COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 030583-95**

Mark V. Page	Employee
O.P. Viau & Sons	Employer
Eastern Casualty Ins. Co.	Insurer

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

APPEARANCES
Maurice F. Cunningham, Esq., for the employee
Mark A. Sullivan, Esq., for the insurer

MAZE-ROTHSTEIN, J. The employee appeals a decision denying his claim for G.L. c. 152, § 30, medical treatment. We affirm the decision.

Mark V. Page, the employee is a plumber. He injured his left knee while moving a hot water heater on August 10, 1995.[1] Following initial hospital treatment, the employee underwent arthroscopic surgery in October 1995. (Dec. 4; Employee Br. 12.) In June 1996, there was another surgical procedure to investigate a neuroma and to harvest cartilage from his knee. The June 1996 procedure was the first stage of autologous cartilage implantation (ACI), the requested medical treatment at issue in this case. (Dec. 2, 5.)

The insurer denied the employee's request for payment of the ACI medical procedure. On May 5, 1997, pursuant to G.L. c. 152, § 10A, the matter went to a conference. Following the conference, an order denying the claim was filed. The employee appealed to a hearing de novo before the same administrative judge. (Dec. 2.)

[1] The employee had arthroscopic surgery to his left knee in 1974 and again in 1978. However, the administrative judge credited his testimony that he had no further difficulty with his knee until August 10, 1995. (Dec. 5.)

On July 23, 1997, pursuant to §11A[2], a doctor examined the employee. The doctor's report and depositional testimony were entered into evidence. (Dec. 1, 3.) As the employee had just had knee surgery in June 1997, which might have impacted the §11A physician's opinion, the judge allowed the parties to submit additional medical evidence. (Dec. 2.) The insurer submitted a doctor's medical report and deposition and the employee submitted hospital records, sports clinic reports and medical reports. (Dec. 1, 3.)

At the outset of his decision, the judge acknowledged that the only issue in dispute is whether the "(ACI) [procedure] is reasonable and related to the injury of August 10, 1995." (Dec. 2.) He adopted the medical opinions of the § 11A physician and of the insurer's doctor both of whom opined that the employee had unrelated underlying inflammation and splitting of cartilage in the knee, unrelated degenerative changes and that the ACI procedure was inappropriate for Mr. Page. (Dep. of Dr. White, 28; Dep. of Dr. Mitchell, 30-31; Dec. 6.) After considering the medical testimony in its entirety, the judge determined, pursuant to the requirements of § 30[3], that the ACI procedure was not a reasonable treatment. (Dec. 6-7.) Accordingly, the judge denied the claim. However, he did note that the employee continued to be entitled to other treatment modalities which are reasonable and related. (Dec. 7.) The employee appeals.

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[2] General Laws c. 152, § 11A, gives an impartial medical examiner's report the effect of "prima facie evidence with regard to the medical issues contained therein," and expressly prohibits the introduction of other material medical evidence to meet it unless the judge finds the additional medical testimony is required due to the complexity of the medical issues involved or the inadequacy of the report. See O'Brien's Case, 424 Mass. 16 (1996).

[3] General Laws c. 152, § 30 (St. 1991, c. 398, § 53), reads in pertinent part:

> The insurer shall furnish to an injured employee adequate and reasonable health care services, and medicines if needed, together with the expenses necessarily incidental to such services. . . . Where services are provided to employees under this section, the reasonable and necessary cost of such services shall be paid by the insurer.

This case is one of a recent number coming before the Reviewing Board via improper procedure. See Ferriabough v. Raytheon Corp., 13 Mass. Workers' Comp. Rep. ___ n.3 (December 13, 1999); Opper, D.C. v. Monson Dev. Center, 13 Mass. Workers' Comp. Rep. 138 (1999). Whenever the reasonableness or necessity of medical treatment, pursuant to § 30, is the sole issue in a case, the appropriate procedure is outlined in § 8(4).

Section 8(4) of the Act states, in pertinent part:

> At any time subsequent to the filing of a claim or complaint solely regarding the reasonableness or necessity of a particular course of treatment, any party to such claim or complaint may request the *senior judge* to appoint a physician from the appropriate roster to conduct an examination of the employee and make a report within fourteen days. If the *senior judge* determines that said claim or complaint involves only the issue of reasonable and necessary medical treatment, he shall make such appointment within seven days. The impartial physician shall determine the appropriateness of any medical treatment claimed or denied by the parties, using any guidelines adopted by the health care services board or promulgated by the department. The determination by the impartial physician shall be binding upon the parties until any subsequent proceeding within the division of dispute resolution. The determination of the impartial physician shall be prima facie evidence of the appropriateness or inappropriateness of the course of medical treatment in question at any hearing at which such treatment is at issue.

(Emphasis added).

The procedure set out in § 8(4) differs significantly from that set out in § 11A. Section 11A(2) states, in pertinent part:

> When any claim or complaint involving a dispute over medical issues is the subject of an appeal of a conference order pursuant to section ten A, the parties shall agree upon an impartial examiner . . . and submit such choice to the administrative judge. . . . The impartial shall examine the employee and make a report. . . . 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 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.

Under § 8(4) the authority for the appointment of an impartial examiner rests solely with the senior judge. Under §11A that authority rests with the administrative judge. Also, § 8(4) allows the medical examiner request to be made at anytime following the filing of the claim or complaint, while § 11A restricts requests to ten days following the filing of an appeal from a conference order. The two sections further differ in the reporting responsibility of the impartial examiner. Under § 8(4) the impartial examiner is charged with determining the reasonableness and necessity of medical treatment. Conversely, the § 11A doctor must render an opinion on medical disability, its duration and causal relationship. See Opper, D.C., supra at 140-141. While the reports under both § 8(4) and § 11A are given artificial prima facie legal weight, under § 8(4), parties may offer other medical evidence at their will. By contrast, pursuant to § 11A, the administrative judge may authorize the submission of additional testimony only under certain circumstances. See supra n. 2.

Unlike the Ferriabough and Opper cases cited above where no proper request for a § 8(4) exam was made, the parties here did request a § 8(4) procedure from the senior judge. (Insurer Br. 1-2.) The senior judge responded, in a letter dated April 8, 1997, directing the parties to agree on a § 8(4) doctor with payment of a $350 fee and "[a]ssuming a conference order, appealing parties will be required to pay the $350 fee which will result in the appointment of another impartial physician pursuant to M.G.L. c. 152 § 11A(2)." (Insurer Br., Exhibit A.) (Emphasis in the original April 8, 1997 letter). Needless to say, the parties did not pursue the § 8(4) avenue further. (Insurer Br. 2.)

As a matter of law, the parties are not required to have a § 11A exam where the only issue is the reasonableness or necessity of a particular course of medical treatment. The § 8(4) procedure is the section that applies to purely § 30 claims. G.L. c. 152, § 8(4). Then "[i]f the senior judge determines that said claim or complaint involves only the issue of reasonable and necessary medical treatment, he shall make such appointment within seven days." Id. On appeal from a conference order, having had

the appropriate § 8(4) medical review, there is no basis to require payment of a second fee.

Without further objection, the matter here proceeded before the administrative judge and as he lacked the authority to appoint a medical examiner pursuant to § 8(4), an impartial examiner was appointed pursuant to § 11A. We consider the failure to proceed under the appropriate statutory provisions, to have been determined in the manner of the law of the case, see Haberger v. Carver, 297 Mass. 435, 440 (1937) (rulings not challenged below become law of the case), or by waiver. See Dalton v. Post Publishing Co., 328 Mass. 595, 599 (1952)(waiver of a defense may occur expressly on implication regardless of its merits). We now address the remainder of the case as it is framed before us.

In his brief, the employee asserts that the judge gave undue weight to the § 11A doctor's report in finding it prima facie evidence. This position is without merit. Section 11A gives the report of the impartial examiner prima facie weight as to the matters contained therein. "Prima facie evidence, in the absence of contradictory evidence, requires a finding that the evidence is true." Coggin v. Massachusetts Parole Board, 42 Mass. App. Ct. 584, 589 (1997). However, once additional medical evidence is admitted, (see G.L.c.152 §, 11A(2)), the prima facie evidence loses its "artificial legal force" and becomes ordinary expert testimony among the others from which a judge may freely choose the most persuasive. It is entitled to be weighed by the fact finder like any other evidence. See Norton v. Bureau of State Office Buildings, 13 Mass. Workers' Comp. Rep. 122, 126-127 (1999), quoting Cook v. Farm Service Stores, 301 Mass. 564, 566 (1938). Thus, additional medical evidence was allowed into the record and ultimately, the administrative judge appropriately weighed the medical evidence, accepting the medical testimony of one expert and discounting that of another. See Id. at 127. The judge adopted the consistent opinions of the § 11A physician and the insurer's doctor. It was within the administrative judge's discretion to adopt those medical opinions over those presented by the employee's medical expert.

Amon's Case, 315 Mass. 210 (1943). There is no error in the treatment of the medical evidence.

Next, the employee contends that the reports and opinions of the § 11A physician and the insurer's doctor were tainted with fatal errors of law and could not, therefore, be the foundation of the decision. (Employee Br. 24.) More specifically, the employee maintains that the causal relationship between the employee's knee injury and the incident dated August 10, 1995 was previously adjudicated and therefore has res judicata effect.

"Res judicata is a rule that a final judgment rendered by a court of competent jurisdiction on the merits is conclusive as to the rights of the parties and as to them constitutes an absolute bar to a subsequent action involving the same claim." Aguiar v. Gordon Aluminum Vinyl, 9 Mass. Workers' Comp. Rep. 103, 107 (1995). As a tool of repose in a case, res judicata is employed with precision and forbearance given the delicate balance between the parties' rights to defend against or vindicate a claim and the court's effort to end duplication of effort and expense. See Id., citing Restatement (Second) of Judgments § 33 (1982). Principles of res judicata apply to courts and agency adjudications alike. See Restatement (Second) of Judgments, supra at § 83 (1), (2). For res judicata to apply the claim at issue must be the same as that decided in the prior action. Aguiar at 109. Here, the prior final judgment in this matter is an unappealed conference order establishing only original liability. (Insurer Br. 8.) The issue in the present matter is the reasonableness and necessity of medical treatment, an issue that was not addressed by the conference order. Res judicata does not apply to this issue. As to this heretofore undecided issue, the medical opinions of the § 11A examiner and Dr. Mitchell both set out that, regardless of how the employee came to be in his current state, he was an inappropriate candidate for the ACI procedure. (Dep. of § 11A physician, 28-29, 42, 48, 50; Dep. of Dr. Mitchell, 12-13, 31-36, 39, 57.)[4] The

[4] Among the reasons why the employee was not a suitable candidate for the procedure were that it was still largely experimental (Dep. of § 11A physician, 48; Dep. of Dr. Mitchell, 39); the advanced degenerative processes in multiple sites within the employee's knee (Dep. of

adopted medical opinions, though in contradiction to the employee's position, amply support the conclusion reached in the decision.[5] See Amon's Case, supra.

It is, therefore, affirmed.

So ordered.

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Susan Maze-Rothstein
Administrative Law Judge

Filed: May 23, 2000

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Martine Carroll
Administrative Law Judge

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Frederick E. Levine
Administrative Law Judge

§ 11A physician, 28-29; Dep. of Dr. Mitchell, 31, 32-34); it is recommended for younger patients with a single trauma (Dep. of Dr. Mitchell, 11-12); other mainstream medical alternatives are available (Dep. of § 11A physician, 42, 50); and the employee's excessive weight. (Dep. of § 11A physician, 28-29, Dep. of Dr. Mitchell, 57.)

[5] In his decision, the administrative judge confirmed that the employee was entitled to other treatment modalities which are reasonable and related. (Dec. 7.) We do not disturb this finding. Despite adoption of medical opinions that no longer relate the employee's condition to his work injury, (Id.), the insurer has not appealed.