COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS	**BOARD NO. 038597-98**
Joseph A. McKenna, Jr.	Employee
Pool and Spa Center	Employer
Eastern Casualty Insurance	Insurer

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

APPEARANCES
Thomas P. Gay, Esq., for the employee
John A. Smillie, Esq., for the insurer

MCCARTHY, J. The insurer appeals from a decision in which an administrative judge awarded weekly permanent and total incapacity benefits under G. L. c. 152, § 34A. The insurer argues that the § 11A medical opinion does not support the judge's finding of permanent and total incapacity from January 8, 2002, the date of the employee's exhaustion of § 34 temporary total incapacity benefits and that the earliest date that an award of § 34A benefits could be made is June 27, 2002, the date of the § 11A examination. It also argues that the judge failed to apply the provisions of § 1(7A)[1] to the employee's claim and, thus, committed an error of law in finding that the employee's cervical disc herniation was causally related to his work-related low back injury or its sequellae. We disagree on both counts and affirm the decision.

[1] General Laws c. 152, § 1(7A), as amended by St. 1991, c. 398, provides in pertinent part:

> If a compensable injury or disease combines with a pre-existing condition, which resulted from an injury or disease not compensable under this chapter, to cause or prolong disability or a need for treatment, the resultant condition shall be compensable only to the extent such compensable injury or disease remains a major but not necessarily predominant cause of disability or need for treatment.

Joseph McKenna, the employee, was a fifty-seven year old married, father of three adult children at the time of hearing. (Dec. 2-3.) He graduated from Bristol County Agricultural High School with additional training in cement finishing and is certified in freon removal. (Dec. 3.) His work history includes eleven years of construction work, ten years with the Town of Mansfield Highway Department as a laborer/supervisor and ten years as a self-employed landscaping contractor. He began working for the employer in May 1998. His job duties included sales, service and installation of swimming pools and spas, selling parts and chemicals and other related tasks. Id.

On October 7, 1998, Mr. McKenna was putting a safety cover on an in-ground swimming pool. (Dec. 3.) When one side of the cover slipped into the pool, the employee bent over to pick it up. As he did so, he felt an immediate sharp pain in his back. The employee was temporarily unable to move his legs and experienced neck discomfort. He sought medical attention that day and eventually had back surgery, physical therapy and began a work hardening program. Although the work hardening program was to have lasted seven to eight weeks, the employee was unable to complete it because of the pain and discomfort in his back and legs. Id. Subsequent to his discharge from the program he attempted additional physical therapy and was again referred to work hardening. (Dec. 3-4.) During the course of this program, while lifting two or three pound weights, Mr. McKenna experienced pain in his right shoulder and neck area. (Dec. 4.) Once again the program was discontinued and epidural injections were administered along with electrical stimulation to his shoulder. Following these treatments his condition worsened and he began to feel pain radiating from the middle of his neck down the right side into his shoulder and into his arm and hand. Id.

The insurer accepted liability for the employee's October 7, 1998 lumbar injury and paid him weekly § 34 temporary total incapacity benefits from October 8, 1998 to April 26, 2001, when the employee was assigned an earning capacity by a conference order directing payment of § 35 temporary partial incapacity benefits from April 27, 2001 to August 12, 2001. On April 9, 2002, in response to the employee's claim for a resumption of § 34 benefits, an order issued directing the insurer to pay the employee

temporary total incapacity benefits from August 13, 2001 to date and continuing. The insurer appealed. Subsequent to that order, the employee's § 34 benefits exhausted and he moved to join a claim for benefits under § 34A. The judge allowed the employee's motion. (Dec. 2.) (Employee's brief, 1.)

The employee was examined in accordance with § 11A by Dr. Michael Freed on June 27, 2002. In his report, the § 11A examiner diagnosed the employee with a herniated lumbar disc at left L3-4, spondylosis and spondylolisthesis, as well as a large herniated cervical disc and spondylosis at C5-6. He opined that the employee's lumbar disc herniation on the left at L3-4 was more likely than not related to the industrial injury and that the degenerative changes in his lumbar spine were not related to that incident but could have been aggravated by it. (Dec. 5.) He also felt that since the employee had no prior history of cervical problems, the cervical disc herniation was either caused by the work incident and aggravated by work hardening or was caused exclusively by the work hardening program. (Dec. 5-6.) He opined that Mr. McKenna was medically disabled from any physical work because of the large cervical disc herniation but that he had reached maximum medical improvement with regard to the lumbar injury with a ten-percent whole person impairment because of that injury. The § 11A examiner did not offer an opinion on the degree of impairment for the cervical injury because the employee had not reached an end result. (Dec. 6.)

At his deposition on January 17, 2003, the § 11A doctor indicated that during his examination, the employee exhibited some limitation of range of motion in his lumbar spine; that he had some mild pain and weakness, but that otherwise the examination of his lumbar area and legs was rather unremarkable. Nevertheless, the doctor did impose limitations of avoiding heavy lifting and frequent required forceful or constant postural changes. (Dec. 6.)

As for the cervical injury, the § 11A examiner opined that the cervical disc herniation could have been caused by the work hardening program and that it was more likely related to that incident. He also maintained his opinion that the cervical problems were either caused by the work injury on 10/7/98 and then suddenly made worse during

work hardening or caused by the work hardening itself. (Dec. 6-7.) Lastly, the doctor confirmed that the employee had pre-existing degenerative changes in his cervical spine even before the work hardening incident and that these changes might make one more susceptible to a herniation. (Dec. 7.)

The judge adopted the § 11A examiner's medical opinions and found that the employee suffered a causally related herniated lumbar disc on the left at L3-4. (Dec. 7.) He further found that the employee suffered a large herniated central disc at C5-6 that was causally related to the employee's industrial injury or its sequellae and that the employee was medically disabled from any physical work because of his cervical injury. Id. He awarded the employee permanent and total incapacity benefits under § 34A from January 8, 2002, the date of the employee's exhaustion of benefits under § 34. (Dec. 9.) We have the insurer's appeal.

The insurer first argues that the § 11A medical evidence does not support the judge's finding of permanent and total incapacity as of January 8, 2002, the date the employee exhausted his benefits under § 34 and that the earliest date that an award of § 34A benefits could be made is the date of the examination, June 27, 2002. We disagree.

Section 11A(2)[2] sets out factors that a § 11A report must address including: disability and extent thereof, causal relationship, medical end result, and loss of function, if applicable. Additional medical evidence is generally required when the § 11A report

[2] General Laws c. 152, § 11A(2), provides, in pertinent part:

> The report of the impartial medical examiner shall, where feasible, contain a determination of the following: (i) whether or not a disability exists, (ii) whether or not any such disability is total or partial and permanent or temporary in nature, and (iii) whether or not within a reasonable degree of medical certainty any such disability has as its major or predominant contributing cause a personal injury arising out of and in the course of the employee's employment. Such report shall also indicate the examiner's opinion as to whether or not a medical end result has been reached and what permanent impairments or losses of function have been discovered, if any. Such impartial physician's report shall constitute prima facie evidence of the matters contained therein.

provides an inadequate response to a period of contested incapacity occurring prior to the § 11A examination and the examiner's actual medical disability opinion is limited to the exam date. George v. Chelsea Hous. Auth., 10 Mass. Workers' Comp. Rep. 22, 24 (1996).

The judge here adopted the opinion of the § 11A examiner that the employee suffered a large herniated central disc at C5-6 that was causally related to his work injury or the work hardening sequellae. The judge also accepted the § 11A examiner's opinion that the employee is medically disabled from any physical work because of the cervical injury.[3]

The § 11A report and deposition testimony comprised the entire medical evidence in this case as the parties filed no motions regarding inadequacy or complexity. (Dec. 7.) A review of the record evidence reveals that nothing in the § 11A examiner's report or deposition testimony indicates that the doctor was unable or unwilling to render an opinion regarding the extent of, or the likely cause of, the employee's incapacity from the date of his cervical injury until the date of the § 11A examination. Compare George, supra (additional medical evidence compelled as a matter of law when at deposition the impartial physician was unable to render an opinion on the extent of medical disability prior to the date of his examination). On this record, the judge could conclude that there was no "gap" problem.[4] The impartial report was facially adequate. It could be rationally read to cover the onset period of claimed permanent and total incapacity. It provided a detailed report of the medical records that had been forwarded for review as well as an opinion as to causation, specifically that the cervical disc herniation was either

[3] We take judicial notice of documents in the board file, which revealed that the employee engaged in a work hardening program in 2001. (August 31, 2001 narrative report of Dr. Parakram Ananta; report submitted to § 11A examiner, Statutory Ex. 1, p. 6.) See Rizzo v. M.B.T.A., 16 Mass. Workers' Comp. Rep. 160, 161 n.3 (2002). See also P.J. Liacos, Massachusetts Evidence § 2.8.1, at 25-26 (7th ed. 1999).

[4] The judge's award was fully supported by the § 11A examiner's report and deposition. Compare Lorden's Case, 48 Mass. App. Ct. 274 (1999); Wilkinson v. City of Peabody, 11 Mass. Workers' Comp. Rep. 263, 265 (1997)(administrative judge rejected the § 11A examiner's opinion and instead relied upon his own knowledge).

caused by the industrial accident and aggravated by work hardening, or caused exclusively by the prescribed work hardening. (Statutory Ex. 1 p. 7.) The judge adopted the § 11A examiner's opinion that the employee was disabled from any physical work because of his cervical disc herniation and credited the employee's testimony regarding his physical condition, symptomatology and capacity to perform activities of daily living.[5] The judge properly considered the medical testimony together with the employee's uncontroverted testimony in finding permanent and total incapacity from the date of the employee's exhaustion of § 34 benefits.[6] As his decision reflects a thoughtful and well-reasoned analysis of the employee's testimony against the backdrop of the expert medical evidence, we are able to determine with reasonable certainty that correct rules of law were applied to facts that were properly found. White v. Continental Constr., Inc., 17 Mass. Workers' Comp. Rep. 323, 324 (2003), citing Lockheart v. Wakefield Eng'g, 16 Mass. Workers' Comp. Rep. 302, 304 (2002), quoting Praetz v. Factory Mut. Eng'g & Research, 7 Mass. Workers' Comp. Rep. 45, 47 (1993); G. L. c. 152, §§ 11B, 11C. Compare Bellanton v. The Flatley Co., 11 Mass. Workers' Comp. Rep. 617, 618 (1997)(judge not competent to fill the medical evidentiary gap on her own based only on non-medical evidence). The conclusion of permanent and total incapacity is rationally drawn from these facts and is consistent with law. We therefore affirm it. G. L. c. 152, § 11C.

The insurer also argues that the judge erred by not applying the provisions of

[5] The employee testified that during the work hardening program he experienced a shocking pain starting in his neck and going down into his shoulder. (Tr. 16, 17.) The employee also testified that this condition worsened following further treatments and complained of continuous pain when performing even the simplest of tasks. (Tr. 19, 22-32.) The judge found that the employee presented as a completely credible witness and had no doubt that his testimony was entirely truthful. (Dec. 5.)

[6] The judge also considered the employee's age, education, work history and capabilities in light of the medical evidence in determining whether the employee's disability prevents him from obtaining and retaining remunerative work of a substantial and not merely trifling character. (Dec. 8.) See Scheffler's Case, 419 Mass. 251, 256 (1994).

§ 1(7A) to the employee's acknowledged pre-existing degenerative changes in the cervical spine. Again, we disagree. The applicability of that statute to the employee's pre-existing degenerative changes in his cervical spine is academic, given the insurer's failure to raise § 1(7A) at hearing. The insurer has the burden to do so in order to force the employee to satisfy the heightened causal relationship standard. Saulnier v. New England Window and Door, 17 Mass. Workers' Comp. Rep. _____ (September 29, 2003), citing Rivera v. Conair Martin Indus., Inc., 17 Mass. Workers' Comp. Rep. 129, 131 (2003), citing Jobst v. Leonard T. Grybko, 16 Mass. Workers' Comp. Rep. 125, 130-131 (2002); Fairfield v. Communities United, 14 Mass. Workers' Comp. Rep. 79, 83 (2000); Frey v. Mulligan, Inc., 16 Mass. Workers' Comp. Rep. 364, 367 (2002)(§ 1(7A) issue waived if insurer fails to raise it in its issues statement or orally at the hearing).

Neither the decision, nor the hearing transcript, identifies § 1(7A) as an issue raised by the insurer. Moreover, an examination of the insurer's issue sheet confirms that § 1(7A) was not raised. (Insurer's Ex. #1.) If the insurer wanted to take advantage of the heightened standard of causation, it had the burden of raising § 1(7A) prior to this appeal, and producing evidence at hearing that the employee came within the terms of the statute. Tripp v. Cape Cod Hosp., 17 Mass. Workers' Comp. Rep. ____ (November 26, 2003); Schmidt v. Nauset Marine Inc., 17 Mass. Workers' Comp. Rep. 326, 330 (2003), citing Fairfield, supra. See also Gookin v. M.J. Daly & Sons, Inc., 17 Mass. Workers' Comp. Rep. ____ (October 1, 2003)(insurer's bare assertion of issue in brief not argued thereafter need not be decided); 452 Code Mass. Regs. § 1.15. When an insurer fails to properly raise § 1(7A) as a defense or subsequently does not meet its burden of production, then the employee is taken "as is." Jobst, supra at 131. Thus we deem the insurer's § 1(7A) argument waived.

On this record we see no error. The decision is affirmed. Pursuant to § 13A(6), employee's counsel is awarded a fee of $1,276.27.

So ordered.

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William A. McCarthy
Administrative Law Judge

Filed: **December 9, 2003**

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Martine Carroll
Administrative Law Judge

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Susan Maze-Rothstein
Administrative Law Judge