COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 017435-05**

Gary D. Brzezinski	Employee
Aerotek Energy	Employer
Hartford Insurance Company	Insurer

REVIEWING BOARD DECISION
(Judges Costigan, Fabricant and Koziol)

The case was heard by Administrative Judge Preston.

APPEARANCES
George N. Keches, Esq., for the employee
Donald M. Culgin, Esq., for the insurer at hearing and on appeal
Richard W. Jensen, Esq., for the insurer on brief

COSTIGAN, J. Citing two errors, the insurer appeals from the administrative judge's decision awarding the employee permanent and total incapacity benefits pursuant to G. L. c. 152, § 34A. First, it contends that without notice to the parties prior to the issuance of his decision, the judge used medical evidence admitted for the pre-impartial examination "gap period" only, to support his finding of permanent and total incapacity. Second, it argues the judge improperly ignored the impartial physician's prima facie opinion of partial disability. We agree the judge violated the parties' due process rights by failing to give them notice and an opportunity to respond to his expansion of the scope for which he had allowed additional medical evidence. We recommit the case so that the parties may respond to this ruling with relevant medical evidence.

The employee was twenty-seven years old at the time of hearing. From September 2001 until May 2005, when he received an associate's degree in biotechnology, he was employed as a surveying party assistant, performing heavy physical labor. In May 2005, he began work for the employer as a manufacturing associate. That job involved assembling, disassembling and cleaning equipment, (Tr.

5), a strenuous job requiring extensive use of both hands. On June 3, 2005, the employee sustained a fifth finger crush injury when the cover of a piece of equipment fell onto his right dominant hand. (Tr. 6-7.) After initial treatment for the fracture, complications arose, and the employee began experiencing excruciating, radiating pain and hypersensitivity in his entire right arm. These symptoms were only marginally relieved through narcotic medication, injections, pain management treatment and stellate blocks. (Dec. 4.) The employee has not returned to work.

The insurer accepted liability for the injury and paid weekly § 34 total incapacity benefits to exhaustion, (Dec. 3), but it resisted the employee's claim for § 34A permanent and total incapacity benefits. Following a § 10A conference, the administrative judge ordered the insurer to pay § 34A benefits. The insurer appealed to a hearing de novo, challenging disability and extent of incapacity. (Dec. 2.)

On November 17, 2008, Dr. Andrea J. Wagner examined the employee pursuant to § 11A. At hearing, the judge allowed the parties to submit additional medical evidence "up to the date of the 11A exam." (Tr. 50.)[1] Dr. Wagner's report

---

[1] The parties and the judge discussed the submission of additional medical evidence:

Judge:	Attorney Keches, the date of your claim is June of '08 and you're seeking benefits at the expiration of his 34 claim.
Mr. Keches:	That's correct.
Judge:	I would need to, in the event that I find for your client –
Mr. Keches:	Gap medicals?
Judge:	I would need to hinge a date bounded in the medical records. So it could be prior. It could be subsequent. I don't know what it is.
Mr. Keches:	And that's fine, Your Honor, because I think both of us have medicals, I think, relative to the gap medicals.
Judge:	*So to the extent with regard to his capacity for work, I'd accept any medicals up to the date of the 11A exam.* And are you going to depose Dr. Wagner?
Mr. Culgin:	Yes, your Honor – well, I reserve that. . . .
The Judge:	Are the parties resting?
Mr. Culgin:	Yes, Your Honor.
The Judge:	No further evidence?
Mr. Keches:	None, your Honor.
Judge:	Any motions?
Mr. Keches:	No, Your Honor.
Mr. Culgin:	I don't.

and deposition testimony were admitted as evidence. (Ex. 1; Dec. 2.) The employee's additional medical evidence consisted of the April 10, 2008 and May 28, 2008, reports of Dr. Howard Wu, and the February 27, 2009 report of Dr. Thomas Simopoulos.[2] (Ex. 4; Dec. 1, 4-5.) The insurer did not submit any additional medical evidence.

In his decision, the judge made the following ruling with respect to the admission of additional medical evidence:

> The report of the impartial medical examiner is adequate. Additional medical evidence was authorized by virtue of the Employee's complex long-standing pain symptomology [sic] and diagnosed complex regional pain syndrome condition.

(Dec. 2.) The judge adopted the opinions of the employee's treating physicians, Dr. Wu[3] and Dr. Simopoulos, and made no reference whatsoever to the opinions of the impartial medical examiner.

Based on the adopted medical opinions of the employee's treating physicians, and his belief of the employee's testimony about his excruciating pain on contact, depression, lack of concentration and decreased memory, the judge concluded the

---

(Tr. 49-50; emphasis added.)

[2] Although Dr. Simopoulos's report of February 27, 2009 post-dated the impartial medical report of November 17, 2008, and thus was outside the "gap period," the insurer concedes it did not object to the admission of that evidence. The insurer, however, was entitled to rely on the judge's ruling allowing additional medical evidence for the pre-§ 11A examination period only. In any event, although the judge adopted certain of Dr. Simopoulos's opinions as to diagnosis and pain managment treatment, (Dec. 5-6), the report did not expressly address the nature and extent of the employee's disability between November 17, 2008 and when he was examined on February 27, 2009. (Ex. 4.)

[3] Dr. Wu opined the employee had developed complications from his work injury resulting in reflex sympathetic dystrophy (RSD), otherwise known as chronic regional pain syndrome. Dr. Wu further noted the employee has radiating pain throughout his entire upper extremity with mottling changes in the skin, severe sympathetic reactions and hypersensitivity throughout. The employee has had no permanent relief despite extensive treatment and multiple medications. He has near complete loss of range of motion of his right arm, and, after three years of treatment, his RSD is a chronic and permanent condition. (Dec. 4-5.)

employee was permanently and totally incapacitated, and had been so since April 10, 2008:

> I find the Employee's industrial accident of June 3, 2005, wherein he injured his right hand, to be the genesis of the cascade of events leading to his reflex sympathetic dystrophy/complex regional pain syndrome, and the accident is the sole cause of his now permanent and chronic incapacity to perform any work. Residual effects of his right arm injury produce overwhelming and debilitating pain and inability to perform any essential functions with his right dominant upper extremity. He has no ability to move the arm without accelerating the pain. He has limited ability to move the arm, lift, or grasp objects. The significant dosages of narcotic pain medication produce side effects that hinder digestion, sleep, and concentration. He is essentially home-bound with overriding pain that excludes any meaningful activity that translates to any ability to perform non-trivial work on the open labor market. . . . Although he has marketable vocational skill sets to perform work, he remains physically unable to do so. It is unrealistic to anticipate a change in his chronic condition, now four years post-accident.

(Dec. 6.) The judge awarded § 34A benefits accordingly.

The Insurer's Due Process Argument

The insurer contends its due process rights were violated by the judge's ruling, made known to the parties for the first time in the hearing decision, (Dec. 2), that the medical issues were complex, and by his resultant use of what were supposed to be pre-impartial examination "gap medicals" to establish ongoing incapacity after November 17, 2008, the date of the § 11A exam.[4] We agree.

It is axiomatic that the parties have a due process right 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 an opportunity to rebut it,* as well as to develop a record for

[4] The insurer does not claim the judge's complexity ruling in his decision was unclear. Cf. Anzalone v. Massachusetts Water Res. Auth., 22 Mass. Workers' Comp. Rep. 291, 293 (2008)(where judge leaves it to reader to infer ground upon which additional medical evidence was authorized, reviewing board unable to determine with reasonable certainty that correct rules of law have been applied). Nor does the insurer argue that the judge was required to further support his ruling with subsidiary findings. See Shaw's Case, 74 Mass. App. Ct. 1107 (2009)(Memorandum Pursuant to Rule 1:28)(court refuses to adopt objective standard of complexity justifying submission of additional medical testimony).

meaningful appellate review. Anderson v. Lucent Techs., 21 Mass. Workers' Comp. Rep. 93, 95-96 (2007)(emphasis in original), citing Casagrande v. Massachusetts Gen. Hosp., 15 Mass. Workers' Comp. Rep. 383, 386 (2001), citing Haley's Case, 356 Mass. 667 (1972). It is also established that the judge is permitted, "on his own initiative," to find the impartial report inadequate or the medical issues complex, and to authorize the submission of additional medical evidence. G. L. c. 152, § 11A. See Viveiros's Case, 53 Mass. App. Ct. 296, 300 (2001)(judge has discretion sua sponte to allow parties to present additional medical evidence). However, in order to preserve their due process rights, a judge must "timely apprise the parties of all rulings to which they might respond," and provide them with a "reasonable opportunity to respond to any material change in circumstances." Mayo v. Save On Wall Co., 19 Mass. Workers' Comp. Rep. 1, 4-5 (2005).

Thus, where additional medical evidence is admitted solely to address medical issues during the gap period prior to the impartial medical examination, the judge violates the parties' due process rights when, without prior notice to the parties, he uses that evidence to address other issues, such as the nature and extent of incapacity after the impartial exam. Serabian v. Herb Chambers Ford, 23 Mass. Workers' Comp. Rep. 57, 59 (2009); Gulino v. General Elec. Co., 15 Mass. Workers' Comp. Rep. 378, 380-381 (2001). "Failure of due process results from foreclosing the 'opportunity to present testimony necessary to present fairly the medical issues.' " Anderson, supra at 96, quoting from O'Brien's Case, 424 Mass. 16, 23 (1996).

Unaware of the judge's expanded ruling, the insurer had no realistic opportunity to present medical evidence to rebut the opinions of the employee's treating doctors.[5] Had the insurer known, before the close of the evidence, that the judge was going to use the employee's additional medical evidence to address *ongoing* incapacity, rather than incapacity during the gap period, it could have opted

[5] The insurer deposed Dr. Wagner, the impartial medical examiner, but apparently relied on the judge's ruling that hers was the only medical opinion relevant to extent of disability after November 17, 2008.

to depose the employee's physicians or submit additional medical evidence of its own. Cf. Babbitt v. Youville Hosp., 23 Mass. Workers' Comp. Rep. 215, 218-219 (2009)(judge did not consider that by initial ruling of inadequacy, he may have induced employee to forgo statutory right to depose impartial physician). On due process grounds, the case must be recommitted.

The Impartial Physician's Opinion

Lastly, we address the insurer's argument that the appropriate remedy is reversal, not recommittal. It maintains the impartial medical opinion is the only evidence on which the judge properly could rely to decide the issue of the employee's ongoing disability, and Dr. Wagner's testimony mandates a finding of only partial disability. This argument is without merit and contrary to law. Doctor Wagner's opinion that the employee has chronic pain syndrome, rather than RSD, and is partially disabled, does not preclude a finding of permanent and total incapacity. See Guzman v. Act Abatement Corp., 23 Mass. Workers' Comp. Rep. 291, 300 (2009); MacEachern v. Trace Constr. Co., 21 Mass. Workers' Comp. Rep. 31, 36 (2007) (judge's belief of employee's complaints of pain may provide basis for finding total incapacity in face of medical opinion of only partial disability). The judge's error was not deciding sua sponte that the medical issues were complex, but rather so deciding without notice to the parties. Therefore, the remedy is not to require the judge to base his decision solely on the impartial medical opinion, but to recommit the case to allow the parties to respond to that ruling. See Anderson, supra (due process commands an order permitting the insurer a reasonable time to respond to medical evidence); Godinez v. Perkins Paper Co., Inc., 22 Mass. Workers' Comp. Rep. 83 (2008)(where employee's additional medical evidence admitted after record closed, insurer should have been given notice and opportunity to respond).[6]

---

[6] The employee suggests that although the judge may have made a "technical" error in failing to notify the parties of his complexity ruling and his expanded use of the gap medical evidence, such error was harmless because the impartial medical report and deposition testimony could have supported the finding of permanent and total incapacity. (Employee br. 14-17.) This ignores the fact that the judge's error goes to the heart of the parties' due

Accordingly, we recommit the case to the judge to allow the parties to offer additional medical evidence, including reports and deposition testimony, addressing the extent of the employee's disability for all periods at issue.

So ordered.

Patricia A. Costigan
Administrative Law Judge

Bernard W. Fabricant
Administrative Law Judge

Catherine Watson Koziol
Administrative Law Judge

Filed: FILED OCT 29 2010 Dept. of Industrial Accidents

process rights to know the evidence against them and to have the opportunity to rebut it. See Serabian, supra at 60 n.1 (error in failing to inform parties of expanded use of gap medicals not rendered harmless by finding treating physician's opinion on causation was supported by impartial examiner's testimony causal relationship "could" exist if employee found credible). Cf. Mims v. M.B.T.A., 18 Mass. Workers' Comp. Rep. 96, 98-99 (2004)(where adopted impartial opinion supported judge's incapacity findings, it was harmless error for judge to expand use of gap medical evidence to address ongoing incapacity).