COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO.:** 011823-05

Carol P. Posusky	**Employee**
Unicco Services Company	**Employer**
Travelers Property & Casualty Co. of America	**Insurer**

REVIEWING BOARD DECISION

(Judges Horan, Costigan and Fabricant)

The case was heard by Administrative Judge Chivers.

APPEARANCES

Michael J. Chernick, Esq., for the employee
George D. Kelly, Esq., for the insurer at hearing
Paul M. Moretti, Esq., for the insurer on appeal

HORAN, J. The insurer appeals from a decision denying the insurer's complaint to discontinue or modify the employee's § 34 benefits. The insurer raises two issues warranting discussion. We affirm the decision.

The employee last worked on April 19, 2005, when she injured her neck and left shoulder while employed as a housekeeper. On March 6, 2006, the employee underwent surgery. She remains on pain medication for her injuries. At the time of the hearing, the employee was sixty-one years old. Although she struggled in school, she is a high school graduate. She has no skills other than cleaning and factory assembly work. (Dec. 2.)

The report of Dr. Demosthenes Dasco, the § 11A impartial medical examiner, is the only medical opinion in evidence.[1] He opines the employee's "diagnosis is neck pain with cervical radiculopathy on the left side status post surgery for discectomy at C5-C6 and spinal fusion." (Stat. Ex. p. 2.) He further opines the employee is

[1] Dr. Dasco was not deposed.

capable of performing only limited light duty work, with a ten pound lifting restriction, and no lifting above the shoulder level. Id. at 3.

The judge adopts Dr. Dasco's opinion, credits the employee's testimony concerning her pain, and finds that, given her educational background and work history, "[the employee's] ability to find employment in the open labor market is extremely limited." (Dec. 3.) Noting the employee was previously found unsuitable for vocational rehabilitation services, the judge suggests the employee seek further vocational assistance "with the restrictions as set forth by the impartial physician." Id. The judge concludes that without further vocational assistance, the employee could not be "expected to find employment in the open labor market." Id.

The insurer argues the judge failed to consider its § 1(7A) "a major" cause defense.[2] Although § 1(7A) is listed as an issue, the judge fails to address it.[3] However, because the only medical evidence in the case does not, as a matter of law, carry the insurer's burden of production on the statute's "combination" element, there is no error. MacDonald's Case, Mass. App. Ct. 08-P-187 (February 9, 2009) citing Johnson v. Center for Human Dev., 20 Mass. Workers' Comp. Rep. 351, 353 (2006)(fourth sentence of § 1(7A) must be raised as an affirmative defense; insurer has burden of production demonstrating the combination element).

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

[3] General Laws c. 152, § 11B, provides, in pertinent part:

> Decisions of members of the board shall set forth the issues in controversy, the decision on each and a brief statement of the grounds for each such decision.

See Vieira v. D'Agostino Assocs., 19 Mass. Workers' Comp. Rep. 50 (2005).[4] Dr. Dasco's report contains only one reference to a pre-existing condition: "MRI of the cervical spine done on August 8, 2005 was reported to show degenerative changes and herniated disc at C5-C6 on the left side." (Stat. Ex. p. 1.) Beyond its reference to "degenerative changes," Dr. Dasco's report does not contain any language which could be reasonably construed to support a finding of combination. In fact, Dr. Dasco's diagnosis makes no reference to the employee's arguably underlying condition.[5] In short, the resultant condition disabling the employee consists of a "cervical radiculopathy on the left side status post surgery for discectomy at C5-C6 and spinal fusion." (Stat. Ex. p. 2.) Because medical evidence of combination is lacking, the employee's burden of proof on causation is carried by Dr. Dasco's opinion that the employee's disabling condition is "related to the injury [the employee] sustained at work on April 19, 2005." (Stat. Ex. p. 4.)

The insurer also claims the judge lacked authority to order "[t]hat the employee seeks [sic] further assistance from OEVR."[6] (Dec. 4.) While it is true a judge

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[4] See also 452 Code Mass. Regs. § 1.11(1)(f), effective March 21, 2008 (after the filing date of the decision in this case), which provides:

> In any hearing in which the insurer raises the applicability of the fourth sentence provisions of M.G.L. c. 152, § 1(7A), governing combination injuries, the insurer must state the grounds for raising such defense on the record or in writing, with an appropriate offer of proof.

[5] Dr. Dasco does not opine that the employee's herniated disc pre-existed her industrial accident. His use of the term "degenerative," in reference to the other "changes" noted in the employee's cervical spine, could support a finding that such changes constituted a "pre-existing condition." G. L. c. 152, § 1(7A). However, there is no cause for recommittal, as Dr. Dasco's testimony fails to establish that the employee's "degenerative changes" combined with her work-related herniated disc to cause her disability or her need for treatment. MacDonald, supra.

[6] OEVR refers to the department's office of education and vocational rehabilitation. See G. L. c. 152, § 30F-H.

cannot compel an employee to cooperate with OEVR, the judge below did no such thing. His "order" is nothing more than a suggestion that the employee re-explore her rehabilitation rights under the act. (See Dec. 3: "I suggest she return to vocational rehabilitation. . . .") Even if it can be said the judge exceeded his authority by *requiring* the employee to revisit OEVR, such an order is not enforceable[7] and, therefore, is harmless.

Accordingly, we affirm the decision.[8] Pursuant to the provisions of § 13A(6), the insurer is directed to pay employee's counsel a fee of $1,495.34.

So ordered.

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Mark D. Horan
Administrative Law Judge

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Patricia A. Costigan
Administrative Law Judge

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Bernard W. Fabricant

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[7] General Laws c. 152, § 30H, provides, in pertinent part:

> If the insurer and employee fail to agree to a vocational rehabilitation program, the employee may apply to the office of education and vocational rehabilitation for vocational rehabilitation services. The office shall determine if vocational rehabilitation is necessary and feasible to return the employee to suitable employment. Such determination by the office shall be final and not subject to review by the board or reviewing board, but may be appealed to the commissioner.

[8] We summarily affirm the decision with respect to the insurer's remaining arguments on appeal.

Administrative Law Judge Filed: March 20, 2009