

COMMONWEALTH OF MASSACHUSETTS

**DEPARTMENT OF
INDUSTRIAL ACCIDENTS**

BOARD NO. 026534-03

Carol A. Legendre
Town of Harwich
Massachusetts Educ. and Govt. Assn. SIG

Employee
Employer
Insurer

REVIEWING BOARD DECISION
(Judges Fabricant, Costigan and Horan)

The case was heard by Administrative Judge Chadinha.

APPEARANCES

Leonard Y. Nason, Esq., for the employee
Robert J. Riccio, Esq., for the insurer at hearing and on brief
Holly B. Anderson, Esq., for the insurer on brief and at oral argument

FABRICANT, J. The insurer raises several issues on appeal from an administrative judge's award of § 34A permanent and total incapacity benefits for a lower back injury the employee sustained during two incidents at work. We address only the insurer's argument that the opinion of the impartial physician did not support the judge's finding that the work injuries remained a major cause of the employee's disability. We disagree, and affirm the decision.¹

The employee was an assistant town clerk for the employer Town of Harwich in 2002 when a file cabinet fell onto her, causing injury. She underwent acupuncture and chiropractic treatment and was back to work full time after a four day absence, although she continued to experience low back spasms radiating down her leg. (Dec. 4.) A second incident occurred at the same job in the summer of 2003 when the employee replaced a piece of Plexiglas on a countertop and heard a pop in her lower back. She experienced pain and spasms in her lower back, and pain radiating down her right leg to her toes. The employee eventually underwent surgery in June 2006, and continued to treat, as the surgery failed to alleviate her pain. The insurer paid benefits without prejudice until

¹ As to the remaining issues raised by the insurer, the decision is summarily affirmed.

November 2003. The employee has never returned to work, and was ultimately awarded accident disability retirement benefits. (Dec. 4-5.)

The employee submitted to an impartial medical examination with Dr. James Broome on February 1, 2006. In his report, Dr. Broome diagnosed degenerative disc disease with an annular tear, a herniated nucleus pulposus and facet arthritis leading to a synovial cyst. The doctor found a causal connection between the employee's industrial accidents and her medical conditions, which included persistent instability of her right leg. Barring successful surgery, Dr. Broome considered the employee permanently and totally disabled, with considerable limitations on lifting, pushing, pulling or sitting for any length of time. Dr. Broome opined that the employee's work injury of July 2003 combined with her non-work-related, pre-existing degenerative condition to prolong her disability, and that the work injury remained a major cause of her disability. (Dec. 6-7.)

Four months after the impartial examination, the employee underwent another surgery which was also unsuccessful in remitting her pain. At his subsequent deposition, Dr. Broome held to his opinions, even when presented with the employee's previously undisclosed history of pre-existing back problems. (Dec. 7-8.)

The judge credited the employee's history of her work duties and injuries, and the extent of her symptoms, pain and physical limitations. (Dec. 10-12.) Based on that testimony and the adopted medical opinion of Dr. Broome, the judge concluded the employee remained permanently and totally incapacitated, with her work injuries as a major cause of such incapacity. The judge found that the heightened causal standard of § 1(7A)² had been met by Dr. Broome's deposition opinions, which never deviated from those in his initial medical report. (Dec. 12-13.)

² General Laws c. 152, § 1(7A), provides, in pertinent part:

If a compensable injury or disease 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 that such compensable injury or disease remains a major but not necessarily predominant cause of disability or need for treatment.

The insurer argues Dr. Broome's causal relationship opinions are without evidentiary support because he did not account for the employee's incomplete history of her pre-existing condition at the time of the impartial examination. Thus, the insurer argues, the decision must be reversed because the judge could not rely on Dr. Broome's speculative and incompetent opinion as a matter of law. See Patterson v. Liberty Mut. Ins. Co., 48 Mass. App. Ct. 586, 592 (2000)(employee cannot prevail when medical opinion on causal relationship is based on "assumptions that are not established by [the] evidence"). Therefore, the issue is whether Dr. Broome's opinion remained consistent throughout his deposition, when he was presented with the history of the employee's pre-existing back problems, which she had not disclosed at the time of the impartial examination.

Dr. Broome's opinion that the work incidents were a major cause of the employee's disability and failed surgery is sound. He consistently maintained that the 2002 and 2003 work injuries at issue were a major cause, even when considered with the employee's newly disclosed, pre-existing condition dating back to 1995. When he testified, "if her history is accurate, those injuries [at work in 2002 and 2003] were a major cause of her need to have [the unsuccessful] surgery," (Dep. 41), the doctor was referring to the employee's account of the work incidents occurring as they did, and the pain stemming from those events. (Dec. 7-8.) The cross-examination leading up to the above quotation makes this clear:

Q: With respect to your opinion that the alleged injury or injuries [the employee] suffered at work in either August of 2002 or July of 2003 being the major cause of her disability and/or need for treatment, has your opinion changed, given this new information you've been provided today?

A: If the alleged injuries occurred in 2002 and 2003, they remain a major cause of her disablement according to the formula that is in the law, a major cause. If we believe her history. Everything hinges on her history and her veracity.

(Dep. 36-37.)

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Q: We're assuming that [the employee] has this spondylolisthesis and degenerative disc disease dating back to at least the x-rays of September 1995, correct?

A: Yes.

Q: If she sustained any injuries to her low back subsequent to that time [2002 and 2003 work injuries], those injuries would have combined with those pre-existing conditions that were shown on the x-rays, correct?

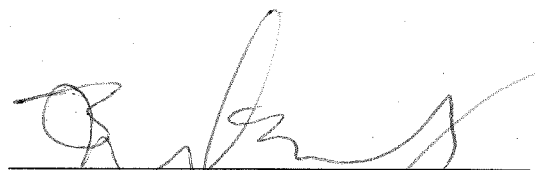
A: Yes, and that's what I said, that it would be a major cause of the disability, if her history is accurate.


(Dep. 40.)

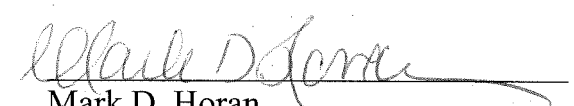
Because the judge found the employee credible, explicitly adopting Dr. Broome's above-quoted testimony, (Dec. 10), we conclude the judge's award of permanent and total incapacity benefits is supported by adequate subsidiary findings grounded in the record evidence.

The decision is affirmed. Pursuant to § 13A(6), the employee's attorney is awarded a fee of \$1,488.30.

So ordered.


Bernard W. Fabricant
Administrative Law Judge


Patricia A. Costigan
Administrative Law Judge


Mark D. Horan
Administrative Law Judge

Filed:

