COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 026700-99**

Timothy Donegan	Employee
Eastern Tool and Stamping	Employer
Arrow Mutual Insurance	Insurer

REVIEWING BOARD DECISION
(Judges Levine, Maze-Rothstein and Carroll)

APPEARANCES
Alan S. Pierce, Esq., for the employee
John A. Morrissey, Esq., for the insurer

LEVINE, J. The insurer appeals an administrative judge's decision awarding ongoing incapacity benefits for a June 30, 1999 industrial injury. The insurer contends that the judge erroneously adopted the employee's medical evidence over that of the G. L. c. 152, § 11A, physician. The employee appeals the decision on the basis that the judge's award of § 35 partial incapacity benefits as of the exhaustion of § 34 total incapacity benefits was outside the scope of his authority. We affirm the decision.

The employee injured his back when he slipped and fell at work. (Dec. 5.) The insurer accepted the injury. (Dec. 3.) On October 24, 1999, the employee underwent microsurgical disc excision at L4-L5. (Dec. 6.) In August 2000, the insurer brought a complaint to modify or discontinue compensation. It contested disability, extent of incapacity and causal relationship. (Dec. 3.) On January 31, 2001, Dr. John Ritter performed a § 11A impartial medical examination. He opined that the employee suffered from a L4-5 disc herniation causally related to his 1999 work injury, which was partially medically disabling. (Dec. 3, 7.) Because Dr. Ritter did not receive all the medical records intended for his review, the judge allowed the parties to submit additional medical evidence. (Dec. 3.) The employee introduced reports of his surgeon, Dr. Richard Ozuna, and of Dr. James Wepsic. Both doctors totally disabled the employee from all employment, and, viewed as a whole, L. Locke, Workmen's Compensation

§ 522 (2d. ed. 1981), considered the prospect of further surgery for his condition a reasonable or not unreasonable option, as conservative treatment had not succeeded in alleviating the employee's debilitating pain. (See Dec. 7-8; reports of Drs. Wepsic and Ozuna.[1]) On August 2, 2001 the employee underwent the second surgery -- a posterior spinal fusion. (Dec. 8.)

Despite having allowed the parties to submit additional medical evidence without limitation, (Dec. 3), the judge found that the impartial report had prima facie weight "as to the period of time beginning with the exam and continuing to date." (Dec. 8.) The judge then adopted the opinions of the employee's doctors, credited the employee's reports of pain, and awarded incapacity benefits under §§ 34 and 35, along with medical benefits under §§ 13 and 30. (Dec. 8-10.)

The gravamen of the insurer's appeal is that the judge erred when he accorded prima facie weight to the opinions of the impartial physician, Dr. John Ritter, but then issued a decision that neither comported with that doctor's opinions, nor explained his deviation from those opinions. The insurer's argument would have merit if the impartial medical evidence were the only medical evidence in the case. However, as already pointed out, the judge allowed additional medical evidence based on the inadequacy of Dr. Ritter's medical evidence. (Dec. 3.) The insurer does not challenge that action on appeal. The impartial medical evidence lost its prima facie status under § 11A(2) once the employee introduced medical evidence "that warrant[ed] a finding to the contrary." Cook v. Farm Servs. Store, Inc., 301 Mass. 564, 566 (1938). See Norton v. Bureau of State Office Bldgs., 13 Mass. Workers' Comp. Rep. 122, 126-127 (1999). Once such additional medical evidence was in the case, the judge was free to adopt whichever opinions he found persuasive. Coggin v. Massachusetts Parole Bd., 42 Mass. App. Ct. 584, 589 (1997)(judge may adopt additional medical evidence over impartial medical evidence). The judge was thus warranted in adopting the medical opinions of the employee's doctors, Drs. Wepsic and Ozuna, rather than the opinion of Dr. Ritter, in

[1] Although these reports were discussed by the judge, he neglected to mark them as exhibits.

reaching his conclusion that the employee was totally incapacitated. Amon's Case, 315 Mass. 210, 215 (1943). Although the judge committed error when he declared that the impartial medical evidence was "prima facie," (Dec. 8), which it was not, the error did not prejudice the insurer because the judge was warranted in adopting the employee's medical reports.

The only question the insurer's appeal leaves is whether the medical evidence supplied by the employee supported the judge's conclusion that the August 2, 2001 surgery was reasonable and necessary. (Dec. 8-9.) Relying on the reports of Drs. Wepsic and Ozuna, the judge found that the employee's pain, was "continuous and intolerable." (Dec. 8.) The judge further found that the employee's pain and disability had increased when the employee entered the hospital on August 2, 2001. (Id.) The judge also adopted the opinions of Drs. Wepsic and Ozuna, (id.), which, when looked at as a whole, considered the surgery to be reasonable or not unreasonable. (See reports of Drs. Wepsic and Ozuna.) See Walker's Case, 243 Mass. 224, 225 (1922)("cautious declaration of an opinion which is based upon disputed and disputable facts and conclusions of fact"). The judge's conclusion is therefore sound.

The employee raises on appeal the propriety of the judge's award of § 35 partial incapacity benefits as of the exhaustion of his § 34 total incapacity benefits, even though he had not sought § 35 benefits. There is no basis for the employee's concern that the award of § 35 benefits will have res judicata effect on a subsequent claim for § 34A benefits. We have approved the administrative award of the maximum amount available under § 35 as a "stop gap" while a claim for § 34A benefits is contemplated or pending. See Cugini v. Town of Braintree, 17 Mass. Workers' Comp. Rep. ___ (July 17, 2003); Lavoie v. Zayre Corp., 13 Mass. Workers' Comp. Rep. 76, 79 (1999). Unlike an award of § 35 benefits that actually reflects an employee's earning capacity, an administrative award, such as here, does not require the employee to prove a "worsening" in the event

he chooses to pursue a claim for § 34A permanent and total incapacity benefits. Id. Cf. Foley's Case, 358 Mass. 230 (1970).[2]

Accordingly, the decision is affirmed. Pursuant to § 13A(6), the insurer is ordered to pay employee's counsel a fee of $1,273.54.

So ordered.

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Frederick E. Levine
Administrative Law Judge

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Martine Carroll
Administrative Law Judge

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Susan Maze-Rothstein
Administrative Law Judge

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Filed: **October 7, 2003**

[2] We note that the employee had not claimed § 34A benefits; where such benefits are not claimed, they should not be awarded. Casey v. Town of Brookline, 17 Mass. Workers' Comp. Rep. ___ (June 20, 2003).