COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 09586-01**

Mondestin Pierre	Employee
Bedford CTF Holdings, Ltd.	Employer
Zurich American Insurance	Insurer

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

APPEARANCES
John Sheehan, Esq., for the employee
Anthony DaDalt, Esq., for the insurer

MCCARTHY, J. The insurer appeals from a decision awarding the employee ongoing § 34 benefits for an accepted industrial injury, which occurred on March 11, 2001. The insurer argues one issue on appeal, contending that the administrative judge erred as a matter of law by denying its motion for additional medical evidence based on its allegation that the § 11A medical evidence was inadequate. We decline to conclude that the judge's denial of the insurer's motion was arbitrary, capricious or contrary to law. We therefore affirm the decision.

Mr. Pierre, an immigrant from Haiti with little ability to speak English, was injured at his job as a kitchen worker, when four heavy trays fell onto his left knee, tearing his lateral and medial meniscis, and injuring his lateral femoral condyle. He underwent surgery about four months later, which resulted in only temporary relief. At the time of the hearing, the employee still experienced knee pain every day. (Dec. 4, 5.)

The employee's claim for compensation went to a full evidentiary hearing on cross appeals of the administrative judge's conference order of benefits. (Dec. 2.) The employee underwent an impartial medical examination, pursuant to

§ 11A(2), on October 9, 2001. The examining physician opined that Mr. Pierre had indeed sustained a tear of the medial and lateral meniscis of the left knee with a traumatic loose body in the lateral femoral condyle, all causally related to the industrial injury. The doctor further opined that Mr. Pierre should not exert a great deal of weight on his left leg due to the defect in the weight-bearing surfaces of the lateral femoral condyle. The judge adopted these opinions. The doctor's prognosis was that the employee would be substantially improved in 6-8 weeks, and he opined that, if the pain is significantly improved, the employee could start more weight bearing at that time. The judge did not adopt these opinions. As to the employee's surgery, which took place three months before the impartial medical examination, the doctor opined at his deposition that it was too early to get an accurate reading of whether there would be a good or bad result, and that he had no information or knowledge about the employee's knee condition after his examination. (Dec. 6-7.) The judge ruled that the impartial medical evidence was adequate in regard to the doctor's present medical disability and causal relationship opinions, rejecting the insurer's argument that that opinion did not adequately address the period of claimed incapacity after the examination.[1] (Dec. 6-7.)

The judge concluded that the employee was temporarily and totally incapacitated, based on the impartial physician's opinion that the employee could perform only sedentary work, the employee's credible complaints of continuing pain, and his vocational profile of limited education and limited ability to communicate in English. (Dec. 7.)

The insurer on appeal pursues its argument regarding the inadequacy of the impartial medical evidence for the period subsequent to the examination. The

[1] The judge did allow, on his own initiative, additional medical evidence for the period prior to the § 11A examination, due to the lack of an opinion on disability for that "gap" period. (Dec. 3.) The judge did not rely on the medical documents submitted pursuant to his ruling, (Exhibit 3), and the insurer raises no issue on appeal with respect to this action.

insurer points to the seven months between the § 11A medical examination and the hearing, and the fact that the employee was recovering from surgery at the time of the examination. The surgery had taken place three months prior to the § 11A examination. The judge's response to the insurer's concerns was as follows:

> Dr. Hewson opined that the timing of the examination was too early to get an accurate reading of whether this man is going to have a good or bad result (Id. at 35), and that he did not know what happened to the employee after the impartial examination (Id. at 43). The question of the medical end result is distinct and different from the extent of present disability. The very nature of scheduled matters in this Department necessarily means that an impartial examination will reflect issues at a particular point in time, even though further improvement, or deterioration, might occur.
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> However, I find that, even if the additional medical reports had been admitted, Dr. Hewson testified he could not tell who had prepared the report indicating the employee was recovering (Id. at 39, 40).
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> The impartial examination had been performed some three months following surgery, and the employee was on partial weight bearing at the time of the examination. The insurer argued that the impartial report was inadequate, and moved to introduce additional medical evidence. I find, however, that Dr. Hewson's report contains the essential elements required by § 11A. On the basis of Dr. Hewson's report alone, I find the employee's disability from his regular employment is total, that the employee was capable of very little walking, and that the doctor expected improvement "*if* the pain is significantly improved, he could start more weight bearing." I was not persuaded by the insurer's argument for opening up the medical evidence for the period subsequent to the impartial examination.

(Dec. 6-7; emphasis in original.)

We cannot say the judge's denial of the insurer's motion was arbitrary, capricious or contrary to law. § 11C.[2] The judge was correct to note that, short of

[2] On the other hand, we are not suggesting that it would have been error if the judge allowed the motion.

the employee having reached a medical end result, a hearing will *always* take place while the employee is in a period of recovery from the industrial accident, thereby rendering the earlier impartial examination less than current. The insurer urges that the employee underwent surgery three months *before* the impartial examination, thereby complicating the assessment of the extent of medical disability. While there is something to the argument, we are unwilling to extend our § 11A inadequacy analysis to include such a fact pattern as a matter of law. The present case is unlike those cases in which there was an event, surgery or development of sequelae *subsequent* to the impartial examination that could trigger entitlement to additional medical evidence. Cf. Deleon v. Accutech Insulation & Contract, 10 Mass. Workers' Comp. Rep. 713 (1996); Escalante v. Reidy Heating and Cooling, 17 Mass. Workers' Comp. Rep. ___ (May 20, 2003); McCoy v. C & S Wholesale Grocers, 15 Mass. Workers' Comp. Rep. 356 (2001). Moreover, while the insurer is correct that the lapse of time between the impartial examination and the hearing – seven months – is perhaps longer than desirable, we agree with the judge that such is the nature of scheduling § 11A examinations. Nonetheless, if we were to simply say that a lapse of, say, more than six months between the § 11A examination and the hearing entitles the parties to additional medical evidence on the basis of the staleness (inadequacy) of the § 11A report, we would create an incentive to delay, and effectively eviscerate the statute for a great many of the cases subject to the statute. We do not think that such an interpretation is warranted.

Accordingly, we affirm the decision. The insurer, of course, may file a complaint to discontinue or modify benefits at any time.

We award the employee a § 13A(6) fee in the amount of $ 1,273.54.

So ordered.

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William A. McCarthy
Administrative Law Judge

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Susan Maze-Rothstein
Administrative Law Judge

Filed: **August 13, 2003**

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Martine Carroll
Administrative Law Judge