COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 045803-97**

Donna L. Remillard	Employee
TJX Companies Incorporated	Employer
CNA Insurance Company	Insurer

REVIEWING BOARD DECISION
(Judges Fabricant, Horan and Levine)

The case was heard by Administrative Judge Maher.

APPEARANCES
Sandra Jenkins Bryant, Esq., for the employee
David G. Shay, Esq., for the insurer at hearing and on brief
Christopher L. Maclachlan, Esq., for the insurer on brief and at oral argument

FABRICANT, J. The insurer appeals from a decision awarding § 34 benefits beginning May 10, 2010, for a November 21, 1997, accepted work injury. The insurer argues the judge erred in causally relating the employee's incapacity to the 1997 injury instead of finding a new injury related to repetitive stress and lifting at work when a successive insurer was on the risk. Because neither party raised the possibility of a new cumulative injury or successive insurer liability in a timely or meaningful way, those issues were not before the judge.[1] Therefore, as the medical evidence supports a continuing causal relationship to the 1997 injury, the judge did not err in finding the insurer responsible for the employee's ongoing incapacity.

The insurer also challenges the judge's application of § 35B to establish the compensation rate the employee was paid. We uphold the determination of

[1] General Laws, c. 152 § 11, states, in pertinent part:

> At the hearing the [administrative judge] shall make such inquiries and investigations. . . [to] enable him to issue a decision with respect to the issues before him.

§ 35B's applicability, but vacate as unnecessary his finding, with respect to that section, that the employee suffered "no new injury."

Finally, we agree with the insurer that the judge did not make adequate findings regarding § 1(7A), and therefore recommit the case for further findings on that issue.

The employee, a warehouse worker, suffered two work-related injuries. In April 1991, while lifting heavy boxes, she developed right arm pain and pain in her trapezius, radiating to her neck and head. She was out of work for three years, during which time she was paid workers' compensation benefits. In April 1994, she returned to regular work, but suffered ongoing pain. On November 21, 1997, while again lifting a heavy box at work, she injured her right shoulder, scapula, neck and right arm. The insurer accepted liability for the neck and right shoulder conditions, and paid weekly compensation benefits for approximately six months, as well as ongoing medical benefits. (Dec. 5-6.)

In May 1998, the employee returned to work with restrictions, including lighter lifting and fewer hours. Over time, however, the lifting requirements of her new job increased along with her hours. She took Vicodin for her increasing pain, but was unable to keep up with her work. (Dec. 6.) "Over the years while working," the employee began to have pain in her left shoulder, in addition to her right-sided pain. (Dec. 7.) Ultimately, on May 10, 2010, because of pain and inability to do her job, the employee accepted a voluntary retirement. (Dec. 6.) She now has pain in the back of her neck that radiates from her shoulders to her hands. (Dec. 7.)

At hearing, the employee alleged only November 21, 1997, as the date of injury, and sought compensation based on the wage in effect at the time she left work[2] pursuant to § 35B.[3] The insurer raised the affirmative defense of

[2] The employee's claim is for benefits beginning on October 22, 2010. As part of her retirement package, the employee was paid one week of salary for every year she had

§ 1(7A),[4] and the issues were defined by the judge as: 1) applicability of § 35B; 2) extent of incapacity after October 22, 2010; 3) causal relationship of the employee's incapacity to the November 21, 1997 work injury; and 4) applicability of § 1(7A). (Dec. 5; Tr. 4-11.)

At the close of testimony on February 14, 2012, insurer's counsel indicated that the parties would file a stipulation regarding the average weekly wage for § 35B purposes. (Tr. 119-120.) Almost two months later, in a letter dated April 2, 2012, the insurer submitted a stipulation as to the employee's average weekly wage on May 7, 2010, the last day she worked, and on the date of injury, November 21, 1997. In the same letter, the insurer added a stipulation that CNA went off the risk as of July 1, 2007, when Zurich Insurance came on the risk.[5] Despite this revelation regarding the change in insurance coverage, neither party requested the consideration of any new issue or defense, or sought to join Zurich, the successive insurer.

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worked. No claim for weekly benefits has been made for those weeks she received severance pay. (Dec. 6.)

[3] General Laws, c. 152, § 35B, provides, in relevant part:

> An employee who has been receiving compensation under this chapter and who has returned to work for a period of not less than two months shall, if he is subsequently injured and receives compensation, be paid such compensation at the rate in effect at the time of the subsequent injury whether or not such subsequent injury is determined to be a recurrence of the former injury . . . .

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

[5] We take judicial notice of documents in the board file. Rizzo v. M.B.T.A., 16 Mass. Workers' Comp. Rep. 160, 161 n.3 (2002).

Based on the adopted portions of the medical evidence and the employee's credible testimony, the judge found the employee sustained a personal injury on November 21, 1997. (Dec. 10.) The judge also determined that after the employee returned to modified work, her symptoms worsened over time until she was unable to work, at which time she accepted a severance package effective May 10, 2010. (Dec. 10.) Ultimately, the judge found the employee remained totally disabled after October 22, 2010, and that the "singular cause" of her incapacity was the November 21, 1997 industrial accident. (Dec. 11.) Addressing the affirmative defense of § 1(7A), the judge found the insurer had "failed to prove the factual predicates . . . to put it into play. I do not find that there was a pre-existing non-work related injury or condition that combined with the injury to prolong the disability or need for treatment." (Dec. 11.)

Finally, the judge found the employee had met the criteria for the application of § 35B because she returned to work following the 1997 industrial injury for over two months, and her symptoms worsened to the point that, by May 2010, she was unable to work. Finding there was "not a new injury," and her incapacity and need for treatment were related to the November 21, 1997 injury, the employee was entitled to compensation based on her average weekly wage as of the time she left work, May 10, 2010. (Dec. 12.) The insurer was ordered to pay § 34 benefits beginning on May 10, 2010,[6] pursuant to § 35B, as well as § 36 benefits for permanent loss of function for the cervical spine and right major upper extremity in the amount of $31,046.83. (Dec. 12, 13.)

On appeal, the insurer first maintains the medical evidence compels the conclusion that the employee suffered a new, cumulative injury after her return to work in 1998, rather than a recurrence or worsening of her 1997 injury. This

[6] Although the employee claimed § 34 benefits beginning on October 22, 2010, (Dec. 3), and the judge found her disabled from that date forward, (Dec. 11), neither party challenges his order that the insurer pay § 34 benefits from May 10, 2010. Also, the employee does not challenge the judge's failure to address her claim for § 34A benefits. (Dec. 11.)

alleged new injury involved at least the employee's *left* shoulder and upper thoracic pain, and bilateral median neuropathy, which arose in the course of the employee's work activity. (Dec. 12.) Thus, the insurer contends, § 35B is inapplicable. Instead, the insurer maintains that liability should be charged solely to the successive insurer on the risk on the date of the 2010 claim. (Ins. br. 15, citing Comeau v. Enterprise Elecs., 26 Mass. Workers' Comp. Rep. ___ [August 28, 2012].)

The problem with the insurer's argument is that the question of whether the employee suffered a new injury after 2007 was not before the judge. The employee claimed she was injured on only one occasion: November 21, 1997. The insurer did not raise liability as an issue, or defend at hearing on the ground that the employee suffered a new injury, after she returned to work, for which a successive insurer was liable. In fact, the insurer did not bring to the judge's attention the fact that it went off the risk on July 1, 2007, until almost two months after lay testimony was completed. When it did notify the judge of this fact, it did so in a letter it had represented would be a stipulation as to the average weekly wage pursuant to § 35B. The insurer did not indicate this was newly discovered evidence, nor did it ask the judge to add a new issue or defense, hold a status conference, join the successive insurer, or move to re-open the hearing. The insurer did not even argue the successive insurer/cumulative injury issue in its written closing argument to the judge.

The insurer is charged with providing timely notice of the bases on which it is defending a case. 452 Code Mass. Regs., § 1.11(3), provides:

> *Before the taking of testimony in a hearing* before an administrative judge, the insurer shall state clearly the grounds on which the insurer . . . has declined to pay compensation . . .

(Emphasis added.) In Bamihas v. Table Talk Pies, 9 Mass. Workers' Comp. Rep. 595, 597-598 (1995), we explained:

> The import of [this regulation] is unmistakable: an insurer must give the employee fair notice of the grounds for its defense at hearing.

To condone a strategy which would require the judge to rule on issues neither party has clearly raised at the hearing would potentially create due process violations. See Haley's Case, 356 Mass. 678, 681 (1970). See also n.1, supra.

Because these issues were not raised in a timely fashion, the judge was not required to rule on them, and would have exceeded the scope of his authority had he done so. Boyden v. Epoch Senior Living, Inc., 23 Mass. Workers' Comp. Rep. 61, 63 (2009)(judge erred by awarding benefits for time period not claimed). Accordingly, the insurer has waived the right to argue these issues on appeal. Yeshaiau v. Mt. Auburn Hosp., 27 Mass. Workers' Comp. Rep. ___ n.9 (February 6, 2013); Smith v. Partners Healthcare Sys., Inc., 24 Mass. Workers' Comp. Rep. 438, 47 (2010), citing Commonwealth v. Head, 49 Mass. App. Ct. 492, 494 (2000)(a party "may not try his case on one theory and then obtain appellate review on a theory not advanced below"); Green v. Town of Brookline, 53 Mass. App. Rep. 120, 128 (2001)(issue waived if not presented to judge below).

The insurer next challenges the judge's finding that the employee's ongoing disability is causally related to the 1997 injury. On the case as presented to the judge, we find no error. There is no question that the employee's incapacity after May 2010 is causally related to the 1997 work injury. Causal relationship to the original injury is not severed simply because the employee may have suffered a later injury. In fact, the successive insurer rule contemplates that an employee may suffer "two or more compensable injuries that are causally related to a resulting incapacity." Pilon's Case, 69 Mass. App. Ct. 167, 169 (2007). However, again, where there is no successive insurer and no issue of another date of injury, the successive insurer rule does not come into play to shift liability.[7]

[7] In fact, had the judge found the insurer here was not liable because the employee suffered a new injury while Zurich, the successive insurer, was on the risk, such a finding would not have been binding on Zurich, as a non-party. See Blanco v. Alonso Constr.,

Similarly, because successive insurer liability for a new injury was not raised, we need not address the insurer's argument that the employee's left sided symptoms (left median neuropathy and left shoulder pain due to overuse exacerbated by working with the right sided injury), are not causally related to the original injury. (Ins. br. 9-10.) Moreover, the judge did not adopt any medical opinion causally relating the employee's disability to her left-sided problems. (Dec. 8.)

Even if the issue of whether the employee suffered a new injury had been properly raised, the insurer's position that the adopted medical evidence "compels" the finding of a new injury is of dubious merit. See Havill v. Mead Westvaco/Willow Mill, 26 Mass. Workers' Comp. Rep. ___ (September 6, 2012) and cases cited (in successive insurer case, award against first insurer will be upheld, even though employee's pain has worsened while he continued to work, where the adopted expert opinion indicates the employee's disability is causally related to his original injury). The judge adopted Dr. Tanenbaum's opinion that the employee's symptoms worsened over time until she was no longer able to work. (Dec. 8.) This finding is clearly in line with those in Havill, supra, and other cases where liability against the original insurer was upheld. See Carroll v. State Street Bank & Trust, 19 Mass. Workers' Comp. Rep. 306 (2005), aff'd sub nom., Carroll's Case, 68 Mass. App. Ct. 1119 (2007)(Memorandum and Order Pursuant to Rule 1:28). Accordingly, we uphold the judge's findings on causal relationship, except with respect to § 1(7A), as discussed infra.

The insurer also contends that the judge erred in applying **§** 35B, rather than the successive insurer rule. Once again, due to the failure to raise any issues related to successor liability, we find no error in the application of § 35B.

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26 Mass. Workers' Comp. Rep. 157, 160-161 (2012)(error for judge to allow insurer to argue successive insurer defense while denying employee motion to join successive insurers).

However, we do agree with the insurer's alternative argument,[8] that the judge's finding (made in the context of his § 35B ruling) of no "new injury," is unnecessary. Because that precise issue was not before the judge, we vacate it.

Section 35B is not a mechanism for determining which of two insurers is liable. Its purpose is to determine the rate at which the employee is paid compensation if she returns to work for at least two months following a compensable injury and is "subsequently injured." While a new injury may also be a "subsequent injury," the compensation rate and average weekly wage at the time of the new injury will apply without § 35B's assistance. See Wadsworth's Case, 461 Mass. 675, 685 and n.11(2012); Puleri v. Sheaffer Eaton, 10 Mass. Workers' Comp. Rep. 31, 36 n. 3 (1996). While the distinction between a recurrence and a new injury is important where there is a question of which of two insurers is liable, such is not the case where only one insurer is involved and no question of a new injury has been effectively raised. Cf. Bolduc v. New England Coffee Co., 26 Mass. Workers' Comp. Rep. ___ (October 4, 2012)(judge had only two choices under successive insurer doctrine: either disability was a recurrence of original injury payable under § 35B, or it was a new injury, for which second insurer bore risk).

Finally, the insurer challenges the adequacy of the judge's § 1(7A) findings. We agree that, with respect to *right* median neuropathy, the judge's findings are insufficient to satisfy the requirement that he make explicit findings addressing the elements of § 1(7A). See Vieira v. D'Agostino Assocs., 19 Mass. Workers' Comp. Rep. 50, 53 (2005). The judge's determination that there was not "a pre-existing non-work related injury or condition that combined with the injury," and that the insurer "failed to prove the factual predicates . . . to put [§

[8] In a letter submitted to this Board after oral argument, the insurer requested that we vacate the judge's finding there was "not a new injury" to avoid any collateral estoppel effect should it later attempt to litigate a claim against Zurich. We offer no opinion as to the availability of this remedy.

1(7A)] into play," (Dec. 11), is too cursory for us to determine whether the judge correctly applied the law. A complete explanation of the bases for these conclusions is required. See Praetz v. Factory Mut. Eng'g and Research, 7 Mass. Workers' Comp. Rep. 45, 47 (1993).

The insurer argues that, with respect to right median neuropathy, it met its burden of production by presenting evidence that the employee suffered from pre-existing carpal tunnel syndrome and, in fact, had carpal tunnel surgery in 1996. The insurer maintains the element of combination is satisfied as a matter of law because the pre-existing condition (carpal tunnel syndrome) is synonymous with the condition diagnosed by Dr. Roaf (right median neuropathy).[9] In turn, the employee points to evidence that her carpal tunnel syndrome and 1996 surgery were causally related to the 1991 work injury, and thus compensable. (Employee br. 22.) The judge did not make any determination regarding compensability or even provide a threshold § 1(7A) analysis, despite the fact that the insurer clearly raised § 1(7A) with respect to that condition. On recommittal, the judge must make explicit findings, supported by medical evidence, on the pertinent § 1(7A) factors of combination and compensability of the pre-existing condition of carpal tunnel syndrome. See MacDonald's Case, 73 Mass. App. Ct. 657, 659-660 (2009). With respect to combination, he must also explicitly determine whether the carpal tunnel syndrome and median neuropathy are, in fact, the same condition.[10]

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[9] We note that while there is medical evidence which appears to support the insurer's contention that the two diagnoses are essentially the same, the judge does not adopt or reject it. See, e.g., Dr. Roaf's § 11A report diagnosing "Recurrent Right Median Neuropathy. Carpal tunnel release 1996." (Ex. 1, p. 6.) .

[10] Although the judge found the employee suffered a compensable injury to her neck, head and right arm in 1991, he gave no indication regarding whether she developed right carpal tunnel syndrome from that injury. The employee testified her right carpal tunnel surgeries were work-related, but no contemporaneous medical evidence was introduced regarding the etiology of the right carpal tunnel syndrome. (See Oral Argument Tr. 40.)

The insurer also argues that a § 1(7A) analysis with respect to the employee's allegedly pre-existing condition of fibromyalgia is required. However, insurer's counsel mentioned only carpal tunnel syndrome when the judge asked him to make an offer of proof with respect to § 1(7A). (Tr. 4-5.) We agree with the employee that the insurer failed to properly raise § 1(7A) by failing to make an offer of proof respecting fibromyalgia prior to the close of evidence. See 452 Code Mass. Regs. § 1.11(f). Though the insurer said it would make a later offer of proof regarding other medical conditions, we have not found any indication that it did.[11] Because there was no notice of the insurer's intention to raise § 1(7A) with respect to fibromyalgia, there is no error in not performing a § 1(7A) analysis of that condition.[12] Cf. Dyan v. S&F Concrete, 25 Mass. Workers' Comp. Rep. 405, 408-411(2011)(judge erred by finding, sua sponte and without notice to parties, that insurer waived its § 1[7A] defense, where judge misstated regulation, the nature of the alleged pre-existing condition was clear from outset of hearing, and the employee did not allege noncompliance with regulation at hearing or thereafter).

Accordingly, we affirm the judge's order that the insurer pay § 34 benefits based on his finding that her ongoing incapacity after 2010 is causally related to her 1997 work injury. We also affirm the application of § 35B, but vacate the finding of "no new injury" under that section. Finally, we recommit the case to the judge for a further analysis pursuant to § 1(7A) regarding the employee's right carpal tunnel syndrome.

So ordered.

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[11] Dr. Tanenbaum states in his deposition that he had treated the employee for fibromyalgia, but does not indicate whether it pre-existed the 1997 work injury, or whether it combined with her work injury to disable her.

[12] In addition, we note that the judge did not find that the employee was disabled as a result of her acknowledged fibromyalgia.

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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: **May 30, 2013**