COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 009778-97**

Richard Blais	Employee
BJ's Wholesale Club	Employer
CNA Insurance Co.	Insurer

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

APPEARANCES
Dennis P. Bisio, Esq., for the employee
Darren I. Goldberg, Esq., for the insurer

WILSON, J. The parties cross-appeal from a decision in which an administrative judge awarded the employee G. L. c. 152, § 34, benefits for temporary, total incapacity to exhaustion, and ongoing § 35 partial incapacity benefits thereafter. We summarily affirm the decision as to the employee's challenge to the judge's assignment of an earning capacity. We affirm the decision as to the insurer's appeal for the reasons that follow.

The employee suffered an industrial back injury that developed as a result of spending a considerable amount of time with his head and neck turned backwards, with his back twisted, driving a forklift backwards, as was required by the employer. As of March 17, 1997, the employee could no longer drive backwards because of his low back and right leg pain. (Dec. 4.) The insurer paid the employee without prejudice until August 1, 1997. The employer requested that the employee return to work, but the employee's pain was too great. On December 15, 1997, the employer terminated the employee, (Dec. 5), and the employee filed a claim for compensation benefits on December 17, 1997. (Dec. 2.) The employee's claim was not conferenced until August

28, 2000, when a prospective order of § 35 benefits issued. Both parties appealed to a full evidentiary hearing. (Id.)

On November 6, 2000, the employee underwent a § 11A impartial medical examination by Dr. Louis A. Fuchs, an orthopedic surgeon. Dr. Fuchs diagnosed chronic lumbosacral myofascitis and radiculitis. The doctor was unable to explain the employee's symptomatology on an orthopedic basis. He opined that the employee's driving backward produced symptoms for some three to six months, but certainly not for almost four years. He felt the employee had the ability to return to his job, with the restrictions that he not lift over thirty pounds, and not sit for more than one hour at a time. Dr. Fuchs could not attribute all of the employee's pain to his work-related injury. (Dec. 6.) The judge, on his own initiative, allowed the parties to introduce additional medical evidence on the basis of the inadequacy of Dr. Fuchs' medical report and the gap periods prior to and after the November 6, 2000 examination. See G. L. c. 152 § 11A(2). The insurer elected to depose Dr. Fuchs, which deposition was held on July 31, 2001. (Dec. 3.)

The employee submitted medical records and reports of his treating physicians, who causally related the employee's complaints to the industrial injury, and considered that the employee had been totally disabled for three years as a result. The judge adopted those opinions. (Dec. 7-8; 10-12.) The judge rejected the opinion of the impartial physician, Dr. Fuchs, that the employee was no longer disabled, and that the employee's disability was no longer causally related to the industrial injury. (Dec. 11.) The judge also rejected the opinions of the insurer's physicians in part, but adopted the opinion of Dr. Derbyshire as to the employee's extent of disability at least as of the date of his examination of the employee, September 7, 2000. At that time, Dr. Derbyshire felt the employee could perform a modified job. The judge based his assignment of a weekly $240.00 earning capacity, as of September 7, 2000, on that opinion. (Dec. 12.)

The insurer argues that the judge erroneously ruled that the medical opinion of the impartial physician, Dr. Fuchs, was inadequate. The insurer cites Shand v. Lenox Hotel, 14 Mass. Workers' Comp. Rep. 152 (2000), for the proposition that the judge's authority

to allow additional medical evidence under § 11A(2), on the basis of the inadequacy of the impartial physician's opinion, is not without bounds. Id. at 154-155. While we agree with the proposition stated in Shand, supra, it has no application in this case, due to the insurer's failure to timely object to the judge's ruling. The issue, therefore, has not been preserved for appellate review. See Viveiros' Case, 53 Mass. App. Ct. 296, 299-300 (2001)(court declined to review adequacy of impartial opinion on appeal, where employee had not moved to expand medical record on the basis of inadequacy); Lyons v. Chapin Ctr., 17 Mass. Workers' Comp. Rep. ____ (January 13, 2003)(following Viveiros, supra).

At the commencement of the hearing, the judge, on his own initiative, ruled that additional medical evidence could be introduced effectively without limitation, based on the report's inadequacy as to causal relationship and disability for the entire period of the incapacity claimed, both for the pre-examination "gap" and ongoing present incapacity:

> Now, prior to coming on the record, I indicated to you that there were a number of things I was contemplating doing on my own motion. Noticing that there are some three years in time for which benefits are at issue prior to the date of the Fuchs examination and that there's a good seven months since then it seems appropriate just based upon that upon the need for me to have evidence to address those periods of time that there has to be additional medical evidence both certainly pre- and post-Fuchs.
>
> Now, I also raise, since I was evaluating the Fuchs' report as evidence on this central issue to the claim evidence before me, that in my mind that there were other inadequacies to Dr. Fuchs' examination, specifically, the manner in which he addressed causal relationship and disability even at the time of a snap shot were such that those things raised questions as well as answering questions. And so for those reasons as well I thought it appropriate for there to be additional evidence.
>
> Now, not to steal your thunder but prior to coming on the record Mr. Goldberg was indicating his position as far as the time period since November of 2000. That it was his hope that the deposition being taken to cross-examine Dr. Fuchs that he's indicated his desire to pursue would give Dr. Fuchs the opportunity to either, I suppose, fill in at least some of those holes and at least clear up certain inadequacies to his opinion at least as to the time period that he saw Mr. Blais. And I don't know if you want to elaborate on that or you are satisfied with my rendition of what you were speaking to before.

(Tr. 11-12.) Counsel for the insurer replied:

> I'm satisfied, Judge. Just to clarify my position is that I believe that the deposition of Dr. Fuchs would act as his final opinion on the issues involved in the case and that at deposition questions could be asked about causal relationship and any other inadequacies that might be on his report and face and that *after deposition that afterwards the parties could present motions if they felt to have it found inadequate or objections to motions of inadequacy.*

(Tr. 12, emphasis added.) After hearing briefly from the employee's counsel, the judge then reiterated that he was allowing "evidence to come in on all issues for all periods of time pre- and post-Fuchs." (Tr. 13.)

The course of the procedural discussion can be summarized thusly. The judge ruled that the impartial report was inadequate. The insurer would take the impartial doctor's deposition and, if the deposition testimony cured some or all of the report's inadequacies, the insurer would follow up with a motion as appropriate.[1]

Hence, it comes as somewhat of a surprise that nothing in the record or board file indicates that the insurer ever took that necessary last step; it did not file post-deposition objections to the judge's ruling of inadequacy. Under these circumstances, the insurer cannot now be heard to complain that Dr. Fuchs' prima facie opinion should have taken the day as a matter of law. "In the absence of an objection the judge was not given an opportunity to make corrections [in his ruling allowing additional medical evidence] which might have been necessary had the asserted errors been brought to his attention in a timely manner, and the [insurer is] therefore precluded from complaining on appeal" that the judge's handling of the medical evidence was erroneous. Kinchla v. Welsh, 8 Mass. App. Ct. 367, 373-374 (1979).[2] As the record stands and as the statute allows, the judge's adoption of the employee's treating physician's opinions over that of the impartial physician is simply a matter of his clear authority to adopt whatever competent

[1] We acknowledge that counsel for the insurer stated that he would file objections to any *motions* for inadequacy post-deposition. We can only understand this to be a misstatement, as the judge had already ruled that the report was inadequate on his own initiative.

[2] As the issue is raised only on appeal, we do not take a position as to whether the allowance of a motion for inadequacy prior to taking the announced deposition is correct as a matter of law.

medical evidence he finds most persuasive, in the absence of any objection or motion to strike subsequent to the deposition.

> Nothing in § 11A . . . requires the administrative judge to adopt the conclusions of the [§ 11A] report or precludes him from considering additional medical evidence once it becomes part of the record. Indeed, "prima facie evidence may be met and overcome by evidence sufficient to warrant a contrary conclusion." Anderson's Case, supra at 817. Once properly admitted, the probative value of medical testimony is to be weighed by the fact finder, in this case, the administrative judge. Robinson v. Contributory Retirement Appeal Bd., 20 Mass. App. Ct. 634, 639 (1985). [citation omitted]. Thus it is "within the province of the [administrative judge] to accept the medical testimony of one expert and to discount that of another." Fitzgibbons's Case, 374 Mass. 633, 636 (1978).

Coggin v. Massachusetts Parole Bd., 42 Mass. App. Ct. 584, 589 (1997). There was no error.

The insurer also argues that the judge erred by failing to apply the § 1(7A) standard of "a major" causation, which the insurer appropriately raised at hearing. (Insurer's Defense Sheet.)[3] We agree that the decision lacks any findings on the § 1(7A) major causation issue. There is no error, however, in light of the uncontroverted medical testimony that the employee's degenerative disc disease did not actually constitute a "pre-existing condition, which resulted from an injury or disease not compensable under this chapter." § 1(7A).

The only medical evidence addressing the nature of the employee's pre-existing degenerative disc condition was that of Dr. Fuchs, the impartial physician:

> Q: Did the employee have any signs of preexisting problems in his MRI or EMG?
>
> A: Well, those findings in his EMG are not usually pathologic findings; that is, they don't usually produce symptoms. *Everyone has this disc bulging, and everyone after about age 25 or 30 will develop some degenerative disc disease.*
>
> Q: Doctor, is it true that degenerative disc disease is a preexisting condition?

[3] The judge did not acknowledge the insurer's defense sheet.

A: *I don't want to say that the disc disease as noted is an illness or pathologic because it's just most often like wrinkling of the skin or graying of the hair.*

(Dep. 21; emphasis added.) The doctor's emphasized testimony above indicates that this employee's pre-existing condition was not pathologic – it was not of the nature an illness or disease.[4] We take from the testimony that the doctor's opinion was that this employee's degenerative disc condition, i.e, disc bulging, was essentially *normal* for a person of his fifty-two years, in the same manner as gray hair and wrinkles would also be normal. As age is not a pre-existing illness or disease, we therefore consider that the first element of § 1(7A)'s application was missing in this case. See Errichetto v. Southeast Pipeline Contractors, 11 Mass. Workers' Comp. Rep. 88, 91 (1997)(age cannot be considered as a § 1(7A) "pre-existing condition"). The judge's failure to address the issue evinces no prejudicial error.

We summarily affirm the decision as to the insurer's other appellate arguments.

Accordingly, the decision is affirmed. We award an attorney's fee in the amount of $1,273.54.

So ordered.

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Sara Holmes Wilson
Administrative Law Judge

Filed: **May 15, 2003**

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Susan Maze-Rothstein
Administrative Law Judge

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William A. McCarthy
Administrative Law Judge

[4] Dorland's Medical Dictionary (26th ed. 1985) defines "Disease" as "any deviation from or interruption of the normal structure or function of any part, organ, or system (or combination thereof) of the body that is manifested by a characteristic set of symptoms and signs and whose etiology, pathology, and prognosis may be known or unknown."