COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS	**BOARD NO. 012407-10**
Keith Villiard	Employee
Rogers Insulation Specialist	Employer
Commerce and Industry Insurance	Insurer

REVIEWING BOARD DECISION
(Judges Levine, Fabricant and Koziol)

The case was heard by Administrative Judge McDonald.

APPEARANCES
Arinda R. Brooks, Esq., for the employee
Diane Cole Laine, Esq., for the insurer

LEVINE, J. The insurer appeals from an administrative judge's decision denying its complaint for modification or discontinuance. For the reasons that follow, we reverse part of the decision and allow the insurer's complaint for discontinuance as of August 1, 2011, the date of the impartial examination.

On or about March 1, 2010, the employee, an insulation installer, injured his back at work while carrying a heavy bundle of insulation. (Dec. 4.) The insurer accepted the claim, and began paying § 34 temporary total incapacity benefits.[1] On January 25, 2011, the insurer filed a complaint to modify or discontinue payment of compensation; the complaint was denied following a § 10A conference. The insurer appealed to a § 11 evidentiary hearing. (Dec. 2.)

On August 1, 2011, Dr. Kenneth Polivy performed a § 11A impartial examination of the employee. Dr. Polivy noted that, at the time of his examination, the employee complained of ongoing lower back pain and leg pain, which had progressed from his right to his left leg. However, Dr. Polivy found no objective

[1] We take judicial notice of documents in the board file. Rizzo v. M.B.T.A., 16 Mass. Workers' Comp. Rep. 160, 161 n.3 (2002).

evidence of orthopedic impairment. He opined that the employee's subjective complaints involving the lumbar spine were secondary to lumbar spondylitis, and his current left leg symptoms were "secondary to ongoing wear and tear degeneration in the lumbar spine which was not accelerated or aggravated by the alleged work injury." (Ex. 2, report of Dr. Polivy.) He noted that the employee's MRI of March 12, 2010, approximately two weeks after the work injury, indicated evidence of a right lumbar disc protrusion. "The natural history of this disc protrusion is a gradual resolution with time over the span of one year." Id. Finally, Dr. Polivy opined: "Mr. Villiard has reached an end result from his work injury of March 1, 2010. I find no restrictions from a return to full prior work activities at present." Id.; see Dec. 5-6. Neither party deposed Dr. Polivy. (Dec. 3.)

At hearing, the insurer raised as issues extent of disability, causal relationship, and § 1(7A). The employee moved to introduce additional medical evidence due to the inadequacy of Dr. Polivy's report and/or the complexity of the medical issues. (Tr. 3-4; see Employee's "Motion for Inadequacy and/or Complexity.") Rizzo, supra. The insurer opposed the motion, except with respect to the allowance of "gap" medicals between January 25, 2011 (the date of filing of the insurer's complaint) and August 1, 2011 (the date of the impartial examination). (Tr. 5-6.) The judge agreed to admit additional medical evidence for the gap period:

> I would concur that Doctor Polivy's report does not address the *extent of the employee's disability* for the period from January 25, 20[1]1 to the date of his examination, and *to that extent the report would be inadequate* and I have allowed the introduction of additional medical evidence for the period prior to his examination.

(Tr. 6; emphases added.) In his decision, the judge restated the ruling he had made at hearing, allowing additional medical evidence "only for the period prior to the doctor's examination." (Dec. 2-3.)

The insurer submitted the January 18, 2011, report of Dr. Steven Sewall, who

opined that the March 1, 2010, work injury caused a " 'flare-up of pre-existing degenerative disc disease.' " (Dec. 6.) In Dr. Sewall's opinion, the aggravation was much improved, and the employee could return to his regular work if he practiced proper body mechanics for lifting and bending. Id.

The employee submitted the March 23, 2011, report of Dr. Michael Marciello, his treating physician since 2007, (Dec. 1, 6), as well as other treatment records. Dr. Marciello reported earlier work-related back injuries, (Dec. 6-7),[2] and opined the work incidents of November 2008 and March 2010 were major causes of the employee's disability and need for treatment. (Dec. 7). He further opined that, at the time of his examination, the employee was disabled from all employment. (Dec. 8.)

The judge credited the employee's testimony regarding his pain and limitations, including that he could lift no more than five pounds, and that at the time of hearing, he had pain primarily in his right leg, which occasionally shifted to the left leg, and pain in his entire low back. (Dec. 5.) The judge concluded that the employee's present level of pain prevented him from returning to his former work. (Dec. 10.)

Addressing causal relationship, the judge found, "based upon the opinions of Dr. Marciello, Dr. Polivy, and Dr. Sewall," that the employee had pre-existing degenerative disc disease which combined with the injury of March 1, 2010. (Dec. 9.) He adopted Dr. Marciello's opinion that "the incident of March 1, 2010, is a major cause of the employee's present disability and need for medical treatment." (Dec. 11;

[2] The judge also found that "these conditions, including 2007 and 2008 arose out of the employee's work, and therefore would be compensable under the Act." (Dec. 8.) While Dr. Marciello first treated the employee for back pain in 2007, his March 23, 2011, report does not causally relate the 2007 problems to his work. (See Ex. 4.1.) Dr. Marciello did opine the "work-related incidents of November 2008 and March 2010 are major, but not necessarily predominant cause [sic] of Mr. Villiard's disability and current need of medical treatment." (Ex. 4.1, Dec. 7.)

see Dec. 7.) However, the judge ruled that the "a major cause" standard of § 1(7A) [3] was not applicable because the judge adopted the opinion of Dr. Marciello and the credible testimony of the employee that the employee had "several prior injuries to his back in 2008 and 2009 that . . . were compensable under this chapter." (Dec. 9, 11-12.) Accordingly, the judge held it was necessary only to find that the March 1, 2010, injury "contributed in the slightest degree to the employee's present disability and incapacity . . . ." (Dec. 9.) See Rock's Case, 323 Mass. 428, 429 (1948).

Turning to disability, the judge adopted Dr. Marciello's restrictions as of March 11, 2011, limiting lifting to ten pounds and prohibiting repetitive bending, stooping, pushing or pulling, as well as prolonged sitting or standing. (Dec. 8, 10.) The judge went on to find the employee totally incapacitated "at present." He adopted Dr. Marciello's opinion "that as of March 11, 2011, the employee remained totally disabled from all work because of the injury of March 1, 2010." (Dec. 11.) The judge denied the insurer's complaint to modify or discontinue the employee's § 34 benefits. (Dec. 13.)

The insurer argues that the judge erred by adopting Dr. Marciello's opinion, which was admitted to address disability during the "gap period," to support ongoing incapacity and causal relationship during and after the gap period. We agree. " 'Gap medicals, when allowed for [the] reason of providing evidence in the retrospective pre-examination period, may not then be used for other medical issues in the case, such as *present* disability.' " Perez v. Work Inc., 20 Mass. Workers' Comp. Rep. 117, 119 (2006), quoting Mims v. M.B.T.A., 18 Mass. Workers' Comp. Rep. 96, 100 (2004.) To use gap medical evidence to establish present disability, without prior notice to the parties, violates their due process rights by "foreclosing the 'opportunity

[3] G.L. 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.

to present testimony necessary to present fairly the medical issues.' " Brzezinski v. Aerotek Energy, 24 Mass. Workers' Comp. Rep. 273, 279 (2010), quoting from O'Brien's Case, 424 Mass. 16, 23 (1996).

Similarly, without prior notice to the parties, those same "gap medicals," may not be used to support a finding of ongoing causal relationship. Ward v. Frito Lay, Inc., 19 Mass. Workers' Comp. Rep. 141, 142 (2005)("where there is no recognition that the medical evidence was opened up on the issue of causation, the reviewing board cannot conclude that the judge had that in mind when he made his findings"). Moreover, where gap medical evidence was allowed only for disability prior to the impartial examination, those medicals may not be used to determine causal relationship during the gap period. Serabian v. Herb Chambers Ford, 23 Mass. Workers' Comp. Rep. 57, 59-60 (2009).

Here, the judge erred by relying on Dr. Marciello's opinion to determine ongoing incapacity and causal relationship, and to defeat the application of § 1(7A), where that opinion was admitted only to address disability during the gap period. We agree with the insurer that, under these circumstances, the only appropriate medical evidence on which the judge could rely for disability subsequent to the impartial examination, and for causal relationship during the gap period and thereafter, is the impartial physician's report. See Serabian, supra. We think that Dr. Polivy's opinion does support the judge's finding of a causally related disability up to the date of his impartial examination, though for reasons different from those cited by the judge. The judge erroneously based his finding that § 1(7A)'s "a major cause" standard was inapplicable on Dr. Marciello's opinion that the employee had prior compensable injuries which contributed to his disability. Dr. Polivy, on whose opinion the judge should have relied, opined that "degeneration in the lumbar spine . . . was not accelerated or aggravated by the alleged work injury [of March 1, 2010]." (Ex. 2; Dec. 6; see Ins. br. 13.) In other words, the employee's pre-existing condition did not combine with his 2010 work injury, thereby defeating the application of § 1(7A). Applying this simple causation standard, Dr. Polivy's opinion is adequate to support

causal relationship prior to the date of his examination. Referring to the employee's March 12, 2010, MRI, Dr. Polivy wrote: "The natural history of this disc protrusion is *gradual resolution with time over the span of one year*. . . . . [I]t is my opinion that Mr. Villiard has reached an end result *from his work injury of March 1, 2*010." (Ex. 2; emphasis added.) Thus, though the judge erred by relying on Dr. Marciello's opinion to defeat the application of § 1(7A) and support causal relationship during the gap period, such error does not require recommittal, as it did in Serabian, supra, because the prima facie medical opinion supports disability and causal relationship through the gap period, but no further. [4]

With respect to disability, Dr. Polivy opined that, as of August 1, 2011, the employee had reached an end result from his 2010 work injury, and was not restricted from returning to his prior work activities. Moreover, in Dr. Polivy's opinion, any complaints the employee had with respect to his back or his left leg were causally related to his degenerative lumbar condition, which was not "aggravated or accelerated" by the March 2010 work injury. (Ex. 2; Dec. 5-6.) Thus, the prima facie medical evidence does not support any causally related disability after August 1, 2011. See Nunes v. Town of Edgartown, 19 Mass. Workers' Comp. Rep. 279, 283 (2005), citing Rock's Case, supra ("doctor's opinion of *no* causal relationship did not satisfy the employee's lesser burden of proving his work-related injury contributed 'to the slightest extent' to the need for surgery"); Gonzales v. City of Lynn, 18 Mass. Workers' Comp. Rep. 195, 201 (2004)(where impartial physician did not opine that the employee's work injury contributed in any way to any period of incapacity,

[4] We note that the judge erred by finding the employee had pre-existing degenerative disc disease which combined with the injury of March 1, 2010, "based on the opinions of Dr. Marciello, Dr. Polivy, and Dr. Sewall." (Dec. 9.) The opinions of those three doctors were not consistent with one another. Dr. Sewall was the only physician whose opinion clearly supports a finding of a combining pre-existing condition. More importantly, the judge could not properly rely on the opinions of Dr. Marciello and Dr. Sewall to establish causal relationship. However, since the judge ultimately found that § 1(7A) did not apply, and Dr. Polivy's opinion supports this finding, the error was harmless.

employee has not satisfied burden of proving work injury was "even to the slightest extent a contributing cause of [her] subsequent disability").

Accordingly, we affirm so much of the decision that denied and dismissed the insurer's complaint for modification or discontinuance for the period of time prior to August 1, 2011, the date of the § 11A examination. We reverse so much of the decision that denied the insurer's aforesaid complaint for the period of time beginning August 1, 2011, and order that incapacity benefits discontinue as of August 1, 2011.

So ordered.

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Frederick E. Levine
Administrative Law Judge

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Bernard W. Fabricant
Administrative Law Judge

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Catherine Watson Koziol
Administrative Law Judge

Filed: ***January 7, 2013***