COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 035795-96**

Linda Hinton	Employee
Mass Mutual Life Insurance Company	Employer
Mass Mutual Life Insurance Company	Self-insurer

REVIEWING BOARD DECISION
(Judges Levine, Carroll and Wilson)

APPEARANCES
Cornelius W. Phillips, Esq., for the employee
Michael T. Henry, Esq., for the self-insurer

LEVINE, J. The self-insurer appeals from a decision in which an administrative judge awarded the employee permanent and total incapacity benefits for an unusual pain syndrome known as complex regional pain syndrome, which resulted from a blow to the hand combined with a pre-existing central nervous system disorder. The self-insurer initially accepted the injury. Thereafter, it brought a complaint to discontinue compensation. At the § 10A conference, the employee's claim for § 34A permanent and total incapacity benefits was joined for hearing. The conference order denied the self-insurer's complaint to discontinue and awarded § 35 partial incapacity benefits after the exhaustion of § 34 temporary total incapacity benefits. Both parties appealed to a hearing de novo. (Dec. 2.)

On appeal from the hearing decision, the self-insurer argues that the judge arbitrarily refused its request to inspect medical records regarding the employee's pre-injury hospitalizations for severe depression and post-traumatic stress disorder (those records were inspected by the judge in camera and ruled irrelevant) and that the judge erred by failing to apply the causation standard of § 1(7A) applicable to combination injuries – that the industrial accident must remain a major cause of the resultant disability. We agree with the self-insurer that the judge's findings as to § 1(7A) were

deficient, and that recommittal on that issue is appropriate. Having conducted our own in camera review, we conclude that some of the disputed records are relevant. We transmit copies of those records to the administrative judge for distribution to the parties, and for whatever further proceedings are deemed necessary with regard to that matter. We summarily affirm the decision as to the self-insurer's other arguments.

The employee was injured at work on August 26, 1996, when a keyboard holder struck her left hand. Her hand swelled, and she sought conservative treatment. However, the employee's hand pain did not improve. The pain spread from her hand up the employee's arm and into her neck. After attempts to return to work, the employee left work on February 2, 1997. (Dec. 3.)

The employee's medical condition worsened. She had problems walking, speaking, eating, drinking and performing everyday life activities. Her treating physicians suspected Reflex Sympathetic Dystrophy (RSD). On May 31, 2000, the employee underwent surgery to implant a pump to dispense pain-controlling medication. The device significantly improved the employee's symptoms, but she still remained severely restricted. (Dec. 3.)

The medical experts testifying in the proceeding all agreed that the employee's diagnosis was not RSD. The employee was examined by an impartial physician, who opined that, because that diagnosis was ruled out, there was no causal connection between the employee's injury and her pain syndrome. The impartial physician opined that her pain might be explained by some form of depression or other psychiatric illness. Declaring that the case was medically complex, the judge allowed additional medical evidence. (Dec. 4-5.)

The employee's current treating physician, Dr. Mark Thimineur, opined that the employee suffered from a complex regional pain syndrome (CRPS) closely associated with RSD, and that this syndrome was superimposed on a pre-existing central nervous system (CNS) disorder. (Dec. 5.)[1] The doctor opined that the work injury triggered the

[1] There was no objection to or motion to strike Dr. Thimineur's testimony that he received a history that the employee suffered a head injury in a motor vehicle accident. (Dr. Thimineur

symptoms by its effect on the pre-existing CNS disorder. The judge adopted the opinions of Dr. Thimineur and his theories of what caused the employee's pain syndrome, and credited the employee's testimony as to her symptoms. The judge also found the opinions of the employee's treating psychologist, Terese Weinstein Katz, Ph.D., supportive of Dr. Thimineur's opinions. (Dec. 6.) Dr. Katz opined that although depression and post traumatic stress disorder can sometimes cause debilitating pain syndromes, these diagnoses – present in the employee's medical status – could not explain the severe physical symptoms suffered by the employee. (Dec. 5.) The judge found the employee's mental condition to be understandable given her physical problems. (Dec. 7.)

The judge noted that the surgical implanting of a pain device led to some relief in the employee's symptoms, but also noted that Dr. Thimineur suggested that this would only lead to some reduction in those symptoms. Despite improvement in her ability to function, the employee still has severe restrictions. The judge concluded that the employee was entitled to permanent and total incapacity benefits. (Dec. 3, 7.) The judge reserved the self-insurer's right to seek modification of § 34A benefits from the date the pump was implanted, May 31, 2000. (Dec. 7.)

The self-insurer moved to compel production of records of the employee's psychiatric treatment prior to the industrial accident. The employee objected on grounds of privilege under G. L. c. 233, § 20B. The employee, however, conceded that the judge should undertake an in camera review of the records sought to be discovered by the self-insurer.[2] The judge did review the records in camera, and ruled that they were not relevant. (March 13, 2001 Tr. 99.)

Dep. 10.) Contrast Buck's Case, 342 Mass. 766, 771 (1961)(self-insurer preserved its rights with respect to a misstatement of fact in a hypothetical question). See also P.J. Liacos, Massachusetts Evidence § 8.14 (7th ed.) ("A physician may testify as to statements of past pain, symptoms, and condition made to him when he was consulted by declarant for purposes of diagnosis and treatment").

[2] G. L. c. 233, § 20B, provides for disclosure of privileged psychiatric records:

The self-insurer argues that the judge's ruling on the pre-injury psychiatric records was an abuse of discretion, as the self-insurer could not review the records to argue their relevancy. We disagree. The judge's in camera review of the disputed records comported with the procedures set out by the Supreme Judicial Court in Commonwealth v. Bishop, 416 Mass. 169 (1993). In that case, the court formulated a five stage protocol for handling privileged records. Id. at 181-184. The first stage, the determination of whether the records are privileged, is not disputed in this case, as the psychiatric records clearly fall within G.L. c. 233, § 20B. At issue in this case is stage two, which pertains to the self-insurer's contention at hearing that the records were relevant, and to the judge's in camera review to determine the relevancy. Nothing in this stage two process gives the self-insurer the right to inspect the records that it seeks to produce as relevant to the defense of the claim. Although this " 'Catch-22' situation," Bishop, supra at 179, n.6, has been criticized, it remains the law. See Commonwealth v. Sheehan, 435 Mass. 183, 198 (2001)(Sosman, J., concurring)("It is always difficult, and often impossible, to demonstrate what important exculpatory evidence is in documents that one has not seen"). In any event, the judge recognized that the records might be relevant, as he conducted the stage two protocol of an in camera review. The in camera review under Bishop was properly conducted "*out of the presence of all other persons*, to determine whether the communications, or any portion thereof, are relevant." Bishop, supra at 182 (emphasis added). Because this is precisely what the judge did in the present case, there was no error in the procedure followed by the judge.

The self-insurer also argues that the psychiatric records necessarily are relevant to the employee's claim for compensation. Based on our own in camera review, we agree that various records which include references to physical pain symptomatology and

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> (c) In any proceeding … in which the patient introduces his mental or emotional condition as an element of his claim or defense, and the judge or presiding officer finds that it is more important to the interests of justice that the communication be disclosed than that the relationship between patient and psychotherapist be protected.

coincident depression should be disclosed.[3] In our view these records could bear on the issue of the employee's pre-existing medical condition, which could enter into the overall picture of compensability under § 1(7A). See infra. We therefore return to the administrative judge copies of the relevant records for distribution to the parties and for such further proceedings as the judge deems appropriate. We also set out the following from Stages 3 and 4 of the Bishop protocol, which should be followed where appropriate:

> *Stage 3 – access to relevant material.* The judge shall allow . . . counsel . . . access to the relevant portions of the privileged record for the sole purpose of determining whether disclosure of the relevant communication . . . is necessary [to the self-insurer's defense].
>
> The judge shall ensure that breaches of confidentiality attending access to the relevant portions of the privileged records are limited only to those absolutely and unavoidably necessary. Any records so examined shall be subject to a protective order . . . to ensure that the information will not be divulged beyond the extent required for the purpose stated above. The judge shall allow counsel access to the privileged records only in their capacity as officers of the court.
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> *Stage 4 – disclosure of relevant communications.* The burden is on the [self-insurer] to demonstrate that disclosure of the relevant portions of the records . . . is required to provide the [self-insurer] a fair [defense against the claim].

Bishop, supra at 182.

The self-insurer's next argument -- that the judge failed to make the required findings under the § 1(7A) causation standard for "combination" injuries -- has merit. That provision reads:

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[3] The concept of what is relevant is broad:

> Evidence is generally relevant so long as it has "a rational tendency to prove an issue in the case," or makes a "desired inference more probable than it would be without" the evidence. . . . The desired evidence "need not establish directly the proposition sought; it must only provide a link in the chain of proof." . . . Indeed, evidence is to be considered relevant if it only "throw[s] light," . . . or "shed[s] light on an issue," . . . or, "in connection with other evidence, it helps [the fact finder] a little." . . . So long as evidence possesses any of those probative tendencies, even if it "is of marginal significance, we cannot say that it [is] irrelevant."

Commonwealth v. Pare, 43 Mass. App. Ct. 566, 572-573 (1997)(citations omitted).

> 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.

The judge concluded, based on the opinions of Dr. Thimineur, that the employee

> suffers from a complex regional pain syndrome (CRPS) closely associated to [sic] RSD . . ., which in Ms. Hinton's case is superimposed on a pre-existing central nervous system (CNS) disorder. . . . While that CNS disorder pre-existed the work injury, it was the work injury that triggered the symptoms that eventually came about. . . . As a result of the work injury and its effect on the pre-existing CNS disorder, Ms. Hinton is now totally disabled, and unlikely to ever be able to return to the work force.

(Dec. 5-6; citations to deposition omitted). As there is no evidence in the record that the pre-existing CNS disorder was connected to any employment, i.e., "compensable" versus "noncompensable," these findings explicitly address the prerequisites for application of § 1(7A). However, the judge left the ultimate question of compensability unanswered: Whether the work injury remained *a major cause* of the employee's disability and need for treatment.

The employee effectively accepts that § 1(7A) applies in this case. (Employee brief, 8-9.) We do note that the self-insurer did not alert the judge or the employee of its intention to invoke § 1(7A) in defense of the claim on its defense sheet or in its opening statement at the commencement of the lay hearing.[4] We reiterate that "the insurer has the burden to raise the statutory provision of § 1(7A) as a defense and produce evidence to trigger its application." Jobst v. Grybko, 16 Mass. Workers' Comp. Rep.___ (2002), citing Fairfield v. Communities United, 14 Mass. Workers' Comp. Rep. 79, 83 (2000). However, in light of the ample evidence introduced relating to the pre-existing condition and of the employee's acceptance that § 1(7A) was at issue, it appears the parties tried the

[4] See 452 Code Mass. Regs. § 1.11(3)("Before the taking of testimony in a hearing before an administrative judge, the insurer shall state clearly the grounds on which the insurer either has declined to pay compensation, or the grounds on which it seeks modification or discontinuance").

case under that standard by consent. Cf. Debrosky v. Oxford Manor Nursing Home, 11 Mass. Workers' Comp. Rep. 243, 245 (1997).

Accordingly, we recommit the case for further findings on whether the employee's work injury remains a major cause of her total incapacity and need for treatment. On the issue of § 1(7A), the parties may supplement the medical evidence. They may also revisit the employee's present incapacity. Finally, we transmit to the judge copies of the records that we consider relevant, for further proceedings under Bishop, supra.

So ordered.

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Frederick E. Levine
Administrative Law Judge

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Sara Holmes Wilson
Administrative Law Judge

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Martine Carroll
Administrative Law Judge

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