COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 024673-99**

Catherine Nee	Employee
Boston Medical Center	Employer
Boston Medical Center Corporation	Self-insurer

REVIEWING BOARD DECISION
(Judges Levine, Maze-Rothstein and McCarthy)

APPEARANCE
Ann Marie Freely, Esq., for the employee at hearing
Catherine Nee, pro se, on appeal
Richard P. Maloney, Esq., for the self-insurer

LEVINE, J. The self-insurer appeals a decision in which an administrative judge found that the employee had sustained a cumulative back injury arising out of her employment. Finding merit in one of the issues raised by the self-insurer, we recommit the case for further findings. G. L. c. 152, § 11C.

The employee's claim was denied at conference. She appealed to a de novo hearing. (Dec. 2.)

The judge's findings, after hearing, include the following. The employee is a 59 year old native of Galway, Ireland, who completed the equivalent of the twelfth grade before immigrating to the United States. She began working for the employer in 1983. In 1996, she was transferred to the billing department where she spent most of her workday sitting at a computer, entering data. (Dec. 4.) Her work station was awkwardly configured. In order for her to work at the computer, the employee had to raise herself several inches, elbows raised. She also was unable to move the keyboard toward her. Not long after her transfer to this department, she began to experience pain in her back and legs. Id. In January 1999, the employer's new policy limited the time employees

could be out of their chairs.[1] After January 1999, the employee's back and leg pain began to increase. By April of 1999, her back and leg pain had increased such that she could no longer work. (Dec. 5.) The employee's primary care physician began conservative treatment with analgesic and anti-inflammatory medication. She was referred to a neurosurgeon in late April 1999 and she underwent various diagnostic evaluations. A lumbar myelogram/contrast CT demonstrated right S1 root filling defect consistent with nerve root impingement. Id. It was the neurosurgeon's opinion, adopted by the judge, that the employee was totally disabled.[2] Id.

In June 1999, the employee began treatment with a neurologist. The judge adopted this doctor's opinion that the employee was suffering from lumbar disc herniation with nerve root compression; that the employee was totally disabled from any gainful employment; and that the employee suffered a cumulative work-related injury to her back. (Dec. 5-6.)

The employee underwent an impartial medical examination on January 7, 2000. (Dec. 6.) See § 11A(2). The impartial physician, Dr. Tandon, described the employee as suffering from a lumbar disc herniation at L5/S1 with associated nerve root impingement. (Dec. 6.) In his report, Dr. Tandon stated that there did not appear to be a clear cut causal connection between the back condition and the employee's employment. (Impartial

[1] The self-insurer essentially argues that the weight of the evidence does not support the judge's finding that the employee's work station was awkwardly configured. The self-insurer contends that the judge should have credited its witnesses and should not have credited the employee's testimony. It overlooks that findings based on credibility determinations are the sole province of the hearing judge and will generally not be disturbed on appeal. See Lettich's Case, 403 Mass. 389, 394 (1988). Lagos v. Mary A. Jennings, Inc., 14 Mass. Workers' Comp. Rep. 21, 25-26 (2000).

[2] Prior to the impartial physician's deposition, the employee had submitted a Motion for Additional Medical Testimony and Evidence which was denied by the judge as to the period following the examination; however, the judge allowed additional medical evidence for the period of April 19, 1999, the date of injury, through January 7, 2000, the date of the impartial examination. (Dec. 3.) We affirm this aspect of the decision. See George v. Chelsea Hous. Auth., 10 Mass. Workers' Comp. Rep. 22 (1996)(appropriate to allow additional medical evidence for the period of time prior to the impartial physician's examination).

Examiner Ex. 1; Dec. 6.) However, he changed his opinion at his deposition when presented with details of the employee's work environment. (Dec. 6.) See Perangelo's Case, 277 Mass. 59, 64 (1931)("The opinion of an expert which must be taken as his evidence is his final conclusion at the moment of testifying").

The judge adopted the impartial physician's opinion, expressed at the deposition, that the employee's work environment, i.e., sitting all day at an ergonomically deficient work station, aggravated her underlying condition and resulted in her present disability and need for ongoing treatment. (Dec. 6; see Dr. Tandon Dep. 19, 20, 24-27, 56-57.) The judge concluded that the employee sustained a cumulative back injury arising out of and in the course of her employment and that the employee is totally disabled as a result of her back injury. (Dec. 7.) The judge awarded the employee § 34 temporary total incapacity benefits from April 19, 1999 to date and continuing, along with § 30 medical benefits for treatment of the diagnosed condition. Id.

The self-insurer's first contention is that the employee's condition arose out of sitting for long periods. Sitting is common to many jobs, and relying on Zerofski's Case, 385 Mass. 590 (1982), the self-insurer argues that it is not liable. Zerofski states that "to be compensable, the harm must arise either from a specific incident or series of incidents at work, or from an identifiable condition that is not common and necessary to all or a great many occupations." Id. at 594-595 (footnotes omitted).

The self-insurer's argument fails because the judge found that the employee's work station was ergonomically inappropriate, (Dec. 4-5), and because the § 11A physician opined that such ergonomic factors established a causal connection between the employee's injury and her employment. (Dec. 5-6.) The fact that an employee's disability came about because of prolonged sitting does not necessarily preclude recovery under the act. See Diliberto v. New England Elec. Co., 11 Mass. Workers' Comp. Rep. 123, 134-135 (1997)(reviewing board recognized that ergonomic factors could be relevant to Zerofski analysis of prolonged sitting injury), *aff'd sub nom*. Aetna Life & Cas. Ins. Co. v. Commonwealth, 50 Mass. App. Ct. 373 (2000). As the evidence supports the judge's findings, we affirm the judge's conclusion that the employee's medical

disability was sufficiently "identified with the employment," Zerofski, supra at 595, to be the basis for an award of compensation under the act.

The self-insurer's next argument is that the judge failed to apply the appropriate causation standard for combination injuries under § 1(7A). The judge made no findings on § 1(7A). The impartial physician diagnosed pre-existing degenerative spondylosis. (Impartial Examiner Ex. 1; Dr. Tandon Dep. 12.) He also testified that the work conditions worsened the condition. (See, e.g., Dr. Tandon Dep. 26-27). The employee's counsel specifically cross examined Dr. Tandon on whether he could opine that the work injury met the requisite causation standard. (Dr. Tandon Dep. 24-25.) Section 1 (7A) states:

> 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.

Dr. Tandon testified at one point that he could not "give percentages, major, minor and all that," (Dr. Tandon Dep. 26), on the question whether the work injury constituted a major cause of the employee's disability; id., but he did testify, inter alia, that the work environment did "appear to be a good cause." (Dep. 27.) Because "good" can mean "ample" or "substantial," e.g., "a good income," we think there is sufficient evidence to recommit the case for the judge to consider the § 1(7A) issue and to make the required findings in this case as to whether § 1(7A)'s standard of "a major cause" was met by the employee.

Accordingly, we recommit the case for further findings on the issue of § 1(7A). The remainder of the decision is affirmed.

So ordered.

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Frederick E. Levine
Administrative Law Judge

Susan Maze-Rothstein
Administrative Law Judge

MCCARTHY, J. (Dissenting) Based on the record reviewed, I would reverse the finding that the employee sustained a compensable injury and deny the claim. The theory of recovery is that the employee's injury was caused by a disabling condition not common or necessary to all or a great many occupations. The employee sat all day entering data into a computer which sat on a desk in front of her. Everyone agrees that injury caused by prolonged sitting or standing falls on the side of wear and tear and is not compensable under c. 152. What then was unusual or uncommon about Ms. Nee's work environment? She testified that the chair she sat on was old, (Tr. 15), that the back and seat of the chair were adjustable but only with difficulty, (Tr. 16), and that she adjusted the chair up to the computer but she didn't know how far. (Tr. 39.) She also testified that her desk was "high" and the computer keyboard was stationary. Ms. Nee testified that she had to raise herself up seven or eight inches and raise her elbows to operate the computer. (Tr. 17.) She put a box under her feet, (Tr. 18), and brought in two pillows, one to sit on and one which she placed behind her back "to try and be comfortable" (Tr. 21.) The record is silent as to when she got the box and brought in the pillows. She complained to two of her supervisors about her work station but nothing was done about it. (Tr. 18, 42.) Everyone in the department had the same type of chair. (Tr. 47.) The judge found that the employee testified credibly, (Dec. 6), thereby adopting the employee's testimony as fact. In my view, the employee has proven that her work station was uncomfortable but has failed to prove that the working conditions she described would not be found in a great many occupations. Her injury, in my opinion, falls on the side of "wear and tear" and is thus not compensable.[3]

[3] The medical evidence relied on by the judge in finding causal relationship is problematic. The judge adopted Dr. Mahoney and the §11A physician, Dr. Tandon, on the issue of causal

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William A. McCarthy
Administrative Law Judge

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relationship. Dr. Mahoney causally related Ms. Nee's injury to "Sitting at a very fixed position for many hours during the workday for a long period of time." (Ex. No. 6, July 7, 1999 report, p.2.) But that is not the history found by the judge. In arriving at an opinion on causal relationship in his deposition, it is by no means clear that the history hypothetically given and used by Dr. Tandon follows the facts found by the judge. While the doctor believes that the chair used by the employee would have some bearing, he is not sure that holding her arms above chest level would matter. (Depo. Dr. Tandon p. 20.) He also assumes that there was a change in the employee's chair, stricter time requirements and repetitive movement in arriving at his opinion that ". . . an underlying degenerative condition could easily surface out and something dormant could become more symptomatic and produce pain." (Depo. Dr. Tandon.)