COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 001022-98**

Ruth Jenkins	Employee
Nauset, Inc.	Employer
Arbella Indemnity Insurance	Insurer

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

APPEARANCES
Joyce W. Scudder, Esq., for the employee at hearing and on brief
Lois M. Farmer, Esq., for the employee on brief
Christopher J. Bradford, Esq., for the insurer at hearing and on brief

MAZE-ROTHSTEIN, J. This case involves cross appeals. The employee appeals that portion of a decision denying her claim for benefits beyond May 12, 1998. The insurer appeals the award of attorney fees to the employee. After a review of the evidentiary record, we recommit the case for further findings. See G. L. c. 152, § 11C.

Ruth Jenkins, the employee, was a thirty-eight year old, divorced mother of four minor children at the time of the decision. (Dec. 3.) She had worked as a waitress/bartender, certified nurse's assistant and, for a time, had been self-employed as a home care provider. In 1987, Ms. Jenkins commenced employment with Nauset, Inc. as a residential instructor for mentally retarded adults ("clients"). Among other duties, she assisted six clients with activities of daily living. While that did not include help with bathing and other matters of personal hygiene, she was responsible for the clients' safety. Ms. Jenkins worked the evening shift after the clients had returned from their community activities. (Dec. 3.)

On January 12, 1998, one of the clients attacked the employee. She sustained blows to her face and chest and was bitten and kicked. Eventually, the client was

restrained. Despite the incident, the employee completed her shift. The next morning Ms. Jenkins experienced pain in her ribs, right arm, lower back, neck and head. Id. She reported to a local Health Stop and x-rays were taken. The employee was advised to remain out of work for a few days and to seek the advice of her primary care physician. (Dec. 3-4.) She also sought treatment with a neurologist, and a rehabilitation specialist. (Dec. 4.) On January 16, 1998, approximately four days after the incident, the employee's car slid out of control and struck a telephone pole. As she did not sustain any significant injuries as a result of the impact, Ms. Jenkins did not seek medical treatment. (Dec. 5.)[1]

The insurer voluntarily paid, without prejudice, § 34 weekly temporary total incapacity benefits from January 13, 1998 to May 12, 1998. See G. L. c. 152, § 8(1). Thereafter, the employee filed a claim for further benefits. Following a § 10A conference, the insurer was ordered to pay § 34 temporary total incapacity benefits from May 12, 1998 to July 9, 1998 and § 35 temporary partial incapacity benefits from July 10, 1998 onward. The insurer appealed to a hearing de novo. (Dec. 2.)

On October 15, 1998, pursuant to G. L. c. 152, §11A,[2] a neurologist examined the employee. (Dec. 1, 2.) The parties were authorized to submit additional medical evidence for the "gap period" prior to the date of the §11A examination and to address the diagnosis of thoracic outlet syndrome.[3] (Dec. 2.) See George v. Chelsea Hous. Auth., 10 Mass. Workers' Comp. Rep. 22 (1996)(where § 11A doctor renders no opinion for a

[1] The administrative judge determined that "[t]here was no indication that [the employee] in fact treated anywhere for injuries from the automobile accident." (Dec. 5.)

[2] General Laws c. 152, § 11A(2) requires that a medical examiner be appointed when the appeal of a conference order involves a dispute over medical issues.

[3] General Laws c. 152, § 11A(2) further provides that "the administrative judge may, on his own initiative or upon 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." Id. Here, the § 11A examiner opined that the employee showed symptoms of thoracic outlet syndrome. (Employee Ex. 2; Dec. 2.) Pursuant to § 11A(2), additional medical evidence was permitted to address that diagnosis. (Dec. 2.)

disputed period prior to the examination date, report is inadequate as a matter of law, procedures must further the accuracy of judge's determination on pivotal contested issues or due process violation implicated). The employee submitted medical reports of her primary and neurological doctors. The insurer submitted § 45[4] medical reports and the employee's rehabilitation specialist opinion.[5] (Dec. 1.)

The § 11A examiner diagnosed bilateral cervical and thoracic strain and sprain, lumbosacral strain and sprain, right lateral epicondylitis and depression. The doctor causally related the diagnoses to the work incident. (Rep. 5, 6; Dep. 15, 16; Dec. 6.) He noted that there were elements of elaboration, but nonetheless opined that the employee had intermittent thoracic outlet syndrome. However, the § 11A examiner further opined that the symptoms of the syndrome did not preclude the employee from working nor was she disabled as a result. (Rep. 7; Dep. 29, 30, 47, Dec. 7.)

One of the employee's treating physicians opined that she had symptoms from a cervical strain and thoracic outlet syndrome secondary to the cervical strain. He, however, failed to express any causal relationship or extent of the disability opinion during the gap period. (Employee's Ex. 3; Dec. 8.) The employee's other treating physician, confirmed the diagnosis of thoracic outlet syndrome and causally related that diagnosis to the work incident. That doctor further opined that the diagnosis of thoracic outlet syndrome in this patient would result in severe impairment possibly for a lifetime. (Employee's Ex. 3; Dec. 8.)

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[4] General Laws c. 152, § 45, as amended by St. 1991, c. 398, § 72, reads in pertinent part:

> After an employee has received an injury, and from time to time thereafter during the continuance of his disability, he shall, if requested by the insurer or insured, submit to an examination by a registered physician, furnished and paid for by the insurer or the insured.

[5] Said doctor was one of the employee's treating physicians. Since the record was introduced by the insurer, it was excluded pursuant to 452 Code Mass. Regs. § 1.11(6) which states in pertinent part: "a party may offer as evidence medical reports prepared by physicians engaged by said party[.]"

The insurer's medical expert diagnosed right cervical and thoracic strain, right lateral epicondylitis, low back pain and knee pain by history. He causally related this diagnosis to the work incident, but also suggested that the unrelated motor vehicle accident may have contributed to the employee's injuries. The insurer's doctor further opined that the employee would have difficulty restraining clients, but could otherwise work on a full-duty basis. He felt the employee should start with several hours of work per day gradually leading to a full work week. (Insurer's Ex. 6; Dec. 9.) In an addendum dated August 4, 1998, the insurer's doctor recanted his earlier medical opinion and opined that the employee was able to return to her regular work duties without restrictions. (Insurer's Ex. 6; Dec. 9.)[6]

The judge credited the employee's testimony regarding the nature and extent of her injury, and her complaints of pain corroborating intermittent thoracic outlet syndrome. She adopted the medical opinions of the § 11A examiner as to diagnosis, causal relationship and level of impairment. In addition, the judge adopted the medical opinions of the insurer's and employee's doctors "inasmuch as I find them to be consistent with the impartial report of [the § 11A doctor]." (Dec. 10.) Ultimately, the judge denied the employee's claim for further benefits beyond May 12, 1998, awarded medical expenses, pursuant to §§ 13 and 30, for the related conditions and a fee to the employee's counsel. (Dec. 11.) Both parties appealed the decision and we address their issues in turn.

The sole issue raised by the employee is that the judge misconstrued the medical evidence of continuing disability stemming from thoracic outlet syndrome in denying benefits. (Employee's brief, 1.) In particular, the employee argues that the judge erred when she determined that there was no evidence of disability during the gap period. (Dec. 10; Employee's brief, 10.) We agree.

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[6] The medical report of the other doctor submitted by the insurer, was determined to be of no "benefit" as it covered "the time period that Ms. Jenkins was being paid without prejudice[.]" (Dec. 8.) Accordingly, the administrative judge "did not give [his] report any weight[.]" (Dec. 10.)

Although the § 11A doctor opined that the employee was not disabled due to intermittent thoracic outlet syndrome, *as of the date of his examination,* (Rep. 7; Dec. 10), the administrative judge also adopted the medical opinion of the employee's Dr. Philip Macy as it bolstered the diagnosis of thoracic outlet syndrome. (Dec. 10.) The medical opinion of Dr. Macy, dated December 21, 1999, went beyond a mere diagnosis to indicate that: "[t]he implication of this diagnosis [thoracic outlet syndrome] is that the patient will be severely impaired possibly for a lifetime as a result of the trauma the patient sustained two years ago." (Employee's Ex. 3.) It follows that if the employee *continues* to suffer some impairment as of the December 1999 report date, that the employee necessarily suffered some impairment prior to that report date, *i.e.* the gap period. See Conroy v. Fall River Herald News Co., 306 Mass. 488, 493 (1940)("Not infrequently an inference is permissible that a state of affairs . . . proved to exist, has existed for some time before."); Hernandez v. Cresthood Foam Co. Inc., 13 Mass. Workers' Comp. Rep. 445, 449 (1999)(for same concept in § 11A context); Dirusso v. MBTA., 11 Mass. Workers' Comp. Rep. 217, 220 (1997). Therefore, it was error for the judge to determine that there was *no medical evidence* regarding the level of impairment or disability advanced by the employee during the gap period. (Dec. 10.)

Moreover, Dr. Macy's report can be read to fill more than just the gap period, as one of the judge's reasons for opening the medical evidence in the first place was: "to cover the time [gap] period *as well as to cover the diagnosis* [of thoracic outlet syndrome]." (Dec. 2.)(Emphasis added.) Nevertheless, the judge adopted the medical opinions of the § 11A examiner and the employee's medical expert without squarely resolving the fact that the two opinions conflict as to medical disability during the gap period. See Dryden v. Geo-Con Inc., 11 Mass. Workers' Comp. Rep. 312, 313 (1997)(case recommitted where the judge adopted a medical opinion of no medical disability as of a certain date and another medical opinion finding disability covering the same timeframe). Where the judge failed to qualify whether Dr. Macy's opinion was adopted in whole or in part, we are unable to perform our appellate function. See Ballard's Case, 13 Mass. App. Ct. 1068 (1982) (specific and definite findings required to

enable proper appellate review). Accordingly, the case must be recommitted for further findings.

The insurer raises two issues on appeal. First, the insurer states that the employee failed to meet her burden of proof as to medical disability during the gap period. For the reasons set forth in this opinion we cannot either concur or disagree with that argument at this time. Second, the insurer maintains that the employee did not prevail and therefore is not entitled to an attorney's fee. (Insurer's brief, 5, 7.) It is inappropriate to adjudicate the insurer's second issue until the case has reached a final result. See New England Canteen Serv. Inc. v. Ashley, 372 Mass. 671, 677 (1977)(claim not ripe for appellate review until all issues resolved at trial level). As the case is recommitted for further findings, we do not reach the fee issue at this juncture.[7]

Since the administrative judge who rendered the decision no longer serves with the department, the case is recommitted to the senior judge for reassignment to a different administrative judge for a limited hearing de novo on the gap period issue.

So ordered.

Susan Maze-Rothstein
Administrative Law Judge

Martine Carroll
Administrative Law Judge

Sara Holmes Wilson
Administrative Law Judge

Filed: May 7, 2001

[7] We acknowledge that, as indicated by the insurer in its brief on page 6, n.1, the employee has attached numerous medical records as an appendix to her brief – many of which were not admitted into evidence. Only those medical records properly submitted into the evidentiary record at hearing were utilized to determine the outcome of the parties' cross appeals.