COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 051951-00**

Alan Bradley	Employee
Daven Corporation	Employer
Continental Casualty Insurance Co.	Insurer

REVIEWING BOARD DECISION

(Judges Costigan, McCarthy and Levine [1])

APPEARANCES

Paul S. Danahy, Esq., for the employee
Mark J. Kelly, Esq., for the insurer

COSTIGAN, J. The employee appeals from a decision in which the administrative judge authorized the insurer to discontinue payment of weekly incapacity benefits for an accepted low back injury. The employee contends that the judge made several errors. Finding no merit in any of his arguments, we affirm the judge's decision.

The employee, age twenty-five at the time of hearing and a native of Ireland, began work for the employer in February 1999. His job as sales manager involved demonstrating, selling and delivering welding equipment and supplies. (Dec. 5.) The judge found that on November 28, 2000, [2] the employee injured his back while placing a spool of welding

[1] Judge Levine no longer serves on the reviewing board.

[2] One would think that by the time the insurer's complaint for modification or discontinuance of weekly compensation reached the hearing stage, the date of injury in this accepted liability case would have been fixed. Alas, that has not happened. The insurer's complaint, filed in July 2001, cited a December 5, 2000 date of injury, as did the insurer's prior filings with the department. In his hearing memorandum, the employee likewise identified the date of his low back injury as December 5, 2000, and his claim for total incapacity benefits as tracking from that date. (Ex. 1.) In his biographical data form, however, the employee identified November 29, 2000 as the date on which he first sought medical treatment for his back injury. (Id.) At hearing, the employee testified that he last worked for the employer on November 28, 2000, when he injured his back placing a 44-pound spool of welding wire in a van. (Tr. 13-14.) Dr. Andrea Wagner, the § 11A impartial physician, had a history of the employee injuring his back at work on November 28, 2000. (Ex. 2, March 19, 2002 Wagner report, pp. 1, 2; Wagner Dep. 14,

wire into the employer's van. Earlier that month, on Saturday, November 11, 2000, the employee awoke with back pain. He sought medical treatment, and on November 21st underwent a lumbar MRI study which revealed degenerative disc disease at L5-S1 with a small paracentral disc herniation. (Dec. 6, 8, 9.) The employee lost no time from work in November. (Dec. 6.)

Once the employee stopped working on or about December 11, 2000, the insurer paid weekly incapacity benefits based on a December 5, 2000 date of injury, for which it eventually accepted liability. Following a § 10A conference, the judge denied the insurer's request for a modification or termination of weekly compensation. (Dec. 2.) At hearing, the insurer raised the issues of extent of disability and § 1(7A) causal relationship, due to the pre-existing degenerative condition of the employee's lower back. (Dec. 3.)

Pursuant to § 11A, on March 19, 2002, the employee underwent an impartial medical examination by Dr. Andrea J. Wagner. Dr. Wagner diagnosed the employee with a lumbosacral sprain/strain, causally related to the work injury, and lumbar disc disease. Dr. Wagner opined that the employee had reached a medical end result and was partially disabled. She noted that at the time of the examination, the employee's medical condition was the result of the combination of the work injuries [3] and the pre-existing degenerative disc disease. (Dec. 8; Dep. 47.)

On the employee's motion, the judge declared the medical issues complex, and allowed the parties to submit their own medical evidence for the periods before and after the impartial examination. (Dec. 3.) The insurer introduced an October 5, 2002 report of its medical expert, Dr. Kevin Bozic. Based on the medical records he reviewed and the

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15, 16, 18, 19, 20, 26, 34, 40 and 47.) The judge's decision reflects that the parties stipulated to December 5, 2000 as the date of injury, (Dec. 4), and yet the judge found that the employee's low back injury occurred on November 28, 2000. (Dec. 6.)

[3] The employee also alleged that he first injured his back at work on Friday, November 10, 2000. Although the parties stipulated to "incidents" occurring on that date and on November 28, 2000, the only date of "injury" agreed on was December 5, 2000. The administrative judge did not credit the employee's testimony that he injured his back at work on November 10, 2000. (Dec. 6.) In any event, as discussed infra, the dispute as to the November 10, 2000 incident is of no ultimate consequence to our determination of the employee's appeal.

history he took from the employee, Dr. Bozic opined that the employee's lumbosacral strain was partially disabling but had likely resolved twelve weeks after the November 28, 2000 incident at work. The doctor also opined that the employee continued to suffer from discogenic back pain with chronic low back pain unrelated to his work injury. (Dec. 10.) Dr. Bozic opined that the employee had a longstanding degenerative back condition prior to the November 28, 2000 industrial incident. Finally, Dr. Bozic observed that the employee's "job is a contributing factor to his mechanical back pain and discogenic pain, but is not the major contributing factor at this point and the episode of November 28, 2000 is not the major contributing factor." [4] (Ex. 5, October 5, 2002 Bozic report.)

The judge adopted Dr. Bozic's opinion that the employee's lumbosacral strain had likely resolved approximately three months after the November 28, 2000 incident at work. The judge found that any disability the employee may have had after February 28, 2001 was "unrelated to the industrial injury." (Dec. 11.) However, in accordance with Cubellis v. Mozzarella House, 9 Mass. Workers' Comp. Rep. 354, 356 (1995), the judge authorized the insurer to discontinue weekly incapacity benefits as of July 10, 2001, the date the insurer filed its complaint for modification or discontinuance of compensation. (Dec. 14-15.) [5]

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[4] Dr. Bozic's opinion was rendered in response to questions posed by counsel for the insurer, who apparently used the wrong standard of "the major" contributing cause, rather than the actual § 1(7A) standard of "a major" contributing cause applicable to combination injuries. See footnote 8, infra.

[5] The employee challenges the retroactive termination of weekly compensation, arguing that it improperly invaded the benefits the insurer had paid on a without-prejudice basis. We need not decide whether such a termination would be appropriate in this case, see Carucci v. S & F Concrete, 13 Mass. Workers' Comp. Rep. 405, 411 (1999), because the termination of benefits on July 10, 2001, the filing date of the insurer's modification/discontinuance complaint, did no such thing. The initial 180-calendar day period for payment without prejudice pursuant to § 8(1), expired on or about June 8, 2001. In any event, we note that had the insurer been paying weekly incapacity benefits on a without-prejudice basis, as the employee contends, there would have been no need to file a complaint for modification or discontinuance. With the seven-day written notice to the employee required by § 8(1), the insurer could have terminated benefits unilaterally, without recourse to the department.

The employee first argues that the judge erred by failing to make specific findings on the alleged November 10, 2000 work incident. According to the employee, this is a pivotal issue, because his pre-existing degenerative disc condition was a crucial factor in the judge's termination of benefits. We disagree. The only possible relevance of the alleged November 10, 2000 "incident" to the accepted December 5, 2000 injury, is the highly suspect postulation that the judge might have misapplied § 1(7A), because the employee's pre-existing lumbar degenerative disc disease was the result of a work related, compensable condition, rather than a pre-existing condition resulting from a noncompensable injury or disease. [6] The premise behind that theory is that the degenerative disc disease described by Dr. Bozic in his October 5, 2002 report as "longstanding," was caused by the alleged work injury of November 10, 2000. That premise strains common sense and credulity when one considers that the degenerative disc disease at L5-S1, and small paracentral disc herniation, were first documented by MRI study performed on November 21, 2000, a mere eleven days after the alleged work incident. (Dec. 8; Ex. 4, March 19, 2001 Spatz report.) Moreover, as to the "incident" alleged on November 28, 2000, and the accepted work injury of December 5, 2000, a repeat MRI study performed in February 2001 showed no evidence of any interval change. (Dec. 6.) In any event, the adopted opinion of the insurer's expert, Dr. Bozic, supported the judge's discontinuance of incapacity benefits without reference to the § 1(7A) causal standard.

The employee next argues that the judge misconstrued the opinions of the impartial physician, Dr. Wagner, and the insurer's medical expert, Dr. Bozic. To the extent that the judge did not adopt Dr. Wagner's opinion, for the stated reason that she was under the

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[6] General Laws c. 152, § 1(7A) provides, in pertinent part:

> If a compensable injury or disease combines with a pre-existing condition, which resulted from an injury or disease not compensable under this chapter, to cause or prolong disability or a need for treatment, the resultant condition shall be compensable only to the extent such compensable injury or disease remains a major but not necessarily predominant cause of disability or need for treatment.

incorrect assumption the employee had no prior back problems, (Dec. 8), the employee's argument necessarily bears no fruit. If anyone has misconstrued Dr. Wagner's opinion, it is the employee when he argues that the doctor changed her causal relationship opinion during her deposition. Late in the deposition, Dr. Wagner merely elaborated on her earlier testimony regarding the existence of a pre-existing degenerative condition. The doctor stated only that the employee's pre-existing condition was not overly symptomatic before his work injury, (Dep. 44), and that both the industrial injury and the pre-existing condition were at play in the employee's disability when she examined him. (Dep. 47.) That testimony misses the dispositive question that went unanswered in the deposition: whether, under the appropriately raised § 1(7A) causation standard for combination injuries, the industrial injury remained a major cause of the employee's disability. This the doctor never addressed, because she was never asked. [7] See Lyons v. Chapin Ctr., 17 Mass. Workers' Comp. Rep. 7, 10-12 (2003).

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[7] At bat on cross-examination, the employee swung and missed on meeting his burden of proof under § 1(7A):

> Q. Let me see if this is a fair assessment of your opinion; that at this point in time, you feel that Mr. Bradley's ongoing condition, or at least the condition at the time you saw him, was due to the combination of the soft tissue injuries that he sustained on November 10, 2000 and November 28 of 2000, and the preexisting degenerative disease.
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> A. That's correct.
>
> Q. So you think both of them are at play?
>
> A. Mm-hmm, I do, mm-hmm.
>
> Q. Continue to be at play?
>
> A. Mm-hmm.
>
> Q. So it's not as though you felt that the work injuries had at some point subsided completely?
>
> A. I can't say that, no.

As to the opinion of the insurer's expert, Dr. Bozic, which the judge adopted, the employee argues that the judge ignored the part of the opinion that established an ongoing causal connection between the work injury and the employee's discogenic pain. This argument also avails the employee nothing. Much like Dr. Wagner, Dr. Bozic opined only that the employee's "job is a contributing factor to his mechanical low back pain and discogenic pain." (Ex. 5, October 5, 2002 Bozic report.) This opinion falls far short of satisfying the employee's § 1(7A) burden of proving that his work injury was and remained "a major cause" of his disability. Thus, even if the judge's findings on the medical evidence might have been more complete, such deficiency gives rise to only harmless error.

Finally, and related to that last argument, the employee asserts error because Dr. Bozic used the wrong standard of causation in addressing the employee's disability -- he applied "the major" rather than "a major" cause. We agree with the employee that "the major" causation standard improperly raises his burden of proof, [8] but we disagree that the judge was therefore bound to adopt the opinion of the employee's treating physician, Dr.

Q. That answers my question, thank you, that's fine.

(Dep. 47-48.)

[8] In arguing that Dr. Bozic's reference to "the major" cause is grounds for reversal or recommittal, the employee relies on our decision in Studzinski v. F.M. Kuzmeskus, Inc., 14 Mass. Workers' Comp. Rep. 421 (2000). His reliance is misplaced. Studzinski is distinguishable because it addressed a § 11A medical opinion that was the exclusive, prima facie medical evidence in the case. Id. at 423. Where the § 11A examiner uses the wrong causation standard, the report (and deposition, if there is one) is rendered inadequate for failure to satisfy the statutory requirements, necessitating the allowance of additional medical evidence. Id. at 423-424; Lebrun v. Century Mkts., 9 Mass. Workers' Comp. Rep. 692, 695-696 (1995). However, this analysis under § 11A(2) simply does not apply when the "the major cause" opinion is proffered by one of the parties' medical experts. As is the case here, the only matter implicated is the employee's burden of proof. There are no due process concerns such as can be triggered by the § 11A impartial medical examination system. See O'Brien's Case, 424 Mass. 16, 22-23 (1996)(due process concerns arise when the § 11A medical evidence is insufficient to provide each party a fair opportunity "to make out its position on the disputed issue"). The judge's choice of one doctor's opinion, properly in evidence, over another, ordinarily does not present a legal issue for our review. Silveira v. Bull Information Sys., 8 Mass. Workers' Comp. Rep. 136, 137 (1994); Wright, supra.

Ananta, who did opine that the work injury "remains a major" cause of disability. (Dec. 9; Ex. 4, August 27, 2002 Ananta report.); Wright v. Energy Options, 13 Mass. Workers' Comp. Rep. 263, 266 (1999). Instead, the judge permissibly could adopt, in part, the opinion of Dr. Bozic, for the proposition that the work injury simply would not have remained causally related to the employee's disability for more than three months. Turcotte v. Westinghouse Elec. Corp. , 9 Mass. Workers' Comp. Rep. 300, 303 (1995); Amon's Case, 315 Mass. 210 (1943).

Accordingly, we affirm the judge's decision.

So ordered.

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Patricia A. Costigan
Administrative Law Judge

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William A. McCarthy
Administrative Law Judge

Filed: December 30, 2004