COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS	**BOARD NOS.:** 025732-98, 044371-04 045017-04
Andrea Cook Hewitt	Employee
Blue Ridge Insurance	Employer
Pacific Insurance	Insurer
General Casualty	Employer
General Casualty	Self-insurer
National Grange Insurance	Employer
Chubb Group of Insurance Companies	Insurer

REVIEWING BOARD DECISION

(Judges Horan, McCarthy and Fabricant)

APPEARANCES

Mary-Ann L. Lane, Esq., for the employee at hearing and on brief
Linda D. Oliviera, Esq., for Pacific Insurance at hearing
Paul M. Moretti, Esq., for Pacific Insurance on brief
David M. O'Connor, Esq., for General Casualty at hearing
Melissa A. Pomfred, Esq., for General Casualty on brief
Edward M. Moriarty, Esq., for Chubb at hearing
William C. Harpin, Esq., for Chubb on brief

HORAN, J. General Casualty, a self-insurer in the middle of this three insurer[1] case, appeals from a decision ordering it to pay the employee ongoing § 34 benefits and medical benefits. We affirm the judge's finding that the employee's work as an insurance claims adjuster caused her disability and incapacity from work. However, because the

[1] The three insurers are, in chronological order based on date of injury: Pacific Insurance as the insurer of employer Blue Ridge Insurance, General Casualty, a self-insurer, and Chubb Group, the insurer of employer National Grange.

employee claimed only § 35 benefits after August 26, 2006,[2] we vacate the § 34 award from that date forward. We also recommit the case for further findings of fact consistent with this opinion.

The employee commenced work as a full time claims adjuster for Blue Ridge Insurance (Blue Ridge) on January 7, 1997. (Tr. 13.) She testified that in 1998, she filed a workers' compensation claim after experiencing elbow pain while employed at Blue Ridge. (Tr. 14.) The record is silent as to whether that claim was accepted, and the employee acknowledged she then lost no time from work, but did seek medical treatment. (Tr. 15.) She continued working for Blue Ridge, but sometime prior to 2003, Blue Ridge was acquired by General Casualty, although the record is silent as to when this actually occurred.[3] The employee continued to work despite occasional flare-ups of pain. In 2001, she experienced pain in her wrists. She sought medical treatment in 2002, and underwent a series of cortisone injections. Her symptoms improved and, in 2003, she left employment with General Casualty without pain in her hands, wrists or arms. (Dec. 2.) She commenced employment with National Grange Insurance (National Grange) in 2003, and again experienced pain in her elbows, arms and wrists. (Tr. 22.) She underwent additional cortisone injections and a regimen of physical therapy. In June 2004, the employee had left elbow surgery. In 2005 and 2006, she had additional elbow surgeries. (Dec. 3.)

At conference, the judge ordered Chubb Insurance (Chubb) to pay § 35 partial incapacity benefits and medical benefits under §§ 13 & 30. Chubb appealed. Prior to the hearing, the employee was examined by Dr. MacEllis K. Glass, the § 11A examiner. Both the medical report and the deposition testimony of Dr. Glass were admitted into evidence. Dr. Glass's

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[2] The employee's hearing memorandum claimed § 34 benefits from November, 2005 to March, 2006 and from April, 2006 to August, 2006, and § 35 benefits from May, 2005 to "present." (Employee Ex. I.) At the hearing, employee's counsel more precisely defined the

§ 34 claim, requesting "temporary total disability for the period from November 16 th through March 16 th" and a second period "from April 26 th through August 26 th." (Tr. 7.)

[3] When the employee was asked if she knew when Blue Ridge became General Casualty, she replied: "Not offhand, no." (Tr. 16.) The judge asked for a stipulation, which was promised but not submitted. Id.

opinion is the only medical opinion in the record. (Dec. 1-3.) At the hearing, Blue Ridge, General Casualty and Chubb all raised the issues of liability, disability and extent thereof, causal relationship (including § 1(7A)), and average weekly wage.[4]

Dr. Glass opined the employee suffered from chronic lateral and medial epicondylitis of both elbows. (Dec. 3.) Dr. Glass further opined that at some point in 2002, the employee's condition had reached a point of self-perpetuation, when simple daily activities would aggravate it. (Dec. 3; Dep. 34.) The judge found that although the employee's symptoms first appeared while she was employed with Blue Ridge in 1998, her condition worsened in 2002 while engaged in work activities for General Casualty. Given that the employee's symptoms were in a state of "self-perpetuation" while in the employ of General Casualty, the judge concluded that it was liable to pay the compensation due because "[u]nder the successive insurer rule, Pacific, the insurer for Blue Ridge, was replaced by the time of the 2002 symptoms by the self-insured General Casualty." (Dec. 4-5.)

General Casualty raises numerous issues on appeal. First, it claims the judge erred by finding a causal relationship between the employee's epicondylidities and her work as a claims adjuster. While we agree that Dr. Glass's deposition testimony *could* be interpreted to express an opinion insufficient to carry the employee's burden of proving causation, we believe the judge's interpretation, viewed in combination with the causation opinion expressed by Dr. Glass in his report, is reasonable. In his report, Dr. Glass opines, "it is reasonably probable that the *original epicondylidities* related to overuse on the job."[5] (Stat. Ex. 1, p. 4; emphasis added.) But the doctor's report also revealed the following thoughts on the causation issue:

> The factor creating the greatest doubt is the persistence of her epicondylar symptoms years after she has given up her office work, during which time she was treated extensively with conservative management and had previously indicated that discontinuation of work for a family leave absence had promptly relieved these complaints. This clouds the issue of causality to a significant degree.

[4] Unfortunately, the board file does not contain any of the insurers' "Defense" sheets described in the decision as insurers' exhibits 1, 2 and 3. (Dec. 1.) On appeal, the employee does not challenge the insurer's (or self-insurer's) right to raise any of the issues brought to our attention. We note there is no issue before us concerning the application of § 1(7A) or average weekly wage.

[5] Dr. Glass also opined the employee did not suffer from carpal, or cubital, tunnel syndrome. (Stat. Ex. 1, p. 4.)

Id. Perhaps sensing that Dr. Glass's causation opinion was subject to change, Chubb noticed the doctor's deposition for the purposes of cross-examination. See G. L. c. 152, § 11A(2).

At his deposition, Dr. Glass was asked if his report contained, *inter alia*, his opinion on causation; he replied: "Yes." (Dep. 9.) He was never asked if his opinion had changed, and he never specifically rejected it. When asked about the underlying cause of bilateral epicondylitis, he described it as a chronic inflammatory process, which caused the employee's tendinous degeneration (which had been identified by her surgeon). (Dep. 29, 36, 38.) When asked what caused the chronic inflammatory process, the doctor replied: "You'll have to ask the creator." (Dep. 38.) Later, when he was asked, "what in her history caused that degeneration that they found on that surgery?" the doctor replied:

> Bad luck, biology. Some people get heart attacks. Other people don't. There's - - no way that you can say in advance who's going to suffer what. There are no - - there are no hard and fast answers. *And in particular, when it comes to things like degenerative inflammatory disease, you cannot divide or apportion a time or a particular activity in regard to responsibility. It's just totally inexact science.* You're faced with a - - with a real problem . . . .

T]here is no way one can say with any degree of reasonable medical certainty this happened at this time or at another.

(Dep. 39-40; emphasis added.) General Casualty argues that because the foregoing constituted the expert's opinion regarding causation, the employee's claim must fail, as the opinion cannot support an award of benefits. Sponatski's Case, 220 Mass. 526 (1915); See Perangelo's Case, 277 Mass. 59, 64 (1931).[6] However, the judge does not share General Casualty's interpretation of the totality of Dr. Glass's testimony. The judge found

[6] In Perangelo, two doctors who originally had opined that the employee's medical condition was work-related subsequently, and expressly, repudiated their opinions based on changed circumstances. Here, in the administrative judge's estimation, this is not what occurred. We cannot say the judge's interpretation of the medical evidence is grounds for reversal under

G. L. c. 152, § 11C.

that Dr. Glass "firmly relat[ed] Ms. Hewitt's elbow problems to her work activity, [but was] more circumspect in establishing firm causal relationships as between employers." (Dec. 3.) This conclusion is reasonable, as the doctor never specifically rejects his initial view that "it is reasonably probable" the employee's condition is "related to overuse on the job." (Stat. Ex. 1, p. 4.) Moreover, the judge could reasonably conclude that Dr. Glass was having difficulty pinpointing a specific injury date − as opposed to concluding that the employee's work, over time, was the "reasonably probable" cause of her disabling condition. The judge's finding that, by "sometime in 2002" the employee's work-related condition "reached a point of 'self-perpetuation,' " is firmly grounded in Dr. Glass's testimony. (Dec. 3; Dep. 34, 55.)

This leads us to General Casualty's second argument. It maintains the judge's finding that the employee was working for General Casualty in 2002 lacks sufficient evidentiary support.[7] We agree. Unfortunately, there is nothing in the record revealing any stipulation on when Blue Ridge was purchased by General Casualty. See footnote 3, supra. The employee's biographical data sheet reveals only that the employee worked as a claims adjuster for Blue Ridge *and* General Casualty "[f]rom Jan. '97 to June '03." (Employee Ex. 1.) Employee's counsel failed to produce evidence to sufficiently identify when the employee began working for General Casualty − as a result of its takeover of Blue Ridge. If indeed the employee was working as a claims adjuster for General Casualty in 2002, the award of benefits against it may stand. Accordingly, it is appropriate to recommit the case for further findings on this issue.

The insurer is also correct that the judge had no authority to award § 34 benefits after August 26, 2006, as the employee claimed only § 35 benefits for this period.[8] See

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[7] According to the board file, the employee claimed that while working for General Casualty, she suffered an industrial injury on February 13, 2002. The employee did not begin work for National Grange until June 2003. (Tr. 22.) Dr. Glass opined the employee's symptoms were "well documented and of a chronic nature prior to 2003." (Dep. 29.)

[8] We have held that a judge may award *less* than what is claimed. In other words, if an employee claims only § 34 benefits for a period of time, an award of § 35 benefits will be upheld as a "lesser included" claim. Bracchi v. Insurance Auto Auctions, 22 Mass. Workers' Comp. Rep. ___ (October 29, 2008); Tredo v. City of Springfield School Dept., 19 Mass. Workers' Comp. Rep. 118 (2005).

footnote 2, supra; Medley v. E.F. Hauserman Co., 14 Mass. Workers' Comp. Rep. 327 (2000). We also agree with the insurer that the judge erred when he failed to address the effect of the employee's receipt of unemployment benefits in 2004.[9] See G. L.c. 152, § 36B. At the hearing, the employee admitted to receiving said benefits to perhaps the end of May, or the beginning of June, 2005. (Tr. 45, 63-64.)

In sum, we find no fault with the judge's interpretation of the medical evidence, but recommit the case for further findings to identify for whom the employee was working in 2002, and to address § 36B. We also vacate the award of § 34 benefits after August 26, 2006, and recommit the case for the judge to address the employee's entitlement, if any, to § 35 benefits for the period claimed, mindful of the provisions of § 36B. In light of our holding, we need not reach the remaining appellate issues raised by General Casualty.

Based on the foregoing, as the employee has yet to prevail, we award no fee to employee's counsel pursuant to G. L. c. 152, § 13A(6).

So ordered.

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Mark D. Horan
Administrative Law Judge

[9] General Laws c. 152, § 36B, provides:

> (1) No benefits shall be payable under section thirty-four or section thirty-four A for any week in which the employee has received or is receiving unemployment compensation benefits.
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> (2) Any employee claiming or receiving benefits under section thirty-five who may be entitled to unemployment compensation benefits shall upon written request from the insurer apply for such benefits. Failure to do so within sixty days after written request shall constitute grounds for suspension of benefits under said section thirty-five. Any unemployment compensation benefits received shall be credited against partial disability benefits payable for the same time period, or, if for a period of time for which partial disability benefits have already been paid, shall be credited against any future partial disability benefits which are or may become payable.

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Bernard W. Fabricant
Administrative Law Judge

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William A. McCarthy
Administrative Law Judge

Filed: **November 19, 2008**