COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 052712-99**

Greg P. Pike Employee
Trial Court Courthouse Facilities Employer
Commonwealth of Massachusetts Self-insurer

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

APPEARANCES
Nora Z. Tolins, Esq., for the employee
Timothy M. Linnehan, Esq., for the self-insurer

COSTIGAN, J. The self-insurer appeals from a decision in which an administrative judge found that the employee sustained a work-related low back injury and awarded him a closed period of G. L. c. 152, § 34, total incapacity benefits and then ongoing § 35 partial incapacity benefits. Finding merit in most of the self-insurer's arguments on appeal, we reverse the decision and vacate the award of benefits.

The employee, age forty-three at the time of the hearing, commenced employment as a court house facilities regional supervisor for the Commonwealth in February 1999. (Dec. 3.) He claimed that on November 8, 1999, while he was trying to position a ladder against the Westboro District Court building, a gust of wind jerked the ladder and he twisted his back. He was out from work from December 1, 1999 to February 7, 2000, when he returned to his same position with the employer but on a part time, fifteen hours per week, schedule. (Dec. 5.) Following a G. L. c. 152, § 10A, conference, the administrative judge ordered the self-insurer to pay § 34 benefits for the period of total lost time and § 35 benefits from February 7, 2000 to February 8, 2001. Only the self-insurer appealed from that conference order. (Tr. I, 5; Self-ins. Brief 3.)

Because liability - - that is, the occurrence of a compensable personal injury - - was disputed by the self-insurer, the parties agreed at the § 10A conference that a § 11A impartial medical examination was not required. (Dec. 3; Tr. I, 4.) See 452 Code Mass.

Regs. § 1.10(7). Therefore, the parties were allowed to submit their respective medical evidence at hearing. The self-insurer elected not to do so. (Dec. 3; Tr. I, 7.) Thus, the only expert medical evidence before the judge was the January 10, 2001 report of Roland P. Caron, M.D., introduced by the employee. (Dec. 3.)

Following two days of hearing,[1] at which the employee and five witnesses testified, the administrative judge filed a decision in which he awarded the employee the same closed period of § 34 temporary total incapacity benefits, but ongoing § 35 partial incapacity benefits from and after February 7, 2000. The self-insurer appealed. See G. L. c. 152, § 11C.

The self-insurer mounts four challenges to the administrative judge's decision. First, it contends that the judge improperly admitted and adopted hearsay testimony to find in the employee's favor on the issue of liability, that is, whether the employee sustained an industrial injury on November 8, 1999. Second, it argues that the judge failed to hold the employee to the higher standard of causation set forth in G. L. c. 152, § 1(7A). Third, the self-insurer maintains that, setting aside its § 1(7A) defense and argument, the employee still failed to meet his burden of proof on simple causal relationship. Fourth, it argues that the decision is arbitrary and capricious because a) the judge's finding of a work injury is based on contradictory evidence which he erroneously credited, and b) the decision lacks adequate subsidiary findings of fact to allow proper appellate review. We address these arguments in order.

The Hearsay Issue

"Unless otherwise provided by M. G. L. c. 152, or 452 CMR 1.00, the admissibility of evidence and the competency of witnesses to testify at a hearing shall be determined under the rules of evidence applied in the courts of the Commonwealth." 452 Code Mass. Regs. § 1.11(5). See Haley's Case, 356 Mass. 678, 681-682 (1970). The hearsay rule forbids the admission in evidence of extrajudicial statements offered to

[1] References to the transcript of the first day of hearing, November 7, 2000, are designated as "Tr. I" and to the second day, March 28, 2001, as "Tr. II".

prove the truth of the matters asserted in the statements. P. J. Liacos, Massachusetts Evidence § 8.1, at 463. (7th ed. 1999). We agree with the self-insurer that the judge ran afoul of this rule and disagree with the employee that it was harmless error.

Patrick Felix, a witness called by the employee,[2] worked as a project engineer for the employer. (Tr. II, 6.) On November 8, 1999, he had an appointment to meet the employee at the Westboro District Court to inspect the roof which was leaking. (Dec. 7.) On direct examination by the employee's attorney, Felix was asked whether he noticed anything unusual about the employee's demeanor when he met up with him that morning on the roof of the court house. Felix testified that he noticed the employee was grimacing and he thought that indicated the employee "had some kind of pain." (Tr. II, 11.) The self-insurer did not object to that questioning.

Felix was then asked whether he had questioned the employee as to why he appeared to be in pain. Felix answered that he asked the employee if he was all right and the employee replied he had hurt himself. The self-insurer made a late objection to the question already answered and the judge sustained the objection. Id. After recounting what he had said to the employee, Felix was again asked what the employee had said to him. This time the judge overruled the self-insurer's hearsay objection and allowed Felix to testify that the employee said he was in pain and that he had hurt his back putting up a ladder. (Tr. II, 12-15.) The judge allowed Felix's testimony about what the employee said, stating, "it is being offered for the statement being made," (Tr. II, 13), but, as the self-insurer correctly argues, it is apparent from his subsidiary findings that the judge adopted Felix's testimony for the truth of the matter, that is, to find that the employee did sustain a work-related back injury:

> Mr. Felix found Mr. Pike to be grimacing in pain at that time and to have difficulty climbing the ladder. *I find that Mr. Pike did explain the occurrence of the twisting incident moving a ladder to Mr. Felix* . . . I determine that Mr. Pike has met his burden of proof with respect to liability, causation and extent of disability. *The testimony of Patrick Felix*

[2] The hearing decision incorrectly states that the self-insurer called Felix. (Dec. 1.)

> *does indeed support Mr. Pike's claim that he sustained an industrial injury on November 8, 1999.*

(Dec. 7, emphasis added.) This evidentiary error, by itself, requires reversal of the judge's liability finding, as it "injuriously affected substantial rights" of the insurer. Moseley v. New England Fellowship for Rehab. Alternatives, 13 Mass. Workers' Comp. Rep. 316, 324 (1999); Indrisano's Case, 307 Mass. 520 (1940) (a decree in a workmen's [sic] compensation case will not be reversed for error in the admission or exclusion of evidence, unless substantial justice requires reversal).

The § 1(7A) Issue

The self-insurer argues that the administrative judge erred in failing to assess the employee's claim under the higher standard of causation prescribed in G. L. c. 152, § 1(7A).[3] We see no error.

It is well-established that an insurer has the burden not only to raise the statutory provisions of § 1(7A) in defense of an employee's claim but also to produce evidence to trigger its application. See Jobst v. Leonard T. Grybko, 16 Mass. Workers' Comp. Rep. 125, 130 (2002); Fairfield v. Communities United, 14 Mass. Workers' Comp. Rep. 79, 83 (2000). Here, the self-insurer did raise § 1(7A), (Dec. 3; Exhibit 2; Tr. I, 6), and the employee did testify that prior to the events of November 8, 1999, he had "a sensitive back," (Tr. I, 59), "a back that's tender." (Tr. I, 73) However, the employee attributed those complaints to his 1997 industrial injury while working for Filene's, id., and the self-insurer conceded in its brief that the employee "*first* injured his back in 1997 when he suffered *an industrial injury* while employed by Filene's . . . that resulted in his being unable to work for approximately four months. . . ." (Self-ins. Brief 1, emphasis added). The self-insurer does not suggest that any pre-existing condition resulting from that

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[3] Section 1(7A), as amended by St. 1991, c. 398, § 14, 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.

compensable work injury made § 1(7A) applicable to the employee's claim. As a matter of law, it could not. See Powers v. Teledyne Rodney Metals, 16 Mass. Workers' Comp. Rep. 229, 231-232 (2002); White v. Town of Lanesboro, 13 Mass. Workers' Comp. Rep. 343, 346 (1999) ("[I]f the combining pre-existing condition is compensable, then § 1(7A) does not come into play. In that case, compensability is determined by the traditional 'any causal connection' standard. See Rock's Case, 323 Mass. 428, 429 (1948)").

The self-insurer acknowledges in its brief that the sole basis for its § 1(7A) defense is that the employee had a pre-existing, congenital condition -- an extra (sixth) lumbar vertebra. (Self-ins. Brief 9-10.) It contends that because this condition was established by the medical evidence, the administrative judge was required to apply the § 1(7A) "a major" causation standard to the employee's claim. The self-insurer is wrong.

The only statements made by Dr. Caron which even remotely touch upon the elements of § 1(7A) are:

> *X-rays were taken which revealed extensive degenerative disc disease at L4-5 and at L5, S1. Also, he has six lumbar vertebra* [sic]*, normal is usually five.* The gentleman, based on the review of the records, history and MRI sustained at work on November 8, 1999 a ruptured or protruded disc at L4-5 on the left side . . . He is presently working three days a week, and I believe that the degenerative process in his disc at L4-5 and L5, S1 will increase with time, and I feel that the prognosis is guarded as far as his back is concerned . . . and also the possibility arises that he may get some spinal stenosis and foraminal impingement which will require in the future complete laminectomies at these levels . . . Addendum: *A review of the X-rays taken at Memorial Campus of the U-Mass Medical Center on November 17, 1999 failed to reveal any degenerative disc disease, so apparently this has set in since the injury.*

(Caron report 1, emphasis added.)[4] The doctor's one mention of the existence of the sixth vertebra, without more, falls far short of establishing the non-compensable, pre-

[4] Dr. Caron's report is not included in the list of seven exhibits in the hearing decision, but the judge refers to it under the heading "Depositions and Medical Evidence" on page 3 of his decision.

existing condition required by § 1(7A). Contrast Cook v. Stop & Shop, 15 Mass. Workers' Comp. Rep. 252, 257 (2001)(self-insurer, without objection, submitted report of employee's treating chiropractor who opined that prior, non-work related motor vehicle accident was cause of employee's constant neck and right arm pain). Moreover, Dr. Caron states unequivocally that the extensive degenerative disc disease at the L4-5 and L5-S1 levels, revealed by x-ray studies performed in conjunction with his January 9, 2001 evaluation of the employee, was not present in x-rays taken on November 17, 1999, and had "set in since the work injury." (Caron report 2.) Thus, we hold that the self-insurer did not meet its burden of production under § 1(7A) and the administrative judge did not err in failing to apply the causation standard prescribed by § 1(7A).[5]

The Causal Relationship Issue

Beyond its § 1(7A) defense, the self-insurer argues that the employee failed to meet his burden of proving even simple causation between the ladder incident and his subsequent low back complaints and medical disability. It contends that Dr. Caron's opinion as to causal relationship between the November 8, 1999 ladder incident and the employee's diagnosed ruptured or protruded disc at L4-5 is based on facts not in evidence, and that the judge's adoption of that opinion constitutes reversible error. Having reviewed the evidentiary record, we agree.

The judge found:

> At about 8:30 a.m. as he was placing a ladder against the building to go up on the roof for an inspection, a gust of wind jerked the ladder as he was holding it and *this precipitated a strong aching sensation in his lower back. He did work in discomfort for several days thereafter* and then sought treatment at the U. Mass Hospital on November 12, 1999.

[5] Even if Dr. Caron's report supported the self-insurer's § 1(7A) defense, which it did not, the self-insurer could not have met its burden of *production* by offering the report into evidence as it was not a medical report prepared by a physician engaged by the self-insurer. See 452 Code Mass. Regs. § 1.11(6); Colon v. Kitty's Restaurant & Lounge, 14 Mass. Workers' Comp. Rep. 67, 69-70 (2000). Here, however, the report was offered into evidence by the employee.

(Dec. 5-6, emphasis added.) As to his ladder wrestling, the employee confirmed that he took one section of an extension ladder, leaned it against the carport area of the court house building, climbed up the ladder onto the roof, dragged up the section and, while trying to lean the section on the next tier of the building, to access the main roof, "[t]he wind caught the top of the ladder and forced it back to where the cars were parked, and that's when I made a fast move to try to straighten it out." He testified that he made a twisting movement, a sharp movement to try to keep the ladder from blowing over, "and that's when the injury happened." (Tr. I, 21-24.)

When the judge found that the incident "*precipitated* a strong aching sensation" in the employee's back, (Dec. 5, emphasis added), however, he diverged from the employee's testimony. The employee testified that he didn't feel anything at all throughout that day and the first time he had symptoms which he related to the ladder incident was "[t]hat night when I was going to bed." (Tr. I, 24.) The employee confirmed that he was "able to work and operate the next day," although he felt very stiff in his lower back, and he acknowledged that he did not report the incident to his employer until November 11, 1999. (Tr. I, 25.)

Even more problematic, however, is the discrepancy between the employee's testimony and the history assumed by Dr. Caron in his January 10, 2001 report: "Mr. Greg Pike . . . stated that on November 8, 1999, he was lifting a ladder and *had acute pain in his low back and down the left lower extremity.*" (Caron report 1, emphasis added.) The employee expressly contradicted that history when he testified, and it is not

even supported by the testimony of Patrick Felix, discussed infra.[6]

Most questions of causation are beyond lay knowledge and require expert medical opinion. Valdes v. Tewksbury Hospital, 16 Mass. Workers' Comp. Rep. 196, 198 (2002), citing Josi's Case, 324 Mass. 415 (1949). Such is the case here. To the extent that Dr. Caron assumed the immediate onset of acute low back and left leg pain in formulating his causal relationship opinion, we agree with the self-insurer that the opinion does not satisfy the employee's burden of proof. "Where specific facts are in controversy, '[e]xpert opinion . . . must be based on either the expert's direct personal knowledge, on evidence already in the record or which the parties represent will be presented during the course of the trial, or on a combination of these sources.' " Collins's Case, 21 Mass. App. Ct. 557, 563 (1986), quoting LaClair v. Silberline Mfg. Co., 379 Mass. 21, 32 (1979). As the only expert medical causation opinion before the judge was based on facts not in evidence, it was error for him to adopt that opinion. Accordingly, we reverse the judge's finding of causal relationship.

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[6] The history on which Dr. Caron based his causal relationship opinion was that the employee experienced low back pain radiating down his leg *while* he was lifting the ladder. As to the onset of his low back pain, the employee unequivocally testified otherwise:

> Q. And did you feel anything at that time?
> A. Not really, no.
> Q. Did you – sometime soon after that, did you feel something?
> A. Not that day at all.
> Q. When was the first time that you had symptoms that you relate to this incident?
> A. That night when I was going to bed.
> Q. And what did you feel?
> A. A real, I don't know if it was a pulled muscle or something down the lower part of my back. It was really aching me.

(Tr. I, 24.) As to when the employee first experienced radiating leg pain, the record reflects that a two-page document dated November 22, 1999 and entitled "Chiropractic Registration and History," was offered into evidence by the self-insurer, and admitted as Exhibit 6. (Tr. I, 54; Dec. 1.) The employee, who testified that he filled out the form, (Tr. I, 54), confirmed that the stated reason for his visit to the chiropractor -- "left leg hip to lower ankle [pain]" -- was accurate, as was the history that those symptoms had appeared "2 days after lifting of ladder." (Tr. I, 56.)

The Contradictory Testimony Issue

In making his factual liability findings, the judge expressly stated that the employee was a credible witness, but he also stated that Patrick Felix, a witness called by the employee, was credible. (Dec. 7.) Moreover, he used Felix's testimony, not the employee's, to support his finding that the employee injured his back at work and had the immediate onset of a strong aching sensation in his back. (Dec. 5, 7.) Because the employee and Mr. Felix testified to entirely different versions of the events of November 8, 1999, the judge's credibility findings, usually final and immune from appellate review, see Nee v. Boston Medical Ctr., 16 Mass. Workers' Comp. Rep. 265, 266 n.1 (2002), citing Lettich's Case, 403 Mass. 389, 394 (1988), cannot stand. "Where there are conflicts in evidence requiring credibility assessments, fact finding is required to *choose* between them." Candito v. Browning-Ferris Industries, 15 Mass. Workers' Comp. Rep. 119, 123 (2001), citing Carney v. M.B.T.A., 9 Mass. Workers' Comp. Rep. 492, 494 (1995). (Emphasis added.)

Patrick Felix's testimony concerning his observations of the employee was properly admitted. He testifed that he observed the employee grimacing in pain, (Tr. II, 11, 24), and having difficulty climbing the ladder on the second tier. (Tr. II, 24-25.) However, over repeated hearsay objections by the self-insurer, which were wrongly overruled by the judge, Felix was permitted to testify that the employee told him he had hurt his back putting up a ladder.[7] Felix also testified that the employee said he was in

[7] The employee testified, and the judge found, that the ladder incident occurred at approximately 8:30 a.m. (Tr. I, 20, 63; Dec. 5.) Felix testified that he arrived at the court house for his meeting with the employee between 9:00 a.m. and 10:00 a.m. (Tr. II, 23-24.) Given that time frame, we do not think that the employee's purported statements about his back injury, as testified to by Felix, could be found to have been "made under the impulse of excitement or shock" so as to be admissible under the spontaneous exclamation exception to the hearsay rule. P. J. Liacos, Massachusetts Evidence § 8.16, at 551 (7th ed. 1999.)

pain. (Tr. II, 12, 14.)[8] The employee himself denied that he had said anything to Felix about injuring his back, "because it really wasn't bothering me that day." (Tr. I, 79-80.) He testified that he felt nothing in his back until that night, at home, while going to bed. (Tr. I, 24.) That the respective testimony of the employee and Felix cannot be reconciled is apparent, and would otherwise call for recommittal to the judge for further credibility findings.

We note, however, that even if the administrative judge were to choose to credit the employee's testimony over that of Patrick Felix, or vice versa, neither witness's testimony establishes the history assumed by Dr. Caron – that the employee experienced acute pain in his low back and down his left lower extremity while lifting a ladder on November 8, 1999. (Caron report 1.) Thus, recommittal to the administrative judge for additional credibility findings could not serve to rehabilitate the sole expert medical opinion on causal relationship. The employee has failed to meet his burden of proof. Sponatski's Case, 220 Mass. 526 (1915); Dodd v. Walter A. Furman Co., 16 Mass. Workers' Comp. Rep. 59, 62 (2002).

Accordingly, we reverse the administrative judge's decision and deny and dismiss the employee's claim. So ordered.

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Patricia A. Costigan
Administrative Law Judge

[8] Felix further testified, "[e]ach time he [Pike] tried to climb the second tier ladder, he was Ow Ow [sic]." (Tr. II, 25.) Although neither party has argued the point, see 452 Code Mass. Regs. § 1.15(4)(a)(3) (issues not briefed on appeal need not be addressed by the reviewing board), to the extent that this testimony recounted an expression by the employee of present pain, it may have been admissible as an exception to the hearsay rule. P. J. Liacos, Massachusetts Evidence § 8.14, at 547 (7th ed. 1999). The real problem, however, which the judge did not resolve, is that the employee denied having any back complaints at all when he met with Felix that morning, or throughout the rest of his work day. See footnote 6, infra.

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Susan Maze-Rothstein
Administrative Law Judge

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William A. McCarthy
Administrative Law Judge

Filed: **March 20, 2003**