COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS	**BOARD NO. 041541-94**
Carlos Rodriguez	Employee
Ames Department Stores	Employer
Old Republic Insurance	Insurer

REVIEWING BOARD DECISION
(Judges Carroll, Levine and Maze-Rothstein)

APPEARANCES
Robert A. Wall, Esq., for the insurer
Constant S. Poholek, Jr., Esq., for the employee at conference
Employee pro se at proceeding on July 28, 1998

CARROLL, J. The insurer appeals an administrative judge's suspension of the employee's weekly benefits due to the employee's failure to attend an impartial examination after due notice and without cause. The insurer claims that the administrative judge was required under G.L. c. 152, §§ 45 and 11A(2) to suspend not only the employee's weekly benefits but all compensation. The insurer also argues that circumstances warranted not suspension, but forfeiture of compensation. Finally, the insurer maintains that the judge should have ordered such suspension and forfeiture as of the date of the first missed impartial examination rather than as of the date of the decision. We agree that the relevant portions of the statute require the judge to suspend all compensation, and therefore reverse so much of the decision ordering suspension of only weekly benefits. We do not agree with the insurer's other arguments, and therefore affirm the decision in all other respects.

This case arose out of the insurer's complaint to discontinue or modify compensation. Following a conference order denying the complaint, the insurer appealed to a hearing de novo. An impartial examination pursuant to § 11A was scheduled for

November 13, 1997. (Dec. 1.) The employee failed to attend that examination, but a second examination was authorized and scheduled for March 24, 1998. (Dec. 1-2.) Though the employee was appropriately notified, he also failed to attend the second examination. On March 27, 1998, a notice was sent to the employee explaining that another examination would not be scheduled until the employee paid a cancellation fee. The employee did not pay the cancellation fee and no examination took place. (Dec. 2.)

A proceeding was scheduled before the administrative judge on July 28, 1998, at which the insurer presented a Motion for Relief pursuant to § 11A(2) and § 45, seeking suspension and forfeiture of the employee's compensation. The employee appeared without counsel. The judge advised him that he would continue the case for approximately one week, until August 5, 1998, and explained that the insurer's motion, if allowed, would result in suspension, and possibly forfeiture, of his weekly benefits. (Dec. 2.) The judge advised the employee to contact his attorney immediately, and even notified the employee's attorney of the reschedule date himself by voice mail. (Dec. 2-3.)

Neither the employee nor his attorney appeared on August 5, 1998, and no explanation of their absence was provided. At that time, the insurer once again presented its Motion for Relief. In accordance with § 11A(2), the judge found "sufficient cause for suspension of benefits pursuant to section forty-five," (Dec. 3), and suspended payment of weekly incapacity benefits effective August 5, 1998, the date of the decision. (Dec. 4.) The insurer appeals.

Section 11A(2) provides, in relevant part:

> Failure of an employee to report to an impartial medical examiner agreed upon or appointed under this section or under section eight, after due notice and without cause . . . shall constitute sufficient cause for suspension of benefits pursuant to section forty-five.

(emphasis added).

Section 45 requires the employee to submit to periodic examinations by a physician chosen by the insurer, and further provides:

> If the employee refuses to submit to the examination or in any way obstructs it, his right to compensation shall be suspended, and his compensation during the period of suspension may be forfeited.

(emphasis added).

The judge, though stating that "the Employee's right to compensation is hereby suspended," (Dec. 3.), nevertheless only ordered that "the Insurer be allowed to suspend payment of the Employee's weekly incapacity benefits." (emphasis added). (Dec. 4.) The insurer argues that the word "compensation" in § 45 refers to more than weekly benefits, and that the judge's order should allow the suspension of compensation, which includes not just weekly incapacity benefits but medical and § 36 benefits as well. We agree.

A statute must be read as a whole so that the various portions taken together constitute a harmonious and consistent legislative enactment. Price v. Railway Exp. Agency, 322 Mass. 476, 480 (1948); Hurley's Case, 302 Mass. 46, 48 (1938). Here, § 11A(2), refers to "suspension of benefits pursuant to section forty-five," which, in turn, refers to suspension of "compensation." Reading § 11A(2) in conjunction with § 45, see Bencivengo v. Walter C. Benson Co., 319 Mass. 110, 111 (1946), we interpret the word "benefits" to mean "compensation."[1]

"Compensation" has been held to include more than weekly incapacity benefits. At the very least, it includes medical expenses. Boardman's Case, 365 Mass. 185 (1974); Leblanc v. City Gardens, Inc., 9 Mass. Workers' Comp. Rep. 726, 727 (1995). By definition, it also includes § 36 benefits for specific and permanent injury.[2] Compare

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[1] Indeed, we basically equated the terms "benefits" and "compensation" in Diaz v. Western Bronze Co., 9 Mass. Workers' Comp Rep. 528, 532 (1995), stating that "there cannot be a broader definition of an injured employee's entitlements under the Act than either term, 'benefits' or 'compensation'."

[2] Section 36 provides, in relevant part:

> In addition to all other compensation to the employee shall be paid the sums hereafter designated for the following specific injuries; . . .

(emphasis added).

Armstrong's Case, 416 Mass. 796, 803 (1994) (cost of living adjustments pursuant to § 34B do not constitute "compensation" under § 28). Thus, we agree with the insurer that the word "compensation" must be read to include medical and § 36 benefits.

Furthermore, where § 45 requires that the employee's "right to compensation shall be suspended," and § 11A(2) provides that failure to attend an impartial examination "shall constitute sufficient cause for suspension of benefits pursuant to section forty-five" (emphases added), the judge does not have discretion to suspend only a portion of the employee's compensation. The words of the statute are mandatory, not discretionary, and require the judge to suspend "compensation" as defined above, not just weekly benefits. See Taylor's Case, 44 Mass. App. Ct. 495, 499 (1998) (use of "shall" in § 35B mandates payment of compensation at the rate in effect at the time of the subsequent injury); see also McLeod's Case, 389 Mass. 431, 435 (1983) (the mandatory nature of § 51A is demonstrated not only by the language the legislature employed ["shall take into consideration"] but also by the language it did not employ; the statute contains no guidelines for the exercise of discretion). Thus, we reverse the judge's order suspending only weekly benefits and order the suspension to include, in addition, medical and § 36 benefits.

However, we do not disturb the judge's decision insofar as he made "no finding as to whether the employee's benefits should be deemed forfeited, but instead defer[red] that ruling until such time, if ever, litigation commences." (Dec. 3.) Section 45 indicates that the employee's benefits "may be forfeited" if he fails to attend an impartial examination. Unlike the language regarding suspension of compensation, this language is not mandatory, but discretionary. See Beal v. City of Newton, 9 Mass. Workers' Comp. Rep. 248, 251 (1995) (an order of recoupment under §§ 11D(2) and (3), which state that recoupment "may be ordered," is discretionary). It was thus within the judge's discretion to address this issue or not, and he chose not to address it until further proceedings are initiated.

Finally, we do not agree with the insurer that the judge should have ordered suspension as of the date of the first missed impartial examination rather than as of the

date of the decision. Neither § 45 nor § 11A(2) prescribes the time when the suspension must begin. A suspension of benefits under the above-referenced sections of the statute is not equivalent to a discontinuance of benefits, which must be grounded in the evidence. See Betty v. Olsten Health Care, 12 Mass. Workers' Comp Rep. 311, 313 (1998). In the latter situation, the judge has discontinued benefits because the employee's incapacity has ceased, so it is necessary that the date of discontinuance be based on a date which has medical or vocational significance. In the case at hand, the judge has suspended benefits not on evidence that the employee is no longer incapacitated but because he has failed to submit to an examination to determine whether he remains incapacitated. There is no evidence regarding the employee's level of incapacity, and thus there can be no evidentiary basis as to the appropriate date for discontinuing benefits. We therefore hold that the judge has discretion as to when to suspend an employee's benefits pursuant to § § 11A(2) and 45, and that suspension as of the date of the decision is not arbitrary.

For the above reasons, the case is reversed insofar as it orders only suspension of the employee's weekly benefits; instead all compensation is suspended until such time as further proceedings are initiated. In all other respects, the decision is affirmed.

So ordered.

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Martine Carroll
Administrative Law Judge

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Frederick E. Levine
Administrative Law Judge

Filed:

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Susan Maze-Rothstein
Administrative Law Judge