

COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF  
INDUSTRIAL ACCIDENTS

BOARD NO. 024914-04

Tara Mays  
Alpha Industries, Inc.  
Mass. High Tech SIG

Employee  
Employer  
Insurer

**REVIEWING BOARD DECISION**  
(Judges Fabricant, Costigan and Koziol)

The case was heard by Administrative Judge Bean.

**APPEARANCES**

Charles E. Berg, Esq., for the employee at hearing  
James N. Ellis, Esq., for the employee on appeal  
Douglas F. Boyd, Esq., for the insurer

**FABRICANT, J.** The employee appeals from a decision on recommittal from the Appeals Court finding error in the denial of the employee's motion to introduce additional medical evidence due to the inadequacy of the § 11A impartial medical testimony. We agree with the employee that the judge has erred once again by adopting the very part of the impartial medical opinion the Appeals Court found inadequate. Another recommittal is required.

The insurer accepted the employee's diagnosis as causally related to her exposure to chemical solutions while working as a grinding operator on July 12, 2004. (Dec. 851.) On recommittal, the judge allowed additional medical evidence, as ordered by the Appeals Court. (Dec. 853.) However, the judge did not adopt any of the employee's additional medical evidence. (Dec. 855 and Clarification.<sup>1</sup>) Instead, the judge again adopted the impartial physician's "persuasive medical opinions." (Dec. 855.) The impartial physician diagnosed the employee as having sustained a chemical-based bronchitis with some component of reactive airway disease. (Dec. 852.) The judge

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<sup>1</sup> On July 9, 2009, the employee filed a motion asking the judge to reconsider his decision filed on July 2, 2009. By "Clarification" filed on July 16, 2009, the judge acknowledged, but rejected, the disability opinions of one of the employee's medical experts.

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found the impartial physician's opinion on disability to be that the employee was "capable of *returning to work*." (Dec. 852; emphasis added.) As a result, the judge discontinued the employee's § 35 benefits as of November 14, 2005, the date of the impartial medical examination. (Dec. 856.)

The problem with the decision is that it mischaracterizes the impartial physician's opinion on medical disability, the essential issue on recommitment. The impartial physician testified he could not accurately answer whether the employee could return to any job in which she would again be exposed to chemicals similar to those in her former job. Mays's Case, 72 Mass. App. Ct. 1116, n.1 (2008)(Memorandum and Order pursuant to Rule 1:28). The Appeals Court therefore ruled: "The [impartial physician's] testimony is clear that he could not reach a conclusion about the employee's ability to return to her former job." Id. The court's ruling is the law of the case and cannot be revisited absent extraordinary circumstances not present here. King v. Driscoll, 424 Mass. 1, 7-8 (1996)(questions decided in earlier appeal of same case not open for rehearing). See also Peterson v. Hopson, 306 Mass. 597, 599-600 (1940).

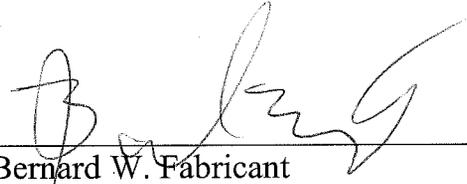
The impartial physician offered no opinion regarding the employee's ability to return to work involving chemical exposures. Therefore, the judge's mischaracterization of the impartial physician's opinion and ultimate adoption of that mischaracterization as "persuasive medical opinion[]," (Dec. 855), was not a sound basis for discontinuing § 35 benefits as of the date of the impartial medical examination. The judge's finding to that effect is thus arbitrary, capricious and contrary to law, and cannot stand.

M.G.L. c. 152 § 11C.

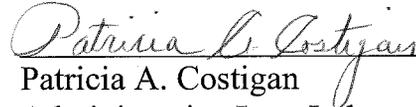
Accordingly, we reverse the decision and recommit the case for further findings consistent with this opinion.

So ordered.

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Bernard W. Fabricant  
Administrative Law Judge



Patricia A. Costigan  
Administrative Law Judge



Catherine Watson Koziol  
Administrative Law Judge

Filed:

