COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS	**BOARD NO. 038458-85**
Joseph Norton	Employee
Helen Norton	Claimant
Bureau of State Office Buildings	Employer
Commonwealth of Massachusetts	Self-Insurer

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

APPEARANCES
Joseph F. Agnelli, Jr., Esq., for the employee
Arthur Jackson, Esq., for the self-insurer

CARROLL, J. The self-insurer appeals from a decision in which the administrative judge awarded § 31 widow's benefits to the claimant, finding the employee's death to be causally related to a 1985 accepted industrial injury, a heart attack. The self-insurer argues on appeal, *inter alia*, as follows: (1) that the regulation which states that no impartial physician shall be required in death cases is unenforceable as it conflicts with §11A(2); (2) that the hearing judge erred by failing to accord the impartial examiner's opinion prima facie weight; and (3) that the judge failed to make the required written ruling of inadequacy prior to allowing the introduction of additional medical evidence. For the reasons that follow, we affirm the administrative judge as to the above issues and summarily affirm all other issues raised by the self-insurer.

The employee was a master-plumber who worked two jobs, five days a week prior to May 29, 1985. He was very physically active at home where he renovated his kitchen, gardened and maintained the house inside and out. On May 29, 1985, Mr. Norton suffered a myocardial infarction which the self-insurer accepted as work related. The employee stopped working and his level of physical activity changed dramatically. Others were called into his home to do work he had previously done. The employee

received ongoing, uninterrupted workers' compensation benefits due to his work-related myocardial infarction and, while receiving those benefits, he had another heart attack in January of 1992, during a vacation in Florida. (Dec. 6.) While being followed every three months by Dr. Goodson, an internist, and Dr. Freedlich, a cardiologist, the employee had another myocardial infarction on July 14, 1994. (Dec. 7.) On September 29, 1994, Mr. Norton died as the result of yet another myocardial infarction after breaking out in a sweat while in bed. Id. At the time of his death, the employee was receiving § 34A benefits as the result of an unappealed conference order dated May 7, 1990. (Dec. 3.)

The employee's wife (the claimant) filed a claim for widow's benefits, which were ordered at conference. The self-insurer appealed to a hearing de novo. Id. The sole issue at hearing was the causal relationship of Mr. Norton's death to the May 29, 1985 accepted industrial accident, for which the employee was receiving ongoing § 34A benefits at the time of his death on September 29, 1994. (Dec. 4.)[1]

Dr. Mark Goldman performed a records review as a § 11A impartial physician. Dr. Goldman never examined the deceased employee. (Dec. 10.) The claimant moved, pursuant to § 11A, to strike the report and testimony[2] of the impartial physician or to declare his opinions inadequate.[3] The claimant argued that the §11A report was inadequate because the impartial physician could not comply with the statutory require-

[1] The parties agreed at hearing that, with a decision on causal relationship, the parties would resolve all other entitlements; therefore, specific rulings were not required on any issue other than causal relationship. (Dec. 4.) The parties agreed that the unpaid bills of Dr. Brown and Tobey Hospital are for reasonable and necessary medical treatment. (Dec. 4-5.) It was also agreed that if causal relationship of the death to the 1985 work related myocardial infarction was established by hearing decision, then the self-insurer would pay widow's benefits and funeral expenses. (Dec. 5.) Considering these stipulations and the facts of this case, an application of § 7A is unnecessary. See Costa v. Colonial Gas Co., 12 Mass. Workers' Comp. Rep. 483 (1998). General Laws c. 152, § 7A, deemed procedural by St. 1991, c. 398, § 107.

[2] The claimant's § 11A motion was, in effect, to strike all opinions of Dr. Goldman, despite the fact that the deposition of Dr. Goldman had not yet been taken.

[3] The judge did not strike the impartial examiner's opinions and, in fact, allowed the deposition of the impartial examiner, which is in evidence.

ment to "examine" the employee prior to death. See G.L. c. 152, § 11A(2). The judge agreed with this argument on inadequacy and allowed the motion stating that the § 11A report was ". . . not sufficient in this . . . death case." (July 27, 1996 Tr. 3-4; see also Dec. 4.) Further, the judge allowed additional medical evidence stating that ". . . as the fact finder, I found [additional medical evidence] necessary to make a fair determination in this matter." (Dec. 10.) In her decision, the judge stated that Dr. Goldman's opinion was not given prima facie weight but was "thoroughly considered as one expert medical opinion in this proceeding." Id.

The judge concluded that the opinion of Dr. Goodson, the claimant's medical expert, was convincing, (Dec. 10, 12), and superior to that of Dr. Goldman's, (Dec. 10),[4] and that Dr. Goodson's analysis was more thorough than Dr. Goldman's. Id. Dr. Goodson opined that the employee's death was causally related to his 1985 industrial injury, as the employee had never returned to his pre-injury status, and had remained permanently and totally disabled from the 1985 heart attack until his 1994 death by heart attack. (Dec. 12.) The judge therefore awarded the claimed benefits. (Dec. 13.)

Of the several issues raised by the self-insurer, we find three which merit discussion. First, the self-insurer contends that the departmental regulation, 452 Code Mass. Regs. § 1.10(5), is unenforceable as it conflicts with § 11A(2) of the Act. (Self-insurer Brief 10.) That regulation provides that no impartial physician shall be required in disputed matters concerning the death of an employee.[5] The self-insurer argues that this regulation conflicts with § 11A(2)'s requirement that an impartial physician be appointed "[w]hen *any* claim or complaint involving a *dispute over medical issues* is the

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[4] Dr. Goldman did not find the employee's death to be causally related to the employee's work activities. (See generally report of Dr. Goldman, Ins. Exh. 2; and Deposition of Dr. Goldman.)

[5] 452 Code Mass. Regs. § 1.10(5) in relevant part, now reads: "No impartial physician shall be required in disputed matters concerning death . . . ." The wording of the regulation in effect at the time of the employee's death in 1994 read, in pertinent part, as follows: "No impartial

subject of an appeal of a conference order . . . .” (Emphasis added.) We do not agree.

We note at the outset that the proper inquiry is not whether there is a conflict between the statute and its interpretive regulation, but whether “the application of any section of [c. 152] *is made impossible* by the enforcement of any particular regulation . . . .” G.L. c. 152, § 5 (emphasis added). If such be found, “the administrative judge or reviewing board shall not apply such regulation during such proceeding only.” Id. See Corriveau v. Home Insurance Co., 43 Mass. App. Ct. 924 (1997). The question, therefore, is whether the regulation’s permissible exclusion of death cases from the statutory phrase, “disputes over medical issues,” makes the application of § 11A(2) “impossible.” We do not think that it does. In fact, the opposite is true, as § 11A(2) requires that “[t]he impartial medical examiner, so agreed upon or appointed, *shall examine the employee* and make a report . . . .” (Emphasis added). The § 11A(2) examination “is made impossible” by the death of the employee; § 1.10(5) recognizes that fact. Moreover, the regulation is not mandatory but permissive in its language, “No impartial physician shall be required . . . .” 452 Code Mass. Regs. § 1.10(5). This does not mean, as the case at bar illustrates, that a § 11A report cannot be had in a death case. It simply means it is not required. In fact, here a record review was conducted by a § 11A examiner but absent an actual examination of the employee prior to his death, the judge found the § 11A doctor’s report “insufficient” to respond to the medical dispute in the case. (July 27, 1996 Tr. 3-4; Dec. 4.) Therefore, the regulation is enforceable, application of § 11A(2) is possible and, though none was necessary, a § 11A doctor was appointed in the present case. See G.L. c. 152, § 5.

That said, however, the question remains as to the judge’s treatment of the impartial physician’s opinion. The self-insurer next argues that the judge erred by failing to accord the impartial examiner’s opinion prima facie weight, as required by § 11A(2). We read the decision to have found that the prima facie evidence (medical opinion of the impartial examiner) lost its artificial legal force when it was met with other evidence (Dr.

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physician shall be required in disputed matters concerning . . . § 31 (death of employee) . . . .” Thus, both versions provide that no impartial physician is required in death cases.

Goodson's medical opinion) that warranted a contrary conclusion. Bedugnis v. Paul McGuire Chevrolet, 9 Mass. Workers' Comp. Rep. 801, 803 (1995).

"The hallmark of § 11A medical testimony is its status as exclusive and prima facie evidence." Brooks v. Labor Management Serv., 11 Mass. Workers' Comp. Rep. 575, 579 (1997). General Laws c. 152, § 11A(2), states in pertinent part: "Such impartial physician's report shall constitute prima facie evidence of the matter contained therein . . . . [N]o additional medical reports or depositions of any physicians shall be allowed by right to any party . . . ." In Mendez v. The Foxboro Co., 9 Mass. Workers' Comp. Rep. 641 (1995), we examined how the allowance of additional medical evidence, can affect the prima facie force of a § 11A medical report. Id. at 643-644. See also Lebrun v. Century Markets, 9 Mass. Workers' Comp. Rep. 692, 696-697 (1995). Brooks, supra, like Mendez and Lebrun, discussed Cook v. Farm Service Stores, Inc., 301 Mass. 564 (1938), "for its seminal exploration of the character of prima facie evidence in general, albeit within the context of auditors' reports." Brooks, supra at 579. Cook explained prima facie evidence as follows:

> [P]rima facie evidence is "evidence," remains evidence throughout the trial, and is entitled to be weighed like any other evidence upon any question of fact to which it is relevant. [Citations omitted.] Prima facie evidence means evidence which not only remains evidence throughout the trial but also has up to a certain point an artificial legal force which compels the conclusion that the evidence is true, and requires the judge to give effect to its unquestionable truth by a ruling . . . .
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> When does *prima facie* evidence . . . lose its artificial legal force and compelling effect, and retain only its inherent persuasive weight as a piece of evidence to be considered with other evidence in finding the fact? . . . [Prima facie evidence] retains the artificial legal force and compelling effect which it has by virtue of being "prima facie evidence," until, and only until, evidence appears that warrants a finding to the contrary.

Cook v. Farm Service Stores, 301 Mass. 564, 566 (1938).

The Appeals Court in Coggin v. Massachusetts Parole Board, 42 Mass. App. Ct. 584 (1997), analyzed the question of prima facie evidence specifically in the context of § 11A:

> General Laws c. 152, § 11A, provides that the impartial physician's report "shall constitute prima facie evidence of the matters contained therein." "Prima facie evidence, in the absence of contradictory evidence, requires a finding that the evidence is true." Anderson's Case, 373 Mass. 813, 817 (1977). See Thomes v. Meyer Store, Inc., 268 Mass. 587, 588 (1929). Nothing in § 11A, however, requires the administrative judge to adopt the conclusions of the report or precludes him from considering additional medical evidence once it becomes part of the record. Indeed, "prima facie evidence may be met and overcome by evidence sufficient to warrant a contrary conclusion." Anderson's Case, supra at 817. Once properly admitted, the probative value of medical testimony is to be weighed by the fact finder, in this case, the administrative judge. Robinson v. Contributory Retirement Appeal Bd., 20 Mass. App. Ct. 634, 639 (1985). Barbieri v. Johnson Equip., 8 Mass. Workers' Comp. Rep. 90, 93 (1994). Thus, it is "within the province of the [administrative judge] to accept the medical testimony of one expert and to discount that of another." Fitzgibbons's Case, 374 Mass. 633, 636 (1978).

Coggin, supra at 589.

Thus, the effect of the judge's admitting in evidence the employee's expert's opinion, which was contrary to the opinion of the § 11A physician, was that the § 11A prima facie evidence "lost its artificial legal force." Cook, supra. As the judge stated, it was then to be "considered as one expert medical opinion" among the three[6] in evidence. (Dec. 10.)

The judge's analysis reflects the appropriate handling of the prima facie § 11A evidence. Ultimately, all that is meant by "prima facie evidence [being] met and overcome by evidence sufficient to warrant a contrary conclusion" is that the judge was free to credit the opinion of the employee's expert over that of the § 11A physician. See Coggin, supra.

Finally, the self-insurer argues that the judge erred by failing to make the required written ruling of inadequacy prior to allowing the introduction of additional medical

[6] In addition to the opinions of Dr. Goodson and Dr. Goldman, the opinions of Dr. Rodney Falk were in evidence, by report, (Ins. Exh. 1), and deposition, on behalf of the self-insurer. The judge rejected Dr. Falk's opinion "in favor of the superior credible medical opinion of Dr. Goodson." (Dec. 11.)

evidence. See Dunham v. Western Massachusetts Hospital, 10 Mass. Workers' Comp. Rep. 818, 822 (1996). We disagree. The judge allowed additional medical evidence in writing on the face of the claimant's § 11A motion. In addition to this written ruling, the judge made a verbal ruling, on the record, that the § 11A report was "not sufficient" in this case (July 27, 1996 Tr. 3-4). In her decision, she then reaffirmed her ruling allowing additional medical evidence. (Dec. 4, 10.) Taken together, the judge's rulings make it clear she found the § 11A report to be inadequate. The judge fulfilled the requirement of a "written finding that testimony is required due to . . . inadequacy of the [§ 11A] report . . . ." 452 Code Mass. Regs. § 1.12(5)(a); Dunham, supra at 822.

The decision is affirmed. The self-insurer is directed to pay claimant's counsel a fee of $1,193.20 together with necessary expenses under the provisions of §13A(10).

So ordered.

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Martine Carroll
Administrative Law Judge

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Susan Maze-Rothstein
Administrative Law Judge

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Frederick E. Levine
Administrative Law Judge

Filed: May 6, 1999