COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NOS. 070248-89 009765-95**

Halina M. Sawicka	Employee
Archidiocese of Boston	Employer
Cigna Companies	Insurer
Nazareth, Inc.	Employer
Archdiocese of Boston S.I.G C/O Managedcomp.	Self-insurer

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

APPEARANCES
Casimir S. Lopata, Esq., for the employee
Loran G. Lang, Esq., for the insurer (Cigna Co.) at the hearing
Sheila Annand Carey, Esq., for the insurer (Cigna Co.) on the brief
Peter P. Harney, Esq., for the self-insurer (Archdiocese of Boston S.I.G.) at the hearing
Robert J. Riccio, Esq., for the self-insurer (Archdiocese of Boston S.I.G.) on the brief

MAZE-ROTHSTEIN, J. Halina Sawicka, a 53 year old Polish immigrant, twice injured her back lifting and catching toddlers in her work as a preschool teacher at her employer, Nazareth, Inc. (Dec. 4-5.) The self-insurer, the second insurer in this successive insurer case, appeals a decision that concluded that it was liable for the payment of the employee's partial incapacity benefits stemming from a 1995 aggravation of her 1989 work injury. Contrary to the self-insurer's assertion, the judge properly credited the employee's testimony and adopted the G.L. c. 152, § 11A, physician's opinion, based on a history consistent with the judge's findings, that the employee's incapacity was causally related to the 1995 aggravation. (Dec. 8-9.) We therefore affirm the decision. In so doing, however, it is appropriate to address an arguable change in the law governing causal relationship in § 11A cases effected by the Appeals Court opinion in Patterson v. Liberty Mutual Insurance Co., 48 Mass. App. Ct. 586 (2000).

Ms. Sawicka first injured her back at work on December 14, 1989, when she bent over to pick up a child. She had an immediate onset of pain, and was paid temporary total incapacity benefits for approximately one year. Ms. Sawicka underwent a lumbar discectomy of her herniated L4-5 disc on May 31, 1990. (Dec. 5.) When she returned to work in December 1990, Ms. Sawicka still had pain and stiffness, for which she continued to treat with rest and three to four visits per year to her primary care physician.

On April 27, 1995, Ms. Sawicka reinjured her back at work, catching a falling child. She experienced an immediate increase in pain, reported the incident, and went home, where she stayed for two days' bed rest. When she returned to work, Ms. Sawicka was unable to do much physically. The employer then terminated Ms. Sawicka on July 17, 1995, for poor "job performance." (Dec. 6.) The employee had just been on a two week vacation to Poland to see her terminally ill mother. The seven hour airplane rides each way had been very difficult due to her back pain. (Dec. 6-7; Tr. 83.)

Ms. Sawicka claimed compensation benefits from April 27, 1995 and continuing, against the insurer at the time of her original injury in 1989, and against the employer as self-insurer at the time of the 1995 incident. (Dec. 2-3.) The judge denied both claims at the § 10A conference, and the employee appealed both to a full evidentiary hearing. (Dec. 3.) The employee was examined by Dr. Arthur Bowman, an orthopedic surgeon, pursuant to the provisions of G.L. c. 152, § 11A(2).[1] The doctor assembled a history

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[1] Section 11A(2) provides, in pertinent part:

> When any claim or complaint involving a dispute over medical issues is the subject of an appeal of a conference order pursuant to section ten A, the parties shall agree upon an impartial medical examiner from the roster [of certified specialists in various medical fields] to examine the employee . . . or [the] administrative judge shall appoint such examiner from the roster. . . .
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> The impartial medical examiner, so agreed upon or appointed, shall examine the employee and make a report at least one week prior to the beginning of the hearing, which shall be sent to each party. . . . The report of the impartial medical examiner shall, where feasible, contain a determination of the following: (i) whether or not a disability exists, (ii) whether or not any such disability is total or partial and permanent or temporary in nature, and (iii) whether or not within a reasonable degree of medical

from the employee and his review of records. The history was that the employee had a 1989 back injury which involved a disc problem at the L4-5 and required surgery in 1990; that she returned to work despite stiffness and discomfort; that in April 1995 she reinjured her back and that a subsequent MRI suggested an extruded disc fragment at L3-4, a different level than shown in a pre-1990 MRI. The § 11A examiner found objective neurological deficits and radicular symptoms accompanying the employee's back pain. The doctor opined that the injuries were work-related, if one were to credit the employee's history, and that the injuries were consistent with the lifting or tugging of a child in 1995. (Dec. 7; March 27, 1998 Dep. 52-53.) The doctor was deposed by the self-insurer, and retreated from his causal relationship opinion when presented with hypothetical facts not found by the judge. (Dec. 9-10.)

The judge found that Ms. Sawicka suffered two industrial injuries, and he adopted the § 11A examiner's opinion that her renewed symptoms were causally related to the second work incident, as it aggravated her previous work-related impairment. (Dec. 9-10.) The judge concluded, "as this second industrial injury served to worsen the employee's condition, the responsibility for compensation lies with the self-insurer, as it was on the risk at the time of the April 27, 1995 injury, and not with its earlier insurer who had been on the risk at the time of the 1989 injury." (Dec. 10.) The judge specifically rejected the parts of the § 11A's deposition testimony based on the self-insurer's hypothetical facts, which facts were "at odds with what [he] found as fact." Id. As a result, the judge awarded the employee continuing § 35 partial incapacity benefits commencing as of her termination from employment, July 18, 1995, along with § 30 medical benefits. (Dec. 11.)

The self-insurer asserts in its appeal that the judge erred by failing to adopt the § 11A doctor's deposition testimony that he could not causally connect the 1995 incident

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certainty any such disability has as its major or predominant contributing cause a personal injury arising out of and in the course of the employee's employment.

to the employee's disability, if the doctor were to base his opinion on the self-insurer's hypothetical question. The question assumed that the employee

> had some increased back symptoms that day [April 27, 1995] . . . that the employee chose not to have a follow up appointment a month later because this situation improved . . . that the employee continued to do her job thoughout that period of time . . . that the employee went off to Poland on a trip to visit her mother . . . that subsequent to this she was terminated from employment [a]nd subsequent to being terminated from employment two weeks later is the first reference to radiculopathy.

(March 27, 1998 Dep. 45-46.) The self-insurer's argument lacks merit. The facts found by the judge, based on the employee's testimony at hearing, support the § 11A's examiner's opinion that causal relationship existed. (Dec. 7.) Contrary to the self-insurer's hypothetical, the judge did not find that the employee "continued to do her job after the 1995 incident." Instead, he found that the she was only able to return to work in a limited fashion, without being able to do much physically due to back pain. (Dec. 7, 9; Tr. 83.) The judge did not find that the employee improved a month after the incident.[2] The employee's trip to Poland was found by the judge to have been difficult for her due to her back pain. Likewise, the employee's termination was related to her inability to perform her job physically, due to her back pain. (Tr. 81-82.) All told, there is no basis for attributing error to the judge's disregard of the § 11A examiner's vacillation on causal relationship in response to self-insurer's incomplete, inaccurate and self-serving hypothetical question. Therefore, as to this central component of the self-insurer's appeal, we affirm the decision. [3]

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[2] "Back improved" was written next to a cancelled May 11, 1995 appointment note in the treating physician's office chart. (March 27, 1998 Dep. 12.) The judge apparently did not find this notation probative, as he did not make a finding regarding it.

[3] All of the other arguments in the self-insurer's brief are merely variations on its argument regarding the hypothetical question. We summarily affirm the decision as to all other matters argued.

Nonetheless, an important wrinkle remains. We agree with the self-insurer as to one issue alluded to in its brief – that the medical evidence fails to establish the requisite *standard* of causation under § 11A(2)(iii). That subsection states that the § 11A physician must opine on whether the employee's "disability has as its major or predominant contributing cause a personal injury" under the Act. (Self-insurer Brief, 7); G.L. c. 152 § 11A(2)(iii). In dicta, the recent Appeals Court case of Patterson v. Liberty Mut., 48 Mass. App. Ct. 586 (2000), issued after the self-insurer filed its brief, speaks to this very issue. Patterson is the first published opinion of either the Appeals Court or Supreme Judicial Court that addresses this issue. Since the Appeals Court's pronouncements on this issue are by way of dictum, we are not bound to apply it. However, dictum from a higher court may be an indication of how the law will be interpreted by that court if the issue should be squarely presented. In the circumstances, we think it is appropriate for us to comment on the applicability of § 11A(2)(iii), since the Appeals Court's dictum, if applied here, would alter the outcome of the present case and an entire line of reviewing board cases. See Gately's Case, 415 Mass. 397, 399 (1993)("interpretation of a statute by the agency charged with primary responsibility for administering it is entitled to substantial deference"). Coggin v. Massachusetts Parole Bd., 42 Mass. App. Ct. 584, 586-587(1997).

In Patterson, the Appeals Court reversed an award of benefits, because an administrative judge had relied on incompetent medical evidence provided by the § 11A physician. Specifically, the medical opinion lacked a sufficient factual foundation. The § 11A doctor's view that a workplace exposure caused Patterson's disabling injury "impermissibly rested on assumptions and information not established (as was required) by his own direct personal knowledge or by admissible evidence in the record." Patterson, supra at 595. After reviewing the details of the supposed grounds for the medical opinion the court concluded:

> As such it was merely an unsubstantiated opinion based on assumed facts not established by the admissible evidence and thus the product of surmise and

> conjecture as to the existence of *any* causal connection, much less the "major or predominant cause."

Id. at 596 (emphasis in original; footnote omitted).

After the court determined that the causation opinion failed at the foundation, in dictum it discussed the "its major or predominant contributing cause" standard appearing in § 11A(2)(iii). The court addressed the issue thusly:

> We note initially a structural defect in the IME's report that (while not in and of itself fatal) was a portent of the underlying inadequacy of his causation opinion. General Laws c. 152, § 11A(2), as amended by St. 1991, c. 398, § 30, requires the IME's report to "contain a determination [inter alia] . . . whether or not within a reasonable degree of medical certainty any . . . disability [of the claimant determined by the IME to exist] has as its major or predominant contributing cause a personal injury arising out of and in the course of the employee's employment." Here, however, the report failed to state any aspect of the IME's opinion as being within a reasonable degree of medical certainty or that any particular workplace event or condition was the major or predominant cause of Patterson's disabling respiratory problems or claimed MCS. His assertion that Patterson's exposures to latex and unspecified operating room agents at the hospital "did causally contribute" to those problems fell far short of that requirement.

Id. at 593 (emphasis added; footnote omitted).

The medical evidence in the present case likewise does not address the § 11A(2)(iii) standard of "its major or predominant contributing cause." However, we see no error here, as the Patterson analysis is inapposite to successive injury cases and, in light of the practical effect of the § 11A(2)(iii) standard, in cases not involving § 1(7A).[4]

[4] For an analysis of the interplay between the § 11A language ("its major or predominant") and its counterpart in § 1(7A)("a major but not necessarily predominant") in the legislative

The Patterson court's analysis of § 11A(2)(iii)'s requirement for the medical report to address whether the employee's disability had the work injury as "its major or predominant contributing cause" was "judicial dicta not necessary to [that] particular decision." Moss v. Old Colony Trust Co., 246 Mass. 139, 151 (1923). See Brown v. Commissioner of Correction, 336 Mass. 718, 720 (1958). Certainly, where the Patterson court concluded that the § 11A medical evidence failed to support the employee's claim at all with regard to causal connection, any discussion of the quantum of proof that the employee had failed to adduce was surplusage. See, in particular, Patterson, supra at 593, n. 14. As such, we need not follow it. Klegerman v. New York, N.H. & H.R. Co., 290 Mass. 268, 275 (1935). Instead, we follow our own precedents in deciding the present issue, which holdings are "inconsistent with the reasoning" set out in the Patterson dicta. Boott Mills v. Boston & M.R.R., 218 Mass. 582, 592 (1914).

The present case is governed by Bourassa v. D.J. Reardon Co., 10 Mass. Workers' Comp. Rep. 213 (1996). In Bourassa, we recommitted the case, based on our determination that the judge erred in part by assessing the employee's claim for a June 1991 industrial injury against a successive insurer under the § 11A(2)(iii) standard of "its major or predominant contributing cause." We observed:

> At all times pertinent here, the employer and the insurer took Mr. Bourassa in whatever state of health he was in during the thirteen-month period of employment and the term of the policy. He did not have to comply with any standard of fitness or warrant that he was in perfect health. So when he returned to work in March 1990, the employer took him, "as is," including whatever tendency that his ankle, weakened by the earlier fracture, might [sic] deteriorate.

Id. at 216; footnote omitted.[5] We, thus, regarded as error the judge's adoption of the

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enactment process, see infra. See also Hammond v. Merit Rating Bd., 9 Mass. Workers' Comp. Rep. 708, 710-711 (1995)(harmonizing the two standards in case where both sections applied).

[5] We add the following language from a seminal early interpretation of the Act by Rugg, C.J.:

§ 11A physician's opinion that the work did not "constitute a major contributing cause [of the employee's] current right ankle malady . . .," and the judge's reliance on that opinion in denying the claim. Id. at 217. "This response to question (iii) found in 11A(2) . . . does not help in determining compensability where, as here, the employer takes the employee 'as is.' " Id. We continued, setting out the correct analysis to be applied on recommittal:

> [The impartial physician], presumably responding to statutory question 11A(2)(iii), did not believe that the work performed during the thirteen months in question was a major contributing cause to his right lower extremity problem. However he may very well be of the opinion that the work aggravated or accelerated the condition. Indeed, the insurer's medical expert may even agree with the employee's medical expert that this was an aggravation or acceleration and then there would be no medical dispute at all -- and thus no need for an 11A exam! *But if a medical dispute remains, and an 11A(2) exam is required, the three statutory questions are to be asked only "where feasible." If feasible means practical, suitable or logical, question (iii) should not be asked in the case at hand.*

Id. at 218 (emphasis added). The present successive insurer case should be assessed under the same "as is" standard of causation. This is exactly what the judge did, for as a matter of law application of the § 11A(2)(iii) causation standard is "not feasible" in cases where serial work injuries result in subsequent incapacities and successive insurers bear responsibility for even the slightest contributing causation. See Rock's Case, 333 Mass. 428, 429 (1948).

> It has been argued with force on behalf of the insurer that since the harm to the employee [a disabling acute heart impairment] was not wholly the effect of the work but came in large part from the previous weakened condition of the employee's heart, hence, either there can be no award of compensation, or it should be restricted to that part of the injury which resulted directly from the work, and the part of the injury which flowed from the previous condition should be excluded. . . . There is nothing said [in the act] about the protection being confined to the healthy employee. The previous condition of health is of no consequence in determining the amount of relief to be afforded. . . . All who rightly are describable as employees come within the act.

In re Madden, 222 Mass. 487, 494 (1916).

For two reasons, even if we were to treat the Patterson dicta analysis of the § 11A(2)(iii) causation standard as precedential authority, we would still harmonize it with our approach in Bourassa, supra. First, the legislative history of the 1991 amendments to §§ 11A and 1(7A) supports this view. Section 1(7A) contains a provision applying a similar, but not identical, standard of causation in cases involving combinations of work injuries and pre-existing non-work-related conditions:

> 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.

G.L. c. 152, § 1(7A), amended by St. 1991, c. 398, §§ 13 to 15. Early drafts of the amendment sought to impose a heightened standard of causation for all workers' compensation injuries, regardless of the existence of non-work-related causal factors. For example, § 16 of the Weld-Cellucci reform bill, "An Act Relative to the Efficient and Equitable Compensation of Injured Workers" (November 7, 1991), provided that, "*No disability* shall be compensable under this chapter unless a work-related injury or disease is *the major contributing cause* of the disability." (Emphasis added.) The Weld administration's reform bill offered essentially the same heightened standard to be applied by the impartial physician. Section 39 of the bill, in a slightly later version, provided, "The report shall, *where feasible*, contain a determination whether a disability exists, whether such disability is total or partial and permanent or temporary, *and whether or not within a reasonable degree of medical certainty any such disability has as its major contributing cause a personal injury arising out of and in the course of employment.*" (Emphasis added). Next, on December 9, 1991, the House Committee on Ways and Means reported out House Bill 6357, "An Act Relative to the Fair and Effective Compensation of Injured Workers." That later bill contained a version of the

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It is important to keep in mind that the present case, Patterson, and Bourassa are not governed by the more limited causation standard established by § 1(7A) regarding non-work-related and work-related combination injuries. See infra.

subject § 1(7A) amendment, closer to the version finally enacted than the earlier Weld administration's proposal. In House Bill 6357, § 14, the heightened causation standard applied only to the combination injuries (non-work-related plus work-related), but the standard was "the predominant contributing cause." A companion bill contained provisions for the § 11A physician, which imposed the obligation to assess causation by way of "the major contributing cause" standard *for all injuries* identical to the earlier Weld administration proposal. House Bill 6357, § 31. When the 1991 Act finally came into existence, the amendment to § 1(7A) provided for the standard of "a major but not necessarily predominant" cause for compensable and noncompensable combination injuries and conditions. St. 1991, c. 398, § 14. However, the amendment to § 11A still applied its assessment "where feasible" of the heightened causation standard – now "its major *or* predominant contributing cause" – to all employees going before an impartial physician, regardless of the type of injury presented. St. 1991, c. 398, § 30.

Recently, Catherine Koziol, writing in the 2000 supplement to Locke, Workmen's Compensation (2d 1981), commented:

> [D]uring the legislative process, this definition [of § 1(7A) "major but not necessarily predominant" causation] originally contained only "major contributing cause" and applied to all injuries rather than being narrowed to the aggravation of a non-industrial pre-existing injury or disease. Later in the legislative process, "predominant contributing cause " was substituted for "major contributing cause," again without being narrowed to an aggravation of a non-industrial pre-existing injury or disease. Ultimately, the two concepts were melded into the present language which emerged from the conference committee's work during the evening of December 18, 1991 and was narrowed as indicated above. Interestingly, the companion provision in bill section 30 . . . provides that an impartial physician's opinion, among other things, shall contain a determination as to "whether or not within a reasonable degree of medical certainty any such disability has as its major or predominant cause a personal injury arising out of and in the course of the employee's employment." *Because of the ultimate narrowing in § 1(7A) of the W.C. Act (c. 398), the amendment to § 11A is now inconsistent and needs correction.*

Koziol, supra § 10.6, 289-290 (emphasis added). See also Hammond v. Merit Rating Bd., 9 Mass. Workers' Comp. Rep. 708, 710-711 (discussing and harmonizing the two

standards) and 714-719, Smith, J. concurring, Legislative History Appendix. We are persuaded by this analysis.

In an attempt to harmonize Patterson with the legislative history just extrapolated, we make this second suggestion: Even if simple industrial injuries (those not presenting other causes from pre-existing, non-work-related sources) were to be assessed by § 11A physicians according to the literal words of the § 11A(2)(iii) causation standard – that the work be the major or predominant contributing cause of the employee's disability – the single industrial cause could be characterized as meeting that standard as a matter of law, regardless of the physician's use of the phrase in the impartial medical report. In other words, the only cause must of course be the "major," "predominant," or any other relevant characterization one might want to accord it. Moreover, and pertinent to the successive insurer case before us, where there are two *industrial* causes at play, we simply see no hint of a legislative intent in 1991 to reverse the nearly seventy years of the risk spreading successive insurer rule, that any contribution from the most recent work injury connects the ensuing disability to that injury. See Evan's Case, 299 Mass. 435, 436-437 (1938); Donahue's Case, 290 Mass. 239, 240-241 (1935). Reference to the heightened causation standard in § 11A(2)(iii) may be ignored as it is legally and practically not "feasible" to be applied in such circumstances.

For all of the foregoing reasons, we decline to apply § 11A(2)(iii) in the present case, and affirm the decision as reached. We summarily affirm the decision as to all other issues argued by the self-insurer. We award the employee's attorney a fee under § 13A(6) in the amount of $ 1243.36.

So ordered.

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Susan Maze-Rothstein
Administrative Law Judge

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Frederick E. Levine
Administrative Law Judge

Filed: December 1, 2000

CARROLL, J. (concurring). I agree that we should affirm the administrative judge's decision.

Nonetheless, I do not believe it is appropriate for us to address Patterson and its "arguable" impact on this case without the parties having actually raised the issue. As the employee pointed out at oral argument, the reviewing board raised this issue, not the parties. The reviewing board has no power to issue advisory opinions. See § 11C. Yet, that is just what we have here, in effect. Further, insofar as the troubling language in Patterson is characterized as dicta, no more need be said. Whatever controversy that we have put before ourselves at that point disappears, and the law review article that follows is no more than the empty clamour of dicta banging against dicta.

I concur in the result.

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Martine Carroll
Administrative Law Judge