COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 10832-12**

Douglas Ballou	Employee
Briscon Electric	Employer
AIM Mutual Insurance Company	Insurer

REVIEWING BOARD DECISION
(Judges Fabricant, Harpin and Calliotte)

The case was heard by Administrative Judge Benoit.

APPEARANCES
Boaz Levin, Esq., for the employee
Robert J. Riccio, Esq., for the insurer at hearing
Holly B. Anderson, Esq., for the insurer on appeal

FABRICANT, J. The insurer appeals from a decision awarding the employee §§ 34 and 35 benefits in addition to §§ 13 and 30 medical benefits, including payment for a November, 2013 lumbar surgical procedure and rehabilitation services. The insurer claims the decision contains several errors that require reversal and dismissal of the claim. We do not agree that dismissal would be appropriate on initial causation, and instead recommit the case for further findings on that issue. However, we reverse the §§ 13 and 30 award for back surgery.

The employee, forty-four years old at the time of the hearing, initially injured his back in 1991 while working at a supermarket. He underwent a laminectomy in 1992 and returned to work in 1993 for Briscon Electric, performing various jobs until he was laid off in 2009. In August of 2011, the employer rehired the employee to work on a large job order, operating a so-called "4-slide" machine. He was again laid off in March of 2012, when the order was completed. The employee did not recall a specific incident where he injured his back, but alleged an injury occurred during repetitive work-related lifting and carrying. (Dec. 4.)

After a § 10A conference on January 2, 2013, the judge ordered § 34 benefits, but did not order the insurer to pay for lumbar surgery. Both parties appealed the conference order. On May 18, 2013, pursuant to § 11A(2), the employee was examined by Dr. Charles Kenny, a board-certified orthopedic surgeon. The judge found the report of Dr. Kenny was adequate. (Dec. 3.) Neither party requested the opportunity to depose the impartial physician or to submit additional medical evidence. Thus, Dr. Kenny's report was the only medical evidence in the case.

The judge determined that the employee sustained an industrial injury during his employment between August 2011 and March 20, 2012, and that this injury combined with a pre-existing back condition (lumbar degenerative disc disease and spinal stenosis) to cause or prolong disability and treatment. (Dec. 5, 10.) The judge further found that the industrial injury remained a major but not necessarily predominant cause of disability and need for treatment, and ordered payment of §§ 34 and 35 benefits, in addition to payment of medical expenses, including a November, 2013 lumbar surgery. (Dec. 10.)

On appeal, the insurer argues that the judge erred in awarding benefits, because the employee failed to meet his burden of proof under the heightened causation standard of § 1(7A).[1] The insurer first asserts that the employee did not prove that the pre-existing back condition was compensable. See Vieira v. D'Agostino Assocs., 19 Mass. Workers' Comp. Rep. 50, 53 (2005)(employee's burden to prove compensable nature of pre-existing condition to invalidate § 1(7A) defense). However, the employee argues in his appeal that "the Insurer's contention that the pre-existing condition is not compensable is irrelevant, because the § 1(7A) defense is defeated on the 'major cause' element of the statute." (Employee br. 13.) The employee's failure to address this argument is a

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

concession that is tantamount to a waiver. Therefore, we need not address this issue further. Yeshaiau v. Mt. Auburn Hospital, 27 Mass. Workers' Comp. Rep. 15, 19-20 n. 10 (2013)(self-insurer's concession on permanency obviated employee's need for proof).

The insurer next argues the impartial physician's "major cause" opinion is based on assumed work conditions not credited by the judge, and therefore it does not sustain the employee's burden of proof. We agree that this evidence may not be sufficient.

The employee and two witnesses for the employer testified as to the job duties performed by the employee, addressing the weight of buckets and kegs that the employee transported from one location to another, and the number of times per day he had to lift those loads. Dr. Kenny included his understanding of the employee's job requirements in his § 11A report, dated May 18, 2013.[2] The judge found, "[i]t is clear that he had to lift and/or carry objects weighing between 35 and 70 pounds on a repetitive basis, though *much less repetitive than the 'four or five hundred' times per day that he described to Dr. Kenny*." (Dec. 7; emphasis added.)

The judge adopted Dr. Kenny's opinion that the work-related injury combined with the pre-existing condition to cause or prolong the complaints, disability, and need for treatment, and that the work-related injury became a major cause of the employee's ongoing disability and need for treatment. The judge acknowledged that the employee's description of his job to the § 11A examiner was not consistent with his testimony at hearing:

> Notwithstanding my conclusion that the Employee *exaggerated somewhat* the amount of weight that he lifted and the number of times per day he

[2] Dr. Kenny's May 18, 2013, report states:

> He says he worked as a press operator in a factory and had been laid off for approximately two years when he resumed his work in August of 2011. At that point the work consisted of among other things carrying buckets weighing 60 lbs. that had staples in them for approximately 100 feet. He would do this *four or five hundred times a day*. He says that the distances were variable and he can't say that it was always exactly 100 feet. He says that sometimes he worked with lighter buckets and on those particular days he was responsible for carrying the buckets for other workers who weren't able to do that.

(Ex. 1, 1; emphasis added.)

> lifted loads, I accept and adopt the above statements of fact and/or opinion of Dr. Kenny. I do not perceive Dr. Kenny's opinions as relying on insufficient facts as a basis for his conclusion.

(Dec. 8; emphasis added.)

The insurer argues that the impartial doctor's opinion was based on facts not found at hearing, and therefore it cannot be relied on to establish causal relationship. (Insurer br. 24.) Alternatively, the insurer argues the judge's finding that the employee "exaggerated" his efforts "somewhat," (Dec. 8), is insufficiently specific to allow for effective appellate review. (Insurer br. 28-29.) We agree with the insurer's alternate position. The problem lies in the fact that, in this repetitive injury claim, the judge failed to make findings regarding the number of times per day the employee carried buckets back and forth from one location to another. He found only that, in his conversation with Dr. Kenny, the employee "exaggerated somewhat" the repetitive nature of his carrying, by stating that he carried buckets 400-500 times per day. The lack of specific findings as to the frequency of the employee's lifting and carrying leaves us without a record upon which we may determine whether the judge was correct that the discrepancy between the number of times he carried buckets per day and what he told Dr. Kenny was, in fact, only "somewhat exaggerated." See Praetz v. Factory Mu. Eng'g & Research, 7 Mass. Workers' Comp. Rep. 45, 47 (1993) (judge has duty to address issues in a manner such that board can "determine with reasonable certainty whether correct rules of law have been applied to facts that could be properly found").[3] On recommittal, the judge should make specific findings on this issue, supported by the evidence.

We note that, while the discrepancy between the facts adopted by the judge and the history provided to the doctor is problematic, it is not, as yet, fatal.[4] "There is no

[3] We find no meaningful inconsistency between the judge's findings regarding the weight the employee lifted and Dr. Kenny's understanding on that issue. The judge found the employee lifted "between 35 and 70 pounds" regularly (Dec. 7), while Dr. Kenny reported he lifted buckets weight 60 pounds repetitively. (Ex. 1.)

[4] The employee suggests that the insurer could have remedied any inadequacy of the impartial's opinion by deposing Dr. Kenny. However, it is the employee who has the burden of proving each

requirement that the causal connection be shown by expert testimony alone." Wilson's Case, 89 Mass. App. Ct. 398, 401 (2016), citing McAuliffe v. Metcalf, 289 Mass. 67, 69 (1935). However, in finding causal relationship despite the claimant's "exaggerated" testimony, the judge is suggesting that that there are other factors he considered but did not specify when reaching his conclusions. Without further findings, we cannot determine whether Dr. Kenny's opinion can serve as the basis of a causal relationship nexus.

The insurer also argues that the judge's award of medical benefits, specifically for the employee's November 2013 surgery, is without a medical opinion foundation. We agree. The judge found:

> The parties did not submit any medical evidence regarding the time period following the May 2013 report of Dr. Kenny, but the Employee testified credibly regarding his physical condition between Dr. Kenny's examination and the time of the emergency surgery in November 2013. *I see no reason to doubt that the surgery was performed for conditions for which the industrial injury was a major cause.*

(Dec. 8-9.) The employee's obligation in a claim for payment of medical benefits is to introduce evidence that the medical treatment was adequate, reasonable, and causally related. Celko v. P.J. Overhead Door, Inc., 27 Mass. Workers' Comp. Rep. 131, 135 n. 7 (2013). Such evidence constitutes a medical question beyond the common knowledge of a lay person, O'Rourke v. New York Life Insurance, 30 Mass. Workers' Comp. Rep. ___ (December 7, 2016), citing Stewart's Case, 74 Mass. App. Ct. 919, 920 (2009), thus requiring expert medical opinion. Josi's Case, 324 Mass. 415, 418 (1949). The employee's testimony alone is insufficient to establish these factors, and the judge has cited nothing in Dr. Kenny's opinion to support his conclusion that the surgery was causally related to the employee's work injury, reasonable, or adequate. In fact, five

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and every element of his claim. Taylor v. USF Logistics, Inc., 17 Mass. Workers' Comp. Rep. 182, 185 (2003), citing Sponatski's Case, 220 Mass. 526 (1915). See also Brackett v. Modern Continental Constr. Co., 19 Mass. Workers' Comp. Rep. 11, 14 (2005)(party can't be required to depose impartial to "cure" an inadequate report).

months before the surgery Dr. Kenny opined the employee was at a medical end result, and offered no opinion at all regarding whether surgery would be reasonable or causally related. (Ex. 1.) The employee did not attempt to submit any additional medical evidence, or depose the impartial examiner. Thus, he failed in his burden of proof. Sokos v. MCI Concord, 30 Mass. Workers' Comp. Rep. ___ (July 8, 2016), and cases cited. We therefore hold that, regardless of the outcome of the initial causal relationship decision, the judge's finding that the employee's November 2013 surgery was causally related to his repetitive work was error.

Accordingly, we vacate the judge's finding the employee's back surgery was causally related to his work injury. We recommit the case to the judge for further findings on the frequency of the employee's lifting and carrying, based on the evidence adduced at hearing. The judge must then determine whether the discrepancy between the facts he has found and the facts on which the impartial opinion was based is insignificant enough to allow reliance on Dr. Kenny's causation opinion.

So ordered.

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Bernard W. Fabricant
Administrative Law Judge

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William C. Harpin
Administrative Law Judge

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Carol Calliotte
Administrative Law Judge

Filed: February 6, 2017