COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 051932-95**

Steven Delaney	Employee
Laidlaw Waste Systems	Employer
National Union Fire Ins. Co.	Insurer

REVIEWING BOARD DECISION
(Judges McCarthy, Smith and Wilson)

APPEARANCES
Tanya P. Millett, Esq., for the employee
Maryann Calnan, Esq., for the insurer

MCCARTHY, J. The insurer appeals a § 11 hearing decision in which the employee was awarded weekly § 34 benefits, medical expenses under § 30, attorney fees and costs for the deposition of the impartial medical examiner. The insurer contends that the judge's finding that the employee is totally incapacitated is arbitrary and not supported by the evidence presented. We disagree and therefore affirm the decision.

At the time of the hearing, Steven Delaney was forty-two years of age, married with two minor children, and lived in Weymouth, Massachusetts. Mr. Delaney is a high school graduate with training as a mechanic. (Dec. 2.) He was employed by Laidlaw Waste Systems for eighteen years, most recently as a truck mechanic. His job responsibilities included the frequent lifting of 150 pounds or more and climbing and crawling over and around trucks as needed to perform the required mechanical work. (Dec. 3.)

On December 7, 1995, while repairing the wiring on a trash truck, the employee felt a muscle spasm and heard a "scrunching" noise, like an electric shock, in his back and leg. (Dec. 3.) He reported the incident to the shop supervisor and continued to work the remainder of his shift. After the workday was completed, Delaney went home to soak in a tub and rest. He returned the next day and completed his responsibilities despite being in pain. The employee rested over the weekend and returned to work on Monday. However, he experienced pain and contacted his doctor from the work site. An appointment was made for the following day. The

employee's doctor advised two weeks bed rest and prescribed muscle relaxants. The employee has not returned to work since. (Dec. 3.) Mr. Delaney was referred to Dr. DiTullio who then scheduled the employee for various diagnostic tests. In February 1996, the employee underwent low back disc surgery at South Shore Hospital. Following the operation, the employee had a course of physical therapy. (Dec. 3.) The employee was released to work on a restricted basis as of August 1, 1996. When the employee went to his work place, he was told to leave the premises as his case was in litigation. (Dec. 3.)

On July 9, 1996, pursuant to § 10A, the employee's claim for § 34 benefits and for penalties pursuant to § 14 (1) was conferenced before an administrative judge. On July 17, 1996, a conference order was filed directing payment of weekly § 34 benefits and denying a § 14(1) penalty. Both parties appealed to a hearing *de novo*. (Dec. 1.)

On September 26, 1997, the employee was examined by Dr. John F. McConville, a § 11A examiner. Both the medical report and the deposition testimony of the impartial physician were admitted into evidence. (Dec. 1.) Doctor McConville diagnosed the employee's physical status as post lumbar laminectomy L4-5 with left L5 discectomy causally related to the work incident. (Dep. 12, 13; Dec. 5.) He also opined that the employee was partially incapacitated for work as a diesel mechanic, but that he could perform work that did not require repeated bending, stooping, squatting, or lifting of items weighing in excess of thirty pounds. (Rep. 3, 18; Dec. 5.) Additionally, the impartial examiner opined that Mr. Delaney was at a medical end result, that no further treatment was necessary, and that he had sustained a ten percent permanent loss of physical function. (Rep. 3-4; Dec. 5.) Dr. McConville also noted that Delaney would benefit from a pain clinic in that surgery had not achieved a complete resolution of his symptoms. (Dep. 19-20; Dec. 5.) The administrative judge found the § 11A report adequate and adopted both the impartial examiner's report and deposition testimony.

On appeal, the insurer contends that the administrative judge's finding that the employee was totally incapacitated is arbitrary and not supported by the evidence. More specifically, the insurer states that the employee: (a) attempted a return to work in August, 1996, but did not do so due to a dispute with the employer; (b) was an accomplished diesel mechanic and was asked to train co-workers, (Tr. 8, 42-43); (c) was able to build radio controlled model airplanes of wood and fly them, (Tr. 44-46); (d) was able to do chores around

the house including mowing the lawn and building a play house for his children, (Tr. 28-30); and (e) was capable of driving to Michigan to attend a wedding, (Tr. 47.) (Insurer's brief, 3.) This evidence, when combined with the medical opinion of the 11A examiner that the employee could return to work with restrictions, argues the insurer, requires a finding of an earning capacity. (Insurer's brief, 2-4.)

This argument fails when the entire hearing record is examined. The administrative judge found the employee to be a credible witness. (Dec. 6.) Witness credibility issues rest with the administrative judge and such determinations are final. Lettich's Case, 403 Mass. 389, 394 (1988). The employee testified at length regarding his pain. (Tr. 27-33, 37, 45, 47-49.) He stated that he would spend "a couple of hours a day putting [sic] around the house and then I spend my afternoons on Tylenol and lying in bed." (Tr. 27.) He also testified that he uses Tylenol and Motrin on a constant basis and that if he deviates from his schedule of very light activity for any longer than a few hours he has to spend the entire next day in bed. (Tr. 27-28.)

Contrary to the insurer's assertion, Delaney testified that he "would have tried" to return to work in August, 1996 (Tr. 20); this is well short of an acknowledgement that he was capable of returning to work. Delaney also testified the he was no longer capable of mowing the lawn, due to pain, and that his father-in-law had taken over this chore, (Tr. 29); that his children were enrolled in preschool because he was not capable of changing them or adequately watching over them, (Tr. 27, 49); that he can no longer undertake projects such as building a playhouse, even with others doing all the lifting, and that he told his wife "that's the last project" due to pain, (Tr. 30); that he wakes with pain, (Tr. 32), and is sometimes confined to bed for two days straight, (Tr. 31); that he has a "couple of good hours a day," . . . "but that's not every day." (Tr. 28); and that although he traveled to Michigan by vehicle to attend his niece's wedding, he spent all but two hours of the journey lying in the back of a station wagon. (Tr. 47.) Presumably the judge believed this testimony because she expressly found Mr. Delaney to be credible witness, (Dec. 6), and also found "that [the] Employee continued to be significantly disabled because of pain." (Dec. 6.) On this record it was open to the judge to conclude that Delaney's pain was sufficiently debilitating as to temporarily totally incapacitate him, notwithstanding the § 11A opinion that he could work with restrictions. Anderson v. Anderson Motor Lines, Inc., 4 Mass. Workers' Comp. Rep. 65 (1990).

The administrative judge adopted the § 11A medical opinion, found that the employee continued to be significantly disabled because of pain and noted that neither party offered vocational testimony to indicate what opportunities were available to the employee in his current medical condition. (Dec. 6.) The reasonably detailed nature of the judge's findings and her particular attention to the employee's testimony regarding his level of pain refute the insurer's contention that the judge's decision was not predicated on a careful evaluation of the evidence as a whole. See Woolfall's Case, 13 Mass. App. Ct. 1070 (1982). Accordingly, we affirm.

The insurer shall pay employee's attorney a fee of $1,193.20 pursuant to § 13A(6).

So ordered.

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William A. McCarthy
Administrative Law Judge

Filed: March 15, 1999

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Sara Holmes Wilson
Administrative Law Judge

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Suzanne E.K. Smith
Administrative Law Judge