COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 038945-08**

Mandy Goulet	Employee
Kmart Corporation	Employer
Indemnity Insurance Company of America	Insurer

REVIEWING BOARD DECISION
(Judge Koziol, Levine and Fabricant)

The case was heard by Administrative Judge Murphy.

APPEARANCES
Rickie Weiner, Esq., for the employee at hearing
Teresa Brooks Benoit, Esq., for the employee at deposition[1]
Charles E. Berg, Esq., for the employee on appeal
James N. Ellis, Esq., for the employee on appeal
Phillip Ronan, Esq., for the insurer at hearing
John J. Canniff, Esq., for the insurer on appeal

KOZIOL, J. The insurer appeals from a decision awarding the employee § 34 benefits for incapacity related to a "combination" injury, after the judge found the work injury remained a major cause of the ensuing disability and need for treatment under § 1(7A).[2] The insurer contends that the judge misinterpreted the medical evidence which, it argues, cannot support the award of benefits as a

[1] Attorney Benoit appeared on behalf of the employee at Dr. Scott Cowan's deposition. Attorney Weiner appeared on behalf of the employee at the depositions of Dr. Alan Bullock and Dr. Errol Mortimer.

[2] General Laws c. 152, § 1(7A), 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.

matter of law. Because the decision lacks findings which adequately address the adopted medical evidence, we vacate the decision and recommit the case.

The employee has a history of low back pain and in 2007 she was diagnosed with degenerative disc disease and a herniated L5-S1 disc. (Dec. 4.) On January 1, 2008, while working as a home health aide for a concurrent employer, the employee fell and injured her coccyx. As a result of that injury, she stopped working for the concurrent employer and for Kmart. (Dec. 4.) On May 8, 2008, the employee returned to work as a sales associate at Kmart. (Dec. 4.) On May 9, 2008, while working for Kmart, the employee suffered a work-related low back injury. She has not worked since.

On November 17, 2008, the employee underwent an anterior interbody fusion at L5-S1. She uses narcotic medication to manage her pain. (Dec. 4-5.) The impartial physician, Dr. Alan Bullock, diagnosed significant pre-existing degenerative disc disease at L4-5 and L5-S1 aggravated by the May 2008 work injury.[3] Citing Dr. Bullock's failure to opine on the applicable "a major" cause standard under § 11A(2), and his inability to opine as to whether there was a causal relationship between the employee's May 9, 2008 injury and the employee's subsequent surgery, the employee moved to submit additional medical evidence on the grounds of inadequacy and medical complexity. (Employee's

[3] The employee was paid workers' compensation benefits relating to the January 2008 injury, and that case was the subject of a lump sum settlement approved March 3, 2009, before the present claim was filed. (Dec. 1); Rizzo v. M.B.T.A., 16 Mass. Workers' Comp. Rep. 160, 161 n. 3 (2002)(judicial notice of board file). The January 2008 claim was settled with acceptance of liability for a coccyx injury, and expressly without acceptance of liability for a low back injury. The settlement's narrative attributes the employee's low back problems to her injury at Kmart. But the lump sum settlement, to which Kmart was not a party, has no impact on the present case. See G. L. c. 152, § 48(4); Kszepka's Case, 408 Mass. 843 (1990)(lump sum settlement may not affect award for separate and distinct injury). Moreover, Dr. Bullock opined, and the judge found, the employee "had a pre-existing degenerative disease which combined with the injuries the Employee sustained in January 1, 2008 and the aggravation from the May 8th and 9th 2008 work activities at Kmart." (Dec. 6.) Accordingly, the judge found the insurer had met its burden of production in regard to the issue of § 1(7A). (Dec. 6.) Dr. Bullock provided no "a major cause" opinion for either alleged work injury.

Motion to Admit Additional Medical Evidence, 2-3 [8/25/10].) The judge allowed the motion, finding the medical issues complex. (Dec. 3.) The employee introduced the reports and deposition testimony of Dr. Errol Mortimer, and the deposition testimony of her treating physician, Dr. Scott Cowan. The judge did not discuss Dr. Mortimer's opinions but found that Dr. Cowan "opined . . . that a major cause of the Employee's need for surgery was the Employee's work activities at Kmart on May 8th and 9th 2008." (Dec. 6.) The judge adopted Dr. Cowan's opinion, and concluded the employee suffered a work-related injury, which was a major cause of her disability and medical treatment for her back, including the November 17, 2008 surgery. (Dec. 6-7.)

The insurer argues that the judge mischaracterized Dr. Cowan's causation opinion, which it contends is "confusing" and "insufficient as a matter of law under § 1(7A) to support the award of benefits." (Ins. br. 8.) The confusion stems from the questions posed to Dr. Cowan, which presupposed a successive insurer application of simple causation. As explained in footnote 3, supra, the successive insurer rule has no place in this case, and counsel's posing of questions assuming the applicability of the "slightest" cause principle, Rock's Case, 323 Mass. 428, 429 (1948), led to the development of medical evidence distinctly unhelpful to the analysis of § 1(7A) causation. (Dep. 11, 12, 23.)

Regarding the insurer's contention that the medical evidence failed as a matter of law to satisfy the applicable § 1(7A) "major" causation inquiry, we turn to the following deposition testimony initiated by insurer's counsel:

> Q: Doctor, to a reasonable degree of medical certainty, would you agree that the major cause of the employee's need for surgery was there was a preexisting degenerative disc condition at L5/S1 that was refractive [sic] to conservative care and progressive, would that be the major cause of her need for surgery which was done on November 17, 2008?
>
> A: Yes.

(Dep. 20-21.) Employee's counsel then engaged in redirect examination:

> Q: Are you aware that there can be more than one major cause under the statute?
>
> A: Yes.
>
> Q: Is a second major cause the work activities at Kmart which caused her need to have surgery thereafter?
>
> A: I would say yes.

(Dep. 21.) This testimony clearly satisfied the employee's burden under § 1(7A). However, after eliciting the testimony, counsel for the employee continued:

> Q: And, again, to a reasonable degree of medical certainty, is it your opinion that she had at least a 1 percent aggravation while working at Kmart that then required surgery and the subsequent disability and need for treatment?
>
> A: Yes.
>
> . . .
>
> Q: Doctor, just lastly, if you assume that she testified truthfully, and her testimony was that it was just a bunch of going back and forth climbing ladders, bending, twisting, if you assume that to be true, would that have been enough to cause the aggravation that ultimately lead [sic] to surgery and need for treatment?
>
> A: That 1 percent, yes.
>
> Whereupon, the deposition concluded.

(Dep. 23, 25-26.)

The insurer asserts that this case should be governed by Perangelo's Case, 277 Mass. 59 (1931), which dictates that the last opinion expressed by the expert physician prevails over any prior opinions which run counter to the latter. Accordingly, it argues Dr. Cowan's last opinion left the employee with a legally insufficient causation opinion requiring reversal without recommittal. But this case is not governed by Perangelo, because the insurer's argument rests on the premise that the doctor changed his opinion from "a major cause" to a one percent

aggravation after being presented with new evidence.[4] This claim is not borne out by the record.[5] (Dep. 7-12.)

However, we agree with the insurer that the decision cannot stand because the decision leaves us to speculate whether the judge was cognizant of the apparent inconsistency between the doctor's final opinion and the adopted "a major" cause opinion, or whether she somehow read the doctor's answer to the final question as being consistent with his earlier "a major cause" opinion.[6]

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[4] The insurer describes the "new evidence" as follows:

> Dr. Cowan was not aware that the employee had returned to work at Kmart and had possibly aggravated her condition until he was informed at the deposition.

(Ins. br. 10.)

[5] Prior to providing the "a major cause" opinion adopted by the judge, the doctor answered multiple questions about the employee's condition as it existed prior to, and after, her return to work at Kmart:

> Q: If the duties that I described to you –if you assume that those duties that I talked about earlier were true, would you concede that she has *at least a 1 percent aggravation* of her back condition while working at Kmart?
>
> A: I would.
>
> Q: Do you feel that her need for surgery and her subsequent disability are related to her injuries while working at Kmart?
>
> A: Yes.
>
> Q: Do you feel that all her medical treatment has been reasonable and necessary and related to that injury when working at Kmart?
>
> A: Yes.

(Dep. 11-12; emphasis supplied.)

[6] Unlike a situation where a doctor, without reason, overtly changes his causal relationship opinion over the course of the deposition, Orlofski v. Town of Wales, 23 Mass. Workers' Comp. Rep. 175, 179-180 (2009), Dr. Cowan expressed his opinions throughout his deposition, using the causal relationship standards framed by the parameters set forth in the attorneys' questions. Those questions were specifically

Without further findings of fact we cannot determine whether the judge's conclusion is correct or tainted by error of law. See Praetz v. Factory Mut. Eng'g & Research, 7 Mass. Workers' Comp. Rep. 45, 46-47 (1993). Accordingly, we reverse the decision and recommit the case for a de novo hearing.[7]

So ordered.

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Catherine Watson Koziol
Administrative Law Judge

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Bernard W. Fabricant
Administrative Law Judge

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Frederick E. Levine
Administrative Law Judge

Filed: ***April 25, 2012***

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framed as "at least," or "at the very least" a one percent aggravation, which the doctor affirmed. Where the burden of showing the relative weight of an injury's contribution to the need for medical treatment and disability under § 1(7A) rests with the employee, engaging in the "at least one percent" inquiry without more, is irrelevant. See Stewart's Case, 74 Mass. App. Ct. 919, 920 (2009)("Accordingly, a finding of heightened causation under § 1(7A) must be supported by medical opinion that addresses – in meaningful terms, if not the statutory language itself – the relative degree to which compensable and noncompensable causes have brought about the employee's disability"). Dr. Cowan's sole departure from his practice of answering questions using the standard framed by the attorney occurred in his final testimony that the May 2008 injury was "*that* one percent" contributor to the need for treatment. (Dep. 26; emphasis added). While his final testimony reasonably could be viewed as referring to the standard supplied by employee's counsel in the multiple "one percent" questions posed earlier, (Dep. 11, 12, 23), the judge's decision does not show that she made such finding. And by itself, "that one percent" is insufficient.

[7] The matter must be retried because the administrative judge who authored the decision no longer serves on the industrial accident board. Consequently, we transfer the case to the Senior Judge for reassignment to another administrative judge.