**COMMONWEALTH OF MASSACHUSETTS**

**DEPARTMENT OF INDUSTRIAL ACCIDENTS** **BOARD NO. 25971-95**

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| Vicki Bean | Employee |
| Tenavision | Employer |
| American Policyholders Liquidating Trust | Insurer |

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

**APPEARANCES**
Ronald W. Stoia, Esq., for the employee
Donald E. Hamill, Esq., for the insurer

**MAZE-ROTHSTEIN, J**. On appeal the insurer contests the employee's award of continuing G. L. c. 152, § 34 temporary total incapacity benefits, arguing that the findings of causal relationship between the employee's neck injury and her industrial accident lacks sufficient evidentiary support. We agree, and reverse and recommit the case for further findings. See G. L. c. 152, § 11C.

Vicki Bean was forty-seven years old when the hearing in this matter took place. In January 1994, she commenced employment with Tenavision. She rented television time to hospitalized patients, collected rental fees, repaired patients' televisions and telephones and performed some clerical and record-keeping functions. (Dec. 4-5.)

On June 20, 1995, when stepping down from a chair after pulling the plug on a wall mounted television, she felt a severe pain in her low back. She sought the medical care of a neurosurgeon, who diagnosed a herniated disc. On November 17, 1995, she underwent surgery. On November 22, 1995 a second herniated disc was diagnosed and she again underwent surgery. After the second surgery, she had a series of unsuccessful nerve blocks followed by a third back surgery, in April 1996. Finally, in April 1998 Ms. Bean's lumbar and cervical spine were fused at the site of the prior herniations. She presently takes seven different prescribed medications. (Dec. 5.)

The employee filed a claim for benefits, which the insurer resisted. Following a § 10A conference the insurer was ordered to pay § 34 benefits. (Employee brief 1.) Prior to the expiration of those benefits, the employee filed a claim for § 34A permanent and total incapacity benefits. The judge denied the claim at conference but awarded § 35 temporary partial benefits at the maximum rate.[1] The employee appealed and was heard de novo. (Dec. 2.)

Pursuant to § 11A, the employee was examined by an orthopedic surgeon. He diagnosed her as having a failed back and neck syndrome, both of which he chronologically related to her work injury and subsequent surgeries. The doctor opined that the employee was not at a medical end result for either her lumbar or cervical problem. To accommodate her back condition, he restricted the employee to no prolonged standing or walking, lifting beyond ten pounds, bending, squatting or stooping. For her neck, he urged, no frequent neck twisting or prolonged looking upward or downward. (Dec. 7; Exh. 2; Dep. 20, 26.) At hearing, the employee moved to submit additional medical evidence.[2] The motion was denied. She renewed her motion following the § 11A physician's deposition and again her motion was denied. (Dec. 3.)

The § 11A doctor's opinions on causal relationship and disability were adopted in the decision. Payment of § 34A permanent and total benefits was ordered as of June 18, 1998. The insurer appeals, arguing that the evidentiary foundation for the finding of

[1] General Laws c. 152, § 35, limits temporary partial incapacity benefits to no more than seventy-five percent of what the employee would receive if eligible for § 34 total temporary benefits. G. L. c. 152, § 35, as amended by St. 1991, c. 398, § 63.

[2] 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).

causal relationship between the employee's cervical condition and her industrial injury is insufficient.[3] (Insurer's brief 1, 3-4.) We agree.

In his § 11A report, the doctor stated:

> Regarding her neck, She [sic] chronologically relates the onset of symptoms to the work related injury of [June 20, 1995]. The presence of diffuse spondylosis noted on cervical MRI [December 13, 1995] suggests that this condition predates the work-related injury of [June 20, 1995]. It is my opinion that the injury [June 20, 1995] exacerbated this pre-existing condition. Albeit an asymptomatic one.

(Ex. 2.) In his deposition, the doctor was asked to clarify his opinion on causal relationship between her neck condition and her work injury. He stated, "I don't have a mechanical basis for aggravation of her neck injury other than the chronological relationship between the event and the pain." (Dep. 19.)

"[W]hether the accident . . . was the proximate cause of the ensuing [medical] disability was a matter beyond the common knowledge and experience of the ordinary layman, and proof of any causal relation between the accident and the [medical] disability must rest upon expert medical testimony." Josi's Case, 324 Mass. 415, 417-418 (1949). While a judge may permissibly adopt a doctor's somewhat weak opinion on causality and bolster it with a lay opinion to reach causation, it is impermissible to do so where no medical causal relationship opinion is in evidence. Bedugnis v. Paul Mcguire Chevrolet, 9 Mass. Worker's Comp. Rep. 801, 803(1995); Allie v. Quincy Hospital, 12 Mass. Workers' Comp. Rep. 167, 169 (1998). "In complex matters, a mere temporal correlation does not establish medical causation." Allie at 169. See also Koonce v. Bay State Bus Corporation, 14 Mass. Workers' Comp. Rep. 238, 240 (2000). Because § 11A opinion here rests causal relationship solely in the temporal, it does not suffice to meet the legal standard for causation.

Section 11A states that the report of the medical examiner must contain an opinion of causal relationship. G. L. c. 152, § 11A(2). Moreover, although the § 11A report shall be given prima facie status, when a judge, acting either sua sponte or on the motion of a

[3] The insurer does not challenge the findings as to the employee's back condition.

party, finds said report inadequate, or the medical issues complex, additional medical testimony may be allowed. Id. Here the temporal opinion regarding the employee's neck condition does not constitute a sufficient medical opinion to meet the legal standard for causal relationship. Where, as here, the § 11A report fails to adequately address causal relationship, it is inadequate as a matter of law. Mendez v. The Foxboro Co., 9 Mass. Workers' Comp. Rep. 641 (1995); Allie, supra.

The proper remedy for an inadequate impartial medical opinion is the allowance of additional medical evidence. Safford v. Worcester Hous. Auth., 10 Mass. Workers' Comp Rep. 339, 342 (1996); LeBrun v. Century Markets, 9 Mass. Workers' Comp. Rep. 692, 694-697 (1995). Although the employee has not cross appealed, the reviewing board must assure fair administration of the § 11A system, which can work due process deprivations in its application. See O'Brien's Case, 424 Mass. 16, 22-24 (1996); Shand v. Lenox Hosp., 12 Mass. Workers' Comp. Rep. 365, 368-369 (1998)(where § 11 A motion is advanced at hearing, general rule that failure to cross appeal precludes a party from obtaining a more favorable judgement, not read as diminishing a party's due process rights too). The employee twice moved for the allowance of additional medical evidence arguing the § 11A report's inadequacy. The motion was twice denied. (Dec. 3; Tr. 4-5; Motion dated June 15, 1999.) It should have been allowed. On recommital, additional medical evidence must be allowed to properly support a finding on the presence or absence of causal relationship between the employee's neck condition and her work injury.

As additional medical evidence is required on the threshold issue of causal relationship of the employee's neck condition, the insurer's arguments on prognosis will better be addressed after the judge has the benefit of the full medical picture. (Insurer's brief 4-5.) We reverse the decision and return it to the administrative judge to make findings consistent herewith.

So ordered.

Susan Maze-Rothstein
Administrative Law Judge

Martine Carroll
Administrative Law Judge

Filed: June 1, 2001

Sara Holmes Wilson
Administrative Law Judge