COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 035981-04**

Stephen P. Sistis	Employee
Baldwinsville Pizza Barn	Employer
AIM Mutual Insurance Company	Insurer

REVIEWING BOARD DECISION
(Judges Fabricant, McCarthy and Costigan)

APPEARANCES
Rickie T. Weiner, Esq., for the employee at hearing
James N. Ellis, Esq., for the employee on appeal
Gregory M. Iudice, Esq., for the insurer

FABRICANT, J. The employee appeals from a decision awarding a closed period of § 34 benefits for a trip and fall injury to his left knee. The employee argues that the judge treated his motion for additional medical evidence inconsistently, allowing it at hearing but then denying it in the decision. We agree with the employee that the judge's action was arbitrary and capricious, and that the decision must be reversed and the case recommitted as a result. Because the judge has retired, the proceedings on recommittal must be de novo.

On October 14, 2004, the employee tripped on a stair while delivering pizza, and landed on his left knee. He reported the incident to the employer and went home. Two days later, the employee sought medical treatment, and eventually underwent arthroscopic surgery, performed by Dr. Al-Masri in May 2005. (Dec. 4-5.) In the meantime, the employee filed a claim for workers' compensation benefits, which the judge denied at the § 10A conference. The employee appealed to an evidentiary hearing. (Dec. 2.)

The employee submitted to an impartial medical examination by Dr. John Corsetti on May 18, 2005, just two weeks after his arthroscopic surgery. Dr. Corsetti diagnosed a soft tissue contusion of the left knee. Upon reviewing a MRI, he ruled out a tear of the medial meniscus, but found medial degeneration. Dr. Corsetti opined that the blunt trauma resulting from the employee's fall would have aggravated the pre-existing arthritis, and a flare-up would be expected to last for two to three months before gradually resolving. Dr. Corsetti considered the medial meniscus arthroscopy to have been unnecessary for the contusion-type of injury suffered by the employee. (Dec. 5-6.)

Finding Dr. Corsetti's impartial medical report adequate, the judge adopted his opinions. (Dec. 3, 6.) The judge found the employee would have been capable of returning to work three months post-injury, that is, on or about January 14, 2005, and that the May 2005 surgery performed by Dr. Al-Masri was not reasonable or necessary. The judge found the insurer liable for the employee's October 14, 2004 work injury, but awarded only three months of total incapacity benefits. (Dec. 6, 8.)

The employee contends, and the insurer does not contest, that the judge allowed his motion for additional medical evidence during the hearing. Indeed, the transcript reveals this to be the case. (Tr. 52-53.) The insurer further agrees with the employee that all of the treating records submitted at conference, along with Dr. Al-Masri's records, were in fact before the judge as additional medical evidence prior to the close of the hearing record. (Tr. 53; Ins. br. 4.)

Under these circumstances, where the judge neither lists the medical records as exhibits, nor mentions them in his findings, we cannot be assured that he considered the evidence he admitted. Rose v. Benchmark Assisted Living, 20 Mass. Workers' Comp. Rep. 1 (2007). The judge must resolve all issues in controversy before him. G. L. c. 152, § 11. Because the employee claimed he was incapacitated beyond the three month period allowed by Dr. Corsetti, and that Dr. Al-Masri's surgery was compensable treatment under § 30, the judge's error goes to the heart of the employee's disability case, and is not harmless. The apparent failure of the judge to consider the employee's medical evidence violated the employee's due process rights. See O'Brien's Case, 424 Mass. 16, 22-23 (1996)(additional medical evidence should be allowed under § 11A(2) where necessary to fairly present the medical issues). Having found the additional medical evidence necessary, the judge was obliged to consider it.

The employee's other argument on appeal, that the judge abused his discretion by reducing the § 13A(5) attorney's fee payable to counsel for the employee "due to the complexity of the dispute and the effort expended," is not persuasive. The judge's award of $3,000.00 under §13A(5) in this matter is not beyond the bounds of consideration by the judge, and is not otherwise unreasonable.

Accordingly, we reverse the decision. We transfer the case to the senior administrative judge for reassignment and a hearing de novo.

So ordered.

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Bernard W. Fabricant
Administrative Law Judge

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William A. McCarthy
Administrative Law Judge

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Patricia A. Costigan
Administrative Law Judge

Filed: March 11, 2008