COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 030819-98**

Anton W. Jobst, Jr.	Employee
Leonard T. Grybko	Employer
Great American Insurance Co.	Insurer

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

APPEARANCES
Harold I. Resnic, Esq., for the employee at hearing
Steven D. Rose, Esq., for the employee on brief
Mary Ann Calnan, Esq., for the insurer at hearing and on brief

MAZE-ROTHSTEIN, J. Finding no compensable personal injury arising out of and in the course of employment, Anton Jobst's claim for continuing benefits was denied. Aggrieved, he appeals alleging errors. Because the case involves the complex intricacies of the application of Zerofski's Case, 385 Mass. 590 (1982), and the 1991 amendments to G. L. c. 152, § 1(7A), not properly addressed by the decision, the arguments have merit, and we recommit the case. See G. L. c. 152, § 11C.

Mr. Jobst was thirty-one years old at the time of hearing. In July 1996, he commenced employment with Leonard T. Grybko as a mechanic. Although primarily an auto mechanic, he also serviced thirteen to fifteen buses. (Dec. 2.) Among other responsibilities, he would perform oil changes, grease fittings, check brake pads for wear and replace them as necessary. When replacing brake pads, the large bus wheels would be manually removed. The work activities required extensive use of a "creeper," a small-wheeled platform, used by mechanics to work under vehicles. Id. There was testimony by the employee and other witnesses that his responsibilities also required considerable squatting, kneeling, weight bearing and crawling on his knees. (Tr. 11, 15, 16, 17, 56, 57, 65, 66.)

On April 28, 1998, while at home after having completed his workday, Mr. Jobst noticed pain and swelling in his right knee. He did not recall, however, any specific incident at work. He obtained a doctor's appointment the next morning and reported the problems to his employer. (Dec. 2.) He returned to work, despite his pain, and soon began to experience pain in his left knee as well. The employee continued to receive medical care and on May 21, 1998, an MRI revealed torn cartilage in his right knee. On July 8, 1998, the employee underwent a surgical procedure to repair the cartilage. He continued to work up to the surgical date. (Dec. 3.) The employee has not returned to work since.

The employee filed a claim for compensation that met with the insurer's resistance. Following a § 10A conference, the administrative judge awarded a closed period of § 34 temporary total incapacity benefits. Both parties appealed to a hearing de novo. (Dec. 2.) The issues at the hearing were liability (whether or not an industrial injury occurred), the extent of any incapacity and causal relationship. (Dec. 1; Ins. Ex. 1.)

On March 25, 1999, pursuant to §11A,[1] the employee was examined. (Dec. 1, 4.) The doctor's report and depositional testimony were admitted into evidence. (Dec. 1.) The §11A examiner acknowledged the diagnosis of torn cartilage; however, he did not specifically relate the tear to the work activities or to any distinct traumatic event. Instead, he opined that the tear was consistent with a long term, degenerative tear and fraying. (Dec. 4; Dep. 13, 23.) The physician also opined that the employee's work around the buses aggravated his pre-existing condition, but that the surgery was conducted to correct the pre-existing tear. (Dec. 4; Dep. 14, 15, 16-17, 24.) Further, he observed that were it not for the underlying condition, the employee's pain would have

[1] General Laws c. 152, § 11A(2), as amended by St. 1991, c. 398, § 30, requires that: "When any claim or complaint involving a dispute over medical issues is the subject of an appeal of a conference order . . . the parties shall agree upon an impartial medical examiner [who will then examine the employee and prepare a medical report that addresses issues of disability and causal relationship.]" The report, once prepared, becomes the exclusive medical evidence unless on two limited exceptions the judge allows the submission of additional medical evidence.

resolved quickly without surgical intervention. (Dec. 4; Dep. 17.) Finally, the doctor stated that the employee's ongoing symptoms were related to the previously torn meniscus in his right knee. (Dec. 4; Dep. 24, 26, 31, 32.) The insurer's motion to submit additional medical evidence was denied. (Dec. 2.)

The administrative judge adopted the §11A medical opinion that the employee's torn cartilage was the product of a long term, degenerative tear and fraying rather than the result of any one traumatic event. Additionally, the judge determined that the surgical repair caused the employee's ongoing symptoms. Although the judge found that the tear pre-existed the symptoms, he acknowledged that the employee's unremitting pain compelled the surgery and that therefore, the case may present "a compensable worsening of the underlying condition and resulting pain symptoms." (Dec. 5.) The judge then reasoned that his analysis under § 1(7A)[2] should focus on "what brought on the need for surgery." (Dec. 5.) Ultimately, the judge determined that the employee's claim for benefits was not compensable under the Act. (Dec. 7.)

On appeal, the employee asserts that the § 11A doctor opined that the surgical procedure was required because the previously asymptomatic torn cartilage was aggravated by the employee's work activities. Therefore, Mr. Jobst submits causal relationship has been established and the judge "clearly ignore[d] this crucial statement of the [§11A] doctor . . . ." (Employee br., 3.) The error, the employee posits, requires reversal of the decision. In the alternative, he proffers that recommittal is appropriate for further clarification of the interpretation of the medical evidence. Id. We agree that recommittal is appropriate.

[2] General Laws c. 152, § 1 (7A), as amended by St. 1991, c. 398, reads in pertinent part:

> "Personal injury" includes . . . a compensable injury or disease [that] 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.

At the outset, we note that the employee testified that kneeling, squatting, crawling, heavy lifting and bending were included in the scope of his workplace activities. (Tr. 11, 15, 16, 17.) These activities were corroborated by the testimony of his employer, (Tr. 56, 57), and by a co-worker. (Tr. 65, 66.)[3] Moreover, the 11A examiner also discussed the physical demands of the employment. (Dep. 14, 16-17, 20, 26.) In the face of all this evidence the judge found that the employment merely required "some kneeling" and "occasional bending of the knee." (Dec. 6) The judge failed to make the requisite findings as to the basic factual substrate for the construction of his legal analysis. Accordingly, the case must be recommitted for additional findings with an eye toward all of the physical demands that could stress the employee's knee in his employment.

Another pivotal fact remains unresolved in the present decision. The judge simply found that when the employee went home on April 28, 1998 he noticed pain and swelling. Absent from this finding is any inkling of what the judge believed that the employee did on that day. The finding must be reached by resolving the conflicting testimony of the employee and the employer as to the actual work activities on April 28, 1998. The employee testified that he had "manhandled" numerous tires while working on six to eight buses within his eight-hour shift.[4] (Tr. 18-20.) The employer testified to the contrary stating that the employee replaced the rear brakes of one bus and "could have changed a couple of tires." (Tr. 56, 59.) The choice of testimonies gives rise to two entirely different legal analyses of the case. It is only after these preliminary factual determinations are made that the legal analysis will enable proper appellate review. Cicerone v. Quincy Adams Restaurant & Pub, Inc., 14 Mass. Workers' Comp. Rep. 62,

[3] Although the judge noted testimony that the employee complained of knee problems, (Dec. 3), the employer and the co-worker each testified that the employee had no problem performing the physical requirements of the employment up until April 1998. (Tr. 62, 66.)

[4] Both the employee and the employer testified that the tires weigh approximately 125 pounds or so each. (Tr. 16-17, 63.)

66 (2000)("It is the duty of an administrative judge to make such specific and definite findings, based on the evidence, as will enable the reviewing board to determine . . . whether correct rules of law have been applied").

On the strength of the factual findings that were made, the judge correctly determined that Zerofski's Case, 385 Mass. 590 (1982), applied. However, he erred in his application of Zerofski principles. The first prong of Zerofski addresses "a *specific incident* or *series of incidents* at work." Zerofski's Case, supra at 594-595 (emphasis added). This part of the analysis should have encompassed whether the employee's cumulative work activities of April 28, 1998 amounted to either a specific incident or series of injurious incidents. Instead the judge only found that the employee did not recall a specific incident on the date in question. (Dec. 2.) The employee's recall is but a fraction of the necessary fact finding for proper application of the first prong of the Zerofski mechanism of injury test.

The employee had testified to a series of strenuous activities on the subject date, which included squatting during the removal and lifting of numerous bus tires each weighing approximately 125 pounds. (Tr. 16-17, 18, 20-21.) Although the § 11A examiner did not specifically relate the tear to the April 28, 1998 activities, he did suggest that the events of the day may have resulted in a sprain to the knee. (Statutory Ex. 3; Dep. 16, 17, 26-28, 31-32.) Further, the § 11A physician could not entirely rule out the occurrence of the tear on April 28, 1998. (Dep. 23)("there's really no way of knowing [if the tear was present before April 28, 1998.]") In light of the lay testimony that the employee was performing his regular duties without difficulty prior to April 28, 1998, along with the medical opinion of a possible sprain or even tear that day, the judge must determine whether there was a specific incident or series of incidents. As the judge failed to adequately address these issues we recommit the case for him to do so.

Should the judge find that the first prong of Zerofski is not satisfied, he must then address the second prong which offers another means of arriving at a compensable mechanism of injury arising from "an identifiable condition that is not common and necessary to all or a great many occupations." Zerofski's Case, supra at 595. Despite an

effort to apply the facts in this case to the second prong of Zerofski, the application was flawed. The focal point of error was in the judge's factual limitation of the employee's work activities to "some kneeling" and "occasional bending of the knee." (Dec. 6-7.) As noted above, there was testimony of a litany of other physical tasks performed by the employee over nearly two years that do not appear to be common to most forms of employment on which the decision is silent. Contrast Aetna Life & Cas. Ins. Co. v. Commonwealth, 50 Mass.App.Ct. 373 (2000)(sitting is too common an activity to meet the Zerofski standard). The judge must readdress this issue on recommittal. If neither his findings as to specific work performed on the injury date, nor as to the repetitive work performed for the two years up to that date, meet the Zerofski criteria, then the inquiry would end there.

Should, however, one or the other prongs of the Zerofski test be met, the judge must next turn to the question of causation and the applicability of § 1(7A). In the first instance, the insurer has the burden to raise the statutory provision of § 1(7A) as a defense and produce evidence to trigger its application. See Fairfield v. Communities United, 14 Mass. Workers' Comp. Rep. 79, 83 (2000)(insurer has burden to produce evidence that would support finding that a pre-existing noncompensable injury or disease combined with a compensable injury). The insurer's defense sheet does not specifically raise G. L. c. 152, § 1(7A), as a defense. (Insurer's ex. 1.) Likewise, when the judge inquired at hearing as to whether there were any additional issues, the insurer did not specifically raise § 1(7A) as a defense. (Tr. 3-4.) Counsel for the insurer did, however, in her opening statement mention that testimony would be forthcoming that the employee had problems with his knees prior to April 28, 1998. (Tr. 5.) On recommittal, first the judge should determine whether a § 1(7A) defense was properly raised by the insurer. If so, he must also determine whether the insurer met its burden of production on the factual predicate necessary to trigger § 1(7A) application. If either of the first two considerations have not been met, the employee is taken "as is."

If § 1(7A) has been raised properly and the burden of production met, then the judge must examine the evidence as to whether a pre-existing unrelated condition

combined with the work injury to cause or prolong a need for treatment. See G. L. c. 152, § 1(7A). As to the combining element of § 1(7A), other than a minor skiing incident when the employee was fifteen years of age, no evidence of any prior non-work related injury was presented. Moreover, the § 11A doctor felt that the ski incident was inconsequential and did not cause the tear. (Dec. 4; Dep. 7.) Further, the § 11A examiner's medical opinion does not bar the tear's pre-existence due to the employee's prior work activities with this employer. Despite the doctor's opinion that the tear itself was the product of a long term degenerative process, "tears like this . . . take more than just a few days to come on," (Dep. 23), that opinion seems inclusive of aggravations at work. (Statutory Ex. 1, Dep. 13-15, 31.) Over the course of his nearly two-year employment with this employer, the employee performed physical activities, which themselves may have been the root of the tear. Therefore, the judge should make specific findings as to the medical opinion presented and whether the employee's prior work activities for this employer caused the tear in his knee. Such a finding would also render § 1(7A) inapplicable.

If the judge nonetheless ultimately determines that § 1(7A) has been raised and is applicable, he must then apply it making the necessary findings as to whether the April 28, 1998 activities, or those of the two years of employment in general, caused an aggravation, to the identified pre-existing knee condition, that remains "a major" cause of ongoing medical disability or need for treatment. See G. L. c. 152, § 1 (7A) at n.2, supra. The judge skirted the issue by focusing his § 1 (7A) analysis exclusively on the need for surgery. (Dec. 5.) He acknowledged that the § 11A examiner opined that the surgery was conducted due to pain brought about by the stress of the employee's work activities, and that but for the pre-existing tear, the employee's pain symptoms would have subsided without the need for surgery. (Dec. 4, 5.) Although the judge determined that the work around the buses aggravated the employee's condition, he concluded that "the minor incident of bending the knee . . . is not a major cause of the need for surgery." (Dec. 6.) Again, the physical aspects of the employee's job went well beyond a "minor incident of bending the knee." (Tr. 11, 15, 16, 17, 56, 57, 65, 66.) The § 1 (7A) analysis at present

is flawed. Should § 1 (7A) apply at all, the judge should be mindful of all the physical demands of the job on either April 28, 1998 or on both that day and the two years leading up to that date**.** See Hammond v. Merit Rating Bd., 9 Mass. Workers' Comp. Rep. 708, 708-711 (1995)(event or events can be "the proverbial 'straw that breaks the camel's back' " where condition needs but a "small trigger to blossom into incapacity"; said trigger may be "a major cause").

We recommit the decision to the administrative judge for further findings relevant to the law that may pertain here.

So ordered.

Susan Maze-Rothstein
Administrative Law Judge

Martine Carroll
Administrative Law Judge

Sara Holmes Wilson
Administrative Law Judge

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