COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 003838-17**

Frederick Searcy	Employee
Lily Transportation Corp.	Employer
Ace American Insurance Co.	Insurer

REVIEWING BOARD DECISION
(Judges Fabricant, Calliotte and Long)

The case was heard by Administrative Judge Braithwaite.

APPEARANCES
Patrick F. Keady, Esq., for the employee at hearing and on appeal
W. Todd Huston, Esq. for the insurer at hearing and on appeal

FABRICANT, J. The insurer appeals from the administrative judge's decision awarding the employee § 34 temporary total incapacity benefits for a closed period, followed by ongoing § 35 partial incapacity and § 30 medical benefits. The insurer claims error because the judge does not specifically address § 35E[1] in his hearing decision. The insurer further alleges error in the judge's ruling that § 1(7A)[2] did not

[1] General Laws, c. 152, § 35E states, in relevant part:

> Any employee who is at least sixty-five years of age and has been out of the labor force for a period of at least two years and is eligible for old age benefits pursuant to the federal social security act or eligible for benefits from a public or private pension which is paid in part or entirely by an employer shall not be entitled to benefits under sections thirty-four or thirty-five unless such employee can establish that but for the injury, he or she would have remained active in the labor market.

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

apply, rendering the decision arbitrary, capricious and contrary to law. For the reasons that follow, we affirm the judge's decision.

The employee was born on July 31, 1953, and was sixty-six years old at the time of hearing. In 2006, he started working as a tractor-trailer driver for Universal Logistics, which was subsequently bought out by the employer. He was required to be at the shop every day at 4:45 a.m. and make deliveries throughout New England, New York, and New Jersey. When he returned to the shop he would inspect the trailer and tractor inside and out, which included checking tires and disconnecting and reconnecting the trailer. His activities included package delivery, equipment maintenance, paperwork and training other drivers. About 5-10% of the time he was required to load and unload products. He drove the same tractor daily with a goal of 400 miles. (Dec. 6.)

On February 7, 2017, at the end of his workday, the employee tried to pull a jammed king pin to disconnect his trailer from the tractor and felt the immediate onset of pain in his shoulder and neck. He reported the injury to his supervisor, although no report was filed until the following day. (Dec. 6-7.)

The employee came to work on February 8, 2017, and worked a full day. However, significant snowstorms on February 9th and 10th prompted the employee to notify his supervisor of his decision not to drive. When the employee returned to work on February 14, 2017, he was unable to drive more than 200 miles, and that became the last day that he worked. (Dec. 7.)

On February 14, 2017, the employee sought his first medical treatment at an urgent care facility in Dedham, Massachusetts. He had extreme pain going down his right arm to the pinky and ring finger, and was diagnosed with cervical radiculopathy. On February 17, 2017, Dr. Mark Jacobs, the employee's primary care physician, also agreed with the diagnosis of cervical radiculopathy. The employee continued his treatment under the care of Dr. Reyad, and physical therapy was prescribed. (Dec. 7.)[3]

[3] The employee testified that that physical therapy resulted in "very slow improvement" to his symptoms. (Dec. 7; Tr. 37.)

The insurer commenced payment of § 34 benefits on February 15, 2017, and the employee subsequently filed a claim for § 34 temporary total incapacity benefits from July 7, 2017, to date and continuing.[4] A § 10A conference order dated May 4, 2018, awarded the employee § 35 benefits at the rate of $236.68 per week from May 2, 2018, to date and continuing, and §§ 13 and 30 benefits, including payment for a right shoulder MRI. Both parties filed timely appeals, and a hearing *de novo* commenced on January 29, 2019. (Dec. 3.)

On September 11, 2018, the employee was examined by Dr. Jerald W. Katz, the § 11A physician, and the parties took his deposition on May 14, 2019. (Dec. 5.) At hearing, the insurer raised the affirmative defense of § 1(7A) and made an appropriate offer of proof. Because the impartial physician did not specifically address the employee's right side tremor or issues related to the claimed § 1(7A) defense, the insurer's motion to introduce additional medical evidence due to the inadequacy and or complexity of those medical issues was allowed. (Dec. 4.)[5] The judge adopted the § 11A examiner's report, and found, in part:

1. That the employee injured his cervical spine and right arm on February 7, 2017, with a specific injury to his neck, scapula, right shoulder down to his 4th and 5th fingers, with coarse tremor on the right side;
2. That while working for the employer as a truck driver, he was pulling the king pin between the cab and trailer, when he felt a sharp snap in his shoulder blade and neck;
3. That the employee had cervical radiculopathy that went back to 2014, and ultimately 2006, if not earlier;
4. That the 2017 MRI clearly demonstrated a herniated disc at C6-7 which is the cause of the ongoing disability and need for treatment;
5. That there is a causal relationship because he was asymptomatic

[4] Rizzo v. M.B.T.A., 16 Mass. Workers' Comp. Rep. 160, 161 n.3 (2002)(judicial notice taken of board file).

[5] The employee developed a tremor in his right wrist or right arm about a week or two after the injury. He had never experienced that before and still experienced it at the time of hearing. (Dec. 8.) Ultimately, based on the reports of Drs. Katz, Siegel and Sabra, the judge found that the tremors are not causally related to the injury. (Dec. 13.)

between 2014 and 2017.

(Dec. 10-11.)

The judge also adopted the May 14, 2019, deposition testimony of Dr. Katz, making the following relevant findings:

1. That the work-place incidents happened pursuant to the Employee's testimony;
2. That the cervical spondylosis, where the employee has degenerative disc disease, is clearly preexisting;
3. That the cervical radiculopathy is causally related, is an aggravation of an underlying condition, and caused the employee to remain partial and permanently disabled;
4. That this is a[] "direct insult" to what makes this an aggravation; and
5. That this aggravation is a major cause of this total disability for driving a tractor-trailer, and partial disability of any gainful employment.

(Dec. 11.)

The judge further adopted the causation and ongoing incapacity opinions of the employee's treating physician, Dr. Marc Friedberg. Dr. Friedberg opined that the June 8, 2017, cervical MRI determined that the "cervical radiculopathy[was] caused by his cervical spondylosis with the work injury," and that the employee's injury continued to be the major cause of his disability. (Dec. 12.)

In his hearing decision, the judge ordered the insurer to pay the employee § 34 temporary total incapacity benefits from July 7, 2017, to September 10, 2018, and partial incapacity benefits pursuant to § 35 as of September 11, 2018, to date and continuing, as a result of the industrial injury sustained on February 7, 2017. (Dec. 9.) The insurer appealed.

The first issue raised by the insurer is whether the judge's failure to address its defense pursuant to § 35E was arbitrary, capricious and contrary to law. The judge listed § 35E as an issue raised by the insurer, but in a footnote, the judge noted, "The insurer did not submit a defense at hearing for Sec. 35E, over-65 benefits, and thus it is waived."

(Dec. 4, n. 1.) The insurer argues that all the criteria of § 35E were met and that it properly raised the issue. However, even if it did not properly raise § 35E, the insurer maintains the defense was tried by consent, and the judge was required to address it. The employee counters that the insurer did not properly raise § 35E because it did not raise it prior to hearing in its denial or at conference; moreover, it did not file a motion to join § 35E as a defense, thus failing to provide the employee with an opportunity to defend. Accordingly, the employee contends the judge was not required to address § 35E. We agree with the employee, but for different reasons.

Section 35E creates a rebuttable presumption requiring termination of an employee's §§ 34 or 35 benefits upon eligibility for certain age-dependent benefits. Rebuttal requires the employee to show that, but for the injury, he would have remained active in the labor market. Bamihas v. Table Talk Pies, 9 Mass. Workers' Comp. Rep. 595 (1995)(employee entitled to fair notice of the grounds for defense of § 35E at hearing), citing Haley's Case, 356 Mass. 678, 681 (1970)(parties are entitled to opportunity to present evidence and to know what evidence is presented against them and to an opportunity to rebut such evidence and to argue on the issues of fact and law involved in the hearing). Just as an administrative judge cannot award an employee § 34A permanent and total incapacity benefits if not sought, an insurer cannot expect judicial assistance in assertion of defenses that could extinguish entitlement to benefits. Bamihas, supra.

It is clear that an insurer may not raise the affirmative defense of § 35E for the first time on appeal. Phillips's Case, 41 Mass. App. Ct. 612 (1996). See Ovalle v. City of Everett, 34 Mass. Workers' Comp. Rep. 65 (2020)(self-insurer waived affirmative defense of failure to mitigate by failing to raise the issue at commencement of hearing, in its hearing memorandum, or verbally during testimony); Doherty v. Union Hospital, 31 Mass. Workers' Comp. Rep. 195 (2017)(even though self-insurer raised affirmative defense of statute of limitations in its denial, the defense was waived because not raised at hearing; raising the issue in hearing brief did not provide employee with "fair notice of

the grounds for its defense at hearing"). However, it is less clear whether an insurer may raise the issue for the first time at hearing by listing § 35E as a defense on its issues sheet and by stating verbally at the start of hearing that § 35E is an issue, where the employee does not offer an objection. The court in Phillips's Case, supra, though not presented with this situation, relied, in part on 452 Code Mass Regs. § 1.11(3)(1988), in holding the insurer could not raise § 35E .[6] The court stated:

> By virtue of this regulation, Phillips's rights under G. L. c. 152, were deemed established before the judge notwithstanding the provisions of § 35E. We note that [the insurer] neither sought to amend its defenses nor requested the board to order a rehearing based on newly discovered evidence. . . .
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> In a workers' compensation case, the claimant shoulders the burden of proof as to all elements of the claim: employment within the coverage of the act, injury arising out of and in the course of employment, causal relation between injury and disability, extent of disability, and a timely claim. Locke, Workmen's Compensation § 502 (2d ed. 1981). The Legislature has, however, placed the burden on insurers to inform claimants of the issues it will contest. See G. L. c. 152, § 7. Section 7 goes so far as to provide, "Any grounds and basis for noncompensability specified by the insurer shall be the sole basis of the insurer's defense on the issue of compensability in any subsequent proceeding, unless based upon newly discovered evidence." [The insurer's] burden was to raise the grounds on which it disclaimed liability for Phillips's injuries. The board committed no error of law in preventing [the insurer] from introducing issues which had not been raised before the judge and which were not based on newly discovered evidence.

Id. at 618. Thus, while directly addressing only the situation where an insurer failed to attempt to raise § 35E at hearing, the court suggests that the insurer's ability to raise

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[6] This regulation is now codified at 452 Code Mass. Regs. § 1.11(2)(2017), and states:

> 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 . . . provided that such statements are based on grounds and factual basis reported by the insurer or based on newly discovered evidence within the provisions of [G.L. c. 152, § 7]. On all other issues, the employee's rights under G. L. c. 152 shall be deemed to have been established.

§ 35E at hearing, where it has not raised the issue in its denial or at conference, is limited to those situations where it has sought to amend its defenses at hearing. The regulations allow for amendment of certain claims and defenses at a conference or hearing only through a motion to amend. They further provide that a party shall be allowed a reasonable time to prepare a defense to an amended claim or defense. See 452 Code Mass. Regs. 1.22(1) and (3).[7] While clearly this is the preferable method of raising a new affirmative defense at hearing, we have not always required this formality, particularly where the employee does not object to the raising of the affirmative defense. See, e.g., Chrigstrom v. Kenoza Vending Co., Inc., 32 Mass. Workers' Comp. Rep. 83 (2018)(although insurer failed to raise affirmative defense of failure to mitigate at any time prior to hearing, the issue was clearly tried by consent, without objection by the employee; therefore, judge needed to address the insurer's argument), citing Opanasets v. Suffolk County Sheriff's Dept., 29 Mass. Workers' Comp. Rep. 53 (2015)("employee's failure to object to self-insurer's questioning of doctor on § 1[7A] defense and employee's closing argument to judge stating he satisfied his burden under § 1[7A] showed employee 'effectively consented to trying the case under the § 1[7A] standard' "). Here, not only did the employee not object to the raising of § 35E at hearing, but employee's counsel also questioned the employee about whether he planned

[7] 452 Code Mass. Regs. § 1.22 states, in relevant part:

> **(1)** Pursuant to M.G.L. c. 152, § 49, a party may amend his or her claim or complaint as to the time, place, cause, or nature of the injury, as a matter of right, at any time prior to a conference, with written notice to all parties. At the time of a conference or thereafter, a party may amend such claim or complaint only by filing a motion to amend with an administrative judge. Such a motion shall be allowed by the administrative judge unless the amendment would unduly prejudice the opposing party.
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> . . . .
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> **(3)** No amendment to a claim or complaint may be made except as provided by M.G.L. c. 152 and 452 CMR 1.00. Any party shall be allowed a reasonable period of time to prepare a defense to an amended claim or complaint. Such period shall not exceed 45 calendar days from the date of notice of the amendment, unless an administrative judge finds that additional time to prepare a defense is needed.

to work past the age of 65, thus leading to the insurer's argument that the issue was tried by consent. (Tr. 44.)

However, here, we need not decide whether the insurer followed the proper procedure for raising § 35E or whether the issue was tried by consent, because, at the time of hearing, not all the prerequisites for its application were met. The statute requires that the employee be at least sixty-five years old, have been out of work for "at least two years," and be eligible for receipt of Social Security superannuation retirement benefits or a public or private pension. Here, the employee had not been out of work for "at least two years" at the time of the hearing. His last day of work was February 14, 2017, and the hearing was held on January 29, 2019.[8] The insurer maintains that the two-year requirement was satisfied because the employee had been out of work for two years by the time the record closed and by the time the hearing decision issued. However, we have never allowed this defense to be raised prospectively. See, e.g., Lafleur v. M.C.I. Shirley, 24 Mass. Workers' Comp. Rep. 301, 306 (2010)(the predicates for § 35E's application are not present where the employee was forty-nine years old at the time of hearing, and a little over one year had elapsed since the date the employee last worked). The relevant time for raising § 35E is when the requirements for its application have been met, not in anticipation of those prerequisites being satisfied. The § 35E claim was simply not ripe for adjudication when the insurer attempted to raise it at hearing, which is the date that all evidence regarding all claims and defenses is due for presentation. Accordingly, the judge was correct that "the insurer did not submit a defense at hearing for Sec. 35E," and "thus it is waived." (Dec. 4, n.1.) While it would have been preferable for him to inform the parties of his ruling at the time of hearing, where, as a matter of law, the defense is not viable, we affirm his finding.

We next address the insurer's argument that the judge's failure to apply the claimed § 1(7A) defense was arbitrary, capricious and contrary to law. We agree that the

[8] We note that, at the time of the insurer's denial and at conference, the employee was not even 65 years old.

judge erred in finding the insurer failed to prove the "factual predicates" to put § 1(7A) into play, but hold that he nonetheless correctly found that the employee met his burden of proving the work injury remains "a major cause" of his disability and need for treatment.

Pursuant to the provisions of § 1(7A) governing combination injuries, the insurer raised the issue and submitted an offer of proof referencing the § 11A examiner's opinion that the employee had pre-existing non-industrial related cervical problems aggravated by the industrial accident. The employee offered no opposition and noted the issue was raised at conference. The judge thus accepted the insurer's offer of proof. (Tr. 5-6.)

The judge then specifically adopted the testimony of the § 11A examiner, Dr. Katz, who opined in his report that the employee had cervical radiculopathy dating back to 2006 and 2014, if not earlier, that he was asymptomatic between 2014 and 2017, that a 2017 MRI demonstrated a herniated disc at C6-7 and that he injured his cervical spine causally related to the work injury. (Ex. 1.) At deposition the § 11A physician testified that the employee had preexisting cervical spondylosis, and that the causally related cervical radiculopathy is an aggravation of that condition. (Dep. 20-25.)

Nonetheless, the judge made the following findings relevant to the insurer's § 1(7A) defense: "The Insurer did not prove the factual predicates thereof to put it into play. I do not adopt evidence of a prior cervical radiculopathy. I find that there were no prior or subsequent injuries due to prior cervical radiculopathy." (Dec. 16.) This was error. The insurer need not produce evidence that the employee had a prior cervical radiculopathy or prior (or subsequent) injuries causally related to cervical radiculopathy. It need only produce evidence that the employee had a pre-existing noncompensable condition which was aggravated by the work injury. Dr. Katz's adopted opinion that the employee had pre-existing cervical spondylosis which was aggravated by the work injury, causing radiculopathy, clearly satisfied the insurer's burden. See Pollard v. M.B.T.A., 35 Mass. Workers' Comp. Rep. ___ (March 16, 2021).

Despite the judge's erroneous rejection of the asserted § 1(7A) defense, he

ultimately hedged by proclaiming, "*If I am mistaken,* I adopt Dr. Katz's opinion that the February 7, 2017 injury at the very least is a major cause of the Employee's ongoing disability and need for medical treatment." (Dec. 16; emphasis added.) He also adopted the opinions of Dr. Friedberg, who reiterated that the work injury remains a major cause of disability, (Dec. 12; Ex. 11).[9] All the explicit findings as to the relevant § 1(7A) elements have been met: the nature of the preexisting condition, the compensable injury with combination, and the major cause of disability. Therefore, any error in disallowing the § 1(7A) defense was harmless. Mason v. Action, Inc., 26 Mass. Workers' Comp. Rep. 221, 226 (2012).[10]

Although this is not the preferred method to cure an anticipated flaw in judgement, in this case it is effective nonetheless, providing an accurate summary and analysis of the evidence pursuant to the statute. See Praetz v. Factory Mut. Eng'g. and Research, 7 Mass. Workers' Comp. Rep. 45, 47 (1995)(Judge must address issues in a manner enabling this board to determine with reasonable certainty whether correct rules of law have been applied to facts properly found). Because the employee has carried his burden of proof, the insurer's § 1(7A) defense is defeated. The decision is affirmed.

Because the employee has prevailed in the insurer's appeal to the reviewing board, pursuant to M.G.L. c. 152 § 13A(6), the insurer shall pay a fee to the employee's attorney in the amount of $1,765.38, plus necessary expenses.

So ordered.

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[9] The judge also adopted reports prepared by Dr. Millen and submitted by the insurer indicating that the employee's complaints from 2014 until February 7, 2017, were resolved and he was completely fine until that point. (Dec. 13.) The fact that Dr. Millen opined that the employee was not symptomatic for two years prior to the 2017 injury does not negate the opinion that the employee had a pre-existing condition that was aggravated by the work injury, which was a major cause of his disability.

[10] Of course, in any future claims, §1(7A)'s "a major cause" standard will apply.

Bernard W. Fabricant
Administrative Law Judge

Carol Calliotte
Administrative Law Judge

Martin J. Long
Administrative Law Judge

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