COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS	**BOARD NO. 032632-05**
Wayne Ellingwood	Employee
CLP Resources, Incorporated	Employer
American Casualty of Reading Pennsylvania	Insurer

REVIEWING BOARD DECISION
(Judges Horan, Costigan and Levine)

The case was heard by Administrative Judge Lewenberg.

APPEARANCES
Teresa Brooks Benoit, Esq., and Charles E. Berg, Esq., for the employee at hearing
James N. Ellis, Esq., for the employee on appeal
Michael A. Fager, Esq., for the insurer

HORAN, J. The employee appeals from a decision dismissing his claim for §§ 13 & 30 medical benefits owing to his failure to pay the appeal fee mandated by G. L. c. 152, § 11A(2).[1] We affirm.

On October 4, 2010, the employee filed a claim for medical benefits and attorney's fees, which the insurer denied.[2] (Dec. 1-3.) At the § 10A conference,

[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. The insurer or any claimant represented by counsel who files such appeal shall also submit a fee equal to the average weekly wage in the commonwealth at the time of the appeal to defray the cost of the medical examination under this section within ten days of filing said appeal. . . .

[2] We take judicial notice of the board file including, but not limited to, the employee's October 4, 2010, §§ 13 & 30 claim (Form 110), the March 14, 2011 conference memorandum (Form 140), the March 15, 2011, § 10A(2) conference order, and the employee's March 22, 2011 appeal of that order (Form 121). See Rizzo v. M.B.T.A., 16 Mass. Worker's Comp. Rep. 160, 161 n.3 (2002).

counsel for both parties completed and signed a Form 140.[3] It indicated that an impartial medical examination was necessary to resolve the issue of the employee's claim for medical benefits, and that the parties agreed on the medical specialty of the impartial physician to be appointed. Following the conference, the judge ordered the insurer to pay for the employee's "treatment by Richard V. Mazzaferro, M.D., from March 23, 2010 to June 24, 2010. . . ." (Dec. 2.)

Seeking additional medical benefits, the employee appealed the conference order.[4] However, he failed to pay the fee for the impartial medical examination. See footnote 1, supra. Rather, on his Form 121, the employee checked the box entitled "Non-Medical Issue," which in turn caused the case to be set for a hearing on May 19, 2011.[5]

At the hearing, the insurer moved that the case be continued pending receipt of the impartial medical examiner's report. (Dec. 5; footnote 5, supra.) The judge noted that:

> The employee objected on the basis that there was no medical issue in dispute as the insurer did not present any medical evidence at the time of conference. When [I] pointed out that there was no such request at conference . . . the employee agreed to pay for the impartial to take place.

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[3] This form, entitled "Temporary Conference Memorandum Cover Form," consists of two pages and summarizes the parameters of the dispute *sub judice*.

[4] The insurer did not appeal the order, thereby accepting its terms. See G. L. c. 152, § 10A(3).

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

> The impartial medical examiner, so agreed upon or appointed, shall examine the employee and make a report at least one week prior to the beginning of the hearing, which shall be sent to each party. *No hearing shall be commenced sooner than one week after such report has been received by the parties.*

(Emphasis added.) This provision permits the parties to peruse the § 11A report, to prepare appropriate motions, and to discuss resolution of the case prior to the hearing. Oftentimes, parties appear at hearings to present proposed lump sum settlement agreements for judicial approval. See also 452 Code Mass. Regs. § 1.11.

(Dec. 5.) The employee then asked "to be allowed to go ahead and submit the [appeal] fee and have it go out to an impartial at this point. . . ."[6] (May 19, 2011, Tr. 9.) The judge granted the employee's request,[7] and the hearing was then continued to permit the employee to pay for, and attend, an impartial medical examination. Id. at 14.

When the employee did not pay the fee, or advance a claim for its waiver on the grounds of indigency, the matter came before the judge again on August 12, 2011. (Dec. 5.) Entertaining the insurer's motion to dismiss,[8] the judge noted the employee had once again failed to pay the fee and, citing the provisions of 452 Code Mass. Regs. § 1.10(9),[9] held that:

> At conference the parties agreed that an impartial was required and made no request otherwise. As judge, I made no determination that there was no medical issue in dispute and I did not state such in the conference order. The parties under these circumstances were on notice

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[6] Nevertheless, the employee objected to having to pay for an impartial examination where the insurer had offered no "contravening medical evidence" at the conference. (May 19, 2011, Tr. 13.)

[7] The judge stated: "I'm going to allow the employee to submit the impartial fee, which should have been submitted originally, and I will schedule an impartial with a physical medicine pain specialist, which is what was agreed upon at the time of conference. . . ." (May 19, 2011, Tr. 14.)

[8] The insurer had also moved to compel the production of medical records. The judge declined to rule on that motion in light of his decision to dismiss the employee's appeal. (Dec. 5.)

[9] That regulation provides: "No impartial physician shall be required where an administrative judge has determined, based upon the information submitted at the § 10A conference, that there is no dispute over medical issues and has so stated in the § 10A conference order." See also 452 Code Mass. Regs. § 1.02, which provides, in pertinent part:

> Disputes Over Medical Issues as used in . . . § 11A(2), shall not include any case in which . . .
> (d) based upon the information submitted at a Conference pursuant to . . . § 10A, the administrative judge determines that there is no dispute over medical issues. The judge's determination, and reasons therefor, shall be stated in the . . . Section 10A Conference order.

> that an impartial examination was required. No motion has ever been made to find otherwise. The employee unilaterally provided in the appeal that there was no medical issue in dispute and did not pay the fee. At status conference, the employee then agreed to pay the fee and reneged on that agreement. Employee now represents that [he has] no intention of paying for an impartial examination.
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> . . .
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> I find that since the employee has indicated an unwillingness to pay for an impartial examination that his claim should be dismissed.

(Dec. 6.) See Arruda v. Cut Price Pools of Somerset, Inc., 14 Mass. Workers' Comp. Rep. 169 (2000).

On appeal, the employee argues the judge erred by dismissing his claim. Specifically, the employee maintains that because the insurer offered no medical evidence to dispute his claim at conference, there was no medical issue in dispute; ergo, there was no need for an impartial medical examination. While this argument *could* have caused the judge to conclude that no § 11A examination was necessary, the employee's point is lost because he deprived the judge of the opportunity to consider the merits of this argument at conference. To the contrary, at conference the employee *agreed* that an impartial medical examiner would be required. We cannot ignore the record, the statute, and the applicable regulations. Accordingly, we conclude the employee waived his right to challenge, at hearing, whether an impartial medical examination was necessary to resolve his pending claim for additional medical benefits.[10] There was no error.

The decision is affirmed.

So ordered.

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Mark D. Horan
Administrative Law Judge

[10] See and compare 452 Code Mass. Regs. § 1.11(1)(c), which provides:

> [I]n any hearing conducted pursuant to M.G.L. c. 152, § 11 the parties may, consistent with 452 CMR 1.02, at the discretion of the administrative judge, agree in writing or on the record that an impartial physician is not required if such agreement has not been reached at Conference. . . .

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Patricia A. Costigan
Administrative Law Judge

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Frederick E. Levine
Administrative Law Judge

Filed: **May 16, 2012**