COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS	**BOARD NO. 030073-02**
James T. Paganelli	Employee
Massachusetts Turnpike Authority	Employer
Massachusetts Turnpike Authority	Self-Insurer

REVIEWING BOARD DECISION
(Judges Fabricant, Carroll and Costigan)

APPEARANCES
Brian C. Cloherty, Esq., for the employee
Elizabeth A. Fleming, Esq., for the self-insurer

FABRICANT, J. The self-insurer appeals an administrative judge's decision awarding the employee ongoing weekly § 34 total incapacity benefits. We agree that the judge erred by considering and making findings on the employee's low back condition, an issue that was not raised. We vacate the decision as to that issue; in all other respects, we affirm the decision.

The employee, a toll collector, originally injured his left arm and shoulder at work on March 28, 1999.[1] Following surgery and rehabilitation, the employee returned to his position in February 2002. However, working aggravated his already painful condition, and he left work again on August 20, 2002.[2] (Dec. 3-4.)

[1] The employee and the self-insurer both acknowledge in their briefs that, in a prior hearing decision filed on December 20, 2001, (Board No. 018941-99), a different administrative judge found the self-insurer liable for the employee's original March 28, 1999 injury to his left shoulder. (Employee br. 3; Self-ins. br. 2.) The self-insurer maintains the 2001 hearing decision also held that the employee had failed to prove that his low back condition was caused by the 1999 work incident. (Self-ins. br. 2.) However, the self-insurer did not offer this decision into evidence in the instant case, nor did it ask the judge to take judicial notice of the decision, or present any other evidence as to the terms or existence of this decision.

[2] The judge found the employee had been incapacitated from all work since August 20, 2002, (Dec. 4), but the employee testified that he returned to work on August 26, (Tr. 20), and to modified duty on September 1 and 2. (Tr. 25-26.)

In September 2002, the employee filed a claim for a left shoulder injury, alleging a date of injury of August 20, 2002. Following a § 10A conference, at which the employee claimed dates of injury of March 28, 1999 and August 20, 2002, an administrative judge ordered the self-insurer to pay the employee weekly § 35 partial incapacity benefits from August 21, 2002 to August 31, 2002, and from September 3, 2002 to date and continuing. (Order of Payment § 35 filed January 14, 2003.) The self-insurer appealed to a *de novo* hearing. (Dec. 2.)

Dr. Eui K. Chung examined the employee pursuant to § 11A. Neither party opted to depose Dr. Chung. (Dec. 2.) At hearing, the self-insurer filed a motion to strike the impartial examiner's report on the grounds that the impartial physician offered an opinion on a physical condition (the employee's low back problem) which was beyond the scope of the medical issues in dispute, and which had been litigated in a prior hearing. In addition, the self-insurer alleged the employee engaged in an improper ex parte communication with the impartial physician by directly submitting to him a medical record from Dr. Pongor that had not been provided to the judge or to the self-insurer. The self-insurer also moved for the allowance of additional medical evidence. (Ex. A, for Identification only; Tr. 3.) The judge found the impartial report adequate, and denied the self-insurer's motion to strike it. However, he allowed the parties to submit additional medical evidence due to "the complexity of the medical issues occasioned by the employee's prior and prospective surgery." (Dec. 2; Tr. 5-6.) Both the employee and the self-insurer submitted additional medical evidence.[3] (Dec. 1; Exs. 7 and 8.)

The judge adopted the opinion of Dr. Chung, the § 11A examiner, that the employee's left shoulder injury was causally related to his injury at work on March 28, 1999. He also adopted Dr. Chung's opinion that the employee has chronic impingement

[3] On August 1, 2004, the self-insurer filed an objection to the employee's additional medical evidence, alleging that it did not receive the medical records the employee submitted to the judge on or about July 1, 2004. (Ex. E, for Identification only.) The judge denied the self-insurer's motion, id., leaving the record open until August 16, 2004. (Letter from administrative judge to parties dated August 10, 2004.)

syndrome, restricting him to no lifting over ten pounds with his left arm, as well as no elevation, outreaching, or overhead use, and that without further surgery, he will not improve. In addition, the judge adopted Dr. Chung's opinion that the employee's low back strain was causally related to his original injury of March 28, 1999, and that he needed further diagnostic testing regarding his low back. (Dec. 5.) The judge adopted the opinion of Dr. Paul Pongor, the employee's treating physician, that the employee's left shoulder condition causes pain and restricts the employee's ability to reach overhead and extend his left arm, and that surgery may significantly improve the employee's condition. The judge also credited Dr. Pongor's opinion that the employee needed a MRI of his right shoulder to determine if he has problems with it which are related to his left shoulder injury. (Dec. 6.)

The judge concluded that the employee, though partially medically disabled, was totally incapacitated from any work due *only* to his left arm and shoulder condition, which was causally related to the initial industrial accident of March 28, 1999, and the resulting aggravation during his return to work in 2002.[4] (Dec. 6.) He awarded § 34 benefits beginning August 21, 2002, and payment of medical bills, including the recommended left shoulder surgery.[5] (Dec. 7-8.) In addition, he found the employee to have sustained low back and right shoulder injuries causally related to the March 28, 1999 work event, and aggravated on August 20, 2002. (Dec. 4, 7.) Although no disability was found to have resulted from those injuries, payment of medical bills for low back and right shoulder treatment, including diagnostic work-up, was ordered. (Dec.

[4] Dr. Chung did not address whether the employee's incapacity after August 21, 2002 was causally related to an aggravation suffered upon his return to work. (See Ex. 1, Impartial report of Dr. Chung.) However, Dr. Pongor did opine that the employee's March 1999 injury was aggravated by his return to work. (Ex. 8, June 9, 2004 report of Dr. Pongor.)

[5] In finding the employee totally incapacitated, the judge found that he was excluded from his prior strenuous work (owning and operating trucks, forklifts and heavy construction equipment, and acting as a toll collector), which required continual use and reaching of his left arm and shoulder. The judge found that the employee lacked transferable skills to perform an occupation using only one arm, and there was no sedentary or light job he could perform, given his symptoms and the prospect of further surgery. (Dec. 3, 6.)

7-8.) The judge also determined that § 1(7A)'s heightened causation standard did not apply to the employee's left shoulder, right shoulder or low back conditions. (Dec. 7.)

The judge noted that although the self-insurer had raised *res judicata* with respect to the low back injury on its hearing memorandum, it had submitted no documents from the department, no evidence, and no memorandum of law as to how it might apply to the low back injury claim. As a result, there was no application of *res judicata*. (Dec. 7.)

On appeal, the self-insurer first argues that the judge erred in finding the employee's low back condition causally related to the March 28, 1999 injury, and in ordering medical treatment for the low back. The self-insurer contends that the judge improperly expanded the parameters of the medical dispute since the employee did not claim a low back injury in the case before him.[6] Moreover, the self-insurer maintains that the causal relationship of any incapacity resulting from a low back injury of March 28, 1999 had been fully litigated and decided by a prior hearing decision of December 20, 2001, thus becoming *res judicata*. (Self-ins. br. 2.) We agree with the self-insurer's first contention, but disagree that the self-insurer met its burden of proving *res judicata* as to the low back.

"[T]he scope of an administrative judge's authority at a § 11 hearing is limited to deciding those issues in controversy. G. L. c. 152, § 11B." Hall v. Boston Park Plaza Hotel, 12 Mass. Workers' Comp. Rep. 188, 190 (1998). "Where there is no claim and, therefore, no dispute . . . the judge stray[s] from the parameters of the case and err[s] in making findings on issues not properly before [him.]" Gebeyan v. Cabot's Ice Cream, 8 Mass. Workers' Comp. Rep. 101, 103 (1994). See also Casey v. Town of Brookline, 17

[6] It is not clear from the record whether the employee actually made any claim with respect to the right shoulder. A claim for § 13 and 30 medical bills was joined at hearing, (Tr. 9), that the employee characterizes as a joinder of expenses for approval of a MRI for the right shoulder. (Employee br. 1.) Later in the hearing, the judge stated that the claim was for "a left shoulder injury, perhaps a right shoulder injury. . . " (Tr. 69.) At any rate, the self-insurer has not argued error in the judge's determination of causal relationship of the right shoulder or in his order of payment for diagnostic tests for the right shoulder. (See Dec. 7.) Therefore, we deem that issue waived. See Martinez v. Northbound Train, 18 Mass. Workers' Comp. Rep. 294, 306-307 n.12 (2004)(argument waived if not made).

Mass. Workers' Comp. Rep. 302, 309 (2003); Medley v. E.F. Hausermann Co., 14 Mass. Workers' Comp. Rep. 327, 330 (2000). That is precisely what the judge did here. We are convinced that the employee made no claim of a low back injury in the instant proceeding, either as to his initial work incident of March 28, 1999, or his work activities between February 2002 and August 20, 2002. In fact, the hearing transcript reflects that employee's counsel specifically stated, "there is not a claim before the Court today relative to a back injury," and the judge agreed that "the back is not an issue today." [7] (Tr. 68-69.) Therefore, the issue cannot even be said to have been tried by consent.[8] In spite of these clear statements to the contrary, the judge did address the employee's low back problems, finding them causally related to the March 28, 1999 work injury, and finding medical treatment necessary, though no disability had resulted. (Dec. 4.) This was error. Therefore, we vacate so much of the decision as addresses the employee's low back condition.[9]

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[7] The employee also states in his brief that he did not raise the back injury in his claim.

[8] Cf. Freeman v. University of Mass., Boston, 18 Mass. Workers' Comp. Rep. 138 (2004)(where employee did not claim injury for 1995 incident, but insurer failed to object to employee's examination of impartial physician regarding causal relationship between work place and that incident, and in fact engaged in extensive cross-examination of impartial physician regarding 1995 incident, issue was tried by consent of the parties, failure to raise the issue notwithstanding); Hinton v. Mass. Mutual Life Ins. Co., 16 Mass. Workers' Comp. Rep. 342 (2002)(where ample evidence was introduced relating to pre-existing condition and to employee's acceptance of § 1(7A) as an issue, it appeared parties tried case under that heightened causation standard by consent); Lazarou v. City of Peabody, 13 Mass. Workers' Comp. Rep. 386, 390-391 (1999)(appellant attorney's questions to expert on causal relationship defeated argument that issue had not been litigated); Bernardo v. Hallsmith Sysco, 12 Mass. Workers' Comp. Rep. 397, 402 n.5 (1998) (while amendment of claim under 452 Code Mass. Regs. § 1.23 is better practice, cumulative work trauma theory tried by parties' consent, based on insurer's failure to object to deposition questions addressing that theory); Debrosky v. Oxford Manor Nursing Home, 11 Mass. Workers' Comp. Rep. 243, 244-245 (1997).

[9] Because the judge allowed additional medical evidence, the fact that Dr. Chung opined on issues outside the medical dispute does not require recommittal. Cf. Ruiz v. Unique Applications, 11 Mass. Workers' Comp. Rep. 399 (1997)(where impartial examiner addressed medical issues not in dispute, judge erred by refusing to allow the introduction of additional medical evidence). Moreover, the judge did not factor in the back strain in determining incapacity. (Dec. 4, 7.)

Although this holding is dispositive of the judge's treatment of the low back condition, we address the self-insurer's argument that the first hearing decision in 2001 was *res judicata* as to that issue, since it is an issue that will likely arise again. Principles of *res judicata* clearly apply to workers' compensation proceedings. See Buonanno v. Greico Bros., 17 Mass. Workers' Comp. Rep. 91, 94 (2003), citing Longerato's Case, 352 Mass. 284, 287 (1967). However, *res judicata* is an affirmative defense which must be both raised and proven:

> The burden is on the party claiming *res judicata* by reason of a prior adjudication to allege enough facts in his plea or motion to establish that the cause of action was (1) between the same parties; (2) concerned the same subject matter; and (3) was decided adversely to the party seeking to litigate the subject matter again. See New England Home for Deaf Mutes v. Leader Filling Stations Corp. 276 Mass. 153, 157 [1931]. A party relying on *res judicata* as an affirmative defence must prove either from the record of the former action or from extrinsic evidence the subject matter decided in the earlier judgment. Daggett v. Daggett, 143 Mass. 516, 521 [1887]. Cote v. New England Navigation Co. 213 Mass. 177, 182 [1912]. Boston & Maine R.R. v. T. Stuart & Son Co. 236 Mass. 98, 102 [1920]. . . .

Fabrizio v. U.S. Susuki Motor Corp., 362 Mass. 873, 873-874 (1972). Contrary to the self-insurer's argument, the judge is not required to take judicial notice of an unidentified and unadmitted prior hearing decision simply because the self-insurer raises *res judicata*. The self-insurer has an affirmative obligation to produce evidence to support its contention. Here, the self-insurer did not offer as evidence the prior hearing decision, or present any other evidence to establish the existence or terms of the decision.[10] Thus, the self-insurer failed to meet its burden of proof that the affirmative defense of *res judicata*

[10] The extent of the evidence presented by the self-insurer was the following question by self-insurer's counsel and the answer by the employee:

> Q: And you have other problems that have been deemed not work related, say, with your back, correct?
> A: Correct.

(Tr. 68.)

barred relitigation of the employee's March 28, 1999 low back condition, and the judge was correct in finding principles of *res judicata* inapplicable. (See Dec. 7). Cf. Maldonado v. Tubed Products, Inc., 19 Mass. Workers' Comp. Rep. 221 (2005)(where judge took judicial notice of prior decision, it was *res judicata* as to initial causal relationship in subsequent § 34A proceeding).

We turn to the self-insurer's argument that the judge erred by denying its motion to strike the impartial report. (Ex. A for identification only.) The self-insurer maintains that the impartiality of the § 11A physician was compromised because the employee brought to Dr. Chung's attention at the impartial examination a medical report from Dr. Pongor dated May 27, 2003, which had not been previously submitted to the judge or provided to the self-insurer. (Ex. B for identification only.) The employee admitted he brought this document to the impartial examination. (Tr. 37-38.) The self-insurer maintains that Dr. Chung relied on this note by Dr. Pongor to conclude that the employee would benefit from surgery, an opinion which the judge also adopted.

The self-insurer is correct that, "[t]he general tenor of § 11A and the rules interpreting and applying it indicate that all communications with the impartial examiner should be funneled through the administrative judge or the impartial medical unit of the Department. 452 Code Mass. Regs. § 1.14(2)."[11] Karsaliakos v. K & L Concrete Service Co., 14 Mass. Workers' Comp. Rep. 285, 288 (2000). The employee failed to follow these procedures when he showed Dr. Chung the note from Dr. Pongor. However, the impartial doctor's receipt of information in violation of board procedure does not necessarily require that the impartial opinion be struck. Howell v. Norton Co., 11 Mass. Workers' Comp. Rep. 161, 165 (1997). In Howell, we held that there was no "compelling inference that bias fatally contaminated th[e] case *ab initio*, requiring the

[11] 452 Code Mass. Reg. § 1.14(2) provides, in relevant part:

> No party or representative may initiate direct, *ex parte* communication with the impartial physician and shall not submit any form of documentation to the impartial physician without the express consent of the administrative judge.

allowance of the insurer's motion to strike the § 11A opinion," where the impartial physician had an ex parte conversation with the employee on the telephone after the examination in preparation for the deposition. Id. Though the judge in Howell found that conversation should not have taken place, he took sufficient steps to guard against possible bias or prejudice to the insurer when he allowed the submission of additional medical evidence. Id. Similarly, here, the impartial physician's consideration of Dr. Pongor's one-line note about the efficacy of surgery, though technically improper under the regulation, was cured by the allowance of additional medical evidence.[12]

In general, the question of inadequacy resulting from bias is left to the discretion of the administrative judge, who has the duty to resist tenuous baseless, or frivolous challenges to the impartial physician's report. Tallent v. M.B.T.A., 9 Mass. Workers' Comp. Rep. 794, 799 (1995), citing Police Comm'r of Boston v. Municipal Court of the W. Roxbury Dist., 368 Mass. 501, 508 (1975). Only where the record will support but one conclusion will we rule on the issue of bias as a matter of law. Amoroso v. University of Mass. Medical School, 19 Mass. Workers' Comp. Rep.233, 236 (2005), citing Tallent, supra. Here, the judge has ruled on the self-insurer's motion alleging bias. We cannot say, as a matter of law, that he abused his discretion. Moreover, the bias of a witness goes only to his credibility, not to the admissibility of his opinion. Thus, the

[12] We have held that where *non-medical* evidence -- the report of the employee's vocational expert -- was erroneously forwarded to the impartial examiner prior to the preparation of his § 11A report, and the doctor testified the vocational report influenced his opinion on the employee's medical disability, "the presumption of impartiality" was compromised. Barrett v. Kiewit Atkinson Cashman, 19 Mass. Workers' Comp Rep. 286, 289 (2006). However, the nature and content of the document received in error by the impartial physician in Barrett, coupled with its acknowledged impact on the doctor's disability opinion, distinguish that case from the instant case. Though we do not condone the employee's circumvention of the procedure prescribed in the regulation, see footnote 11, supra, on the facts of this case, we will not say, as a matter of law, that Dr. Chung's receipt of Dr. Pongor's report compromised the impartiality, or the appearance of impartiality, of Dr. Chung's opinions. In any event, the challenged opinion as to the efficacy of another surgery was also contained in the additional medical testimony which the judge "authorized because of the complexity of the medical issues occasioned by the employee's prior *and prospective surgery."* (Dec. 2; emphasis added.) The judge wrote: "Dr. Pongor opines that a left distal clavicle surgical resection procedure may significantly improve the employee's present difficulties. I adopt Dr. Pongor's opinion above to the extent so noted." (Dec. 6)

judge was not required to exclude Dr. Chung's opinion from evidence; rather, he acted appropriately by admitting additional medical evidence. See Howell, supra

Accordingly, we reverse the decision insofar as the judge found the employee's low back condition causally related to the March 28, 1999 work incident, and we vacate the award of medical benefits for the low back. We summarily affirm the decision as to all other issues raised by the self-insurer.

Pursuant to § 13A(6), employee's counsel is awarded a fee of $1,407.15

So ordered.

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Bernard W. Fabricant
Administrative Law Judge

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Martine Carroll
Administrative Law Judge

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Patricia A. Costigan
Administrative Law Judge

Filed: **February 6, 2007**