COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS

BOARD NO. 027092-04

Scott Murphy	Employee
American Steel & Aluminum Corp.	Employer
AIM Mutual Insurance Co.	Insurer

REVIEWING BOARD DECISION
(Judges Horan, Costigan and Fabricant)

The case was heard by Administrative Judges Constantino and Benoit.

APPEARANCES
Charles E. Berg, Esq., for the employee at the first hearing
Rickie T. Weiner, Esq., for the employee at the second hearing
James N. Ellis, Esq., for the employee on appeal
Gregory M. Iudice, Esq., for the insurer at the first hearing
Robert J. Riccio, Esq., for the insurer at the second hearing
Holly B. Anderson, Esq., and Daniel M. Cunningham, Esq., for the insurer on appeal

HORAN, J. Due to a unique procedural history, we consolidate the employee's appeals[1] from two hearing decisions,[2] which address different claims arising from one date of injury. For the reasons that follow, we affirm the first decision, and recommit the second decision for further findings of fact.

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[1] The insurer also appealed the first hearing decision. We affirmed that decision, and the insurer did not appeal our decision to the Appeals Court. This fact, and the insurer's failure to appeal the second hearing decision, leaves only the issues raised by the employee's appeals from both hearing decisions, and those implicated by the Appeals Court's remand.

[2] The first hearing, held on February 22, 2006 and April 3, 2006, resulted in a decision filed on March 30, 2007, by Administrative Judge William Constantino, Jr.; we refer to it as Dec. I. The second hearing, held on September 25, 2008, resulted in a decision filed on April 27, 2009, by Administrative Judge Paul F. Benoit; we refer to it as Dec. II.

Hearing #1

At the first hearing, the employee claimed §§ 13, 30 (medical) and § 34 (total incapacity) benefits for his alleged work-related right-sided carpal tunnel syndrome (CTS), resulting from an August 31, 2004, injury.[3] The § 11A impartial medical examiner, Dr. David J. Bryan, examined the employee on October 27, 2005, and issued a comprehensive nine-page report. Dr. Bryran noted that since 2002, the employee had experienced bilateral upper extremity pain. In 2004, based on those symptoms, he was diagnosed as suffering from amyotrophic lateral sclerosis (ALS).[4] In light of the insurer's § 1(7A) defense, the employee moved for leave to submit additional medical evidence on inadequacy and complexity grounds.[5] The judge denied the employee's motion. (Dec. I, 3.) At his deposition, Dr. Bryan opined the employee suffered from two discrete illnesses, CTS and ALS, which, independent of each other, caused the employee's symptoms. (Dep. 5, 17, 23.) Thus, the doctor's testimony did not support the proposition that the employee's work-related CTS "combined," for § 1(7A)[6]

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[3] At that time, the employee did not claim, but did reserve, his right to seek § 36 benefits (for loss of function and/or disfigurement) in the future. (Dec. I, 2.)

[4] ALS is commonly known as Lou Gehrig's disease. The employee does not allege his work caused this condition. The judge also found the employee's ALS pre-existed his CTS, a finding that has not been challenged on appeal. (Dec. I, 10.)

[5] See General Laws, c. 152, § 11A(2), which provides, in pertinent part:

> Notwithstanding any general or special law to the contrary, no additional medical reports or depositions of any physicians shall be allowed by right to any party; provided, however, that the 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.

[6] The insurer raised this defense at both hearings. General Laws, c. 152, § 1(7A), provides, in pertinent part:

> If a compensable injury or disease combines with a pre-existing condition,

purposes, with the employee's ALS to cause his disability or need for treatment. The judge credited Dr. Bryan's concluding opinion, and found the employee's non work-related ALS "prevented [the employee] from working at . . . American Aluminum and Steel." (Dec. I, 8; Dep. 23.) Consistent with Dr. Bryan's testimony, the judge found that although the employee's right-sided CTS was work-related, it did not disable him from work. Accordingly, the judge ordered the insurer to pay medical benefits under §§ 13 and 30 for treatment of the employee's CTS. (Dec. I, 10-12.)

The first hearing decision was appealed by both parties. We affirmed. See Murphy v. American Steel & Aluminum Corp., 23 Mass. Workers' Comp. Rep. 225 (2009). Only the employee appealed from that decision.[7]

Hearing #2

At the second hearing, held over twenty-nine months after the first, the employee advanced two new claims relative to his August 31, 2004, injury before a different administrative judge.[8] He claimed both § 36 loss of function and disfigurement benefits for his work-related right CTS, and for his alleged *left-sided* CTS. The employee did not claim entitlement to incapacity benefits owing to his CTS. (Dec. II, 1, 5, 7.)

> which resulted from an injury or disease not compensable under this chapter, to cause or prolong disability or a need for treatment, the resultant condition shall be compensable only to the extent such compensable injury or disease remains a major but not necessarily predominant cause of disability or need for treatment.

[7] The insurer's failure to appeal our decision, affirming the first hearing decision, leaves intact our rejection of its § 1(7A) defense to the employee's initial claim for incapacity benefits. We note the second judge also rejected the insurer's § 1(7A) defense to the employee's § 36 claims. The insurer did not appeal the second decision.

[8] The case was reassigned because Judge Constantino retired from the industrial accident board on June 13, 2007.

Once again, Dr. Bryan examined the employee pursuant to § 11A. Dr. Bryan's report, dated February 7, 2008,[9] was entered into evidence. The employee moved for leave to submit additional medical evidence, and the judge, finding Dr. Bryan's report inadequate, and the medical issues complex, opened the record to afford both parties the opportunity to submit additional medical evidence. (Dec. II, 3.)

After considering all of the medical evidence, the judge adopted parts of the opinions of three physicians. See, e.g., Clarici's Case, 340 Mass. 495, 497 (1960). He adopted Dr. Bryan's opinion only to the effect that the employee's right carpal tunnel syndrome was "stable." (Dec. II, 5.) He adopted the opinion of Dr. Vincent P. Birbiglia, a medical expert retained by the employee, and concluded the employee's "sensory complaints were indicative of [nothing other than] carpal tunnel syndrome." Id. Finally, the judge adopted the opinion of Dr. Harvey G. Clermont. He found that Dr. Clermont:

> [E]stimated the Employee's loss of function in the right, major hand at 80% and in the left hand at 60%. He refined this opinion by testifying that the carpal tunnel syndrome was the major determinant of the loss of function in the right hand, and that the ALS was the cause of a minor percentage of that loss of function. He did not render an opinion with respect to the portion of the left hand's loss of function specifically attributable to carpal tunnel syndrome.

Id. On various grounds, the judge rejected the insurer's § 1(7A) defense.[10] The judge also concluded, "[t]he Employee failed to establish the disfigurement of his hands, and I award no benefits under Section 36(k)."[11] The judge awarded § 36 benefits for the functional loss to the employee's right hand:

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[9] The decision lists the report date as January 31, 2008, which was when the employee's examination took place. (Dec. II, 2.)

[10] As the insurer did not appeal the second decision, we do not address the propriety of the judge's ruling on this issue.

[11] The employee does not challenge this ruling on appeal.

> I find that the appropriate Section 36 benefit for loss of function of the employee's right, major hand attributable to the industrial injury is $22,310.87. This figure represents an 80% loss of function of that hand, of which I assess 75% as attributable to the carpal tunnel syndrome and 25% to the amyotrophic lateral sclerosis, relying on Dr. Clermont's attribution of the carpal tunnel syndrome as being the major cause of the loss of function of that hand.

(Dec. II, 7.) Lastly, the judge rejected the employee's § 36 claim for functional loss to the employee's left hand: "[t]he Employee failed to establish an evaluation of the source of the loss of function of the left, minor hand. . . ." (Dec. II, 7.) We have this case before us on the employee's appeal. See discussion, infra.

Procedural History

As noted, both parties appealed from the first hearing decision. The record on appeal from the first decision contained neither the record nor the decision from the second hearing. Accordingly, in our first hearing decision,[12] we were not given the opportunity to address the argument, advanced for the first time before the Appeals Court, that Administrative Judge Constantino, presiding over the first hearing, abused his discretion by failing to find the medical issues complex because, in a hearing held over two years *later*, Administrative Judge Benoit, faced with two new claims advanced by the employee, exercised his discretion and found the medical issues complex.

The appeals of both hearing decisions, in our view, were effectively consolidated when the Appeals Court, in Murphy's Case, 78 Mass. App. Ct. 1101 (2010)(Memorandum and Order pursuant to rule 1:28), vacated our decision in Murphy,[13] supra, and remanded the case. The court stated:

> In that [second] case, contrary to this one, the administrative judge determined that the identical employment and medical history as the one

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[12] See Murphy, supra.

[13] Unlike the situation which developed at the Appeals Court level, the second decision was *not* part of the record before us when we decided the cross-appeals from the first administrative judge's decision.

> presented here raised complex medical issues requiring the case to be reopened[14] for the admission of additional medical evidence. Having reopened the case to resolve the complexities he perceived, the judge there determined that a portion of the employee's loss of function was primarily caused by [CTS] rather than attributable to [ALS] as found in this case.
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> . . .
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> We are faced here with contradictory analyses of the issue of medical complexity, and the potential, at least, of two opposite results, each entitled to deference. While there may be justification for such an outcome, we consider it appropriate for the board to exercise its expertise in the first instance to provide a consistent and coherent approach under the statutory scheme that it administers.

Murphy's Case, supra. We offer the following rationale in support of each judge's decision to rule as he did when faced with the issue of medical complexity.

The Appeal from the First Decision on Remand

We review the discretion exercised by each judge respecting the issue of medical complexity in light of the nature of the claims brought, the arguments advanced by the parties, and the issue, or issues, *sub judice* at the time each case was tried. We are also mindful that what is complex to one judge may not be to another, regardless of whether the passage of time causes a material change in circumstances. See e.g., Dunham v. Western Massachusetts Hosp., 10 Mass. Workers' Comp. Rep. 818, 822 (1996), and its progeny.

The first hearing concerned *only* the employee's claim for incapacity and medical benefits for *right* CTS. In accordance with the § 11A impartial medical examiner's opinion, the judge did not apply the heightened "a major" causation standard of § 1(7A).[15] We found the judge did not abuse his discretion when he denied the employee's motion to admit additional medical evidence on complexity

[14] The description of the judge's action as "reopening" the case is inaccurate. The judge's allowance of additional medical evidence occurred prior to the close of the record in the first place, as per usual.

[15] See Murphy, supra at 226-227, n.3.

grounds, as the impartial physician's opinion adequately addressed all the medical issues presented.[16] As we stated:

> The employee's argument that the judge erred as a matter of law by failing to allow additional medical evidence is also without merit. The contention is essentially that, because the case presented a combination injury, susceptible to the application of § 1(7A) "major" causation, the medical issues were necessarily complex, and/or that the § 11A physician's opinion was inadequate as a matter of law. We disagree.

Murphy, supra at 227. In fact, the § 11A physician's opinion did not support the "combination" element of the insurer's § 1(7A) defense. See MacDonald's Case, 73 Mass. App. Ct. 657, 659-660 (2009). Moreover, in his first appeal to this board, the employee did not argue that because Dr. Bryan's opinion did not "present fairly the medical issues" then in dispute, the judge's decision to foreclose consideration of additional medical evidence violated his due process rights.[17] See O'Brien's Case, 424 Mass. 16, 23 (1996).

On remand, the employee urges us to articulate "a bright line objective standard for [sic] determine when a case is medically complex." (Employee supp. br. 2.) We decline the invitation, and note the Appeals Court has affirmed, on multiple occasions, our position that a judge's decision whether or not to consider additional medical evidence is to be reviewed under the "abuse of discretion" standard. See, e.g., Coggin v. Massachusetts Parole Bd., 42 Mass. App. Ct. 584, 588 (1997); Gargan's Case, 75 Mass. App. Ct. 1109 (2009)(Memorandum and Order Pursuant to Rule 1:28); Tavano's Case, 74 Mass. App. Ct. 1126 (2009)(Memorandum and Order Pursuant to Rule 1:28); Thiboult's Case, 74 Mass. App. Ct. 1120 (2009)(Memorandum and Order Pursuant to Rule 1:28).

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[16] At that time, Dr. Bryan only restricted the employee from work with vibratory stimuli due to his right CTS. (Dec. I, Ex. 1, 9.)

[17] See employee br. dated July 21, 2008. We reject the employee's apparent attempt to raise this issue for the first time in its supplemental brief to this board, which was submitted on December 22, 2010, after the Appeals Court's remand.

In light of the issues then *sub judice*, the extensive and adequate opinion of Dr. Bryan, and the arguments then advanced by counsel in support of its motion on complexity grounds, we cannot say as a matter of law that the judge's decision to deny the employee's motion to admit additional medical evidence constituted an abuse of discretion. His decision to rely upon Dr. Bryan's opinion cannot be said to be the product of an "arbitrary determination, capricious disposition, or whimsical thinking," but rather a ruling "free from partiality [and] not swayed by sympathy. . . ." Davis v. Boston Elevated Ry. Co., 235 Mass. 482, 496-497 (1920).

Because the insurer did not appeal our decision in Murphy, supra, the law of the case is: 1) the employee's right CTS is a work-related medical condition; 2) that condition did not disable him from work at that time;[18] 3) the insurer was responsible to pay medical benefits for that condition; and 4) the employee's work-related CTS did not combine, for § 1(7A) purposes, with his ALS to cause any alleged disability or need for treatment. See Dec. I., and footnote 7, supra.

At the second hearing, the judge addressed different claims advanced by the employee, to wit: § 36 (loss of function and disfigurement) benefits relating to both right *and left* CTS. These claims were grounded, in part, on new medical evidence developed *after* the first hearing.[19] Dr. Bryan conducted his second impartial medical examination of the employee nearly three years after the first. See footnote 8, supra. The purpose of the second examination was to evaluate specifically these new claims; the doctor was not asked to evaluate the employee's disability owing to his right CTS, as he did previously. (Dec. II, Ex. 1.) In the end, Dr. Bryan's second opinion was adopted only in part. (Dec. II, 5.) This is because the judge found Dr. Bryan's second opinion inadequate, and the case

[18] We note the judge's decision on this point was also grounded in his finding that the employee "left his job in May 2005 because he thought the job was not worth doing." (Dec. I, 9.)

[19] See, in particular, the reports of Dr. Birbigilia and Dr. Clermont. (Dec. II, Exs. 8-9.)

before him to be medically complex; accordingly, he opened the record to consider additional medical evidence.[20] (Dec. II, 3.) We fail to appreciate how the second judge's ruling on medical complexity calls into question the propriety of the first judge's ruling on that subject. In light of the nature of the claims advanced, and the fresh medical opinions adopted, there were not "two opposite results" here. Murphy's Case, supra. We also note the judges were not faced with "the identical . . . medical history" at their respective hearing. Id. Much of the medical evidence that served as the foundation for the employee's second claim did not exist at the time of the first hearing. (Dec. II, Exs. 8-9.) Furthermore, the judge was not asked to address the employee's loss of function attributable to his right CTS at the first hearing.[21] Accordingly, consistent with this opinion, we reinstate our original decision in Murphy v. American Steel & Aluminum Corp., supra.

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[20] Although neither party challenges the judge's decision to open the evidence on complexity grounds at the second hearing, the judge's decision is entirely understandable in light of the nature of the claims filed (especially the employee's claim that his left CTS was also work-related).

[21] The Appeals Court wrote that "the judge there determined that *a portion of the employee's loss of function was primarily caused by [CTS]* rather than attributable to [ALS] *as found in this case*." Murphy's Case, supra. (Emphasis added.) We view these findings, taken in the context of the nature of the claims before each judge, differently. The judge's decision in the first hearing does not refer to the employee's "loss of function." The judge did note that Dr. Bryan "characterizes the carpal tunnel syndrome of Mr. Murphy *to be a mild contribution to his impairment*." (Dec. I, 8; emphasis added.) The judge went on to find, consistent with Dr. Bryan's opinion, that although it was work-related, the employee's CTS was mild, and not causative of any claimed incapacity from work. (Dec. I, 10.) The judge's decision to deny incapacity benefits was also based, in part, on his finding that the employee left work not because of his CTS, but because "he thought the job was not worth doing." (Dec. I, 9.) The judge who presided at the second hearing did not find that the employee's ALS was the primary cause of his claimed functional loss. Rather, he adopted the opinion of Dr. Clermont that the employee's "carpal tunnel syndrome was the major determinant of the loss of function in the right, major hand at 80% and in the left hand at 60%." (Dec. II. 5.) Thus, given the nature of the claims presented, and the medical evidence considered at each juncture, we fail to see how the judges' findings are contradictory.

The Employee's Appeal from the Second Decision

The employee's appeal from the second hearing decision challenges only the judge's denial of the employee's § 36 claim for functional loss owing to his left CTS. As noted, the first decision did not address the employee's left CTS. At the second hearing, the judge noted, "[t]he insurer raises the following defenses: The insurer reserves the issue of liability, that is denying the industrial injury." (September 25, 2008, Tr. 4.) It is unclear what the judge meant when he chose this phrasing. At a hearing, there is no such thing as "reserving" liability. Liability is either an issue, or it is not, as the issues of disability, causation, etc., all are premised upon a liability finding. The judge did not list liability as an issue in his decision, and it is unclear if he took this defense into consideration in denying the claim for the employee's left CTS. (Dec. II, 1.) The judge's expressed rationale for rejecting the employee's § 36 benefits for left carpal tunnel syndrome is found in two places. First, the judge found:

> Doctor Clermont estimated the Employee's loss of function in the right, major hand at 80% and in the left hand at 60%. He refined this opinion by testifying that the carpal tunnel syndrome was the major determinant of the loss of function in the right hand, and that the ALS was the cause of a minor percentage of that loss of function. He did not render an opinion with respect to the portion of the left hand's loss of function specifically attributable to carpal tunnel syndrome. I accept and adopt these opinions of Dr. Clermont.

(Dec. II, 5.) Later, the judge wrote, "[t]he Employee failed to establish an evaluation of the source of the loss of function of the left, minor hand, and I award no benefits for that injury." (Dec. II, 7.)

On appeal, the employee challenges the judge's decision to deny the employee's § 36 claim for left CTS as "arbitrary and capricious and contrary to law." (Employee br. 14.) The employee argues the judge's award of § 36 benefits for functional loss of the employee's right hand, and his denial of the employee's claim for § 36 benefits for functional loss of the employee's left hand, defies explanation, given that the judge credited the opinions of Drs. Birbiglia and

Clermont, who both opined that the employee's left *and* right CTS were work-related,[22] and given further that the judge credited Dr. Clermont's bilateral functional loss assessment. (Dec. II, 5.) These alternative findings cause us confusion as well, particularly in light of the judge's rejection of the insurer's § 1(7A) defense, and the holding of Branconnier's Case, 223 Mass. 273 (1916) (compensation award attributable to total blindness upheld where one-eyed man lost vision in remaining eye in work-related accident); compare Houston v. Van Cort Instruments, 9 Mass. Workers' Comp. Rep. 590 (1995). Because it is unclear whether the judge applied the correct rules of law in assessing the employee's § 36 claim for his left carpal tunnel syndrome, we recommit the case to the judge for further findings of fact consistent with this opinion.[23]

So ordered.

Mark D. Horan
Administrative Law Judge

Patricia A. Costigan
Administrative Law Judge

Bernard W. Fabricant
Administrative Law Judge

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[22] See deposition of Dr. Birbiglia, 19-20; June 14, 2007 report of Dr. Clermont, 3 (Dec. II, Ex. 9.)

[23] We do not address the issues raised by the insurer in its supplemental brief to this board, as it did not appeal the second hearing decision. See General Laws, c. 152, § 10A(3).