COMMONWEALTH OF MASSASCHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 017365-98**

Susan Therrien	Employee
Stop & Shop	Employer
Stop & Shop	Self-insurer

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

APPEARANCES
Thomas H. O'Neill, Esq., for the employee
Sean P. Downing, Esq., for the self-insurer

MAZE-ROTHSTEIN, J. Susan Therrien, the employee, appeals from a decision that allowed the self-insurer's complaint to discontinue weekly incapacity benefits for her accepted industrial injury on a G.L. c. 152, § 45,[1] medical examination date. The employee argues that her due process rights were violated when the opinion of the self-insurer's physician was adopted without allowing the employee the opportunity to depose the doctor. The employee also argues error in the failure to award § 50 interest, and § 35A dependency benefits for her son. Upon review we affirm the discontinuance of weekly incapacity benefits, order the § 50 interest due and recommit the case for further findings on the issue of dependency. See G.L. c. 152, § 11C.

Ms. Therrien worked for the employer in the pharmacy department. On February 19, 1998, she injured her right major shoulder at work while lifting a big box off a pallet for pricing. She continued to work until April 30, 1998, but has not worked since then. (Dec. 4-5, Tr. 10-11, 14.) The self-insurer accepted the injury, and paid § 34 temporary

[1]General Laws c. 152, § 45, amended by St. 1991, c 398, § 72, reads 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 injured, submit to an examination by a registered physician, furnished and paid for by the insurer or the insured.

total weekly incapacity benefits from April 30, 1998 onward. (Dec. 3.) The self-insurer filed a complaint to discontinue the employee's weekly benefits, which was denied at a § 10A conference. The self-insurer appealed to a full evidentiary hearing, where the judge allowed Ms. Therrien to join claims regarding her appropriate weekly compensation rate and dependency benefits. (Dec. 2-3.) Initially, the judge took judicial notice of the minimum $ 133. 11 compensation rate under § 1(11) as of the date of injury.[2] From April 1998, the self-insurer had paid, $ 90. 25, below the statutory minimum, by calculating sixty percent of the employee's former $ 150. 41 average weekly wage. (Dec. 3.) Also subject to judicial notice was the employee's joint Federal Tax Return for 1998, filed with her husband, indicating that their son and daughter were dependents at that time.[3] (Dec. 4.)

The employee underwent a § 11A medical examination on September 8, 1999. (Dec. 3.) On the employee's motion, the judge deemed the report and deposition of the § 11A examiner inadequate, and the parties were allowed to submit additional medical evidence by October 6, 2000.[4] The employee submitted her additional medical evidence two days early, on October 4, 2000. The self-insurer requested a two week extension, from the scheduled date of its October 16, 2000 § 45 medical examination, to submit a report. The judge allowed the motion, and the self-insurer submitted its report within the

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[2] General Laws c. 152, § 1(11) provides that the "mimimum weekly compensation rate" shall equal "twenty percent of the average weekly wage in the commonwealth according to the calculation on or next prior to the date of injury by the deputy director of the division of employment and training."

[3] The contents of an income tax return are not the proper subject of judicial notice. See Williams v. Massa, 431 Mass. 619, 627, 629 (2000). P. Liacos, of Massachusetts Evidence § 2.6 (6th ed. 1994). Rather, the document should be introduced in evidence as an exhibit.

[4] General Laws c. 152, § 11A, gives an impartial medical examiner's report the effect of "prima facie evidence [with regard to the medical issues] contained therein," and expressly prohibits the introduction of other medical testimony unless the judge finds that additional medical testimony is required due to the complexity of the medical issues involved or the inadequacy of the report. See O'Brien's Case, 424 Mass. 16 (1996); See also Mendez v. Foxboro Co., 9 Mass. Workers' Comp. Rep. 641, 646-648 (1995) (where § 11A(2)'s reference to "testimony" was interpreted as consistent with the requirements of G.L. c. 233, § 79G).

extension time frame on October 31, 2000. The employee's counsel received the report on November 3, 2000. (Affidavit of Thomas H. O'Neill, attorney for the employee.) The record closed shortly thereafter.

The judge relied on the self-insurer's § 45 medical opinion that the employee could do sedentary to light duty work at the time of the October 16, 2000 examination, and discontinued weekly incapacity benefits as of that date. (Dec. 7, 11.) He also adjusted the employee's weekly benefits paid to reflect the $133.11 minimum weekly compensation rate. (Dec. 11.) See Betances v. Consolidated Serv. Corp., 11 Mass. Workers' Comp. Rep. 65 (1997). The judge awarded dependency benefits for the employee's daughter, until she reached the age of eighteen on February 12, 1998, and for the employee's husband for the entire period of incapacity awarded. (Dec. 10-12.) The decision was silent as to dependency benefits for the employee's son.

The employee asserts on appeal that her due process rights were violated, when the self-insurer submitted its § 45 medical examination report on October 31, 2000, without the employee having an opportunity to cross-examine the doctor. Denial of an opportunity to depose a doctor can result in a due process deprivation under certain circumstances. See Stacey v. Northshore Children's Hosp., 8 Mass. Workers' Comp. Rep. 365, 368-373 (1994). However, here the employee's counsel did nothing to address this problem at any relevant time, after he received a copy of the report on November 3, 2000. The employee's counsel readily admits in his affidavit that he was aware of the examination on October 16, 2000, and the self-insurer's intention to introduce the resulting report. Since the employee's counsel did not seek the appropriate remedy of an extension to depose the doctor in timely fashion, we consider that any due process argument has been waived. Phillips' Case, 278 Mass. 194, 196 (1932); Lagos v. Mary A. Jennings, Inc., 14 Mass. Workers' Comp. Rep. 21, 26 (2000). Cf. Stacey, supra; Gulino v. General Elec. Co., 15 Mass. Workers' Comp. Rep. ____ (November 8, 2001)(timely motions and argument before administrative judge on issue of deposing opponent's expert, whose report was introduced as additional medical evidence).

The employee argues that § 50 interest is due on the amounts awarded on her joined claims regarding her weekly compensation rate and dependency benefits. We agree. General Laws c. 152, § 50, amended by St. 1991, c. 398, § 77, provides, in pertinent part:

> Whenever payments of any kind are not made within sixty days of being claimed by an employee . . . and an order or decision requires that such payments be made, interest at the rate of ten percent per annum on all sums due from the date of the receipt of the notice of the claim by the department to the date of payment shall be required by such order or decision.

Section 50 is self-operative, and the self-insurer must pay interest in accordance with that section on any amounts – over and above that already being paid – ordered by the judge in the hearing decision. See Le v. Boston Steel & Mfg. Co., 14 Mass. Workers' Comp. Rep. 75, 78 (2000).

The employee argues that the denial of dependency benefits under § 35A for the employee's son is arbitrary and inconsistent. General Laws c. 152, § 35A (St. 1987, c. 465, § 42), establishes the conclusive presumption of dependency, in pertinent part, for:

> Children under the age of eighteen years, or over said age but physically or mentally incapacitated from earning, if living with the employee at the time of his injury . . . or over said age and a full-time student qualified for exemption as a dependent under section one hundred and fifty-one (e) of the Internal Revenue Code.

Questions of dependency otherwise are to be determined by the administrative judge as a factual question. Id.

We agree that the findings at Dec. 4 (that the son was listed as a dependent in the employee's 1998 tax return) and at Dec. 10 (that the son was eighteen years old more than a year before the industrial accident) may be inconsistent in the absence of any findings explaining the discrepancy in the evidence. At present, we cannot discern[5] whether there was a colorable reason under § 35A for the son's continued dependency.

[5] General Laws c. 152 § 35A, as amended by St. 1987, c. 465 § 42, allows for dependency benefits of six dollars per week added to the weekly compensation rate. The sum, however, is not to exceed the lesser of the employee's average weekly wage or one hundred and fifty dollars.

Where the evidence conflicts, findings of fact resolving the conflict are necessary. See G.L.c. 152, § 10B; Candito v. Browning–Ferris Indus., 15 Mass. Workers' Comp. Rep. 189, 123 (2001). We therefore recommit the case for the judge to make further findings on the issue of the dependency of the employee's son.

Accordingly, we affirm the order of discontinuance, order the statutorily required payment of § 50 interest and recommit the case for a cohesive analysis of the son's dependency.

So ordered.

Susan Maze-Rothstein
Administrative Law Judge

William A. McCarthy
Administrative Law Judge

Sara Holmes Wilson
Administrative Law Judge

Filed: December 20, 2001