COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS	**BOARD NOS. 043509-07 025100-09 025101-09 026625-09 026627-09**

David Cvinar	Employee
128 World of Transportation	Employer
AIM Mutual Insurance Company	Insurer
Arbella Indemnity Insurance Company	Insurer
United States Fire Insurance Company	Insurer
Insurance Company of the State of Pennsylvania	Insurer

REVIEWING BOARD DECISION
(Judges Fabricant, Horan and Levine)

This case was heard by Administrative Judge Bean.

APPEARANCES
Richard H. Schwartz, Esq., for the employee
Robert P. diGrazia, Esq., for AIM Mutual Insurance Company
Eugene M. Mullen, Jr., Esq., for Arbella Insurance Company
Ellen H. Sullivan, Esq., for United States Fire Insurance Company
Ralph DiMeo, Esq., for Insurance Company of the State of Pennsylvania

FABRICANT, J. AIM Mutual Insurance Company (AIM) appeals from a decision finding it liable for an injury to the employee's left shoulder, requiring total shoulder replacement, and ordering it to pay a closed period of § 34 total incapacity benefits, ongoing § 35 partial incapacity benefits, and medical benefits pursuant to §§ 13 and 30. Because we agree that the judge did not clearly adopt an expert medical opinion supporting his findings or perform an adequate § 1(7A)[1] analysis, we vacate the decision, and recommit the case for further findings of fact.

[1] General Laws c. 152, § 1(7A), provides, in relevant 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

The employee has been an automotive technician and mechanic since 1981. He has had intermittent problems with his left shoulder since 1987, when he suffered a minor shoulder injury during a softball game at the company outing of a prior employer. Although that injury required no immediate treatment and involved no lost work time, continuing problems with the shoulder in 1998 culminated in injections and arthroscopic surgery in 1999. (Dec. 676.)

In 2002, the employee began working for the present employer as a mechanic. His left shoulder began bothering him again in 2005 and, by 2006, he was requesting lighter jobs which significantly reduced his income.[2] By 2007, he was experiencing "stabbing" pain and received shoulder injections. In July 2008, he again had arthroscopic surgery on his shoulder. After the surgery, his doctor suggested shoulder replacement surgery, but the employee declined. He returned to lighter work within a few days, working slowly and making less money. (Dec. 676-677.)

On April 6, 2010, due to continuing shoulder pain, the employee underwent left shoulder replacement surgery. (Dec. 677-678.) Due to lifting restrictions following surgery, he was unable to return to work as a mechanic. In July 2010, he returned to work as a service advisor, a lighter position in which he earned less money. (Dec. 678.)

Prior to undergoing shoulder replacement surgery in April, 2010, the employee filed claims for weekly compensation and medical benefits against the four insurers on the risk during his tenure with the employer. Following a § 10A conference on January 20, 2010, a judge ordered the last insurer on the risk, the

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> compensable only to the extent such compensable injury or disease remains a major but not necessarily predominant cause of disability or need for treatment.

[2] The judge recited the employee's testimony that in the summer of 2006, he experienced severe pain in his left shoulder at work while attempting to move an 800 pound transmission, which almost fell on him. However, the employee did not report the incident, nor is it noted in any contemporaneous medical reports. (Dec. 677.) It is not clear from the judge's findings whether he credited the employee's testimony regarding this incident.

Insurance Company of the State of Pennsylvania, to pay § 34 benefits beginning on the date of the employee's prospective surgery.[3] Both the employee and the Insurance Company of the State of Pennsylvania appealed to a hearing de novo. (Dec. 674-675.) The case proceeded to hearing with all four insurers.[4] See Borstel's Case, 307 Mass. 24 (1940).

On June 21, 2010, Dr. Murray J. Goodman examined the employee pursuant to § 11A, and his report and deposition testimony were admitted in evidence. (Ex. 3.) Dr. Goodman diagnosed the employee with pre-existing osteoarthritis of the left shoulder, which was not work-related. Nevertheless, Dr. Goodman acknowledged that " 'demands' inherent in an auto mechanics [sic] job make it 'inevitable' that he would not be able to continue his heavy duty work at some point in the future." (Dec. 679). Finding Dr. Goodman's causation opinion unclear, the judge allowed the parties to submit additional medical evidence. (Dec. 674-675, 678-679.)

Dr. Richard Warnock, who examined the employee for AIM on January 8, 2010, traced the employee's shoulder problems to his 1987 injury at the softball

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[3] The decision indicates that the judge awarded § 35 partial incapacity benefits following the conference. (Dec. 674.) However, the conference order itself reflects the judge awarded § 34 benefits following the anticipated surgery. Accordingly, the Insurance Company of the State of Pennsylvania paid § 34 benefits beginning in April 2010, presumably modifying them to § 35 partial incapacity benefits after the employee returned to work in July 2010. See Rizzo v. M.B.T.A., 16 Mass. Workers' Comp. Rep. 160, 161 n.3 (2002)(reviewing board may take judicial notice of documents in board file).

[4] The insurers and dates of injury assigned to each, representing the last date each insurer was on the risk, are:

> December 1, 2004 - Arbella Indemnity Insurance Company
> November 30, 2005 - AIM Mutual Insurance Company
> December 1, 2007 - United States Fire Insurance Company
> May 19, 2009 - AIM Mutual Insurance Company
> August 27, 2009 - Insurance Company for the State of Pennsylvania

The employee withdrew his claim against Arbella for a 2002 injury date. (Dec. 675.)

game. The doctor opined the employee's left shoulder arthritis was present in 1999, and that a previously unreported 2006 work incident involving an 800 pound transmission might have caused a transient aggravation. Nonetheless, the doctor further opined that the employee's shoulder replacement surgery was " 'due to the natural progression of his underlying pre-existing osteoarthritis and not any specific activity at work.' " (Dec. 680, quoting Ex. 6, report, p. 4, and Warnock dep. 29, 34, 37, 38, 61.)

Dr. William Shea examined the employee on January 19, 2010, at the request of the Insurance Company of the State of Pennsylvania, and diagnosed end stage glenohumeral arthritis with possible painful ankylosis of the left shoulder, causally related to injuries in 1987 and 1999. (Dec. 680-681.) Dr. Suzanne Miller, the employee's treating surgeon, opined that the employee's " 'repetitive work activities over the years have exacerbated his osteoarthritis of the shoulder and was [sic] a major contributing factor for the need for shoulder replacement on 4/6/10.' " (Dec. 681.)

The judge ultimately found the employee's left shoulder condition and shoulder replacement surgery causally related to his work with the employer:

> The employee originally suffered a shoulder injury while playing softball in 1987. He underwent a shoulder surgery in 1999. Thereafter he worked as an auto mechanic for the employer in this action for several years, performing much heavy work and overhead work that exacerbated his deteriorating shoulder condition. Throughout the years since 1987 his shoulder developed osteoarthritis. The employee's years of repetitive work activities exacerbated his pre-existing osteoarthritis and this work related exacerbation combined with the pre-existing osteoarthritis to cause the disability and need for treatment, in particular the total shoulder replacement surgery. Therefore, the insurer on the risk at the time of the most recent exacerbation is responsible for the payment of workers' compensation benefits.

(Dec. 681-682.) The judge further found that the employee's pain and disability peaked in 2008, causing him to undergo arthroscopic surgery which reduced, but did not eliminate, his pain. After that, his pain and level of disability did not

increase, but remained constant, leading him to opt for total shoulder replacement on April 6, 2010, which, according to Dr. Miller and Dr. Goodman, would have been reasonable as early as 2008. Accordingly, as the insurer on the risk from December 2, 2007 to May 19, 2009 was AIM, the judge found it liable for the employee's weekly incapacity medical benefits. (Dec. 682.) The judge ordered AIM to pay weekly § 34 benefits from April 6, 2010 to July 25, 2010, and § 35 benefits thereafter, based on the employee's actual earnings of $800 per week, as well as reasonable and necessary medical treatment. (Dec. 683.) The claims against the other insurers were dismissed. (Dec. 683-684.)

On appeal, AIM argues that the judge failed to rely on an expert medical opinion in determining the employee's shoulder condition and need for surgery were causally related to his work for the employer while AIM was on the risk. In addition, AIM argues that the judge erred by failing to make explicit findings regarding its properly raised § 1(7A) affirmative defense. The employee and the Insurance Company of the State of Pennsylvania maintain that the judge, in fact, adopted the expert medical opinion of the employee's treating physician, Dr. Miller, and properly determined the employee's most recent exacerbation occurred when AIM was on the risk. In addition, they contend the judge conducted an adequate § 1(7A) analysis. We agree with AIM that the case must be recommitted for the judge to make further findings specifying the medical evidence on which he relied, and to perform the required analysis under § 1(7A).

It is axiomatic that a judge is free to adopt the opinion of one medical expert over that of another, Beverly v. M.B.T.A., 17 Mass. Workers' Comp. Rep. 621, 624 (2003), and that he may adopt all, part or none of a medical opinion. Clarici's Case, 340 Mass. 495, 497 (1960); Zapata v. Demoulas Supermarkets, 18 Mass. Workers' Comp. Rep. 310, 315 (2004). However, we must be able to determine what opinion the judge relied upon, and for what purpose. Schaeffer v. Philadelphia Sign Co., 25 Mass. Workers' Comp. Rep. 215, 220 (2011), and cases cited. Here, we cannot do so because the judge merely recites the medical

opinions of doctors Goodman, Warnock, Shea, and Miller, without clearly adopting any of them. Although, in his subsidiary findings imposing *liability* on AIM, the judge references the opinions of both Dr. Miller and Dr. Goodman that the 2008 surgery was reasonable, he does not state, and it does not necessarily follow, that he adopted Dr. Miller's opinion on causal relationship. In fact, since Dr. Miller and Dr. Goodman disagreed on causal relationship -- with Dr. Miller opining the employee's repetitive work activities were a "major contributing factor" of his need for surgery, (Dec. 681), and Dr. Goodman opining the employee's work was *not* the cause but had some effect on his condition (Dec. 679), -- we cannot tell, without more specific findings, which, if either, expert medical opinion the judge adopted on causation. On recommittal, the judge must make subsidiary findings clearly indicating on what medical opinions he has relied, and for what purpose. See Stewart's Case, 74 Mass. App. Ct. 919 (2009)(where there are medical opinions which would support the judge's conclusion, case must be remanded for judge to determine whether and to what extent he accepts or rejects the medical evidence).

Once the judge has clarified the medical opinion or opinions on which he relied, he must address the relevant elements of § 1(7A). There is no dispute that § 1(7A) was properly raised. The judge noted it as an issue on the record, (Tr. 5), and lists it in the hearing decision. (Dec. 673.) Although he does not indicate a basis for his findings, he seems to begin a § 1(7A) analysis by finding that "[t]he employee's years of repetitive work activities exacerbated his pre-existing osteoarthritis and this work related exacerbation combined with the pre-existing osteoarthritis. . . ." (Dec. 681-632.) See Baldini v. Department of Mental Retardation/DMR3, 23 Mass. Workers' Comp. Rep. 159, 163 (2009), citing MacDonald's Case, 73 Mass. App. Ct. 675, 660 (2009)(the two essential elements of the insurer's burden of production in establishing threshold requirements for § 1[7A] applicability are the existence of a pre-existing condition, and the combination of that pre-existing condition with the alleged work injury).

However, the judge then goes on to find that these two factors combined merely "to cause" the employee's disability and need for treatment. This finding of simple causation is, insufficient to satisfy the employee's burden of proving "a major cause" under § 1(7A). The analysis the judge must perform where, as here, § 1(7A) has been appropriately raised, is described in "exquisite detail" in Vieira v. D'Agostino Assocs., 19 Mass. Workers' Comp. Rep. 50 (2005),[5] and many subsequent cases. Given the judge's failure to perform an adequate § 1(7A) analysis, or even to adopt expert medical opinion, we cannot tell whether he actually determined the "a major cause' standard was applicable, or whether he assumed the employee had defeated § 1(7A) by proving that his pre-existing condition was compensable. In any case, we do not speculate. See Praetz v.

[5] In Vieira, supra, we explained:

> We will continue to require that judges make explicit findings as to these § 1(7A) elements, where the section is appropriately raised by the insurer. See Saulnier v. New England Window and Door, 17 Mass. Workers' Comp. Rep. 453, 459-460 (2003). Addressing the necessary analysis in exquisite detail, we note that the administrative judge must first address the nature of the pre-existing condition: whether it stems from an injury or disease *see* Vasquez v. Sweetheart Cup Co., 19 Mass. Workers' Comp. Rep. 17, 19 n.4 (2005) and cases cited) [sic], and, if so, whether it is appropriately characterized as "not compensable under [c. 152]." As to the latter inquiry, "[i]f there is medical evidence that the pre-existing condition continues to retain any connection to an earlier compensable injury or injuries, then that pre-existing condition cannot properly be characterized as 'non-compensable' for the purposes of applying the § 1(7A) requirement that the claimed injury remain 'a major cause' of disability." Lawson v. M.B.T.A., 15 Mass. Workers' Comp. Rep. 433, 437 (2001). [Citation omitted.] It is the *employee's burden to prove the compensable nature of the pre-existing condition* in order to invalidate a § 1(7A) defense. See LaGrasso v. Olympic Delivery, 18 Mass. Workers' Comp. Rep. 48, 54-55 (2004). If the pre-existing condition is not compensable, the judge must then address the effect of its combination with the subject work injury. See Resendes v. Meredith Home Fashions, 17 Mass. Workers' Comp. Rep. 490 (2003). If the employee has not defeated § 1(7A) by successfully attacking either of these first two elements of the statute, the judge must then make findings on the last element: whether the work injury remains a major but not necessarily predominant cause of the resultant disability or need for treatment. [Citation omitted.]

Id. at 53; emphasis added.

Factory Mut. Eng'g & Research, 7 Mass. Workers' Comp. Rep. 45, 47 (1993)(reviewing board should be able to "determine with reasonable certainly whether correct rules of law have been applied to facts that could be properly found"). Stated otherwise, effective appellate review is impossible because the judge has failed to resolve all issues in controversy. Oliver v. Varian Ion Implant Sys., 25 Mass. Workers' Comp. Rep. ___ (2011).

Accordingly, we vacate the decision, reinstate the conference order, and recommit the case for the judge to make findings of fact regarding the medical evidence he has adopted, and to perform an appropriate § 1(7A) analysis. Because the judge's conclusion on liability may be affected by these determinations, he should revisit that issue as well.

So ordered.

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Bernard W. Fabricant
Administrative Law Judge

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Mark D. Horan
Administrative Law Judge

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Frederick E. Levine
Administrative Law Judge

Filed: **June 27, 2012**