COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 021454-99**

Americo Capozzi	Employee
Allen Davis d/b/a Brockton Auto Repair	Employer
Legion Insurance Company	Insurer

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

APPEARANCES
Karen Hambleton, Esq., for the employee
James Ramsey, Esq., for the insurer

CARROLL, J. The insurer appeals an administrative judge's award of ongoing § 34 weekly temporary total incapacity benefits, alleging several errors. Finding none, we affirm the decision.

Americo Capozzi has a ninth grade education. For twenty-three of his forty-six years, he performed auto repair and autobody work using various tools weighing up to fifty pounds on a repetitive basis. Prior to going to work for the employer in September 1998, he had had minor problems with his hand. (Dec. 3.) After he began working for the employer as an autobody repairman and painter, he experienced an increase in pain, numbness and tingling in his fingers, and cramping in his hands, which caused him to drop tools and increased the time it took to complete his work. For this reason, Mr. Capozzi stopped work on May 25, 1999, and has not returned. (Dec. 4.)

After leaving his job with the employer, Mr. Capozzi sought medical treatment from a number of specialists, including an orthopedist, a neurologist, a hand specialist and a pain management specialist. He was prescribed splints, physical therapy, cortisone injections to both wrists and nerve blocks, as well as Neurontin, Celebrex, Soma and Amitriptyline to relieve his pain and discomfort. Surgery has not been recommended. Id.

The employee filed a claim for compensation, resulting in a § 10A conference order awarding § 35 temporary partial incapacity benefits beginning October 5, 1999. The insurer appealed to a de novo hearing. (Dec. 1.) Pursuant to § 11A, the employee was examined by an impartial physician, Dr. Savage, who diagnosed him with bilateral carpal tunnel syndrome. Dr. Savage opined that Mr. Capozzi's work for the employer caused a worsening of his symptoms and causally related Mr. Capozzi's "disability to his work with [his] upper extremities over his entire work history up to and including his work for Brockton Auto Repair." Dr. Savage also restricted the employee from heavy lifting, using vibratory or dangerous equipment, and frequent repetitive motion of the hands, wrists and forearms. (Dec. 5.) Neither party deposed the impartial examiner, or submitted additional medical evidence. (Dec. 1-3.)

The judge in his hearing decision adopted the opinion of Dr. Savage as described above. However, the judge rejected the impartial physician's opinion that Mr. Capozzi could perform light duty work. (Dec. 5-6.) Crediting Mr. Capozzi's complaints of numbness in his fingers, severe cramping in his hand, and constant pain from the elbows of both extremities, the judge found the employee limited in his ability to hold objects and perform activities of daily living. Based on the employee's testimony, the judge further found that the medications Mr. Capozzi takes cause drowsiness and headaches. Finally, the judge credited the employee's testimony that he would like to work, but feels he can no longer perform the type of work he had been doing because of his pain. (Dec. 5.) The judge went on to find the employee totally "disabled"[1] from his last day of work for the employer, May 25, 1999, and awarded § 34 weekly total incapacity benefits from that date forward. (Dec. 6.)

The insurer raises a number of issues on appeal. First, it contends that the judge's findings on causal relationship are unsupported and, moreover, that the judge should have

[1] Though the judge used the term "disabled" throughout, he clearly meant "incapacitated" at times. "Disability" properly refers to the employee's medical condition, while "incapacity" combines the elements of physical injury (the medical component) and loss of earning capacity traceable to the physical injury (the economic component). See Loudenslager v. Mass. College of Art, 14 Mass. Workers' Comp. Rep. 322, 323 n.1 (2000).

applied the heightened § 1(7A) "major" cause standard.[2] We find no merit to these arguments. As the employee points out, the insurer failed to raise causal relationship or § 1(7A) as issues at hearing. Though the judge lists causal relationship as an issue in his decision, (Dec. 2), that appears to be an error. The board file reveals that the only issue the insurer indicated on its issues sheet, filled out prior to hearing, was disability and extent thereof. Neither § 1(7A) nor causal relationship is mentioned. Correspondingly, counsel for the insurer stated, in closing at the hearing, that, ". . .[T]here's no doubt that Mr. Capozzi has significant problems with his hands. What's before you today is *disability and extent thereof*." (Tr. 83, emphasis added.) Even in its written closing argument submitted to the administrative judge, the insurer argued only for an increase in the earning capacity. Indeed, one of its proposed findings basically admits to causal relationship: "The employee did sustain an aggravation of a preexisting industrial injury on May 25, 1999." (Insurer's closing argument and suggested findings of fact dated February 16, 2001).[3]

Issues, objections and claims not raised below are generally waived on appeal regardless of merit. Wynn & Wynn, P.C. v. Massachusetts Comm'n Against Discrimination, 431 Mass. 655, 674 (2000). This principle applies where the insurer fails to raise causal relationship or § 1(7A) at hearing. Corkery v. General Motors Corp. 13 Mass. Workers' Comp. 222, 225 (1999) (issue of causal relationship waived where neither transcript nor exhibits reveal it was raised); Frey v. Mulligan, Inc., 16 Mass. Workers' Comp. Rep. 364, 367 (2002) (insurer who does not mention the heightened "a major" cause standard in either its statement of issues or orally at the hearing has

[2] 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.

[3] We take judicial notice of these documents contained in the board file. See Rizzo v. M.B.T.A., 16 Mass. Workers' Comp. Rep. 160, 161 n.3 (2002).

effectively waived § 1(7A), even if it were otherwise applicable). Thus, we hold that the insurer has waived its right to contest on appeal any aspect of causal relationship, including the applicability of § 1(7A).[4] See also Fairfield v. Communities United, 14 Mass. Workers' Comp. Rep. 79, 83 (2000) (insurer has the burden not only to raise the statutory provisions of § 1(7A) in defense of an employee's claim but also to produce evidence to trigger its application).

The insurer's other main contention is that the judge erred in finding that the employee was temporarily totally incapacitated. The insurer makes a number of arguments in support of this allegation. First, it argues that a finding of total incapacity is arbitrary and capricious where the impartial examiner opined that the employee could perform light duty work. This contention is without merit. First, the impartial physician's opinion regarding the employee's work capacity is so qualified, it is problematic even to characterize it as an opinion that the employee is only partially disabled:

> *If* the patient were to do work at this time, it should be light duty work only which avoids heavy lifting, vibratory or dangerous equipment or frequent repetitious motion of the hand, wrist and forearm. The patient also likely will need to continue to wear his splints *if* he were to do a *very modified, light duty type employment if* it were available to him.

(Impartial Examiner Report, 3, emphasis added.)

Moreover, an expert opinion of partial disability does not preclude a finding of total incapacity if the judge appraises the physical effects of a work injury and its impact, together with vocational factors, on earning capacity. See Cipoletta v. Metropolitan Dist.

[4] We note that even if § 1(7A) had been properly raised, the insurer failed to produce evidence that a pre-existing *noncompensable* condition combined with the employee's compensable injury. See Liberman v. McLean Hosp., 17 Mass. Workers' Comp. Rep. ___ (January 7, 2003) (determination of whether pre-existing injury or disease alleged to combine with the work injury is "not compensable" is key to whether § 1(7A) "a major" cause standard applies). Here, the judge found that the impartial physician, whose report had prima facie status, causally relates the employee's disability to his work with his upper extremities *over his entire work history up to and including his work for the employer*. (Dec. 5, emphasis added.) See Lawson v. M.B.T.A., 15 Mass. Workers' Comp. Rep. 433, 437 n. 4 (2001) (a compensable pre-existing injury [as opposed to a noncompensable pre-existing injury which triggers a § 1(7A) analysis] is not necessarily one for which compensation was actually paid).

Comm'n, 12 Mass. Workers' Comp. Rep. 206, 208 (1998). Here, the judge took into account the employee's limited ninth grade education, his work experience which was confined to auto repair and autobody work, and his age (forty-six), in coming to his decision that the employee was totally incapacitated. In addition, the judge credited the employee's complaints of pain in assessing his level of incapacity. This analysis was entirely proper. See Delaney v. Laidlaw Waste Sys., 13 Mass. Workers' Comp. Rep. 72, 74 (1999)(where employee testified to numerous limitations due to pain and judge found employee credible, judge could conclude that employee was totally incapacitated, notwithstanding § 11A opinion that he could work with restrictions). The insurer further contends that a finding of total incapacity is improper because there was no medical opinion that the employee is at an end result. However, whether an employee is at an end result is not determinative of whether he is entitled to total incapacity benefits. See, e.g., Andrews v. Southern Berkshire Janitorial Serv., 16 Mass. Workers' Comp. Rep. ___ (November 27, 2002) (reviewing board upheld award of § 34A benefits where impartial examiner opined employee was not at a medical end result). We see no error in the conclusion of the judge here that the employee is totally incapacitated.

The decision of the administrative judge is hereby affirmed. Pursuant to § 13A(6), the insurer is ordered to pay an attorney's fee of $1,273.54.

So ordered.

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Martine Carroll
Administrative Law Judge

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Susan Maze-Rothstein
Administrative Law Judge

Filed: **March 21, 2003**
MC/jdm

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Patricia A. Costigan
Administrative Law Judge