COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 035578-92**

Susan A. Reynolds	Employee
Kay Bee Toys	Employer
CVS Corporation	Insurer

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

APPEARANCES
Paul G. Lalonde, Esq., for the employee at oral argument
Thomas H. O'Neill, Esq., for the employee at hearing and on brief
Douglas F. Boyd, Esq., for the insurer

COSTIGAN, J. The third hearing decision filed by the administrative judge in this case is the subject of an appeal by the insurer.[1] The insurer contends that the § 11A impartial medical opinion which the judge adopted in finding the employee totally incapacitated, first temporarily and then permanently, is devoid of the requisite statement of causal relationship between the employee's physical complaints and restrictions and her industrial injury. We agree that the expert medical evidence is less than optimal in that regard but disagree that the judge's decision requires reversal or recommittal.

On July 10, 1992, the employee, an assistant manager for Kay Bee Toys, injured her low back while carrying merchandise. (Dec. I, 2.) The insurer accepted the claim and paid periods of temporary total and temporary partial incapacity benefits under G. L. c. 152, §§ 34 and 35. By conference order, G. L. c. 152, § 10A(2)(b), a different administrative judge authorized the insurer to discontinue the employee's weekly compensation, effective November 1,

[1] We refer to the decision now on appeal as "Dec. III." References to the judge's first hearing decision, filed on May 25, 1995, are designated as "Dec. I," and to the second hearing decision, filed on August 8, 1997, as "Dec. II."

1993.[2] The employee appealed the discontinuance order but did not pay the requisite fee for the § 11A impartial medical examination. G. L. c. 152, § 11A(2). At hearing, that judge dismissed her claim without prejudice. (Employee Brief, 1.) The employee then filed a claim for further benefits, which was tried before the current administrative judge. In his first hearing decision, the judge found that the employee had a part-time, light duty work capacity. He awarded her temporary partial incapacity benefits under G. L. c. 152, § 35, based on an assigned earning capacity of $116.00 per week, from and after December 2, 1993. (Dec. I, 6.)

In a subsequent claim, which the employee joined to the insurer's discontinuance complaint, she alleged a worsening of her medical condition and sought either § 34 temporary total incapacity benefits or a higher rate of § 35 benefits. In his second hearing decision, the judge adopted the § 11A impartial medical examiner's opinion that the employee had a 40-hour per week modified work capacity. He assigned her a higher weekly earning capacity of $175.00, which reduced her § 35 benefit rate. (Dec. II, 3-4.)

In this proceeding, the administrative judge took judicial notice of both of his prior decisions. (Dec. III, 2; Tr. 5.) He found that the employee, who had previously exhausted her statutory entitlement under § 35, had been totally incapacitated from and after April 1, 1999. The judge awarded her § 34 temporary total incapacity benefits to exhaustion, followed by § 34A permanent and total

[2] Shortly thereafter, the employee returned to work as a cashier at Kay Bee for two days but went out again due to a reported worsening of her back pain. She has not worked since late 1993. (Dec. I, 2; Dec. II, 3; Dec. III, 4-5.)

incapacity benefits.[3] (Dec. III, 5).

The interpretation of medical opinions on causal relationship is, in the first instance, for the administrative judge to determine. Donovan v. Commonwealth Gas Co., 15 Mass. Workers' Comp. Rep. 415, 417 (2001). Having reviewed the § 11A report and deposition testimony of Kuhrt Wieneke, M.D.,[4] we agree with the insurer that the doctor did not offer an express opinion that the employee's complaints of headaches, neck pain and upper back pain were causally related to her industrial injury.[5] (Wieneke Dep. II, 19-24.) That is not a fatal deficiency, however, because the doctor confirmed that his opinion as to the employee's chronic partial disability was based solely on her low back complaints. (Id. at 22.)

Although the insurer long ago had accepted liability for the employee's 1992 low back injury, it was entitled to challenge the extent of her incapacity from

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[3] The employee's claim was originally for total incapacity benefits under § 34 and/or § 34A from and after April 1, 1999; adjustment of an alleged underpayment by the insurer of past § 35 benefits; and § 8 penalties. The claim was denied at conference and the employee's appeal brought the case to hearing. After the hearing but before the judge issued his decision, the parties resolved the latter two aspects of the employee's claim by partial lump sum settlement, (Dec. III, 2), leaving only the issue of the employee's entitlement to weekly incapacity benefits to be adjudicated.

[4] The board file reflects that the § 11A impartial medical examination (the third by Dr. Wieneke in this case) took place on April 17, 2000 and the doctor's § 11A report bearing that same date is in evidence as Statutory Exhibit 1. (Dec. III, 1.) Pursuant to § 11A(2), the employee deposed the impartial physician on August 21, 2000. On March 9, 2001, the employee filed a motion to re-open the medical evidence because she had undergone additional treatment in late 2000 and additional diagnostic testing in January 2001, after both the § 11A exam and Dr. Wieneke's first deposition. The administrative judge allowed the employee's motion to the extent of permitting the employee to depose Dr. Wieneke a second time. Both deposition transcripts are in evidence. We refer to the August 20, 2000 deposition as "Dep. I" and the May 1, 2001 deposition as "Dep. II."

[5] Dr. Wieneke did testify that the employee's complaint of numbness in her hands, (Tr. 13-14), was not causally related to any problems in her lower, middle or upper back. (Wieneke Dep. I, 21.)

and after April 1, 1999. "Extent of incapacity is an issue not amenable to disposition once and for all." Azor v. V & R., Inc., 9 Mass. Workers' Comp. Rep. 576, 577 (1995). It was also entitled to dispute the causal relationship of any such incapacity to the original injury, Himmelman v. A.R. Green & Sons, 9 Mass. Workers' Comp. Rep. 99, 101 (1995), but at the subject hearing, it did not do so. That fact is dispositive of the insurer's appeal. Generally, issues not raised below cannot properly be raised for the first time on appeal. Dudley v. Yellow Freight Sys., Inc., 15 Mass. Workers' Comp. Rep. 204, 207 (2001), citing Jones v. Wayland, 374 Mass. 249, 252-253 n.3 (1978).

At the outset of the evidentiary hearing, the insurer raised the issues of medical disability and extent of incapacity only, relative to the employee's low back complaints. (Insurer Exhibit 1; Tr. 42.) It did not put at issue whether those complaints remained causally related to her 1992 work injury. At the end of the hearing, the insurer moved orally to amend its Issues Statement (Insurer Exhibit 1) to include the issue of causal relationship, but only as to the headaches, upper back and cervical complaints to which the employee had testified:

Mr. Boyd: The only other issue which I would want to raise now is the issue of causal relationship. On the defense sheet I raised the issue of disability. I did not raise the issue of causal relationship. [The] employee testified that we are dealing with upper back, cervical, headaches. That's not referenced in Dr. Wieneke's report. *It is not what has been accepted by way of previous unappealed hearing decisions.*

Judge: Okay. Do you have an objection to him amending causal relationship *as regards to those* - -

Mr. O'Neill: No objection.

Judge: Okay. So I will amend the Insurer's Number 1 to include causal relationship.

Mr. Boyd: Thank you, Judge.

(Tr. 42, emphasis added.)

The administrative judge found that "[b]ased on the diagnostic reports and medical history available at the time of his [third] examination of the employee, Dr. Wieneke, the impartial physician, had opined that there was no discernable [sic] basis for Ms. Reynolds complaints, and suggested she was capable of working." (Dec. III, 3.) The doctor had offered much the same opinion when he examined the employee in 1994 and again in 1996. (Wieneke Dep. I, 24-26.) Based, in part, on that expert medical opinion, the administrative judge had previously found that the employee was only partially incapacitated, although her disability remained causally related to the work injury. (Dec. I, 3, 5; Dec. II, 2-3.) The insurer did not appeal to the reviewing board from either of those two decisions. (Tr. 42; Employee Brief, 2-3.) [6]

At his May 1, 2001 second deposition, however, Dr. Wieneke for the first time reviewed the employee's January 2001 CT scan and discography results and that diagnostic testing caused him to change his opinion concerning the extent of the employee's medical disability. (Wieneke Dep. II, 7, 14-15, 21-22.) It is apparent from his decision that the administrative judge was persuaded by the doctor's explanation of his revised opinion. The judge wrote:

> Rarely, have I seen an opinion as to disability change so dramatically, but the new CT scan and discography seem to be the missing piece of the puzzle in this case in terms of explaining the employee's complaints of low back pain. As the impartial doctor emphasizes, before those results, all diagnostic tests previously had not shown anything that would explain why the employee was having such drastic back pain, which tended to suggest that the pain, if any, was not as great as she was complaining of. However, the new series of tests clearly show radial tears that satisfactorily give a basis for her complaints of pain, and I now credit those complaints based on the new testing.

[6] The employee's appeal from the judge's second hearing decision was summarily affirmed by the reviewing board. Reynold's Case, 13 Mass. Workers' Comp. Rep. 459 (1999).

(Dec. III, 4.) In the absence of any finding of inadequacy of the § 11A report,[7] the administrative judge was required to give it prima facie effect. Silverman v. Dep't of Transitional Assistance, 15 Mass. Workers' Comp. Rep. 176, 179 (2001).

Lastly, although the § 11A examiner opined that the employee had a chronic partial disability and that she could perform sedentary to light duty work, (Wieneke Dep. II, 21-22), the administrative judge found that the employee was totally disabled and awarded total incapacity benefits. (Dec. III, 4-5.) We see no error. Partial medical impairment and total incapacity are not necessarily mutually exclusive. Bowden v. Kelly, Inc., 13 Mass. Workers' Comp. Rep. 1, 4 (1999), citing Anderson v. Anderson Motor Lines, Inc., 4 Mass. Workers' Comp. Rep. 65, 67 (1990). As he was permitted to do, the administrative judge considered and credited the employee's testimony concerning her pain and physical restrictions and concluded that her partial medical disability equated to total incapacity from gainful employment. Tremblay v. Art Cement Prods. Co., Inc., 13 Mass. Workers' Comp. Rep. 236, 239 (1999); (Dec. III, 2-4.)

We affirm the administrative judge's decision. Pursuant to G. L. c. 152, § 13A(6), employee's counsel is awarded a fee of $1,321.63.

So ordered.

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Patricia A. Costigan
Administrative Law Judge

[7] Both before and after the second deposition of the impartial medical examiner, the employee filed a motion to have the § 11A report declared inadequate and to allow the introduction of additional medical evidence. The administrative judge denied both motions. See G. L. c. 152, § 11A(2).

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Susan Maze-Rothstein
Administrative Law Judge

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Sara Holmes Wilson
Administrative Law Judge

Filed: November 26, 2002