COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO.:** 046729-97

Stephanie Florea	Employee
County of Bristol Sheriff's Dept.	Employer
County of Bristol	Self-insurer

REVIEWING BOARD DECISION

(Judges McCarthy, Costigan and Fabricant)

APPEARANCES

Michael Lynn, Esq., for the employee
Robert M. Novack, Esq., for the self-insurer

McCARTHY, J. The self-insurer appeals from a decision in which the administrative judge awarded the employee specific injury benefits under § 36 for an accepted industrial injury to her left knee. At issue in this appeal is whether the judge's sua sponte ruling that the § 11A medical report was inadequate, thus allowing additional medical evidence, was arbitrary and capricious. We conclude that the ruling was proper and the decision is sound. We therefore affirm it.

The employee's claim for § 36 benefits first went to a § 10A conference which yielded an order of payment. (Dec. 2.) The self-insurer appealed, and the employee underwent a § 11A impartial medical examination. The impartial physician offered this ambiguous causal relationship opinion:

> The patient related her complaints to multiple work related injuries dating back to 1995 and her multiple surgical procedures, preferable [sic] to her left knee, culminating in a total knee replacement in February 2001. It appears evident from the records, that the patient had long-standing, and probably pre-existing degenerative changes, found even in 1995. These degenerative changes are probably related directly to her sport activities over many years and her excessive weight.

(Stat Ex. 1.) The impartial physician did not address loss of function. For that reason, the judge found the opinion inadequate, and allowed additional medical evidence,[1] which he then adopted to award the § 36 benefits claimed. (Dec. 4-5.)

The self-insurer argues the award of § 36 benefits cannot stand, because the impartial opinion on causal relationship effectively foreclosed any attribution of loss of function to the employee's work injury. Thus, it argues, the employee simply failed to prove her claim; the § 11A opinion mandated that result. We are not convinced that the § 11A opinion is as clear as the self-insurer contends.

The opinion quoted above does not, in fact, rule out a work component to the employee's *present complaints*, but the doctor fails to give a definitive opinion. Instead, he narrates the employee's account of what *she* considers to be the work component of her disability. Does the doctor agree? We cannot say. Meanwhile, the doctor's opinion regarding the pre-existence of the degenerative changes does not speak at all to the cause or causes of her current permanent loss of function. Given that we cannot discern what the § 11A physician meant by the above quoted opinion on causal relationship, we see no error in the judge's sua sponte ruling that the § 11A report was inadequate.

The exclusive and prima facie medical evidence provided by an impartial physician under § 11A must be of a higher quality than what is before us here. The doctor's causal relationship opinion says nothing that would assist the judge in resolving the loss of function claim before him. Because there was no abuse of discretion in the judge's allowance of additional medical evidence, pursuant to G. L. c. 152, § 11A(2), we affirm his decision.[2]

The self-insurer shall pay counsel for the employee an attorney's fee under the provisions of G. L. c. 152, § 13A(6), in the amount of $1,458.01.

So ordered.

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[1] Only the employee submitted an expert medical opinion addressing loss of function. (Dec. 5.)

[2] Although unnecessary to our disposition of the self-insurer's appeal, we briefly comment on its second argument. We agree with the judge that res judicata did not bar the self-insurer's causal relationship defense of the employee's claim for § 36 benefits.

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William A. McCarthy
Administrative Law Judge

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Patricia A. Costigan
Administrative Law Judge

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Bernard W. Fabricant
Administrative Law Judge

Filed: October 1, 2008