COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 012113-96**

Francis Burke, Jr.	Employee
Burns & Roe Enterprises	Employer
Hartford Insurance Company	Insurer

REVIEWING BOARD DECISION
(Judges Maze-Rothstein, McCarthy and Levine)

APPEARANCES
James S. Aven, Esq., for the employee at hearing
Gerard A. Pugsley, Esq., for the employee on brief
Christine M. Gill, Esq., for the insurer at hearing
Christine M. Harding, Esq., for the insurer on brief

MAZE-ROTHSTEIN, J The insurer appeals an award of G.L. c. 152, § 34, temporary total weekly incapacity benefits following the insurer's complaint to modify or discontinue them. Among its several arguments, one is dispositive of the appeal. It contends that the findings reflect no consideration of whether the employee's work related knee injury was aggravated when he returned to work with a different employer. We agree with the insurer, and recommit the case to the administrative judge now handling the employee's pending § 34A claim for further findings on the return to work issue.

Francis Burke, fifty years old at the time of hearing, graduated from Quincy Trade School, completed a five-year apprenticeship with Local 12 and obtained a Masters' License in Plumbing and Welding. He worked as a union plumber, laborer and foreman for thirty years. (Dec. 3.) He had been working for the employer for approximately one month when a heavy pipe fell on his left knee and foot. (Dec. 4.)

The aftermath of the injury was substantial. His left knee had significant chondral damage post-trauma, torn medial and lateral menisci, synovial plica and medial collateral ligament strain, as well as a fracture of the first, second and third toes with a crushing

injury to his left foot. (Dec. 4.) In November 1996, (Tr. 28), Mr. Burke underwent knee surgery. (Dec. 4-5.) The surgeon's operative notes indicated that the employee

> has severe destructive changes of the cartilage in his knee which dooms him, in all likelihood, to further deterioration which appears to be happening by virtue of his increased symptoms now and also the possibility that he may need a total knee replacement sometime down the road. In addition, he has not fully recovered from the crush injuries to his toes and may have some permanent loss of function there in flexion as well.

(Dec. 5, quoting surgeon's operative notes).

The insurer paid § 34 temporary total incapacity benefits from March 26, 1996 until June 3, 1996. See G.L. c. 152, §§ 7(1) and 8(1)(payment without prejudice provisions). (Insurer brief 1; Insurer's Notification of Payment; Insurer's Notification of Termination or Modification of Weekly Compensation During Payment-Without-Prejudice Period.)[1] At that time the employee returned to work for another employer. See G.L. c. 152, § 8(2)(unilateral discontinuance provisions). (Tr. 9-10, 13; Employee brief 2; Insurer brief 1.) The insurer resumed payment on November 8, 1996, when the employee again went out of work. (Insurer brief 1; Tr. 13; see Employee brief 1-2.) The insurer filed a complaint to modify the employee's benefits. (Insurer's Complaint for Modification, Discontinuance or Recoupment of Compensation dated July 23, 1997; Employee brief 1; see Insurer brief 1.) Following a denial of the complaint, the insurer appealed to a hearing de novo. (Dec. 2.)

The decision properly notes the insurer's acceptance of the claim and lists the issues as extent of incapacity and causal relationship. (Dec. 2.) Also, the time frames of the employee's § 34 claim are noted, March 26, 1996 to June 2, 1996 and from November 8, 1996 onward, (Dec. 2), but the return to work explanation for the gap in the claimed period from June to November received no mention.

[1] We take judicial notice of these departmental forms, prepared by parties in interest, included in the board file for relevant aspects of the procedural history not reported by the administrative judge. See P.J. Liacos, Massachusetts Evidence § 2.8.1, at 43 (6th ed. 1994).

The judge found the § 11A physician's report adequate,[2] and admitted his deposition into evidence. (Dec. 2-3.) Adopting that opinion, the judge found the employee had yet to reach a medical end result to the March 26, 1996 causally related industrial injury. He further found Mr. Burke totally incapacitated from plumbing work.[3] The insurer was ordered to pay § 34 benefits for the closed period from March 26, 1996 to June 2, 1996, and from November 8, 1996 on. (Dec. 7.)

The insurer appeals, arguing that the employee failed to prove a causally related medical disability legally due to the March 26, 1996 industrial injury. It contends that, though there is medical and lay evidence that the June to November work at a second employer, Marandola Construction, aggravated the employee's knee condition, the judge not only disregarded this evidence, but even failed to acknowledge that the employee returned to work. (Insurer brief 6-9.) The employee counters that the medical and lay evidence support ongoing causation related to the March 26, 1996 work injury. (Employee brief 6-8.) We agree with the insurer that the failure to account for the effects of the employee's work at Marandola Construction Company is error. For that reason, we cannot tell whether the judge applied the so-called "successive insurer" rule correctly.[4] See Praetz v. Factory Mut. Eng'g & Research, 7 Mass. Workers' Comp. Rep. 45, 47 (1993) ("reviewing board must be able to determine with reasonable certainty whether correct rules of law have been applied to facts that could be properly found").

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[2] General Laws c. 152, § 11A, gives an impartial medical examiner's report the effect of "prima facie evidence [with regard to the medical issues] contained therein," and expressly prohibits the introduction of other medical testimony unless the judge finds that additional medical testimony is required due to the complexity of the medical issues involved or the inadequacy of the report. See O'Brien's Case, 424 Mass. 16 (1996).

[3] The insurer has not appealed the extent of the employee's incapacity, and we therefore do not address whether the judge performed an adequate vocational analysis. See 452 Code Mass. Regs. § 1.15(4)(a)3 (issues not briefed on appeal need not be addressed by the reviewing board).

[4] We note that a successor insurer for Marandola Construction Company has neither been claimed against nor joined. However, that does not change the analysis that the judge should have performed, given the evidence presented.

Mr. Burke's unrebutted testimony was that he returned to work as a plumber in June of 1996 for Marandola Construction Company. (Tr. 9-14.) The insurer maintains it first learned about the employee's return to work at hearing. (Insurer brief 4, 7.) It argues that the resounding silence in the decision on the impact of the employee's return to physically demanding work, leaves unresolved the question of an aggravation at the Marandola Construction Company job from June until November 1996.

The law regarding successive insurers provides that if a second injury is "even to the slightest extent a contributing cause of the subsequent disability," liability is assessed against the insurer of the second employer. Rock's Case, 323 Mass. 428, 429 (1948). Of course, to be compensable, an injury must arise from an identifiable work-related incident or series of incidents or from an identifiable condition that is not common and necessary to all or a great many occupations. Zerofski's Case, 385 Mass. 592, 594-595 (1982). The injury need not occur at a definite time or result from a specific incident, but "may develop gradually from the cumulative effect of stresses and aggravations." Trombetta's Case, 1 Mass. App. Ct. 102, 105 (1973).

> Thus, when the pain following a work injury has been occasional and well controlled by drugs but later, in association with subsequent work, becomes constant, more severe and not adequately controlled by drugs, a finding of a new injury will be upheld. Trombetta, supra at 104-105; Smick [v. South Central Mass. Rehab. Resources, Inc., 7 Mass. Workers' Comp. Rep. 84, 86 (1993)]. See generally L. Locke, Workmen's Compensation, [§ 178 (2d. ed.)] and cases cited.
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> Conversely, where the pain or complaints following a work injury have been continuous, subsequent incapacity will usually be deemed a recurrence of the original injury, chargeable to the first insurer, despite subsequent employment predating the incapacity. See Rock's Case, supra at 429-430. That is to say, continued pain and a subsequent worsening, can support a conclusion that a current incapacity is causally related to the original injury, subjecting the first insurer to liability. Rock's Case, supra [footnote omitted.]

Spearman v. Purity Supreme, 13 Mass. Workers' Comp. Rep. 109, 112 (1999).

Here, the judge failed to even mention that the employee returned to work for up to five months with a subsequent employer, despite the employee's extensive testimony

on this issue at hearing. (See Tr. 9-12-14, 19, 26-27, 38-39, 42-43, 44.) We thus have no idea how the judge viewed the employee's somewhat equivocal testimony—whether he believed that the pain remained unabated from the start, naturally progressing to medical disability requiring surgery, or whether he believed that the pain was worsened by the work return to a heavy construction plumbing job to the point of a new injury or aggravation. Since we cannot determine whether the judge even considered the evidence regarding the employee's return to work, we must recommit the case for credibility findings on the employee's testimony about his return to work at Marandola Construction. See Rodgers v. Massachusetts Dept. of Pub. Works, 14 Mass. Workers' Comp. Rep. 306, 312 (2000)(where findings give no indication that the judge reviewed all medical evidence submitted, case must be recommitted for further assessment of medical evidence).

Once these necessary findings are made, only then can the question of ongoing liability for the March 26, 1996 injury, or to some later aggravation, be addressed. Of course, "[w]hether the employee sustained a personal injury by reason of the work done by him after his return to work . . . , and whether if he did there was a causal connection between the injury and the ensuing incapacity [are] not matters that [can] be determined by the [administrative judge] from [his] own knowledge; these [are] matters calling for expert medical testimony." Casey's Case, 348 Mass. 572, 574 (1965), citing Sevigny's Case, 337 Mass. 747, 749 (1958); O'Rourke v. Town of West Bridgewater, 13 Mass. Workers' Comp. Rep. 415, 419 (1999). See also Josi's Case, 324 Mass. 415, 417-418 (1949) (expert medical testimony is necessary to establish causal relationship where causation is beyond the common knowledge and experience of the ordinary lay person). Further, a judge cannot substitute his own lay opinion on causal relationship for that of the § 11A physician *where the doctor had the same facts before him as did the judge*, when he rendered his final opinion on causal relationship. Gomes v. Bristol County House of Correction, 13 Mass. Workers' Comp. Rep. 128, 131 (1999), citing Shand v. Lenox Hotel, 12 Mass. Workers' Comp. Rep. 365, 368 (1998).

The italicized proposition from Gomes, supra, is the focus of an evidentiary wrinkle in the medical evidence relevant to disposition of the aggravation, successive insurer issue. Here, the only medical testimony was that of the § 11A examiner, which has prima facie effect. G.L. c. 152, § 11A(2). The judge specifically adopted that reported opinion, (Dec. 5), relating the employee's knee problems to the March 25, 1996 work injury. (Statutory Ex. 1.) The insurer argues that the testimony of the § 11A examiner, who learned for the first time at deposition that the employee returned to work as a plumber after the March incident, supports the theory that the employee's duties at his subsequent employer, Marandola Construction Company, aggravated his knee condition. However, the evidence supporting this contention was not admitted; an objection to its admissibility was sustained by the judge.[5] The insurer does not raise, as an issue on appeal, that the exclusion of the evidence was erroneous, and therefore we do not address that issue. See 452 Code Mass. Regs. § 1.15(4)(a)3. In Haley's Case, 356 Mass. 678 (1970), the court held that the reviewing board violated the employee's right to administrative due process by considering as evidence a physician's report to which an objection had been sustained. The court noted that the appeal was not based on the alleged wrongful admission or exclusion of evidence. "Although the employee [objected] to the single member's exclusion of a question about [the doctor's] report, the

[5] The relevant testimony, which was not admitted, is as follows:

> Q: Sure. Doctor, assuming that the employee engaged in the work of a master plumber which involved bending, squatting, doing heavy lifting, reported an increase in his symptoms while doing work of that nature over a six month period, necessitating him to change his bedroom from the second floor to the first floor because he noted the onset of difficulty on stair climbing. Assuming those facts, would you exclude, from your own personal knowledge, that the employment he had at Marindolla [sic] Construction Company served to the slightest degree to aggravate his symptom complex?
> A: That was the new job?
> Mr. Aven: Please note my same objection. [Employee counsel had earlier objected to a similar question, which was not answered, on the grounds that the hypothetical was not reflective of the testimony of the employee. (Dep. 12.)]
> Q: That's correct.
> A: I think it would seem to me that his work at the Marindolla [sic] Construction Company aggravated his condition even further.

(Dep. 12-13.)

record does not show that he preserved it by raising it [on appeal] before the [reviewing] board." Id. at 682. Similarly, here the insurer has not alleged that the judge wrongfully excluded the above-referenced medical testimony, but rather argues as though the evidence had been admitted. On appeal, the party seeking reversal of a trial judge's evidentiary rulings bears the burden of demonstrating prejudice, which requires the proponent of the excluded evidence to make "'a plausible showing that the trier of fact might have reached a different result if the evidence had been before it.' " Cohen v. Liberty Mut. Ins. Co., 41 Mass. App. Ct. 748, 752 (1996), quoting DeJesus v. Yogel, 404 Mass. 44, 48-49 (1989). There was no such effort here.

The only evidence the insurer succeeded in having admitted on the subject of an aggravation at the second employer was a thin but nonetheless pliable reed of support for its successive insurer causation argument on appeal.[6] Moreover, while the § 11A examiner's final deposition testimony causally related the employee's knee condition to the March 26, 1996 injury, (Dep. 36-37),[7] because there are no findings on the employee's somewhat equivocal testimony regarding his pain, symptoms, or activities throughout his return to work, we cannot know whether the § 11A doctor, in forming his

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[6] The testimony reads:

> Q: So then you, from your own personal knowledge, could not exclude there was an aggravation while working for Marindolla [sic] Construction Company doing the work of a plumber, as you understood those duties?
>
> A: Correct.

(Dep. 33.)

[7] Q: Has anything asked of you today changed your opinion as to the causal relationship of Mr. Burke's knee injury, Dr. Greenberg?

> A: No, it hasn't. Although I was not aware of the fact that he had returned to work. I don't think that makes any difference. I think he had a knee injury which Dr. Leitzes called a twisting injury. That was the only knee injury that he's had, traumatic knee injury. And the findings within his knee, at least some of them, are suggestive of trauma. He also had some pre-existing symptoms – pre-existing disease in the knee, which is asymptomatic. That certainly was not helped by the trauma. Whether it be twisting or a pipe falling on his knee doesn't make any difference. He then became symptomatic.

opinion, had the same history as the judge would have found on the employee's physical experiences at Marandola Construction. " '[T]he history upon which the medical expert relies is crucial to his opinion.' " Saccone v. Department of Pub. Health, 13 Mass. Workers' Comp. Rep. 280, 282 (1999), citing Patient v. Harrington & Richardson, 9 Mass. Workers' Comp. Rep. 679, 682 (1995), quoting Scali v. Mara Prods., Inc., 6 Mass. Workers' Comp. Rep. 78, 80 (1992). If based on misstatements or omissions of material fact, then the § 11A opinion is entitled to no weight. Reddy v. Charles P. Blouin, 14 Mass. Workers' Comp. Rep. 341, 345 (2000), citing Buck's Case, 342 Mass. 766, 770-771 (1966). Thus, on recommittal, first specific findings vis-à-vis the employee's condition immediately before, during and after his return to work must be made, followed by a determination of whether the § 11A opinion is sufficiently grounded in the evidence to be entitled to prima facie weight. Saccone, supra at 282. If it is not, then additional medical evidence must be admitted. See Brooks v. Labor Mgt. Servs., 11 Mass. Workers' Comp. Rep. 575, 581 (if the § 11A physician's opinion cannot stand alone as prima facie, it cannot be exclusive).[8]

Since the employee is pursuing a § 34A permanent and total incapacity claim before a different administrative judge, we recommit this case to that judge for a de novo hearing on the issue of whether the employee suffered an aggravation of his knee condition when he returned to work for Marandola Construction Company. As the judge must make findings of fact requiring credibility determinations, it would not be appropriate for him to make those determinations on the printed record. O'Brien v. Gillette Co., 15 Mass. Workers' Comp. Rep. ___ (July 30, 2001), citing Antoine v. Pyrotector, 7 Mass. Workers' Comp. Rep. 337, 342 (1993). We note that causal relationship and extent of incapacity are only issues as of the time of the insurer's request

[8] We also point out what we suggested earlier, an opinion that the original industrial injury is medically causally related to the employee's incapacity does not preclude the subsequent employment from being legally liable for that incapacity. Spearman, v. Purity Supreme, 13 Mass. Workers' Comp. Rep. 109, 112(1999)("medical causation may not be the same as legal causation").

for modification or discontinuance. See Cubellis v. Mozzarella House, Inc., 9 Mass. Workers' Comp. Rep. 354, 356 (1995) (challenge to extent of incapacity as of the filing of insurer's complaint for discontinuance, not from the outset of the claim).

So ordered.

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Susan Maze-Rothstein
Administrative Law Judge

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William A. McCarthy
Administrative Law Judge

Filed: October 5, 2001

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Frederick E. Levine
Administrative Law Judge