COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 042215-98**

Richard Anzalone	Employee
Circuit City	Employer
Travelers Insurance Co.	Insurer

REVIEWING BOARD DECISION
(Judges McCarthy, Costigan and Carroll)

APPEARANCES
Dennis E. McMahon, Esq., for the employee
Vincent M. Tentindo, Esq., for the insurer at hearing
John J. Canniff, Esq., for the insurer on appeal

MCCARTHY, J. The employee appeals from a decision in which an administrative judge discontinued payment of § 34 benefits stemming from an August 15, 1998 work injury as of the date of the § 11A medical examination, June 25, 2001, and denied the employee's claim for § 34A benefits. The employee on appeal argues that the decision flies in the face of our construction of § 11A set out in Ruiz v. Unique Applications, 11 Mass. Workers' Comp. Rep. 399 (1997)(impartial medical opinion that falls outside the medical dispute delineated by parties' medical evidence submitted for review pursuant to § 11A(2) is inadequate). We agree with the employee that the judge did not address the Ruiz issue in relation to the retroactive discontinuance of § 34 benefits, from June 25, 2001 until exhaustion on October 29, 2001. We therefore reverse the order of discontinuance, and recommit the case for a reassessment of that period of disputed incapacity with the Ruiz principles in mind. We otherwise affirm the decision.

Mr. Anzalone slipped on wet plaster at work, twisting his upper body, and injuring his neck, right shoulder and left heel. He experienced pain radiating down his right arm to his right hand. (Dec. 4.) The insurer accepted liability and paid weekly benefits. (Dec. 2.) The employee treated with a number of doctors, and underwent an MRI,

myelogram, CAT scan, EMGs, and nerve conduction studies. On March 22, 1999, the employee had an anterior cervical discectomy and interbody fusion at the C5-6 level to relieve symptoms of radiculopathy and myelopathy. Despite the surgery, the employee continued to experience pain, now with radiation to both arms and hands. The employee underwent more studies, and had three trigger point injections which had no beneficent effect. (Dec. 4-6.)

The employee was evaluated by the insurer's neurologist, Dr. Levine, who opined that the neck surgery had provided no benefit, and that there was no correlation between the employee's symptoms, his physical findings and his test results. (Dec. 6.) Dr. Levine considered that the employee was partially disabled. (Levine Report, September 1, 2000, p. 6.)[1]

The insurer filed a complaint for modification of weekly benefits, which the judge denied in a § 10A conference order dated May 3, 2001. (Dec. 2-3.)[2] The employee claimed § 34A benefits in the conference memorandum of the same date, which we judicially notice, although the judge's order made no reference to that claim. See Rizzo v. M.B.T.A., 16 Mass. Workers' Comp. Rep. 160, 161 n.3 (2002). The insurer appealed, and the employee underwent a medical examination pursuant to § 11A(2) on June 25, 2001. The impartial physician diagnosed the employee with acute right cervical strain, resolved, and multiple continuing somatic complaints without obvious organic cause. The doctor causally related the right cervical strain to the employee's incident at work, but opined that the employee's symptoms at the time of the examination were nonorganic and inconsistent with the injury described. The doctor was of the opinion that the

[1] Although Dr. Levine's report was not in evidence, it is necessary to refer to it, as the employee's entire appellate argument fundamentally rests on its contents. It was attached to the Employee Brief as Exhibit 1, and the insurer does not contest the employee's inclusion of the report in his appeal.

[2] The judge erroneously identified the insurer's complaint as being a request for modification or discontinuance of benefits. (Dec. 3.) On the contrary, the insurer requested only a modification, based on Dr. Levine's opinion of partial disability, as that medical report would not support a request to discontinue benefits altogether. See Insurer's Complaint for Modification, D.I.A.

employee had reached a medical end result, with no disability, and that he could return to work without restrictions. (Dec. 8.)

The judge allowed the employee's motion for additional medical evidence on the basis of medical complexity. (Dec. 8.) The employee submitted records and reports of his treating physicians. (Employee Ex. 4.) The employee drew the judge's attention to the issue of the parameters of the medical dispute addressed in Ruiz, supra, in a letter date January 30, 2002 (copied to the insurer's counsel), which is located in the board file. See Rizzo, supra. The insurer did not submit any medical evidence. (Dec. 9.) The employee's § 34 benefits were exhausted as of October 29, 2001, at which time the insurer terminated payments of weekly benefits of any kind. The judge noted at the outset of the November 1, 2001 present disability hearing that the employee's § 34A claim was joined. (Tr. 3.)

The judge did not find the employee to be a credible witness. (Dec. 9.) She adopted the opinions of the impartial physician, (Dec. 9-10), and retroactively discontinued the employee's weekly benefits as of the date of the impartial medical examination, June 25, 2001. (Dec. 10.) The judge made no mention of the employee's § 34A claim.

The employee argues on appeal that this case is governed by Ruiz v. Unique Applications, 11 Mass. Workers' Comp. Rep. 399 (1997). There we concluded that an opinion of a § 11A medical examiner that expanded the scope of the medical dispute, which the parties brought to the impartial medical examiner through their own medical evidence, was inadequate as a matter of law, necessitating the allowance of additional medical evidence. Id. at 402. The employee points out that the scope of the medical dispute in this case was only as to the extent of disability from partial to total, because the insurer's examiner, Dr. Levine, considered that the employee was partially disabled by his work related impairment. Therefore, the employee argues, the judge erred by adopting

---

Form 108, dated January 20, 2001, along with Dr. Levine's report attached to Employee Brief, and marked as Exhibit 1.

the opinion of the impartial physician that he was no longer disabled. We agree with the employee, but only to a point.

Insofar as the hearing had as its subject, in part, the insurer's complaint for modification (the filing of which commenced the present proceeding), the judge should have addressed the Ruiz issue in her decision. Under the specific terms of § 11A(2), the "dispute over medical issues" must be initially identified in order for the claim or complaint to be subject to the statute. The legislature's intention in enacting § 11A was to "*minimize* situations where 'dueling doctors' present conflicting medical evidence concerning . . .the degree of disability." Scheffler's Case, 419 Mass. 251, 257 (1994)(emphasis added). The § 11A physician's *widening* of that medical conflict, when not explainable by the passage of time resulting in a change in the employee's medical condition, "is antithetical to a reasonable implementation of the statute." Ruiz, supra, at 402.

> Our system of dispute resolution is out of focus – and will harm employees as well as insurers – if we allow it to broaden rather than narrow areas of disagreement and increase rather than decrease the unpredictability of outcome in a case.
>
> . . .
>
> If there is to be any stability and predictability at hearing, the § 11A examiner should be told exactly what is in dispute and his opinion, if it is to be found adequate, should fall somewhere within the extremes of the [parties' experts'] conflicting opinions . . . We must assume that the legislature positioned the § 11A exam at step three of the dispute resolution process advisedly. By placing the exam later rather then earlier, the legislature left it to the parties to develop the nature and extent of the medical dispute.

Ruiz, supra at 402-403 (footnote omitted). See O'Brien's Case, 424 Mass. 16, 21 (1996), citing Murphy v. Commissioner of the Dep't of Indus. Accidents, 415 Mass. 218, 223-225 (1993)("At the hearing, the [impartial] report constitutes prima facie evidence of disputed medical issues.") Since the Ruiz problem emerged from the medical matrix underlying the insurer's complaint for modification, the period of incapacity put at issue by that complaint – from the June 25, 2001 examination until the October 29, 2001

exhaustion of § 34 – needed to be analyzed with the Ruiz precepts in mind.[3] Since we are unable to determine if the judge had Ruiz in mind at all, given the decision as it stands, recommittal is appropriate.[4] Crowell v. New Penn Motor Express, 7 Mass. Workers' Comp. Rep. 3, 5 (1993); § 11C.

However, we do not agree with the employee that his affirmative claim for § 34A permanent and total incapacity benefits, joined to the insurer's retroactive modification complaint at hearing, (Tr. 3), should be affected in any way by the Ruiz issue. The insurer never agreed to any extent of *ongoing* incapacity at the hearing, and merely checked "disability, and extent thereof" and "causal relationship" on its issues sheet, along with specifically denying § 34A. (Insurer Ex. #1.) The joined claim for § 34A benefits was a separate and independent claim, requiring somewhat different proof (i.e., permanence) from that presented with regard to the insurer's complaint for retroactive modification, and cannot fairly be constrained by the same concerns under Ruiz that legitimately emerged from that complaint. See Medley v. E.F. Hauserman Co., 14 Mass. Workers' Comp. Rep. 327, 330-331 (2000); Russell v. Red Star Express Lines, 8 Mass. Workers' Comp. Rep. 404, 407 (1994). Accord Conroy's Case, 61 Mass. App. Ct. (2004)(relative to "prevailing" under § 13A(5), absence of insurer's limitation of ongoing disputed incapacity on its appeal of conference order meant that full range of that benefit entitlement was in jeopardy); Connolly's Case, 41 Mass. App. Ct. 35, 37 (1996)(same). As such, we conclude that the judge's denial of the employee's § 34A claim, supported as it was by sufficient findings of fact based on the evidentiary record, evinces no error.

---

[3] Because the insurer has not appealed the decision, the payment of § 34 benefits between the filing of its Complaint for Modification in January 2001 and the impartial examination in June 2001, put into dispute by that complaint (see Cubellis v. Mozzarella House, Inc., 9 Mass. Workers' Comp. Rep. 354, 356 [1995]), is no longer at issue.

[4] We acknowledge the insurer's argument that the employee has already received the very remedy that a Ruiz violation provides, namely, the right to introduce additional medical evidence on all issues. Our concern, however, regards the judge's failure to address the appropriately raised Ruiz problem and to articulate a reason or reasons for adopting the impartial medical opinion on disability, notwithstanding Ruiz. See, e.g., id. at 402-403 (change of medical condition due to passage of time).

Accordingly, we reverse the decision in part and transfer the case to the senior judge for reassignment to a new administrative judge and a hearing de novo on the June 25, 2001—October 29, 2001 period of incapacity, consistent with this opinion.[5] We otherwise affirm the decision.

So ordered.

_____
William A. McCarthy
Administrative Law Judge

Filed: **July 1, 2004**

_____
Patricia A. Costigan
Administrative Law Judge

_____
Martine Carroll
Administrative Law Judge

[5] The administrative judge who wrote the decision on appeal no longer serves with the department.