COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 018511-94**

David Tirone	Employee
Massachusetts Bay Transportation Authority	Employer
Massachusetts Bay Transportation Authority	Self-insurer

REVIEWING BOARD DECISION
(Judges Carroll, Wilson and Levine)

APPEARANCES
John J. McDonough, Esq., for the employee
Joseph S. Buckley, Esq., for the self-insurer

CARROLL, J. The employee appeals from a decision in which an administrative judge allowed the self-insurer's request to discontinue payment of § 35 benefits for an accepted industrial accident occurring on May 24, 1994. The employee argues that the judge erred by basing the discontinuance on a job offer that did not exist as of the date assigned to discontinue weekly benefits. We agree, vacate the discontinuance date, and order discontinuance as of the date on which the job offer was made. The employee also challenges the judge's findings on the effect of a subsequent motor vehicle accident on the continuing liability of the workers' compensation insurer for any potential future benefits. The judge concluded that the subsequent motor vehicle accident broke the chain of causation between the industrial accident and any after-occurring incapacity or need for treatment. We reverse that finding and conclusion. We otherwise affirm the decision.

On May 23, 1994, the employee tripped and fell down a flight of stairs at work, injuring his left shoulder, back, buttocks, leg and head. After a hearing, the employee was awarded a closed period of temporary total incapacity benefits, and ongoing partial incapacity benefits, based on a weekly earning capacity of $190.00. (Dec. 4-5.) Thereafter, the self-insurer requested discontinuance of the employee's § 35 benefits,

which request was denied at the § 10A conference on June 12, 1997. (Dec. 2.) The self-insurer appealed to a hearing de novo.

An impartial medical examination of the employee pursuant to G.L. c. 152, § 11A(2), took place on November 7, 1997. The impartial physician diagnosed acute and chronic back strain, exogenous obesity, neck strain and right upper arm neuralgia. The doctor causally related only the back strain to the 1994 industrial accident, and opined that the employee was totally disabled from returning to his usual occupation as a guard and motorman for the M.B.T.A. The impartial physician opined that the employee was not yet at a medical end result, and that he could work in a sedentary job, with no repetitive lifting of more than five pounds, and no sitting or standing for more than fifteen minutes, with frequent rest periods. The doctor noted that the employee did have a non-work-related osteoarthritic low back condition, prior to his 1994 industrial injury, but that the industrial back injury was the major cause of the employee's ongoing disability and need for treatment. (Dec. 5-6.)

During cross-examination at his deposition, the self-insurer presented the impartial physician with information that the employee had suffered an intervening motor vehicle accident on September 5, 1995. The doctor stated that the employee's complaints could be attributable to that motor vehicle accident. (Dec. 7; Dep. 49-50.) The self-insurer also presented the doctor with information regarding its offer to the employee of a sedentary fare collector position. (Insurer's Ex. # 3.) The doctor stated that the employee was capable of performing the offered position. The judge adopted the opinions of the impartial physician in their entirety. (Dec. 7.)

The judge did not find the employee to be credible. (Dec. 7.) The judge credited the testimony of the self-insurer's witness regarding the job offer of fare collector, a position which paid an amount that equaled or exceeded the employee's pre-injury average weekly wage. (Dec. 9.) The judge also credited the testimony of a casualty field adjuster of Commercial Insurance Co., with regard to the employee's pending claim due to his 1995 motor vehicle accident. That witness testified that the employee claimed a disc herniation at L4-L5 as a result of that accident. The judge determined

that the intervening motor vehicle accident effectively broke the chain of causal relationship between the employee's present complaints and his 1994 industrial accident. (Dec. 8.)

The judge concluded that the employee could perform the offered position as fare collector, and found that the employee's entitlement to § 35 benefits ceased as of the date of the impartial examination, November 7, 1997. (Dec. 9.) In addition, the judge concluded that, since the employee had a pre-existing non-work-related impairment to his back, and also experienced "another non-work-related accident on September 5, 1995, to the extent where [the impartial physician] is now unable to differentiate between what part of his restrictions are due to the prior condition and the accepted back injury, I find the claimant has failed to meet his burden of proof that his current restrictions, if any, are related to the accepted industrial injury of May 24, 1994." (Dec. 9.) The employee appeals.

We agree with the employee that there is an error in the administrative judge's discontinuance of weekly benefits as of the date of the impartial medical examination, November 7, 1997. The doctor did testify at deposition that the partially disabled employee could perform the offered fare collector position without qualification, based on his findings at the November 7, 1997 examination. (Dec. 6-7; Dep. 27-28, 59-60.) However, the job offer was not made until March 19, 1998. (March 19, 1998 Tr. 72.) General Laws c. 152, § 35D(3), requires both that the employee be capable of performing the offered job, and that "such job has been made available to him[.]" We see no basis for predating the availability of the fare collector job to correspond with the date on which the employee's capacity to perform the job was ascertained. The judge's conclusion that partial incapacity benefits be terminated was based specifically on that job offer. Therefore, since the first date on which both the capacity to perform the job and the job's availability are established in this record is March 19, 1998, that must be the date for assignment of the termination of benefits. We reverse the termination of benefits as of November 7, 1997, and order termination as of March 19, 1998.

The employee also challenges the conclusion the judge drew from the occurrence of the September 1995 motor vehicle accident. The judge found

> "that intervening motor vehicle accident, for which [the employee] treated with Dr. Mudrock between October 4, 1995 and January 29, 1997, has effectively broken the chain of causal relation for Mr. Tirone's complaints relating to the accepted industrial injury of May 24, 1994. Since Mr. Tirone had a prior non-work-related condition (which had been aggravated [sic] the accepted industrial injury) and subsequently experienced another non-work-related accident on September 5, 1995, to the extent where Dr. Saperstein is now unable to differentiate between what part of his restrictions are due to the prior condition and the accepted back injury, I find that the claimant has failed to meet his burden of proof that his current restrictions, if any, are related to the accepted industrial injury of May 24, 1994."

(Dec. 8-9.) The judge's analysis is erroneous.

There is no basis for mixing the employee's non-work-related medical condition *pre-existing* the industrial injury with the *subsequent* non-work-related aggravation of that injury in the assessment of the employee's medical disability status. These are two discrete areas of inquiry and analysis having nothing to do with each other. According to the impartial doctor, the employee's pre-existing subclinical osteoarthritis traumatica of his low back combined with the May 24, 1994 industrial injury to cause a prolonged disability with further need of treatment.[1] The testimony triggered the application of the § 1(7A) heightened standard of "a major but not necessarily predominant" cause for proving compensability for an industrial injury. The impartial doctor opined that this standard was met. (Dec. 6.)

However, the subsequent motor vehicle accident of September 5, 1995 requires an entirely different approach to the causal relationship question. The industrial injury remains compensable, relative to that later event, if the employee can prove any

[1] The doctor also considered the employee's exogenous obesity as a pre-existing condition warranting the § 1(7A) analysis for "combination" injuries. However, without an opinion stating that the obesity was of such a severe or morbid degree as to constitute a "disease" under the statute, we do not so consider the employee's excess weight. See Fairfield v. Communities United, 14 Mass. Workers' Comp. Rep. 79 (2000); Errichetto v Southeast Pipeline Contractors, 11 Mass. Workers' Comp. Rep. 88, 93 (1997).

continuing causal connection between the work and the resultant incapacity. See Morgan v. Seaboard Prods., 14 Mass. Workers' Comp. Rep. 280 (2000); Kashian v. Wang Laboratories, 11 Mass. Workers' Comp. Rep. 72, 74 (1997), *aff'd* Single Justice of the Appeals Court, 97-J-135 (1997); Squires v. Beloit Corp., 12 Mass. Workers' Comp. Rep. 295, 297-298 (1998); Roderick's Case, 342 Mass. 330 (1961).

The only medical evidence in the case – proffered by the impartial doctor and found by the judge to be adequate under § 11A(2) (Dec. 7) – did not eliminate causal connection between the industrial injury and the employee's present complaints. The doctor opined that the employee's symptoms could be attributable to the subsequent motor vehicle accident. (Dep. 49-50.) We do not understand this opinion to express that the work-related status of the employee's impairment no longer obtained, or that the doctor retracted his prior opinion on such causal relationship. Cf. Perangelo's Case, 277 Mass. 59, 64 (1931). At no time was he asked whether he would consider that the work injury ceased to be related to the employee's present medical impairment, in view of the subsequent motor vehicle accident. Liability for the industrial injury is not cut off by such conjectural medical opinion testimony as a matter of law. See Roderick's Case, supra, Whitehead's Case, 312 Mass. 611, 613 (1942); L. Locke, Workmen's Compensation § 502, n.15 (2d ed. 1981) ("As a practical matter, the insurer has the burden of producing evidence against the claimant when it seeks to deny a claim by contending that the employee had deviated from the employment, *that causal relation was interrupted by an independent intervening cause*, and the like.") (Emphasis added). The testimony of the insurance adjuster – while it might raise an eyebrow regarding the employee's work injury claim – simply cannot substitute for the impartial physician's opinion regarding the issue of medical causal relationship. See Josi's Case, 324 Mass. 415, 417-418 (1949) (proof of medical causation that is beyond knowledge and experience of layperson must be based on expert medical testimony). Therefore, we reverse the judge's finding that the intervening motor vehicle accident effectively broke

the chain of causal relationship between the work injury and the employee's back complaints.[2]

Accordingly, we reverse the decision, in part, as to the date of discontinuance and as to the finding of an intervening non-work-related accident cutting off liability for this industrial injury. We otherwise affirm the decision.

So ordered.

Martine Carroll
Administrative Law Judge

Sara Holmes Wilson
Administrative Law Judge

Frederick E. Levine
Administrative Law Judge

Filed: **July 19, 2001**
MC/jdm

[2] As there was no error in the judge's reliance on the job offer for the termination of the employee's § 35 benefits, our analysis only has the effect of "leaving the door open" for the employee to pursue a claim for further compensation benefits. We express no anticipatory opinion as to the merits of any such future claim.