COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS	**BOARD NO. 035786-08**
Robin Lee Berry	Employee
North Shore Medical Center	Employer
Partners Healthcare System, Inc.	Self-insurer

REVIEWING BOARD DECISION
(Judges Costigan, Horan and Levine)

The case was heard by Administrative Judge Bean.

APPEARANCES
Paul S. Danahy, Esq., for the employee
Donald M. Culgin, Esq., for the self-insurer at hearing
John C. White, Esq., and Richard W. Jensen, Esq.,
for the self-insurer on brief

COSTIGAN, J. The employee appeals from the administrative judge's decision awarding her a closed period of § 34 total incapacity benefits, and continuing § 35 partial incapacity benefits, based on an assigned weekly earning capacity of $320. The employee advances one argument only: the judge's failure to list as exhibits, let alone make findings concerning, her additional medical evidence, precludes this board from conducting a meaningful review of the judge's overall incapacity analysis. We agree, and recommit the case for consideration of that evidence and for further findings.

The employee, a certified nurse's aide, suffered a low back injury while moving a heavy patient at work on December 29, 2008. The self-insurer paid weekly incapacity benefits without prejudice until November 2009, when it terminated payments based on a job offer of a unit secretary's position at the hospital. (Tr. 24 - 29.) The employee filed a claim for further compensation and, following a § 10A conference, the judge awarded the employee § 34 total incapacity benefits of $375.20 per week, based on her average weekly wage of $625.33, from November 14, 2009 and continuing. (Dec. 501.) The self-insurer appealed and, pursuant to § 11A(2), the

employee underwent an impartial medical examination by Dr. Murray Goodman on March 29, 2010. The impartial physician opined that the employee suffered from a work-related lumbosacral strain, and pre-existing, non-work-related facet joint arthropathy. The doctor found the employee permanently, partially disabled with restrictions against lifting in excess of ten pounds, and bending or sitting for more than an hour. The doctor opined that the restrictions were due to both diagnoses. (Dec. 502-503.) Although not noted in any manner in the decision, the parties do not dispute that the judge allowed the employee's motion to introduce additional medical evidence to address the so-called "gap period" of disability prior to the impartial medical examination. The transcript of the hearing confirms the judge's ruling.[1]

The employee's only argument on appeal is that the judge erred in failing to list or discuss the gap medical evidence which he allowed the employee to introduce. We agree. See Murphy v. B & M Office Installation, 24 Mass. Workers' Comp. Rep. 217 (2010)(judge's failure to list and discuss additional medical evidence requires

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[1] Mr. Danahy: The only thing I would suggest is just the gap medicals before the date of the impartial, Your Honor. I'd be more than willing just to put the two conference packages in as they were, if there is no objection.

Mr. Culgin: I have no objection.

. . .

The Judge: This will be Mr. Danahy's conference package, and this will be Mr. Culgin's conference package.

Mr. Danahy: That's a nonmedical conference package.

The Judge: I do not have a copy of that. Mr. Culgin must have given me two and you gave me one and generally I keep one. So if you have a copy I'll take it.

Mr. Danahy: Whereas this is my only copy I'll get a copy and get it off to you.

The Judge: All right.

Mr. Danahy: I can get that to you by the end of the week.

The Judge: Apparently Mr. Culgin only sent me one because I have a cover sheet and the tab, and nothing else. So I'll ask the two of you to send me the deposition transcript and your conference packet and anything else that will qualify as a gap medical from before the date of the impartial medical examination.

(Tr. 50-51.)

recommittal as reviewing board unable to determine whether judge considered that evidence, or considered but did not adopt it). See also Casagrande v. Massachusetts Gen. Hosp., 12 Mass. Workers' Comp. Rep. 137, 140-141 (1998). At a minimum, the judge should be held to doing that which he told the parties he would do: accept and consider additional medical evidence for the pre-impartial examination gap period. Here, there is no doubt that the judge ignored the additional medical evidence he had authorized, as he found the impartial medical report was the "only report submitted into the evidence in this case." (Dec. 503.)[2]

The self-insurer argues, however, that the judge's award of § 34 total incapacity benefits for the entire pre-impartial examination period renders the employee's argument moot, as she could not have received greater benefits, had the judge considered her gap-period additional medical evidence. (Self-ins. br. 8-9.) Our concurring colleague endorses this argument, characterizing the judge's misstep as "harmless error," but for the possibility the gap medical evidence could lead the judge to declare the medical issues complex.

We disagree that because the judge awarded § 34 total incapacity benefits for the entire period predating the § 11A examination, the additional medical evidence, offered by the employee but ignored by the judge, could have no other consequence or relevance. There is no way to know whether the judge's findings on Dr. Goodman's impartial medical opinions, and his corresponding assignment of a minimum wage earning capacity, might have differed, had he considered medical evidence addressing the employee's disability status prior to the impartial medical examination. Even though the gap medical evidence could not be used to address present disability, see Perez v. Work Inc., 20 Mass. Workers' Comp. Rep. 117, 119

[2] Our review of the board file confirms that by letter to the administrative judge dated November 2, 2010, and stamped as received by the department on November 5, 2010, the employee submitted a copy of her conference package of medical reports and records, as had been agreed to at the close of the evidentiary hearing. See footnote 1, supra. Rizzo v. M.B.T.A., 16 Mass. Workers Comp. Rep. 160, 161, n.3 (2002)(proper for reviewing board to take judicial notice of contents of board file).

(2006), that evidence nonetheless might, for example, confirm that the employee's complaints of pain and physical restriction,[3] which the judge expressly credited, (Dec. 503), were consistent throughout, potentially supportive of a continuing § 34 award, notwithstanding the impartial physician's "permanent partial" disability opinion. See Cordi v. American Saw & Mfg. Co., 16 Mass. Workers' Comp. Rep. 39, 46 (2002)(findings regarding pain may permit finding of total incapacity although medical testimony indicates partial disability). That evidence might also reflect that other diagnoses were involved in the employee's medical picture which, in turn, could lead the judge to declare, sua sponte, the medical issues complex, requiring the admission of additional medical evidence for *all* purposes. Further, given that the impartial physician's opinion constitutes "prima facie evidence of all matters regarding the employee's *medical* condition" only, Moynihan v. Wee Folks Nursery,

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[3] The judge made the following subsidiary findings of fact:

> Today the employee complains of continuous low back pain radiating down through her buttocks to her legs down to the knees, more on the right than the left. She has one or two good days a week when her pain is diminished, but still present. She used to enjoy riding a motorcycle, dancing, walking with friends, crocheting and going to the movies. Now she can do none of these. . . . The employer offered the employee a light duty job as a secretary. The employee believes that she cannot do the job. She does not know how to type and does not use a computer. She cannot sit for long periods.

(Dec. 502.) Moreover, the employee testified that she has not had any measurable improvement in the level of her back pain or her ability to function since her industrial injury. (Tr. 41.) We are constrained to point out that if the very complaints the judge found credible were confirmed by the gap medical evidence as consistent from the date of the employee's injury, throughout the gap period, to the date of the § 11A examination, the judge could not properly rely on Dr. Goodman's opinions to support both his award of total incapacity benefits from December 29, 2008 through March 28, 2010, and his assignment of an earning capacity and award of partial incapacity benefits from and after March 29, 2010. See Ormonde v. Choice One Communications, 24 Mass. Workers' Comp. Rep. 149, 154-156 (2010); Doonan v. Pointe Group Health Care and Sr. Ctr., 23 Mass. Workers' Comp. Rep. 53 (2009). However, as the self-insurer has not appealed the § 34 award, the sufficiency of its evidentiary support is not before us.

Inc., 17 Mass. Workers' Comp. Rep. 342, 346 (2003), citing Scheffler's Case, 419 Mass. 251, 256 (1994), the ignored gap medical evidence might indicate a history of injury different from that relied upon by the § 11A physician.

As it stands, the judge's assignment of a minimum wage earning capacity, and the award of partial incapacity benefits, as of the date of the impartial examination, are supported by the § 11A physician's opinions on the nature, extent and causal relationship of the employee's disability, as of March 29, 2010. This is not to say, however, that the gap medical evidence could not affect the judge's *interpretation* of the impartial medical evidence, and his corresponding view of the employee's disability status as of the impartial medical examination and continuing.

"It is the settled duty of the hearing judge to make such specific and definite findings upon the evidence as will enable this board to determine with reasonable certainty whether correct rules of law have been applied." Crowell v. New Penn Motor Express, 7 Mass. Workers' Comp. Rep. 3, 4 (1993). Accordingly, we recommit the case for the judge to review the additional medical evidence he allowed and make further finding of fact addressing that evidence.

So ordered.

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Patricia A. Costigan
Administrative Law Judge

Filed: **September 22, 2011**

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Mark D. Horan
Administrative Law Judge

LEVINE, J. (concurring). Because the gap medical evidence potentially could lead the judge sua sponte to declare the medical issues complex, I concur in the result the majority reaches.

Otherwise, the judge's failure to consider the gap medical evidence was harmless error as the "judge awarded the employee exactly what [she] sought," Lamb v. Louis M. Gerson Co., 11 Mass. Workers' Comp. Rep. 584, 588 (1997), for the period prior to the date of the impartial examination. In Lamb, the judge harmlessly erred by failing to find a gap for that period. In the present case, the judge credited the employee's complaints of pain and physical restriction. (Dec. 502, 503.) The gap medicals may not be used for determining present disability. Mims v. M.B.T.A., 18 Mass. Workers' Comp. Rep. 96, 100 (2004); Perez, supra.

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Frederick E. Levine
Administrative Law Judge

Filed: **September 22, 2011**