COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 001556-04**

Teena M. Dupre	Employee
Loomis House, Inc.	Employer
Atlantic Charter Insurance Co.	Insurer

REVIEWING BOARD DECISION
(Judges Horan, Carroll and McCarthy)

APPEARANCES
Paul G. Lalonde, Esq., for the employee
Scott E. Richardson, Esq., for the insurer

HORAN, J. The insurer appeals from a decision awarding the employee § 34 benefits for a work-related neck injury. We affirm the decision.

Teena Dupre worked as a certified nurse's assistant at Loomis House since February, 2002. Her job entailed lifting up to 230 pounds. On or about January 18, 2004, she felt a "popping sensation" in her neck while assisting a patient at work.[1] She was paid benefits on a without prejudice basis through July 8, 2004. Following a conference on her claim, the administrative judge issued an order of payment for § 34 benefits. The insurer appealed. (Dec. 2, 4-5.)

Pursuant to G. L. c. 152, § 11A, the employee was examined by Dr. Eugene W. Leibowitz, who issued a report dated February 23, 2005. At the hearing on June 8, 2005, the insurer raised, *inter alia*, the issues of disability, extent of disability, and causal relationship. On August 15, 2005, the administrative judge, on the employee's motion, found the medical issues complex and gave both

[1] According to the Holyoke Medical Center records, identified in the decision as the records of Dr. Garry M. Bombardier, (Dec. 3), the employee initially complained of neck *and* shoulder pain.

parties until September 30, 2005 to submit additional medical evidence.[2] (Dec. 1-2.) The employee submitted medical records from her treating physicians, Dr. Christopher H. Comey, Dr. Garry M. Bombardier and Dr. Peter A. Viera. (Dec. 3.) The insurer rested on the report and deposition testimony of Dr. Leibowitz.

In his hearing decision, the judge adopted Dr. Comey's opinion that the employee has a "symptomatic C5-6 disc" and that she "requires a fusion surgery to alleviate her symptoms . . . ." The judge also found the employee's work-related injury "caused herniated discs at the C3-C4 and C5-C6 level [*sic*]." (Dec. 7; see footnote 6, infra.) He adopted Dr. Bombardier's opinion that the employee was disabled "through at least May 6, 2005." (Dec. 6.) However, the judge did not adopt Dr. Leibowitz's opinion, explaining that the doctor, at his deposition,[3] "could offer no opinion, either way, whether the incident in January of 2004 caused the [disc] herniations." Id.

The insurer raises two issues on appeal. We address them in turn.

First, the insurer maintains the employee failed to meet her burden of establishing a causal relationship between her injury at work and her disability.[4] We disagree. On the issue of causation, the judge found that:

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[2] On two occasions at the hearing stage, the employee, by motion, urged the judge to permit the introduction of additional medical evidence on the ground that the impartial report of Dr. Leibowitz was inadequate. Neither party argued the medical issues were sufficiently complex to warrant the submission of such evidence. However, the statute plainly allows the judge, *sua sponte*, to expand the medical record on this basis. General Laws c. 152, § 11A(2) provides, in pertinent part:

> [T]he administrative judge may, on his own initiative . . . 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 . . . .

[3] The doctor testified, "I can make no judgment as to whether the incident under consideration that occurred in January of 2004, was the cause of the herniations or not." (Dep. 30.)

[4] The insurer does not contend that the employee has failed to causally relate her cervical disc herniations to her work injury.

> . . . on the surface, it would appear the employee fails to meet her burden by failing to provide any direct evidence on the critical element of causation. However, after reviewing all the records of the treating physicians, it is a reasonable inference that the doctors were of the opinion there was causation by the patient's history. In that I find that the history provided by the employee is credible, I therefore find causation does exist with the injury of January 18, 2004.

(Dec. 6.) We need not reach the issue of whether the judge's inference was reasonable and proper on this evidentiary record, because our review of the record reveals the judge incorrectly concluded such evidence was lacking. Specifically, the records of Dr. Bombardier,[5] adopted by the judge to support his disability finding, clearly indicate the doctor *did* causally relate the employee's disability to her injury at Loomis House. The doctor's records include numerous "evaluation reports," coinciding with the dates of the employee's office visits. On nearly all of these forms, the doctor has checked off, in the top left-hand corner under the heading "other impressions", the box labeled "direct result of a work related event(s) by history", while also checking, in the top right-hand corner of these forms, under the heading "employee work status", the box labeled "no work." At no time throughout the employee's course of treatment did Dr. Bombardier check the boxes labeled "causation unclear" or "not work related." These evaluation reports also contain, on the same page as the above referenced boxes, references to the diagnoses of "cervical disc" and "disc disease".[6] Thus, the judge's causation finding is supported by the medical evidence he adopted.[7]

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[5] See footnote 1, supra.

[6] Dr. Bombardier's records also contain two MRI studies confirming the employee's disc herniations at C3-4 and C4-5.

[7] Even Dr. Leibowitz, whose opinion the judge did not credit, conceded he would place physical restrictions on the employee: "[h]er complains (*sic*) and the findings on the MRI are enough for me to suggest that these restrictions be maintained." (Dep. 43.) Moreover, when asked if those restrictions "had their origin in the injury she sustained," the doctor testified: "[s]he gaits (*sic*) it from that period of time, and; therefore, I need

Lastly, the insurer argues the judge erred by allowing the parties to introduce additional medical evidence on the grounds of complexity.[8] We disagree. Because the legislature has expressly permitted judges, on their "own initiative," to allow the parties to submit additional evidence upon a finding of complexity, we believe a judge's decision to do so is entitled to substantial deference. G. L. c. 152, § 11A; compare Viveiros's Case, 53 Mass. App. Ct. 296 (2001)(judge under no obligation, *sua sponte*, to admit additional medical evidence). In light of the judge's expressed frustration with the failure of the impartial physician to address an important aspect of the case, we see no abuse of discretion here.

Accordingly, we affirm the decision. Pursuant to § 13A(6), the insurer is directed to pay employee's counsel a fee of $1,407.15.

So ordered.

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Mark D. Horan
Administrative Law Judge

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Martine Carroll
Administrative Law Judge

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William A. McCarthy
Administrative Law Judge

Filed: October 23, 2006

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to." (Dep. 45.)

[8] See footnote 2, supra.