COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 043440-06**

Stevan Schaeffer	Employee
Philadelphia Sign Co.	Employer
AIM Mutual Insurance Co.	Insurer

REVIEWING BOARD DECISION
(Judges Levine, Costigan and Horan)

The case was heard by Administrative Judge Hernández.

APPEARANCES
Michael A. Fager, Esq., for the employee
Robert J. Riccio, Esq., for the insurer at hearing
Holly B. Anderson, Esq., for the insurer on appeal

LEVINE, J. The insurer appeals from a decision awarding the employee G. L. c. 152, § 34A, permanent and total incapacity benefits. Because the judge recited the medical testimony, without making findings of fact, we cannot fully address the issues raised by the insurer. Therefore, we recommit the case to the judge for further findings consistent with this opinion.

Stevan Schaeffer, fifty-eight years old at hearing, is a high school graduate and has a thirty year work history as a framing carpenter. In 2004, the employee began working as a sign installer for the employer. (Dec. 4.) On January 31, 2006, while taking down a sign from a bank, he fell from a ladder, fracturing his left wrist and left ankle and tearing his left rotator cuff. As a result, he underwent eleven surgeries, including a rotator cuff repair, four left wrist surgeries, and six left ankle surgeries, culminating on August 29, 2008, in fusion of his ankle. (Dec. 5.)

The insurer accepted liability for the employee's injuries and paid § 34 benefits from February 1, 2006 through exhaustion on March 31, 2009. The employee's claim for § 34A benefits was denied at conference, and the employee received § 35 benefits. (Dec. 4.) The employee appealed to a hearing. (Dec. 3.)

On July 23, 2009, pursuant to § 11A of the act, Dr. Osama Al-Masri examined the employee. Dr. Al-Masri restricted the employee from using his left arm above his shoulder, from pulling or pushing or using his left wrist for any activity requiring power, strength or repetitive movement, and from standing or walking more than a short distance due to his left ankle injury. The impartial physician opined that the employee was permanently impaired, that his impairment was "close to total because of the severity of the injury to his left wrist and left ankle where he cannot stand up and walk and cannot return to his previous job as a carpenter or working to remove and install signs." He further opined that the January 31, 2006 injury "is by far the prominent cause of his impairment and he will not be able to return to more than a sedentary type job probably on a part-time basis." (Dec. 7.) Neither party deposed Dr. Al-Masri.

At the start of the hearing, the judge found Dr. Al-Masri's report adequate, (Tr. 4), but allowed the employee's motion to submit additional medical evidence for the "gap" period, without identifying precisely what that period was. (Dec. 4; Tr. 4.) The employee submitted, and the judge accepted, the April 25, 2008 report of Dr. Anthony Caprio, who had been the § 11A examiner in a prior proceeding on the insurer's complaint to discontinue benefits. (Dec. 5; Tr. 4.)[1] At the conclusion of lay testimony, the employee also sought to have admitted three reports by Dr. John L. Doherty (dated January 26, 2009, October 14, 2008 and January 23, 2008), and a May 19, 2008 report of Dr. Edward Rodriguez. (Dec. 2.) The insurer objected to the admission of those reports on the grounds that they were not "gap" medical evidence,[2]

[1] Prior to a hearing on this complaint, the employee underwent left ankle fusion surgery. The parties then filed a § 19 agreement in which the insurer agreed to continue the employee on § 34 benefits until exhaustion and then to place the employee on maximum § 35 benefits. (Employee br. 2-3.)

[2] The employee argued that the "gap" period began at the time of Dr. Caprio's April 25, 2008 impartial report, or at least as of the time the employee's benefits were reduced on March 9, 2009. (Tr. 113-114.) The insurer maintained the "gap" period encompassed the time between the April 29, 2009 § 10A conference and Dr. Al-Masri's July 23, 2009 § 11A examination.

and no ruling had been made that the impartial report was inadequate or the medical issues complex. The insurer also objected, for the first time, to the admission of Dr. Caprio's § 11A report. The judge stated that he would "keep [Dr. Caprio's] report" and "give it appropriate weight." (Tr. 114.) However, he would "review [the employee's other submissions] and let the parties know with respect to whether or not they will be admitted as gap meds." (Tr. 115.) On April 5, 2010, the insurer submitted by e-mail its own "gap" medical evidence consisting of a March 23, 2009 report of Dr. George Lewinnek and two reports of Dr. Richard Anderson, dated July 9, 2008 and August 22, 2007. (Dec. 2.) See Rizzo v. M.B.T.A., 16 Mass. Workers' Comp. Rep. 160, 161 n.3 (2002)(reviewing board may take judicial notice of board file).

In his decision, the judge stated he had allowed additional medical evidence to address the gap period. (Dec. 4.) Although he had never ruled on the insurer's motion to exclude the employee's medical submissions, the judge listed as evidence the reports of Dr. Doherty and Dr. Rodriguez, which had been submitted by the employee.[3] He also listed the insurer's "gap" submissions as evidence. He then recited the medical opinions of doctors Al-Masri, Caprio, Doherty, Rodriguez, and Lewinnek.[4] He also recounted the testimony of Brian Davis, a private investigator retained by the insurer, as well as the testimony of the employee's vocational expert, Linda Palange, and the insurer's vocational expert, Susan Chase. He did not specifically credit or reject any of the medical, vocational or investigative evidence.

The judge did "credit the Employee's testimony and find that his pain symptoms have not improved." (Dec. 14.) He wrote: "*Based upon the medical evidence and the lay testimony*, I find that the work limitations and restrictions would

---

[3] There appears to be no dispute that the judge failed to inform the parties, prior to the issuance of the decision, whether he had accepted the reports of Dr. Doherty and Dr. Rodriguez as "gap" medical evidence. (Employee br. 16; Ins. br. 23.)

[4] The judge did not recite the medical opinions of Dr. Anderson.

include that the Employee refrain from any repeated bending and lifting of heavy objects." (Dec. 14; emphasis added.) He further found the employee is no longer capable of performing his previous jobs, all of which involved physical labor, as a result of his 2006 injuries, and has no transferable skills to sedentary or light work. (Dec. 14-15.) The judge concluded: "*Given the record as a whole,* including credible evidence of the Employee's physical ability, causally related medical restrictions, the Employee's age, education, and experience, I find that the Employee is permanently and totally disabled." (Dec. 15; emphasis added.) The judge ordered the insurer to pay § 34A benefits beginning on March 9, 2009. (Dec. 18.)

The insurer appeals, arguing the judge erred 1) by failing to give prima facie effect to Dr. Al-Masri's impartial opinion that the employee could work with certain restrictions; 2) by failing to adopt the employee's testimony he could perform a driving job; and 3) by improperly relying on the employee's gap medical evidence to support his findings on present disability, without informing the parties, prior to the issuance of the decision, that he was expanding the use of those medicals. It also argues that employee's "gap" medical evidence was stale because it was generated prior to the gap period.

To a large extent, especially with respect to the medical evidence, the judge merely recited the evidence without crediting or rejecting it, and without making clear findings of fact. We are thus unable to "determine with reasonable certainty whether correct rules of law have been applied to facts that could be properly found." Praetz v. Factory Mut. Eng'g & Research, 7 Mass. Workers' Comp. Rep. 45, 46-47 (1993).

Mere recitations of the evidence without findings of fact are disapproved. See Messersmith's Case, 340 Mass. 117, 120 (1959); Ruusukallio v. Toole Properties, Inc., 21 Mass. Workers' Comp. Rep. 261, 261-262 (2007). Here, the judge's decision is largely devoid of factual findings except with respect to his crediting the

employee's testimony that his pain symptoms have not improved.[5] (Dec. 14.) The judge made no findings as to what medical opinion or opinions he adopted; he simply recited the opinions in great detail, and then based his conclusion that the employee was permanently and totally incapacitated "upon the medical evidence and the lay testimony." (Dec. 14.) As we stated in Cordi v. American Saw & Mfg. Co., 16 Mass. Workers' Comp. Rep. 39, 46 (2002):

> The judge is free to credit the testimony of one medical expert over another, Wright v. Energy Options, 13 Mass. Workers' Comp. Rep. 263, 266 (1999), but we should be able to tell on what medical evidence, if any, he based his award. Allen [v. Luciano Refrigeration, 15 Mass. Workers' Comp. Rep. 346 (2001)]. His general finding on extent of incapacity "must emerge clearly from the matrix of his subsidiary findings." Crowell [v. New Penn Motor Express, 7 Mass. Workers' Comp. Rep. 3, 4 (1993)].

See also Beverly v. M.B.T.A., 17 Mass. Workers' Comp. Rep. 621, 624 (2003).

Here, due to the absence of this "matrix of subsidiary findings," we cannot tell whether, as the insurer argues, the judge erred by failing to give prima facie effect to the impartial report and instead improperly factored in the "gap" medical evidence in determining present and ongoing incapacity. See Mims v. M.B.T.A., 18 Mass. Workers' Comp. Rep. 96, 100-101 (2004)(gap medicals, when admitted to provide evidence for period prior to impartial examination, may not then be used for other medical issues, such as present disability); Gulino v. General Elec. Co., 15 Mass. Workers' Com. Rep. 378 (2001)(same). It is not our function to weigh the medical evidence or speculate regarding on what evidence the judge relied. See Brommage's Case, 75 Mass. App. Ct. 825, 827 (2009). Accordingly, it is appropriate to recommit

---

[5] Even that testimony, however, is not entirely consistent, and calls for further findings. The employee testified both that he was incapable of working, (Tr. 31), and that he could do a driving job which did not require him to drive more than 30 minutes at a stretch, would allow him to get out and change position and would not require heavy lifting. (Tr. 48.) Of course, the judge is not required to adopt the employee's possibly "optimistic view of his own work capacity." Guzman v. Act Abatement Corp., 23 Mass. Workers' Comp. Rep. 291, 301 (2009). Moreover, he is he required neither to adopt nor even discuss vocational testimony. Sylva's Case, 46 Mass. App. Ct. 679, 681-682 (1999); Casello v. Executive Glass Co., 20 Mass. Workers' Comp. Rep. 221, 223 (2007).

this case to the administrative judge for further findings of fact on the medical issues. G. L. c. 152, § 11C.

On recommittal, the judge should also rule on the insurer's motion to exclude the employee's "gap" medical evidence. Failure to timely apprise the parties of all rulings to which they might respond may result in a due process violation. Godinez v. Perkins Paper Co., 22 Mass. Workers' Comp. Rep. 83, 87-88 (2008); Mayo v. Save On Wall Co., 19 Mass. Workers' Comp. Rep. 1, 4-5 (2005). Although the insurer submitted its own additional medical evidence, it did not seek to depose the employee's physicians, as it might have, had it known their reports were in evidence. See Mims, supra at 100-101(parties had right to take depositions both to challenge opponent's medical evidence and to bolster their own); Gulino, supra at 381 (same). Given the insurer's timely objection to the admission of these records, we see no merit to the employee's argument that the insurer waived its right to challenge their admission by submitting its own gap medicals. Cf. Green v. Town of Brookline, 53 Mass. App. Ct. 120, 128 (2001)(objections, issues or claims not raised below, even if meritorious, are waived on appeal). If the judge allows the reports in evidence, he must give the insurer an opportunity to rebut such evidence.[6]

Accordingly, because of the absence of adequate subsidiary findings, and because the judge did not inform the parties prior to the issuance of the decision

[6] With respect to the insurer's argument that the employee's "gap" medical evidence is stale because it was created prior to the "gap period," we make two observations. First, the "gap" is almost always the disputed period of incapacity between the commencement of the claim and the § 11A examination. Mims, supra at 97. The employee's claim began on March 9, 2009, (Tr. 3), and the judge awarded § 34A benefits from that date. (Dec. 18.) The impartial examination was on July 23, 2009. All of the "gap" evidence submitted by the employee (and the evidence submitted by the insurer, except Dr. Lewinnek's March 23, 2009 report) was created prior to March 9, 2009. Even so, such evidence may not necessarily be irrelevant for the ensuing gap period, if it can reasonably be read to address the period in question. Miller v. Metropolitan District Comm'n, 11 Mass. Workers' Comp. Rep. 355, 357 n.3 (1997)(where symptoms unchanged, medical opinion could cover a period of time not addressed in the medical report).

whether the employee's "gap" medical evidence had been admitted, we recommit the case for further proceedings and findings consistent with this opinion.

So ordered.

Frederick E. Levine
Administrative Law Judge

Patricia A. Costigan
Administrative Law Judge

Mark D. Horan
Administrative Law Judge

Filed: