COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 022597-99**

Victor Morini	Employee
Wood Ventures, Inc.	Employer
Reliance National Insurance Co.	Insurer

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

APPEARANCES
Bruce S. Lipsey, Esq., for the employee
Scott A. Smith, Esq., for the insurer
Christina Schenk-Hargrove, Esq., for the insurer on brief

CARROLL, J. The insurer appeals the decision of an administrative judge in which the employee was awarded G. L. c. 152, § 34, total incapacity benefits until exhaustion and § 34A permanent and total incapacity benefits thereafter. Among its claims of error, the insurer contends that the administrative judge improperly allowed the employee to amend his claim to include § 34A benefits, long after the close of the evidentiary record, without providing the insurer a meaningful opportunity to present evidence on the § 34A issues. There are also issues of reliance on medical opinions not in evidence, and whether the vocational opinion relied upon by the judge improperly strayed into the medical realm. After a review of the evidentiary record, we reverse the decision and recommit the case to the administrative judge for additional findings.

Victor Morini, the employee, was fifty-nine years old at the time of his injury. (Dec. 3.) Mr. Morini graduated from high school in 1957 and served three years in the Marine Corps. He was intermittently employed as a roofer for nine years. Additionally, the employee has over thirteen years experience as a grocery manager with Star Market and several years of experience as a road supervisor for Cumberland Farms. (Dec. 4.)

In October 1997, Mr. Morini commenced employment with Wood Ventures as a truck driver, working ten-hour days loading a truck with a forklift and making deliveries. (Dec. 4.) On May 26, 1999, while loading eighty pound cement bags onto a truck, the employee injured his lower back. (Dec. 3-4.) The insurer initially accepted the case. Approximately five months later, the insurer modified the incapacity benefits being paid to the employee.[1] (Undated Insurer's Notification of Termination or Modification of Weekly Compensation During Payment Without Prejudice Period, date stamped received by DIA Claims October ?, 1999[2]; Insurer's Br. 3.) The employee filed a claim to reinstate § 34 benefits as of October 22, 1999. (Employee's Claim dated November 8, 1999.) Following a § 10A conference before an administrative judge, the insurer was ordered to pay § 34 total incapacity benefits from their date of termination. (Corrected Order of Payment of § 34, March 6, 2000.) The insurer appealed to a hearing de novo and the matter was heard before a different administrative judge.

Pursuant to § 11A, on June 15, 2000, the employee was examined by impartial examiner Dr. David D. Adelberg. The judge denied the employee's motion to declare the impartial report inadequate. (Dec. 4.) As a result, Dr. Adelberg's opinions were the sole medical evidence and retained prima facie status. See G. L. c. 152, § 11A(2). Dr. Adelberg opined that the employee had "symptomatic degenerative joint and disc disease of the lumbar spine with a small left-sided disc herniation with mass effect of the S1 nerve root." He further opined that the disc herniation was "the major"[3] contributing factor to the employee's discomfort and

[1] The procedural history as stated in the judge's decision incorrectly states that the insurer filed a complaint for discontinuance or modification. (Dec. 2.)

[2] We are unable to read the exact date the document was received by the D.I.A. in October, 1999.

[3] Although the § 11A examiner opined that the disc herniation was "the major" contributing factor to the employee's incapacity, it need only be "a" major. The heightened causal relationship standard of § 1(7A), "a major but not necessarily predominant cause," was properly met after the insurer raised it at hearing and is not an issue on appeal.

incapacity and that, without surgery, the employee had reached an end result.[4] The impartial examiner imposed restrictions which include no repetitive lifting, no routine lifting in excess of fifteen pounds, no working at the mid-waist level[5] or above, no assuming an extreme spine position and he should be allowed to sit and stand and change positions at will. (Dec. 4; Ex. 5, 2; Dep. 51-55, 60).

Properly relying upon the impartial examiner's opinion, the judge found causal relationship. (Dec. 5.) In determining the resulting disability, however, the judge then went on to discuss the medical opinion of Dr. Fine-Edelstein, the employee's treating physician,[6] and two vocational experts. (Dec. 5-6).

Mr. Paul Blatchford, a vocational expert, testified at hearing that the employee was not able to sustain work-related activities considered to be sedentary. The vocational expert noted that the employee was able to sit for only one-half hour, and only by shifting side to side. (Dec. 6; Ex. 8.) He also testified that sedentary work involves lifting no more than between ten to twenty pounds. Where the § 11A examiner restricted the employee's lifting activities to between ten and fifteen pounds, and based on other factors from a vocational standpoint, Mr. Blatchford determined that the employee had no ability to perform sedentary work. (Dec. 6; Tr. 47, dated April 13, 2001). The judge adopted and incorporated the vocational expert's opinion that the employee could not perform sedentary work, regardless of

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[4] In his report, the § 11A examiner opined that although the industrial accident exacerbated the lower back and degenerative disease, the employee's situation changed materially when he incurred an intercurrent injury from moving a twenty-pound bureau outside of his employment. (Dec. 4-5; Ex. 5, 2.) Later, at his deposition, the § 11A examiner stated that he was uncertain as to whether moving the bureau actually provoked further symptoms. (Dec. 4-5; Dep. 37.) Nevertheless, intervening factors, if any, are not an issue on appeal. The insurer did not address this issue sufficiently to raise it to the level of appellate review.

[5] In his report, the § 11A examiner opined that the employee should avoid work at the mid-chest level. (Ex. 5, 2.) The § 11A medical expert clarified, at deposition, that mid-chest was a typographical error and should read mid-waist. (Dep. 51.)

[6] The medical opinion of Dr. Fine-Edelstein was submitted as an exhibit to the § 11A examiner at deposition. (Dec. 5.) The reliance on Dr. Fine-Edelstein's medical opinion is an issue raised on appeal by the insurer. We address this point later in our decision.

lifting requirements. He specifically rejected the testimony of Ms. Tricia Dalton, the insurer's vocational expert. (Dec. 6.)

Nine months after the record closed, shortly before rendering his decision, the judge allowed the employee's motion to join a claim for § 34A permanent and total incapacity benefits.[7] (Dec. 2.) Ultimately, the judge determined that the employee was totally and permanently incapacitated.[8] Accordingly, he ordered the insurer to pay § 34 benefits until exhaustion and § 34A benefits thereafter,[9] as well as reasonable and related medical expenses and legal fees to employee's counsel. (Dec. 9.).

First, the insurer contends that the judge erred when he allowed, over the insurer's objection, (Insurer's Opposition to Employee's Motion to Join § 34A, dated April 29, 2002) the employee's motion to amend his claim to join an additional claim under § 34A, permanent and total incapacity, nine months after the hearing record closed. We agree. Except as to amendments to claims or complaints which are a matter of right prior to a § 10A conference, pursuant to 452 Code Mass. Regs. § 1.23(1),[10] when considering a motion to amend, the judge must make a

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[7] The hearing concluded on April 13, 2001. On April 24, 2002, the employee filed a motion to join the § 34A claim as § 34 benefits were scheduled to exhaust. The insurer opposed the motion, arguing that it would have no opportunity to conduct discovery or present evidence on the central issues of a new claim for § 34A. The motion was, nevertheless, allowed on May 10, 2002. (Dec. 2.) The judge's decision was filed shortly thereafter on June 26, 2002.

[8] Though the judge used the term "disabled" throughout, he clearly meant "incapacitated" at times. "Disability" properly refers to the employee's medical condition, while "incapacity" combines the elements of physical injury (the medical component) and loss of earning capacity traceable to the physical injury (the economic component). See Loudenslager v. Massachusetts College of Art, 14 Mass. Workers' Comp. Rep. 322, 323 n.1 (2000).

[9] The administrative judge issued his decision on June 26, 2002. At the same time, on June 24, 2002, the Massachusetts Appeals Court held that § 34A benefits could be awarded prior to the exhaustion of § 34 benefits; i.e., exhaustion of § 34 temporary total incapacity benefits is not a prerequisite to a § 34A claim. Slater's Case, 55 Mass. App. Ct. 326 (2002).

[10] 452 Code Mass. Regs. § 1.23 provides in pertinent part:

> (1) A party may amend his claim or complaint as to the time, place,

determination as to whether such amendment would unduly prejudice the opposing party. Id. See also Casagrande v. Massachusetts Gen. Hosp., 12 Mass. Workers' Comp. Rep. 137, 140-141 (1998). There is no finding to that effect in the decision before us; nor will we infer such a finding, where the record is so clearly inconsistent with that proposition. Here the insurer was not apprised of the necessity to defend against the impartial medical opinion of permanent disability until eleven months after it deposed the impartial physician and nine months after the record closed. The doctor's opinion that the employee's disability was permanent, was not in issue where the employee's claim was originally for *temporary* total incapacity benefits, and also where the opinion was that the employee was only *partially* disabled.[11] As such, the insurer was not afforded due process - the opportunity to present evidence on the central issue related to the employee's (§ 34A) claim.[12] See Casagrande v. Massachusetts Gen. Hosp., 15 Mass. Workers' Comp. Rep. 383, 386 (2001) ("Fundamental requirements of due process entitle parties to a hearing at which they have an opportunity to present evidence, to examine their own witnesses, to cross-examine witnesses of other parties, to know what evidence is presented against them and to have opportunity to rebut it, as well as to develop a record for meaningful

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> cause, or nature of the injury, as a matter of right, at any time prior to a conference on a form provided by the Department. At the time of a conference or thereafter, a party may amend such claim or complaint only by filing a motion to amend with an administrative judge. Such a motion shall be allowed by the administrative judge unless the amendment would unduly prejudice the opposing party.

[11] Adding a new issue at that stage in the proceedings would have required, at a minimum, further medical evidence. Chamberlain v. DeMoulas Mkts., 14 Mass. Workers' Comp. Rep. 187, 192 (2000)(adding new issue on final day of hearing, after all medical evidence had been gathered, would have required further medical evidence).

[12] Examination of the record reveals that on April 29, 2002, the insurer filed an opposition to the employee's motion to join the § 34A claim. Despite the insurer's argument, in its opposition motion, that it would have no opportunity to conduct discovery or present evidence on the central issues of the employee's (§ 34A) claim, the judge allowed the claim amendment on May 10, 2002. The judge never reopened the hearing and then filed his decision on June 26, 2002.

appellate review," citing Haley's Case, 356 Mass. 667 (1972)); Billert v. Rainbow Nursing Home, 13 Mass. Workers' Comp. Rep. 360, 364 (1999) ("At a minimum, a party has a right to proper notice and an opportunity to be heard"); see also Wile-Mitchell v. Sharnet Corp., 12 Mass. Workers' Comp. Rep. 116, 118-119 (1998) (due process requires, at a minimum, that the parties have a right to know the evidence against them, opportunity to rebut same, to present evidence, to examine and cross-examine witnesses and to argue all issues of fact or law involved in the hearing). We therefore vacate the award of § 34A benefits.

Next, the insurer argues that the judge's decision is not supported by the medical evidence. More specifically, the insurer contends that the judge improperly rejected the § 11A examiner's opinion that the employee was only partially impaired. The impartial examiner imposed physical restrictions upon the employee regarding lifting, sitting and working below the mid-waist level. (Ex. 5, 2; Dep. 50-54.) Nevertheless, the medical expert opined that the employee was only partially disabled, (Ex. 5, 2; Dep. 50), and capable of working a full forty-hour week. (Dep. 55.) The impartial examiner's medical opinion was the sole medical opinion in evidence and was, therefore, entitled to prima facie status. See G. L. c. 152, § 11A(2).

The administrative judge acknowledged the medical expert's opinion as to a partial, physical disability and the ability to perform work with restrictions; however, it appears that the judge utilized the medical opinion of the employee's treating physician, Dr. Fine-Edelstein, to partially refute the § 11A examiner's medical opinion. (Dec. 5, 6.) Doctor Fine-Edelstein's medical opinions were not made part of the evidence before the hearing judge simply because they were marked as exhibits at the impartial examiner's deposition. See Cowan v. Springfield Assoc., Inc., 9 Mass. Workers' Comp. Rep. 503, 505 n.6 (1995) ("marking of exhibits for identification in a deposition . . . does not in itself transform the documents into evidence"). While the employee moved to have them admitted for the purpose of filling the pre-impartial examination "gap" - which the insurer did not oppose (April

13, 2001 Tr. 12) - the judge denied the § 11A motion to submit additional medical evidence, in any event, (Dec. 4; April 13, 2001 Tr. 15.). Thus, it was error for the judge to rely on Dr. Fine-Edelstein's medical opinion to support his finding that the employee was totally incapacitated. (Dec. 6.). We recommit the case for the judge to revisit his incapacity analysis without regard to the medical opinion of Dr. Fine-Edelstein. At the same time, the judge may reevaluate the unopposed motion for allowance of additional medical evidence for the "gap" period. (See infra.)

Finally, the insurer argues that the judge erroneously relied on the employee's vocational expert for a medical opinion on the employee's physical restrictions in reaching his conclusion that the employee was totally incapacitated. We do not think that the vocational expert substituted different medical restrictions for those set out by the impartial physician, absent minor discrepancies. (For example, the impartial physician's 10-15 pound lifting limit versus Mr. Blatchford's 10 pound lifting limit.) We do note that Mr. Blatchford based his vocational opinion on sedentary work being prolonged (six to eight hours) sitting, rather than the impartial physician's restriction of being able to sit or stand at will, which supported the doctor's partial sedentary work capacity. Moreover, Mr. Blatchford's opinion was also based on sedentary work as involving the potential necessity of using foot controls, something the employee probably could not do given the medical restrictions identified by the § 11A physician and relied on by the vocational expert. We see these factors as vocational, not medical, in nature.

Nonetheless the judge's findings on Mr. Blatchford's opinion are muddled and require clarification on recommittal:

> I adopt the recommendation of vocational expert Paul Blatchford that the employee is "not able to sustain work-related activities of a vocational nature considered to be sedentary." Tr. 47. According to vocational relocation guidelines, "sedentary light work" involves lifting no more than between ten (10) and twenty (20) pounds. Because the 11A report restricts his work capacity to lifting less than ten (10) to fifteen (15) pounds, the employee is only qualified for "sedentary light work." Thus, in light of Mr. Blatchford's testimony and the lifting limit set forth in the 11A report, I find the employee

> unable to work in either a sedentary position or one requiring more lifting. Further supporting this finding is Mr. Blatchford's vocational report stating that the employee was functionally limited because he was unable to sit longer than "1/2 and [sic] hour to an hour, with shifting from side to side."

(Dec. 6.) We do not understand the judge's reasoning behind these findings. Nothing the judge sets out explains his using the vocational opinion to take the employee's status from medical partial disability to total incapacity. The impartial physician's opinions constitute prima facie evidence as to medical disability and related medical matters. Vocational expert opinion is evidence for the judge to then weigh in assessing how § 11A based medical disability impacts on the employee's earning capacity. Simoes v. Town of Braintree School Dept., 10 Mass. Workers' Comp. Rep. 772 (1996), citing Scheffler's Case, 419 Mass. 251 (1994). The judge on recommittal should reassess the testimony of Mr. Blatchford and its impact on his incapacity analysis.

We recommit the case for further findings on the extent of the employee's incapacity for all periods of claimed incapacity. The § 11A examiner acknowledged that he would have to physically examine the employee in order to comment on his work ability "at any given moment," (Dep. 61), and he would have to rely on "the past historical development of treating physicians . . . or independent medical examination at the time prior to [his] examination to form an opinion as to [the employee's] work ability." (Id.) Therefore, the judge must address the gap period between the date of injury and the date the sole medical opinion in evidence was rendered by the § 11A examiner. (Exh. 5.) This case may also involve a post-§ 11A exam gap period. The circumstances that we previously have held give rise to such a gap are not present in this case.[13] However, the deposition of the impartial physician

[13] The "gap period" traditionally is the timeframe from the date of injury to the date of the § 11A examination, but a gap period can exist following the examination in certain circumstances. See Gulino v. General Electric Co., 15 Mass. Workers' Comp. Rep. 378, 381-382 (2001) (inconsistencies in the medical opinions of the § 11A examiner, was tantamount to a finding of inadequacy, and required additional medical evidence); Pelletier

occurred nearly one year after his examination and report, and he acknowledged that he would not be able to do anything but speculate as to the employee's work ability at that time. (Dep. 62.) Therefore, the judge should determine whether either or both such gap periods exist and, if so, he should reevaluate the unopposed motion for allowance of additional medical evidence. He must then make sufficient subsidiary findings to support his incapacity determinations for those gap periods.

Accordingly, we vacate the award and recommit the decision for reconsideration and further findings consistent with this opinion.

So ordered.

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Martine Carroll
Administrative Law Judge

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Patricia A. Costigan
Administrative Law Judge

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Susan Maze-Rothstein
Administrative Law Judge

Filed: September 15, 2003
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v. McKinney Bus Co., 12 Mass. Workers' Comp. Rep. 290 (1998) (surgical procedure post-dating the impartial's examination is an important event which renders a prior evaluation by the impartial inadequate); LaRoche v. Revere Housing Authority, 12 Mass. Workers' Comp. Rep. 218 (1998) (event or development such as completion of a reconditioning program subsequent to an impartial physician's report renders report inadequate); DeLeon v. Accutech Insulation Contract, 10 Mass. Workers' Comp. Rep. 713 (1996) (important event subsequent to the impartial's report which rendered the impartial report inadequate was the employee's attempt to return to work.)