings consistent with this opinion.

Robert Slight, the employee, is a fifty-seven year old high school graduate with prior employment experience as a millwright, a maintenance mechanic, and a salesman. (Dec. 4.) In 1989, he injured his low back while working for another employer. At that time, Mr. Slight was informed that he had a disc problem in his lower back; he was out of work for nearly a year. As a consequence, he also stopped heavy physical work. (Dec. 5.) In October, 1994, Mr. Slight commenced employment with Hyannis House Apartments as a caretaker. (Dec. 4.) His duties included remodeling, appliance repair, grounds care, and snow removal. (Dec. 5.)

On January 15, 1996, while lifting a barrel of broken sheet-rock in the course of his employment, the employee developed sharp low back pain resulting in spasms. On January 18, 1996, he was treated at the emergency room of the Cape Cod Hospital. The diagnosis was back strain. (Dec. 5, 6.) One week later,

due to continuing low back pain, he returned to that facility. From February 1996 to August 1996 the employee underwent chiropractic care. (Dec. 6.) He was diagnosed by the chiropractor as having an aggravated disc problem in the lumbar area and in the upper back, with pain in the left shoulder and left arm. Eventually, the employee was referred to physical therapy at the Cape Cod Hospital. Id.

The employee brought a claim for workers' compensation benefits. Pursuant to § 10A, the matter was conferenced before an administrative judge. The judge ordered payment of § 34 benefits and the insurer appealed to a hearing de novo. (Dec. 2.)

On September 24, 1996, pursuant to § 11A, the impartial examiner, Dr. Thomas Antkowiak, examined the employee. Dr. Antkowiak completed a report, which was admitted into evidence. (Dec. 2.)[1] The impartial examiner opined that the employee had sustained a low back strain which was an aggravation of the employee's "pre-existing lumbar disc condition which was of long standing and related to a 'herniated disc' which had occurred in 1989." (Impartial Examiner Ex. 5.) Additionally, Dr. Antkowiak opined that this aggravation would have resolved within two to three months. However, in light of the employee's pre-existing condition, the impartial examiner opined that the employee was "an unlikely candidate for this type of job given its heavy physical requirements." (Impartial Examiner Ex. 6.) Finally, Dr. Antkowiak opined that the employee's neck and shoulder complaints were not the result of the January 15, 1996 work incident "but occurred six or seven weeks later as a result of some manipulative treatment by his treating chiropractor." Id.

Although the administrative judge adopted the § 11A examiner's opinions, he permitted additional medical evidence due to complexity. (Dec. 6, 7.) In response, the insurer deposed Dr. David S. Babin, (Dec.3); in the course of the

[1] The judge erroneously reported that Dr. Antkowiak was deposed. (Dec.1.)

deposition, the insurer also put in evidence various records and reports.[2] (Dec. 3.) Also worthy of note, the administrative judge excluded unspecified "speculative" statements appearing in the impartial examiner's report. (Dec. 7, 14.) The administrative judge quoted extensively from the deposition of Dr. Babin. (Dec. 7- 13.) Ultimately, the judge determined that the employee had sustained a personal injury arising out of and in the course of his employment and that the employee continued to remain totally disabled. (Dec. 15.) Accordingly, the administrative judge ordered the insurer to pay on-going § 34 benefits from the date of the injury, medical payments and attorney's fees and expenses. (Dec. 16-17.)

The insurer contends that the decision of the administrative judge is inconsistent on its face, contrary to law, and should be reversed. Alternatively, the insurer requests that the decision be recommitted for further findings. The insurer argues that although the judge adopted the § 11A examiner's opinion that the employee was disabled for several months following the injury, the judge determined that the employee was totally disabled beyond the period of time expressed by Dr. Antkowiak. This, the insurer contends, was a finding made by the judge without any medical foundation. We agree that the judge erred.

Both Dr. Antkowiak in September 1996 and Dr. Babin in April 1997 opined that the employee's work-related January 1996 back injury had resolved. (Impartial Examiner Ex. 6; Babin Dep. 43.)[3] Theirs were the only medical opinions on the extent of medical disability. The judge "must rely on uncontroverted medical testimony on issues of causation and extent of medical disability where such issues are beyond the common knowledge and experience of the layperson." Burrill v. Litton Industries, 11 Mass. Workers' Comp. Rep. 77, 81

[2] The employee, who had moved to submit additional medical evidence, did not offer any.

[3] In his only other examination of the employee, which occurred in April 1996, Dr. Babin opined that the employee had ongoing partial disability related to the employee's January 1996 work-related injury. (Babin Dep. 35-37.)

(1997), citing cases. Although the judge purported to adopt Dr. Antkowiak's diagnosis as his subsidiary findings, (Dec. 6), the judge nevertheless thereafter found "by the weight of the medical evidence that the Employee was temporarily totally incapacitated . . . between the period of January 15, 1996 to date and continuing." (Dec. 14; see also Dec. 15.)

The judge offered no basis for his rejection of the doctors' uncontradicted opinions that the employee's work-related back injury had resolved. Moreover, both physicians also agreed that the employee's cervical condition was not related to the January 1996 industrial injury. (Impartial Examiner Ex. 6; Babin Dep. 37-38, 77-78.) And the judge made no findings at all as to the relationship of the employee's cervical condition to the January 1996 industrial injury. In any case, there is no basis in the evidence to reject the doctors' opinions and to legally connect the cervical condition and the January 1996 industrial injury.[4] The judge's finding of incapacity related to the January 1996 industrial injury, after the September 1996 examination by the impartial physician, is therefore unsupported by the evidence; it is arbitrary and capricious, and we reverse it. See Whalen v. Resource Management, 9 Mass. Workers' Comp. Rep. 689, 691 (1995).

The judge's findings regarding the employee's incapacity prior to September 1996 are also flawed. The employee moved to submit medical evidence in addition to the report of the impartial physician. The basis for the motion included that Dr. Antkowiak's opinion was speculative because he opined

[4] Increased disability resulting from the complications of medical treatment for an industrial injury is related to the injury and compensable. Locke, Workmen's Compensation § 223 (2d ed. 1981). Dr. Babin testified that the employee did not mention cervical problems until after he had begun (chiropractic) manipulative treatment. (Babin Dep. 37.) Dr. Antkowiak related the employee's neck and arm complaints to chiropractic manipulative treatment. But he further stated that the manipulative treatment "was done for uncertain reasons in the upper back and neck area. Based on his initial history, there would have been no real reason for manipulative care in that area because the complaints were in the lower back and not in the neck. The ongoing treatment for his neck and arm problem again would not be related" to the January 1996 injury. (Impartial Examiner Ex. 6-7.)

that the employee had returned to his pre-industrial injury status (two or three months after the January 1996 industrial injury) when the doctor only examined the employee one time, at the impartial examination.[5] The judge appeared to agree with the employee and to exclude that part of Dr. Antkowiak's report relating to the employee's condition prior to the date of Dr. Antkowiak's examination because it was speculative.(Dec. 14.)[6] The judge went on to find the employee temporarily totally incapacitated including from the date of the industrial injury in January 1996 through September 24, 1996, the date of the impartial examination. Id. But the judge never explained the basis for his finding the employee totally incapacitated during that period of time.[7] As a result, the decision fails to comport with the minimum requirement of § 11B to set forth a brief statement of the grounds in support of the judge's finding of total incapacity. It is the duty of the administrative judge to address the issue of the employee's incapacity up to the date of the impartial physician's examination in a manner that enables the reviewing board to determine with reasonable certainty whether correct rules of law have been applied to the facts that could be properly found. Praetz v. Factory Mut. Eng'g. & Research, 7 Mass. Workers' Comp. Rep. 45, 47 (1993).

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[5] The motion also claimed that the issue as to the causal connection of the employee's neck condition to the industrial injury was complex. The judge ruled that the medical issue was complex. (Dec. 7.)

[6] The judge did not specify which parts of the report he excluded, but the judge cited Figueredo v. City of Fall River, 10 Mass. Workers' Comp. Rep. 313 (1996), and George v. Chelsea Hous. Auth., 10 Mass. Workers' Comp. Rep. 22 (1996), both of which held that an impartial physician's report is inadequate, requiring additional evidence, if the physician has no opinion as to the employee's disability for a period of time prior to the date of the impartial examination. These cases do not stand for the proposition that an impartial physician can never express an opinion as to an employee's disability status prior to the date of the impartial examination. Of course, for such an opinion to be probative, the doctor needs an adequate foundation. See DeBrosky v. Oxford Manor Nursing Home, 11 Mass. Workers' Comp. Rep. 243, 244 (1997) (The impartial physician's "opinion was not speculative; it was based on the history he received, the reports he received, and his examination of the employee").

[7] We repeat that Dr. Babin opined that the employee was partially disabled in April 1996. (Babin Dep. 36.)

In the present case, as we have pointed out, there is medical evidence of medical disability for some period of time prior to the impartial physician's examination. In his decision as to the employee's earning capacity during that period, the judge's findings "must reflect an analysis of the effect of the medical limitations on the vocational profile after a reasoned consideration of the employee's age, education, training, work experience, mental capacity and any other factors relevant to a determination whether the employee has an ability to perform remunerative work of a substantial and non-trifling nature on the open labor market." Faille v. U.S. Concrete, 11 Mass. Workers' Comp. Rep. 473, 476 (1997), citing Scheffler's Case, 419 Mass. 251, 256-257 (1994). The case must be recommitted so that the judge can make those adequately supported findings.

The decision is reversed to the extent it finds the employee temporarily and totally incapacitated after September 24, 1996. There is no support in the medical evidence for such finding. The decision is reversed and the case recommitted for adequate findings as to the employee's incapacity between January 15, 1996 and September 24, 1996.

So ordered.

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Frederick E. Levine
Administrative Law Judge

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Martine Carroll
Administrative Law Judge

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Susan Maze-Rothstein
Administrative Law Judge

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Filed: **June 4, 1999**