COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 004465-81**

Edmond Joseph	Employee
City of Fall River	Employer
City of Fall River	Self-insurer

REVIEWING BOARD DECISION
(Judges Maze-Rothstein, McCarthy and Wilson)

APPEARANCES
Michael S. Sahady, Esq., for the employee
Daniel S. Hendrie, Esq., for the self-insurer

MAZE-ROTHSTEIN, J. The employee appeals from a decision that authorized the self-insurer's discontinuance of G.L. c. 152, § 34A permanent and total incapacity benefit payments and ordered ongoing weekly § 35 partial incapacity benefits. Because the judge improperly allowed the submission of medical evidence outside of the means prescribed by § 11A,[1] we reverse the decision and recommit for further findings.

Edmond Joseph was sixty-seven years old at the time of the hearing in this matter. After completing the eighth grade, he entered the work force as a laborer and warehouseman. Most recently, Mr. Joseph worked as a custodian for the City of Fall River school district. He was so employed from 1967 until June 15, 1981 when he injured his lower back and neck while lifting a heavy barrel of trash into a dumpster. (Dec. 4; Tr. 13-15.)

Pursuant to an unappealed conference order, Mr. Joseph received the maximum amount of § 34 temporary total incapacity benefits. Thereafter, he received § 34A

[1] General Laws c. 152, § 11A, gives an impartial medical examiner's report the effect of "prima facie evidence [with regard to the medical issues] contained therein," and expressly prohibits the introduction of other medical testimony to meet it unless the judge finds that additional medical testimony is required due to the complexity of the medical issues involved or the inadequacy of the report. See O'Brien's Case, 424 Mass. 16 (1996).

permanent and total incapacity benefits. Subsequently, the self-insurer filed a complaint to modify those benefits. (Dec. 4.) Following a § 10A conference denial of its complaint, the self-insurer appealed to a full evidentiary hearing. The issues at hearing were the extent of the employee's incapacity and continuing causal relationship. (Dec. 3.)

As required by § 11A, the employee was examined by an orthopedic doctor who diagnosed ruptured cervical discs causing chronic pain and immobilization associated with muscle atrophy and weakness causally related to the June 15, 1981 industrial injury. The doctor opined that the employee was medically disabled due to his work injury and precluded from returning to the work force. (Dec. 5; Statutory. ex. 1.)

Neither party moved for a finding by the judge that the § 11A report was inadequate or the medical condition complex. Nevertheless, the judge on his own initiative declared the § 11A physician's report adequate, and neither the record nor the decision in any way suggests that the judge felt that the medical issues were complex. Yet he declined to adopt the § 11A opinion. (Dec. 5.) Instead, after observing Mr. Joseph in the courtroom and on videotape, and without making his observations part of the record,[2] the judge directed the parties to submit additional medical records pursuant to § 11. (Dec. 6; letter from Administrative Judge to parties, dated March 2, 1999; Dec. 10; Insurer ex. 2.) Thereafter, the judge adopted the opinions of two other doctors, both of whom examined the employee on behalf of the self-insurer, and found Mr. Joseph to be partially medically disabled. (Dec. 6, 7, 9, 12, 13.) The judge outlined vocational options he believed suited the employee's condition, authorized the discontinuance of § 34A benefits and directed the self-insurer to commence payment of § 35 benefits. (Dec. 14.)

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[2] The practice of making observations that go to the questions of extent of medical disability based on an assessment of the "employee's level of discomfort" at hearing without putting these observations on the record was considered "ill-advised" unless supported by medical evidence. See Mastrangelo v. Ametek Aerospace, 7 Mass. Workers' Comp. Rep. 184, 186-189 (1993).

On appeal, the employee argues that the allowance of additional medical evidence pursuant to § 11 instead of § 11A(2) was an error of law. We agree.

In his March 2, 1999 letter to the parties, the judge made the following ruling.

> Based on my preliminary review of the evidence and testimony presented at Hearing in this matter on February 11, 1999, I have determined that additional medical records are required for my consideration.
>
> Pursuant to § 11 of the Statute: 'at the hearing the member . . . may require and receive any documentary or oral matter not previously obtained as shall enable him to issue a decision with respect to the issues before him.' The parties are instructed to submit pertinent medical records. . . .

The judge accurately noted part of § 11.[3] However, his reliance on § 11 ignores the law contained in § 11A(2), which states, in pertinent part:

> Notwithstanding any general or special law to the contrary, no additional medical reports or depositions of any physicians [other than the impartial medical examiner] shall be allowed by right to any party; provided, however, that the administrative judge may, on his own initiative or upon a motion by a party, authorize the submission of additional medical testimony when such judge finds that said testimony is required due to the complexity of the medical issues involved or the inadequacy of the report submitted by the impartial medical examiner. . . .

G.L. c. 152, § 11A(2)(emphasis added). It is established that where the language of a statute is unambiguous and clear, it must be given its plain and ordinary meaning. Jinwala v. Bizzaro, 24 Mass. App. Ct. 1, 4 (1987). To harmonize §§ 11 and 11A(2), we must interpret each section "according to the intent of the Legislature ascertained from all its words construed by the ordinary and approved usage of the language, considered in connection with the cause of its enactment, the mischief or imperfection to be remedied and the main object to be accomplished, to the end that the purpose of its

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[3] The initial sentence of § 11 states, in its entirety, "At the hearing the member shall make such inquiries and investigations as he deems necessary, and may require and receive any documentary or oral matter not previously obtained as shall enable him to issue a decision with respect to the issues before him." G.L. c. 152, § 11, amended by St. 1932.

framers may be effectuated." Oxford v. Oxford Water Co., 391 Mass. 581, 587 (1984), quoting Hanlon v. Rollins, 286 Mass. 444, 447 (1934). None of the words contained in a statute are to be rejected as surplusage and none are to be given undue emphasis. Each word is to be given the appropriate weight and meaning, which the context and an examination of the statute, taken as a whole, shows the framers of the statute intended. Meunier's Case, 319 Mass. 421, 423 (1946).

Pertinent to the discussion here, § 11A was amended by St. 1991, c. 398, § 30, long after the 1911 enactment of § 11, to limit parties from advancing opposing experts unlike most other areas of adversarial law. See O'Brien's Case, 424 Mass. 16, 20 (1996). In an effort to address this specific "mischief," the amendment to § 11A created a statutory mechanism governing medical evidence in all workers' compensation cases "involving a dispute over medical issues." G.L. c. 152, § 11A. The interplay of §§ 11 and 11A, has not been interpreted; however, the legislature's directive that the provisions of § 11A(2) be followed, "Notwithstanding any general or special law to the contrary" is the kind of explicit language meant to supercede any administrative judge's general power under § 11 to "make such inquiries and investigations as he deems necessary. . . ." In enacting § 11A, the legislature has, thus, deliberately taken the medical aspect of hearings out of the more general § 11 "inquiries and investigations"[4] that judges may make. To rule otherwise would nullify the carefully drawn conditions for allowance of additional medical evidence set out in § 11A(2).

The judge explicitly found that the § 11A report was adequate and nothing in the decision suggests that the judge felt the medical issues were complex. He then attempted a novel way of introducing additional medical evidence, but it is a route which

[4] There is no case law interpreting § 11. We are left to wonder how a single member, after he "inquires and investigates," is able to get the fruits of such inquiry and investigation into evidence when he puts on his adjudicatory hat.

would gut the requirements of § 11A(2). The decision cannot stand.[5] Accordingly, we reverse it and recommit the case for further findings consistent herewith.

So ordered.

Susan Maze-Rothstein
Administrative Law Judge

William A. McCarthy
Administrative Law Judge

Sara Holmes Wilson
Administrative Law Judge

Filed: February 7, 2001

[5] After using the errant § 11 route to additional medical evidence, the judge then inexplicably relied on § 11A(2) gap law for the proposition that a gap in medical evidence may only precede a § 11A examination, in disallowing consideration of the employee's post § 11A examination medical opinion. (Dec. 9.) George v. Chelsea Hous. Auth., 10 Mass. Workers' Comp. Rep. 22 (1996). Gaps in medical evidence can occur both before and after the § 11A opinion, (Dec. 9); see Deleon v. Accutech Insulation & Contract, 10 Mass. Workers' Comp. Rep. 713 (1996)(there can be a gap after a § 11A exam as well as before).