COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 002685-99**

Salvatore Gulino	Employee
General Electric Company	Employer
General Electric Company	Self-insurer

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

APPEARANCES
William A. Curry, Esq., for the employee
Scott E. Richardson, Esq., for the self-insurer at hearing
Paul M. Moretti, Esq., for the self-insurer on appeal

CARROLL, J. The self-insurer appeals from a decision in which an administrative judge awarded ongoing partial incapacity benefits based on the employee's expert medical evidence. The self-insurer argues that the judge erred in sua sponte expanding the use of additional medical evidence – from considering it only for the "gap" period prior to the impartial medical examination, to using it to assess causal relationship after the examination - because he did not notify the parties of his decision to do so and did not give them the opportunity to develop the additional medical evidence with an eye toward the causal relationship issue. The self-insurer also argues that the judge mischaracterized the § 11A physician's opinion in reaching his decision to allow additional medical evidence. We agree with the first contention, and recommit the case for further proceedings and findings accordingly.

Salvatore Gulino slipped and fell at work on January 29, 1999. He went out of work, and has not returned. (Dec. 302.) The employee was paid § 34 temporary total incapacity benefits from January 30, 1999 to July 6, 1999. (Dec. 300.) He then filed a claim for further § 34 benefits, which was denied at conference. At the hearing de novo, the self-insurer contested only the extent of disability and causal relationship. (Dec. 299,

301.) Before the hearing, an impartial physician examined the employee on March 22, 2000. (Dec. 302.) In response to the self-insurer's § 11A motion, the judge allowed the parties to introduce their own medical evidence to address the employee's medical status during the "gap" period from the date of injury until the impartial examination. (Dec. 304; Addendum to the Dec. 318.) ("Addendum") The impartial physician's diagnosis was low back strain superimposed on degenerative arthritis, which existed prior to the work injury. (Dec. 302-303.) After the taking of lay testimony, the § 11A doctor was deposed on the medical issues in dispute. While the doctor causally related the employee's low back strain to his work injury, his opinion regarding the work injury's present affect on the employee's disability was susceptible to multiple interpretations.[1] As a result, after the close of the record and without further communication with the parties, in the hearing decision the judge ruled that the impartial physician's opinion was inadequate as to continuing causal relationship, and that additional medical evidence was necessary for that issue, as well as the "gap" period. (Dec. 301, 304; Addendum, 318-319.) See Peroulakis v. Stop & Shop, 12 Mass. Workers' Comp. Rep. 93, 96-97 (1998); Brooks v. Labor Mgt. Servs., 11 Mass. Workers' Comp. Rep. 575 (1997). The judge

[1] The judge noted the doctor's "seemingly inconsistent statements" regarding that issue in his deposition testimony:

> The doctor causally related the low back strain to the January 29, 1999 work injury. Report, page 2, deposition, page 32, line 3. But he said that the employee's present disability is primarily related to the pre-existing degenerative disease. The back strain was presently neither the predominant cause of the disability nor a major cause, but was merely a "minor" cause of his disability. Deposition, page 35, line 15, see also page 49, line 23, page 53, lines 16, 23. But the employee's current symptoms "may be" related to the work incident. Deposition, page 44, line 2. He later stated that the work injury "was an identifiable injury that took place and it contributed significantly to (the employee's) situation...." Deposition, page 51, line 13. He believes that a medical end result has been reached. Report, page 2.
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> [The impartial physician] stated that the continuing effect of the work related low back strain was not the 'predominant' or a 'major' cause of his disability but was a 'minor' or 'significant' cause of it. He stated that the employee had returned to pre-injury status, yet could not physically perform his pre-injury job.

(Dec. 303-304.)

concluded, based on the employee's expert medical evidence, that the employee was entitled to a closed period of § 34 benefits, and ongoing § 35 partial incapacity benefits, based on a $300.00 weekly earning capacity. (Dec. 306-307.)

The problem with the judge's broadening the scope of his inadequacy ruling, identified by the self-insurer, is that the judge did not inform the parties of his action. The decision, filed on October 10, 2000, was the first notice. (Addendum, 319.) When the self-insurer received the decision, it filed a Motion for Reconsideration. That motion resulted in the judge's filing his Addendum to the Decision, in which he wrote:

> [The decision at page 304] informs the parties for the first time that the medical record is open to new evidence on all issues for all time periods. The Review[ing] Board has held that an administrative judge may *sua sponte* open up the record to additional medicals in appropriate circumstances. In this case, the doctor's "seemingly inconsistent statements" discussed in my decision on pages 303-304 create an appropriate instance when an administrative judge can, and should, open the record to further medical evidence. So I did. Upon making that decision one could expect that I would notify the parties of the change in my ruling and invite the submission of further medical evidence. However, the parties had informed me at the time that they submitted the "gap" medical evidence, that they did not have any evidence which post dated the impartial medical examiner's examination. Therefore, the lack of such a notice did not impact either parties' rights.

(Addendum, 319.) Therefore, the judge did not change his decision, and did not allow the parties the opportunity to further address the medical issues in the case, in any way.

The self-insurer contends that the decision is arbitrary and capricious. We agree. Whether the parties had any medical evidence that post-dated the impartial examination, should not have been the sole consideration for the judge in addressing the rights of the parties in his addendum.[2] Having changed the scope of his § 11A inadequacy ruling to include a primary issue in the litigation – continuing causal relationship between the work injury and the employee's present disability – the parties each had a right to have

[2] The self-insurer contends that, although no medical evidence was submitted that post dates the impartial examiner's report, there is no record evidence that such medical evidence never existed. (Self-insurer brief 4-5 n.2.)

the opportunity to put forward evidence on that dispute. See O'Brien's Case, 424 Mass. 16, 23 (1996) (failure of due process results from foreclosing "opportunity to present testimony necessary to present fairly the medical issues"). Here, the parties had the right to take depositions, both to challenge their opponent's medical evidence and to bolster their own. The judge could not procedurally cut off the parties' opportunity to develop their cases in that manner. See Martin v. Colonial Care Ctr., 11 Mass. Workers' Comp. Rep. 603, 606-607 (1997) (right to depose medical expert is fundamental to due process); Murmes v. Gambro Health Care, 14 Mass. Workers' Comp. Rep. 13, 18-19 (2000) ("Where there is an inability to cross-examine a medical witness, absent statutory exception, such physician's reports are not admissible in evidence").

Thus, while the administration of his own courtroom is a matter within the exercise of the judge's sound discretion, such discretion does not include the authority to do what the judge did in this case, namely, to foreclose the opportunity for the parties, at their election, to fully address the medical issues by cross-examining the expert witnesses. Therefore, we must recommit the case. The judge may also consider opening up the record for the parties to introduce more recent medical reports, given the passage of time.

The self-insurer's second contention is that the judge's ruling on the broader use of additional medical evidence – other than merely for the "gap" – was, in itself, an abuse of discretion.[3] The self-insurer argues that the judge mischaracterized the impartial physician's deposition testimony, when he found that the doctor had made "seemingly inconsistent statements" regarding continuing causal relationship. The self- insurer specifically states that the impartial physician never deviated from his opinion that the work injury was not a major, but a minor cause of the employee's present disability, and that his present symptomatology was due to the progression of his underlying arthritic

[3] The judge's allowance of additional medical evidence beyond that allowed for the "gap" was, in effect, a further ruling that the impartial medical evidence was inadequate, pursuant to § 11A(2). The self-insurer's argument on this point, likewise, is based on the premise that the impartial medical evidence was adequate as to ongoing causal relationship, and that the allowance of additional medical evidence for that purpose was error of law.

condition. (Self-insurer brief 23-28; Dep. 53-54.) Contradictorily, however, the self-insurer concedes that the impartial physician opined that the employee's current symptoms may be related to the work incident and that the work injury was an identifiable injury that took place and it contributed significantly to the employee's situation. (Self-insurer brief 23-24, 27; Dec. 303; Dep. 44, 51.) The multiple reads that could be had of the language used by the doctor in his deposition include the finding of inconsistency made by the administrative judge. As such, we cannot say that the judge was wrong as a matter of law; therefore, we affirm the allowance of additional medical evidence.

Accordingly, we recommit the case for further proceedings consistent with this opinion.

So ordered.

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Martine Carroll
Administrative Law Judge

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Sara Holmes Wilson
Administrative Law Judge

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Susan Maze-Rothstein
Administrative Law Judge

Filed: **November 8, 2001**
MC/jdm