COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 023515-08**

Grace Akinmurele	Employee
Target Corporation	Employer
Target Corporation	Self-insurer

REVIEWING BOARD DECISION
(Judges Costigan, Fabricant and Levine)

The case was heard by Administrative Judge Bean.

APPEARANCES
Alan S. Pierce, Esq., for the employee
Steven J. Bolognese, Esq., for the self-insurer at hearing
John J. Canniff, Esq., for the self-insurer on appeal

COSTIGAN, J. The self-insurer appeals from the administrative judge's decision denying its complaint for discontinuance of benefits and awarding the employee ongoing § 34 total incapacity benefits based on multiple physical and mental diagnoses. The self-insurer argues the decision and award cannot stand because the judge relied on an expert medical opinion which combined work-related and non work-related diagnoses to conclude the employee was totally disabled. We agree, vacate the decision, and recommit the case for further findings.

The employee, age sixty-one on the date of hearing, had worked for Target, unloading trucks on the night shift, for approximately three months prior to September 1, 2008. (Tr. 8.) On that date, while performing her job, she was struck in the head by a falling box. She felt pain in her head, shoulder and right arm, and has not worked since. (Dec. 512.) The self-insurer accepted liability and paid benefits, but later filed the present complaint to discontinue such payments, challenging disability, extent of disability, and causal relationship, and raising § 1(7A)'s heightened causation as an affirmative defense. (Dec. 510-511.) Following a § 10A

conference in December 2009, the judge denied the self-insurer's complaint, and it appealed.

On March 20, 2010, pursuant to § 11A(2), the employee underwent an impartial medical examination by Dr. Nagagopol Venna, who offered diagnoses of chronic pain syndrome and complex regional pain syndrome (CRPS) in the employee's neck and right arm, causally related to her work injury. He also diagnosed the employee with severe depression and anxiety with behavioral changes, but did not definitively opine those diagnoses were causally related to her industrial injury. The doctor wrote:

> The striking abnormalities in Ms. Akinmurele's mental state and in the rest of her motor functions, are of unclear nature and cause. She has emotional components of severe depression and anxiety, behavioral change into a querulous, diffident state. These, along with generalized bradykinesia, the slowed gait and sleep disturbances indicate progressive basal ganglionic disorder such as diffuse Lewy body disease. Further neurological assessment is needed to establish this diagnosis or find alternative etiology.
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> This aspect of her illness is not attributable to the work injury to the head and neck and arm in September of 2008. The initial mild symptoms after the trauma with increased depression, dizziness are indicative of post-concussion syndrome and expected to resolve within 6 months. The current neuro-psychiatric syndrome is not compatible with such injury.
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> This severe neuropsychiatric disorder causes her permanent disability and is likely to worsen progressively. The combination of this and the complex regional pain syndrome of the dominant right upper limb, makes Ms. Akinmurele completely disabled including in activities of [daily] living and even light physical strains of lifting light weights, bending and carrying weights.

(Ex. 3.)

Pursuant to the judge's finding of medical complexity, both parties introduced additional medical evidence. (Dec. 511, 513.) Most pertinent are the opinions of the employee's treating physician, Dr. Kiame J. Mahaniah, who diagnosed post-concussive syndrome, chronic pain syndrome, depression and anxiety, all of which he causally related to the employee's work injury. (Dec. 516-517.) Although the judge adopted Dr. Mahaniah's opinions as corroborative of Dr. Venna's, we cannot

reconcile them on one key issue: the causal relationship of the employee's neuropsychiatric disorder.

At his deposition, Dr. Venna testified the employee refused to allow him to perform formal testing of her right arm because she complained of pain with any kind of movement or touch. He nevertheless diagnosed causally related CPRS of the right arm, based on the history of the work injury, the employee's complaints of pain and sensitivity to touch, the coldness and clamminess of her right hand, and lack of normal mobility. (Dep. 17, 19, 23, 29.) The doctor also diagnosed a general bradykinesia in the employee's limbs on her left side, (Dec. 18), unrelated to the work injury. He opined the employee might benefit from psychiatric treatment, but said her psychiatric problem *could* be related to either her CPRS diagnosis, (Dep. 33), or dementia, a form of which is diffuse Lewy body disease. (Dep. 37-38.)

The judge adopted the impartial physician's opinions:

> I find the opinions of Dr. Venna to be the most persuasive and I rely on them to find that the employee is temporarily totally disabled due to her September 1, 2008 industrial injury. He was particularly persuasive when offering the opinion that the combination of physical and neuropsychiatric conditions, when considered together, totally disable the employee. I also rely on the opinions of Dr. Mahaniah who generally supports Dr. Venna's opinions and causally relates both the physical and psychiatric conditions to the industrial injury. I agree with Dr. Mufson that the employee had pre-existing psychiatric issues, however, I find that the industrial injury and its sequelae have caused her chronic depression and anxiety. . . . I find that the employee's condition is exacerbated by conditions not related to the industrial accident including Lewy body disease.

(Dec. 518)

Based on the employee's testimony and that of her fiancé, which the judge found credible,[1] as well as the above-noted adopted medical opinions, the judge found

[1] "Credibility determinations are the sole province of the hearing judge, and we will not disturb them when, as here, they are based on the evidence and reasonable inferences drawn therefrom." Ormonde v. Choice One Communications, 24 Mass. Workers' Comp. Rep. 149, 153 (2010). For this reason, we reject the self-insurer's argument that the impartial physician's opinions were fatally flawed by the fact that some of the history the doctor obtained and relied on was provided by the employee's fiancé, who accompanied her to the

the employee remained totally incapacitated and ordered the insurer to pay § 34 benefits and medical benefits from and after September 2, 2008.[2] He concluded that the combination of physical and neuropsychiatric conditions rendered the employee totally disabled. (Dec. 518.)

We first note that the self-insurer does not challenge the judge's failure to apply the "a major cause" provisions of § 1(7A)[3] to the employee's psychiatric claim, even though the adopted opinion of Dr. Michael Mufson establishes the employee had a pre-existing psychiatric condition. (Dec. 515-516, 518.)[4] See Cornetta's Case, 68

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§ 11A exam. Moreover, Dr. Venna testified that he reviewed certain medical records in conjunction with his physical examination of the employee, (Dep. 5), and he was questioned extensively by both parties concerning those records. (Dep. 7-10, 11, 15-16, 18, 35-36.)

[2] Although the judge acknowledged that the case came before him at conference on the insurer's modification/discontinuance complaint, (Dec. 511), and he clarified at hearing that the insurer was "seeking a full discontinuance of the employee's compensation," (Tr. 4), his award inaccurately suggests that no weekly incapacity benefits had previously been paid.

[3] General Laws c. 152, § 1(7A), provides, 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.

[4] The judge summarized the opinions of Dr. Michael Mufson, the self-insurer's psychiatric expert:

> The doctor concluded that the employee does not have a psychiatric injury related to the industrial injury. He found that she had "long standing psychological problems that include passive-dependent personality and [was] a woman with chronic depression." These problems are the cause of her "ongoing subjective complaints of chronic pain and cognitive impairment that are both psychologically based." Her "current medical and psychiatric state is that she is in a regressed psychological state, complaining of cognitive impairment and chronic pain. Her passive-dependent personality style, with passive-aggressive behavior, underlies her subjective ongoing complaints that she is unable to work. Yet there is no objective data in the medical or neurological evaluations that she is suffering from any primary neurologic disorder related to cognitive impairment or pain syndrome."

(Dec. 516, quoting Ex. 7.) The judge wrote, "I agree with Dr. Mufson that the employee had pre-existing psychiatric issues," (Dec. 518), but nevertheless also found persuasive the

Mass. App. Ct. 107, 118-119 (2007)(where physical injury causes exacerbation of pre-existing psychiatric disability, that mental condition must be analyzed under "combination injury" provisions of § 1[7A]). The self-insurer acknowledges raising § 1(7A) as an affirmative defense, (Dec. 510, Ex. 2, Tr. 4), but abandons that defense on appeal.[5]

The self-insurer's principal argument is that the judge erred by adopting the impartial physician's opinion that the employee's disability was the result of *all* of the diagnoses found, regardless of their work-relatedness. Such an opinion, argues the self-insurer, flies in the face of well-established precedent that only *work-related* diagnoses may be the basis of the judge's disability assessment and order of benefits. This rule was first set out in Hummer's Case, 317 Mass. 617, 623 (1945), and has been restated in several reviewing board cases. See, e.g., Gray v. Sunshine Haven, Inc., 22 Mass. Workers' Comp. Rep. 175, 177 (2008); Resendes, supra; Patient v. Harrington & Richardson, 9 Mass. Workers' Comp. Rep. 679, 682-683 (1995).

We agree that the impartial medical opinion as to disability, which factored in "conditions not related to the industrial accident including Lewy body disease," (Dec. 518), could not properly be used as wholesale support for the judge's award of § 34 benefits.[6] Because that is exactly what the judge did, recommittal is necessary.

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opinion of Dr. Venna, that the employee had no pre-existing conditions -- physical or psychiatric -- which were affecting her inability to work. (Dep. 34.)

[5] "Lest there be any confusion, although the insurer [sic] may have listed § 1(7A) as an issue, [footnote omitted], this case does not fall within the penumbra of § 1(7A)." (Self-ins. br. 9.) Quoting Resendes v. Meredith Home Fashions, 17 Mass. Workers' Comp. Rep. 490, 492 (2003), the self-insurer asserts that "the combination that exists in the present case is not a combination of medical factors impacting on each other 'to cause or prolong disability or a need for treatment'. . . . Rather there are two co-existent, but entirely independent, medical conditions, that separately cause different disabilities in the same person." (Self-ins. br. 9, n.3.)

[6] The employee argues that the diagnosis of diffuse Lewy body disease has not been confirmed and, at best, Dr. Venna termed it only a possible diagnosis. (Employee br. 3-4.) What is clear from Dr. Venna's deposition, however, is that with the exception of her right upper extremity symptoms, (Dep. 25-27), the doctor did not causally relate any of the employee's other mobility problems to the work injury. He diagnosed her with a progressive

Accordingly, we reverse the decision, vacate the award,[7] and recommit the case for further findings on the nature and extent of the employee's *causally related* incapacity. We summarily affirm the decision as to all other issues argued.

So ordered.

Patricia A. Costigan
Administrative Law Judge

Bernard W. Fabricant
Administrative Law Judge

Frederick E. Levine
Administrative Law Judge

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basal ganglionic disorder involving bradykinesia, a generalized decrease of normal mobility of the body, marked by changes in gait, shuffling, walking slowly or stiffly, frequent falls, and stiffness in the arms or legs. (Ex. 3; Dep. 23-24.) Coupled with the employee's severe depression, anxiety, behavioral changes and sleep disturbances, Dr. Venna made the differential diagnosis of diffuse Lewy body disease. (Dep. 24-25). He opined that in the context of "an overall approach to try to restore her to health," the employee's chronic regional pain syndrome (CRPS) of the right upper extremity might benefit from psychiatric treatment, but the need for such treatment was not related to a sequelae of the CRPS problem. (Ex. 3; Dep. 32-33.)

[7] We reinstate the conference order denying the self-insurer's complaint for modification or discontinuance of weekly incapacity benefits. See LaFleur v. M.C.I. Shirley, 25 Mass. Workers' Comp. Rep. ___ (November 30, 2011).