COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 016559-97**

Harold T. Hourihan, Jr.	Employee
David & Hourihan, Inc.	Employer
Eastern Casualty Insurance Co.	Insurer

REVIEWING BOARD DECISION
(Judges McCarthy, Maze-Rothstein and Levine[1])

APPEARANCES
Paul A. Gargano, Esq., for the employee
John A. Smillie, Esq., for the insurer

MCCARTHY, J. On May 3, 1997 Harold T. Hourihan, ("the employee"), was working on top of an oil tank truck during a heavy rainstorm. Hourihan fell from the top of the truck landing between the truck body and the tank. The insurer accepted the claim and paid appropriate c. 152 benefits. Eventually the insurer filed a complaint to terminate or modify weekly benefits, to which the employee joined a claim for payment of medical expenses under § 30 with respect to a claimed knee injury. Following the conference, an order was filed which denied the complaint to terminate or modify and the claim of payment for medical expenses for treatment of the knee. Cross appeals were taken from that order.

Doctor James S. Broome, a board certified orthopedic surgeon, examined the employee as provided by § 11A. The hearing judge allowed a motion to admit additional medical evidence based on the complexity of the medical issues. See G.L. c. 152 § 11A(2). The hearing judge also allowed a motion which put in issue an increase in the employee's average weekly wage by application of § 1(1) and § 51. The last day of testimony was May 5, 2000, and the hearing judge closed the record on May 31, 2000.

[1] Judge Levine recused himself from the panel because a family member provided expert testimony at the hearing.

(Dec. 4.) On May 25, 2000, employee counsel filed a Motion to Amend the claim by adding a claim for permanent and total incapacity benefits under § 34A of the Act.[2]

With the evidentiary portion of the hearing completed, the judge summarized his findings as follows:

> After hearing all the evidence, and considering the arguments set forth by counsel, I conclude and so find that the employee was temporarily totally incapacitated through the period of time his benefits expired by operation of law, and that he is now permanently and totally incapacitated within the meaning of the Act. I also find that while his left knee condition is related to the industrial accident, there is insufficient evidence to prove that his right knee is so causally related. Lastly, with respect to the employee's claims for an increase in his average weekly wage under Section 1(1) and an increase in his compensation rate in accordance with Section 51, I do not find that he has met his burden of proof to show entitlement to increases under either Section of the Act.

(Dec. 4.) The judge then concluded his decision by denying the insurer's complaint to modify or terminate weekly benefits and ordered the insurer to pay § 34A benefits at the weekly rate of $133.33 based on an average weekly wage of $200.00.

In his appeal, the employee argues that the judge committed legal error by not applying § 51 thereby increasing the average weekly wage, by refusing to compute it using the average weekly amount being earned by a person employed doing the same work, and by failing to find that the injury to the right knee was causally related to the accepted industrial accident. After reviewing the entire record and the briefs of counsel, we are satisfied that the hearing judge properly applied the applicable law to the facts as found. Cf. Praetz v. Factory Mut. Eng'g & Research, 7 Mass. Workers' Comp. Rep. 45 (1993). We therefore summarily affirm the decision with respect to the three issues raised on appeal by the employee.

[2] The decision makes no mention of the filing of this motion. Nevertheless, it is evident that the motion was received and allowed because the claim for § 34A is listed as one of the issues. (Dec. 2.)

The insurer in its cross appeal raises a single issue. It contends that it was error for the judge to consider the claim for § 34A benefits because there was no notice given that the motion was in fact allowed nor was the insurer given an opportunity to prepare a defense to this claim as required by 452 Code Mass. Regs. § 1.23.[3]

It is clear from the record that the insurer could not have known that § 34A was an issue during the testimonial phase of the hearing.[4] Constitutional due process requirements apply in workers' compensation cases. "[P]arties to proceedings before a single member or a reviewing board under G.L. c. 152 . . . are entitled to a hearing at which they have an opportunity to present evidence, to examine their own witnesses and to cross examine witnesses of other parties, to know what evidence is presented against them and to an opportunity to rebut such evidence, and to argue, in person or through counsel, on the issues of fact and law involved in the hearing." Haley's Case, 356 Mass. 678, 681 (1970). But what, if anything, happens to this due process right when there is a failure on the part of the aggrieved party to object in a timely fashion?[5]

We are satisfied that on the facts of this case the insurer waived its right to know and defend against § 34A as an issue in dispute when it failed to timely object to the motion to add that issue. It is well settled that a party cannot object for the first time on appeal to the admission of medical evidence after the

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[3] 452 Code Mass. Regs. § 1.23(3) reads as follows:

> No amendment to a claim or complaint may be made except as provided by M.G. L. c. 152 and 452 CMR 1.00. Any party shall be allowed a reasonable period of time to prepare a defense to an amended claim or complaint. Such period shall not exceed 45 calendar days from the date of notice of the amendment, unless an administrative judge finds that additional time to prepare a defense is needed.

[4] Recall that the last day of hearing was May 5, 2000. The Motion to add § 34A as an issue was dated May 25, 2000, the record closed May 31, 2000 and the judge filed his decision on September 20, 2000.

conclusion of a hearing unless an objection has been made upon discovery of the filing of the evidence and a request is made to reopen the case to allow the aggrieved party to offer further evidence. Phillips's Case, 278 Mass. 194 (1932). In order to give legs to its argument, the insurer should have objected to the motion or moved to reopen the hearing to introduce appropriate evidence. Having chosen to remain silent, the insurer may not successfully raise this issue for the first time on appeal to the reviewing board. Lagos v. Mary A. Jennings, Inc., 14 Mass. Workers' Comp. Rep. 21 (2000) (insurer had ample time to raise a defense of alcohol use as an issue and, apparently, chose not to do so; issues not raised below cannot be properly raised for the first time on appeal). See Giannelli v. DAKA, Inc., 12 Mass. Workers' Comp. Rep. 379 (1998), (employee's failure to object to hearing taking place before the impartial examination conducted was not properly preserved for appeal); compare Medley v. E. F. Hauserman Co., 14 Mass. Workers' Comp. Rep. 327 (2000) (board vacates denial of § 34A benefits in the absence of a claim for § 34A, a listing in the decision claim section, or evidence that the § 34A issue was before the judge at hearing).

The insurer in its brief does not explain its failure to object. That failure is fatal to what appears to be an otherwise meritorious basis for appeal. Accordingly, we affirm the decision of the hearing judge. The insurer is directed to pay employee counsel a fee of $ 1,285.63 under the provisions of § 13A(6).

So ordered.

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William A. McCarthy
Administrative Law Judge

Filed: **January 31, 2002**

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Susan Maze-Rothstein
Administrative Law Judge

[5] The insurer here does not contend that it objected to the Motion to add § 34A.