COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD # 055172-98**

Lillian Ortiz-Sanchez	Employee
Inter-Connection Technology	Employer
Metrowest Health, Inc.	Self-Insurer

REVIEWING BOARD DECISION
(Judges Maze-Rothstein, McCarthy and Costigan)

APPEARANCES
Chester L. Tennyson, Jr., Esq., for the employee
Mark A. Sullivan, Esq., for the insurer at hearing
Kerry G. Nero, Esq., for the insurer on brief

MAZE-ROTHSTEIN, J. We have the employee's appeal from a decision denying her claim for workers' compensation benefits for a chronic pain condition, as a result of fibromyalgia. The employee argues that the judge mischaracterized the § 11A physician's causation opinion, and based his denial of benefits on that errant view of the medical evidence. We agree that the judge misconstrued the expert's opinion and reverse the denial of benefits. See G. L. c. 152, § 11C. The employee also argues that the evidence does not support the work history findings. We agree with this assertion as well and recommit the case for an assessment of the employee's earning capacity. See G. L. c. 152, § 11D.

At the time of hearing, the employee, Lillian Ortiz-Sanchez, was a single, forty-four year old native of Puerto Rico, where she had completed high school. She immigrated to the United States in 1988 and, in 1989, began working with the employer as an assembler, a job which involved putting together wire tubing and cable harnesses. (Dec. 4.) To accomplish that, Ms. Ortiz Sanchez pulled cables around a table and tied them with plastic wraps using hand tools such as wire strippers and crimpers. Id. She

remained in this position until some time in 1996 when she became a quality control inspector. Id.

In September of 1998, Ms. Ortiz-Sanchez began feeling symptoms in her wrists. She often dropped things, and had difficulty holding tools and materials. (Dec. 5.) Her wrist pain increased and spread into her forearms and up her neck. She was diagnosed with carpal tunnel syndrome. A left carpal tunnel release was performed on June 11, 1999, her last date of employment. Id. Unfortunately, the surgery was to no avail. Her symptoms worsened requiring the use of splints on both hands. Even basic household tasks became unbearable. (Dec. 5-6.)

The self-insurer paid the employee weekly § 34 temporary total incapacity benefits without prejudice from June 14, 1999 through October 19, 1999. See G. L. c. 152, § 8(1). Ms. Ortiz-Sanchez claimed ongoing benefits thereafter. [1](Dec. 1.) That claim was denied after a § 10A conference. The employee appealed to a full evidentiary hearing. Id. The employee was examined pursuant to the provisions of G. L. c. 152, § 11A. The judge allowed the self-insurer's motion to submit additional expert medical testimony due to complexity, and permitted the parties to introduce their own medical evidence.[2] Id.

The judge adopted the § 11A examiner's opinion, the opinion of employee's expert, Dr. Michael Kane, and that of the self-insurer's expert, Dr. Peter Dewire, that the employee suffered not from carpal tunnel syndrome but from fibromyalgia or a myofacial pain syndrome, affecting her arms, wrists and hands. (Dec. 7-8, 10.) As to causation, although Dr. Kane and, to some degree, the §11A examiner, found that her work

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[1] Benefits were paid without prejudice. See G. L. c, 152, § 8(1), as amended by St. 1991, c. 398, §§ 23 to 25. The insurer disputed liability at both the § 10A conference and at the § 11 hearing. (Dec. 2.) Technically, the employee should have claimed benefits from and after June 14, 1999.

[2] General Laws c. 152, § 11A, gives an impartial medical examiner's report the effect of "prima facie evidence [with regard to the medical issues] contained therein," and expressly prohibits the introduction of other medical testimony unless the judge finds that additional medical testimony is required due to the complexity of the medical issues involved or the inadequacy of the report. See O'Brien's Case, 424 Mass. 16 (1996).

activities aggravated her symptoms, the judge was not persuaded that the work activities caused or aggravated her underlying condition; it was more likely, the judge concluded, that the employee developed this condition independently, and the effects of the condition made it increasingly difficult for her to do her work. (Dec. 11.) As to the extent of medical disability, the judge adopted the opinions of the § 11A examiner that the employee had the capacity to work, but should avoid repetitive use of her hands and arms, and heavy lifting, pushing or pulling. (Dec. 8-9.)

The judge concluded that the employee did not suffer a personal injury arising from and in the course of her employment and that, although she suffers from a medically disabling condition, she is not entitled to benefits under Chapter 152. (Dec. 11.)

The employee's first assertion on appeal is that the denial of her claim was based on a misread of the § 11A examiner's causation opinion and that the decision therefore must be reversed and the case recommitted. We agree.

The judge interpreted the § 11A examiner's opinion thusly; it is "equally likely that the condition was caused by her work or not caused by her work." (Dec. 7.) The deposition testimony of the § 11A doctor's elicited by employee's counsel directly contradicts that finding:

> Q: In this case, Doctor, do you have an opinion, again using the standard more likely than not, as to whether the work that Lillian Ortiz-Sanchez described to you, was either a cause or a major contributing factor in producing her disability?
>
> A: The most complete answer I could give you is consistent with either. She could have exacerbation of symptoms secondary to a medical condition that was not directly caused, and there are also patients that could potentially develop some symptoms as a direct result of their work, and I could not discern which of those was more likely than not in the patients case.

(Dep. 13.) The doctor further testified:

> Q: And, Doctor, do you have an opinion, again, more likely than not, as to whether her work aggravated that condition to produce the disability?

A: By the patient's history, it would certainly be concluded that it aggravated it since she described that the pain was worse as the day progressed and that symptoms became more problematic for her over a period of time.

Q: Do you have an opinion, again, using that standard more likely than not, as to whether the work that Lillian Ortiz-Sanchez described to you was a major contributing factor in producing her disability?

A: By the history elicited from the patient I concluded that it was reasonable that it contributed significantly to her symptomology.

Q: And in reaching that conclusion, Doctor, did you take into consideration your education, your experience, the medical records that you reviewed, the examination you performed of Lillian Ortiz-Sanchez and the history that she gave you?

A: Yes, I did.

(Dep. 14-15.)

This testimony can not be taken to mean, as the judge found, that it was equally likely that the condition was caused by her work or not caused by her work. What is ineluctably apparent is that the § 11A doctor was testifying that her work was either *a cause* or *a major contributing cause* in producing her medical disability.[3] Thus, the finding that the § 11A physician's adopted opinion did not causally relate the employee's physical condition to the workplace is completely without support in the evidence and is thus arbitrary and capricious. Because the judge misconstrued key medical evidence and found facts not based on the record, we must reverse the decision. Audette's Case, 5 Mass. App. Ct. 867-868 (1977); Rowe v. Lilly Industrial Coatings, Inc., 9 Mass. Workers' Comp. Rep. 50, 52-53 (1995); see also Dooley v. City of Lynn, 11 Mass.

[3] Interestingly, the judge noted the concert of opinions on causation: Dr. Kane concluded that repetitive, heavy hand work was consistent with the type of stress which often coincides with the onset of symptoms and that it is likely that the employee's work is an important cause of her symptoms, and Dr. Dewire opined that her initial symptoms may have been causally related to her work but did not remain so. (Dec. 8-9.)

Workers' Comp. Rep. 347, 349-351 (1997)(miscast of § 11A examiner's causation opinion grounds for reversal).

The record reveals that the self-insurer did not raise the application of G. L. c. 152, § 1(7A)[4] at hearing and did not appeal the decision. The issue is waived. See Fairfield v. Communities United, 14 Mass. Workers' Comp. Rep. 79, 81-83(2000)(discussing insurers' burden of production under § 1(7A)).

This case is therefore governed by the simple contributing cause standard for physical injuries that preceded the 1991 amendments to § 1(7A). Under that "as is" standard of causation, an aggravation or acceleration of a pre-existing disease or infirmity to the point of disablement is as much a personal injury as if the work had been the sole cause. An employee whose claim falls within this standard need only show that the employment was a contributing cause of the injury. The previous condition of the employee's health is of no consequence in determining the amount of relief to be afforded. Madden's Case, 222 Mass. 487 (1916); Robles v. Riverside Mgmt., Inc., 10 Mass. Workers' Comp. Rep. 191, 195 (1995); Dooley v. City of Lynn, 11 Mass. Workers' Comp. Rep. 347, 350 (1997). "As is" liability under the Act attaches for an industrial aggravation of a preexisting medical condition so long as it contributed even to the slightest extent to the subsequent employee's medical disability. Dooley, supra, citing Massarelli v. Acumeter Labs, 10 Mass. Workers' Comp. Rep. 703, 706 (1996).

Under this standard, the adopted expert medical opinion of the § 11A examiner supports only one result. See Newton v. Merrimac Paper Co., 10 Mass. Workers' Comp. Rep. 499, 501-502 (1996). We reverse the causation finding, as causation attaches here as a matter of law.

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[4] General Laws c. 152, § 1(7A), as amended by St. 1991, c. 398, § 14, reads in pertinent part:

> If a compensable injury or disease combines with a preexisting 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 that such compensable injury or disease remains a major but not necessarily predominant cause of disability or need for treatment.

The employee next argues that the evidence does not support the judge's findings relative to her work history. We agree. In his decision, the judge found:

> In about 1996, the employee's position changed to that of a quality control inspector. This job involved less use of her hands than did the assembly job, but still required her to perform some assembly type work. For the most part, however, she spent her time checking cable covers under a magnifier.

(Dec. 4.)

Findings of fact must be adequately supported by the evidence and reasonable inferences that can be drawn therefrom. Judkins' Case, 315 Mass. 226, 228 (1943); Candito v. Browning-Ferris Industries, 15 Mass. Workers' Comp. Rep. 119 (2001). Neither the testimony nor the evidence in the record supports the above finding. In fact, the finding contradicts the employee's testimony that as a quality control inspector she constantly used both hands and was required to pull very hard on each contact to assure tightness and that there was no defect, often using hand tools such as cutters and screwdrivers. (Tr. 13-14, 16.) This clear error requires recommittal for a re-examination of the employee's work history.

On recommittal as to the question of the extent of medical disability, if the judge accepts the physical restrictions of the adopted medical opinions, then he must make findings on how these limitations would impact the employee's job performance. Findings on the question of an earning capacity for non-trifling work on the open labor market must be made as well. See G. L. c. 152, § 11D; Scheffler's Case, 419 Mass. 251, 260 (1994); Frennier's Case, 318 Mass. 635, 639 (1949).

We reverse the decision as to the denial of benefits and recommit the case for further findings on the extent of medical disability and on the employee's capacity for work.

So ordered.

Filed: May 2, 2003

Susan Maze-Rothstein
Administrative Law Judge

William A. McCarthy
Administrative Law Judge

Patricia A. Costigan
Administrative Law Judge