COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO.:** 036791-06

Ronald Higinbotham	Employee
Emcor Balco Company	Employer
CNA Insurance Company	Insurer

REVIEWING BOARD DECISION

(Judges Fabricant, McCarthy and Horan)
The case was heard by Administrative Judge Bean.

APPEARANCES

Richard H. Schwartz, Esq., for the employee at hearing
Alan S. Pierce, Esq., for the employee on appeal
Paul A. Brien, Esq., for the insurer at hearing
John J. Canniff, Esq., for the insurer on appeal

FABRICANT, J. The insurer appeals from an administrative judge's decision awarding the employee ongoing § 34 total incapacity benefits. The insurer contends the judge erred by refusing to schedule an impartial examination because he found there was no "dispute over medical issues," as required by G. L. c. 152, § 11A,[1] and then erred further by denying the insurer the right to submit its own medical evidence.

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

> When any claim or complaint involving a *dispute over medical issues* is the subject of an appeal of a conference order pursuant to section ten A, the parties shall agree upon an impartial medical examiner from the roster to examine the employee and submit such choice to the administrative judge assigned to the case within ten calendar days of filing the appeal, or said administrative judge shall appoint such examiner from the roster.

(Emphasis added.)

We hold that the insurer waived any right it may have had to demand a § 11A impartial examination by failing to raise the issue below, and by "opting out" of the impartial examination process. However, the judge misapplied Ruiz v. Unique Applications, 11 Mass. Workers' Comp. Rep. 399 (1997), and erred by not allowing the insurer to submit its own medical evidence. We recommit the case to permit the parties to submit medical evidence necessary to address the medical issues raised.

At the § 10A conference on April 30, 2007, the employee claimed § 34 benefits for an injury occurring on October 23, 2006. The insurer raised the affirmative defense of § 1(7A) and contested liability, disability, and causal relationship. The insurer did not submit any medical reports.[2] The employee submitted medical reports and notes from three physicians. (Dec. 343, 346.) On the joint conference memorandum, the parties checked the box indicating that no impartial examination was necessary. (Temporary Conference Memorandum Cover Form.) See 452 Code Mass. Regs. § 1.02.[3]

Following the conference, the judge ordered the insurer to pay the employee § 34 benefits from October 25, 2006 to date and continuing. The insurer appealed. (Dec. 343.) At the hearing on January 22, 2008, the insurer again challenged liability, disability, and causal relationship, including § 1(7A). Citing Ruiz, supra, the judge instructed the parties that "the medical issues have been framed by the [employee's] conference submissions and there will be no impartial doctor, nor will there be any submissions of updated medical reports from the parties since the conference." (Tr. 6; Dec. 344.) In accordance with the judge's instructions, the employee submitted the same medical records he had submitted at conference. Subsequent to the hearing, but prior to the close of the record, the insurer attempted to admit into evidence the June 22,

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[2] We take judicial notice of documents within the board file. Rizzo v. M.B.T.A., 16 Mass. Workers' Comp. Rep. 160, 161 n.3 (2002).

[3] 452 Code Mass. Regs. § 1.02 provides, in pertinent part:

> Disputes Over Medical Issues as used in M.G.L. c. 152, § 11A(2), shall not include any case in which:. . . .
>
> (b) the parties 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. . . .

2007 report of Dr. Robert Pennell. The judge marked the report for identification but, again citing Ruiz, supra, he excluded Dr. Pennell's report from evidence, over the insurer's objection. (Dec. 345.) The judge adopted the opinions of the employee's three treating physicians, and awarded § 34 total incapacity benefits. (Dec. 347-348.)

On appeal, the insurer contends the judge erred by declining to schedule a § 11A examination. We disagree. Having opted out of the impartial medical examination pursuant to 452 C.M.R. § 1.02,[4] the insurer cannot now claim that the judge erred by proceeding without one.

The insurer next contends its due process rights were violated when the judge refused to admit the medical report of Dr. Pennell into evidence. We agree. The judge incorrectly reasoned that Ruiz, supra, barred the insurer's medical evidence at hearing, because no medical evidence was submitted by the insurer at conference. (Dec. 344.) Ruiz held that an impartial report which strays beyond the bounds of the medical dispute delineated by both parties' submissions at conference, is inadequate, thus mandating that the judge allow additional medical evidence. Id. at 402-403. "[T]he outcome . . . went awry when the § 11A examiner offered an opinion which stepped outside the boundaries of the medical dispute framed earlier. The result was a *widening* of the medical conflict, not a narrowing of those issues. This is antithetical to a reasonable implementation of the statute." Id. at 402 (emphasis in original). Ruiz specifically contemplates the findings of a § 11A medical examination and, by its very terms, cannot have any application to a case in which the parties choose to opt out.

Constitutional due process applies to hearings before the board, where the parties "are entitled to . . . have an opportunity to present evidence, to examine their own witnesses and to cross-examine witnesses of other parties, to know what evidence is presented against them and to [have] an opportunity to rebut such evidence. . . ." Haley's Case, 356 Mass. 678, 681 (1972). Where a party is denied "an opportunity to present testimony necessary to present fairly the medical issues, there then might well be a failure of due process. . . ." O'Brien's Case, 424 Mass. 16, 23 (1996). Here there was such a failure, as the judge arbitrarily denied the insurer the right to present medical evidence at the hearing. Cf. Lorden's Case, 48 Mass. App.Ct. 274 (1999)(judge erred by rejecting the impartial examiner's opinion and denying both parties' motions to submit additional medical evidence).

[4] See footnote 3, supra.

Because we cannot tell to what extent the employee's decision to submit only the medical records he had submitted at conference was determined by the judge's erroneous limitation on the medical evidence at hearing, (Tr. 6), both parties must be given the opportunity to submit whatever medical evidence they deem fit to support their respective positions. See Phillips's Case, 41 Mass. App. Ct. 612, 618 (1996).

Accordingly, we recommit the case for further proceedings and findings of fact on the medical issues of causal relationship, including § 1(7A),[5] disability and the extent thereof.

So ordered.

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Bernard W. Fabricant
Administrative Law Judge

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William A. McCarthy
Administrative Law Judge

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Mark D. Horan
Administrative Law Judge

Filed: **December 29, 2009**

[5] The judge failed to address § 1(7A) at all. On recommittal, he must do so. See Vieira v. D'Agostino Assocs., 19 Mass. Workers' Comp. Rep. 50 (2005).