DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 026257-92**

Roy E. Aitchison	Employee
Phil's Auto Service, Inc.	Employer
Commercial Union Insurance Co.	Insurer

REVIEWING BOARD DECISION
(Judges McCarthy, Levine and Carroll)

APPEARANCES
Herbert E. Zimmerman, Esq., for the employee
Joanne T. Gray, Esq., for the insurer
John J. Canniff, Esq., for the insurer on brief

MCCARTHY, J. Roy E. Aitchison appeals from a decision in which the administrative judge denied and dismissed his claim for extended § 35 benefits based upon permanent and partial loss of function of his major hand and wrist. The judge's conclusion reflects the failure of the § 11A impartial physician to opine as to the relevant impairment. Because the § 11A(2) medical report was inadequate as a matter of law under the circumstances, we recommit the case for a hearing de novo on the issue of the employee's permanent impairment and whether extended § 35 benefits are due.[1]

The employee injured his right hand and wrist at work on June 9, 1992, and was diagnosed as having suffered a closed comminuted fracture of the distal radius. The insurer accepted the case and paid temporary total incapacity benefits until the employee was placed on § 35 partial incapacity benefits pursuant to an order of an administrative judge. The insurer paid § 35 benefits until exhaustion in 1998, whereupon the employee filed a claim for extended § 35 benefits, due to the significant impairment of his major hand and wrist.[2] The insurer resisted the claim. (Dec. 3-4.)

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[1] The administrative judge who wrote the decision no longer serves in the department.

[2] General Laws c. 152, § 35, provides, in pertinent part:

> The total number of weeks of compensation due the employee under this section shall not exceed two hundred sixty; provided, however, that this number may be extended to five

The employee underwent an impartial examination, which eventuated in the physician's opinion that the employee suffered from a 45% permanent impairment of his right upper extremity. (Dec. 6.) The doctor did not opine as to the percentage of permanent loss of function of the employee's major hand up to the wrist, as was required for an appropriate assessment under §§ 36(1)(f) and (i), and § 35. Nonetheless, the judge ruled that the report was adequate under the provisions of § 11A(2). (Dec. 2.) As a result, the judge concluded that the employee had failed to sustain his burden of proving his claim for extended § 35 benefits. (Dec. 8.)

The judge erred as a matter of law, by failing to rule that the impartial report was inadequate to provide the necessary information to perform the required assessment under § 35. The provisions of § 36, incorporated into § 35, are for "specific injuries." See § 36(1). Relevantly, § 36(1)(f) refers to "the major hand": it does not refer to the upper extremity. The impartial physician's opinion regarding the 45% loss of function of the employee's upper extremity was not germane to the issue in dispute: Whether the employee had lost 75% of the function of his major hand, thereby triggering the entitlement to extended § 35 benefits. It is again worth reminding all participants in the c. 152 dispute resolution process that, if § 11A is to function in any way as the Legislature intended – namely, to make the litigation process more economical by narrowing the medical issues – the § 11A physician must be informed as to exactly what he should be addressing. This can be done through perspicuous hypothetical questions as authorized by 452 Code Mass. Regs. § 1.14(2), or cross-examination at deposition. See

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> hundred twenty if an insurer agrees or an administrative judge finds that the employee has, as a result of a personal injury under this chapter, suffered a permanent loss of seventy-five percent or more of any bodily function or sense specified in paragraph (a), (b), (e), (f), (g), or (h) of subsection (1) of section thirty-six, developed a permanent life threatening physical condition, or contracted a permanently disabling occupational disease which is of a physical nature or cause.

General Laws c. 152, § 36(1)(f), provides specific compensation "[f]or the amputation or permanent, total loss of use of the major hand at the wrist" and subsection (i) provides prorated specific compensation "[f]or any permanent but partial loss of use of a member, whether leg, foot, arm or hand . . . ."

Ruiz v. Unique Applications, 11 Mass. Workers' Comp. Rep. 399, 402 (1997). As we stated in Ruiz, "the 'medical dispute' must be identified at some point in the dispute resolution process." Id. Here, the medical dispute was plainly the amount of permanent loss of function of the employee's major hand. Neither the judge nor the disputants informed the impartial physician. Attorneys and judges "must have a good grasp of the legal principles involved in a case" in order to apply § 11A in a manner that is "practical, suitable [and] logical." Bourassa v. D.J. Reardon Co., 10 Mass. Workers' Comp. Rep. 217, 218 & n. 4 (1996). As the Supreme Judicial Court stated in O'Brien's Case, 424 Mass. 16, 22-23 (1996): "Certainly a decision by the administrative judge to foreclose further medical testimony where [as here] such testimony is necessary to present fairly the medical issues would represent grounds for either reversal or recommittal."[3] As we have stated, recommittal is the appropriate disposition for the present appeal. See id.; § 11C.

Since the impartial physician's report was inadequate to answer the *only* relevant medical issue in the case, we conclude it also was "inadequate" pursuant to § 11A(2). As a result, additional medical evidence was mandated as a matter of law. We vacate the decision, and transfer the case to the senior judge for recommittal and further proceedings consistent with this opinion as deemed appropriate by the newly assigned administrative judge.

So ordered.

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[3] It is important to note that § 11A bestows upon administrative judges an authority, consonant with the powers and duties set out in § 11, but unique within the Act in its express articulation:

> [T]he administrative judge may, *on his own initiative* or upon a motion by a party, authorize the submission of additional medical testimony when such judge finds that said testimony is required due to the complexity of the medical issues involved or the inadequacy of the report submitted by the impartial medical examiner.

G.L. c. 152, § 11A(2)(emphasis added). "[I]n this respect too, the scheme of the statute, if it is [to be] administered fairly and reasonably, gives the contestants ample opportunity to be heard and to have considered the merits of their contentions." O'Brien, supra at 24.

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William A. McCarthy
Administrative Law Judge

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Frederick E. Levine
Administrative Law Judge

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Martine Carroll
Administrative Law Judge

Filed: **October 5, 2001**