COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 038087-96**

Rosa DaVilla	Employee
Chadwick's of Boston Ltd.	Employer
TJX Companies, Inc.	Insurer

REVIEWING BOARD DECISION
(Judges Carroll, McCarthy and Levine)

APPEARANCES
Donald Williams, Esq., for the employee
Michael A. Fager, Esq., for the insurer at hearing
John C. White, Esq., and Richard W. Jensen, Esq., for the insurer on appeal

CARROLL, J. Rosa DaVilla worked as a clothes packer for Chadwicks of Boston Ltd. The claim on appeal to the reviewing board is for weekly incapacity benefits for a period of time after benefits were terminated by an earlier decision of an administrative judge. The claim for further benefits was denied at conference and again after a full evidentiary hearing under § 11 of the Act. The employee, on appeal, argues that the administrative judge should have allowed additional medical evidence. We agree and recommit the case to the hearing judge to allow additional medical evidence and for further findings.

The essential background facts are these. On September 25, 1996, the employee tripped on a rack and fell on her right side. She received medical treatment, was out of work, and was paid § 34 total incapacity benefits commencing September 26, 1996, until those benefits were terminated on March 19, 1998 by decision of an administrative judge after hearing on the insurer's complaint to modify or terminate benefits. In that earlier, unappealed decision filed February 3, 1999, a different administrative judge found that Dr. Galvin, the impartial examiner appointed under § 11A of the Act, "could not separate out the percentage of the ongoing disability that was causally related to the pre-existing condition from the work injury," and that the

doctor was of the opinion that "part of [the employee's] ongoing disability is related to the work incident"; the judge was "persuaded that the employee continues to be disabled to some extent because of the work injury." (Dec. I, 8.) The judge then reserved the employee's right to pursue a claim regarding the extent of incapacity after the March 19, 1998 discontinuance. Neither party appealed this earlier decision and the employee then brought further claim.

Over objection of the employee, the employee was sent again to Dr. Galvin for a § 11A exam on this further claim. Dr. Galvin produced a report of his March 6, 2000 exam and the employee filed a motion seeking to be allowed to submit additional medical evidence, arguing that the second report of Dr. Galvin had essentially the same inadequacy in it that the first report had. The judge in this case on appeal denied the motion, stating "Dr. Galvin's report was not found 'inadequate' within the meaning of the statute including the fact that the employee offered no material medical evidence in support of her position." (Dec. II, 2.) This statement suggests that there are unstated reasons for not finding the § 11A report inadequate. However, only one reason is stated. Although preferable, a judge need not give reasons for his finding of inadequacy, Coggin v. Massachusetts Parole Bd., 42 Mass. App. Ct. 584, 588 (1997), but if he does, he cannot give reasons which are arbitrary or capricious or wrong as a matter of law. Paolini v. Interstate Uniform, 11 Mass. Workers' Comp. Rep. 322, 323 (1997)(judge may not reject impartial medical opinion for arbitrary and capricious reasons). The reason given seems to be that the employee made no offer of proof. Although not prohibited from doing so, see Lebrun v. Century Markets, 9 Mass. Workers' Comp. Rep. 692, 694, n. 4 (1995), the party seeking to declare the § 11A report inadequate need not make an offer of proof as to what medicals that party has to support the claim or complaint. The adequacy or not generally depends on the content of the four corners of the report and, if any, the

deposition.[1] Therefore, the reason given by the judge is wrong as a matter of law.

Further, to the extent the judge was simply stating that he did not find this second report inadequate, we do not agree. Taken as a whole, the report is so vague on causal relationship as to be useless in that key area. For example, on the one hand the doctor states:

> ". . . she will probably never be able to return to any reasonable work status but I do not feel this is solely based on her industrial accident."

and elsewhere he states:

> "I cannot find, however, objective findings that explain her symptoms which disable her from headache to bilateral knee to thoracic discomfort, some of which is not based on any physiological or biological pattern."

(Galvin Rep. 4.) The fact that her disability is not "solely" based on her industrial accident is not dispositive of the causal relationship issue and is evidence that some of her disability is based on her industrial accident. See Beckwith v. Willowood of Pittsfield, 14 Mass. Workers' Comp. Rep. 353, 356-357 (2000) (where impartial medical examiner could not form opinion on whether there was causal relationship, failure to allow additional medical evidence denied employee meaningful opportunity to be heard on determinative issue of causation; employee's motion for additional medical evidence should have been allowed as a matter of law). Cf. Niedzwiadek v. Smith and Wesson, 14 Mass. Workers' Comp. Rep. 337, 339 (2000) (impartial doctor's inability to causally connect orthopedic diagnosis to workplace injury, due to his opinion that the employee did not suffer from any orthopedic diagnosis, meant that there was no error in finding impartial opinion adequate). On the minimal medical record present in this case, a determination of § 1(7A) causal relationship cannot be made.

[1] But see for example, Lorden's Case, 48 Mass. App. Ct. 274, 277-280 (1999) (where the administrative judge rejected the impartial doctor's report because the doctor's opinion was based on facts not in evidence or facts not found by the judge, the judge erred by not allowing additional medical evidence). See also Monet v. Massachusetts Respiratory Hosp., 11 Mass. Workers' Comp. Rep. 555, 559 (1997).

Given all of the circumstances of this case, additional medical evidence was warranted. Accordingly, we recommit the case to the hearing judge to allow additional medical evidence and for further findings.

So ordered.

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Martine Carroll
Administrative Law Judge

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William A. McCarthy
Administrative Law Judge

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Frederick E. Levine
Administrative Law Judge

Filed: **March 8, 2002**
MC/jdm