COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO.:** 037625-01

William Cheetham	Employee
US Manufacturing Company	Employer
Granite State Insurance Company	Insurer

REVIEWING BOARD DECISION
(Judges McCarthy, Carroll and Costigan)

APPEARANCES
William Cheetham, pro se
Joseph Conte, Esq., for the insurer at hearing
David G. Shay, Esq., for the insurer on appeal
William C. Harpin, Esq., for the insurer on appeal

McCARTHY, J. The insurer appeals from an administrative judge's decision awarding the employee closed periods of § 34 and § 35 weekly incapacity benefits, making two arguments. We find dispositive the insurer's second argument that its due process rights were violated by the judge's refusal to allow it to depose the impartial examiner. We therefore recommit the case to the administrative judge for the taking of the impartial physician's deposition.

William Cheetham, thirty-two years old at the time of hearing, suffered an accepted injury to his right major hand on September 14, 1991, while working for the employer as a welder. On March 26, 2002, he underwent a right carpal tunnel release. (Dec. 5.) On October 22, 2002, the insurer filed a complaint for modification or discontinuance of the employee's § 34 benefits. The judge issued a § 10A conference order on July 10, 2003, assigning the employee an earning capacity as of that date. Both parties appealed to a de novo hearing, at which the employee, who had been represented by counsel at the conference, appeared pro se. (Dec. 1, 3.)

On June 17, 2004, Dr. Steven Graff examined the employee pursuant to § 11A.[1] The judge found the impartial report adequate and the medical issues not complex. However, she sua sponte allowed the parties to submit additional medical evidence for the so-called "gap" period, from the date of the insurer's filing for modification or discontinuance, October 22, 2002, through the date of the impartial examination. (Dec. 4.) Both parties submitted additional medical evidence, but the judge did not consider any medical records pre-dating the insurer's complaint for discontinuance.[2] (Dec. 2, n.2 and n.3.) The judge denied the insurer's request to depose the impartial physician "as the employee was not claiming benefits beyond the date that he was examined by the § 11A." (Dec. 4.)

At hearing, the employee claimed § 34 benefits from October 22, 2002 (the date the insurer filed its complaint) to July 10, 2003 (the date of the conference order); and § 35 benefits from July 11, 2003 until June 17, 2004 (the date of the impartial examination). (Dec. 3.) The judge found:

> The employee testified that his complaints of numbness and pain persisted throughout the period of time that is in dispute. He noted that at the current time that he still does not feel that he can be a welder, but he acknowledges that he could perform other work. He explained that his hand does not "feel the same" as it did prior to the accident.

(Dec. 6.) The judge adopted the "unrebutted opinion of Dr. Miner and Dr. Boland. . . that the employee remained totally disabled" from October 22, 2002 through July 10, 2003. (Dec. 7.) The judge specifically rejected the opinion of the insurer's expert, Dr. William

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[1] The employee missed the first scheduled impartial examination, and the insurer suspended his benefits on October 24, 2003. See G. L. c. 152, §§ 11A(2) and 45. When the employee attended the rescheduled June 17, 2004 § 11A examination, the insurer did not resume benefits. The judge found that the employee's failure to attend the first examination was an unintentional error based on his confusing the impartial examination with the insurer's examination. She therefore found that the employee was entitled to reinstatement of his benefits during the period of suspension. (Dec. 6, 9.)

[2] This practice is not necessarily appropriate, as a medical report issued prior to the start of the gap period may nevertheless support disability during the gap, as where the physician opines that the employee is permanently partially incapacitated. That was not the case here.

Donahue. The judge further found that the employee remained symptomatic and could not return to his regular heavy work as a welder from July 10, 2003 until June 17, 2004, though he was not actively treating during this time. However, the judge found he could perform part-time sedentary work fifteen hours a week, and assigned him an earning capacity at the minimum wage level. As of June 17, 2004, the date of the impartial examination, the judge found that "the employee could return to full and unrestricted work" in accordance with the opinion of the § 11A physician.[3] (Dec. 7.)

On appeal, the insurer first argues that the decision should be reversed because the evidence does not support a finding of either total or partial incapacity. For the period of total incapacity benefits awarded, October 22, 2002 through July 10, 2003, the insurer contends that there was no testimony by the employee on his condition, and that the medical evidence was insufficient and speculative. The insurer maintains that there was no medical evidence at all addressing the period of partial incapacity awarded, July 11, 2003 to June 17, 2004. In the alternative, the insurer argues that the decision should be vacated and the case remanded for allowance of its request to depose the § 11A physician, and new findings based on a reconsideration of the evidence, including the testimony of the impartial physician.[4]

We find dispositive the insurer's second argument, that the judge violated its due process rights by denying its request to depose the impartial physician. Because the case must go back on that issue, the judge should take the opportunity to re-examine all the medical evidence, along with the impartial physician's deposition testimony. See Perangelo's Case, 277 Mass. 59, 64 (1931)("the opinion of an expert which must be taken as his evidence is his final conclusion at the moment of testifying").

It is indisputable that the parties have a statutory right to depose the impartial physician. General Laws c. 152, § 11A, states: "Either party *shall have the right* to engage the impartial medical examiner to be deposed for purposes of cross examination." (Emphasis added.) The accompanying regulations state: "An administrative judge shall authorize the testimony by deposition of the impartial physician." 452 Code Mass. Regs. § 1.12(5)(1). "This right to depose and cross-examine the § 11A examiner is an essential due process safeguard." Martin v. Colonial Care Ctr., 11 Mass. Workers' Comp. Rep. 603, 607

[3] The judge also awarded the employee § 36 benefits for scarring of his right hand from his carpal tunnel surgery. (Dec. 7, 8.)

[4] The employee has not submitted a brief.

(1997), citing O'Brien's Case, 424 Mass. 16, 23, 24 (1996). The insurer had the right to take the § 11A physician's deposition, both to challenge the employee's medical evidence and to bolster its own evidence. See Gulino v. General Elec. Co., 15 Mass. Workers' Comp. Rep. 378, 381 (2001). The judge did not have the discretion to deny it that right. See Ortiz v. Boston Bagel Co., 17 Mass. Workers' Comp. Rep. 579 (2003)(employee's due process rights violated where judge denied him the opportunity to *re-depose* the impartial examiner following the doctor's submission of an addendum addressing further medical testing).

Moreover, the insurer did not lose the right to depose the § 11A physician because the employee claimed benefits only up to the date of the impartial examination, as the judge's stated reason for denying the insurer's request to depose implies. (Dec. 4.) Here, Dr. Graff did not state he was unable to opine regarding the extent of the employee's incapacity, if any, prior to his examination date; he merely did not do so. If deposed, he may be able to offer an opinion based on the history he took, his examination and the medical records he reviewed. See e.g., McKenna, Jr. v. Pool and Spa Ctr., 17 Mass. Workers' Comp. Rep. 564, 568 (2003)(nothing in § 11A examiner's report or deposition testimony indicates doctor was unable or unwilling to render opinion regarding extent of employee's incapacity from date of injury until date of § 11A examination).[5] See also Cugini v. Town of Braintree School Dep't., 17 Mass. Workers' Comp. Rep. 363, 366 (2003)(doctor's opinion can sometimes be read to support a prior period of disability); Jenkins v. Nauset, Inc., 15 Mass. Workers' Comp. Rep. 187, 191 (2001)(same).

Accordingly, we recommit the case to the administrative judge for the allowance of the insurer's request to take the deposition of the impartial physician. The administrative judge should then address de novo the issue of extent of disability, taking into consideration the deposition testimony of Dr. Graff. Since the record reflects some

[5] While a party cannot be forced to cure an inadequate impartial report by taking the § 11A physician's deposition, Brackett v. Modern Continental Constr. Co., 19 Mass. Workers' Comp. Rep. 11 (2005), citing LaGrasso v. Olympic Deliv. Serv., Inc., 18 Mass. Workers' Comp. Rep. 48, 57 (2004), neither can it be denied the right, if sought, to develop the impartial examiner's opinion regarding the medical issues in dispute.

confusion as to whether a claim for the left hand was to have been joined at conference or hearing,[6] the judge should also clarify this issue on recommittal.

So ordered.

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William A. McCarthy
Administrative Law Judge

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Martine Carroll
Administrative Law Judge

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Patricia A. Costigan
Administrative Law Judge

Filed: December 22, 2005

[6] The conference order modifying the employee's § 34 benefits stated, "I will allow the employee to join a claim for the left hand, and the insurer may obtain an IME or addendum on the left hand that will be submitted to the § 11A." (Order of Modification dated July 10, 2003). See Rizzo v. M.B.T.A., 16 Mass. Workers' Comp. Rep. 160, 161 n.3) (reviewing board may take judicial notice of documents in board file). At hearing, the judge asked the employee: "Just for the record you are not claiming any injuries to the left hand. We are dealing strictly with the right hand today." The employee responded: "No, you had made it where I could join the left hand and every time I try to get in to see a doctor they will deny the approval for me to go see a doctor for the left hand." (Tr. 6.) The judge then stated that she would reserve the employee's right to bring a claim for the left hand, (Tr. 7), and in her decision wrote that the left-hand injury had not been litigated. (Dec. 3 n.5.) Nevertheless, the statement in the conference order, coupled with the ambiguous exchange at hearing between the employee and the judge, and the judge's adoption of medical records referencing bilateral carpal tunnel syndrome, make it unclear what claim or claims were actually before the judge. On recommittal, the judge should clarify this issue. We note that the insurer has not argued on appeal that the judge erred by relying on medical evidence addressing incapacity caused by bilateral carpal tunnel syndrome. See Martinez v. Northbound Train, Inc., 18 Mass. Workers' Comp. Rep. 294, 306-307 n.12) (2004)(argument waived if not made).