COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 016173-97**

Leeanne M. Studzinski	Employee
FM Kuzmeskus, Inc.	Employer
School Transportation Assoc. of Mass.	Insurer

REVIEWING BOARD DECISION
(Judges Wilson, McCarthy & Smith[1])

APPEARANCES
Jack D. Curtiss, Esq., for the employee
Alec E. Cybulski, Esq., for the insurer

WILSON, J. The employee appeals from the decision of an administrative judge, who denied and dismissed her claim for weekly incapacity benefits. Because the judge's findings lack support in the record and the § 11A medical report and deposition on which the judge relied are structurally inadequate, it is appropriate to recommit the case for further proceedings and findings.

Leeanne Studzinski was forty years old at the time of the hearing. On April 15, 1997, she was performing her usual job as a bus driver when her bus was struck from behind by another bus.[2] The employee immediately experienced nausea and neck and shoulder stiffness, and was taken to an emergency room by her employer. After being discharged from the emergency room that same day, she followed up with her primary care physician. Subsequently, she treated at the Dartmouth Medical Center and Mary Hitchcock Clinic, where she participated in a pain management program. (Dec. 3.) At the time of the hearing, the employee continued to complain of right, upper body pain and numbness. (Tr. 37.) She has not returned to any employment. (Dec. 4.)

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[1] Judge Smith no longer serves as a member of the reviewing board.

[2] The errant bus was also owned by the employer in this matter.

The insurer commenced payment of weekly incapacity benefits on a without prejudice basis from April 15, 1997 to October 1, 1997. (Dec. 4.) Thereafter, the employee filed a claim for further benefits, which the insurer resisted. Following a § 10A conference denial of the claim, the employee appealed to a hearing de novo. (Dec. 1.)

The issues raised at hearing were liability, incapacity, extent thereof and causal relationship. (Dec. 1.) The employee testified as did one of the employer's co-owners, whose testimony centered on post-accident job offers made to the employee. (Dec. 2; Tr. 61-62.)

Pursuant to § 11A, the employee was examined by Dr. Alan Bullock, who diagnosed a neck strain superimposed on degenerative changes. Dr. Bullock further opined that, although she should do a home exercise program, the employee requires no further medical treatment and that, had it not been for her pre-existing condition, the work related neck strain would have subsided in six to eight weeks. (Statutory Ex. 1.) In his deposition, Dr. Bullock testified that "the major part" of the employee's current condition is degenerative changes. (Dep. 45.) The judge's denial of the employee's motion to have Dr. Bullock's report declared inadequate and the medical issues complex left his opinions as the sole medical evidence. (Dec. 2; Tr. 3-10.)

In his decision, the administrative judge found that the employee had suffered an industrial injury on April 15, 1997. Adopting the opinions of Dr. Bullock, the judge ruled that the employee returned to baseline eight weeks after her injury, that "the major predominant cause" of the employee's current condition is degenerative changes unrelated to her work injury, and that she could have returned to work in either of two positions that "were available with the Employer at that time." (Dec. 5.)

On appeal, the employee asserts that Dr. Bullock's report lacks the required statement of causation as set forth in G.L. c. 152, § 1(7A).[3] In his deposition, Dr.

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[3] General Laws c. 152, § 1(7A), as amended by St. 1991, c. 398, § 14, provides:

> 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

Bullock was asked his opinion of the "major predominant cause of the employee's condition." He replied, "As of June of 1998 when I saw her, I would have to think that the major part of her pain was the degenerative changes that we saw on x-ray studies." (Dep. 45, emphasis added.) Because the proper inquiry is whether the work injury remains a major cause of the employee's present medical condition, this statement does not satisfy the § 1(7A) standard. Even though the impartial examiner opined that the major part of the employee's pain was caused by degenerative disease, this opinion neither addresses nor rules out the necessary opinion on whether the work injury remains a major cause of the employee's condition. In Robles v. Riverside Mgmt., Inc., 10 Mass Workers' Comp. Rep. 191, 196 (1996), we observed that "judges must find whether the compensable injury that combined with the pre-existing, noncompensable condition to cause disability or needed treatment continues to be 'a major cause,' among any number of major causes . . . ." As the medical opinion here is thus lacking, the report and deposition are facially inadequate. On recommital, the administrative judge must either address specific questions to the § 11A examiner to rectify this shortcoming in the causal relationship opinion, or declare the § 11A report inadequate and allow additional medical evidence.

Whichever route the administrative judge elects to follow in completing the medical evidence, he must next make explicit findings in accordance with § 1(7A) of the Act. That is, he must determine whether the industrial injury caused a physical change and precisely what that change is; whether the work injury combined with the employee's pre-existing condition, which itself was not compensable under the Act; and whether the combination of the work injury and the pre-existing condition caused or prolonged the employee's medical disability or need for treatment. If these questions are answered in the affirmative, the judge then must determine whether the compensable work injury remains a major cause of the current condition. Robles, id. at 195, 198.

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compensable only to the extent such compensable injury or disease remains a major but not necessarily predominant cause of disability or need for treatment.

The employee also asserts that there is no competent evidence in the record to support the judge's finding that the employee returned to baseline within eight weeks following her injury. Crucial and material findings lacking an evidentiary basis render a decision arbitrary and capricious. Coelho v. National Cleaning Contractor, 12 Mass. Workers' Comp. Rep. 518, 523 (1998). The judge apparently attempted to base his finding on a statement by Dr. Bullock that "if [the employee] had not had the pre-existing condition, this [work injury] strain would have gotten better within some six to eight weeks." (Statutory Ex. 1.) This statement, however, is too open-ended and inconclusive to form an adequate basis for the general finding that followed. See DiRocco v. Cooley Dickinson Hospital, 12 Mass. Workers' Comp. Rep 421, 422 (1998)(medical opinion must be more than mere speculation to have any probative value). The judge must revisit the issue of duration of the medical disability, as well as determine the extent of the employee's physical disability in light of the circumstances of a work-related strain superimposed on pre-existing, degenerative disease.

Lastly, the employee asserts several errors in the judge's finding that the employee could have returned to work for the employer either as a bus driver or as a bus monitor, "positions which were available with the employer at that time." (Dec. 5.)

First, there was no evidence that a bus driver offer had been conveyed to the employee. The only job offer testimony elicited pertained to the job of bus monitor. (Tr. 40, 61-62.) Moreover, the judge's finding that the employee was capable of performing the bus monitor job lacks any analysis of its suitability as required by § 35D, which states in pertinent part:

> For purposes of sections thirty-four, thirty-four A and thirty-five, the weekly wage the employee is capable of earning, if any, after the injury, shall be the greatest of the following:-
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> . . .
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> (3) The earnings the employee is capable of earning in a particular suitable job; provided, however, that such job has been made available to the employee and he is capable of performing it. . . .

G.L. c. 152, § 35D. Next, although the bus monitor job pays less than the employee earned at the time of her work injury, the judge made no allowance for this pay differential. (Tr. 62.) Finally, the judge's reference to positions available "at that time" does not fix a date on which the employee could have commenced working. (Dec. 5.)

Accordingly, we recommit this case to the administrative judge for further findings consistent with this decision.

So ordered.

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Sara Holmes Wilson
Administrative Law Judge

Filed: December 29, 2000

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William A. McCarthy
Administrative Law Judge