COMMONWEALTH OF MASSCHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO.:** 06023-05

Johan Drumond	Employee
Boston Healthcare for the Homeless	Employer
Independence Casualty Insurance Co.	Insurer

REVIEWING BOARD DECISION

(Judges McCarthy, Horan and Fabricant)

APPEARANCES

Robert L. Noa, Esq., for the employee at hearing
James N. Ellis, Esq., for the employee on appeal
Kevin P. Jones, Esq., for the insurer

McCARTHY, J. The parties cross-appeal from a decision in which the administrative judge awarded benefits under §§ 34 and 35 for work-related knee and elbow injuries, but terminated weekly payments as of the date of a non-work-related motor vehicle accident increasing the employee's symptoms. Because the judge misapplied the governing law we reverse and recommit the case for further proceedings consistent with this opinion. As to the insurer's appeal, we agree that the judge on recommittal must also address its duly-raised defense of § 1(7A) "a major" causation.

The employee injured her knees and left elbow when she fell through a trap door at work on March 1, 2005. On May 5, 2005, she underwent surgery on her right knee. She continued to have pain in both knees, and returned to part-time work with restrictions. On July 11, 2005, the employee was involved in a motor vehicle accident which increased her pain symptoms in her right knee. (Dec. 6-7.)

The employee underwent a § 11A medical examination on May 4, 2006. The doctor opined that the employee had pre-existing degenerative arthritis in her right knee, and had suffered meniscal tears as a result of her March 1, 2005 injury. (Dec. 7.) The doctor opined that "if the employee's pain persisted and degenerative arthritis is deemed a cause, then it would appear to be a pre-existing condition and not work-related." (Dec. 7, citing

Ex. 1 at p. 4.) The doctor also opined the employee could continue to work as symptomatically tolerated. (Dec. 8.)

The judge adopted the impartial physician's opinions and concluded that the employee had suffered knee and elbow injuries in the March 1, 2005 fall at work; he also found that the employee was able to return to work post-surgery at reduced hours. The judge therefore awarded a closed period of § 34 benefits, followed by a closed period of § 35 benefits, terminating as of the July 11, 2005 non-work-related motor vehicle accident. (Dec. 10-11.) The employee appeals, challenging the basis for the judge's termination of benefits.

In defense of the decision, the insurer relies on a rule of law not contemplated by the judge at the hearing. The insurer contends that the employee's motor vehicle accident was *per se* negligent activity, thereby cutting the causal connection between the resultant incapacity and the work injury. The argument is not persuasive.

The general proposition is that non-work-related activity which is normal and reasonable, and not performed negligently in light of the employee's impairment, does not constitute an intervening cause, if (as discussed below) some causal connection to the original industrial injury remains. See Cox v. Fallon Services, Inc., 21 Mass. Workers' Comp. Rep. 173, 178 (2007)(issue as to whether playing drums was reasonable, non-negligent activity in light of employee's neck impairment); Doten v. Barletta Co., 10 Mass. Workers' Comp. Rep. 423, 425-426 (1996)(recommittal for findings on whether raking leaves not reasonable, and therefore negligent, activity in light of employee's work-related back injury); Twomey v. Greater Lawrence Visiting Nurses' Assoc., 5 Mass. Workers' Comp. Rep. 156, 158 (1991) (leaning over while playing cards aggravated work-related back injury). Here the mere occurrence of a subsequent motor vehicle accident says nothing in regard to the analysis required by these cases. The appropriate first question would be whether the employee was unreasonable in *driving* with her knee injury. There is nothing in this record which would support such a finding, nor is there any evidence that her negligence caused or contributed to cause the motor vehicle accident.

The employee argues on appeal that the judge's use of the non-work-related motor vehicle accident as an intervening event warranting termination of the employee's weekly § 35 benefits is contrary to law. We agree. The judge simply found that the accident increased the employee's symptoms, but nevertheless treated the event as necessarily

terminating causal relationship. (Dec. 10.) However, nothing in his subsidiary findings, and particularly the adopted medical evidence, points to the accident as being of such severity that it overwhelmed and eliminated any causal connection between the work injury and the employee's incapacity.

The law in this area is well established. Our case of Tirone v. M.B.T.A., 15 Mass. Workers' Comp. Rep. 283 (2001), provides a particularly apt analysis:

> [T]he subsequent motor vehicle accident . . . requires an entirely different approach to the causal relationship question[, as compared to *pre-existing* non-work-related medical impairments subject to major cause analysis under § 1(7A)]. The industrial injury remains compensable, relative to that later event, if the employee can prove *any* continuing causal connection between the work and the resultant incapacity. See Morgan v. Seaboard Prods., 14 Mass. Workers' Comp. Rep. 280 (2000); Kashian v. Wang Laboratories, 11 Mass. Workers' Comp. Rep. 72, 74 (1997), aff'd. Single Justice of the Appeals Court. 97-J-135 (1997); Squires v. Beloit Corp., 12 Mass. Workers' Comp. Rep. 295, 297-298 (1998); Roderick's Case, 342 Mass. 330 (1961).

The only medical evidence in the case - proffered by the impartial doctor and found by the judge to be adequate under § 11A(2) - did not eliminate causal connection between the industrial injury and the employee's present complaints. . . . At no time was he asked whether he would consider that the work injury ceased to be related to the employee's present medical impairment, in view of the subsequent motor vehicle accident. Liability for the industrial injury is not cut off by such conjectural medical opinion testimony as a matter of law. See Roderick's Case, supra; Whitehead's Case, 312 Mass. 611, 613 (1942). . . . Therefore, we reverse the judge's finding that the intervening motor vehicle accident effectively broke the chain of causal relationship between the work injury and the employee's [knee] complaints.

Tirone, supra at 287 (emphasis in original). See also Cox, supra at 179-180.

The adopted medical evidence in the present case is similarly inconclusive as to the question of continuing causal connection between the employee's work injury and her post-motor vehicle accident incapacity status. In fact, the impartial physician's opinion simply does not address the issue. "As a practical matter, the insurer has the burden of producing evidence against the claimant when it seeks to deny a claim by contending that

. . . causal relation was interrupted by and independent intervening cause . . .." L. Locke, Workmen's Compensation § 502, n. 15 (2 nd ed. 1981). The impartial physician's opinion was the exclusive medical evidence in the case, even though other medical notes were introduced solely to substantiate the existence of the motor vehicle accident and other matters. The judge could not terminate benefits on the simple basis of the increase in employee's pain.

As a result, we follow Tirone, supra, and reverse the decision as to the termination of partial incapacity benefits. We recommit the case for further proceedings as to extent of the employee's § 35 incapacity. The judge may consider opening the medical record pursuant to § 11A(2), as the interests of justice require.[1]

So ordered.

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William A. McCarthy
Administrative Law Judge

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Mark D. Horan
Administrative Law Judge

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Bernard W. Fabricant
Administrative Law Judge

Filed: ***December 17, 2008***

[1] On recommittal, the insurer's argument on appeal, that the judge should have applied its defense of § 1(7A) "major" causation applicable to "combination" injuries, must also be addressed. See Vieira v. D'Agostino Assocs., 19 Mass. Workers' Comp. Rep. 50 (2005). Because we have reversed the judge's termination of benefits, we need not address the insurer's other argument on appeal, that the judge erred in ordering § 30 benefits post-termination. Because the insurer has prevailed in putting § 1(7A) back in play in the recommittal hearing, no § 13A(6) attorney's fee is due counsel for the employee.