

**COMMONWEALTH OF MASSACHUSETTS**

**DEPARTMENT OF  
INDUSTRIAL ACCIDENTS**

**BOARD NOS. 041795-97  
024191-05**

Joseph F. Cole  
Roger Kent & Co., Inc.  
American Manufacturers Mutual Ins. Co.  
Continental Casualty Ins. Co.

Employee  
Employer  
Insurer  
Insurer

**REVIEWING BOARD DECISION**  
(Judges Costigan, McCarthy and Horan)

The case was heard by Administrative Judge Hernandez.

**APPEARANCES**

Ronald D. Malloy, Esq., for the employee  
Michael P. Mahany, Esq., for American Manufacturers Mutual Ins. at hearing  
Donald M. Culgin, Esq., and Richard W. Jensen, Esq.,  
for American Manufacturers Mutual Ins. on appeal  
Michael A. Fager, Esq., for Continental Casualty Ins.

**COSTIGAN, J.** The employee and American Manufacturers (American), the first of two insurers in this successive insurer case,<sup>1</sup> cross-appeal from a decision in which the administrative judge concluded the employee had failed to prove a new work-related injury to his neck. The judge ordered American to pay ongoing § 35 partial incapacity benefits and medical benefits, and dismissed the employee's claim of a new injury against Continental Casualty (Continental), the successive insurer. Because we agree the judge failed to consider a cumulative injury theory with respect to the employee's claim of a neck injury, we recommit the case for further findings.

On October 23, 1997, the employee suffered an injury to his lower back while lifting a rug at work. American accepted liability, and paid § 34 total incapacity

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<sup>1</sup> American was on the risk on the date of the employee's industrial injury, October 23, 1997. The parties stipulated that Continental's coverage began on October 14, 2002. (Dec. 4.)

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benefits and § 30 medical benefits. The employee returned to work nine weeks later, and worked with restrictions until April 19, 2005, when he went out from work. He continued in medical treatment for his lower back until he stopped working, and American paid for that treatment. The employee did not experience any subsequent injuries or aggravations to his lower back while working from 1997 until 2005. (Dec. 6.)

In 2002, however, the employee developed neck, shoulder and left upper extremity numbness and tingling, which were determined to be caused by diffuse degenerative disc disease of the cervical spine. On November 22, 2004, Dr. David Blaustein, one of the employee's treating physicians, noted that the employee's MRI indicated cervical osteophyte formation, with resultant significant spinal stenosis at C4-5. The employee had been developing neck pain gradually over the span of two to three years. As of February 16, 2005, Dr. Blaustein restricted the employee from heavy lifting and extreme movements of the neck. The employee's cervical spine specialist, Dr. Kirkham Wood, opined that surgery involving cervical decompression with posterior stabilization should be considered. As of July 25, 2005, Dr. Blaustein opined that the employee's pre-existing cervical spondylosis and degenerative disc disease had been aggravated considerably by repetitive lifting and carrying of heavy objects at work. He further opined that the employee's repetitive work activities caused his cervical radiculopathy and upper extremity weakness, the employee's work was the major cause of his neck symptomatology, and he was disabled from all gainful employment. (Dec. 7-9.)

On September 25, 2005, the employee was evaluated by Dr. Michael DiTullio, who opined the April 27, 2005 MRI of the employee's cervical spine revealed degenerative disc disease with some spinal cord compression. Continental's medical expert, Dr. Giles Floyd, examined the employee on October 11, 2005. He opined the degenerative changes in the cervical spine were due, in part, to the naturally progressive deterioration of aging, and not causally related to the employee's work activities. Dr. Floyd noted the employee did not report any specific trauma to his

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neck, but he acknowledged the employee's work activities could have accelerated the degeneration. (Dec. 9-10.)

The employee filed a claim against Continental, alleging both cervical and lumbar injuries. Following a § 10A conference before a different administrative judge, at which the employee's motion to join American was allowed, Continental was ordered to pay the employee § 34 benefits prospectively, from and after January 10, 2006. A denial issued in favor of American. The employee and Continental cross-appealed to an evidentiary hearing. The hearing judge denied the employee's motion to join a claim for § 34A permanent and total incapacity benefits. (Dec. 2-4.)

The employee underwent a § 11A impartial medical examination by Dr. Olarewaju Oladipo on August 3, 2006. Doctor Oladipo diagnosed cervical spondylosis with stenosis, lumbar degenerative disc disease with right-sided radiculopathy, and exacerbation of chronic low back pain. He opined the degeneration in the employee's cervical and lumbar spine was pre-existing, and that the employee's cervical complaints were not caused by any specific work injury, but were due to wear and tear. While the impartial physician felt the employee was disabled from returning to his former employment, he also opined the employee was physically capable of performing other jobs with restrictions. (Dec. 12-13.)

The judge found that because no specific incident or series of incidents at work had aggravated the employee's neck condition, there was no causal connection between his neck symptomatology and his work activities. (Dec. 15-16.) The judge adopted the medical opinions of Drs. DiTullio, Floyd and Oladipo as more persuasive than those of the treating physicians.<sup>2</sup> (Dec. 21.) He wrote:

I find that the employee and his treating physicians failed to describe a *specific incident* or *series of incidents* in the employee's work that "combined with" the pre-existing neck condition and caused Mr. Cole's disability. Dr. Blaustein opined that the employee was suffering from cervical stenosis and arthritis with chronic neck pain and may need surgery and physical therapy to treat this condition. However, Dr. Blaustein did not opine that this condition

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<sup>2</sup> The judge allowed additional medical evidence on the basis of the inadequacy of the impartial report and the complexity of the medical issues. (Dec. 5.) See § 11A(2).

was caused by or arose out of Mr. Cole's employment. Dr. DiTullio exclusively treated the employee's lower back condition and did not address the employee's cervical condition. Dr. Wood opined that the employee suffers from degenerative cervical spondylosis, cervical stenosis and impending myelopathy but he did not offer an opinion as to the cause of the employee's condition or relate it to his employment. The treatment notes of Dr. Wood and Dr. Blaustein do not document any incidents or injuries to the employee's neck while working.

However, both Dr. Wood and Dr. Blaustein opined, verbatim, that the employee's work aggravated this condition. Dr. Pennell failed to document an injury, trauma or event involving the employee's neck but opined that the employee's neck symptoms and need for surgery was a [sic] result of his strenuous activities in the course of his employment between 2002 and April 19, 2005.<sup>[3]</sup> However, the aforementioned physicians do not support their opinions. Symptom aggravation does not necessarily indicate a new injury. The evidence offered by the employee does not support a finding that his current disability is causally related to any neck injury he allegedly suffered at work.

(Dec. 15-16; emphasis added.) The judge further found the employee's lower back impairment, while fundamentally unchanged for eight years after his initial recovery, was undergoing a natural progression resulting in partial incapacity as of April 19,

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<sup>3</sup> While he did not adopt them, the judge did discuss the medical opinions of Drs. Wood and Pennell causally relating the aggravation of the employee's neck symptomatology to his constant and repetitive heavy lifting at work. (Dec. 11-12.) The judge recounted Dr. Pennell's opinions:

On March 8, 2007, Dr. Pennell evaluated the employee and opined that the employee suffered from traumatic herniation of the L3-4 disc with chronic low back pain and right sciatica as well as traumatic aggravation of advanced degenerative changes of the cervical spine with stenosis, neck pain and radicular symptoms. Dr. Pennell opined that the first condition was a result of the work accident in 1997. Dr. Pennell opined that the second condition was consistent with the employee's constant heavy lifting and carrying at work performed between 2002 and April 19, 2005. (Exhibit 7A). Dr. Pennell opined that the employee was totally and permanently disable[d] for gainful employment. Dr. Pennell further opined that the major cause of the employee's neck symptoms and need for surgery was his strenuous activities in the course of employment between 2002 and April 19, 2005.

(Dec. 12.)

2005. For that reason, the judge found no new work-related back injury, and attributed the employee's partial incapacity directly to that 1997 lower back injury for which American had accepted liability. (Dec. 18-19.)

The employee and American both argue the judge erred by analyzing the neck injury claim solely under the theory of a specific traumatic event or events at work, rather than a cumulative work injury. We agree. The judge found the employee had "failed to describe an actual injury to his neck while working and the employee's gap period medical evidence failed to document an actual work injury related to his neck." (Dec. 16.) As the employee points out in his brief, (Employee br. 11-12), the judge mentioned the absence of proof of a specific traumatic injury to the employee's neck at least six times in the decision. (Dec. 10-16.)

It is well-established that to be compensable, an injury "need not result from a specific incident or occur at a definite time, but 'may develop gradually from the cumulative effect of stresses and aggravations.' " Kautz v. Sloane & Walsh, 19 Mass. Workers' Comp. Rep. 54, 62 (2005), quoting Trombetta's Case, 1 Mass. App. Ct. 102, 105 (1973). Here, the judge improperly held the employee to proving a "specific incident or series of incidents" at work had caused or contributed to his neck condition, (Dec. 15), and failed to consider the cumulative effect of lifting activities over the course of the employee's thirty-plus years on the job. (Dec. 5.) Recommittal is appropriate for further findings regarding the employee's cumulative injury claim. § 11C.

We therefore recommit the case for further findings consistent with this opinion. The judge must note that in light of the employee's pre-existing cervical degenerative disease, Continental, the successive insurer, raised the defense of § 1(7A) "a major" causation. See Bernard v. Hallsmith Sysco, 12 Mass. Workers' Comp. Rep. 397, 402 (1998)(applying § 1(7A) "major" causation analysis to work-related aggravation of degenerative spine); Ford v. O'Connor Constructors, Inc., 23 Mass. Workers' Comp. Rep. 145 (2009). Therefore, should the judge determine the employee did sustain a work-related cumulative neck injury, he will have to undertake

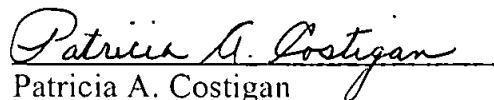
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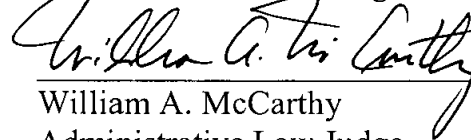
the now-familiar § 1(7A) analysis under Vieira v. D'Agostino Assocs., 19 Mass. Workers' Comp. Rep. 50 (2005). Should he determine that the employee's work activities were and remain a major cause of his neck condition, the judge must revisit his assessment of the employee's earning capacity in light of that additional work-related contributor to the employee's claimed incapacity. Cf. Gray v. Sunshine Haven, Inc., 22 Mass. Workers' Comp. Rep. 175, 177 (2008), citing Hummer's Case, 317 Mass. 617 (1945)(non-work-related disabling factors must be culled out of incapacity analysis).

Accordingly, we recommit the case for further findings consistent with this opinion.

So ordered.

  
Patricia A. Costigan

Administrative Law Judge

  
William A. McCarthy

Administrative Law Judge

  
Mark D. Horan

Administrative Law Judge

Filed:

