COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS	**BOARD NO. 51554-95**
Richard M. Opper, D.C.	Claimant
Pauline A. Lincoln	Employee
Monson Developmental Center/Dept of Mental Retardation	Employer
Commonwealth of Massachusetts	Self-Insurer

REVIEWING BOARD DECISION
(Judges McCarthy, Wilson and Smith)

APPEARANCES
Terence H. Buckley, Esq., for the self-insurer
Richard M. Opper, D.C., pro-se

MCCARTHY, J. Pauline Lincoln worked at Monson Development Center, a facility operated by the Department of Mental Retardation of the Commonwealth of Massachusetts. On December 21, 1995, Ms. Lincoln sustained an industrial injury arising out of and in the course of her employment. She was out of work for a closed period and was paid weekly incapacity benefits by the self-insurer.

Immediately following the accident, the employee received medical treatment at Mary Lane Hospital in Ware, Massachusetts. On February 23, 1996, she was referred to Richard M. Opper, a chiropractor. Doctor Opper treated the employee from that date until July 10, 1996. The Commonwealth paid for chiropractic treatment through March 25, 1996, but refused payment for treatment rendered after that date. Doctor Opper filed a claim for a payment of the treatment he provided and following a conference on that claim, an administrative judge directed payment for the chiropractic treatment through July 1996 at applicable board rates. The self-insurer complied with the order and made payment to Dr. Opper. It also appealed the conference order and asserted its right to a hearing under § 11. At some point prior to the hearing, the self-insurer requested an

impartial medical examination. The judge refused an impartial examination because "the treatment period was long since over, and the review would be little more than a records review." (Dec. 1.)

When the case came on for hearing under § 11, the self-insurer renewed its objection to the judge's refusal to order an impartial examination. The judge overruled the objection, the self-insurer took exception to the ruling in order to preserve the issue for appeal. (Dec. 1.) Having taken exception to the judge's ruling, "the insurer did not otherwise contest the order of payment." (Dec. 1.) The judge then issued a hearing order directing payment of the treatment rendered by Dr. Opper through July 1996 at applicable board rates. (Dec. 2.) We have the case on appeal by the self-insurer.

As framed by the self-insurer in its brief, the single issue for the reviewing board is "Whether the administrative judge was entitled to refuse the insurer's request for an impartial medical examination." (Self-Insurer's brief 3.) In support of its contention that the judge erred by refusing to order an impartial medical examination, counsel for the self-insurer directs us to 452 Code Mass. Regs. § 1.02. This is the definitions section of the board regulations governing dispute resolution at the Department of Industrial Accidents. One of these definitions describes three circumstances where a § 11A impartial medical examination is <u>not</u> necessary.[1] The self-insurer argues that since the dispute before the judge does not fit one of the three excluded categories, an impartial

[1] The definition reads as follows:
<u>Disputes Over Medical Issues</u> as used in M.G.L. c. 152, § 11A(2), shall not include any case in which the parties:
(a) disagree solely regarding the entitlement to weekly benefits concerning a specific period or periods of disability, including death, which occurred prior to the hearing scheduled pursuant to M.G.L. c. 152, § 11;
(b) disagree regarding the liability of the named insurer for any claimed injury; provided, however, that the parties agree that no impartial physician's report is required;
(c) agree upon both the partial nature and the duration of the disability as well as the causal relationship between the disability and the employment; provided, however, that the parties agree that no impartial physician's report is required.

medical examination should have been ordered.[2] For the reasons which follow we deny and dismiss the self-insurer's appeal and affirm the decision of the administrative judge.

There are two sections of c. 152, which provide for impartial medical examinations. Under §11A(2), when any claim or complaint involving a dispute over medical issues is the subject of an appeal of a conference order the parties shall agree upon an impartial medical examiner from the appropriate roster and submit the chosen name to the administrative judge who shall order an examination by that physician. Failing such agreement, the judge shall appoint the examiner from the roster of medical experts developed by the department. The report of the § 11A medical examination shall, where feasible, determine:

> (i) whether or not a disability exists, (ii) whether or not any 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.

Although there is no express reference to disputes over the reasonableness of medical treatment in § 11A, a dispute over medical treatment is "a dispute over medical issues." Thus, if there were no other provision in c. 152 for resolving disputes over medical treatment by use of an impartial medical examiner, it would seem that § 11A would be the proper vehicle. However, there is another statutory provision which deals expressly with disputes about medical treatment, which is the situation in this case.

Section 8(4) reads in pertinent part as follows:

> At any time subsequent to the filing of a claim or complaint solely regarding the reasonableness or necessity of a particular course of medical 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

[2] Although the self-insurer does not say so explicitly, the self-insurer obviously wanted a § 11A exam since the regulation which forms the basis of the argument has to do with § 11A only.

> 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].

In the occasional case then where the sole issue in dispute is the reasonableness or necessity of a particular course of medical treatment, the procedure to be followed is set out in § 8(4) – a procedure quite different from the one prescribed by § 11A. Under § 8(4) the request for the appointment of an impartial medical examiner goes to the senior judge, who must satisfy himself that the reasonableness and necessity of medical treatment is indeed the only issue. In contrast, the appointment of a § 11A impartial examiner is the administrative judge's responsibility. The § 8(4) examination may be requested "[at] any time subsequent to the filing of a claim or complaint." The § 11A examination may only be requested within ten days after filing an appeal from a conference order. The § 11A examiner must, where feasible, render an opinion on medical disability and causal relationship. Under § 8(4) the impartial physician "shall determine the appropriateness of any medical treatment claimed or denied by the parties." While the reports under §§ 11A and 8(4) are both prima facie, § 11A provides " . . . that the administrative judge may, on his own initiative or upon a motion by a party, authorize the submission of additional medical testimony when such judge finds that said testimony is required due to the complexity of the medical issues involved or the inadequacy of the report submitted by the impartial medical examiner." There is no such specific limitation on the medical evidence under § 8(4).

In the case before us on appeal, counsel for the self-insurer did not specify the section under which he was demanding an impartial medical exam. Since he made demand of the administrative judge for the examination, we must conclude that his request for an impartial was made under the provisions of § 11A. As the dispute was solely over medical treatment, the request should have been directed to the senior judge

under § 8(4). The administrative judge had no authority to appoint a § 8(4) impartial medical examiner. Since the hearing judge had no authority to order an examination under the correct section of the Act, a priori he did not err in failing to do so.

The decision of the hearing judge is affirmed.

_____
William A. McCarthy
Administrative Law Judge

Filed: May 11, 1999

_____
Sara Holmes Wilson
Administrative Law Judge

_____
Suzanne E.K. Smith
Administrative Law Judge