COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 001372-16**

Craig Dillingham	Employee
Brewer Petroleum Service, Inc.	Employer
AIM Mutual Ins. Co.	Insurer

REVIEWING BOARD DECISION
(Judges Koziol, Fabricant and Calliotte)

The case was heard by Administrative Judge Bean.

APPEARANCES
Brian R. Sullivan, Esq., for the employee
Steven M. Taylor, Esq., for the insurer

KOZIOL, J. The insurer appeals from a decision ordering it to pay the employee § 34 benefits from June 5, 2017, and continuing, along with §§ 13 and 30 medical benefits resulting from his January 17, 2016, work injury. We affirm so much of the decision as found the employee remains entitled to §34 benefits. Because the matter came before the judge on the insurer's complaint to modify or discontinue benefits, rather than the employee's claim for benefits as stated in the decision, (Dec. 398, 399), we modify the order to reflect the denial of the insurer's complaint.

The employee drove a truck for the employer, loaded and unloaded it and made fuel deliveries. (Dec. 398.) On January 17, 2016, while exiting his truck at the end of his shift, he fell backwards, striking his elbows, shoulder and head, and has not returned to work. The insurer paid the employee § 34 benefits past the payment-without-prejudice period. Rizzo v. M.B.T.A., 16 Mass. Workers' Comp. Rep. 160, 161 n.3 (2002)(judicial notice taken of board file). On October 20, 2016, the insurer filed a complaint to modify or discontinue the employee's weekly benefits, accompanied by a report of its independent medical examiner, Dr. Judy Fino Edelstein. Id. The matter proceeded to a

conference, at which time the judge appears to have misunderstood the nature of the dispute, ordering the insurer to pay the employee § 34 benefits from the date of the conference, February 15, 2017, through June 4, 2017, and § 35 benefits from June 5, 2017, and continuing, at a rate of $748.30 per week based on a $415.72 weekly earning capacity, rather than issuing an order of modification of benefits effective June 5, 2017.[1] Rizzo, supra. Neither party requested a corrected order to reflect the proper procedural posture of the case. Both parties appealed, and, on May 1, 2017, the employee was examined pursuant to § 11A(2), by Dr. Vladan Milosavljevic. (Dec. 2, Ex. 3.)

At the close of the hearing on July 26, 2017, the judge stated that the insurer filed a motion "to open the medical record." (Tr. 104.) The judge then allowed both the employee's request for additional time to prepare a formal response to the motion, and the insurer's request to take Dr. Milosavljevic's deposition. (Tr. 104.) Subsequently, at the motion hearing on August 9, 2017, the judge denied the insurer's motion.[2] (M.Tr. 11.) The insurer took Dr. Milosavljevic's deposition on September 12, 2017, and the record closed on October 27, 2017. (Dec. 398.)

The judge's decision erroneously states that the case is before him "on the employee's initial claim for benefits," not the insurer's complaint to modify or discontinue the employee's benefits.[3] (Dec. 398.) The judge relied on Dr.

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[1] On the date of the February 15, 2017, conference, the employee was receiving § 34 benefits and had been receiving those benefits since the date of injury. Indeed, the employee's only claim or request appearing on the Form 140 Conference Memorandum was that the judge, "deny [the insurer's] complaint." Rizzo, supra. Thus, we observe that, in effect, the conference order prospectively allowed the insurer's complaint to modify the employee's benefits effective June 5, 2017.

[2] Hereinafter we refer to the motion transcript as "M.Tr."

[3] The procedural posture of the case was not clarified at the hearing.

> The issues before me today are, disability, extent of disability.
> Currently the employee is receiving Section 35 partial disability [sic] compensation.
> He is seeking Section 34 temporary total disability [sic] compensation from June 5, 2017, to the present and continuing. That date is the date that I reduced him in my conference order from total disability [sic] to partial disability compensation.

Milosavljevic's medical opinion and "the credible testimony of the employee" to find the employee "is temporarily totally disabled as a result of the industrial accident that he suffered on January 17, 2016," and ordered the insurer to pay the employee § 34 benefits from June 5, 2017, and continuing. (Dec. 399.)

The insurer raises four issues on appeal. Finding no error pertaining to three of the issues raised by the insurer and, under the facts of this case, harmless error regarding the fourth, we affirm.

First, the insurer argues the judge erred by relying on Dr. Milosavljevic's causal relationship opinion because it was based on no more than a temporal relationship theory. We disagree. At his deposition, Dr. Milosavljevic testified he diagnosed the employee as suffering from post-concussion syndrome, post-traumatic headaches, causalgia or pain in both arms mostly in the elbows, carpal tunnel syndrome, and ulnar neuropathy. (Dep. 17; Dec. 399.) He concluded that the post-concussion syndrome, post-traumatic headaches, and pain in both arms were caused by the employee's work injury because the employee did not have any of these symptoms before the accident.[4] (Dep. 19- 20.) He went on to explain that the employee suffers from memory issues, focusing problems, headaches and vertigo which are symptoms of post-concussion syndrome; that the MRA of the employee's head had been ordered to rule out other causes of those symptoms; and, that the negative result "just reinforces the impression that there was no other explanation for

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> The insurer concedes some disability but is seeking a further reduction in the employee's weekly compensation benefits.

(Tr. 3.) The insurer did not object to, or seek clarification of, the judge's statement of the issues in dispute. There was no elaboration about what the insurer was looking for by seeking a "further reduction in the employee's weekly compensation benefits," i.e., was it a further reduction of § 35 benefits, an earlier date of modification, or both. In addition, the insurer's Form 162, Hearing Memorandum, merely contested, without more, "disability and the extent thereof." Rizzo, supra. Thus, the judge's error in his conference order perpetuated itself throughout the remainder of the proceedings. The insurer does not take issue with this error on appeal.

[4] However, Dr. Milosavljevic also opined that the employee's carpal tunnel syndrome and ulnar neuropathy were not related to the industrial accident. (Dep. 56.)

those symptoms." (Dep. 23-24, 25.) Thus, the opinion had more than a temporal basis to it and the doctor's report was not inadequate as a result.

Second, the insurer argues the judge erred in relying on Dr. Milosavljevic's opinion that the employee was totally disabled as a result of his post-concussion syndrome, headaches and pain in his arms. (Dep. Tr. 29-30.) The insurer argues the doctor's opinion was based solely on the employee's own statements and that by relying on those statements, the doctor improperly usurped the judge's role by weighing the employee's credibility. (Ins. br. 8-10.) We disagree.

The insurer's argument ignores the fact that the judge made his own independent and detailed findings about the employee's symptoms and his limited daily activities, and expressly found credible the employee's testimony that "he believes that he cannot return to any type of work." (Dec. 398, 399.) Compare Larti v. Kennedy Die Castings, Inc., 19 Mass. Workers' Comp. Rep. 362, 370-371 (2005)(error where judge failed to make credibility findings regarding employee's complaints of pain and his limitations and only recounted doctor's assumptions employee's complaints were genuine). Moreover, the "[insurer] does not cite to any statute or case, and we cannot find one, in support of its argument that a doctor may not base his medical opinion solely by crediting a patient's subjective complaints." Caramiello v. BSI Bureau of Special Investigations, 21 Mass. Workers' Comp. Rep. 321, 325 (2007). In Caramiello, supra, we upheld an award of permanent and total incapacity benefits where the judge credited the employee's complaints of pain and limitation, and adopted a medical opinion based on the doctor's crediting of the employee's subjective complaints. The remainder of the insurer's argument asserts that the impartial medical examiner's conclusions were not supported by the medical evidence provided to him or from his examination of the employee. In essence, the insurer is asking us to weigh the evidence and to make medical determinations from that evidence, actions we cannot take. As the trier of fact, the judge has the exclusive authority to weigh and credit evidence, and we will not disturb his findings. Pilon's Case, 69 Mass.App.Ct. 167, 169 (2007)("Findings of fact, assessments

of credibility, and determinations of the weight to be given the evidence are the exclusive function of the administrative judge").

We also find no merit to the insurer's third argument that the judge erred by failing to discuss in his decision, the substance of the testimony and Labor Market Survey of the insurer's vocational expert, Diane Adams. (Dec. 398; Ex. 5.) The judge's decision states that Ms. Adams testified at the hearing and lists her Labor Market Survey Report as an exhibit. (Dec. 397, 398; Ex. 5.) Where the judge did not credit the evidence or adopt the vocational expert's opinion, he was not required to do anything more. Sylva's Case, 46 Mass. App. Ct. 679, 681 (1999)("a judge need not adopt a vocational expert's testimony, nor specify his reasons for rejecting that testimony, nor discuss the expert's opinion in his subsidiary findings"); Sweet v. Eagleton School, 25 Mass. Workers' Comp. Rep. 25, 29 (2011).

Lastly, the insurer argues the judge erred by failing "to address 'gap' medicals and the disability prior to June 5, 2017." (Ins. br. 10-12) Specifically, the insurer takes issue with the judge's failure to rule on its October 4, 2017, motion "seeking the submission of additional medical evidence for the 'gap' period from the January 17, 2016, date of injury until the May 1, 2017, impartial medical examination;" his failure to "address the 'gap' medicals;" and, his failure to address "the entire claimed period of disability," in particular, "the disability period prior to June 5, 2017." (Ins. br. 10, 11, 12.)

The insurer's October 4, 2017, "Motion for Submission of Additional Medicals During the Gap Period," consisted of two paragraphs:

1. The §11A Report failed to address the "gap" period from the January 17, 2016 date of injury until May 1, 2017.

2. The § 11A Report is inadequate, as it does not address disability and extent of disability with respect to the time period pre-dating the May 1, 2017 § 11A Examination.

Rizzo, supra.

As a threshold matter, the insurer's argument misstates the period in dispute in this case. While the insurer acknowledges that the case concerns its complaint for

modification or discontinuance, (Ins. br. 10), as a matter of law, where the insurer's complaint serves as the basis for the dispute, the period in dispute begins from the date the insurer filed its complaint to modify or discontinue benefits. Picardi v. Bradlees, Inc., 11 Mass. Workers' Comp. Rep. 43 (1997); Cubellis v. Mozzarella House, Inc., 9 Mass. Workers' Comp. Rep. 354 (1995). In this case, the relevant time period in dispute began on October 20, 2016, not on the date of injury, January 17, 2016, as the insurer suggests.

Insofar as the October 4, 2017, motion is concerned, the record shows the judge did not rule on the motion, despite the employee's assertion to the contrary in his brief.[5] (Employee br. 3.) A judge's failure to rule on a motion may be construed as a denial of the motion. Haslam v. Modern Continental Constr. Co., 20 Mass. Workers' Comp. Rep. 41, 57 (2006), reversed on other grounds, Haslam's Case, 451 Mass. 101 (2008). Even if the judge erred by failing to rule on the October 4, 2017, motion, we conclude that under the circumstances of this case, the judge's failure to do so was harmless. This is so because the hearing record, including the judge's prior ruling on this issue, does not support a finding of inadequacy for the period prior to Dr. Milosavljevic's May 1, 2017, examination of the employee. Cote v. Federal Express Corp., 32 Mass. Workers' Comp. Rep. ____ (7/20/18)(gap medicals only allowed where report is inadequate or issues are medically complex for a specific timeframe in dispute).

Previously, the judge denied the insurer's original July 26, 2017, motion to submit additional medical evidence. (M.Tr. 7-8, 11.) In the original motion, the insurer asserted, among other things, that the matter was medically complex because Dr.

[5] The employee fails to cite to the record in support of his assertion that the judge ruled on the motion and allowed the submission of gap medicals for the time period prior to Dr. Milosavljevic's May 1, 2017, examination of the employee. An exhaustive review of the board file reveals no ruling on the insurer's October 4, 2017, motion. The employee's bare assertion to the contrary first appeared in his written closing argument to the judge. Even the employee's written closing argument is self-contradictory on this point, stating the parties were "permitted to submit medical records addressing the 'Gap Period,' " (Employee's Written Closing Argument, 2), and arguing that Dr. Milosavljevic's report is "the only medical evidence to be considered relative to the extent of Mr. Dillingham's disability" and that it was "[t]he only medical evidence for Your Honor's consideration." Id. at 14-15.

Milosavljevic did not have for his review, certain "gap medical records." The records in question consisted of a cervical spine MRI and a note from the employee's treating physician, Dr. Richard Feeney, that provided specific work restrictions which the insurer asserted, "evidenc[ed] that he is not currently suffering from a total disability." Rizzo, supra. During the August 9, 2017, motion session the judge addressed this allegation, stating:

> The Judge: I am going to find the report is adequate. I want to address what I see are the two issues here that Mr. Taylor has brought up. Some records were not submitted to the impartial doctor, I don't know why except that unless you can tell me I'm wrong they were not excluded from –
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> Mr. Taylor: I think they weren't available at that time.
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> The Judge: Basically I want to say that it was not the DIA's fault. If it was the DIA's fault then I think there was an issue there but they weren't available. Now had they been available, I think Mr. Taylor is right, might change his mind and Dr. Feeney is the treating doctor?
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> Mr. Taylor: Yes.
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> The Judge: So the treating doctor says he can have some light-duty work. Okay. That's interesting but just because the doctor disagrees with him, doesn't make the impartial doctor's report inadequate. But at a deposition you can flush [sic] that out.

(M.Tr., 7-8.)[6]

We agree with the insurer that " 'gap' medicals are appropriate" where the impartial examiner's opinion cannot reasonably be read to cover the period prior to his examination of the employee, and thus create an inadequacy in the record for that time

[6] The insurer's original motion filed July 26, 2017, alleged the matter was medically complex because Dr. Milosavljevic did not review certain unavailable "gap medicals." However, during the August 9, 2017, motion hearing the insurer did not correct the judge when he addressed the issue as being one of inadequacy, not medical complexity. (M.Tr. 7-8.) The insurer appears to have abandoned its contention that the matter was medically complex. Its October 4, 2017, motion and its argument on appeal argue only that the doctor's report failed to address disability for the timeframe prior to the May 1, 2017, examination; the report was inadequate for that period; and, the judge erred in failing to rule on its October 4, 2017, motion. (Ins. br. 10-12.)

period. Mims v. M.B.T.A., 18 Mass. Workers' Comp. Rep. 96, 99 n. 1 (2004). However, aside from reciting the rule, the insurer provides no argument or citation to the record, illustrating how this situation presents itself in this case. After reviewing the employee's testimony, and Dr. Milosavljevic's report and deposition testimony, we do not see any inadequacy. The employee testified extensively about his symptoms and limitations, (Tr. 29-54, 66-68, 81-83), the judge's findings are consistent with his testimony, (Dec. 398), and neither the employee's testimony nor the judge's findings may be construed reasonably as showing improvement in his condition. Moreover, the judge's decision shows that he adopted Dr. Milosavljevic's opinion that a medical end result had not been reached in the employee's case. (Dec. 399.) Referring extensively to Dr. Milosavljevic's report and his deposition testimony, the judge found the employee is temporarily totally disabled as a result of the industrial accident. (Dec. 399.) As we have previously stated,

> The doctor's opinion could support the inference that the employee's medical status, from the commencement of [the period in dispute] until the impartial examination in [May 2017], was essentially unchanged. See Conroy v. Fall River Herald News Co., 306 Mass. 488, 493 (1940)("Not infrequently an inference is permissible that a state of affairs … proved to exist, has existed for some time before"); Jenkins v. Nauset, Inc., 15 Mass. Workers' Comp. Rep. 187, 191 (2001)(citing Conroy, supra, and reading later medical report to support prior period of disability) .
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> Furthermore, the employee testified that he had not worked since the industrial accident because he was in pain and could not perform. [Tr. 34-55.] See Miller v. M.D.C., 11 Mass. Workers' Comp. Rep. 355, 357 n. 3 (1997) (lay testimony of uninterrupted symptomatology can support award of benefits for prior period of disability lacking contemporaneous medical opinion). The judge credited the employee's reports of pain, and used it to find the employee totally incapacitated. [Dec. 398- 399.] There is no error in the award of benefits for the claimed period prior to the impartial examination.

Cugini v. Town of Braintree School Dep't., 17 Mass. Workers' Comp. Rep. 363, 366 (2003).

To the extent the insurer argues an inadequacy was created for the timeframe prior to Dr. Milosavljevic's examination of the employee because his opinion is contrary to the opinions of other physicians who examined the employee "releasing the Employee back to various forms of modified work," (Ins. br. 11 & n. 3), the argument is no different from that proffered by the insurer, and rejected by the judge, at the August 9, 2017, motion hearing. (M.Tr., 7-8.) Indeed, the judge's decision cites pages from Dr. Milosavljevic's deposition where the doctor testified that his opinion regarding the employee's disability was unchanged, despite the insurer's presentation of, and questioning about, earlier conflicting opinions of other practitioners, as well as the videos that were admitted in evidence at the hearing. (Dec. 399.) As noted by the judge during the motion hearing on August 9, 2017, the impartial medical examiner's disagreement with the opinions of other doctors does not render his report inadequate. See Fritz v. Living Assistance Corp., 22 Mass. Workers' Comp. Rep. 247, 255-256 (2008)(observing that if judge declared §11A report inadequate "simply because he favored different expert opinion" that is not otherwise in evidence, it would be "tantamount to judicial nullification of the statute which, after all, was intended by the legislature to minimize the 'dueling doctors' aspect of litigating medical issues").

Accordingly, we affirm the decision of the administrative judge but modify his order to reflect the denial and dismissal of the insurer's complaint to modify or discontinue the employee's weekly benefits. Pursuant to § 13A(6), the insurer is ordered to pay employee's counsel a fee in the amount of $1,654.15, plus necessary expenses.

So ordered.

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Catherine Watson Koziol
Administrative Law Judge

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Bernard W. Fabricant
Administrative Law Judge

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Carol Calliotte
Administrative Law Judge

Filed: **August 31, 2018**