COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS

BOARD NO. 002193-05

Todd Watson	Employee
Rodman Ford Sales	Employer
AIM Mutual Insurance Co.	Insurer

REVIEWING BOARD DECISION
(Judges Koziol, Fabricant and Levine)

The case was heard by Administrative Judge Sullivan.

APPEARANCES
Charles E. Berg, Esq., for the employee at hearing and on appeal
James N. Ellis, Esq., for the employee on appeal
George D. Kelly, Esq., for the insurer at hearing
Paul M. Moretti, Esq., for the insurer on appeal

KOZIOL, J. The parties cross-appeal from the administrative judge's decision ordering the insurer to pay the employee ongoing weekly benefits pursuant to §§ 34 and 35, and medical benefits, for the employee's physical and psychological conditions. The insurer raises three issues on appeal, two of which we summarily affirm. As to the third issue, the insurer argues the judge erred by striking the impartial medical report from evidence after finding the doctor's illness caused him to be unavailable for deposition. The employee raises one issue, arguing the judge erred in reducing his weekly benefits from total incapacity under § 34, to partial incapacity under § 35, as of June 1, 2007. We reject the insurer's argument, and agree with the employee that recommittal is necessary for further findings on the extent of his incapacity.

We recount only the facts necessary to discuss the issues on appeal. The employee suffered a work-related injury to his neck and left shoulder on January 18, 2005. (Dec. 4, 30.) The insurer paid the employee § 34 benefits commencing January 19, 2005, and on September 26, 2006, the insurer filed a complaint to

discontinue those weekly benefits. Rizzo v. M.B.T.A., 16 Mass. Workers' Comp. Rep. 160, 161 n.3 (2002)(judicial notice taken of contents of board file). At the § 10A conference, the judge joined for hearing, the employee's claim for § 34 benefits and medical benefits for a psychological condition resulting from the physical injury. (Dec. 2.) The judge's December 28, 2006, conference order allowed the insurer to prospectively modify the employee's weekly incapacity benefits to § 35 benefits, at the maximum rate, as of January 27, 2006, and ordered the insurer to pay medical benefits for the employee's neck and shoulder, excluding surgery. (Dec. 2.) The parties filed cross-appeals. On August 8, 2007, the employee was examined for his physical injuries by an impartial medical examiner, Dr. James E. McLennan, who wrote a report that same date.

The hearing was conducted over the course of four days, February 8, 2008, March 27, 2008, June 25, 2008, and September 19, 2008.[1] Upon opening the record on the first day of hearing, the judge stated: 1.) he had already denied the employee's motion to submit additional medical evidence, which alleged that the impartial medical examiner's report was inadequate; and, 2.) he had previously ruled that the parties would be permitted to submit additional medical records pertaining to the psychiatric portion of the employee's claim. (Tr. I, 7.) The employee requested that the medical evidence be opened to allow for the submission of gap medical records and reports for the time period prior to the impartial medical examination, and reserved his right to take Dr. McLennan's deposition and to renew his motion for additional medical evidence thereafter. (Tr. I, 7.) The judge allowed the introduction of gap period medical records,[2] and marked and admitted a number of exhibits including Dr. McLennan's report and the employee's Hearing Memorandum. (Tr. I, 15-16; Exs. 1, 2.)

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[1] Hereinafter, we reference the transcripts for these dates as follows: February 8, 2008 as Tr. I; March 27, 2008 as Tr. II; June 25, 2008 as Tr. III; and September 19, 2008 as Tr. IV.

[2] The judge identified the gap period as being from the date of the conference, December 27, 2006, through the date of the impartial medical examination, August 8, 2007. (Tr. I, 15.)

During the third day of hearing, the judge notified the parties that he had been informed by the senior judge that Dr. McLennan was ill and unavailable for deposition, and as a result, he was planning on striking the report from evidence because the doctor "is not available for cross-examination." (Tr. III, 10.) Although the judge found the report to be inadequate, he offered the parties the option of having a second impartial examination or submitting their own medical evidence for the employee's physical injury. He gave the parties an opportunity to submit written arguments about the issue and scheduled a status conference to address the issue further. (Tr. III, 15-17.)

The status conference was not conducted on the record.[3] On the last day of hearing, the judge stated:

> We had a status motion session on July 18, 2008. At which time I heard - - I advised the parties of the unavailability of the impartial doctor and that I would therefore strike the doctor's impartial report, the statutory report because he was not available for cross[-]examination. So I denied the insurer's motion to allow the impartial report.
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> Subsequently the insurer filed its formal written objection dated July 24, 2008. All of these documents will be marked as exhibits and I will put it on the record to preserve everyone's claims and defenses.

(Tr. IV, 3.)

The judge marked the insurer's July 24, 2008, "formal written objection" as Exhibit 24, denied the insurer's motion, and struck Dr. McLennan's report from the record. (Dec. 3.) The parties submitted additional medical evidence pertaining to the physical aspect of the employee's injury which included the depositions of two

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[3] "We urge practitioners and judges alike to conduct all but the most extraneous of trial business on the record." Murphy v. City of Boston, 4 Mass. Workers' Comp. Rep. 169, 173 n.8 (1990); Richardson v. Chapin Center Genesis Health, 23 Mass. Workers' Comp. Rep. 233, 235 (2009). We note that the judge's decision indicates that he did not act sua sponte in rendering his ruling. (Dec. 3.) Rather, the decision states that the employee moved to strike the report and open the medical evidence for the physical injury at the status conference on July 18, 2008. Id. Because there is no record of this proceeding, and the employee's brief makes no mention of this action, we cannot rely on that statement in rendering our decision. The judge's synopsis of the "status motion session," documented above, (Tr. IV, 3), does not cure the deficit in the record created by the failure to conduct that proceeding on the record.

physicians. (Dec. 6-7.) In his decision, the judge found for the employee regarding his psychiatric claim, and concluded the employee was totally incapacitated until May 31, 2007, and partially incapacitated from June 1, 2007 and continuing. (Dec. 35.)

The insurer advances a five pronged attack on the judge's ruling striking the impartial medical report. (Ins. br. 26-27.) First, the insurer asserts that "no party sought to depose Dr. McLennan"; therefore, the doctor's availability "was never an issue" in the case. (Ins. br. 26; Ins. Reply br. 6; Ex. 24.) Second, although it expressly states it does not contest that the doctor no longer performs impartial examinations or that the doctor was ill, it claims "there has been no finding that Dr. McLennan is unavailable." (Ins. Reply br. 6.) Third, the insurer argues the judge's decision to strike the report violates § 11A's requirement that "[t]he report of the impartial medical examiner shall be admitted into evidence at hearing" and it "shall constitute prima facie evidence of the matters contained therein." (Ins. br. 27.) Fourth, it contends the matter is governed by § 20B,[4] and argues the discretion conferred on the judge by that statutory provision, "is confined to a finding as to the purpose of the report," thereby implying the judge has no discretion to exclude the report from evidence. (Ins. br. 29.) Lastly, the insurer argues that the last sentence of 452 Code Mass. Regs. § 1.12(5)(c), which was retained in the regulation after its amendment in 2008, requires the report to be admitted in evidence and to retain its prima facie character, notwithstanding a finding of inadequacy.[5] (Ins. br. 29.)

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[4] General Laws, c. 152, § 20B, states:

> In proceedings before the industrial accident board, the medical report of an incapacitated, disabled or deceased physician who attended or examined the employee, including expressions of medical opinion, shall, at the discretion of the member, be admissible as evidence if the member finds that such medical report was made as the result of such physician's attendance or examination of the employee.

[5] 452 Code Mass. Regs. § 1.12(5)(c), as amended March 21, 2008, states:

> Where an impartial medical examiner who has submitted his or her report is rendered unavailable, or makes him or herself unavailable for deposition, either party may file a motion seeking a ruling that the impartial medical examiner is unavailable. Unless

We do not agree with the insurer's arguments. In June of 2008, when the judge became aware of Dr. McLennan's illness, the lay testimony had not been completed, and as a result, no depositions had been scheduled. Nonetheless, the employee had already moved for a finding of inadequacy regarding Dr. McLennan's report, which was denied, and he had preserved his right to take Dr. McLennan's deposition. (Tr. I, 7; Ex. 2.) In the circumstances, the judge reasonably anticipated the deposition would occur after the close of the lay evidence, and he properly raised the issue of the doctor's unavailability, both in the exercise of his broad discretion to control the conduct of the courtroom, Saez v. Raytheon Corp., 7 Mass. Workers' Comp. Rep. 20 (1993), and in furtherance of the interest of judicial economy.[6]

Second, contrary to the insurer's contention, the judge found that Dr. McLennan was "unavailable" as a result of his illness. (Tr. I, 7.) The judge obtained the information from the senior judge, whom the statute charges with the responsibility of maintaining the list of impartial medical examiners. G. L. c. 152,

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> the parties otherwise agree, a ruling of unavailability resulting from reasons other than those stated in M.G.L. c. 152, § 20B, shall result in the striking from the record evidence of the impartial medical examiner's report, and a required ruling of inadequacy authorizing the parties to submit additional medical testimony. Upon such a ruling, the administrative judge shall allow a reasonable extension of time for submission of such additional medical evidence, not to exceed 45 days. The impartial physician's submitted report, however shall be admitted into evidence at the hearing and shall retain its *prima facie* character notwithstanding the finding of inadequacy.

Previously, the second sentence of 452 Code Mass. Regs. § 1.12(5)(c) stated:

> A ruling of unavailability shall mean the impartial medical examiner's report is inadequate and that additional medical evidence shall be allowed.

[6] Taking the insurer's argument to its logical conclusion, it appears to suggest that the judge cannot raise the issue or take any action upon learning of a doctor's unavailability, but must wait for one of the parties to attempt to schedule the deposition, after the close of the evidence, before the judge makes a ruling on the issue. Adhering to such a course would only prolong what had already become a lengthy proceeding. By raising the issue and ruling on the issue prior to the completion of the lay evidence, the judge gave the parties ample time to assemble their medical evidence before the lay testimony was completed which in turn, should allow them to prepare to conduct depositions of the medical experts as soon as possible, following the completion of the lay testimony.

§ 11A(1). We view that notification to be sufficient to allow the judge to make such a finding, especially in the absence of any evidence to the contrary.

The insurer's third argument is similarly without support. The judge based his ruling on our decision in Martin v. Colonial Care Ctr., 11 Mass. Workers' Comp. Rep. 603, 607 (1997)(where § 11A impartial physician was unavailable for deposition due to moving out of state, due process considerations required impartial medical examiner's report to be stricken from record). (Dec. 3.) Although not directly on point, the rationale for striking the report, expressed in that case, is equally applicable here. See also Padilla v. North Coast Seafood, 19 Mass. Workers' Comp. Rep. 98, 100 (2005)(impartial physician's death prevented cross-examination and required the physician's report to be excluded from evidence).

While we agree with the insurer that the present case is governed by § 20B, we disagree with its assertion that the discretion granted to the judge under that section is limited to determining "the nature of the report." Instead, § 20B grants the judge discretion to admit or to exclude the report from evidence. When the impartial physician provisions of § 11A were enacted in 1991, the Legislature left § 20B intact. We take from this the legislative intent that § 20B also applies to the § 11A impartial physician, i.e., as a doctor who has "examined" the employee. "The Legislature is . . . presumed to know the effect [§ 20B] would have upon the other sections of c. 152, in particular, [§ 11A], as a result of the 1991 amendments." Taylor's Case, 44 Mass. App. Ct. 495, 500 (1998). Where the impartial physician is disabled, as here, § 20B grants the judge the authority to allow such doctor's medical report into evidence.[7] Therefore, the converse must also be true: the judge retains the authority to exclude

[7] As a practical matter, when the physician happens to be an impartial medical examiner acting under § 11A, the only time the judge properly could exercise discretion to allow the report to remain in evidence would be when the parties announce that they do not intend to depose the doctor. The judge in such a circumstance may choose between admission or exclusion of the impartial report. But once a party has chosen to depose the unavailable doctor, due process considerations discussed in Martin, supra, require the judge to strike the report and allow the parties to admit additional medical evidence.

the report, and allow additional medical evidence, as is necessary for the parties' fair presentation of their medical cases. Because the employee had reserved his right to depose the § 11A physician, the judge properly exercised his discretion to exclude the impartial medical report when the impartial physician became unavailable due to illness.

While the judge's decision does not state that he also relied on 452 Code Mass. Regs. § 1.12(5)(c), on the record, the judge stated that provision required him to strike the report. (Tr. III, 13-15.) By its very terms, the regulation applies only to situations in which § 20B does not apply: "[u]nless the parties otherwise agree, a ruling of unavailability *resulting from reasons other that those stated in M.G.L. c. 152, § 20B,* shall result in the striking from the record evidence of the impartial medical examiner's report, and a required ruling of inadequacy. . . ." Id. (Emphasis added).[8] The regulation has no application in this case where the doctor's disability, governed by § 20B, prevents him from being available for deposition.

We agree with the employee that the judge erred in modifying his weekly benefits as of June 1, 2007. That date has no anchor in the credited testimony or the adopted evidence. Makris v. Jolly Jorge, Inc., 4 Mass. Workers' Comp. Rep. 360, 361 (1990). The error is especially apparent where the judge adopted Dr. Aspel's December 2006 opinion that the employee was totally disabled as a result of his psychiatric condition alone, (Dec. 24), and did not adopt any medical opinion showing a change in the employee's psychiatric disability as of June 1, 2007. Doonan v. Pointe Group Health Care and Sr. Ctr., 23 Mass. Workers' Comp. Rep. 53, 54 (2009)(inconsistent use of same disability opinion to support both increase in earning

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[8] The last sentence in the amended regulation states: "[t]he impartial physician's submitted report, however, shall be admitted into evidence at the hearing and shall retain its *prima facie* character notwithstanding the finding of inadequacy." We have decided that this provision cannot be applied, as it conflicts with § 11A(2)'s specific provision guaranteeing the parties' due process right to cross-examine the impartial physician. See Martin, supra at 607; Tejada v. Copley Square Hotel, 14 Mass. Workers' Comp. Rep. 220, 223 (2000); Padilla, supra at

capacity and, earlier, lower earning capacity, was arbitrary and capricious). Accordingly, we recommit the case for further findings on the extent of incapacity. Because the employee has prevailed in regard to the insurer's appeal, the insurer shall pay the employee's attorney a fee of $1,488.30 pursuant to G. L. c. 152, § 13A(6).

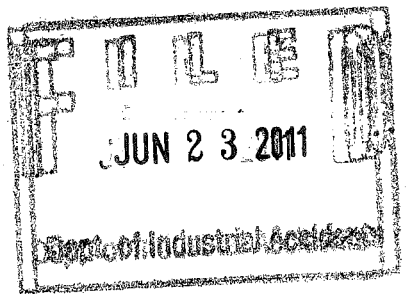
So ordered.

Catherine Watson Koziol
Administrative Law Judge

Bernard W. Fabricant
Administrative Law Judge

Frederick E. Levine
Administrative Law Judge

Filed:



100. Because the 2008 amendment to the regulation was intended to address the problem, the last sentence remains in the regulation in error.