COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS	**BOARD NOS. 036678-12 025992-13**
Reymundo Villar	Employee
Advanced Auto Parts	Employer
ACE American Insurance Company	Insurer

REVIEWING BOARD DECISION
(Judges Fabricant, Harpin and Long)

The case was heard by Administrative Judge Vieira.

APPEARANCES
Ronald W. Stoia, Esq., for the employee
John J. Canniff, III, Esq., for the insurer

FABRICANT, J. The employee appeals from a decision ordering a closed period of §34 benefits from January 21, 2016 to September 6, 2016, as well as ongoing § 35 benefits, for injuries to his right shoulder and thumb sustained on September 25, 2012. The judge also found there was no causal relationship between an alleged left shoulder injury and a work incident on October 7, 2013. We affirm the decision.

The employee was 53 years old at the time of hearing. He was educated through the eighth grade in La Roman, Dominican Republic, and has resided in the United States since 1993. He has no other formal schooling or training, and prior to his most recent employment, his work history consisted of factory work.

Prior to his injury on September 25, 2012, the employee worked for the employer for approximately five years as a picker in the employer's plant in Norton, Massachusetts. He worked the second shift, from 3:00 p.m. to 11:00 p.m., and his job required lifting between one and eight pounds on a regular basis. While working that shift on September 25, 2012, the employee injured his right shoulder and thumb. Following a couple of days out of work, the employee was released to light duty. (Dec. 5; Tr. 23-24). He then had physical therapy while working light duty until October 7,

2013. On that date, he felt a needle-like pinch inside the bottom of his left shoulder. He sought medical treatment and has since remained out of work. (Dec. 5; Tr. 27.)

The employee began treating with Dr. Timothy Schmidt, who sent him to physical therapy. When physical therapy had no apparent effect, Dr. Schmidt performed a repair of a tear on October 24, 2013, and prescribed further physical therapy. (Dec. 6; Tr. 29-30.) On September 1, 2016, Dr. Schmidt performed a fusion of the right thumb, resulting in pain to the entire finger, lack of motion and the inability to grab things. (Dec. 6; Tr. 31.)

Follow-up treatment for the employee included the February 14, 2017, removal of hardware in the thumb by Dr. Schmidt, as well as additional physical therapy for the right shoulder, followed by shoulder surgery on July 1, 2016, by Dr. Paul Monchik. (Dec. 6; Tr. 33.) After another course of physical therapy, there has been no further treatment for the right shoulder, yet the employee still complains of pain and lack of motion. (Dec. 6.) He has treated with another physician, Dr. Deluisi, for his left shoulder, though that treatment was paid for by his own private health insurer. (Dec. 6; Tr. 35-36.)

At hearing, the employee testified he is able to care for his young children and perform a variety of household chores, such as cooking, shopping and washing dishes. He also testified he felt he could do "any light job," and that, depending on the work, he could work 40 hours, or "maybe more." (Dec. 6; Tr. 40-46, 54.)

After finding the § 11A report adequate, the judge authorized the submission of additional medical evidence due to the complexity of the medical issues. The judge also allowed the Employee's subsequent request to open the record for additional medical evidence. (Dec. 4.)[1]

[1] The employee filed a request to open the record and permit the submission of additional medical evidence after the close of evidence on February 1, 2017. The judge extended the filing deadline for the submission of medical evidence until May 31, 2017. Further, although the deposition of the § 11A medical examiner was authorized, neither party opted to take it. (Dec. 4.)

The § 11A examiner, Dr. Scott Harris, examined the employee on September 7, 2016. The judge credited parts of his resultant report, specifically adopting Dr. Harris' opinions that complaints of pain in the right shoulder and thumb are greater than what would be expected, and that there is no evidence in the record to substantiate significant injury to the left shoulder on October 7, 2013. The judge also adopted Dr. Harris' opinion that symptom magnification is persisting, and the left shoulder is "not a workers' compensation issue," (Dec. 9), leading to the judge's ultimate conclusion that, regarding the left shoulder, there is "no work related injury." (Dec. 9.)

The insurer submitted the medical reports of its own medical examiner, Dr. Steven Sewall, admitted as Exhibit No. 6. The judge adopted the following opinions found in the doctor's report of April 12, 2016: there was no real tenderness or muscle atrophy of the right shoulder, there was very good strength on testing, the employee had the ability to raise his right arm overhead despite "a great deal of guarding," and his complaints far outweighed any physical findings. (Dec. 10; Ex. 6.)

On appeal, the employee first argues that the judge's opinion simply adopts the opinions of the §11A medical examiner, Dr. Scott Harris, in finding that the employee did not sustain a compensable injury to his left shoulder. The crux of the employee's argument appears to be that Dr. Harris' opinion offers only a conclusion of law, and not the required medical opinion based upon a qualified review of the medical record and examination of the employee. (Employee br. 5.) Specifically, the employee points to the following statement contained in Dr. Harris' report: "I do not feel there is any evidence in the record to substantiate significant injury to his left shoulder on 10/7/13. I therefore feel that this is not a workman's (sic) comp issue." (Employee br. 5; Ex. 1, 3.) The employee seems to argue that the judge's citation of this opinion in her decision is tantamount to an evidentiary finding *by the doctor* on liability. The employee further argues that such a finding on liability contradicts the judge's finding that the employee's testimony surrounding the work place injury of October 7, 2013 is credible. (Employee br. 6.) We find no such contradiction.

The §11A impartial physician is charged with determining the existence of a disability, the extent of any disability, and whether the disability arises out of and in the course of the employee's employment.[2] Not only may a judge rely upon the impartial physician's opinions, but the resultant report is mandated to be prima facie evidence, G.L. c. 152 § 11A, and, absent contradictory evidence, the judge is required to accept the report as true. Brommage's Case, 75 Mass. App. Ct. 825, 827 (2009). Here, Dr. Harris' opinion is based on his own medical examination of the employee, in conjunction with his review of the employee's medical records. His professional analysis leads him to the conclusion there was no "significant injury" on the date claimed related to events on the job, as described. While Dr. Harris' statement that "this is not a workman's comp issue" may be an imprecise expression of causal relationship, in this context we understand the statement to mean the doctor found that no injury arose out of the course of employment. May's Case, 67 Mass. App. Ct. 209 (2006) citing Robinson's Case, 416 Mass. 454 (1993)(exact wording not necessary for proper application of standard). While the judge may have credited the employee's testimony regarding the events on the dates of the alleged injuries, this in no way precludes a finding that no compensable injury resulted from those events. There is no error.

Next, the employee argues that, although the judge allowed the submission of additional medical records due to the complexity of the medical issues contained in the § 11A report, the judge erred in not also finding the report inadequate, due to Dr. Harris' use of the language "this is not a workman's comp issue" to express whether a disability arose out of and in the course of employment. For the same reasons expressed above, we do not find any error in the judge's determination of adequacy of the report.

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[2] G.L. c. 152 § 11A states, in part:

> The report of the impartial medical examiner shall, where feasible, contain a determination of the following: (i) whether or not a disability exists, (ii) whether or not any such disability is total or partial and permanent or temporary in nature, and (iii) whether or not within a reasonable degree of medical certainty any such disability has as its major or predominant contributing cause a personal injury arising out of and in the course of the employee's employment. . . . Such impartial physician's report shall constitute prima facie evidence of the matters contained therein.

Finally, the employee disputes the judge's findings regarding his earning capacity, arguing that he has proved he has a significantly decreased earning capacity, and can no longer do the work he had previously done as a laborer. In fact, there is ample evidence on the record to support the judge's findings and ultimate conclusions on this issue.

Pursuant to § 35D(4), the determination of an earning capacity following an injury is, simply, the earnings that the employee is capable of earning. An assigned monetary figure cannot emerge "from thin air," Dalbec's Case, 69 Mass. App. Ct. 306, 317 (2007), and must be supported by a factual source. Eady's Case, 72 Mass. App. Ct. 724, 726 (2008).

The evidence relied upon by the judge regarding the determination of the employee's physical capacity to work is clearly referenced in the decision. Dr. Harris examined the employee on September 7, 2016, and concluded that the employee was at a medical end result and "should be graded out for light duty work." (Dec. 9; Ex. 1.) Dr. Harris' conclusions are bolstered by the employee's own testimony that, depending on the type of work available, he could work 40 hours or "maybe more." (Dec. 6.) Relying on this credited evidence, the judge based her benefit assignment on the state minimum wage beginning on September 7, 2016 (the date of Dr. Harris' examination of the employee) and continuing.[3] There is no error.

Accordingly, we affirm the judge's decision.

So ordered.

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Bernard W. Fabricant
Administrative Law Judge

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William C. Harpin
Administrative Law Judge

[3] Use of the state minimum wage to determine earning capacity does not, in any event, require specific findings of fact. Dalbec, supra.

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Martin J. Long
Administrative Law Judge

Filed: October 31, 2018