COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 011599-99**

John P. Casey	Employee
Town of Brookline	Employer
Town of Brookline	Self-insurer

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

APPEARANCES
Joseph M. Burke, Esq., for the employee
Jennifer Dopazo, Esq., for the self-insurer

COSTIGAN, J. The self-insurer appeals from a decision awarding the employee total incapacity benefits under G. L. c. 152, § 34, to exhaustion, and then under § 34A, on the basis that entitlement to § 34A permanent and total incapacity benefits was not claimed by the employee nor litigated by the parties. The administrative judge did not file his decision until seventeen months after the December 2000 close of the record, which hiatus resulted in the exhaustion, prior to such filing, of the § 34 benefits he ultimately awarded.[1] The judge's solution to that dilemma was to sua sponte award the

[1] The only expert medical opinion in evidence was that of the § 11A impartial physician, who examined the employee on January 12, 2000. In his report of that same date, the doctor opined that the employee's "*current status makes him disabled for work at this time. However, as he improves, he can likely get back to work, initially on a limited basis* . . . However, it is clear that he does have a herniated disc, that he will incur *some disability* associated with that and that even though *he is improving with conservative treatment*, he might require surgery in the future." (Stat. Ex. 1, 3; emphasis added.) When deposed on December 1, 2000, almost eleven months after his examination of the employee, the doctor was questioned at length by both parties about his causal relationship opinion, but was not asked a single question relative to the extent of the employee's medical disability during that interval.

Within a week of that deposition, the employee filed a motion to have the § 11A report stricken or declared inadequate, or the medical issues declared complex, and to allow the parties to present additional medical evidence. (The judge's decision incorrectly states that the motion to strike was based on inadequacy only. See Dec. 2.) Because the judge's decision reveals nothing more about the motion, as we are permitted to do, we have reviewed the Board file and have taken judicial notice of the motion, the self-insurer's opposition to the motion, and the

employee § 34A permanent and total incapacity benefits from and after March 30, 2002.[2] The self-insurer also challenges the judge's finding of causal relationship between the alleged industrial accident and the employee's low back disability, and the award of a § 7 penalty. While we affirm the causal relationship finding, we reverse the awards of § 34A benefits and the § 7 penalty.

The employee, age fifty-five when the hearing was held, had worked for the Town of Brookline for almost thirty-three years. At the time of his alleged injury, his title was Senior Sanitary Inspector. On March 9, 1999, he fell from a chair at work. A co-employee witnessed the incident and a nurse employed by the town, who arrived at the scene moments after the incident, checked the employee for possible head injury. She determined that the employee was stable, and he declined further medical care. (Dec. 3-4.)

The employee continued to work, but experienced back pain which "got worse" over the twenty-day period from March 9 to March 29, 1999. The employee reported for

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judge's denial of the motion after oral arguments. Rizzo v. M.B.T.A., 16 Mass. Workers' Comp. Rep. 160, 161 n. 3 (2002). Several grounds were asserted in the employee's motion, but none referred to the absence in the record of a medical opinion addressing the extent of the employee's medical disability after January 12, 2000. After the motion was denied, neither party took any further action to introduce such evidence.

On May 31, 2002, some two years and four months after the § 11A examination, the administrative judge cited to that sole opinion to find that the employee had been and remained totally disabled: "In light of the restrictions defined by Dr. Johnson relative to Mr. Casey's lower back injury, *he is totally disabled*." (Dec. 5; emphasis added). The self-insurer, however, has not challenged that finding or the award of § 34 benefits through March 29, 2002, as unsupported by the requisite medical opinion. See Holt v. City of Boston School Dep't, 16 Mass. Workers' Comp. Rep. 387, 394 (2002), citing Galloway's Case, 354 Mass. 427, 431 (1968). The self-insurer does not argue that the § 34 award was erroneous as to the extent and duration of disability, only that the disability was not causally related to the claimed injury at work. Therefore, we do not disturb that award.

[2] Shortly after the administrative judge filed his decision, the Appeals Court held that exhaustion of § 34 temporary total incapacity benefits is not a prerequisite to a § 34A claim. Slater's Case, 55 Mass. App. Ct. 326 (2002). The critical error here, however, is that there was neither a claim for § 34A benefits, nor an expert medical opinion as to permanent and total disability, before the judge.

work on March 29 but left early because, as he reported to his supervisor, his back pain had become intolerable. After returning home, the employee reached to the floor to pick up a newspaper and experienced severe back pain. He fell to the floor, unable to get up. (Dec. 4.) The employee underwent MRI testing on April 16, 1999 which revealed a left-sided disc herniation at L5-S1. (Id.)

The employee filed a claim for workers' compensation benefits under §§ 34 and 30 and for a penalty under § 7, which the self-insurer resisted.[3] Following a § 10A conference before a different administrative judge, the self-insurer was ordered to pay temporary total incapacity benefits under § 34 from and after March 29, 1999, and reasonable and necessary medical expenses under § 30.[4] The self-insurer appealed to a full evidentiary hearing, which took place on October 23, 2000. (Dec. 2)

The employee underwent a § 11A impartial medical examination on January 12, 2000. In his report, Dr. Stephen H. Johnson opined that the employee's medical disability was not causally related to the fall at work:

> The issue of causality is a difficult one. Certainly, a twisting, bending motion as occurred when he fell on his buttocks *could* be associated with disc herniation. The temporal facts of the case implicate the 03/18/99 [sic] event when he was bending over to pick up a newspaper which can also be associated with subsequent disc rupture.
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> In my opinion, the fall from a chair is unlikely to be causative of his subsequent disc rupture. In reality, I don't think there is any way that one can be sure of that. However, it is clear that he does have a herniated disc,

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[3] The judge incorrectly stated that the claim was accepted. (Dec. 2.) The self-insurer did not dispute that the employee fell from his chair at work on March 9, 1999, (Tr. 5), but it did deny liability, that is, that the incident gave rise to a compensable personal injury. (Self-ins. Ex. 1.) The judge's decision correctly notes that liability was at issue. (Dec. 2.)

[4] The employee's claim for a § 7 penalty was asserted at the § 10A conference but the judge's order did not award the penalty. The employee, however, did not appeal from the conference order. "By statutory directive, an unappealed conference order binds the parties to all matters covered by it. Section 10A provides: 'Failure to file a timely appeal . . . shall be deemed to be acceptance of the administrative judge's order. . . .' " Aguiar v. Gordon Aluminum Vinyl, 9 Mass. Workers' Comp. Rep. 103, 110 (1995). Thus, the penalty claim may not have been properly before the hearing judge for adjudication. As the self-insurer has not argued that point, however, we deem the issue waived. We reverse the § 7 penalty award on other grounds.

> that he will incur some disability associated with that and that even though he is improving with conservative treatment, he might require surgery in the future.

(Statutory Ex. 1, 3; emphasis added.)

That opinion, however, was based on a history that did not include the employee's ongoing pain from the time of the incident until he left work on March 29, 1999, as testified to by the employee. Rather, it assumed that he had developed pain only after, and as a result of, picking up the newspaper at home.[5] (Dec. 4; Statutory Ex. 1, 1.) At the § 11A deposition on December 1, 2000, the doctor was asked to assume that the employee had ongoing complaints of low back and radiating leg pain from March 9, 1999 until March 29, 1999, which history corrolated with the employee's testimony at the hearing. (Dec. 5; Tr. 109-112.) Presented with that history,[6] the impartial physician

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[5] At deposition, the impartial physician explained the facts he had assumed in formulating his causation opinion:

> A. So I mean I think it's all a bit of guesswork for any of us, including myself, but at any rate, if, in fact, there is a causative event, it needs to be of reasonable magnitude and is generally associated with the onset of pain at that time, and onset of persistent pain that then eventually winds up being imaged and treated. It was not clear to me that his pain was at its worse [sic], either at its worse [sic] or that it was consistent after that first fall. That made my conclusions, that's how I drew my conclusions.
> Q. So you didn't have a history of him having persistent pain during the period between the 9th when he fell from the chair and the 29th when he stopped work?
> A. Right.

(Dep. 14-15.)

[6] The critical exchange between the employee's attorney and the § 11A doctor follows:

> Q. If Mr. Casey related that he had pain in his low back and that it radiated after he fell, and that these symptoms persisted up through the time when he stopped work on 3/29/99 [sic], are those the type of symptoms you would be interested in?
> A. Yeah, I mean that would definitely have some bearing. If I could prove the severity of the injury was significant enough and there was persistence, particularly if there's lateralization of symptoms, i.e involving an extremity, in this case a leg or something like that. I mean that is more compelling evidence, but that's not the story I was telling [sic].
> Q. If Mr. Casey further testified that his pain increased during this period, 20 day period that he began to encounter extreme difficulty in sitting for a relative long periods [sic]

opined that the fall at work caused the employee's disc herniation and pain symptomatology. (Dec. 5; Dep. 13-18.) The doctor totally disabled the employee from working as of the time of his examination. (Statutory Ex. 1, 3.)

The self-insurer challenges the judge's finding of causal relationship based on the deposition testimony of the impartial physician. It asserts that the doctor's opinion on causal relationship was conflicting and inadequate, and therefore could not sustain the

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of time, for example, the commute from Marshfield to Brookline . . . Would that be of significance as well?

A. Yeah, it's significant information.

Q. If Mr. Casey was to have testified, as he did testify at the Department under oath before [the judge], that he stopped work on 3/29/99 [sic] because of his low back pain and reported that he was stopping work to his superiors at the Town of Brookline on that day, that he then returned home with pain in his low back which was radiating into his legs, and then upon arriving home, bent over to pick up a newspaper at that particular point in time and then further increasing his pain; would that history be at variance with the history you have had?

A. Yes . . .

Q. So if Mr. Casey had exhibited all these symptoms before he bent down to pick up this newspaper after he had stopped work, and those symptoms [had] not been present before he fell from the chair; is it fair to indict the incident of the falling off the chair as the cause of his low back injury.

A. Yeah.

(Dep. 16-18.)

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A. Yeah.

(Dep. 16-18.)

employee's burden of proof. We do not agree. It is apparent that the change in the doctor's causal relationship opinion, from his § 11A report to his deposition testimony, was predicated on a different, and more accurate, history provided by the employee's attorney during his deposition examination – a history which the judge ultimately credited and found as fact. Contrast Brooks v. Labor Mgt. Serv., 11 Mass. Workers' Comp. Rep. 575 (1997)(where impartial physician changed his opinion on causal relationship without any reason, neither opinion could constitute prima facie evidence under § 11A, resulting in statutorily inadequate medical evidence; additional medical evidence mandated). To the extent that the doctor later answered questions put to him by counsel for the self-insurer in a manner consistent with his written report, those questions did not conform to the employee's history as recounted in his credited testimony at hearing. (Dep. 26-27.) When a doctor is confronted with information that causes him to revise his opinion, "[a]s a general rule, 'the opinion of an expert which must be taken as his evidence is his final conclusion at the moment of testifying.' " Id. at 578, quoting Perangelo's Case, 277 Mass. 59, 64 (1931). Here, however, "[t]he inquiry should be whether the final opinion was based on a sound evidentiary foundation or was speculative *or was unsupported by the facts.*" Hayes v. Commonwealth of Massachusetts, 7 Mass. Workers' Comp. Rep. 232, 235 (1993), citing Boston Gas Co. v. Assessors of Boston, 334 Mass. 549, 578-579 (1956); McEwen's Case, 2 Mass. App. Ct. 63, 66-67 (1974)(emphasis added). Because the questions posed to the § 11A doctor by the self-insurer on cross-examination assumed facts not found by the administrative judge,[7] its contention of conflicts in the doctor's opinion is without merit.

[7] The employee's attorney objected to self-insurer's counsel's hypothetical questions as not consistent with the employee's testimony -- thus, as assuming facts not in evidence, (Dep. 20-23, 26-27, 32), -- and as irrelevant. (Dep. 24.) As to those objections, the judge's decision notes "NR," that is, no ruling was necessary under 452 Code Mass. Regs. § 1.12(6) because the grounds for the objections were not "set forth with particularity, and with the reasons in support thereof," as required by the adjudicatory rule. The reasons were stated with sufficient particularity and the judge's failure to rule on the objections was error, although not dispositive of this appeal.

The judge concluded that the employee's testimony as to his continuing and increasing low back and leg pain between March 9 and March 29, 1999 was credible. (Dec. 5.) As the § 11A doctor's ultimate opinion that the employee's disk herniation and total disability was based on a history the judge found to be accurate and factual, the judge properly adopted that expert medical opinion. (Dep. 18; Dec. 5.) "[T]he history upon which the medical expert relies is crucial to his opinion." Saccone v. Department of Pub. Health, 13 Mass. Workers' Comp. Rep. 280, 282 (1999), citing Patient v. Harrington & Richardson, 9 Mass. Workers' Comp. Rep. 679, 682 (1995), quoting Scali v. Mara Prods., Inc., 6 Mass. Workers' Comp. Rep. 78, 80 (1992). "The weight assigned an expert's opinion is dependent upon the accuracy of the facts assumed by the expert." Patient, supra. Accordingly, we see no error in the judge's liability finding.[8] (Dec. 7.)

We agree with the self-insurer, however, that because the employee made no claim for § 34A benefits, the judge's award of such benefits from and after March 30, 2002 was unauthorized and contrary to law. (Dec. 2.) Medley v. E. F. Hausermann Co., 14 Mass. Workers' Comp. Rep. 327, 330 (2000), quoting Gebeyan v. Cabot's Ice Cream, 8 Mass. Workers' Comp. Rep. 101, 102-103 (1994)("[w]here there is no claim, and therefore, no dispute, . . . the judge strayed from the parameters of the case and erred on making findings on issues not properly before her"). We therefore reverse the award of § 34A

[8] The parties stipulated that the last day of the employee's employment was March 29, 1999, (Dec. 3), and the employee claimed total disability only from and after that date. (Dec. 2.) The judge's use of March 22, 1999 as the start date of the § 34 award is incorrect.

benefits.[9]

As to the judge's award of a $200 penalty for a purported late denial of the employee's claim under § 7, we agree with the self-insurer that such award was incorrect as a matter of law. General Laws c. 152, § 7(1), provides, in pertinent part:

> Within fourteen days of an insurer's[10] receipt of an employer's first report of injury, or an initial written claim for weekly benefits on a form prescribed by the department, whichever is received first, the insurer shall either commence payment of weekly benefits under this chapter or shall notify the division of administration, the employer, and, by certified mail, the employee, of its refusal to commence payment of weekly benefits.

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[9] Even if a § 34A claim had been asserted, the judge's reliance on the § 11A opinion, see footnote 1, supra, to find that, as of March 30, 2002, the employee was permanently and totally incapacitated, would have been error. "A conclusion on incapacity at any particular time has to be in part based on expert medical testimony." Cipoletta v. Metropolitan Distr. Comm'n, 12 Mass. Workers' Comp. Rep. 206, 208 (1998), quoting Dunham v. Western Massachusetts Hosp., 10 Mass. Workers' Comp. Rep. 818, 823 (1996), citing George v. Chelsea Hous. Auth., 10 Mass. Workers' Comp. Rep. 22, 25 (1996). "[B]y the very dynamic nature of injury and disease, [questions of causation and duration of medical disability] are ever changing and thus are unlikely to be subject to a decision that concludes them for all time." Dunham, supra. Although Dunham involved the staleness of non-§ 11A medical evidence, even § 11A expert medical opinions can be rendered inadequate due to staleness. See Cipoletta, supra (based on one and one-half year delay between conference and hearing, judge ruled § 11A report stale and therefore inadequate); Blais v. BJ's Wholesale Club, 17 Mass. Workers' Comp. Rep. ___ (May 15, 2003)(no error in administrative judge, sua sponte, finding § 11A report inadequate due, in part, to fact report was seven months old at time of hearing, when insurer failed to file post-§ 11A deposition motion that inadequacy had been cured).

Because the employee has exhausted his statutory entitlement to § 34 benefits, see footnote 1, supra, should he file a § 34A claim, to prove permanency, he will have to prove only that he has remained totally disabled since March 30, 2002 and that such disability "will continue for an indefinite period of time which is likely never to end, even though recovery at some remote or unknown time is possible. . . ." Sylvester v. Town of Brookline, 12 Mass. Workers' Comp. Rep. 227, 231 (1998), quoting Yoffa v. Metropolitan Life Ins. Co., 304 Mass. 110, 111 (1939). As a matter of law, however, the opinion of temporary total disability which Dr. Johnson offered, based on his January 12, 2000 examination of the employee, see footnote 1, supra, does not satisfy that element in the burden of proof.

[10] The statutory definition of "insurer" includes "a self-insurer" and "any county, city, town or district which has accepted the provisions of section sixty-nine of this chapter." See G. L. c. 152, § 1(7).

In the instant case, the first triggering event under § 7(1) was the filing of the employer's first report of injury, which was dated April 9, 1999.[11] Fourteen days later, on April 23, 1999, the self-insurer filed its notification of denial, dated April 22, 1999.[12] It is beyond dispute that the self-insurer's response was timely. The judge's conclusion to the contrary was erroneous, as he counted the fourteen days from the *employee's* report of his injury to the employer on April 1, 1999.

Accordingly, we reverse the awards of the § 7 penalty and § 34A benefits. We otherwise affirm the decision. Pursuant to G. L. c. 152, § 13A(6), the self-insurer is directed to pay employee counsel a fee of $1,273.54, plus necessary expenses.

So ordered.

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Patricia A. Costigan
Administrative Law Judge

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Martine Carroll
Administrative Law Judge

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Susan Maze-Rothstein
Administrative Law Judge

Filed: **June 20, 2003**

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[11] An employer is required to file such a report "*within seven calendar days,* not including Sundays and legal holidays, *of [its] receipt of notice* of any injury alleged to have arisen out of and in the course of employment *which incapacitates an employee from earning full wages for a period of five or more calendar days*. . . ." (Emphasis added.) See G. L. c. 152, § 6, as amended by St. 1998, c. 161, § 535. The judge found that the employee notified his employer of his alleged back injury on April 1, 1999, (Dec. 6), and mistakenly used that as the trigger date for the self-insurer's response under § 7. As of April 1, 1999, however, the employee had not been incapacitated for five or more calendar days. The first date of total disability claimed by the employee was March 29, 1999, (Employee Ex. 1), making the fifth date April 2, 1999. Thus, the employer's first report of injury filing on April 9, 1999, (six calendar days later, excluding the intervening Sunday), was timely, as was the filing of the self-insurer's denial fourteen days later.

[12] We take judicial notice of these departmental forms contained in the board file. See Rizzo, supra.