COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 007067-00**

Robert Gookin Employee
M. J. Daly & Sons, Inc. Employer
CNA Insurance Co. Insurer

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

APPEARANCES
John F. Trefethen, Esq., for the employee
John J. Maloney, Esq., for the insurer

MAZE-ROTHSTEIN, J. The insurer[1] appeals from a decision that authorized the discontinuance of weekly G. L. c. 152, § 35, partial incapacity compensation as of the date the judge received the transcript of the § 11A examiner's deposition. The insurer argues that the judge erred in using that non-evidentiary date, and it also challenges the award of § 13A legal fees and deposition costs. For the reasons discussed below, we reverse the decision in part, and affirm it in part. See G. L. c. 152, § 11C.

At the time of the § 11A hearing, the employee, Robert Gookin, was a sixty-three year old, high school graduate, who had worked for thirty years as a union pipe fitter before he was hired by the employer in 1996 as a pipe fitter/foreman installing fire protection sprinkler systems. (Dec. 4.)

On February 21, 2000, the employee was attempting to lift a fire pump, using 4 by 4's when the unit slipped and he fell against a wall, striking his lower back. (Id.) He remained out of work for four days. Upon his return, he could continue for only two more days, due to his pain. He went out of work on March 3, 2000, and has not returned since. (Dec. 4, 5.) He treated conservatively with his primary care physician and was

[1] The employee also appealed from the decision but his appeal was dismissed by the reviewing board for failure to file a brief within the time specified by 452 Code Mass. Regs. § 1.15 (4)(g).

referred for chiropractic and physical therapy treatments, which provided minimal relief. (Tr. 13-23.)

The initial claim in this matter was accepted by the insurer. It paid the employee § 34 temporary total incapacity benefits from March 4, 2000 to July 19, 2000, and § 35 partial incapacity benefits from July 20, 2000 and continuing. (Dec. 3, Tr. 4-5.) The insurer's complaint for discontinuance was denied after a § 10A conference.[2] (Dec. 3.) The employee and insurer cross-appealed to a hearing de novo. (Id.) On May 22, 2001, pursuant to § 11A, the employee was examined by physician, who diagnosed degenerative disc disease at several levels with disc space narrowing. (Dec. 6.) He identified nothing to substantiate the employee's ongoing low back pain symptomatology and opined that the he could return to full and active duty as a pipe fitter with no restrictions. (Id.)

At the employee's request, and upon authorization by the judge, the § 11A examiner authored an addendum to his initial report to provide an opinion on an EMG study and a lumbar spine MRI study conducted after his May 22, 2001 examination of the employee. (Dec. 6-7.) In his addendum report, the § 11A physician opined, based on a review of previous records and the additional reports provided, that the abnormalities revealed in those studies were not related to the employee's work injury but were representative of a pre-existing, degenerative, arthritic back. The doctor opined that clinically, the employee had sustained a lumbar strain with an anticipated resolution within some two to three months following the injury. (Dec. 7.)[3] The § 11A doctor was deposed, and the transcript was received on July 18, 2002. His opinions with respect to

[2] In addition, prior to the § 10A conference, the employee filed a motion to join a claim for § 34 benefits. The motion to join was allowed, but the claim was denied. (Dec. 3.)

[3] The § 11A examiner assessed a 5% medical disability due solely to the pre-existing arthritis of the employee's back, wholly unrelated to his work injury. (Dec. 7-8.)

disability and causal relationship remained unchanged from those expressed in his original report and the supplement.[4] (Dec. 8, Dep. 25.)

The judge adopted the § 11A doctor's opinion that although the employee continued to be partially medically disabled, such disability was no longer causally related to his work injury, but rather was a result of his pre-existing degenerative arthritic back condition. (Dec. 13.)[5] He dismissed the employee's § 34 claim and authorized the insurer to discontinue payment of compensation to the employee as of July 18, 2002, the date he received the transcript of the § 11A examiner's deposition. The judge also ordered the insurer to pay the expense incurred by the employee in obtaining the deposition of the § 11A examiner under the provisions of § 9A,[6] and a reasonable counsel fee pursuant to § 13A(5). (Dec. 13-14.)

The insurer first argues error in the judge's use of a non-evidentiary date to authorize discontinuance of compensation. (Insurer brief 1.) We agree. It is well settled

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[4] Prior to hearing, the insurer filed a § 11A(2) motion to admit additional medical evidence. The judge ruled the § 11A examiner's report inadequate for the "gap" period (from July 20, 2000 the date of the employee's claim for §34 benefits) through January 28, 2002 (the date of the § 11A addendum report). (Dec. 9.) As both the employee's claim and the insurer's complaint involved the question of medical disability prior to the date of the § 11A examination, the parties were entitled to introduce medical records and reports covering that "gap" period. See G. L. c. 152, § 11A(2); Berube v. Massachusetts Turnpike Auth., 12 Mass. Workers' Comp. Rep. 172, 174 (1998), citing George v. Chelsea Hous. Auth., 10 Mass. Workers' Comp. Rep. 22 (1996)(where case involves period of incapacity preceding § 11A impartial examination date, additional medical evidence may be admitted for limited purpose of filling in "gap period" between the time of alleged incapacity and date of impartial examination when § 11A exam and report do not cover that period).

[5] Only the insurer submitted additional medical evidence, consisting of two expert reports dated September 20, 2000 and February 21, 2001, respectively. (Dec. 9.) That doctor noted diagnoses of acute lumbosacral strain, resolved, and degenerative arthritis lumbar spine with persistent lumbar discomfort. According to the § 45 physician, the employee was not impaired as of either examination due to the work injury. (Dec. 10.)

[6] Although the judge references § 9A for the payment of expenses incurred by the employee for the deposition of the § 11A impartial physician, the actual statutory authority is § 11A(3). We deem this to be a scrivener's error and harmless. LaPlante v. Maguire, 325 Mass. 96, 98 (1949)(error does not affect final result).

that the modification or discontinuance of weekly incapacity benefits must be based on a change in the employee's medical or vocational status that is supported by the evidence. Whittaker v. Massachusetts Gen. Hosp., 15 Mass. Workers' Comp. Rep. 243, 245 (2001); Demeritt v. Town of North Andover School Dep't, 11 Mass. Workers' Comp. Rep. 630, 633 (1998). A deposition date is usually irrelevant to the employee's medical condition. It signifies only that two busy attorneys, and one busy doctor, have found a mutually agreeable time to meet. Therefore, in most cases, it is an improper date for a change in benefit level. Id. at 633.[7]

Here, although the judge improperly ordered benefits discontinued as of his receipt of the § 11A deposition transcript, he provided sufficient subsidiary findings to establish that the employee's work related incapacity actually ended well before that date. His adoption of the § 11A examiner's medical opinions, as set forth in the May 22, 2001 report, supports the conclusion that the employee's condition was no longer causally related to his work injury, as of that date. However, the insurer's "gap" medical records -- the sole additional medical evidence offered -- would support the conclusion that the employee's work related medical disability could have ended as early as September 20, 2000.

The insurer also alleges error in the award of legal fees and deposition costs. (Insurer brief 1.) We note that although the insurer makes only a passing reference of this issue on the first page of its brief, the issue is not argued thereafter. We are left with merely the insurer's bare assertion. Therefore, pursuant to the provisions of 452 Code Mass. Regs. § 1.15, we need not decide this question.[8] By limiting its argument in the

[7] Cases in which we have upheld the discontinuance of benefits on the doctors' deposition dates are distinguishable from the instant case. In both cases, we found, on an employee's appeal to the reviewing board, that no more advantageous date could be had than the deposition date for termination of benefits. See Skov v. Hillhaven Harrington House & Rehab., 11 Mass. Workers' Comp. Rep. 561, 562 (1997); Sanchez v. City of Boston, 11 Mass. Workers' Comp. Rep. 235, 237 (1997)(use of deposition date approved where the employee appealed, no more favorable date existed in the record, and where deposition testimony was first articulation of expert's opinion that employee's medical condition had changed).

[8] 452 Code Mass. Regs. § 1.15(4) provides in pertinent part:

body of its brief to the issue of the inappropriate discontinuance date, the insurer tacitly waived the issue of legal fees and deposition costs. See Ortona v. Burger King, 11 Mass. Workers' Comp. Rep. 525, 526 (1997)(by arguing only the dependency issue in its brief, the insurer waived the issue of payment of chiropractic expenses).

We recommit this case to the hearing judge to reconsider the medical evidence and determine the appropriate date for discontinuance of compensation benefits based on that evidence. In all other respects, the decision stands.

So ordered.

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Susan Maze-Rothstein
Administrative Law Judge

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Sara Holmes Wilson
Administrative Law Judge

Filed: October 1, 2003

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Patricia A. Costigan
Administrative Law Judge

> (4)(a) Content. The brief of the appellant shall contain under appropriate headings and in the order here indicated:
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> . . .
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> 3. The argument, which shall contain the contention of the appellant with respect to the issues presented, supporting rationale and citations to the authorities, statutes, rules, regulations and parts of the record on which the party relies. *The Reviewing Board need not decide questions or issues not argued in the brief. . . .*

(Emphasis ours).