**COMMONWEALTH OF MASSACHUSETTS**

**DEPARTMENT OF INDUSTRIAL ACCIDENTS** **BOARD NO.:** 032010-01

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| Bryon Valachovic | Employee |
| Big Y Foods | Employer |
| Big Y Foods | Self-insurer |

**REVIEWING BOARD DECISION**
(Judges Fabricant, McCarthy and Horan)

**APPEARANCES**
Donald W. Blakesley, Esq., for the employee
Thomas E. Casartello, Esq., for the self-insurer

**FABRICANT, J.** The self-insurer appeals from a decision in which the administrative judge awarded the employee benefits for a carpal tunnel syndrome related to his work using a pricing gun. Because the award is unsupported by medical evidence that satisfies the employee's burden of proof, we reverse the decision.

The employee worked for the employer for several years as a stocker. His duties entailed putting groceries on shelves, and squeezing a pricing gun with his right hand. The employee was a fast worker, and was capable of pricing more than 800 items with the pricing gun in a single shift. (Dec. 2.)

In the fall of 2000, the employee began to notice problems with his hands, his right thumb straightening and his fingers cramping up. After his symptoms increased, he underwent right carpal tunnel surgery in August 2001. His bilateral symptoms continued to worsen after the surgery, particularly in the right hand. (Dec. 2-3.)

The employee filed a claim for workers' compensation benefits, which the self-insurer resisted. (Dec. 1.) After a denial at conference, the employee appealed to a full evidentiary hearing. (Dec. 2.) The employee underwent a § 11A impartial medical examination by Dr. Demosthenes Dasco. Dr. Dasco opined that the employee suffered from a mild carpal tunnel syndrome of the right hand, and a questionable carpal tunnel syndrome of the left. The doctor restricted the employee from work requiring lifting in

excess of twenty-five pounds. (Dec. 3.) Dr. Dasco opined that, as only repetitious motion of a strenuous nature would cause carpal tunnel syndrome, there was, at best, only a fifty percent chance that the employee's work with a pricing gun caused his carpal tunnel syndrome. The doctor also considered prior injuries that may have contributed to his impairment. Ultimately, Dr. Dasco was not convinced that the employee's carpal tunnel syndrome was work-related. (Dep. 20-21, 31-34.)

The judge, under the guise of adopting Dr. Dasco's opinion, found there was "about a 50 percent chance that [the employee's] condition is related to his work activities." (Dec. 3.) Although the judge made no findings in this regard, it was undisputed that the employee had sustained injuries to his right arm and his back before the onset of his carpal tunnel syndrome. There was also undisputed evidence that the employee frequently played video games in his spare time. (Tr. 38-43.) As a result, the self-insurer raised § 1(7A) in defense of the employee's claim at hearing. (Tr. 58.) On that issue, the judge concluded:

> In order to be compensable, the work activity must be a major but not necessarily predominant cause of the employee's disability. After reviewing the testimony of the witness, and considering the doctor's testimony that the employee's work had a fifty percent chance of being the cause of the employee's problems, I am persuaded that the work activities are a major cause of employee's hand and wrist conditions.

(Dec. 4.) The judge therefore awarded the employee the claimed benefits. (Dec. 5.)

Paradoxically the self-insurer argues on appeal that the judge should not have applied the heightened standard of "a major" causation under § 1(7A). See Viera v. D'Agostino Assoc., 19 Mass. Workers' Comp. Rep. ___ (March 22, 2005) and cases cited. However, we need not address this interesting argument put forward by the party to whose interest that causal standard accrues. It is clear from the evidence that § 1(7A) was appropriately raised at hearing, based on the employee's pre-existing injuries. Regardless, analysis of the medical evidence indicates that the case should have come to a halt well before consideration of the § 1(7A) standard.

Dr. Dasco's testimony at deposition was eminently clear, and, unfortunately, fatal to the employee's claim:

> I thought that the chance of this [carpal tunnel condition] being work related was no more than fifty percent. I can't do any better than that.
>
> (Dep. 21.)
>
> I have already expressed my opinion regarding the causality of his carpal tunnel syndrome and I stated that I am not convinced that his carpal tunnel syndrome was convincingly work related. I felt that there is a chance, that at best fifty percent, that [it] may be work related. I can't go anywhere beyond that.
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> (Dep. 31-32.)
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> I think there is a chance of fifty percent and I will leave it at that. Believe me, I'm trying to be fair to both of you. There is a fifty percent chance. I don't know where you go with that legally, if it's only fifty percent, but I'm not convinced more than fifty percent that this was work related.
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> (Dec. 33-34.)

An employee "must go further than simply to show a state of facts which is as equally consistent with no right to compensation as it is with such right." Sponatski's Case, 220 Mass. 526, 528 (1915). A medical opinion, such as Dr. Dasco's here, that expresses no more than a fifty percent mathematical likelihood of causal connection, does not satisfy the employee's burden of proving that connection "more likely than not." King's Case, 352 Mass. 488, 491-492 (1967); Hachadourian's Case, 340 Mass. 81 (1959); Tartas's Case, 328 Mass. 585, 587 (1952).

The administrative judge mischaracterized Dr. Dasco's opinion in order to reach the conclusion that the employee's injury was compensable: "He suggests there is *about a 50 percent chance* that [the employee's] condition is related to his work activities." (Dec. 3; emphasis added.) The doctor clearly stated fifty percent at best, not "about fifty percent." The distinction is crucial. This percentage testimony is evidence that goes to the *standard of proof:* if the testimony had been " *about* fifty percent," this could have arguably included 51%, which would have met the employee's burden of proving his case to a preponderance of the evidence. Testimony of " *at best* fifty percent" does not meet this standard.

Moreover, the testimony certainly says nothing with respect to the *standard of causation* under the applicable fourth sentence of G. L. c. 152, § 1(7A) - that the work must be and remain "a major but not necessarily predominant contributing cause" of the employee's disability and need for treatment. The doctor's opinion was that there was only a fifty percent chance that the work caused the carpal tunnel condition *at all*. As discussed above, this mathematical formulation does not even meet the employee's burden of proving simple "as is" causation; *a fortiori*, it cannot satisfy the heightened § 1(7A) standard of "a major" causation. As a result, when the judge concluded that "after reviewing the testimony of the witness, and considering the doctor's testimony that the employee's work had a fifty percent chance of being the cause of the employee's problems, I am persuaded that the work activities are a major cause of employee's hand and wrist conditions," that conclusion was contrary to law. G. L. c. 152, § 11C.

The administrative judge's decision demonstrates the confusion between the entirely independent concepts of the standard of proof (preponderance of the evidence, "more likely than not") and the heightened § 1(7A) standard of causation for combination injuries ("a major but not necessarily predominant contributing cause"). An employee claiming benefits where § 1(7A) is applicable must prove, more likely than not, that the industrial injury was and remained a major cause of the disability. See Viera, supra. The judge's use of Dr. Dasco's opinion regarding a fifty percent possibility of any causal connection to support his finding of "a major" causation melded the two theories inappropriately, yielding a legally flawed decision.

Accordingly, the decision is reversed and the employee's claim is denied and dismissed.

So ordered.

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Bernard W. Fabricant
Administrative Law Judge

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William A. McCarthy
Administrative Law Judge

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Mark D. Horan
Administrative Law Judge

**Filed:** May 26, 2005