COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 19239-95**

Timothy L. McCoy Employee
C&S Wholesale Grocers Employer
National Union Fire Insurance Insurer

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

APPEARANCES
Patricia A. Connors, Esq., for the employee
Richard A. Wall, Esq., for the insurer

MCCARTHY, J. The insurer appeals from an administrative judge's decision awarding the employee permanent and total incapacity benefits under § 34A as a result of an industrial accident on May 19, 1995. The insurer argues various points regarding the medical evidence in the case, focusing on the judge's treatment of the § 11A impartial physician's report and deposition testimony. Finding no error, we affirm the decision of the administrative judge.

Mr. McCoy is a 44-year-old high school graduate who was hired by C&S Wholesale Grocers as a transport refrigeration mechanic and foreman shortly after his 1982 military discharge. (Dec. 4.) On May 19, 1995, he felt a sharp pain in his back while lifting a compressor. Id. The employee sought medical treatment the following day and was prescribed physical therapy. Id. The insurer accepted the injury and paid compensation benefits. (Dec. 3.) In November of 1996, following several attempts to return to work, the employee had surgery for removal of a herniated disc at L5-S1. (Dec. 4.) The employee returned to work in January 1997 in a limited capacity with continued

symptomatology of pain and leg weakness, culminating with his termination on June 26, 1997. Id. The employee continued to have leg problems which occasionally resulted in his legs giving way. As a result of one such fall, on August 1, 1999, he was treated for a sprain of his left acromioclavicular joint. (Dec. 4-5.)

The employee filed a claim for § 34A benefits, which the judge ordered as a result of a § 10A conference proceeding on April 8, 1999. The insurer appealed to a full evidentiary hearing. (Dec. 2.) Pursuant to §11A(2), Dr. William L. Lipman examined the employee on September 23, 1999. Doctor Lipman opined that the employee has a post-laminectomy pain syndrome which is causally related to the herniated L5-S1 intervertebral disc injury of May 19, 1995. The doctor further concluded that the employee has a psychological overlay complicating the employee's perception of his pain and disability. (Dec. 5.) He also agreed with the opinion of Dr. John Walsh, the employee's treating physician, that all treatment efforts had been a "complete failure" and that the employee has a 10% permanent impairment of the whole person due to his failed back surgery syndrome. Id. The impartial physician opined that he did not know why the employee's leg gave out on him causing him to fall. (Dec. 3.) He restricted the employee from lifting more than 20 pounds, climbing, crawling, kneeling, or maintaining awkward positions, standing and sitting more than 45 minutes, walking more than two hours per day, use of his left leg for any type of foot controls, and driving more than 20 minutes to work. (Dec. 5-6.)

The employee moved to introduce additional medical evidence at the hearing. The judge allowed the motion as to the employee's shoulder injury, sustained subsequent to the § 11A medical examination. (Dec. 3; Tr. 4.) The judge announced that he would delay a ruling as to the primary opinion of the impartial physician related to the employee's back until after his deposition. (Dec. 3.) The employee introduced a medical report of his treating physician, Dr. John Walsh, regarding his shoulder complaints and leg weakness. (Employee's Ex. 8.) In this report Dr. Walsh opined that: "It should be specifically noted that Mr. McCoy's problem related to his neck and left shoulder are also a direct result of the lower back injury which he sustained in May of 1995 as they were

caused when his lower back gave out causing him to fall sustaining injuries to his neck, upper back and shoulder." (Employee's Ex. 8.)

The judge adopted the opinion of the impartial physician regarding the employee's failed lower back and the concomitant work restrictions. He also adopted Dr. Walsh's opinion as to the causal relationship of the employee's shoulder complaints to the industrial injury. (Dec. 6.) The judge found that the employee's inability to drive would limit his ability to get to and from any occupation from his residence in Hartville, Missouri, a farming community of 539 people which is 45 minutes from the nearest town. (Dec. 7.) The judge concluded that when Mr. McCoy's age, educational level, demonstrated performance on basic skills testing and the restrictions imposed by the impartial physician were considered, the employee had but a trifling earning capacity. (Dec. 8.)

The insurer first argues that the judge erred by deeming the impartial report inadequate and allowing the submission of additional medical evidence. We do not agree. The issue is governed by DeLeon v. Accutech Insulation & Contract., 10 Mass. Workers' Comp. Rep. 713 (1996). In that case, we concluded that where an important event occurs months after the impartial examination, the medical evidence derived therefrom is inadequate as a matter of law. As interpreted by the Supreme Judicial Court, §11A(2) authorizes an administrative judge to take additional medical evidence where this additional testimony would serve some legitimate function. O'Brien's Case, 424 Mass. 16, 22 (1996). The legitimate function of additional medical evidence here allowed the parties to present expert testimony concerning the injury the judge found that the employee suffered to his shoulder after sustaining falls subsequent to the impartial examination. (Dec. 6.) At the time of the lay hearing, the impartial physician's opinion as to the shoulder symptoms and their alleged causal relationship to the industrial accident was necessarily lacking, as the condition had not yet emerged. The judge certainly was well within his discretion to admit additional medical evidence as to the employee's left shoulder injury as a result of the falls.

The insurer also argues that the judge failed to rule on the post-deposition aspect of the employee's motion for additional medical evidence, regarding the adequacy of the impartial physician's opinion on the employee's failed back. (Insurer brief 11-14.) This argument fails for two reasons. First, it is clear that the judge deemed the impartial opinion adequate, as he adopted it in toto with regard to the employee's back. (Dec. 5, 9.) Of even greater importance is the insurer's lack of standing to argue with respect to the judge's omission to act on the motion of the *employee*. Having deemed it not in its interest at hearing to advocate for additional medical evidence on the basis of inadequacy of the impartial medical evidence, or complexity of the medical issues, we do not look favorably upon its insistence on appeal that it was somehow harmed by the judge's procedural omission to give his second ruling on inadequacy. We consider the issue waived, particularly in view of the insurer's contradictory stance in its first argument on appeal, *that the impartial medical evidence was adequate and that the judge should not have allowed additional medical evidence in any event.* (Insurer brief 6-10.)

The insurer next argues that the judge erred by failing to make an explicit finding on causal relationship between the industrial accident and the employee's shoulder complaints. Once again, the insurer's contention is form over substance. The judge's conclusion indicates unequivocally his necessary finding of just that. The judge adopted Dr. Walsh's opinion as to the employee's shoulder. Dr. Walsh explicitly linked the shoulder to the industrial accident by way of the employee's leg giving out and his falling. (Employee's Ex. 8.) Given this, the error, if any, is harmless.

Finally, the insurer complains that it was denied due process because it had no opportunity to address Dr. Walsh's opinion on the shoulder symptoms. (Insurer brief 13-14.) We find no such violation, as the insurer had *exactly* the same opportunity to introduce its own evidence on the shoulder as did the employee. The judge granted the employee's motion to be allowed the opportunity to introduce additional medical evidence at the lay hearing, well before the close of the record.

For the above reasons, the decision of the administrative judge is affirmed.

So ordered.

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William A. McCarthy
Administrative Law Judge

Filed: **October 24, 2001**

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Frederick E. Levine
Administrative Law Judge

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Susan Maze-Rothstein
Administrative Law Judge