COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 011383-98**

Keith Arruda	Employee
Cut Price Pools of Somerset, Inc.	Employer
Mass. Retail Merchants WC Group, Inc.	Insurer

REVIEWING BOARD DECISION
(Judges McCarthy, Smith and Wilson)

APPEARANCES
Honey Polner, Esq., for the employee at hearing
Richard T. Mallen, Esq., for the employer
Linda C. Scarano, Esq., for the insurer
Paul M. Moretti, Esq., for the insurer on brief

MCCARTHY, J. Contending that he injured his left leg in a work-related accident on April 13, 1998, Keith Arruda filed a claim for weekly incapacity benefits, payment of his medical expenses and double compensation under G.L. c. 152, § 28. The insurer resisted the claim and the case was assigned for a conference before an administrative judge. On October 7, 1998, the judge made a retroactive award of weekly § 34 benefits from May 18, 1998 to October 5, 1998. The claim for payment of medical expenses for proposed arthroscopic knee surgery under § 30 and the claim of § 28 double compensation were denied. Both Mr. Arruda and the insurer appealed this conference order.

Mr. Arruda was then scheduled for examination by an impartial medical examiner under the provisions of § 11A of the Act. He "failed to attend the examination and has not offered an excuse for his absence." (Dec. 2.) On October 30, 1998, employee counsel filed a motion to withdraw her appearance on behalf of Mr. Arruda. 452 Code

Mass. Regs. § 1.18(3). Employee counsel had written to her client on four occasions between October 21, 1998 and February 12, 1999, but Mr. Arruda did not respond. The hearing judge then scheduled a status conference for March 1, 1999. Arruda failed to appear at this conference even though notice was sent to him. The insurer and the employer jointly moved to dismiss the claim for lack of prosecution. (Dec. 3.) In a decision filed March 3, 1999 the hearing judge allowed the motion and ordered that, ". . . the employee's appeal of the conference order be . . . dismissed *without prejudice."* (Dec. 3.)[1]

The case comes to the reviewing board on appeal by the insurer. The insurer argues that the administrative judge erred when he dismissed the claim *without prejudice* where the insurer denied liability, paid compensation under the terms of a conference order and then filed a timely appeal for a hearing de novo.

Ordinarily the allowance or denial of a motion to dismiss for failure to prosecute is discretionary. Benjamin v. Walter E. Fernald State School, 9 Mass Workers' Comp. Rep. 321 (1995); L. Locke, Workmen's Compensation § 487, at 574 (2d. 1981). See Bucchiere v. New England Tel. & Tel. Co., 396 Mass. 639, 641 (1986). The Supreme Judicial Court has defined abuse of discretion as "arbitrary determination, capricious disposition, or whimsical thinking," Davis v. Boston Elevated Railway Co., 235 Mass. 482, 496 (1920). We agree with the hearing judge that. "[w]here the employee has not complied with the requirements of § 11A by attending the impartial examination, there is no authority for [him] to hear the claim. See G.L. c. 152, §§ 10A(3) and 11A(2)." (Dec. 3.)[2] Where, as here, there is a medical dispute, a §11A medical exam must take place as

[1] As part of his decision, the judge also allowed employee's motion to withdraw as employee counsel.

[2] Section 11A(2) provides in pertinent part as follows: "The impartial medical examiner, so agreed upon or appointed, will examine the employee and make a report at least one week prior to the beginning of the hearing, which shall be sent to each party. *No hearing shall be commenced sooner than one week after such report has been received by the parties.*" (emphasis supplied).

a condition precedent to a hearing. Kowalczyk v. Morgan Constr. Co., 13 Mass. Workers' Comp. Rep. 284 (1999).

While we agree with the hearing judge that he did not have authority to hear the employee's claim, his decision to dismiss it without prejudice overlooked the insurer's rights established by its cross-appeal of the conference order.

This is not a situation where a dismissal was requested by the employee's own motion before any benefits were paid and with no pending appeal by the insurer. Benefits have been paid here in conformity with a conference order and cross appeals have been taken. Any dismissal must recognize the standing and rights of both parties.

In these circumstances, the dismissal without prejudice deprived the insurer of its statutory right to a hearing on appeal of the order to pay weekly benefits. General Laws c. 152, § 10A(3), provides that, "[a]ny party aggrieved by an order of an administrative judge shall have [the right] to file an appeal for a hearing pursuant to § 11." (emphasis added). See Taylor's case, 44 Mass. App Ct. 495 (1998). This language is mandatory, not precatory. The dismissal without prejudice deprived the insurer of access to the full evidentiary hearing which is afforded under the Act as of right.

The judge's decision leaves the insurer's appeal in limbo.

> It is an essential element of equal protection of the laws that each person shall possess the unhampered right to assert in the court his rights, without discrimination, by the same processes . . . as are open to every other person. The courts must be open to all upon the same terms. No obstacles can be thrown in the way of some which are not interposed in the paths of others. Recourse to the law by all alike without partiality or favor, for the vindication of rights and the redress of wrongs, is essential to equality before the law.

Bogni v. Perotti 224 Mass. 152, 156-157 (1916). The insurer had a constitutional and statutory right to a hearing. These rights were abrogated.

The hearing under § 11 is "de novo" and the conference order may not be introduced at the hearing as some evidence of entitlement to benefits. Any payments made in conformity with the conference order are put in jeopardy when the hearing stage

is reached. In order for the dismissal to be conclusive of the rights of both parties, the dismissal must be with prejudice.

Accordingly, we dismiss the employee's appeal from the conference order with prejudice. At its election, the insurer may seek recoupment of payments made under the conference order by filling a complaint under § 10 of the Act or by bringing an action against the employee in Superior Court. See § 11D(3).

So ordered.

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William A. McCarthy
Administrative Law Judge

Filed: **June 23, 2000**

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Sara Holmes Wilson
Administrative Law Judge

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Suzanne E.K. Smith
Administrative Law Judge