COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 07674-14**

Theresa Saia	Employee
Grow Associates, Inc.	Employer
Travelers Property Casualty Co. of America	Insurer

REVIEWING BOARD DECISION
(Judges Long, Fabricant and Koziol)

This case was heard by Administrative Judge Barrett.

APPEARANCES
Donald Williams, Esq., for the employee
Terence P. Reilly, Esq., for the insurer

LONG, J. The insurer appeals from a decision declining its request to discontinue, modify or recoup benefits paid to the employee. We affirm the decision.

On March 31, 2014, the employee suffered a compensable injury to her neck and head when she was involved in a motor vehicle accident. Although liability for the neck and head conditions was not contested by the insurer, payment for proposed medical treatment was denied. The employee filed a claim seeking those benefits. (Dec. 4-5.) At the §10A conference, the insurer's motion to join a claim for modification of the employee's temporary total §34 incapacity benefits was allowed. However, the judge declined to modify those benefits and ordered the insurer to pay for the claimed medical treatment. The insurer appealed the denial of its modification request and, on April 22, 2016, a §11 hearing was held.[1] The employee was the only witness. Although the judge found the §11A impartial report of Dr. James Nairus adequate, he allowed the submission of "gap" medicals for the period of time preceding the impartial report, thereby indicating

[1] At hearing, insurer counsel indicated that the insurer was not appealing the order awarding the claimed medical treatment. (Dec. 2.)

the report was inadequate to address that time period. On July 29, 2016, the judge issued a decision maintaining the employee's §34 benefits.

The insurer raises four issues on appeal, arguing the judge: 1) misstated expert medical opinion; 2) impermissibly substituted his own opinion for that of the §11A impartial physician, in part by finding the employee appeared uncomfortable during the hearing; 3) impermissibly rejected opinions of the §11A impartial physician; and, 4) failed to make sufficient findings regarding the employee's prior employment position. We address one harmless error regarding the administrative judge's observations of the claimant during the hearing. Otherwise, we summarily affirm the decision.

The judge found: "The employee appeared physically uncomfortable throughout the hearing and often changed her position from a seated to a standing position." (Dec. 10.) The insurer alleges this finding supports its request for recommittal because the hearing transcript is devoid of any evidence that the employee changed positions or that the judge commented on his observations during the hearing. A review of the transcript confirms the absence of any such observations, prompting this comment on proper hearing practice.

The judge may consider as evidence only that which has been introduced as such; if findings are based on information that is not a part of the evidence, a party's right to administrative due process is violated. Haley's Case, 356 Mass. 678, 682-683 (1970). Additionally, "[a]ll evidence considered by the administrative judge must be properly identified, not only to provide the parties an opportunity to challenge such evidence but also to establish an accurate and complete record in the event of an appeal." Rossi v. Mass. Water Resources Auth., 7 Mass. Workers' Comp. Rep. 101, 102 (1993). Regarding observations and comments made by a judge during a hearing, we have previously stated:

> When a judge reaches conclusions as to the employee's physical capacity we look to see that the judge's observations and conclusions are consistent with the medical opinion adopted. . . . A judge should bear in mind that observing the employee in the surrounds of the witness box may not afford the opportunity to see the employee engage in the range or duration of physical activities required to

> perform work. If the judge were to observe the employee demonstrate a physical movement which the judge felt was inconsistent with the employee's testimony as to limitations, and the judge intended to rely upon that observed discrepancy, it would be wise for the judge to place that observation on the record, in the event counsel fails to do so. Similarly, if the judge observed the employee to genuinely appear physically unable to meet even the minimal physical demands of courtroom participation, that too could bear on the judge's determination of earning capacity, in coincidence with supporting medical opinion.

Forziati v. G.A. Masonry Corp., 8 Mass. Workers' Comp. Rep. 362, 363 (1994).

Therefore, when a judge seeks to rely upon observations of an employee at hearing to assist in assessing the employee's physical capacity, such observations should be put on the record to address the aforementioned due process and appellate concerns. Here however, we find no reversible error because the observation was merely cumulative of the judge's numerous other proper findings.

In support of his finding entitlement to ongoing temporary total incapacity benefits, the judge adopted relevant opinions of the impartial physician, including: a diagnosis of a closed head injury; a diagnosis of cervical spine strain with disc bulges and protrusions at the C4-C5 levels; a diagnosis of exacerbation of pre-existing cervical spine degenerative condition making it symptomatic; a finding of the injury acting as the major contributing cause to the disc protrusion at the C5-C6 level; and, a finding of the work injury remaining the major contributing cause to the employee's cervical spine condition, need for treatment, disability and impairment related to it. (Dec. 8.) Also adopted were the impartial physician's opinions that the employee could not lift or carry any objects greater than ten pounds or lift any objects overhead; and, she could not perform repetitive neck motions or perform any repetitive bending or stooping. (Dec. 9.) In further support of the finding of temporary total incapacity, the judge found the employee to be a credible witness and accepted as true the employee's testimony that she was perfectly fine just before the industrial accident, was not nauseous or in pain and, was not experiencing any of the symptoms which she complained of at the time of the hearing. (Dec. 10.) Additionally, the judge credited the employee's testimony that, since the

industrial accident, she has experienced headaches, neck pain, pain between her shoulder blades and nausea. The employee's head pain is constant and increases in severity the more she moves; she experiences nausea and neck pain while walking and turning her head to the left; and, she has difficulty sleeping because of her pain. (Dec. 10.)

> In *Commonwealth v. Coleman*, *390 Mass. at 803*, the Court considered what it termed 'ill advised' remarks by the trial judge concerning his having decided a criminal case when the victim testified and before all evidence was adduced. The Court stated, however, that even if the judge erred, reversal was not required because the evidence overwhelmingly supported the conclusion. Similarly in the present case the aforementioned statements in the judge's decision may have been 'ill advised.' Based upon our review of the entire record, however, we conclude the judge's decision is neither arbitrary nor capricious and there exists ample basis for affirmance.

Mastrangelo v. Ametek Aerospace, 7 Mass. Workers' Comp. Rep. 184, 188 (1993).

Similarly, in the present case, the judge's written finding regarding non-documented observations may have been "ill-advised." However, upon review of the entire record, we conclude the judge's decision is sound in all respects and is neither arbitrary nor capricious.

Accordingly, we affirm the decision. Pursuant to G. L. c. 152, § 13A(6), the insurer shall pay the employee's attorney a fee in the amount of $1,613.55.

So ordered.

Martin J. Long
Administrative Law Judge

Bernard W. Fabricant
Administrative Law Judge

Catherine Watson Koziol
Administrative Law Judge

Filed: **April 11, 2017**