COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 029930-08**

Lazaro Campos	Employee
SMCS Trugreen Landcare	Employer
Zurich American Insurance	Insurer

REVIEWING BOARD DECISION
(Judges Fabricant, Koziol and Calliotte)

The case was heard by Administrative Judge Benoit.

APPEARANCES
John G. Neylon, Esq., for the employee
John J. Canniff, Esq., for the insurer

FABRICANT, J. The insurer appeals from a decision awarding the employee weekly § 34A permanent and total incapacity benefits. We agree that the award cannot stand due to the contradictory and inconsistent nature of the § 11A opinion, which rendered it inadequate as a matter of law. We recommit the case for the admission and consideration of additional medical evidence.

The non-English speaking employee, a landscaper with limited education from Guatemala, injured his back on October 22, 2008, when lifting the arm of a trailer. (Dec. 6.) He underwent a lumbar discectomy on October 5, 2009, and never returned to work. (Dec. 6, 7; Dep. 78.)

The insurer accepted the case and paid § 34 benefits from the date of injury. In a prior hearing decision of June 23, 2011, the judge denied the insurer's complaint for modification of § 34 weekly benefits. The employee subsequently filed a claim for §34A benefits, to which a new complaint to discontinue benefits was joined. (Dec. 3.) At the hearing on the § 34A claim, the insurer raised the affirmative defense of §1(7A).[1] The January 12, 2012 § 11A report of impartial

[1] General Laws c. 152, §1(7A), provides in pertinent part:

physician, Dr. Michele Masi, was admitted into evidence. Finding the medical issues complex, the judge allowed additional medical evidence specifically limited to notes from pain clinic physician, Dr. Cabantog, which Dr. Masi had indicated would be helpful, as well as the results of objective testing recommended by Dr. Masi. (Dec. 4; Tr. I, 17, 18.) On November 2, 2012, Dr. Masi was deposed and given the opportunity to review this additional medical evidence.[2] (Dec. 8.)

Following Dr. Masi's deposition, the employee filed a series of motions seeking to admit the August 2012 report of Dr. James Nairus. The first of these motions was filed on November 20, 2012. The insurer objected, and the judge did not rule on the motion at that time. On June 24, 2013, the employee again filed a motion for the admission of additional medical evidence, and the insurer once again objected. On August 5, 2013, the judge denied both motions, but kept the record open for any additional motions. (Dec. 4.) On August 21, 2013, the employee requested reconsideration of his motions to submit additional medical evidence, and, once again, the insurer objected. (Dec. 4-5.) In his September 5, 2013 decision, the judge stated:

> "My finding of complexity was based on comments of Dr. Masi in her report regarding her suggestion of additional objective tests and the recent reports of Dr. Cabantog regarding Pain Clinic treatment. The record was only opened to allow into evidence specific materials about which Dr. Masi had expressed interest."

(Dec. 5.) The judge then denied the employee's third motion to admit the August 2012 report of Dr. Nairus. Adopting Dr. Masi's opinion, the judge found that the work injury is a major, but not necessarily predominant, cause of the employee's present disability. (Dec. 5.)

> 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.

[2] Dr. Masi also had before her the reports of Dr. Nairus and Dr. Yablon. (Dec. 8.)

On appeal, the insurer argues that, in finding the employee met his burden under the heightened § 1(7A) causation standard that the work injury was "a major cause" of his ongoing disability and need for treatment, the judge mischaracterized the §11A examiner's opinion. We agree that the judge misinterpreted the impartial opinion, but hold that it was inherently contradictory, and therefore inadequate as a matter of law, thus requiring the allowance of the employee's motion for additional medical evidence.

Addressing § 1(7A) in her report, Dr. Masi indicates that the employee did have pre-existing degenerative disc disease which combined with the work injury, and that it is more probable than not the alleged industrial injury or disease remains a major but not necessarily predominant cause of disability or the need for treatment. (Ex. 1.) However, at her deposition, Dr. Masi offered contradictory testimony. Within the space of a few questions, she testified both that the work injury is "a major but not necessarily predominant cause" of the employee's current disability, and that the work injury is acting in a "not necessarily major" fashion. [3] (Dep. 94-95.) This change is not based on the consideration of any new

[3] The colloquy between insurer's counsel and Dr. Masi was as follows:

> Q: Is the original injury still a major cause of the ongoing disability?
> A: I'm of two minds for that. There is the postop status and the lost ankle reflex. In that sense those are related to the work. Whether his current pain is related to progression of lumbar degenerative changes is harder to know. In the absence of any prior records, I'm left with the fact that he had no symptoms before the – before October of 2008. I think the work injury is not the sole – it's a major but not necessarily predominant cause of his current disability. I think there is also lumbar degenerative changes to some degree.
> Q: So the original injury is still acting in some fashion upon Mr. Campos?
> A: Yes.
> Q: And did I hear you say that it is acting in a major fashion?
> A: Not necessarily major.
> Q: Not necessarily major?
> A: Although he continues to have reports of left foot numbness, there is very little consistency in his examination, particularly, I think there is no active evidence for active nerve root irritation at this point.

(Dep. 94-95.)

evidence, cf. Perangelo's Case, 277 Mass. 59, 63 (1931)(physician's last opinion prevails over his prior contradictory opinion where second opinion is based on new evidence), nor did Dr. Masi subsequently clarify her opinion. The §11A impartial physician's opinion must be unambiguous on critical issues such as causation. An ambiguous, confusing and inconsistent opinion is inadequate as a matter of law. Roscoe v. Brigham and Women's Hosp., 28 Mass. Workers' Comp. Rep __ (May 22, 2014); La v. Pre-Owned Elecs. Co., 24 Mass. Workers' Comp. Rep. 199 (2010). Where, as here, an impartial examiner's opinion is simply self-contradictory, the judge may not choose which of the contradictory testimony to adopt. Roscoe, supra; La, supra; Orlofski's Case, 76 Mass. App. Ct. 1133 (2010)(Memorandum and Order Pursuant to Rule 1:28); see Dyan v. S&F Concrete, 25 Mass Workers' Comp. Rep. 405, 412 (2011)(self-contradictory impartial medical report cannot be prima facie evidence and judge must allow employee's motion for additional medical evidence).

Recommittal, not reversal, is appropriate because the employee unsuccessfully filed several motions following the deposition of the impartial physician, seeking to introduce additional medical evidence. La, supra; see Roscoe, supra; cf. Orlofski's Case, supra (recommittal for supplementary medical evidence unnecessary where employee failed to move for admission of additional medical evidence).

Accordingly, we vacate the decision and the benefit award, and recommit the case for the admission and consideration of additional medical evidence and further findings consistent with this opinion.

So ordered.

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Bernard W. Fabricant
Administrative Law Judge

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Catherine Watson Koziol
Administrative Law Judge

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Carol Calliotte
Administrative Law Judge

Filed: **July 30, 2014**