COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 015013-01**

Beatriz Ortiz	Employee
Boston Bagel Company	Employer
Norguard Insurance Company	Insurer

REVIEWING BOARD DECISION
(Judges McCarthy, Costigan and Carroll)

APPEARANCES
Chester L. Tennyson, Jr., Esq., for the employee
Edward M. Moriarty, Jr., Esq., for the insurer

MCCARTHY, J. The parties cross-appeal a decision awarding a closed period of temporary total incapacity benefits for an accepted industrial injury. The insurer on appeal contests solely the award of an attorney's fee under § 13A(5). The employee is aggrieved by the administrative judge's handling of the § 11A medical evidence. We affirm as to the insurer's appeal, and recommit to address the employee's concerns in a manner consistent with this opinion.

The employee suffered an alleged fractured coccyx and lumbar strain as a result of a slip and fall at work on March 12, 2001, her first day at work for Boston Bagel Company. (Dec. 4.) The employee claimed temporary total incapacity benefits, which the judge at conference awarded ongoing from March 13, 2001. (Dec. 2.) The insurer appealed to a full evidentiary hearing. At the outset of that hearing on July 31, 2002, the insurer contested only the extent of incapacity after April 25, 2002, the date of the impartial medical examination, (Dec. 2), done by Dr. Michael H. Freed. The employee deposed Dr. Freed on September 10, 2002. (Dec. 3.) Upon considering a normal bone scan and normal x-rays, Dr. Freed opined that the employee had not injured her coccyx but had suffered a lumbar strain in combination with sacroiliitis related to her March 12,

2001 industrial accident. The doctor opined that the employee was at a medical end result from her lumbar strain, but not from her sacroiliitis. Doctor Freed opined, based on the employee's near normal neurological examination, that the employee could return to her regular employment without restriction. The judge adopted the doctor's opinions. (Dec. 5.)

At hearing, the employee testified that her leg pain had gone from being only in the left leg – as she had reported to Dr. Freed on April 25, 2002, at the § 11A examination – to being greater in the right leg than in the left. (Tr. 30-32.) On October 7, 2002, subsequent to the exam and deposition of Dr. Freed, an MRI of the lumbar spine was undertaken. The films and the report were forwarded to Dr. Freed for his consideration. In a supplemental report, dated December 27, 2002, Dr. Freed indicated that the MRI had shown a small disc herniation on the right at L5-S1. Doctor Freed opined that this abnormality was not causally related to the employee's work injury. The judge adopted that opinion. (Dec. 5.) Asserting that the doctor's medical report and testimony were inadequate under § 11A(2), the employee moved for permission to introduce additional medical evidence. The judge denied the motion.

The judge concluded that the employee could return to unrestricted work as of the date of the impartial medical examination, April 25, 2002, (Dec. 5), and ordered payment of § 34 benefits for the uncontested period from March 12, 2001 until April 25, 2002, medical benefits under §§ 13 and 30, and a § 13A(5) attorney's fee. The insurer contested the award of a fee based on its acceptance of the employee's claim up to the date of the impartial medical examination. The judge, however, noted that since the insurer did not accept the claim until the day of the hearing, the employee had still prevailed at the hearing within the meaning of § 13A(5), and the cognate departmental regulation § 1.19(3).[1] (Dec. 6-7.)

---

[1] 452 Code of Mass. Regs. § 1.19(3) provides, in pertinent part:

> When an insurer, at least two days before a conference, or at least five days before a hearing, serves on a claimant or person receiving compensation or the representative of such claimant or person a written offer to pay weekly compensation or compensation

We summarily affirm the judge's award of the § 13A(5) attorney's fee. Indeed, the insurer's argument on appeal lacks any articulation as to why the judge's straightforward application of regulation § 1.19(3) was erroneous. It was not. Once the five day pre-hearing period under regulation § 1.19(3) is entered, the insurer loses any opportunity to narrow its exposure to a § 13A(5) fee by way of stipulation to any element or period of the employee's claim, or waiver of defenses.

The employee on appeal challenges the judge's denial of her request to depose the impartial physician after he submitted his addendum addressing the employee's MRI testing. The employee did make that request in her Second Motion to Offer Additional Medical Evidence, even though it is not mentioned in the decision. The employee invokes the principles enunciated in O'Brien's Case, 424 Mass. 16 (1996), to support her argument that she was entitled to a second deposition of the impartial physician under the circumstances of this case. We agree.

"[T]he deposition and cross-examination procedure gives a party the . . . opportunity 'to attack, discredit or refute the report.' " Id. at 24, quoting Meunier's Case, 319 Mass. 421, 423 (1946). "In such deposition and cross-examination, the challenging party may inquire into the basis of the examiner's report, whether he considered the medical records and reports submitted to him by that party, [and] how the examiner was able to reach an unfavorable conclusion in light of such records and reports. . . ." O'Brien, supra at 23. "In any case where [the] opportunity [to submit evidence to sustain a party's position] is insufficient, the statutory scheme [under § 11A] may work a deprivation of due process as applied. . . ." Id. The present case is one. The inability of the employee to cross-examine the impartial physician on his opinions based on the newly submitted MRI report indicates an erroneous application of the § 11A procedures. The case requires recommittal for the employee to pursue such cross-examination. See Tejada v. Copley Square Hotel, 14 Mass. Workers' Comp. Rep. 220, 221-222 (2000);

---

under M.G.L. c. 152, §§ 30 or 36, and such offer is not accepted, the insurer shall not be required to pay any fee under M.G.L. c. 152, § 13A, for such conference or hearing,

Martin v. Colonial Care Center, 11 Mass. Workers' Comp. Rep. 603, 606-607 (1997). Leppo v. Rusco Steel Company / Regis Steel Corp. (October 16, 2003).

While we are aware that the § 11A impartial scheme does not explicitly provide for multiple depositions, we do not agree with the insurer that the due process concerns raised by the employee open floodgates for innumerable requests to allow parties to re-depose impartial physicians. We must interpret § 11A in a manner that maintains the fundamental fairness of the system created by the Legislature. Where the circumstances of any given case give rise to a good faith need for an addendum report due to substantially changed conditions or important new information, the party aggrieved by such addendum has a due process right to cross-examine the doctor on the opinions expressed therein.

Accordingly, we recommit the case for further proceedings and findings of fact consistent with this opinion.

So ordered.

_____
William A. McCarthy
Administrative Law Judge

Filed: ***November 25, 2003***

_____
Patricia A. Costigan
Administrative Law Judge

_____
Martine Carroll
Administrative Law Judge

---

unless the order or decision rendered directs a payment of said weekly or other compensation in excess of that offered.