COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 010579-00**

James M. Nutton, Jr.	Employee
Greater Lawrence Educational Collaborative	Employer
Great American Insurance Company	Insurer

REVIEWING BOARD DECISION
(Judges Costigan, McCarthy and Levine)

APPEARANCES
Joseph P. Evans, Esq., for the employee
Peter P. Harney, Esq., for the insurer
Peter P. Harney, Esq. and Aaron E. Morrison, Esq., for the insurer on brief

COSTIGAN, J. The employee and the insurer cross-appeal from a decision in which an administrative judge awarded the employee a closed period of G. L. c. 152, § 34, temporary total incapacity benefits, and ongoing § 35 partial incapacity benefits, for a low back injury at work on February 8, 2000. The employee argues that the judge erred in finding him only partially incapacitated as of January 11, 2001, and that he remained entitled to § 34 benefits. We agree that the § 35 award cannot stand, not for the extent of incapacity issue argued by the employee, but because of a fatal deficiency in the expert medical causation opinions relied on by the judge.

The insurer argues that the employee's testimony regarding the industrial accident and his resulting pain was not credible. We see no merit in that argument. Credibility determinations are the sole province of the hearing judge and, generally, will not be disturbed. Lagos v. Mary A. Jennings, Inc., 14 Mass. Workers' Comp. Rep. 21, 26 (2000), citing Lettich's Case, 403 Mass. 389, 394 (1988). Therefore, we summarily affirm the judge's liability finding that the employee sustained a compensable personal injury while working for the employer. (Dec. 18.)

The insurer also argues that the adopted medical evidence does not support the judge's conclusion that the industrial injury remained a major cause of the employee's

continuing disability, pursuant to the relevant provisions of G.L. c. 152, § 1(7A).[1] On this point only, we agree. Accordingly, we vacate the decision and recommit the case for further findings.[2]

The employee injured his low back while lifting a file cabinet at work on February 8, 2000.[3] He felt sore, but worked the next day at his other job as a direct caregiver for handicapped individuals for the Commonwealth of Massachusetts, Department of Mental Retardation, (Dec. 5, 17), a job he described as "light duty." (Dec. 17-18; Tr. 28.) When he awoke on February 10, 2000, however, the employee could not move his legs, and has not worked for either employer since that time. (Dec. 6.) The employee commenced treatment with Dr. Richard Warnock on that date. He subsequently saw numerous other

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

[2] The employee's other argument on appeal is that the judge should have ordered the insurer to pay G. L. c. 152, § 50, interest on the weekly incapacity benefits he awarded. Section 50 provides in pertinent part:

> Whenever payments of any kind are not made within sixty days of being claimed by an employee . . . and an order or decision requires that such payments be made, interest at the rate of ten percent per annum of all sums due from the date of the receipt of the notice of claim by the department to the date of payment *shall be required by such order or decision*. Whenever such sums include weekly payments, interest shall be computed on each unpaid weekly payment.

(Emphasis added.) We have said that § 50 is self-operative. Drumm v. Viale Florist, 16 Mass. Workers' Comp. Rep. 335, 337 (2002), citing Le v. Boston Steel & Mfg. Co., 14 Mass. Workers' Comp. Rep. 75 (2000). Because we now vacate the award of benefits and recommit this case to the judge to reconsider the medical evidence, he should also address the employee's claim for interest on any incapacity benefits to which he finds the employee entitled.

[3] The employee worked at Greater Lawrence Educational Collaborative as a teacher's aide for special needs students. (Tr. 6-7.) On February 8, 2000, he was asked by several teachers to stay late and help move office and classroom furniture, which was not part of his regular job duties. (Dec. 5; Tr. 7-8.)

physicians, and underwent several diagnostic studies. (Dec. 5-6.)

The insurer did not accept the employee's claim for compensation benefits. The judge denied the employee's claim at the § 10A conference, and the employee appealed to a full evidentiary hearing. (Dec. 4.) The insurer raised § 1(7A) as a defense to the employee's claim. (Dec. 3.) See n.1, supra.

The employee underwent an impartial medical examination, pursuant to § 11A(2), on January 10, 2001. (Dec. 6.) Dr. Tetsuto Numata, the impartial physician, made the following diagnoses: mechanical low back pain, sciatic symptoms, degenerative disc disease and bulging discs at L4-5 and L5-S1, cervical spine degenerative disc disease and small herniated disc, thoracic degenerative disc disease and thoracic spine pain. The doctor causally related only the mechanical back pain and sciatic symptoms to the February 8, 2000 work injury, which the doctor also described as being an aggravation of the employee's underlying degenerative disc disease and bulging discs. (Dec. 7.) The doctor considered that the one-day lapse in the development of the employee's full-blown symptomatology was not unreasonable.[4] The impartial physician opined that at the time of his examination, the employee was not at a medical end point, and that he could work at a sedentary job, as long as it allowed him to change position at will. (Dec. 8.)

The judge ruled the § 11A medical evidence inadequate as to the eleven-month "gap" period between the alleged industrial injury and the impartial medical examination, and the employee submitted reports and records of his treating physicians from that time

[4] The insurer contends that the administrative judge failed to make crucial subsidiary findings of fact concerning the employee's work activities for his other employer on February 9, 2000. We disagree. The judge's decision reflects that he credited and adopted the employee's testimony as to what he did at work the day after his claimed injury. (Dec. 17-18.) Moreover, even when asked by the insurer to assume certain physical requirements of the employee's job with the Department of Mental Retardation, the § 11A impartial medical examiner opined only that it was "possible" that those work activities on February 9, 2000 aggravated the employee's back condition and caused the pain he experienced the next morning. (Dep. 11-12, 20-23, 37-38.) That opinion falls well short of the degree of probability necessary to establish causal relationship. See Patterson v. Liberty Mut. Ins. Co., 48 Mass. App. Ct. 586, 592-593 (2000).

period. (Dec. 8-9; Employee Ex. 4-10.) Stating that he adopted in part the opinion of Dr. Numata, and in part the opinion of Dr. Warnock, the judge found that

> the Employee's work-related injury of February 8, 2000 is an aggravation of his underlying degenerative disc disease. I further find that the work injury continues to be a major but not necessarily predominant cause of the Employee's disability and need for medical treatment.

(Dec. 19.) The judge awarded the employee a closed period of temporary total incapacity benefits through January 10, 2001, the date of the § 11A impartial medical examination, and ongoing partial incapacity benefits thereafter, based on the impartial physician's opinion that the employee had a sedentary work capacity. (Dec. 18, 20.)

The insurer argues that the medical evidence relied on by the judge did not support his award of continuing incapacity benefits, as it failed to sustain the employee's burden of proving that the industrial injury was, and remained, a major cause of such disability under § 1(7A). We agree. First, we note that the opinion of Dr. Warnock, adopted by the judge for the pre-impartial examination "gap" period, (Dec. 8-11), simply did not venture into the arena of "a major" causation.[5] As to the impartial physician's opinion, his deposition testimony unequivocally lends credence to the insurer's argument:

> Q. So . . . is it your opinion that . . . the initial trauma would have been a major cause . . . but then at some point as far as ongoing causation is concerned the underlying condition becomes the major cause[6] of the continued symptoms?

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[5] Dr. Warnock's office notes for the period from February 10, 2000 to November 22, 2000 are devoid of any causal relationship opinion. (Employee Ex. 4.) The strongest opinion the doctor offers is found in his May 2, 2000 report: "It is my medical opinion with a reasonable degree of medical certainty that Mr. Nutton injured his back on 2-8-00. The mechanism of injury is such that *a causal connection* can be readily made." (Id.; emphasis added.) This does not satisfy the employee's burden to prove "a major" causation. See Kryger v. Victory Distribution, 17 Mass. Workers' Comp. Rep. ___ (March 3, 2003), citing Patterson, supra at 598 (2000); Blair v. Olympus Healthcare, 17 Mass. Workers' Comp. Rep. ___ (February 7, 2003); Lyons v. Chapin Ctr., 17 Mass. Workers' Comp. Rep. _ __ (January 13, 2003).

[6] By asking the impartial physician about "*the* major cause," the insurer's attorney improperly presented a higher standard of causation than the employee was required to prove under § 1(7A). As there was no objection to the question, however, the employee waived any challenge to the admissibility of the doctor's response. Minn's Case, 286 Mass. 459, 467 (1933); Phillips's Case, 278 Mass. 194, 196 (1931).

. . .

A. That would be my opinion.

Q. Is that why you testified earlier that the underlying degenerative condition and bulging disc would be the major cause of the condition you found as of the date of your examination?

. . .

A: . . . So my thought would be that the major contributor to the onset of the pain is the [industrial] injury and the ongoing pain that does not recover is due to the fact that the underlying condition is not allowing the condition to heal or improve.

Q: So you are saying that the trauma [industrial accident] is the major cause of the trigger and the underlying condition is the major cause for it lingering, is that right?

A: That would be my interpretation of what I am saying, yes.

Q: So conversely, Doctor, are you then saying that the underlying condition would be a minor cause of the trigger and the alleged trauma would be a minor cause of the ongoing problem?

A: That is correct.

(Dep. 32-34.) Following our decision in Pandey v. Montgomery Rose Co., Inc., 15 Mass. Workers' Comp. Rep. 442 (2001), we conclude that the judge's award of ongoing incapacity benefits cannot stand. See id. at 444 ("minor" cause cannot be read to satisfy "major" cause standard). However, unlike Pandey, in the present case, the impartial physician's opinion did allow that the industrial injury was a major cause of the employee's initial disability, as can be seen in the testimony quoted above and the following:

Q: What role did the [industrial] aggravation play *in the weeks shortly after the alleged trauma*? Would it be a major or minor cause?

A: Still the major cause.[7]

[7] See footnote 5, supra.

(Dep. 26; emphasis added.) Therefore, rather than reverse the decision as unsupported by the medical evidence, as the insurer urges, we vacate it and recommit the case to the judge to revisit the issues of § 1(7A) causal relationship and the extent of incapacity, as to whatever closed period of incapacity can be tied to the record evidence.[8]

Accordingly, the decision is vacated, and the case recommitted for further findings consistent with this opinion.

So ordered.

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Patricia A. Costigan
Administrative Law Judge

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William A. McCarthy
Administrative Law Judge

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Frederick E. Levine
Administrative Law Judge

Filed: **June 2, 2003**

[8] We note that the judge ruled Dr. Numata's report inadequate, and allowed additional medical evidence under § 11A(2), for the eleven-month "gap" period between the alleged industrial accident and the impartial examination. (Dec. 8; April 27, 2001 Tr. 60.) The judge's decision reflects that he carefully reviewed the extensive medical records and reports from that time period introduced by the employee. (Dec. 8-15.) The insurer deposed the § 11A physician, (Dec. 3, 16), but did not submit any additional medical evidence for that "gap" period. (Dec. 16.)