COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 036961-09**

Christine M. Cannava	Employee
City of Medford	Employer
City of Medford	Self-Insurer

REVIEWING BOARD DECISION
(Judges Koziol, Horan and Fabricant)

The case was heard by Administrative Judge Taub.

APPEARANCES
Peter Georgiou, Esq., for the employee
Christopher L. MacLachlan, Esq., for the employee on appeal
Salvatore J. Perra, Esq., for the insurer

KOZIOL, J. The employee appeals from a decision denying and dismissing her claim for § 34 benefits and § 30 medical benefits.[1] The employee argues the judge erred as a matter of law by applying § 1(7A)'s heightened causation standard. She seeks reversal and recommittal for findings pertaining to the extent of her incapacity. We agree that under the facts found, § 1(7A) does not apply to this case; however, the error requires us to vacate the decision and recommit for further findings of fact to address the threshold issue of liability.

The employee is a fifty-nine year old retired art teacher who claimed she injured her right major shoulder in September and November of 2009, performing the following tasks: "daily overhead reaching to remove the previous day's and place the current day's drawings and paintings on a drying rack; her use of her right arm in an elevated position at an easel to demonstrate painting and drawing technique; and," daily operation of the "heavy blade of [a] paper cutter," which

[1] The employee's original claim sought only the payment of § 30 medical benefits. (Dec. 2.) At hearing, the judge allowed the employee's motion to amend her claim to join a claim for § 34 benefits from September 29, 2010, and continuing. (Dec. 2; Tr. 3-6.)

she identified as the "most troublesome" task.[2] (Dec. 3.) The employee's claim was denied by the self-insurer, and the judge denied the claim at conference. (Dec. 2.) The employee appealed and on April 6, 2011, she was examined pursuant to § 11A(2) by Dr. Joel A. Saperstein. At hearing, the self-insurer contested liability, causal relationship, raised § 1(7A), incapacity and the extent thereof, and denied entitlement to medical benefits. Following the hearing and Dr. Saperstein's deposition, the judge allowed the employee's motion to submit additional medical evidence, finding "the question of the causal relationship of the employee'[s] condition sufficiently complex to warrant my having multiple opinions to weigh." (1/27/12 Ruling Allowing Additional Medical Evidence; Dec. 2.) Thereafter, both the employee and the self-insurer submitted additional medical evidence.

The judge found the self-insurer was not liable for payment of the employee's claim and denied and dismissed the claim. (Dec. 6.) The judge provided the following analysis supporting his finding of no liability.

> I do not find it more likely than not that the employee sustained a personal injury arising out of and in the course of employment on November 2, 2009. I do not find it more likely than not that the employee's repetitive activities while performing her duties as an art teacher were a major cause of her right shoulder complaints and her torn rotator cuff.
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> In so finding, I adopt the opinion of Dr. Saperstein, the impartial examiner, that the employee had pre-existing deterioration in her right shoulder and that, while her work activities may have exacerbated that condition in some minor way, the employee's work activities were not a major or predominant causative factor of what he found on examination.
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> I do not question the existence of a rotator cuff tear. However, I do question whether the events of September and November 2009 and the work activities in general were as significant to the development of the condition as Ms. Cannava would have me find. Ms. Cannava did not report any suspicions of her shoulder problem having a work connection to anyone at the school for the remainder of that last year at the school. The notes of her initial visit with Dr. Zilberfarb make no mention of any events at work or her work activities being suspected of being implicated in the

[2] The employee retired in June of 2010, at the end of the school year; her decision to retire was not related to her shoulder complaints. (Dec. 3.)

> development of the shoulder condition. After she completed her 6-8 week course of physical therapy in January 2010, the employee worked for the remainder of the year and performed her regular duties without seeking any further treatment during that time. Ms. Cannava voluntarily retired in June 2010 at the end of that school year and allowed during her testimony that her shoulder condition was not at all involved in her decision to retire.
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> In adopting Dr. Saperstein's opinion and in light of that history, I question the employee's recounting of how she came to have her symptoms in association with particular activities, and her denying any prior shoulder complaints, and am more inclined to believe that the times using a paper cutter in September and November 2009 were not as traumatic as now claimed, but rather were times when the discomfort of a pre-existing condition came to be more acutely noticed.

(Dec. 6-7.)

The employee argues the judge improperly used the wrong causation standard to assess her claim, asserting the "as is" standard applied, rather than the § 1(7A) "a major cause" standard. Although the self-insurer raised the issue of § 1(7A), the judge did not conduct the analysis set forth in Vieira v. D'Agostino Assocs., 19 Mass. Workers' Comp. Rep. 50, 52-53 (2005). We conclude that the insurer's § 1(7A) defense fails under the first prong of Vieira.[3] Dr. Saperstein was clear about the nature of the employee's pre-existing condition, describing it as "chronic tendonitits [sic] of the shoulder with an impingement syndrome" which he causally attributed to "age related deterioration."[4] (Dep. 24-25; Stat. Ex. 1, at

[3] Vieira requires the judge to first determine whether the employee has "(1) 'a pre-existing condition, which resulted from an injury or disease not compensable under this chapter.' " Id. at 52-53.

[4] In his report regarding his causal relationship opinion, Dr. Saperstein stated, "[r]ationale is that she has age related deterioration with a minor exacerbation from an accident. Evidence based medicine shows that this exacerbation should not have lasted more than six weeks." (Stat. Ex. 1, at 5.) Dr. Saperstein testified that "all the activity that she had at work did not cause an acute problem. I think they were a temporary aggravation of a pre-existing condition. That pre-existing condition is chronic tendonitis of the shoulder with an impingement syndrome age related deterioration clearly seen frequently in my – in our culture." (Dep. 24.)

5.) The judge's subsidiary findings acknowledge as much,[5] but those same findings required the use of the "as is" causation standard because pre-existing conditions attributable to "age related deterioration" are insufficient to satisfy the insurer's burden of production pursuant to § 1(7A). Blais v. BJ's Wholesale Club, 17 Mass. Workers' Comp. Rep. 187, 192 (2003).

The employee asserts that the error requires us to reverse the decision and recommit the matter for further findings of fact on the issue of incapacity. We disagree. The judge's findings regarding the employee's credibility were vague and inextricably intertwined with his erroneous finding that liability could not be established because Dr. Saperstein was of the opinion that the alleged incidents were not a major cause of the employee's incapacity or need for treatment. Because the judge's findings regarding the employee's credibility were not clear, and her version of the alleged events at work was discussed in combination with the doctor's adopted medical opinions, rather than treating each factor separately, we cannot determine how the judge would view the threshold issue of liability once the erroneous factor is removed. See Praetz v. Factory Mut. Eng'g & Research, 7 Mass. Workers' Comp. Rep. 45, 46-47 (1993). Accordingly, we

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[5] The judge found Dr. Saperstein

> diagnosed tendinitis and a rotator cuff tear of the right shoulder when he saw the employee in April 2011. Dr. Saperstein was of the opinion that the rotator cuff tear and tendinitis were related, but not in a major way, to the alleged chronic trauma and possible exacerbation during the early part of the school year in 2009. Dr. Saperstein was of the opinion that the employee had a significant pre-existing condition. He described there being an age related deterioration of the connective tissue leading to a chronic deterioration of the rotator cuff. While he allowed that there may have been an exacerbation due to the employee's activity, he did not feel the work activity was causative in a major or predominant fashion. He viewed the exacerbation at work as minor. Dr. Saperstein was of the opinion that Ms. Cannava was not medically disabled, either totally or partially, and that she did not need to be physically limited. He did not feel surgery was appropriate at that time.

(Dec. 4-5.)

vacate the decision and recommit the matter for further findings of fact in accordance with this decision.

So ordered.

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Catherine Watson Koziol
Administrative Law Judge

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Mark D. Horan
Administrative Law Judge

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Bernard W. Fabricant
Administrative Law Judge

Filed: ***February 28, 2013***