COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 047069-94**

Bruce LaFlamme	Employee
Boston City Hospital	Employer
City of Boston	Self-insurer

REVIEWING BOARD DECISION
(Judges Wilson, McCarthy and Smith[1])

APPEARANCES
Nancy L. Hall, Esq., for the employee
John T. Walsh, Esq., for the self-insurer

WILSON, J. The self-insurer appeals from a decision of an administrative judge, who denied its complaint for discontinuance or modification and awarded continuing § 34A benefits for total and permanent incapacity. Because we cannot tell whether the judge confined her analysis to the effects of employee's work injury, we recommmit the case for further findings.

Bruce LaFlamme was forty-nine years old at the time of the hearing in this matter. A high school graduate, he earned an associate's degree in computers in 1971. He commenced working for Boston City Hospital that same year. Hired as a darkroom attendant, he worked his way up to an admitting assistant position. In that job he sat in the reception area, where he created and updated patient information on admission and chart cards and answered the telephones. (Dec. 3.)

In addition to his admitting assistant position, Mr. LaFlamme also worked as a ward secretary at Boston City Hospital, logging patients onto the ward, making appointments for diagnostic tests, and creating and filing medical records. Between the two positions, he worked between eighty-eight and one hundred hours per week. Mr. LaFlamme is legally blind and contracted avascular necrosis of both hips in 1992. Both

[1] Judge Smith no longer serves as a member of the reviewing board.

conditions predated the work injury that is the subject of this decision, and neither condition is the result of or was aggravated by any work-related injury. The judge noted that the employee's blindness had not been a handicap for him and was not an issue in the hearing. (Dec. 3, 9.)

On October 8, 1994, the employee injured his left, minor wrist at work when his ankle became entangled in some wires and he fell to the floor with outstretched hands, landing on his left wrist. (Dec. 4, 7.) He was immediately taken from his workstation to the operating room, where he underwent a closed reduction of his left wrist. Eleven days later, he underwent a second surgery and then endured several additional surgeries for removal of hardware and scar tissue. Fusion of the left wrist has been recommended. (Dec. 4.) The employee has not returned to work.

The self-insurer accepted liability for the work injury, paying § 34 benefits for temporary, total incapacity. Subsequently, the self-insurer filed a complaint for discontinuance or modification of those benefits. A § 10A conference was held, at which time the employee filed a motion to join a claim for § 34A permanent and total incapacity benefits. The self-insurer's complaint was denied but the judge allowed the employee's claim to be joined. Following a conference, the judge ordered the self-insurer to continue paying § 34 benefits to exhaustion and to pay § 34A benefits thereafter. The self-insurer appealed the denial of its complaint, giving rise to a hearing de novo in which the self-insurer's defenses were disability and extent thereof and causal relationship. (Dec. 2.)

Pursuant to § 11A, the employee was examined by Dr. Richard Alemian, an orthopedic surgeon. As neither party deposed Dr. Alemian and no motions to allow additional medical evidence were submitted, Dr. Alemian's report is the sole medical evidence. (Dec. 2.) Dr. Alemian opined that Mr. LaFlamme had a permanent, partial impairment of his left upper extremity and that his left hand was not very useful, as he was unable to hold more than one pound maximum in it. Without a recommended fusion, he was at an end result. (Dec. 8.)

In her decision, the administrative judge made lengthy, intertwined findings regarding the employee's work injury to his left wrist and his non-work related

conditions of blindness and avascular necrosis of the hips. She found that he underwent surgery for his right hip condition in July 1993 and September 1993, but returned to work in January 1994 (prior to his wrist injury) with no special accommodations; that he underwent a third right hip surgery in May 1995 and again had surgery on his left hip in October 1995 and May 1998; that each hip surgery necessitated at least a one week hospitalization followed by intensive physical therapy; that he currently walks with Canadian crutches; that he takes Motrin™ and aspirin for his hip condition; and that he has relied on home health aides provided by the Commission of the Blind each morning and evening since April 1994.[2] (Dec. 3-4.) The judge found that the home health aides were necessitated by the fact that the employee did not have the use of both hands "*as well as because of the problems with his hips.*" (Dec. 4-5, emphasis added.) She found that Mr. Laflamme's life had "drastically changed since his wrist injury *and the problems with his hips*", and that he suffered from depression and anxiety, as well as from the pain caused by his left wrist and "*the pain that he suffered from the avascular nercrosis [sic]*." (Dec. 5, emphasis added.) She further found that he took "*pain medication for both his hips and wrist.*" (Dec. 9, emphasis added.)

Turning to the testimony of the vocational expert, Kathleen Heravi, the judge found that Ms. Heravi believed Mr. LaFlamme to be quite intelligent and employable in a variety of jobs such as dispatcher, telephone answering service operator, and hospital paging operator. (Dec. 6.) The judge expressed concern about this conclusion, however, as she found that Ms. Heravi did not consider the employee's level of pain, nor was she aware that he took Percocets on a regular basis and wore Fentinol patches for pain. The judge also noted that Ms. Heravi opined that "given Mr. LaFlamme's situation with his left hand *and both hips, his blindness*, as well as his need to take medication on an ongoing basis, a personal care attendant or a home health aide at the job site would be a reasonable accommodation." (Dec. 6-7, emphasis added.) The judge found that Ms.

[2] The hearing transcript reveals that the employee testified that he has had a home health aide since October 8, 1994, (Tr. 19), the date of his wrist injury, rather than since April 1994, and that he had also had that type of service previously for hip surgery. (Tr. 26.)

Heravi had not told potential employers whom she contacted that the employee needed a personal care attendant, that he had problems with his hips necessitating the use of crutches, or that he took pain medication on a regular basis. (Dec. 7.)

The judge credited the testimony of the employee and adopted the opinion of the impartial examiner, but did not find persuasive that part of the vocational expert's testimony "that employers would be willing to accommodate Employee's left wrist condition under his present circumstances of pain and indecision about fusion of the wrist." (Dec. 10.) In the general findings she concluded:

> Thus, considering the medical and vocational testimony, and *in relationship to his blindness*, one has to take Mr. LaFlamme as we find him. But for his left [wrist] medical condition, Mr. LaFlamme is an intelligent individual with many transferable skills as revealed in the vocational rehabilitation testimony and otherwise would be employable. However, *based on the facts of this case and considering Employee's blindness* and the ongoing problems related to the left wrist, i.e., his physical condition, and its non-union *as well as the support Mr. LaFlamme would need in order to return to the work force and to remain at work*, I find his capacity to return to meaningful work and work that was not trifling in nature extremely limited. Therefore, I find Mr. LaFlamme to be permanently and totally disabled.

(Dec. 10, emphasis supplied.)

The self-insurer appeals, arguing that the judge improperly considered medical conditions other than the employee's left wrist work injury in reaching her incapacity determination, or that, alternatively, it is not possible to tell whether the judge improperly considered these other medical conditions in reaching her conclusion. We find merit in the self-insurer's second argument.[3]

In the general findings, the judge correctly set forth the standard by which the employee's case should be evaluated.

> It is to be noted from the outset, that only the medical condition or problems related to Employee's left wrist fracture that arose out of and in the course of his employment on October 8, 1994, and not his pre-existing hip surgery or the subsequent surgeries for the bilateral hip avascular necrosis condition, was

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[3] The employee did not file a brief.

> considered in this decision. (see Simoes v. Town of Braintree School Dept., 10 Mass. Workers' Comp. Rep. 772, 774 (1996)[.] Where a work injury is followed by a disease process unrelated to employment, the determination of compensability is limited to incapacity caused not by the blend of the work injury and the after occurring malaise, but by the work related condition alone; citing Patient v. Harrington & Richardson, 9 Mass. Workers' Comp. Rep. 679, 682-683 (1995)[.] In cases where medical conditions emerge after an industrial injury, judges must look "with something akin to tunnel vision and . . . narrowly focus on and determine the extent of . . . harm . . . that is causally related solely to the work injury." Also see Squires v. Beloit Corporation, 12 Mass. Workers' Comp. Rep. 295, 297 (1998)[.] In a situation such as the present one, [where there are subsequent non-work-related injuries] the insurer is responsible for the employee's incapacity as it was just prior to the non-work-related injuries. Insurer is not responsible for the additional incapacity caused by the subsequent injuries.) Thus, incapacity due to the completely unrelated bilateral hip conditions cannot be considered in determining whether the condition of his work-injured left wrist has rendered him partially disabled or permanently and totally disabled.

(Dec. 9.)

Although this an accurate statement of the law with respect to after-occurring injuries or disease processes, it is far from clear that the judge actually applied it with respect to the employee's avascular necrosis.[4] Her frequent references in her subsidiary findings to the incapacity caused by the employee's wrist *and hip* problems cast serious doubt on whether she considered only the physical impairment and diminishment of earning capacity caused by the work-related wrist injury. (Dec. 4-5, 9.)

Moreover, the judge's general findings, (Dec. 9-10), are similarly flawed. Factored into the incapacity equation is the support that Mr. LaFlamme would need to return to and remain at work even though the vocational expert had opined that a personal

[4] The judge did not make a specific finding that Mr. LaFlamme's hip condition had worsened since his wrist injury, but that finding seems implicit in her discussion of the law applicable to supervening or after-occurring injuries or diseases. See Hummer's Case, 317 Mass. 617, 622-623 (1945) (degeneration of the heart occurring after industrial injury to hand, but which had not been aggravated by the hand injury, cannot be considered in determining whether the wrist condition rendered the employee totally and permanently disabled). Even if, despite the necessity for three surgeries and the employee's constant use of crutches by the time of hearing, his hip condition had not worsened and was considered a pre-existing non-compensable condition, there was no medical testimony that his wrist condition combined with his hip condition to increase his disability. See G.L. c. 152, § 1(7A), and discussion infra.

care attendant or home health aide was necessary "given Mr. LaFlamme's situation with his left hand *and both hips, his blindness,* as well as his need to take medication on an ongoing basis . . . . " (Dec. 7, emphasis added.) She also seemed to find significant the fact that the vocational expert did not tell potential employers that Mr. LaFlamme used crutches or that he had problems with his hips. Id. Like the subsidiary findings, these general findings make it impossible to know whether the judge looked with "something akin to tunnel vision. . . to narrowly focus on and determine the extent of physical injury or harm to the body that is causally related solely to the work injury" to his wrist. Patient v. Harrington & Richardson, 9 Mass Workers' Comp. Rep. 679, 683 (1995). Since we cannot determine with reasonable certainty whether the judge applied correct rules of law to the facts as they could properly be found, we must recommit the case for application of the appropriate legal standard. See Praetz v. Factory Mutual Engineering and Research, 7 Mass. Workers' Comp. Rep. 45, 47 (1993).

In addition to the uncertainty engendered by conjoining the wrist and hip conditions, the judge created further uncertainty as to whether she had applied the law correctly by stating that "in relationship to his blindness, one has to take Mr. LaFlamme as we find him[,]" and that she was considering the employee's blindness in determining the extent of his incapacity. (Dec. 10.) These statements seem to indicate that the judge applied an "as is" standard of causation without recognition of the 1991 amendment to G.L. c. 152, § 1(7A).[5] Moreover, the judge's statements appear to reflect a misunderstanding of the "as is" doctrine. Under the "as is" principle of causation, "[a]ggravation or acceleration of a pre-existing disease or infirmity to the point of disablement is as much a personal injury as if the work had been the sole cause." L. Locke, Workmen's Compensation § 173, at 178 (2d ed. 1981). See Long's Case, 337 Mass. 517, 521 (1958). "As is" liability attaches for an aggravation of a pre-existing

[5] The 1991 amendment to G.L. c. 152, § 1(7A), redefined "personal injury" by adding a heightened causation standard where an industrial injury combines with a non-compensable, pre-existing condition to cause or prolong disability or need for treatment. As a result, the "as is" doctrine does not always apply to so-called "combination" injuries occurring after December 23, 1991.

medical condition if the work aggravation is "even to the slightest extent a contributing cause of the [employee's] subsequent disability." Massarelli v. Acumeter Labs, 10 Mass. Workers' Comp. Rep. 703, 706 (1996), citing Rock's Case, 323 Mass. 428, 429 (1948). In a seminal case, the Supreme Judicial Court explained the parameters of the "as is" principle. "The statute prescribes no standard of fitness to which the employee must conform, and compensation is not based on any implied warranty of perfect health, or immunity from latent and unknown tendencies to disease, which may develop into positive ailments, *if incited to activity through any cause originating in the performance of the work for which he is hired*." Crowley's Case, 223 Mass. 288, 289(1916) (emphasis supplied). See also, Zerofski's Case, 385 Mass. 590, 593(1982).

The facts found by the administrative judge in the instant case do not fit the parameters of either the "as is" doctrine or post-1991 § 1(7A) analysis. There was no medical testimony, and no finding by the judge, that the wrist injury aggravated or contributed to the employee's blindness in any way. See Hummer's Case, 317 Mass. 617, 621-622 (1945) (court upheld administrative judge's finding that employee's pre-existing heart condition was not aggravated by employee's work injury to his hand, and therefore should not be considered in determining whether employee was permanently and totally disabled). Nor was there testimony that these conditions combined to increase the employee's incapacity. Compare Gallant's Case, 329 Mass. 607, 608 (1953) (medical testimony indicated that the employee was prevented from doing heavy work by the work-related hernia and by the pre-existing condition of his heart, and that the two conditions could not be separated). Indeed, the judge found earlier in her decision that the employee's blindness had not been a handicap for him and did not become an issue in the hearing. (Dec. 9.) Had the judge properly found an aggravation of or combination with the employee's blindness, or with the avascular necrosis, to cause or prolong disability, she should then have gone on to determine whether the wrist injury remained the major cause of Mr. LaFlamme's disability or need for treatment. § 1(7A). However, as the medical evidence in this case does not support the initial finding, § 1(7A) does not apply. Cf. Fairfield v. Communities United, 14 Mass. Workers' Comp. Rep. 79, 82

(2000)(application of § 1(7A) not triggered where there was no medical evidence on the record that pre-existing obesity is a disease).

" 'The goal of disability adjudication is to make a realistic appraisal of the medical effect of a physical injury on the individual claimant and award compensation for the resultant impairment of earning capacity, *discounting the effect of all other factor*s . . .' " Scheffler's Case, 419 Mass. 251, 256 (1994), quoting L. Locke, Workmen's Compensation § 321, at 375-376 (2d ed. 1981) (emphasis supplied). The employee's legal blindness, which had not hampered him in his ability to work prior to his wrist injury, plays no role in physical disability adjudication in the absence of findings based on expert testimony that the employee's wrist injury aggravated his vision problems or combined with them to increase his incapacity. Nor does the employee's avascular necrosis. Since we cannot tell whether the judge considered these two non-work-related conditions in her determination of Mr. LaFlamme's level of physical impairment and its effect on his earning capacity, we cannot perform our appellate function. See Praetz, supra at 47.

Accordingly, this case is recommitted for further findings, consistent with this opinion, on the extent to which the medical effect of the employee's industrial injury alone affected his earning capacity. Only then can a determination be made of the impact of vocational factors that may " 'affect the ability to cope with the physical effect of injury.' " Scheffler's Case, supra at 256, quoting L. Locke, Workmen's Compensation § 321 (2d ed. 1981).

So ordered.

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Sara Holmes Wilson
Administrative Law Judge

William A. McCarthy
Administrative Law Judge

Filed: **February 7, 2001**