COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS	**BOARD NOS. 040365-02 049092-02**
Larry F. Couch	Employee
Gill-Montague Regional School District	Employer
Massachusetts Education and Govt. Assoc. SIG	Insurer
Town of Montague	Employer
Massachusetts Interlocal Insurance Assoc.	Insurer

REVIEWING BOARD DECISION
(Judges Costigan, McCarthy and Fabricant)

APEARANCES
Terrence A. Low, Esq., for the employee
Robert J. Riccio, Esq., for Massachusetts Education and Govt. Assoc. SIG
Kimberly Davis Crear, Esq., for Massachusetts Interlocal Insurance Assoc.

COSTIGAN, J. The Massachusetts Education and Government Association Self-insured Group (MEGA), first insurer in this successive insurer case, appeals from a decision in which the administrative judge found it was liable for the employee's ongoing total incapacity, after a closed period of total incapacity attributable to the second insurer. Because the judge failed to make necessary subsidiary findings of fact, we cannot "determine with reasonable certainty whether correct rules of law have been applied to facts that could be properly found." Praetz v. Factory Mut. Eng'g & Research, 7 Mass. Workers' Comp. Rep. 45, 47 (1993). Therefore we recommit the case for further subsidiary findings of fact and rulings of law.

The employee filed claims against each of the two insurers, citing work-related incidents in May 2002 and November 2002 respectively. The Massachusetts Interlocal Insurance Association (MIIA), the successive insurer, had paid benefits without prejudice from November 21, 2002 to February 23,

2003, for the November 21, 2002 work incident.[1] Following a § 10A conference, MEGA was ordered to pay the employee benefits from February 23, 2003 and continuing. MEGA appealed, and both claims were litigated at the de novo hearing.[2] (Dec. 2.)

On December 9, 2003, the employee underwent a § 11A impartial medical examination by Dr. John R. Corsetti. The doctor diagnosed discogenic lumbar back pain, without evidence of radiculopathy. He causally related the employee's symptoms to the work injury in May 2002, with an exacerbation attributable to the injury in November 2002. (Statutory Ex.) The doctor opined that the November 2002 exacerbation of the employee's back complaints was temporary, and that it had resolved by the time of the impartial medical examination a year later. Dr. Corsetti opined the employee's back problems noted at the examination were causally related to his May 2002 injury. The doctor discounted the effects of back-related incidents in the early 1990s on the employee's present medical status. (Dec. 3-4; Dep. 15-17.) The doctor described the employee as having returned to his baseline symptoms which, as of the examination date, consisted of chronic low back pain without radiculopathy. The doctor opined that the employee could perform light work, with no excessive squatting, sitting or lifting. (Dec. 4.)

The judge found that on May 28, 2002, when MEGA was on the risk, the employee injured his lower back moving heavy tank hoses. He reported the incident and may have missed a few days of work.[3] He returned to work on light duty and eventually resumed full duty. (Dec. 1-2.)

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[1] MIIA came on the risk as of July 1, 2002. (MEGA Ex. 1.)

[2] A conference denial of payment issued in MIIA's favor, from which the employee appealed.

[3] The employee was unsure whether he lost any time from work after the May 28, 2002 incident. (Tr. 17.) At the § 11A deposition, however, counsel for MEGA asked Dr. Corsetti if he were aware of the fact that the employee lost no time from work as a result of his back injury in May 2002. Neither employee's counsel nor counsel for MIIA objected to the question. (Dep. 19.)

The judge also found that after the employee returned to work, he continued to treat conservatively. Although he still experienced back pain, he was essentially able to perform his full job duties until November 21, 2002, when MIIA was on the risk. On that date, the employee moved a six-hundred pound pump with a co-worker, and noted the onset of the same back pain as he had experienced in May. The next morning he could not get out of bed, and the pain went down his leg. The employee had experienced episodes of back pain in the past, but they always resolved quickly, and in the years immediately prior to his 2002 injuries, he was pain free.[4] (Dec. 1, 3.)

The judge took Dr. Corsetti's "return to baseline" opinion to mean that the effects of the November 21, 2002 injury completely resolved, and the level of back pain the employee continued to experience thereafter was the same as when he returned to eventual full duty following his May 28, 2002 back injury. (Dec. 4.) Based on that finding, as well as the prospect of additional diagnostic testing and possible surgery raised by the impartial physician, the judge found that the employee's incapacity from December 9, 2003 and continuing was total, and that MEGA, the first insurer, was liable to pay benefits. (Dec. 5-6.) Adopting the impartial physician's opinions, the judge concluded that the employee's second injury at work had caused total incapacity from November 21, 2002 to December 9, 2003, and he ordered MIIA to pay § 34 and medical benefits for that closed period.

[4] The judge found that the employee was pain free prior to the May 2002 work injury. (Dec. 3.) The employee, however, testified that following a non-work related (camping) back injury in 1990 or 1991, and up to a work-related back injury in June 2001, he had normal aches and pain in his back due to aging. (Tr. 25-26.) Dr. Corsetti testified the employee had a history of intermittent back pain prior to his 2002 back injuries. (Dep. 25.) He also testified that the employee's chronic low back pain increased with the May 2002 work incident. (Dep. 16.) However, the impartial physician also referred to the employee's asymptomatic back condition prior to that incident. (Dep. 14.) On recommittal, the judge will have to reconcile these inconsistencies.

On appeal, MEGA first argues that the judge failed to make findings on the applicability of the duly raised provisions of § 1(7A). We agree. That statute provides, in pertinent 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.

General Laws c. 152, § 1(7A). Although MEGA had raised § 1(7A) as an issue in its hearing memorandum, (MEGA Ex. 1), the judge failed to list it in his decision as an issue in controversy. (Dec. 1.) The only findings he made that allude to the prior medical history necessary to determine whether § 1(7A) applies to the employee's May 28, 2002 injury claim are the following:

> Mr. Couch did have some previous episodes of back pain several years back, one at work and one camping, but reports that after a short period the pain went away and he was not troubled by back pain in the immediate years before his 2002 work injuries. . . . [The impartial physician] discounts Mr. Couch's previous complaints of back pain (in the years prior) as a *present* factor in his disability. (Dep. p. 13, line 17 to p. 14, line 16; dep. p. 15, lines 5-20.)

(Dec. 3-4; emphasis added.) These findings are wholly insufficient to address the applicability of § 1(7A) to the employee's work injury in May 2002. First, whether the employee's episodes of back pain prior to 2002 were contributing to his disability in December 2003 was not the only issue presented by MEGA's assertion of a § 1(7A) defense. The doctor's opinion that those prior back complaints were not a factor in his disability in December 2003 begs the question of whether they were a contributing factor when the employee injured his back in May 2002. Second, a pre-existing non-compensable condition need not be symptomatic in order to come within the scope of the combination injuries contemplated in § 1(7A). See Larkin v. Feeney's Fence, Inc., 19 Mass. Workers'

Comp. Rep. 78, 80 (2005). The impartial physician described, in general terms, the pre-existing medical condition at play in the employee's injury:

> It is common, in my opinion, that chronic *asymptomatic* findings on a back MRI can become symptomatic when the back is overstressed. So while the actual pathological findings may not be due to specific injury, for instance, lateral recess stenosis, clearly that did not develop at the time of the acute injury, but narrow stenotic lateral recess can become symptomatic and can cause nerve encroachment when the back is overstressed.

(Dep. 14; emphasis added.)[5] This evidence requires the judge to address whether § 1(7A) applies to the employee's claim against MEGA. The necessary analysis, set forth "in exquisite detail" in Vieira v. D'Agostino Assocs. 19 Mass. Workers' Comp. Rep. 50 (2005), bears repeating:

> [T]he administrative judge must first address the nature of the pre-existing condition: whether it stems from an injury or disease, [citation omitted], and, if so, whether it is appropriately characterized as "not compensable under [c. 152]." As to the latter inquiry, "[i]f there is any connection to an earlier compensable injury or injuries, then that pre-existing condition cannot be properly characterized 'non-compensable' for the purposes of applying the § 1(7A) requirement that the claimed injury remain 'a major cause' of disability." [Citations omitted.] It is the employee's burden to prove the compensable nature of the pre-existing condition in order to invalidate a § 1(7A) defense. [Citation omitted.] If the pre-exisitng condition is not compensable, the judge must then address the effect of its combination with the subject injury. [Citation omitted.] If the employee has not defeated § 1(7A) by successfully attacking either of these first two elements of the statute, the judge must then make findings on the last element: whether the work injury remains a major but not necessarily predominant cause of the resultant disability or need for treatment. . . .

[5] Dr. Corsetti testified that the employee's June 27, 2002 lumbar MRI showed a "two level abnormal finding," with a central disk herniation at L5-S1, which could account for the employee's complaints of radiating leg pain. (Dep. 30.) The doctor also noted there was disk dessication, a degenerative process, at the L5-S1 level. (Dep. 31.) Dr. Corsetti considered a June 1, 2003 MRI study as showing mild disc bulging, degenerative facet arthropathy at L4-5, lateral recess stenosis, disk dessication and probable mild encroachment of the L5 nerve roots bilaterally, not noted by the radiologist in the 2002 MRI. (Dep. 13, 31-33.) He could not, however, state with any degree of [medical] certainty whether or not the herniations were degenerative or causally related to the employee's claimed work injuries. (Dep. 36-38.)

Id. at 52-53. Absent such findings, we must recommit the case for further findings on this issue.

MEGA next argues that the judge erred in his application of the successive insurer rule, by finding that liability reverted to MEGA after a temporary exacerbation of the employee's low back condition from November 2002 until December 2003, for which MIIA was responsible. Under the successive insurer rule, liability is assessed against the second insurer if the second injury is "even to the slightest extent a contributing cause to the subsequent disability." Rock's Case, 323 Mass. 428, 429 (1948). However, until the administrative judge on recommittal determines whether § 1(7A) applies to the employee's claim against MEGA and, if it does, whether the employee met his burden of proving "a major" causation, we cannot say with assurance that the successive insurer rule even applies here.[6]

That said, if the judge determines that the employee's May 2002 back injury is compensable under § 1(7A), his findings relative to the employee's return to his baseline symptoms, as they were before the November 2002 injury, appear warranted by the the impartial physician's opinions:

> Q: So it would be your opinion that the injury in November of 2002 worsened Mr. Couch's condition?
>
> A: Appears it worsened it for a period of time and I think then returned. As I testified earlier, he then returned to his baseline level of function. So there was a period of worsening of symptoms followed by resolution of that exacerbation back to his baseline.
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> Q: You say he resolved back to his baseline level of function?
>
> A: No. Baseline level of symptoms. Baseline level of pain. He had chronic -- as I understand, he had chronic low back pain. Back pain

[6] Should the judge on recommittal determine that the employee's May 28, 2002 work incident was not a compensable personal injury under our act, then the employee's claim against MIIA for a November 21, 2002 injury must be assessed under simple "as is" causation, as MIIA did not raise § 1(7A) in defense of that claim. (MIIA Ex. 1.) See Gonzales v. City of Lynn, 18 Mass. Workers' Comp. Rep. 195, 201 (2004).

> increased after the injury of 5/28, he then developed leg pain after the injury of November of '02, November 21st. The leg pain then resolved and he then returned back to his baseline level of sore back without radiculopathic pain.

(Dep. 16-17.)

It appears the judge understood this and other testimony of the doctor to mean that, as of the time of the § 11A examination in December 2003, the employee's medical condition had returned to *status quo ante*, that is, as it was in the months after his first injury of May 28, 2002 and prior to his second injury of November 21, 2002. "By the time of his impartial examination on December 9, 2003, Mr. Couch's exacerbation had abated, and he had returned to the baseline level he was at during the summer of 2002." (Dec. 4.) We cannot say the judge's interpretation of the expert medical evidence in this regard was arbitrary or capricious. (See Dep. 10-11.)

We likewise reject MEGA's argument that the judge failed to acknowledge the aggravation for which MIIA was liable as the successive insurer. (MEGA br. 14.) To the contrary, the judge's findings as to the contribution of the November 2002 work injury to the employee's disability are amply supported by the impartial medical opinion of a temporary worsening, followed by a return to his post-May 2002 baseline state. (Dep. 10-11.) Cf. Garcia v. Valentine Plating Co., 17 Mass. Workers' Comp. Rep. 204, 208-209 (2003)(judge failed to make findings addressing temporary aggravation in successive insurer context).

MEGA also argues it was arbitrary and capricious for the judge to find that "it was probably unadvisable" for the employee to have returned to heavy work after his initial May 2002 injury. (Dec. 4.) We disagree. The judge had before him the impartial doctor's testimony that although the employee continued working, he did so in chronic low back pain, (Dep. 16-17); the degenerative changes in the employee's spine "are clearly permanent and will permanently lead him to be at very high risk for back injury," (Dep. 35-36); and the employee

should not return to the heavy labor he was performing at the time of both injuries -- driving a truck, lifting heavy equipment, etc. (Dep. 38-39.) That medical evidence, coupled with the fact that the employee actually re-injured his back while working that full duty, fully supports the judge's inference that the employee should not have been working full duty in the summer and fall of 2002. We defer to the judge's fact-finding on the extent of the employee's disability as being within his authority under Scheffler's Case, 419 Mass. 251 (1994) and Mulcahey's Case, 22 Mass. App. Ct. 1 (1988).[7]

MEGA finally argues that the judge erred by disregarding the impartial physician's opinions on the contribution of the employee's sneeze in February 2003 to his present medical disability. (Dep. 24-29.) There was no error, because the doctor never opined to anything more than a possibility of causal connection between the sneeze and the employee's disability. A medical expert's opinion is measured against "[t]he standard -- to a reasonable degree of medical certainty -- [which] does not mean that all possibilities other than the industrial injury are eliminated. The standard means that the the industrial injury was more likely a major cause of the employee's condition than some other cause." Pratt v. Transcend Carriers, 18 Mass. Workers' Comp. Rep. 206, 209 (2004). Dr. Corsetti not only did not opine the sneeze was "more likely than not" the cause of the employee's disability, he said just the opposite.[8] The judge would have erred, as a

[7] MEGA does not argue error in the judge's finding that the employee lacks an earning capacity.

[8] Counsel for MEGA questioned Dr. Corsetti on this issue:

> Q. Isn't it possible then that Mr. Couch's current disability and need for treatment could be caused by the sneeze and/or his preexisting degenerative condition?
> A. Well, it's possible. You said "and/or." While it's possible a sneeze alone could create such a level of disability, *I think it's less likely*. I think it's more likely the patient had a condition that was very labile and the sneeze pushed him over the edge because of his preexisting disease.

(Dep. 26.)

matter of law, if he had construed the expert medical testimony about the sneeze as MEGA argues he should have.

Accordingly, we recommit this case to the administrative judge for further subsidiary findings of fact on the issue of the applicability of § 1(7A) to the employee's claim against MEGA. If necessitated by those § 1(7A) findings, the judge must make further findings of fact and rulings of law on the applicability of the successive insurer rule to the employee's claim against MIIA.

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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Bernard W. Fabricant
Administrative Law Judge

Filed: **June 27, 2006**