

**COMMONWEALTH OF MASSACHUSETTS**

**DEPARTMENT OF  
INDUSTRIAL ACCIDENTS**

**BOARD NO. 013371-10**

Carmen Ricardo-Feliz  
Life Care Center of Acton  
Old Republic Insurance Co.

Employee  
Employer  
Insurer

**REVIEWING BOARD DECISION**

(Judges Koziol, Horan and Levine)

The case was heard by Administrative Judge Bean.

**APPEARANCES**

Michael A. Torrisi, Esq., for the employee  
David G. Shay, Esq., for the insurer

**KOZIOL, J.** The insurer appeals from a decision awarding the employee § 34 benefits from April 28, 2010, to date and continuing as a result of bilateral carpal tunnel syndrome. Two of the arguments raised by the insurer require us to vacate the decision and recommit the case to the administrative judge.

The employee is a forty-six year old woman who immigrated to this country from the Dominican Republic in 2007, and speaks only Spanish. (Dec. 3.) After arriving in this country, the employee worked as a sales clerk. (Dec. 3.) In 2008, she began working as a housekeeper in the employer's nursing home where her duties included cleaning, vacuuming, making beds, mopping floors, polishing, and emptying trash cans. (Dec. 3; Ex. 1.) In February of 2010, the employee began to experience discomfort in her hands which continued to worsen. (Dec. 3.) The employee alleged an April 26, 2010, industrial injury consisting of bilateral carpal tunnel syndrome and sought § 34 temporary total incapacity benefits from April 28, 2010, and continuing.

The insurer denied the employee's claim and at conference, the judge ordered the insurer to pay the employee § 34 benefits. The insurer appealed and on May 2, 2011, the employee was examined by a § 11A impartial medical

examiner, Dr. Richard N. Warnock. After completing the lay portion of the hearing,<sup>1</sup> the insurer took Dr. Warnock's deposition. The employee then moved for a finding of inadequacy, which was heard by the judge on January 19, 2012. (Tr. IV.) The judge found Dr. Warnock's report to be inadequate and the parties submitted additional medical evidence. (Dec. 2.) The employee submitted the records and reports of her treating physicians: primary care physician Dr. Lawrence Kidd, and hand surgeon Dr. Crawford Cowles Campbell. (Dec. 2.) The insurer submitted the reports of its examining physician, hand surgeon Dr. Bruce Leslie, and took the depositions of Dr. Kidd and Dr. Campbell. (Dec. 2.)

After discussing the doctors' opinions regarding the issues of diagnosis, causal relationship, and disability and extent thereof, the judge made the following general findings.

I find that the employee suffered bilateral carpal tunnel syndrome injuries due to the repetitive nature of her use of her hands as a housekeeper for the employer. These maladies continue to totally disable the employee, although this total disability is likely to dissipate within the next several weeks to a partial disability or no disability at all. In making these determinations, I rely on the credible testimony of the employee and the persuasive medical opinions of Doctors Campbell, Kidd and Leslie. Each of the doctors diagnosed carpal tunnel syndrome and causally related the ailments to the repetitive hands actions of her job. Dr. Leslie believes that the employee's carpal tunnel syndrome pre-existed her employment for the employer, but that her work for the employer exacerbated the condition. The insurer raises a section 1(7A) defense based on this pre-existing condition. But, accepting Dr. Leslie's opinion on the issue, the employee is still entitled to workers' compensation benefits on an exacerbation theory. No other cause of the employee's carpal tunnel syndrome has been brought forward (other than perhaps a suggestion of an idiopathic cause by Dr. Warnock that was rejected by Doctors Campbell and Kidd). I do not credit the opinions of Dr. Warnock and I credit the opinions of the other doctors, particularly Dr. Campbell.

---

<sup>1</sup> Testimony was taken over the course of three days, the transcripts of which are referred to as follows: September 7, 2011, is Tr. I; October 12, 2011, is Tr. II; and, October 13, 2011, is Tr. III. The transcript from a subsequent motion hearing, held on January 19, 2012, is referred to as Tr. IV.

(Dec. 11.)

The insurer raises six claims of error, two of which are dispositive.<sup>2</sup> First, the insurer argues the judge committed an error of law in conducting his analysis under § 1(7A). Second, the insurer argues the judge's award of temporary total incapacity benefits was internally inconsistent, in part because it was based on the conflicting disability opinions of Dr. Kidd, Dr. Campbell and Dr. Leslie, and also because it ordered ongoing benefits while predicting the employee's disability would dissipate "within the next several weeks." (Dec. 11.)

The judge's discussion of Dr. Leslie's adopted opinion shows he erroneously concluded that the mere presence of a combination injury is sufficient to satisfy the employee's burden of proof under § 1(7A). Castillo v. Cavicchio Greenhouses, Inc., 66 Mass. App. Ct. 218, 219-221 (2006)(aggravation of pre-existing condition satisfies combination requirement of § 1[7A] but not the "a major cause" requirement); Soucy v. Beacon Hospice Inc., 26 Mass. Workers' Comp. Rep. \_\_\_\_ (2012)(finding of work-related worsening of pre-existing non-compensable injury or disease, without more, is insufficient to defeat § 1[7A] defense). The judge went on to find, "[n]o other cause of the employee's carpal tunnel syndrome has been brought forward (other than perhaps a suggestion of an idiopathic cause by Dr. Warnock that was rejected by Doctors Campbell and Kidd)." (Dec. 11.) The insurer claims this finding shows the judge further erred by shifting the burden of proof to the insurer. Because it is unclear what the judge

---

<sup>2</sup> We affirm the judge's finding that the § 11A report of Dr. Warnock is inadequate. While the insurer is correct that the judge should not have based this finding on his rationale and rulings he made in another hearing, to which the insurer was not a party, the error is harmless under the circumstances as the inadequacy finding is supported by the reasons argued by the employee at the motion hearing. (Tr. IV, 9-12); Ruiz v. Unique Applications, 11 Mass. Workers' Comp. Rep. 399, 402 (1997); See Kane v. Mediplex Rehab of Holyoke, 14 Mass. Workers' Comp. Rep. 179, 181 (2000); Nunes v. Town of Edgartown, 19 Mass. Workers' Comp. Rep. 279, 281-285 (2005). Furthermore, the insurer did not object at the motion hearing to the judge's reliance on his prior rulings. We summarily affirm the decision in regard to the remaining three issues raised by the insurer.

meant when he made that finding, we are not prepared to state that he actually engaged in improper burden shifting. Indeed, his statement merely serves to illustrate the threshold problem with his § 1(7A) analysis, which was not articulated by the insurer in its brief: the analysis cannot be conducted properly where the judge erroneously adopts conflicting causation opinions.

The judge adopted the causation opinions of Dr. Campbell, Dr. Kidd and Dr. Leslie. (Dec. 11.) Dr. Campbell was of the opinion that the employee's bilateral carpal tunnel syndrome was caused by her work activities and disagreed with the notion that it was a pre-existing condition. (Dec. 8; Dr. Campbell Dep. 43, 48, 52, 73.) Dr. Kidd only provided a causal relationship opinion regarding the employee's right carpal tunnel syndrome, opining that the employee had no pre-existing condition and that her work activities were a major cause of her right carpal tunnel syndrome. (Dec. 9; Dr. Kidd Dep. 39, 49-50, 51, 56.) Because he had no record that the employee complained of left sided symptoms at any time prior to the date he referred her to Dr. Campbell, Dr. Kidd testified that he would defer to Dr. Campbell's opinions regarding the cause of her left carpal tunnel syndrome. (Dr. Kidd Dep. 56-57, 60-61.) Finally, Dr. Leslie was of the opinion that the employee had "pre-existing carpal tunnel syndrome that was exacerbated by her employment." (Dec. 7.) These three opinions simply are not the same. The judge must choose which opinion he is adopting, and if necessary, address the insurer's § 1(7A) defense by performing the analysis set forth in Vieira v. D'Agostino Assocs., 19 Mass. Workers' Comp. Rep. 50, 52-53(2005)(outlining steps required for proper analysis of combination injuries under § 1[7A] "major" cause standard).

The judge also stated he was relying on the opinions of doctors Campbell, Kidd and Leslie in reaching his conclusion that the employee was totally disabled. (Dec. 11.) The insurer takes issue with the judge's failure to resolve the conflicts

between these doctors' disability opinions.<sup>3</sup> Because the judge failed to resolve the conflicts in the medical evidence concerning the employee's disability, and failed to provide other findings supporting his conclusions regarding the extent of the employee's incapacity, we cannot determine whether correct rules of law were applied. Praetz v. Factory Mut. Eng'g & Research, 7 Mass. Workers' Comp. Rep. 45, 46-47 (1993). Accordingly, we vacate the decision and recommit the matter for further action in accordance with this decision.

So ordered.

---

Catherine Watson Koziol  
Administrative Law Judge

---

Mark D. Horan  
Administrative Law Judge

---

Frederick E. Levine  
Administrative Law Judge

Filed: **December 5, 2012**

---

<sup>3</sup> Dr. Campbell was of the opinion that the employee was totally disabled on August 2, 2010. (Dec. 8.) At his March 21, 2012 deposition, he testified that she continued to be totally disabled, (Dec. 8; Dr. Campbell Dep. 77), and that she had reached a medical end result with regard to her right wrist, but not with regard to her left wrist. (Dr. Campbell Dep. 78.) Dr. Campbell testified that in regard to the employee's right wrist, she would need a work hardening program and functional capacity evaluation in order for him to "determine what she could do," and that she should only use her left hand within her pain tolerance. (Dr. Campbell Dep. 80-81.) Dr. Kidd was of the opinion that when he last saw the employee in May of 2010, she was totally disabled. (Dec. 9.) Dr. Leslie placed no restrictions on the use of her right hand, but limited her use of her left hand to lifting only five to ten pounds. (Dec. 8.)