COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 022329-93**

Christo Lagos	Employee
Mary A. Jennings, Inc.	Employer
Liberty Mutual Insurance	Insurer

REVIEWING BOARD DECISION
(Judges Maze-Rothstein, Carroll & Levine)

APPEARANCES
William T. Salisbury, Esq., and Mary B. Klegman, Esq., for the employee
Thomas G. Brophy, Esq., for the insurer at hearing
Andrew P. Saltis, Esq., for the insurer on brief

MAZE-ROTHSTEIN, J. For the second time, the insurer appeals this case to the reviewing board. In Lagos v. Mary A. Jennings, Inc., 11 Mass. Workers' Comp. Rep. 109 (1997), we recommitted it for a specific determination of whether the employee had a pre-existing condition that would trigger a § 1(7A) analysis. The hearing decision following recommital answered that question in the negative and awarded § 34A weekly permanent and total incapacity benefits for the employee's psychological condition. For reasons stated below, we affirm the decision.

The parties stipulated to the following facts. On June 18, 1993, while employed as a construction worker, a piece of metal being hammered by another employee splintered, impaling Mr. Lagos' neck. He bled profusely. The force of the blow knocked him backwards. He was transported to a hospital emergency room where a vascular surgeon was summoned to surgically remove the shrapnel embedded in his neck. (Dec. 7[1]; Joint Exhibit 1.)

[1] All references to "Dec." are to the second hearing decision, issued on June 18, 1998, after recommital from the reviewing board.

While awaiting the surgeon, Mr. Lagos was left by himself on a stretcher in a small room for several hours. He experienced searing neck pain, panic, palpitations, profuse sweating and difficulty breathing while waiting. He believed he was dying. In preparation for the surgery, a sheet was hung between Mr. Lagos' head and the neck wound to block his view of the procedure. As the anesthesia began to take effect, he had a flashback to unpleasant early childhood experiences. During this episode he recalled that as a small child[2] his mother would close him in a bureau drawer while she worked and that one of his older siblings would let him out upon returning home from school. Also while confined in the drawer, he smelled mothballs, felt rats crawling on him, laid very still and had difficulty breathing. (Dec. 7-8; Joint exhibit 1.)

Since his industrial accident and subsequent surgery, the Mr. Lagos has extreme difficulty breathing while lying down. Consequently, he sleeps upright. He can no longer drive much, due to confusion. He has difficulty concentrating. He suffers from racing thoughts, shortness of breath, sweating, high anxiety, agitation, headaches, poor appetite, forgetfulness, low energy, crying spells and depression. (Dec. 9.) He has not worked since June 18, 1993. (Dec. 4.)

The insurer paid § 34 temporary total incapacity benefits on a without prejudice basis from June 19, 1993 to November 15, 1993. Thereafter, the employee filed a claim for further benefits based on his neck injury as well as his psychological symptoms. The insurer resisted the claim setting the stage for a § 11 hearing. Pursuant to § 11A,[3] the employee was examined by a psychiatrist whose report and deposition testimony were admitted into evidence. (Dec. 4-5.) The doctor opined that the employee's work-related

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[2] The employee was fifty-eight years old at the second hearing. (Dec.10.)

[3] General Laws c. 152, § 11A, gives an impartial medical examiner's report the effect of "prima facie evidence [with regard to the medical issues] contained therein," and expressly prohibits the introduction of other medical testimony to meet it unless the judge finds that additional medical testimony is required due to the complexity of the medical issues involved or the inadequacy of the report. See O'Brien's Case, 424 Mass. 16 (1996). See also Mendez v. Foxboro Co., 9 Mass. Workers' Comp. Rep. 641, 646-648 (1995) (where § 11A(2)'s reference to "testimony" was interpreted as consistent with the requirements of c. 233 § 79G).

surgery was the trigger event for his psychological symptoms and post traumatic stress disorder. (Dec. 5.) In his January 18, 1995 decision, the judge adopted the medical opinion and awarded continuing § 34 temporary total incapacity benefits (Dec. 5), finding that the predominant contributing cause of the employee's emotional disability was his work place injury. See Lagos v. Mary A. Jennings, Inc., 11 Mass. Workers' Comp. Rep. 109, 110 (1997) ("Lagos I").

The insurer appealed that decision, and, in Lagos I, the reviewing board recommitted the case directing the judge to determine and apply the appropriate standard of causation. In Lagos I, we held that the application of the "predominant contributing cause" standard of § 1(7A)[4] was incorrect since that standard applies only to cases involving a mental injury directly caused by work place events. Id. at 110-111; see Cirignano v. Globe Nickel Plating, 11 Mass. Workers' Comp. Rep. 17 (1997). In cases where mental or emotional disabilities arise as sequelae to physical work place injuries, the appropriate standard is one of simple causation, unless there is a combination with a pre-existing unrelated injury or disease. Lagos I, supra at 111-112. Lagos I presented facts which suggested that the employee may have suffered from a combination injury governed by the fourth sentence of § 1(7A).[5] Thus, the causation issue was either whether the necessary surgical treatment for the work-related physical injury caused, to

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[4] General Laws c. 152, § 1(7A), as amended by St. 1991, c. 398, § 14, provides, in pertinent part:

> Personal injuries shall include mental or emotional disabilities only where the predominant contributing cause of such disability is an event or series of events occurring within any employment.

[5] The fourth sentence of G.L. c. 152, § 1(7A), as amended by St. 1991, c. 398, § 14, provides as follows:

> If a compensable injury or disease combines with a preexisting 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.

any extent, the employee's emotional disability or whether, due to traumatic childhood events, the employee had a noncompensible pre-existing condition resulting from an injury or disease, which combined with his compensable injury to cause his mental or emotional disability. Lagos I, supra at 112; Robles v. Riverside Mgmt., Inc., 10 Mass. Workers' Comp. Rep. 191, 195-197(1996). We recommitted the case for that determination.

While that first appeal was pending before the reviewing board, the employee exhausted his § 34 benefits.[6] The employee filed a claim for § 34A benefits, which a new administrative judge[7] awarded at conference. The insurer appealed giving rise to a second hearing. Pursuant to § 11A, the employee was again examined by the same psychiatrist whose new report and earlier report and deposition were admitted into evidence. (Dec. 2.) The doctor opined that the employee suffered from very severe post traumatic stress disorder with associated major depression, anxiety disorder and panic disorder and that the surgery necessitated by his industrial injury triggered his psychological diagnosis. (Dec. 14-15; Joint Exhibits 2 and 3.)

In the decision before us on appeal, the findings are based on the medical opinion, and on the credited testimony of the employee and his wife. (Dec. 15.) The judge specifically found that the childhood events experienced by the employee over fifty years ago, for which he had never sought or required treatment, nor missed any work, did not amount to a pre-existing condition within the meaning of § 1(7A). (Dec. 17-18.) She further found, in accordance with Cirignano, supra at 23-24, that "but for" the industrial accident, the employee would not have the diagnosed disabling condition. (Dec. 17.) Finally, the judge answered affirmatively the question of whether the employee's mental disability was caused by the work-related injury and subsequent surgery "to any extent." (Dec. 18.) Section 34 benefits were awarded from the date of injury to their expiration with ongoing § 34A benefits thereafter. (Dec. 20.)

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[6] Section 34 limits the number of weeks of benefits due an employee to one hundred fifty-six.

[7] The administrative judge who issued the original decision no longer served in that capacity.

The insurer raises several arguments to support its contention that the judge erred in concluding that the employee's incapacity is causally related to his industrial injury. We address each in turn.

First, the insurer alleges inconsistencies between the 1994 § 11A medical report and the 1994 medical deposition.[8] In the June 8, 1994 report, the § 11A doctor stated that "The root cause of [the employee's post traumatic stress disorder, associated major depression, anxiety disorder and panic disorder] are the collective trauma of the patient's childhood. The disorder was triggered, however, by the surgery needed for treatment of the injury suffered at work." (Joint Exhibit 3.[9]) The insurer then points to the following two portions of the doctor's deposition.

> Q: … [is it] fair to say that the factors that contributed to or caused the disorder in Mr. Lagos happened about 40 years ago, approximately. Is that fair to say?
> A: Yes.

(Krainin Dep., 12-13.)

> Q: It would be fair to say that within a reasonable degree of medical certainty that the predominant contributing cause of his psychiatric disorder is his childhood trauma itself and not any employment or incident thereof. Correct?
> A: I would agree with that statement.

(Krainin Dep., 15.)

The insurer's contention is flawed. There is no conflict between the doctor's statement of causal relationship contained in his report and that in either quoted deposition question and answer. The causal standard adopted by the judge was one of

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[8] The judge stated that the medical evidence consisted of both § 11A impartial reports, dated June 8, 1994 and October 21, 1996, and Dr. Krainin's deposition testimony, dated August 24, 1994. (Dec. 2,14.)

[9] Though the judge in her decision lists the June 8, 1994 impartial report as Joint Exhibit 3, the report itself is numbered Joint Exhibit 2. The October 21, 1996 impartial report, while listed as Joint Exhibit 3 in the decision, actually appears to be Joint Exhibit 2. However, for simplicity's sake, we will refer to them as the judge does.

simple causation. The fact that there were causative factors, even predominating causal factors, other than the industrial accident is irrelevant as long as the industrial accident contributed to any extent to the employee's incapacity. Lagos I, supra, at 111. The physician's opinion clearly supported and exceeded the necessary finding that the simple causation standard was met, when he opined that the events leading up to the work-related surgery constituted a major contributing cause of the employee's emotional disability. (Joint Exhibit 4, 18-19, 20-21.) In addition, the second report of October 21, 1996, consistently reiterates the statements made in the 1994 report: "ii) The root causes of [the employee's psychiatric diagnosis] are the collective traumata of the patient's childhood. The disorder was triggered, however, by the surgery needed for the treatment of the injury suffered at work. iii) As far as I am able to determine, the restraint and anesthesia necessary for surgery triggered his flashbacks." (Joint Exhibit 2, 2.) We, therefore, see no contradiction in the quoted deposition statements or elsewhere in that testimony and the statements made in either of the medical reports.

Building on its initial contention, the insurer asserts that the decision is internally inconsistent in ruling that ". . . the serious work related physical injury and required emergency vascular surgery, was and still is a major but not necessarily predominant cause of the employee's emotional disability." (Dec. 19.) The insurer ignores the words preceding the quoted section. The missing words, *"Assuming arguendo that I had found that the Employee had a pre-existing, non-compensable condition, and M.G.L. A. c. 152, Section 1(7A) applied, the Employee still would have prevailed under that analysis in establishing liability against the Insurer. . .*", place the judge's statement in its proper context. (Dec. 18-19, emphasis supplied.) The judge ruled in the alternative. While unnecessary, the earlier finding, based on the simple causal standard, is not undermined.

The insurer next finds fault with the judge's credibility findings. In his second impartial report, the § 11A doctor stated, "Mr. Lagos denied any current alcohol use and any history of past heavy alcohol use. Clearly he is lying." (Joint Exhibit 4, 2.) The insurer argues that, since the physician did not credit this aspect of the employee's history, the judge could not find the employee credible. We disagree. The doctor's

unobjected to testimonial conclusion about the employee's credibility is but one of the many factors a judge weighs in reaching her own credibility determination. Credibility determinations are the sole province of the hearing judge and generally, will not be disturbed. See Lettich's Case, 403 Mass. 389, 394 (1988).

Finally, the insurer argues that the judge erred in not addressing the employee's alcohol use. In the second impartial report, the doctor added a diagnosis of alcoholism. (Joint Exhibit 4, 2.) Nowhere in the record is there any indication that the insurer was raising the employee's alcohol usage as a defense. The medical report was authored on October 21, 1996. The hearing was held on March 6, 1998. The insurer had ample time to raise the issue and, apparently, chose not to do so. Issues not raised below cannot be properly raised for the first time on appeal. Phillips' Case, 278 Mass. 194, 196 (1932).

The decision of the administrative judge is affirmed. The insurer shall pay the employee's counsel a fee in the amount of $1,218.26.

So ordered.

Susan Maze-Rothstein
Administrative Law Judge

Martine Carroll
Administrative Law Judge

Frederick E. Levine
Administrative Law Judge

Filed: February 10, 2000