COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS | **BOARD NO. 051014-96**

James Casello — Employee
Executive Glass Company — Employer
Utica Mutual Insurance Company — Insurer

REVIEWING BOARD DECISION

(Judges Horan, McCarthy and Fabricant)

APPEARANCES

Ronald St. Pierre, Esq., for the employee
Craig A. Russo, Esq., for the insurer

HORAN, J. The insurer appeals from a decision awarding the employee § 34A benefits. We affirm.

The employee, who quit trade school in the tenth grade, has a work history consisting exclusively of strenuous jobs. On November 16, 1996, while employed as a glass technician, he injured his back. On January 23, 1997, he had surgery on his L5-S1 disc. The insurer paid § 34 benefits and, thereafter, § 35 benefits until statutory exhaustion. The employee filed a § 34A claim, which is the subject of this appeal. (Dec. 3-4.)

At the § 34A hearing, the judge found the employee's pain and limitations had increased since 2001, and consequently he was no longer able to perform the limited work he had done post surgery. The judge adopted the opinion of the § 11A examiner, Dr. Lawrence F. Geuss, and the opinions contained in the medical reports submitted by both parties, that the employee's partial disability was permanent. However, considering the employee's strenuous work history, limited education, increased pain and limitations, daily need for narcotic medication, and guarded prognosis for further improvement, the judge found the employee totally incapacitated as of July 6, 2005. (Dec. 4-5.)

On appeal, the insurer first argues the case must be recommitted because the judge's decision failed to acknowledge or discuss the insurer's surveillance videotape, and failed to address the accompanying investigative reports. We disagree.

It is fundamental that a judge must weigh and consider the evidence he has admitted. Warnke v. New England Insulation Co., 11 Mass. Workers' Comp. Rep. 678, 681 (1997). However, " 'an administrative judge is not expected to comment on each and every scintilla of testimony or evidence presented, but only on that which he deems persuasive.' " Anderson v. Lucent Technologies, 21 Mass. Workers' Comp. Rep. 93, 97 (2007), quoting Hilane v. Adecco Empl. Srvcs., 17 Mass. Workers' Comp. Rep. 465, 471 (2003). We are convinced the judge did consider the videotape evidence. Though the decision lists only the two investigators' reports as Exhibit 5, it is apparent from the transcript that the videotape is part of that exhibit. The transcript reveals that, following a fairly extensive discussion regarding the videotape, it was admitted *along with* the surveillance reports as Exhibit 5.[1] In Anderson, supra, we found no merit in the insurer's argument that the judge failed to assess the probative weight of the investigator's testimony and video surveillance evidence where the decision listed the investigator as a witness, and the surveillance video was marked as an exhibit in the hearing record. We see no relevant distinction between the Anderson facts and the facts of this case.

Similarly, we find no merit in the insurer's second argument. It contends recommittal is required because the judge failed to discuss the testimony of its vocational expert. The decision lists the vocational expert as a witness and includes the labor market survey as an exhibit. (Dec. 1.) We have long held that a judge is free to use his own judgment and knowledge in determining whether

[1] The transcript reveals the judge offered the parties the opportunity to show the videotape during the hearing, but because *neither* attorney had seen it, they declined and

vocational testimony is helpful. He is neither required to adopt vocational testimony, nor to discuss it. Sylva's Case, 46 Mass. App. Ct. 679, 681-2 (1999); Faieta, III v. Boston Globe Newspaper Co., 18 Mass. Workers' Comp. Rep. 1, 11 (2004); Schmidt v. Nauset Marine, Inc., 17 Mass. Workers' Comp. Rep. 326, 329 (2003).

The insurer also argues the judge's § 34A finding is contrary to the evidence because he mischaracterized Dr. Geuss's opinion, and relied on the opinion of Dr. John Chaglassian, whose opinion, the insurer maintains, was not in evidence. Again, we disagree.

Regarding Dr. Geuss's opinion, the insurer avers the judge erred when he found that the doctor restricted the employee's lifting to 10 to 15 pounds on a regular basis. In Dr. Geuss's report, he opined the employee could lift 30 pounds on a regular basis. (Ex. 1, report p. 3.) However, at the doctor's deposition, employee's counsel inquired if it was "probably not a good idea (for the employee) to be lifting 30 pounds on a regular basis," to which Dr. Geuss replied, "[c]orrect." When the doctor was asked if it was "safer" for the employee to lift "maybe 10 or 15 pounds on a regular basis," he replied, "[y]es." (Ex. 1, dep. 9.) Because he did not subsequently alter his opinion, the judge was free to adopt it.

Lastly, the insurer argues the judge erred when he relied "on the September 11, 2001 *opinion* of Dr. Chaglassian," because the doctor's *report* of that date was not in evidence. While it is true the September 11, 2001 report is not in evidence, it is also true that 1) the judge does *not* rely on that *report*, and 2) the judge did admit and rely on Dr. Chaglassian's October 25, 2005 report. The insurer entered the latter report into evidence. (Dec. 1; Ex. 6.) In that report, the doctor iterated his opinion from his September 11, 2001 report. The judge's adoption of that part of Dr. Chaglassian's opinion, restated in his October 25, 2005 report, is clearly

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viewed it during a recess. Back on the record, the videotape was introduced into evidence, along with the investigator's reports, as Exhibit 5. (Tr. 111-113.)

permissible. We also summarily reject the insurer's contention that the judge mischaracterized the doctor's opinion.

We affirm the decision. Pursuant to the provisions of § 13A(6), the insurer is directed to pay employee's counsel a fee of $1,458.01.

So ordered.

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Mark D. Horan
Administrative Law Judge

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William A. McCarthy
Administrative Law Judge

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Bernard W. Fabricant
Administrative Law Judge

Filed: October 23, 2007.