COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 004465-81**

Edmund Joseph	Employee
City of Fall River	Employer
City of Fall River	Self-insurer

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

APPEARANCES
Michael S. Sahady, Esq., for the employee
Daniel S. Hendrie, Esq., for the self-insurer

MCCARTHY, J. This case is now before the reviewing board for the second time. In an earlier decision found at 15 Mass. Workers' Comp. Rep. 31 (2000), we reversed and recommitted the case because of the improper allowance of additional medical evidence notwithstanding an express finding by the judge that the § 11A report was adequate. Although neither party moved to open the medical record based on the inadequacy of the § 11A report or the complexity of the medical picture, the judge directed the parties to submit additional medical evidence. As authority for his order, the judge pointed to § 11 which provides in part that, "At the hearing the member shall make such inquiries and investigations as he deems necessary, and may require and receive any documentation or oral matter not previously obtained as shall enable him to issue a decision with respect to the issues before him. . . ."

Edward Joseph, now seventy years of age, has an eighth grade education with work experience as a laborer and a warehouseman. He started work as a school custodian for the City of Fall River in 1967. On June 15, 1981, Mr. Joseph injured his neck and back while lifting a barrel into a dumpster. A conference order directed the self-insurer to pay weekly § 34 benefits. When the statutory maximum for § 34 benefits was reached,

the employee received weekly permanent and total incapacity benefits under § 34A. Years later the self-insurer filed a complaint to modify weekly benefits. The complaint was denied by conference order and the self-insurer appealed, requesting a full evidentiary hearing. As part of the hearing process, an orthopedic medical expert conducted a § 11A exam. He diagnosed ruptured cervical discs causing chronic pain and immobilization associated with muscle atrophy and weakness. The doctor causally related his findings to the June 15, 1981 industrial injury and opined that Mr. Joseph was medically disabled. Joseph, supra at 33. Although the judge found the report to be adequate, he opened the medical aspect of the case and ultimately adopted the opinions of two doctors who examined the employee for the self-insurer. The judge went on to conclude that Mr. Joseph had a weekly earning capacity of $80.00 as of June 24, 1997, and authorized the discontinuance of § 34A benefits and the commencement of § 35 benefits retroactive to that date.[1]

As it reversed and recommitted the first hearing decision, the reviewing board held that it was an error of law to open the record to additional medical evidence absent a finding that the § 11A report was inadequate or the medical issues complex. Id.

The parties on recommittal came before the administrative judge on April 19, 2001 "to discuss the remand." (Dec. II, 3). A medical report prepared by Dr. Eugene A. Russo was offered into evidence by the employee without objection. (Employee Ex. 7.) No additional testimony was taken and on June 27, 2001, the judge filed his second

[1] The administrative judge's decision says that § 34 was paid up to the statutory maximum. (Dec. I, 4). The decision also states that the self-insurer was seeking to reduce, not terminate the employee's weekly benefits, by establishing an earning capacity of $80.00 per week. (Dec. I, 2). The benefit structure in effect on the date of the industrial injury provided for an aggregate maximum payment of § 34 and § 35 benefits of $45,000.00. Mr. Joseph's average weekly wage was stipulated at $256.00 (Dec. I, 3) which would yield a weekly compensation rate of $170.67. Weekly payments at this rate would reach the $45,000.00 statutory cap in just over five years, i.e. 263 and two-thirds weeks. Therefore, the finding of an earning capacity of an amount greater than trifling would not just reduce the weekly benefit, it would take Mr. Joseph off weekly benefits altogether!

decision in this case, "with no change in the ultimate outcome from the prior decision." (Dec. 3.)[2]

Pivotal to this, the employee's second appeal, is the judge's treatment of the § 11A report of examination. After expressly finding it adequate in the first decision and without any new medical evidence or material change in the record, the judge, still without motion to open up the medical record, determined the report was inadequate. This done, it was now open to the judge to consider and adopt the opinions of two medical experts who examined for the self-insurer. And that is just what he did!

The employee on appeal argues that in doing so, the judge ignored the first reviewing board decision and acted in a manner inconsistent with that decision. We agree and reverse this latest hearing decision.

On appeal, the employee asserts that it was error for the judge, on remand, to do little more than restate the findings incorporated into his original decision. (Employee br. 2.) We agree. Directly contradicting his original finding that the § 11A medical report was adequate, (Dec. 5, decision dated April 26, 1999 [hereinafter "Dec. I"]), on recommittal the judge determined that the § 11A medical report was inadequate. (Dec. II, 8.) The judge stated that the foundation for this change was provided by three factors: "The basis of his opinion [the (§ 11A medical expert)] was reliance on facts not found to be in evidence, consideration of medical conditions unrelated to his accepted industrial injury, and weighing of vocational factors that are the sole province of the administrative judge." (Dec. II, 8.)

The reasons now used by the administrative judge to reverse himself by finding the § 11A medical opinion inadequate do not withstand appellate scrutiny. First, from our review of the §11A medical report it does not appear that the medical expert relied on a history at odds with that found by the judge. In fact, what the judge characterized as "history" provided to the impartial physician, was actually the "physical limitations" and

[2] An earning capacity of $80.00 per week was established retroactively, weekly benefits under § 34A were discontinued with simultaneous payment of § 35 benefits ordered.

"range of motion" exhibited by the employee at the examination. Findings on examination are not "history." See Carter v. Shirley, 21 Mass. App. Ct. 503, 506 (1986)(expert's opinion based on the history she took from the plaintiff and her independent examination). "The judge erred in substituting [his] lay assessment of a lesser restriction" for the impartial physician's findings on examination." Herrera v. Cambridge Imported Autobody, 11Mass. Workers' Comp. Rep. 521, 523 (1997). Next, contrary to the judge's assertion that the employee's other medical conditions improperly clouded the § 11A medical opinion, the medical expert disabled the employee based on his work injury alone. Although the medical examiner stated that the employee had "a variety of other health problems," he clearly determined that "this man is medically disabled because of his work injury." (Dec. II Statutory Exhibit.) As to the judge's concern that the § 11A examiner encroached upon the judge's exclusive domain to weigh vocational factors, there simply is no merit to the contention whatsoever. The mere mentioning of the employee's limited education along with his health issues is far from a vocational analysis. Notwithstanding, the medical expert's opinion has prima facie weight as to medical issues only. See G.L. c. 152, § 11A. Any vocational determination, provided by an impartial expert, is of no prima facie consequence. Scheffler's Case, 419 Mass. 251(1994).

The judge in this case has twice opened the record for additional medical evidence for contradictory and independently arbitrary reasons. Because we are unable to discern any logical reason for the judge's determination that this same exact medical opinion was first adequate and then subsequently inadequate, we conclude that this is an extraordinary case, warranting assignment to a different administrative judge. See Gallant v. TRW, Inc., 13 Mass. App. Ct. 1003 (1982)(recommittal to someone other than the presiding individual for clarification or further findings is appropriate where "recommittal to the [presiding member] would be an exercise in futility").

For the foregoing reasons, the decision of the administrative judge is reversed. The case is forwarded to the Senior Judge for reassignment to a different administrative judge for a hearing de novo.

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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Susan Maze-Rothstein
Administrative Law Judge

Filed: June 14, 2002