COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS

BOARD NO. 034796-05

Jacqueline Tucker	Employee
Stanley & Sons, Inc.	Employer
National Union Fire Insurance Co.	Insurer

REVIEWING BOARD DECISION
(Judges Costigan, Horan and Koziol)

The case was heard by Administrative Judge Hernández.

APPEARANCES
William E. O'Keefe, Esq., for the employee
John C. White, Esq., for the insurer

COSTIGAN, J. The parties cross-appeal from an administrative judge's decision awarding ongoing § 35 partial incapacity benefits for the employee's right major hand injury, but denying her claim of a right shoulder injury.[1] The employee challenges the judge's denial of her alleged right shoulder injury claim and her claim for increases to her pre-injury average weekly wage pursuant to § 51. The insurer

[1] At hearing, the employee sought weekly compensation and medical benefits for various periods of total and partial incapacity she claimed were causally related to both her right hand and alleged right shoulder injuries. Based on her status as an apprentice carpenter when she was injured, the employee, age forty-four at the time, also sought periodic adjustments to her average weekly wage pursuant to the provisions of § 51:

> Whenever an employee is injured under circumstances entitling him to compensation, if it be established that the injured employee was of such age and experience when injured that, under natural conditions, in the open labor market, his wage would be expected to increase, that fact may be considered in determining his weekly wage. A determination of an employee's benefits under this section shall not be limited to the circumstances of the employee's particular employer or industry at the time of injury.

The insurer accepted liability for the right hand injury but denied the applicability of § 51 to the employee's claim, and contested liability as to the alleged right shoulder injury, also raising late notice as an affirmative defense. (Dec. 5-6.)

contends the judge's finding of any ongoing incapacity was erroneous. For the reasons that follow, we affirm the decision.

The employee, an apprentice in the carpenter's union, suffered an injury to her right major hand while working on October 4, 2005. She alleged that she also injured her right shoulder when she tried to pull her right hand out from between a cabinet she was moving, and the dolly carrying it. The employee was diagnosed with a contusion of the right hand, neurapraxia of her right middle finger, and a right upper back strain. After working light duty for several weeks, the employee left work on November 22, 2005 and has not returned. (Dec. 9.)

The employee initially treated conservatively for her injuries. On February 8, 2006, a MRI of her right shoulder revealed fluid in the subacromial bursa and mild tendinopathy of the long head of the biceps, as well as degenerative cysts along the humeral head. The employee underwent arthroscopic right shoulder rotator cuff repair on September 18, 2007. (Dec. 9-10.)

Following a § 10A conference, the administrative judge awarded the employee § 35 partial incapacity benefits and medical benefits for her right hand injury, but denied her claim of injury to the right shoulder. (Ins. br. 2.) Both parties appealed and, at hearing, the judge allowed the employee's motion for additional medical evidence for the so-called "gap" period between the employee's October 4, 2005 work injury and the March 7, 2007 impartial medical examination by Dr. Robert Leffert. Because a year had elapsed between the impartial medical examination and the March 4, 2008 hearing, the judge also allowed additional medical evidence for the post-impartial examination period. (Dec. 4.)

The judge did not credit the employee's testimony that she had injured her right shoulder at the same time she hurt her right hand. He found she did not report such an injury nor voice right shoulder complaints when she was seen in the emergency room on the day of the incident. The judge further found the employee failed to mention any right shoulder injury or complaints in a visit two weeks later with her physician, Dr. John Burress. The judge found the employee first complained

of injury to her shoulder on November 10, 2005, three days *after* Dr. Burress cleared her for light duty work relative to her right hand injury, with restrictions against forceful gripping and lifting over five pounds. (Dec. 14.)

The judge found that, as of November 7, 2005, the employee's right hand injury had resolved to the extent she was capable of maintaining modified work. Given her varied vocational history,[2] the judge found the employee possessed transferable skills allowing for work in occupations less strenuous than that of a carpenter. (Dec. 15.) The judge adopted the opinion of the insurer's medical expert, Dr. John McConville, who stated the absence of documentation of right shoulder complaints, post-injury, gave him pause as to the causal connection between the injury and the impairment. Dr. McConville opined the employee's complaints of intermittent parathesesias were attributable solely to her right hand injury. (Dec. 12-13.) The judge rejected the opinion of the impartial physician that the employee's alleged right shoulder injury was causally related to the work injury.[3] (Dec. 20.)

The judge awarded ongoing partial incapacity benefits for the right hand injury, assigning a weekly earning capacity of $320.00. The judge concluded the insurer was not liable for a right shoulder injury. The judge also denied the employee's claim for benefit enhancement under § 51. (Dec. 20-21.)

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[2] The employee held an associate's degree in early childhood education and a bachelor of arts degree in business management. She had worked as a medical administrative assistant in a hospital and as a secretary with the Massachusetts Department of Education. Prior to becoming an apprentice carpenter, the employee had worked in Atlanta, Georgia, as a pre-school teacher and a teacher's aide, ultimately becoming an assistant director at an academy. She also ran a business performing lawn and garden work, and other domestic services, including painting and laying carpet. (Dec. 7-8.)

[3] Doctor Robert Leffert opined the employee had significant rotator cuff derangement with impingement in her right shoulder, and biceps tendinitis. He opined the range of motion of the joints of the right hand was normal and without swelling. He found significant voluntary guarding of the right shoulder but also true spasm and positive impingement. The doctor further opined the employee's clinical findings were consistent with carpal tunnel syndrome, and she was totally disabled from all gainful employment. Based on the history the employee gave him, Dr. Leffert opined her right shoulder complaints were causally related to her industrial accident of October 4, 2005. (Dec. 11-12.)

The employee first argues the judge erred by failing to notify the parties, prior to the filing of his decision, that he changed his mind and deemed the § 11A report inadequate.[4] It is true we have consistently held that the parties are entitled to such rulings prior to the close of the evidentiary record:

> A judge must be vigilant in assuring that the parties are timely apprised of all rulings to which they might respond, and a judge must consistently provide the parties with a reasonable opportunity to respond to any material change in circumstances. When such vigilance does not prevail, due process violations frequently – if not necessarily – result.

Mayo v. Save/On Wall Co., 19 Mass. Workers' Comp. Rep. 1, 4-5 (2005).[5] Here, however, we have no such due process violation.

The judge rejected Dr. Leffert's impartial medical opinion, not because he determined, without notice to the parties, that it was inadequate, but because the doctor assumed a history of injury the judge did not credit. (Dec. 12.) "[T]he weight assigned an expert's opinion is dependent upon the accuracy of the facts assumed by

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[4] Judge: The following exhibits have been entered into evidence: I mark and admit as Exhibit 1 the Section 11A report dated March 7, 2007 of Dr. Robert Leffert, which *at this time* I give prima facie status and find adequate *at this time.*

. . .

But it's my understanding that what's going to come into evidence is [sic] any medical reports, studies, what have you, post the impartial of Dr. Leffert, which was dated March 7, 2007.

(March 4, 2008 Tr. 5, 8; emphases added.) At the next day's continued hearing, the judge allowed the employee's unopposed motion to submit additional medical evidence for the "gap" period from the date of claimed disability to the date of the impartial medical examination. (March 5, 2008 Tr. 3.)

[5] See also, Murphy v. B & M Office Installation, 24 Mass. Workers' Comp. Rep. ___ (August 31, 2010)(employee's due process rights violated when judge, at hearing, declared § 11A impartial medical report inadequate but found same report adequate, and adopted doctor's opinion, in decision denying employee's § 36 claim); Babbitt v. Youville Hosp., 23 Mass. Workers' Comp. Rep. 215, 218-219 (2009)(parties entitled to rely on judge's ruling of inadequacy of § 11A impartial medical report; error for judge to effectively change ruling in his decision); Godinez v. Perkins Paper Co., 22 Mass. Workers' Comp. Rep. 84, 87-88 (2008)(insurer's due process rights violated by judge's failure to rule on insurer's objection to employee's late submission of medical evidence, and judge's acceptance of that evidence, prior to filing decision).

the expert." Tran v. Constitution Seafoods, Inc., 17 Mass. Workers' Comp. Rep. 312, 318 (2003), quoting Saccone v. Department of Pub. Health, 13 Mass. Workers' Comp. Rep. 280, 282 (1999), citing Patient v. Harrington & Richardson, 9 Mass. Workers' Comp. Rep. 679, 682 (1995). Where, as in this case, a judge discredits an employee's testimony that serves as the foundation of an expert medical opinion, the opinion cannot be adopted, Brommage's Case, 75 Mass. App. Ct. 825 (2009)(§11A opinion entitled to no weight if judge discredits its assumed factual foundation),[6] and it is altogether appropriate for the judge to look to additional medical evidence to fill that void. Lorden's Case, 48 Mass. App. Ct. 274, 279-280 (1999)(administrative judge's rejection of medical opinion based on judge's disbelief of employee's history, relied upon by impartial doctor, mandated allowance of additional medical evidence).

The employee incorrectly argues that because the judge declared Dr. Leffert's report adequate and said he would accord it prima facie effect, he could not properly reject the doctor's opinions. The judge's statement about prima facie effect was made at the outset of the first day of hearing, before any evidence had been presented, and was qualified twice by the phrase, "at this time." See footnote 4, supra. Moreover,

> [p]rima facie evidence is evidence, remains evidence throughout the trial and is entitled to be weighed like any other evidence upon any question of fact to which it is relevant. Prima facie evidence means evidence which not only remains evidence throughout the trial but also has *up to a certain point* an artificial legal force which compels the conclusion that the evidence is true, and requires the judge to give effect to its unquestionable truth by a ruling or a direction to the jury.

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[6] The court wrote:

> "An [impartial medical report] does not attain the status of prima facie evidence if it goes beyond the medical issues in the case; if it is not expressed in terms of probability; or if it is unsupported by admissible evidence in the record or any other proper basis." Young's Case, 64 Mass. App. Ct. [903] at 904 [2005] (citations omitted). To this we add that the [impartial medical examiner]'s report is not entitled to any weight unless the fact finder believes the facts on which the report is based.

Brommage, supra at 828.

Cook v. Farm Service Stores, Inc., 301 Mass. 564, 566 (1938) (Emphasis added.) The prima facie evidence loses its artificial legal force, however, when evidence appears that warrants a finding to the contrary. Id. To be entitled to prima facie weight, the expert opinion must be based on competent evidence and facts found by the judge. Patterson v. Liberty Mut. Ins. Co., 48 Mass. App. Ct. 586, 597-598 (2000). See also, Buck's Case, 342 Mass. 766, 770-771 (1961)(expert causality opinion based upon misstatements or omission of material facts entitled to no weight); Scheffler's Case, 419 Mass. 251, 257-259, 261 n.5 (1994)(prima facie effect is to be accorded only to medical opinions as to medical issues based on accurate and complete facts and a competent evidentiary foundation in the record); Coggin v. Massachusetts Parole Bd., 42 Mass. App. Ct. 584, 588-589 (1997)(impartial medical report not to be afforded status of prima facie evidence where based on inaccurate assumptions).

Thus, the judge was free to reject Dr. Leffert's opinions, based as they were on a history of injury the judge did not find as fact, and to adopt the opinion of the insurer's expert, Dr. McConville, which discounted the medical likelihood of a causal connection between the work incident of October 4, 2005 and the employee's subsequent right shoulder complaints, because there were no references in her medical records to right shoulder complaints until a month later. Cf. Moynihan v. Wee Folks Nursery, Inc., 17 Mass. Workers' Comp. Rep. 342, 346 (2003)(where impartial physician delves into credibility, opinion is inadequate as a matter of law).

The employee's argument that she was denied the opportunity to depose the impartial medical examiner and other physicians regarding the issue of causal relationship is specious. Plainly, the employee was aware of Dr. McConville's causal relationship opinion, as contained in his May 5, 2008 report, and that it was in evidence. She filed a motion asking the judge to strike the report, and on June 4, 2008, the judge denied the motion. (Dec. 4.) Moreover, both the employee's and the insurer's other expert medical opinions were admitted into evidence several months before the record closed on December 17, 2008. The employee had ample time and opportunity to depose and cross-examine any medical expert, including the § 11A

physician, but elected not to do so.[7] In any event, we cannot see what any such deposition would have accomplished. The judge simply did not find that the employee injured her right shoulder at work. See Tran, supra at 319 (judge free to disregard impartial medical opinion based on complaints which judge "simply did not believe"). There was no error.

The employee next argues the judge erred in his selective adoption of certain of Dr. Burress's opinions. This argument flies in the face of well settled law that the judge is free to do just that. See Clarici's Case, 340 Mass. 495, 497 (1960)(judge free to accept such portions of medical testimony as he deemed credible). In any event, the judge was consistent in his rejection of Dr. Burress's opinion on the causal relationship between the work injury and the employee's shoulder impairment, while adopting the doctor's opinion as to the employee's partial disability.

Lastly, the employee argues the judge erred in denying her claim for increases in her average weekly wage pursuant to the provisions of § 51. We disagree. The employee adduced no evidence that she was on track to advance in the career of union carpenter. The employee testified "that she was actively engaged in the carpenters' apprenticeship program, obtaining skill acquisition, training, education and on the job training, under a structured program and was in good standing at the time of her injury." (Dec. 18.) However, the director of "the Boston Carpenters Apprenticeship and Training Fund testified he did not know if the Employee was going to complete

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[7] The parties addressed deposition plans with the judge at the March 5, 2008 continued hearing:

Judge:	With respect to deposition, are we going to depose any medical -- any depositions?
Mr. White:	I would request permission, your Honor, to depose Timothy Foster. He's the employee's treating physician, surgeon.
Judge:	Okay. We'll get a date for that. Have that done by April 18th. Do you want to depose --
Mr. Keefe:	No, your Honor.

(March 5, 2008 Tr., 83-84.)

the apprenticeship program, which had a thirty per cent attrition rate in the first year and the same rate over the next three years." (Dec. 18-19.)

As the judge noted, the employee's vocational history was one of frequent moves between different career paths, with far more concentration in the area of early education and educational administration than carpentry. "[T]o ensure entitlement to § 51 benefits, the employee must 'reasonably look forward to wage increases related to skill acquisition.' " Klimek v. Wilbraham Toyota Volkswagen, 17 Mass. Workers' Comp. Rep. 527, 529-530 (2003), quoting Sliski's Case, 424 Mass. 126, 135 (1997). The judge found as a fact there was no such showing in the present case, that is, the employee's intentions were unavailing to her claim under § 51:

> This was soundly within his discretion as a fact finder and not contrary to law. See Kerrigan v. Commercial Masonry Corp., 15 Mass. Workers' Comp. Rep. 209, 213 (2001)(in absence of evidence as to when employee would have obtained heavy equipment operator license, his testimony as to intention to obtain license, even if believed, insufficient to warrant application of § 51). The road to § 51 applicability must be paved with something more than good intentions.

Starr v. Maltby Co., Inc., 23 Mass. Workers' Comp. Rep. 39, 43 (2009). There is no error.

The insurer's appeal challenges the judge's finding of continuing partial incapacity. The judge determined "the Employee's right hand symptoms do not prevent her from sustaining employment," although "modest accommodations would only be necessary for the Employee to work within her level of functioning." (Dec. 17.) Despite the fact the employee has administrative skills that likely would be minimally impacted by her partial right hand disability, we are satisfied the judge's vocational conclusions are based on a reasoned analysis and, therefore, not arbitrary and capricious. See Scheffler's Case, supra at 256.

The decision is affirmed. Because the employee has prevailed against the insurer's appeal of the award of ongoing § 35 benefits, the insurer is directed to pay employee's counsel a fee in the amount of $1,497.28.

So ordered.

Patricia A. Costigan
Administrative Law Judge

Mark D. Horan
Administrative Law Judge

Catherine Watson Koziol
Administrative Law Judge

Filed: