COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 049854-98**

James A. Strong	Employee
John's Oil Burner Service	Employer
Great American Insurance Company	Insurer

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

APPEARANCES
Paul A. Brien, Esq., for the employee
Mary Ann Calnan, Esq., for the insurer

CARROLL, J. The insurer appeals an administrative judge's award of a closed period of weekly G.L. c. 152, § 34, temporary total incapacity benefits and ongoing § 35 partial incapacity benefits, making a number of arguments. Though we find error in the judge's admission of additional medical evidence, we affirm the decision because the judge ultimately adopted the medical opinion of the § 11A impartial examiner.

James Strong is a high school graduate with training in auto mechanics and experience as a steel rigger. He served in the Marine Corps Reserve from 1979 to 1984 where he developed plumbing skills. Mr. Strong began working for the employer in 1982 as a mechanic and truck driver, repairing trucks and oil burners and doing some office work. His job duties usually involved heavy lifting. It was common for the employee to work sixty to ninety hours per week. (Dec. 4.)

In May 1998, the employer sent the employee to Louisiana to complete the construction of a ninety-foot boat owned by the employer. While there, the employee performed heavy physical labor for twelve hours a day, seven days a week. On June 13, 1998, the employee began to experience pain in his left foot and numbness in his right hand. The employer took him to a local hospital. The employee returned to heavy work the next day. His symptoms, with the addition of right shoulder pain, continued through the next few weeks of work in Louisiana. On July 3, 1998, the employee returned to

work in Massachusetts with no abatement of symptoms. (Dec. 4.) He consulted with his primary care physician, and then sought treatment at Swampscott Treatment and Trauma Center for left foot pain and right hand numbness. Though continuing to work for the employer, Mr. Strong limited his physical activity. By the fall of 1998, he was performing only office duties. His shoulder symptoms diminished with the reduction of physical labor but continued to bother him at night. (Dec. 4-5.)

On December 15, 1998, the employee had surgery on his left foot. (Dec. 5.) The insurer began paying § 34 benefits without prejudice, but terminated them on March 14, 1999, and commenced payment of § 35 benefits. The employee's surgeon released Mr. Strong to light duty work approximately a month after his surgery, but the employer would not allow him to return to work until he was fully recovered. Therefore the employee resigned. In April 1999, the employee began part-time office work for Stocker Oil. He then requested a full-time position as an oil burner technician. On April 19, 1999, the insurer discontinued § 35 benefits. The employee still works at Stocker Oil and still experiences left foot and right shoulder pain. (Dec. 6.)

The employee's claim resulted in a conference order awarding § 35 temporary partial incapacity payments. The insurer appealed to a hearing de novo. (Dec. 3.) On February 8, 2000, prior to the hearing, the employee was examined by Dr. Raymond A. Igou pursuant to § 11A. (Dec. 7.) Dr. Igou diagnosed the employee with avascular necrosis of the third metatarsal head, left foot, secondary to trauma, and supraspinatus tendinitis of the right shoulder, both of which were " 'directly related to his reported incident during the summer of 1998.' " (Dec. 8, quoting Statutory Ex. 1.) He opined that the employee was permanently partially disabled and should not do any standing, walking, climbing, prolonged sitting, overhead work or lifting over 20 pounds. (Dec. 8.) After the impartial report was issued, the employee contacted Dr. Igou directly and told him that he was still treating for his foot injury and that more surgery was planned. The impartial examiner then issued an addendum to his report noting that a medical end point had not been reached, contrary to what he had stated in his first report. (Dec. 2; Statutory Ex. 1.)

As a result of the employee's unauthorized contact with the impartial examiner,[1] the insurer alleged bias. The insurer moved to strike the § 11A report or, in the alternative, that it not be given prima facie effect. In addition, the insurer moved to submit additional medical evidence. At the commencement of the § 11 hearing, the judge noted:

> First of all we have determined the insurer's motion for additional medical testimony is allowed by agreement of the parties, based on my perception that there is an O'Brien problem here because the employee communicated directly with the Section 11(A) examining physician after he filed the original report and that 11A physician thereupon issued an addendum sui [sic] sponte . . . so in order to be absolutely fair to all parties we have agreed that the way to cure any potential problems would be to take additional medical evidence.

(Tr. 3.)

Then, in her hearing decision, the judge found there was no evidence that the impartial examiner was biased simply because the employee contacted him after the hearing. (Dec. 2.) Further, the judge specifically found the report of the impartial examiner adequate and the medical issues not complex. (Dec. 2, 9.) Nevertheless, with both parties' agreement, she allowed the submission of additional medical evidence. The employee submitted a number of medical records, and the insurer submitted a report and deposition testimony of its medical expert. (Dec. 1, 2.) Next, despite the admission of additional medical evidence, the judge found that the impartial examiner's report had prima facie effect. (Dec. 2, 9-10.) The judge wrote:

> Having found the report of the D.I.A. medical examiner adequate and within the statutory requirements of § 11A, I am bound to accept the report as *prima facie* evidence of the employee's medical condition, *Murphy v. Commissioner of the Department of Industrial Accidents*, 415 Mass. 218, 224 (1993), unless to do so would deprive a party of due process of law. *O'Brien's Case*, 424 Mass. 16, 24 (1996). In order the [sic] guard against the possibility of a denial of due process, I permitted the parties to submit additional medical evidence. I was not persuaded

[1] 452 Code Mass. Regs. § 1.14(2) provides, in relevant part:

> No party or representative may initiate direct, ex parte communication with the impartial physician and shall not submit any form of documentation to the impartial physician without the express consent of the administrative judge.

> by Dr. Hawkins's opinions and find that the insurer's medical evidence does not overcome the weight of the medical evidence, including the opinions of the § 11A examiner and the evidence offered by the employee. Moreover, since I have found the report of the impartial medical examiner adequate, it is *prima facie* evidence of the employee's medical condition. Dr. Hawkins's opinions did not overcome the effect of the § 11A report augmented with the notes and reports of the employee's treating physicians.

(Dec. 9-10.) (Emphasis in original.) The judge found that, as a result of a series of strains or insults to the body which occurred over an extended period of time during the employee's work for the employer in Louisiana during the month of June 1998, the employee injured his left foot and right shoulder. (Dec. 8-9.) She adopted the opinion of one of the employee's treating physicians, Dr. Pennell, on the degree of the employee's medical disability for the " 'gap' period not specifically addressed in Dr. Igou's report." (Dec. 10.) The judge awarded the employee partial incapacity benefits from the date of injury, June 13, 1998, until he left work on December 16, 1998; total incapacity benefits from that date until March 15, 1999; and partial incapacity benefits from March 16, 1999 and continuing. She found the employee's earning capacity while he was partially incapacitated to be equivalent to his actual earnings. (Dec. 10-11.)

The insurer appeals, alleging that the evidence does not support a finding of causal relationship; that the judge's adoption of the impartial examiner's opinion was arbitrary and capricious because the report contains no foundation for the doctor's conclusions; and that the judge erred in not considering the employee's continuing work for the employer (when a different insurer came on the risk) or his work at Stocker Oil, particularly where she found that a series of strains and insults caused his present problems. (Insurer's brief, 5-11.) We summarily affirm the decision on these issues, but note another error made by the judge (who sought and obtained the agreement of the parties), which merits discussion, although not challenged on appeal.

To guard against the possibility of due process violations, the judge here allowed the parties to submit additional medical evidence, even though she explicitly found the § 11A evidence was adequate, the medical examiner not biased and the medical issues not complex. (Dec. 2, 9.) As we recently held in Schwartz v. Partners Healthcare Sys.,

Inc., 16 Mass. Workers' Comp. Rep. 310 (2002), the admission of additional medical evidence under such circumstances is error. "The judge's generalized concern with the parties' due process rights cannot be an excuse to 'gut the requirements of § 11A(2).'" Id. at 311, quoting Joseph v. City of Fall River, 15 Mass. Workers' Comp. Rep. 31, 35 (2001). The basis for this statement in Schwartz is premised on principles of basic statutory construction. "One of the strongest indications of what construction should be given a statutory provision may be found in the use of negative, prohibitory, or exclusionary words. Where statutory restrictions are couched in negative terms they are usually held to be mandatory." Norman J. Singer, Sutherland Statutory Construction § 57:9 at 36 (6th ed. 2001) (footnote omitted). Moreover, "[w]ords of a statute indicating that a particular course of action . . . is intended to be exclusive, are mandatory." Id. at 38 (footnote omitted).

General Laws c. 152 § 11A (2), as amended by St. 1991, c. 398 § 30, contains exactly such language:

> *Notwithstanding any general or special law to the contrary*, no additional medical reports or depositions of any physicians [other than the impartial physician] 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.

(Emphasis added.)

The judge, neither alone nor with the parties' agreement, may allow additional medical evidence except as prescribed by the statute and related regulations. See G.L. c. 152, § 11A and 452 Code Mass. Regs. § 1.10(5), (6), (7). See also Silverman v. Dept. of Trans. Assis., 15 Mass. Workers' Comp. Rep. 176, 179 n. 5 (2001), citing O'Brien's Case, 424 Mass. 16 (1996). (§ 11A expressly prohibits the introduction of other medical evidence 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.) The approach taken here was clear error as to do so is in violation of the mandatory law.

However, since the judge adopted the impartial opinion, i.e., the only properly admitted medical evidence for the period beyond the gap, we affirm her findings for the period covered by the impartial physician's opinion. Moreover, although neither the judge nor the parties advanced any basis other than 'due process' concerns for the admission of additional medical evidence, the judge could have admitted additional medicals for the so-called 'gap period' on her own. Thus, although not properly in evidence for the reason given by the judge, i.e., due process concerns, the award is supported by competent medical evidence otherwise admissible. Even where the impartial opinion is adequate in that it addresses the issues set forth in § 11A(2), it may be inadequate in its failure to address medical issues prior to the date of the impartial examination. See Sanchez v. O'Connor Constr. Co., 16 Mass. Workers' Comp. Rep. 241, 243 (2002)(judge found impartial report adequate, but allowed submission of medical evidence to cover the "gap" period between the date of injury and the date of the impartial examination). Though the judge did not explicitly so find, she did make it clear that Dr. Pennell's opinion was adopted specifically for the "gap" period. (Dec. 10.)

Accordingly, we affirm the decision. Pursuant to § 13A(6), the insurer is ordered to pay an attorney's fee of $1,273.54.

So ordered.

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Martine Carroll
Administrative Law Judge

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Patricia A. Costigan
Administrative Law Judge

Filed: May 20, 2003
MC/jdm

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Susan Maze-Rothstein
Administrative Law Judge