COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 000626-14**

Maryellen Aceto	Employee
Brigham and Women's Hospital	Employer
Partners Healthcare System Inc.	Self-Insurer

REVIEWING BOARD DECISION
(Judges Fabricant and Long)[1]

The case was heard by Administrative Judge Preston.

APPEARANCES

Michael D. Kantrovitz, Esq., for the employee
Tamara Ricciardone, Esq., for the self-insurer

FABRICANT, J. The parties cross-appeal from the administrative judge's decision awarding the employee § 34 temporary total incapacity benefits, followed by ongoing § 35 temporary partial incapacity benefits. The self-insurer challenges the judge's § 11A adequacy finding as vague and argues the § 11A report and deposition should be stricken because the § 11A examiner no longer maintains an active medical practice. We affirm the decision on this issue. The employee argues error with respect to the judge's handling of the perfected appeal of the conference denial of her § 34A claim. For the reasons that follow, we recommit the case for further findings regarding the employee's § 34A claim.

On January 12, 2014, the employee injured her lower back while working as a registered nurse for the employer. The employee's nursing skills include neurosurgery/neurology, telemetry, seizure monitoring and intracranial pressures. (Dec. 5.) The employee received § 34 temporary total incapacity benefits from January 13, 2014, until May 5, 2014, at which point she was placed on § 35 temporary partial

[1] While Judge Harpin also served on this panel, he left the department before this decision was completed.

incapacity benefits at the maximum rate. The self-insurer filed a complaint to further modify the employee's benefits on December 8, 2015, which was denied at a March 11, 2016, § 10A conference. The self-insurer appealed but withdrew the appeal after the employee's § 11A examination.[2]

The employee subsequently filed a claim for § 34 temporary total incapacity benefits or § 34A permanent and total incapacity benefits from May 11, 2016, to date and continuing. A September 20, 2016, § 10A conference order awarded the employee § 34 benefits from May 11, 2016 to date and continuing, and denied the employee's § 34A claim. The self-insurer filed a timely appeal. On June 19, 2017, the originally scheduled hearing date, the judge allowed a hearing postponement so the employee could petition the director for additional time to perfect her appeal of the September 20, 2016, conference order denying the claim for § 34A benefits. (June 19, 2017 Hearing Tr. 6-7.) The director allowed the employee's petition pursuant to G. L. c. 152, § 10A (3),[3] and a hearing de novo commenced on September 25, 2017.[4]

The self-insurer filed a motion to strike the March 17, 2017, § 11A report of Dr. Frank A. Graf based upon his testimony that he no longer maintains an active medical practice. (Graf dep. 30-32.) The judge denied the motion. However, additional medical evidence was authorized due to the complexity of the medical issues involved. (Dec. 4.) The medical reports and the depositions of Dr. Virginia Keefe-Hassett and Dr. Eugenio Martinez were allowed into evidence. (Dec. 2.)

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[2] We take judicial notice of the board file. See Rizzo v. M.B.T.A., 16 Mass. Workers' Comp. Rep. 160, 161 n. 3 (2002).

[3] General Laws c. 152, § 10A(3) provides, in pertinent part:

> Failure to file a timely appeal or withdrawal of a timely appeal shall be deemed to be acceptance of the administrative judge's order and findings, except that a party who has by mistake, accident or other reasonable cause failed to appeal an order within the time limited herein may within one year of such filing petition the commissioner of the department who may permit such hearing if justice and equity require it, notwithstanding that a decree has previously been rendered on any order filed, pursuant to section twelve.

[4] Rizzo, supra.

In his § 11A report, Dr. Graf opined that the employee's incapacity excludes her from performing light or even sedentary work and that a causal connection exists between her workplace accident and incapacity. The judge adopted that opinion. (Dec. 5.) The judge further adopted the causation and ongoing total incapacity opinions of the employee's treating physician, Dr. Virginia Keefe-Hassett. In his hearing decision, the judge ordered the self-insurer to continue to pay the employee § 34 temporary total incapacity benefits as a result of the industrial injury sustained on January 12, 2014. (Dec. 9.) Both parties appealed.

We first address the issues raised by the self-insurer. The self-insurer argues that the § 11A report should have been stricken as vague. Moreover, it argues the § 11A report was improperly admitted in evidence due to the fact that the examiner no longer maintains a clinical practice, and thus does not meet the criteria for a § 11A examiner as set forth by the Health Care Services Board. (Self-ins. br. 7-8.)[5]

We see no abuse of discretion or error of law in the judge's handling of the medical evidence or denial of the self-insurer's motion. Dr. Keefe-Hassett began treating the employee for her industrial injuries in May of 2017. (Dec. 6.) Dr. Keefe-Hassett opined that the employee is totally disabled based on her pain symptoms and limitations,

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[5] In Bolles v. Suffolk Co. Sheriff's Dep't, 27 Mass. Workers' Comp. Rep. 57, 58 n.3 (2013), we noted:

> Pursuant to G. L. c. 152, § 13(3), on March 15, 2003 the Health Care Services Board (HSB) of the Department of Industrial Accidents established eligibility criteria for § 11A(2) impartial medical examiners. The HSB required, inter alia, that said examiners have an active clinical practice, defined as "the treatment of patients a minimum of 8 hours per week or, a combination of 4 hours of patient treatment plus 4 hours of clinical teaching or research per week." See also G. L. c. 152, § 11A(1). On April 9, 2008, the HSB added the following criteria: "If a provider [impartial medical examiner] retires or fails to meet the minimum requirements for active clinical practice after appointment to the impartial roster, he/she may continue serving for the term of the contract and one renewal, but not more than 4 years, at the discretion of the senior judge."

As decisions regarding the appointment of impartial physicians are at the sole discretion of the Senior Judge, we take no position here regarding the qualifications of Dr. Graf, and refer the issue to the Senior Judge for further review and evaluation. See Bolles, supra, at 59 n. 5.

making it impossible for her to perform work duties, whether part- or full-time. The judge adopted that opinion. (Dec. 7-8.) This opinion is consonant with the opinion of the § 11A examiner that the employee was totally disabled and that it was likely her functional restrictions are permanent. (Graf dep. 23.) Any perceived error was harmless given that the impartial's opinion on the employee's extent of disability was consonant with the adopted opinions of the employee's treating physician. Bolles v. Suffolk County Sheriff's Dept., 27 Workers' Comp. Rep. 57, n. 7 (2013).

Turning to the employee's contention that the judge erred in not addressing the claim for § 34A benefits, (Employee br. 3.), we agree that the appeal asserting the § 34A claim had been perfected, and thus should have been properly addressed at hearing. See G. L. c. 152, § 11B; Ramm v. Commonwealth Gas Co., 30 Mass. Workers' Comp. Rep. 137, 144 (2016)(judge must address every issue raised at hearing, including defenses). For the reasons that follow, we recommit the case to the administrative judge for consideration of the employee's § 34A claim.

The June 19, 2017, hearing transcript primarily discusses a postponement to allow the employee the opportunity to perfect a late appeal for § 34A benefits. The director's July 10, 2017, allowance of the employee's request to file the late appeal is contained in the Board file.

However, despite the employee's perfection of the late appeal for § 34A benefits, when the hearing recommenced on September 25, 2017, neither the parties nor the judge made any reference to the § 34A claim. (September 25, 2017 Hearing Tr. 1-7.)[6] The judge's May 1, 2018, hearing decision ultimately recognizes the § 34A claim by specifically noting that the employee's claims are for "Section 34 or 34A." (Dec. 3.) However, the decision then inexplicably notes that, "…the employee procedurally sought to add a new claim for § 34A benefits over the objection of the insurer. The self-insurer's argument is valid and § 34A is not addressed here." (Dec. 3.) This is clearly inaccurate. While the judge might correctly be referencing the procedural state of the case prior to

[6] Rizzo, supra.

the perfection of the late appeal, the employee subsequently perfected that appeal pursuant to § 10A by obtaining leave to file late. The director's allowance is part of the board file, and the judge and all parties were thus on notice of the employee's § 34A claim. The employee's appeal of the Conference Order on July 17, 2017 was timely, as the appeal was filed within one year of the conference and within twenty-days of the director's approval of the employee's request for a Late Filing of Appeal to Hearing pursuant to § 10A(3). Further, the § 34A claim was not a new claim as it was listed on the Employee's Claim Form 110, the Conference Memorandum, and the Hearing Memorandum. Rizzo, supra. The self-insurer's failure to object at any time after that is an effective waiver of that issue on appeal. Green v. Town of Brookline, 53 Mass. App. Ct. 120, 128 (2001)(objections, however meritorious, not raised below are waived on appeal).

Although it might have been good practice for the employee's attorney to raise more about the § 34A claim during the preliminary portion of the hearing on September 25, 2017, the failure to do so does not invalidate or waive the claim. Despite the § 34A claim being properly on the record as part of the employee's overall claim, it was not properly addressed. As a result, the case must be recommitted to the administrative judge for consideration of the § 34A claim.

Because the employee appealed the hearing decision and prevailed, an attorney's fee may be appropriate under § 13A(7). Employee's counsel must submit to this board for review a duly executed fee agreement between employee and counsel. No fee shall be due and collected from the employee unless and until the fee agreement is received and approved by this board.

So ordered.

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Bernard W. Fabricant
Administrative Law Judge

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Martin J. Long
Administrative Law Judge

Filed: **December 13, 2019**