COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 056955-97**

Joseph Dodd	Employee
Walter A. Furman Co. Inc.	Employer
Eastern Casualty Insurance Co.	Insurer

REVIEWING BOARD DECISION
(Judges Carroll, Levine and Wilson)

APPEARANCES
Robert L. Noa, Esq., for the employee
Peter M. Bancroft, Esq., for the insurer at hearing
Kerry G. Nero, Esq., for the insurer on appeal

CARROLL, J. Both parties appeal the decision of an administrative judge in which the employee was awarded a closed period of § 35 partial incapacity benefits. The insurer contends that the employee did not claim benefits for a portion of the closed period awarded. The employee takes issue with the administrative judge's application of § 1(7A). After appellate review, we reverse in part and affirm in part.

Joseph Dodd was forty-five years old at the time of the judge's decision. He attained a high school diploma and the entirety of his work experience is that of a carpenter. In 1997, Mr. Dodd commenced employment with Walter A. Furman Construction Company as a finish carpenter. On June 30, 1997, Mr. Dodd injured his lower back while moving wood doors in the course of his employment. (Dec. 4.)

The next day, Mr. Dodd was treated by Dr. Tello. Id. Dr. Tello prescribed Vicodin, Ultram and Soma; however, he did not keep Mr. Dodd out of work nor did he place any restrictions on the employee's physical and work activities. (Dec. 4-5.) Subsequent thereto, Mr. Dodd underwent several courses of physical therapy. He now treats with Dr. Latchaw, who has prescribed a myelogram, two spinal blocks, a bone scan and a diskogram. In addition, Mr. Dodd uses Oxycodone medication. (Dec. 5.)

The employee filed a claim seeking § 34 temporary total incapacity benefits or, in the alternative, § 35 partial incapacity benefits from May 27, 1998 and continuing. Pursuant to § 10A, the matter was conferenced before an administrative judge, who entered an order denying the employee's claim. Thereafter, the employee appealed to a hearing de novo before the same administrative judge. (Dec. 2.)

Pursuant to § 11A, Mr. Dodd was examined on February 15, 2000, by Dr. John McConville. The impartial examiner diagnosed an L5-S1 disc herniation with a partial tear of the annulus, with intermittent, mild, bilateral lumbar radiculopathy. (Dec. 5.) Although Mr. Dodd denied back problems prior to the 1997 work injury, Dr. McConville reviewed records and noted treatment and testing in 1993, and a 1992 motor vehicle accident, which suggested to the doctor that some element of back disorder pre-existed. (Dec. 5; Dep. 10.) Since the employee denied prior back problems, Dr. McConville also did not know of a work related back injury in 1987 and, apparently, there was no mention in the records he reviewed. The doctor was not questioned about this earlier injury at his deposition.[1]

Dr. McConville opined that the employee was capable of light duty work that did not require lifting of items weighing in excess of twenty pounds and that did not require frequent bending or stooping. (Dec. 6.) He concluded that the 1997 work

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[1] Dr. McConville was asked if he found any past medical history which he considered significant. (Dep. 9.) He responded as follows:

> Yes. There does appear to be some bit of a problem in that the employee denies any prior problems with his back, but the record clearly indicates that he saw Dr. Tello on August 17, 1993 and had X-ray films of the thoracic spine at that time. He was also involved in a motor vehicle accident in 1992 and had lumbar spine along with neck discomfort as well. The patient had also had a requested MRI study on January 29, 1997 which was refused because of presence of metal in the eye.

The history from the employee to the impartial examiner not only denies prior back problems and, therefore, does not mention a 1987 work injury but also, apparently, the record reviewed by the impartial physician did not contain a history of a 1987 work injury. Moreover, at hearing, when the employee did acknowledge a work related back injury in the 1980's, he testified that he had completely recovered from it. (Tr. 11.)

incident aggravated the employee's underlying back condition, but did not remain a major cause of the employee's symptoms. Id. Despite authorization to submit additional medical evidence, neither party submitted medical opinions independent of the impartial examiner. (Dec. 1, 3.)

The administrative judge determined that following the non-work related 1992 automobile accident and prior to the 1997 work incident in question, the employee reported to doctors with complaints of back pain and back spasms. He "received muscle relax[ants] and pain medication prior to the 1997 industrial injury." (Dec. 8.) The judge adopted the impartial examiner's medical opinion that the industrial injury was not a major cause of the employee's ongoing disability. (Dec. 9, 10.) The judge awarded § 35 benefits, from February 18, 1998 to February 15, 2000, the date of the impartial examination, as well as reasonable medical expenses and attorney's fees.

We first address the employee's concerns. The employee argues that the judge did not apply the proper standard of review as set forth in G.L. c. 152, § 1(7A). In particular, the employee asserts that the impartial examiner's medical opinion that the work injury was a cause but not a major cause of the employee's disability "does not make sense" and is based upon an "incorrect legal definition." We disagree.

It is entirely possible for an injury to be a contributing cause of medical disability without being a major cause of that same disability. That is the case before us. The impartial examiner opined that the work injury did not remain a major cause of the employee's disability. (Dep. 14, 15, 26.) Since this opinion was the only medical evidence of record and had prima facie status, see G.L. c. 152, § 11A (2), the judge was compelled to adopt the opinion. See Burrill v. Litton Indus., 11 Mass. Workers' Comp. Rep. 77, 81 (1997)(error for judge to reject the uncontroverted opinion of an impartial medical examiner without clear and sufficient findings to support conclusions to the contrary). Accordingly, we see no error.

Intertwined with his first issue raised, the employee maintains that the judge erred by finding that the work injury was not "the" major cause of the employee's

disability, as opposed to the proper § 1 (7A) standard that merely requires that the injury remain "a" major cause. This error, the employee asserts, requires reversal. Notwithstanding, the impartial examiner utilized the proper § 1 (7A) standard of "a" major cause in his medical opinion. (Dep. 14, 15, 26.) It was this medical opinion that was adopted by the administrative judge. Therefore, although there is an error in the judge's decision, it constitutes harmless error.

The employee's final contention is that application of c. 152, § 1(7A), is unnecessary in this case, because his pre-existing condition is the result of a prior work injury. This argument is without merit as the medical evidence does not bear out the employee's claim.[2] We note that the employee was given the opportunity to submit additional medical evidence, but chose not to do so. (Dec. 3.) It is well established that the employee has the burden of proving each and every element of his claim. O'Reilly's Case, 265 Mass. 456, 458 (1929). Here, the employee has failed to sustain that burden. We affirm the administrative judge's decision as to the issues raised on appeal by the employee.

Next, we address the insurer's appeal. The insurer contends that the § 35 benefits awarded for the period of February 18, 1998 to May 27, 1998 should be reversed because the employee did not claim incapacity for that time period. (Insurer's brief, 4.) We agree. Although a benefit award may be expanded in some cases, such a finding must be supported by the medical or vocational evidence and the issue must have been tried by consent. Whitaker v. Agar Supply Co., Inc., 14 Mass. Workers' Comp. Rep. 417, 419 (2000). Not only is there no evidentiary support for such a finding in this particular case, the judge actually stated at the outset of the hearing: "We'll note that the employee is claiming temporary total incapacity benefits under Section 34 commencing on May 27, 1998 and continuing, or in the alternative Section 35 partial incapacity benefits." (Tr. 4.) This statement was not challenged or

[2] In fact, the employee denied any prior problems with his back and no questions were asked at the doctor's deposition even alluding to a prior work injury. See n.1. Further, the judge found that the employee had recovered completely from his 1987 industrial injury. (Dec. 7.)

altered by either party. Moreover, at a later point during the hearing, counsel for the insurer reiterated, and the employee answered in the affirmative, that the first date of claimed disability began on May 27, 1998.[3] (Tr. 49.) Clearly, the insurer did not concede an earlier date. As a result, this portion of the administrative judge's decision cannot stand.

We reverse that portion of the administrative judge's decision in which § 35 partial incapacity benefits were awarded prior to the actual date claimed by the employee, May 27, 1998. (Dec. 2; Tr. 4, 49.) The remainder of the administrative judge's decision is affirmed.

So ordered.

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Martine Carroll
Administrative Law Judge

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Frederick E. Levine
Administrative Law Judge

_____
Sara Holmes Wilson
Administrative Law Judge

Filed:
MC/jdm

[3] The relevant portion of the hearing transcript reads as follows:

> "Q. May 27 [1998] is the first date of your disability. That's an approximation rather than a precise date?
>
> A. Yes, I would think so."
>
> (Tr. 49.)