COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS	**BOARD NO. 054447-96**
Deborah Fairfield	Employee
Communities United	Employer
Eastern Casualty Insurance Co.	Insurer

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

APPEARANCES
James F. White, Esq., for the employee
James E. Rame, Esq., for the insurer

MAZE-ROTHSTEIN, J. The insurer appeals a decision in which the judge, on the issue of earning capacity, rejected the insurer's expert vocational testimony regarding a telemarketing position; the judge reasoned that "[s]uch positions as pornographer, abortionist and telemarketer" are too lowly to consider in ascertaining employability. (Dec. 863.) We reverse and recommit the case for further earning capacity findings. We reject the insurer's contention that the judge erred by failing to apply the "a major but not necessarily predominant cause" standard of § 1(7A).

Deborah Fairfield was forty-one years old at the time of the hearing in this matter. She ended her formal education after the ninth grade but later earned a G.E.D. At the time of her work injury she held three jobs -- school bus driver, pre-school classroom helper and housekeeper in a health spa. (Dec. 860.)

On December 19, 1996, Ms. Fairfield attempted to lift a small, but sand filled, storage unit while working at the pre-school. As she lifted it, she felt severe low back pain. She reported the injury but finished her shift that day. Id.

She reported for work later in the day at her second job as a bus driver but was unable to complete her shift due to back pain. She has never returned to that job. She

continued her work as a pre-school student driver but was given a van with a special seat and her route was shortened. She also continued working her third job at a spa, but was assigned light duty work and fewer hours. She stopped bus driving on April 29, 1997 due to back pain; her commercial driver's license and Department of Public Utilities license have since expired. Her work at the spa ended on January 18, 1998. (Dec. 860-861.)

The employee filed a claim for weekly compensation benefits, which the insurer resisted. The claim was denied at a § 10A conference and the employee appealed to a hearing de novo. (Dec. 859.) Pursuant to § 11A the employee was examined by a doctor who diagnosed back strain with morbid obesity and deconditioning and causally related the employee's back strain to her work injury. The doctor found Ms. Fairfield to be totally and permanently disabled from her usual occupations due to her back strain, but felt she had a sedentary physical capacity for work. (Dec. 862, 864.)

The insurer presented a labor market survey and testimony of a vocational expert who identified three broad classes of jobs within the employee's capability. After listening to the employee's testimony, the vocational expert narrowed her focus to telemarketing positions. (Dec. 863.)

In his decision, the judge rejected the opinion of the vocational expert, credited the employee's testimony and adopted the § 11A doctor's opinion. (Dec. 863-864.) He ordered the insurer to pay § 35 weekly temporary partial incapacity benefits from December 20, 1996 to April 28, 1997 with an earning capacity of $270.66 and from April 29, 1997 to January 18, 1998 with an earning capacity of $39. From January 19, 1998 forward the insurer was ordered to pay § 34 temporary total weekly incapacity benefits. (Dec. 865.) The insurer appeals.

The judge discredited the insurer's vocational expert testimony on the basis that the suggested jobs, "although they are legal and profitable, are held in such low regard, that it is not appropriate for a judge to consider them when ascertaining employability. Such positions as pornographer, abortionist, and telemarketer fall into that category." This statement is groundless, irrelevant, and patently inappropriate. Cf. Matter of Brown, 427 Mass. 146, 153 (1998). There is no basis to conclude that telemarketing is an

inappropriate source of employment for consideration in an earning capacity analysis. The judge's personal distaste for the position is not a valid reason to reject the proposed job category as one which the employee might be capable of performing. See § 35D(4). Moreover, by cloaking his rejection of this position in gratuitously insulting language that is unjustified by anything properly before him (see Brown, supra), the finding is arbitrary, capricious and unseemly. We reverse the finding and recommit the case for an assessment of the employee's earning capacity based on the record evidence, including the vocational expert evidence on telemarketing positions allegedly suitable for the employee.

The insurer next contends that the judge erred by failing to address the issue of the employee's obesity as a "pre-existing condition, which resulted from an injury or disease not compensable under this chapter" that combined with the subject work injury requiring application of the § 1(7A) standard of "a major" cause.[1] We disagree.

The insurer's argument presupposes that the employee's morbid obesity is automatically included in the § 1(7A) predicate element of "a pre-existing condition, which resulted from an injury or disease not compensable under this chapter. . . ." G.L. c. 152, § 1(7A). In Errichetto v. Southeast Pipeline Contractors, 11 Mass. Workers' Comp. Rep. 88, 93 (1997), we stated:

> If, based on medical evidence, the judge determines that the employee's obesity is of such a nature that it reasonably can be considered a pre-existing condition – a "disease" under § 1(7A) – she must then analyze whether the industrial injury combined in any way with this pre-existing condition, and whether it "remains a major but not necessarily predominant cause of disability or need for treatment." See Robles v. Riverside Management Co., 10 Mass. Workers' Comp. Rep. 191 (1996).

[1] General Laws c.152, §1(7A), reads in pertinent part:

> "Personal injury" includes….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.

Amended by St. 1991, c.398, §§ 13 to 15.

We find no medical evidence in the record that this employee's morbid obesity is a "disease." The closest the § 11A physician comes to addressing that threshold issue is in his deposition testimony where he stated that he "felt that some of her medical advice had been lacking for her overall well-being, and [he] felt that these recommendations and consultations would help her get back to the point where she could do altered and more modest work, especially with nutritional counseling and *an evaluation to see if she did indeed have a[n] (sic) endocrinological illness that was causing her obesity."* (Dep. 25, emphasis added.) The testimony establishes a *possibility* of disease, not its existence. Moreover, nowhere does the medical testimony speak of "obesity" without inclusion of a second factor, "deconditioning." See, e.g., Dep. 24 ("The major problem at this time is ongoing obesity and deconditioning"). Similarly, there is no evidence that "deconditioning" was a pre-existing condition resulting from a noncompensable injury or disease. See G.L.c. 152, § 1(7A). Section 1(7A) does not apply to this case, as a matter of law, for two reasons – the lack of a medical opinion of obesity as a combining noncompensable pre-existing disease, and the lack of a medical opinion on obesity, without the added factor of "deconditioning," which also lacks a § 1(7A) showing. There was no error in the judge's assessing the evidence under the principles of simple, "as is" causation.

The insurer had the opportunity, at the deposition of the impartial physician, to cross-examine the doctor as to the § 1(7A) predicates that it apparently took to be self-proving. The insurer might have been well-advised to endeavor to make such an inquiry, as it had the burden of producing evidence of the predicates to § 1(7A)'s application – the existence of a pre-existing condition, which resulted from an injury or disease not compensable under this chapter, that combines with the compensable injury or disease that is the subject of the claim or complaint.

The various components of § 1(7A)'s exclusions and limitations to the fundamental concept of the § 26 "personal injury" – that arising out of and in the course of employment – require different treatments regarding the allocation of the burden of

production and proof. While the employee has the burden of proving every element required to establish entitlement to benefits under c. 152, see Sponatski's Case, 220 Mass. 526 (1915), some of the § 1(7A) "laundry list" of limitations and exceptions are, at minimum, part of the insurer's burden of producing evidence.

As Locke stated succinctly in his Treatise:

> 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. In the absence of such evidence, the insurer runs the risk that the single member will accept the claimant's version of the case. *But the effect of producing such evidence is to increase the claimant's burden of persuasion and require him to offer further evidence to substantiate his claim.*

L. Locke, Workmen's Compensation, § 502, n.15 (2nd ed. 1981)(emphasis added), citing Sargentelli's Case, 331 Mass. 193, 195 (1954). See also Almeida v. S & F Concrete Contractors, 11 Mass. Workers' Comp. Rep. 674, 677 (1997).

The effect of the application of § 1(7A) to an employee's claim is certainly to "increase [her] burden of persuasion and require [her] to offer further evidence to substantiate [her] claim[,]" Locke, supra, namely, at least to produce persuasive evidence that the subject industrial injury or disease "remains a major" cause of her disability. If the insurer wanted the advantage of the standard of "a major" causation under § 1(7A), it had the burden of producing evidence that the employee came within the terms of the statute. This means that it had to introduce facts necessary to trigger its application that there was pre-existing "disease" of obesity and/or deconditioning, that combined with the employee's subject work injury for which proposition there was no evidence.

Accordingly, since the insurer did not introduce sufficient evidence to trigger the application of § 1(7A), there was no error in the judge's failure to address and apply it.

We recommit the case for further findings on the employee's present incapacity and earning capacity, consistent with this opinion.

So ordered.

Susan Maze-Rothstein
Administrative Law Judge

Martine Carroll
Administrative Law Judge

Frederick E. Levine
Administrative Law Judge

Filed: April 3, 2000