COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO.:** 029974-04

Richard Higgins	Employee
Town of Maynard School Department	Employer
Massachusetts. Education and Govt. Assoc.	Insurer

REVIEWING BOARD DECISION

(Judges McCarthy, Horan and Fabricant)

The case was heard by Administrative Judge Heffernan.

APPEARANCES|

Edmund P. Hurley, Esq., for the employee
Robert J. Riccio, Esq., for the self-insurer
Holly B. Anderson, Esq., for the self-insurer on appeal

McCARTHY, J. The employee appeals from a decision terminating payment his § 35 partial incapacity benefits as of the date of his impartial medical examination. Finding merit in two of the employee's arguments, we recommit the case for further proceedings and findings.

On July 14, 2004, the employee, who suffered from pre-existing degenerative disc disease and spondylolisthesis, injured his back at work. The self-insurer appealed the conference order awarding a closed period of § 34 benefits followed by ongoing payments of § 35 benefits. (Dec. 3-4.)

On May 2, 2005, at the behest of the self-insurer, pursuant to G. L. c. 152, § 45,[1] the employee was examined by Dr. William Shea. On July 8, 2005, the employee filed a motion to compel the

[1] General Laws c. 152, § 45, provides, in pertinent part:

> After an employee has received an injury, and from time to time thereafter during the continuance of his disability he shall, if requested by the insurer or insured, submit to an examination by a registered physician, furnished and paid for by the insurer or the insured. The employee may have a physician provided and paid for by himself present at the examination. If a physician provided by the employee is not present at the

self-insurer to provide him with a copy of Dr. Shea's report. The judge never acted on the employee's motion to compel,[2] and the self-insurer has refused to provide the employee with a copy of the report.[3]

On July 12, 2005, the employee, pursuant to G. L. c. 152, § 11A, was examined by Dr. Nabil Basta. Dr. Basta was deposed on October 25, 2006. He opined the employee suffered a work-related aggravation of his pre-existing conditions, which had resolved by the time of his examination. Dr. Basta also opined the employee's ongoing partial medical disability resulted from his pre-existing medical conditions only. (Dec. 4-5.) The judge adopted Dr. Basta's opinion, and ordered the employee's §§ 13, 30 and 35 benefits to "be discontinued as of July 12 th, 2005, the date of the § 11A examination." (Dec. 7.)

Two of the issues the employee raises on appeal are dispositive. He claims he was entitled to receive a copy of Dr. Shea's report, and that the self-insurer's failure to provide it infringed unlawfully upon his due process right to cross-examine Dr. Basta. (Employee br. 6.)

The judge's failure to act on the motion to compel may be taken as a denial, which inference the parties do not dispute. Thus, the first issue before us is whether the employee had a right to discover Dr. Shea's report, when the self-insurer had no intention of utilizing it in defense of the employee's claim for benefits.

Our review of statutory and case law leads us to conclude the employee was entitled to obtain a copy of Dr. Shea's report. We first examine the relevant statutory provisions. General Laws c. 152, § 20, provides, in pertinent part, that "[a]ll medical records and reports of hospitals, clinics and physicians of the insurer, employer or of the employee shall be filed with and open to the

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> examination, it shall be the duty of the insurer to file with the division a copy of the report of its examining physician or physicians if and when such report is to be used as the basis of any order by the division.

[2] Indeed, the judge may have never seen the motion; our review of the board file uncovered no such document. However, at oral argument, the parties agreed the motion was filed on July 8, 2005, well in advance of the deposition of Dr. Basta on October 25, 2006. (Dec. 5.)

[3] The self-insurer has never contended that the employee failed to attend the § 45 examination, or that it does not possess a copy of Dr. Shea's report.

inspection of the division so far as relevant to any matter before it. Such reports shall be open to the inspection of any party." We do not agree with the self-insurer's position that § 20 only applies to reports that the retaining party intends to introduce in evidence, as the statute contains no such limitation.

Next, the self-insurer argues that G. L. c. 152, § 30A,[4] renders the § 45 medical report of Dr. Shea non-discoverable:

> As for § 30A, a plain reading of the statute demonstrates both that § 30A imposes no duty upon the Insurer and that a report need not be filed *if the examining physician does not think there exists a causal relationship to work.* See M.G.L. c. 152, § 30A (providing that "Any medical report pertaining to an injury *which appears to be compensable* shall be furnished by the physician or other medical provider to the employee, the insurer, and the department within fourteen days of completion of the examination of the employee." [emphasis added]). Therefore, the only inference, if any, that can be drawn from a lack of a § 30A filing is that the IME report *supports the order of dismissal.*

(Ins. br. 28; emphases in original). We reject the self-insurer's argument as groundless. Nothing in § 30A, which focuses on an examining physician's duty to *furnish* reports, contradicts the employee's right, as plainly set forth in § 20, to *discover* them. Moreover, it simply makes no sense that such discovery hinges upon the causal relationship opinion contained in the report. If this were the case, there would be no way of enforcing the sanction for failure to comply with reporting requirements, as the department would not have the information available to make a determination as to whether an injury "appears to be compensable."

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[4] General Laws c. 152, § 30A, provides:

> Any medical report pertaining to an injury which appears to be compensable shall be furnished by the physician or other medical provider to the employee, the insurer, and the department within fourteen days of completion of the examination of the employee. Each failure to comply with such reporting requirement shall be punishable by a civil fine to be determined by the director of administration, of not less than twenty-five nor greater than one thousand dollars. A schedule of incremental increases relative to violations shall be determined by the commissioner.

The self-insurer's position is also not advanced by the language of § 45: "[I]t shall be the duty of the insurer *to file with the division* a copy of the report of its examining physician or physicians if and when such report is to be used as the basis of any order by the division." (Emphasis added.) Section 45 is not, as the self-insurer argues, incompatible with the employee's right to obtain the examining physician's report under §§ 20 and 30A. "Rather than mechanically applying the concept that the more 'recent' or more ' specific' statute . . . trumps the other, we should endeavor to harmonize the two statutes so that the policies underlying both may be honored." Commonwealth v. Harris, 443 Mass. 714, 725 (2005). The language of the statute clearly does not govern the question of discoverability of a § 45 medical report; it instead imposes on an insurer the simple duty of *filing* a § 45 report when an insurer (or self-insurer) intends to utilize it at a conference or hearing. We also note that the self-insurer's reliance upon 452 Code Mass. Regs. § 1.11(6), providing that a party may only put into evidence "medical reports prepared by physicians engaged by said party," simply does not address discoverability. No argument regarding the discoverability of the § 45 medical report emerges from this provision.

Finally, in Anzalone v. M.B.T.A., 403 Mass. 119 (1988), the court, in dicta, briefly addressed the question of a self-insurer's refusal to supply copies of numerous § 45 medical reports to the employee. In its discussion of that claim of unfair business and insurance settlement practices, the court alluded: "The status of the compensation claim before the Industrial Accident Board is not before us. We note, however, that Anzalone's right to obtain copies of medical reports is adequately provided for by G. L. c. 152. See, e.g., G. L. 152, Sections 20, 20A and 30A." Id. at 121 n.4. Therefore, we conclude the employee is entitled to obtain a copy of Dr. Shea's medical report.[5]

[5] We hasten to add that the injured worker's right to receive a copy of a report pertaining to a medical examination of his person is consistent with the rights of workers, and patients, to request and receive medical reports under various provisions of the general laws, some of which overlap with the right to obtain same under our workers' compensation statute. These laws include, but are not limited to, G. L. c. 149, § 19A (employer requiring physical exam of employee obligated to furnish employee with copy of medical report from exam); G. L. c. 175, S111F (injured person entitled to copy of medical reports of exams commissioned by insurer under liability policies); G. L. c. 175, § 113J (injured persons entitled to copy of medical reports of exams commissioned by motor vehicle liability insurers); G. L. c. 175I, §§ 8, 10 (insurance companies in possession of medical records obligated to provide same to individuals upon written request); see also Mass. R. Civ. Proc. 35 (right to receive copy of medical examiner's

We now turn to the question of whether Dr. Shea's report, rightly in the employee's possession, would be proper material for cross-examination of the impartial physician. The insurer argues the report, even if discoverable, could not be used in cross-examination because it was not part of the hearing record. The argument is fundamentally wrong.

Section 11A(2) explicitly bars from the record any underlying medical records or reports, which are necessarily part of the foundation of the impartial physician's opinions, absent a judge's ruling of the § 11A report's inadequacy or the complexity of the medical issues; it also grants the parties the right to depose the impartial physician for the purposes of cross-examination at the deposition.[6] **[6]** It is precisely this right to challenge the § 11A physician which insulated the § 11A system from a facial constitutional attack on due process grounds. O'Brien's Case, 424 Mass. 16, 23 (1996). The employee's due process right necessarily involves the use, for purposes of cross-examination, of the underlying foundational materials, such as the non-evidentiary treating and examining doctors' reports and records. Id. To the extent the contents of those underlying medical documents, while not in evidence, are brought into the record through the testimony of the impartial physician, it is a result tolerated by the system as a whole. See Commonwealth v. Jones, 75 Mass. App. Ct. 38, 44 (2009)(court rejected claim that autopsy report, upon which expert testimony was based, should have been introduced in evidence, noting that "virtually the entire . . . report was put in evidence through [the expert's] testimony," in any event). Certainly, a judge would not be free to make findings on and adopt that hearsay

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report for court ordered examinations). Considerations of public health policy also support the right of an individual to receive timely information from medical examiners who may offer other diagnoses which may require prompt, and potentially life-saving, medical treatment.

[6] General Laws c. 152, § 11A(2), provides, in pertinent part:

The report of the impartial medical examiner shall be admitted into evidence at the hearing. Either party shall have the right to engage the impartial medical examiner to be deposed for purposes of cross examination. Notwithstanding any general or special law to the contrary, no additional medical reports or depositions of any physicians shall be allowed by right to any party; provided, however, 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.

foundational material. Nonetheless, the opinions contained in the reports of other physicians are proper fodder for cross-examination, which process safeguards the parties' right to challenge the opinion of the impartial medical examiner.

The point is not lost on us that Dr. Shea's § 45 report was not included in the parties' materials, submitted at conference, and initially sent by the department to the impartial physician. Dr. Shea's report could not likely have been so included as his § 45 examination took place only four days before the § 11A examination. For the purposes of cross-examination, however, we see no distinction between those records and reports forwarded by the department and those obtained later, provided proper notice to the opposing party and the administrative judge is given.[7] (Notice is not a matter of dispute in the present case.) Medical conditions are not static, as we have frequently noted. See e.g., Pagnani v. Demoulas/ Marketbasket, 9 Mass. Workers' Comp. Rep. 4, 5 (1995). We decline to construe § 11A in a manner to render the impartial medical examiner scheme unequipped to address the oft-changing medical picture during the course of litigation, by mandating that medical evidence be frozen as of the date of the medical examination. To emphasize the point once more, absent a judge's allowance of additional medical evidence, *none* of the underlying materials reviewed by the impartial doctor are included in the evidentiary record; it is of no consequence whether the doctor's review takes place at the time of the examination or at the deposition months later.

Insofar as the self-insurer argues the § 45 report could not be used as a foundation for the § 11A physician's opinion, because the examining party, the employee, had no unilateral right to introduce it as evidence under 452 Code Mass. Regs. § 1.11(6), we disagree. The governing authority here is Dept. of Youth Servs. v. A Juvenile, 398 Mass. 516 (1986). In that case the court announced its flexible rule regarding foundational materials for expert opinion evidence: that such hearsay materials need not be in evidence; they only need to be independently

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[7] See 452 Code Mass. Regs. § 1.14(2), which provides, in pertinent part:

> Once the impartial physician has been selected or appointed, the administrative judge shall submit to the impartial unit all approved medical records, any hypothetical fact patterns and any stipulations of fact for transmission to the impartial physician. No party or representative may initiate direct, ex parte communication with the impartial physician and shall not submit any form of documentation to the impartial physician without the express consent of the administrative judge.

admissible, and of the sort on which experts in the field reasonably would rely in reaching their opinions. Id. at 532.[8] Clearly the report of another physician regarding the employee's medical status during the period of disability in dispute is the type of foundational material upon which an expert physician would rely. As to whether the report is "independently admissible," that concept is to be construed broadly:

Regarding Section 703(c), in determining whether facts or data are independently admissible, it is not whether the forms in which such facts or data exist satisfy evidentiary requirements. Rather, the court will determine whether the underlying facts or data would potentially be admissible through appropriate witnesses.

Massachusetts Guide to Evidence, 2008-2009 Edition, supra; see Anthony's Pier Four, Inc. v. HBC Assocs., 411 Mass. 451 (1991)(expert could rely on hearsay real estate "comparables," as "the direct testimony of these parties [to the comparable transactions], had it been offered, would have been independently admissible"). Cf. Commonwealth v. LeFave, 408 Mass. 927, 928 n.2 (1990)(highly prejudicial and irrelevant pornographic photographs, which would never be admissible at trial, improper foundation for Commonwealth expert opinion).

[8] A Juvenile was the basis for Proposed Rule of Evidence 703:

> The facts or data in the particular case upon which an expert witness bases an opinion or inference may be those perceived by or made known to the witness at or before the hearing. These include (a) facts observed by the witness or otherwise in the witness's direct personal knowledge; (b) evidence already in the record or which the parties represent will be presented during the course of the proceeding, which fact will be assumed to be true in questions put to the witness; and (c) facts or data not in evidence if the facts or date are independently admissible in evidence and are a permissible basis for an expert to consider in formulating an opinion.

See Flaschner Judicial Institute, Massachusetts Guide to Evidence, 2008-2009 Edition, § 703, at 214-215 (2008).

First, Dr. Shea's report was certainly "independently admissible" at the election of the self-insurer, which paid for its generation.[9] However, if this simple proposition does not take the day, we offer the following analysis as to the employee's rights vis-à-vis Dr. Shea's report.

We have found no case law that analyzes the interplay between the "independently admissible" formulation for foundational materials and the common law rule on which Rule § 1.11(6)[10] is clearly based:

An expert employed by one of the parties ought not to be compelled to furnish expert testimony to the other just because the latter offers him compensation. It is his privilege, if not his duty, to refuse compensation from one of the parties when he has already accepted employment from the other, and such refusal ought not of itself to result in his being ordered to testify.

Boynton v. R.J. Reynolds Tobacco Co., 36 F.Supp. 593, 595 (D. Mass. 1941). In Ramacorti v. Boston Redevelopment Auth., 341 Mass. 377 (1960), the court cited Boynton in its discussion of judicial discretion governing this question in the Commonwealth:

> It is a general rule that an expert *can* be required, without the payment of expert fees, to give an opinion *already formed*. McGarty v. Commonwealth, 326 Mass. 413, 417-418 [(1950)("[A]s it is evident that [the physicians] had already formed opinions, they could have been required to give them without the payment of expert fees.")] *Such discretionary "power would hardly be exercised unless . . . necessary for the purpose of justice."* Barrus v. Phaneuf, 166 Mass. 123, 124. This general rule would apply even though the witness is an official or an employee of the opposing party (Stevens v. Worcester, 196 Mass. 45, 50-51, 56) *or is someone employed as an expert by the opposing party.* Boynton, [supra]. Roberson v. Graham Corp., 14 F.R.D. 83, 84 (D. Mass.). In the latter instance, which is the one before us, an important consideration is

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[9] We cannot emphasize enough, as we already noted, that this entire area of inquiry must be examined outside the strictures imposed by § 11A(2) on additional medical evidence. Absent that, the entire § 11A impartial medical examination system would cease to function, as no foundational medical data could be found to be "independently admissible," thus rendering the § 11A incompetent as a matter of law.

[10] "[A] party may offer as evidence medical reports prepared by physicians engaged by said party. …"

> whether in the circumstances it is fair for one party to acquire the expert opinion of one who has already been engaged by his adversary.

Ramacorti at 379 (emphasis added). See also Bagley v. Illyrian Gardens, Inc., 401 Mass. 822, 826 (1988)(citing Ramacorti for "purpose of justice" standard for party's introduction of opponent's expert opinion).

It can be seen that, even if the independent admissibility assessment under A Juvenile needs to be made relative only to the rights of the *moving party* (the employee),[11] the law certainly does not foreclose the possibility of that party introducing an opponent's expert opinion evidence. Since, in the courts of the Commonwealth, a plaintiff could, "as necessary for the purpose of justice," subpoena Dr. Shea to testify regarding his "opinion already formed" as embodied in his report, that opinion is independently admissible and proper fodder for cross-examination. We cannot countenance a more restrictive evidentiary rule than that established in Proposed Rule 703 and A Juvenile.[12] **[12]** See Haley's Case, 356 Mass. 678, 681-682 (1970); 452 C.M.R. § 1.11(5)(hearings governed by rules of evidence in courts of Commonwealth).

Finally, to the extent the self-insurer relies on Patterson v. Liberty Mut. Ins. Co., 48 Mass. App. Ct. 586 (2000), to support its narrow construction of what the impartial physician may use to assist in formulating his opinion, such reliance is misplaced. That case was explicitly decided on narrower grounds argued to the court, which reflected waiver of any argument based on the law as stated in A Juvenile and Rule 703. Discussing the issue of whether non-medical materials may be used in the impartial physician's formulation of his opinion, the court reasoned:

> It may be that even under [§ 11A(2) and its cognate regulations an impartial physician] can permissibly be provided non-medical records and reports for use in framing his expert medical opinion when such evidence is shown to be both independently admissible and of a type reasonably relied upon by physicians as a permissible basis for formulating an opinion. See Dept. of Youth Servs. v. A Juvenile, 398 Mass. at 528-532; Commonwealth v. Daye, 411 Mass. 719, 741-742 (1992); Liacos, Massachusetts Evidence, § 7.10.2, at 419-420 (6th ed. 1994); Young, Polletts, & Poreda, Massachusetts

[11] We do not consider this to be the case, however.

[12] Were the question to arise, we would decline to enforce Regulation § 1.11(6) in favor of the rules of evidence.

> Evidentiary Standards, Evidentiary Standard 703(c) (2000 Supp. to Hughes, Evidence). *Patterson would not be aided by such an expansion of the [impartial physician's] evidentiary universe, however, because she made no such showings.*

Patterson, supra at 596 n.16 (emphasis added).

Accordingly, we recommit the case for the employee to be granted the opportunity to cross-examine the impartial physician,[13] using the report of the § 45 medical expert, as that is his right under the principles enunciated in O'Brien, supra, and A Juvenile, supra. See Daye, supra at 743("the thrust of the rule is to leave inquiry regarding the basis of expert testimony to cross examination, which is considered an adequate safeguard" of constitutional rights). The judge shall then make such further findings as justice requires.

We summarily affirm the decision as to all other issues argued by the employee on appeal.

So ordered.

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William A. McCarthy
Administrative Law Judge

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Mark D. Horan
Administrative Law Judge

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Bernard W. Fabricant
Administrative Law Judge

Filed: ***December 10, 2009***

[13] The insurer shall bear the costs associated with the further deposition of Dr. Shea.