COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS

Board Nos.: 041268-03, 049498-03, 046329-04, 035068-05, 000003-06, 000004-06, 000068-06, 015947-06

Gardy Gelin	Employee
Vinny Testa's Restaurant	Employer
Royal Insurance Co.	Insurer
Finbar's Pub, LLC	Employer
Professional Liability Insurance Co.	Insurer
Personnel People	Employer
American Zurich Insurance Co.	Insurer
Ocean State Job Lot of Norwood, LLC	Employer
Federal Insurance Co.	Insurer
Reebok International, Ltd.	Employer
Reebok International, Ltd.	Self-insurer
Panera Bread	Employer
Commerce and Industry Insurance	Insurer
Lambert Brothers	Employer
Massachusetts Retail Merchants SIG	Insurer

REVIEWING BOARD DECISION

(Judges Fabricant, Costigan and Horan)

APPEARANCES

Karen Seward, Esq., for the employee
William R. Trainor, Esq., for Royal Insurance Co.
Ellen Harrington Sullivan, Esq., and Daniel W. Gracey, Esq.,
for Professional Liability Insurance Co.
Joseph R. Conte, Esq., and Sheila Cunningham, Esq., for Federal Insurance Co.
Mark J. Kelly, Esq., for American Zurich Insurance Co.
Amy Scarborough, Esq., for Reebok International
Mark H. Likoff, Esq., and Wayne A. Gallo, Esq., for Commerce and Industry
Richard N. Curtin, Esq., for Massachusetts Retail Merchants SIG

FABRICANT, J. The employee appeals from a decision in which the administrative judge concluded that no workplace injury had occurred, and denied and dismissed his claim for weekly workers' compensation benefits.[1] The employee correctly argues that Royal Insurance Company (Royal) accepted liability for his February 2003 work injury when it failed to appeal a different administrative judge's § 10A conference order for medical benefits. We therefore vacate the decision, and recommit the case for a new hearing.[2]

The employee worked as a dishwasher at Vinny Testa's Restaurant. Sometime in early February 2003, he developed bilateral wrist pain while carrying heavy stacks of plates. He did not report an injury to the employer, and his employment terminated on or about February 7, 2003. (Dec. 4-5.)

The employee subsequently filed a claim for workers' compensation benefits against Royal, which resulted in a conference order for § 30 medical benefits for his wrists. Although the decision states that both parties appealed from this conference order, (Dec. 2), the parties agree that, in fact, this order was appealed only by the employee. (Employee br. 2, Royal br. 1, 2.) Because the insurer's failure to appeal is tantamount to acceptance of liability pursuant to G. L. c. 152, § 10A(3),[3] the judge's failure to find that a work place injury occurred, within the meaning of the act, is error and must be reversed. (Dec. 9.)

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[1] We note that the case was tried against multiple successive insurers joined as a result of the employee's motion filed subsequent to the parties' appeal of the October 22, 2004 conference order granting medical benefits to the employee pursuant to §§13 and 30. Only one successive insurer filed a brief responding to the employee's appeal. Given our disposition of the employee's appeal, infra, the successive insurers will again be parties to the proceedings. See Borstel's Case, 307 Mass. 24, 26-27 (1940).

[2] As the administrative judge who wrote the decision no longer serves on the industrial accident board, the proceedings on recommittal must be *de novo*.

[3] General Laws c, 152, § 10A(3), provides, in pertinent part:

> Any party aggrieved by an order of an administrative judge shall have fourteen days from the filing date of such order within which to file an appeal for a hearing pursuant to section eleven. Such hearing shall be held within twenty-eight days of the department's receipt of such appeal.

Royal argues that this error is harmless and asserts that the February 2003 injury was a mere "flare up" of a pre-existing congenital condition that resulted in no lost time from work. Based on the impartial medical physician's opinion that the employee had a pre-existing congenital wrist condition that was exacerbated by his work as a dishwasher, Royal raised § 1(7A) "a major" causation as part of its defense. (Dec. 7.) The impartial physician specifically opined that the work contribution to the employee's resultant disability was "moderately significant," which he further defined as "fifty percent or less." (Dec. 8.) We disagree with the insurer that, *as a matter of law*, the impartial physician's opinion cannot satisfy the § 1(7A) standard of "a major" causation. See Siano v. Specialty Bolt & Screw, Inc., 16 Mass. Workers' Comp. Rep. 237, 240 (2002) ("A major cause is an important, a serious, a moderately significant cause.") We therefore conclude that the judge's error in denying liability for the accepted February 2003 workplace injury was not harmless, nor was his resulting failure to perform the requisite causation analysis under § 1(7A).

Accordingly, we reverse the decision, and recommit the case for a new hearing, at which the employee's entitlement to weekly benefits, if any, shall be adjudicated against Royal and all successive insurers involved in the original litigation.

We transfer the case to the senior judge for reassignment to an administrative judge for a hearing de novo.

So ordered.

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Bernard W. Fabricant
Administrative Law Judge

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Patricia A. Costigan
Administrative Law Judge

Failure to file a timely appeal or withdrawal of a timely appeal shall be deemed acceptance of the administrative judge's order and findings. . . .

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Mark D. Horan
Administrative Law Judge

Filed: **September 17, 2008**