COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 055617-95**

Maria Pavao	Employee
Chase Collections	Employer
Arbella Indemnity Insurance Co.	Insurer

REVIEWING BOARD DECISION
(Judges Wilson, Smith and Smith)

APPEARANCES
Susan A. Fiore, Esq., for the employee
Michael W. Morrissey, Esq.,
and Christopher J. Bradford, Esq., for the insurer

WILSON, J. Maria Pavao appeals from a decision in which an administrative judge denied and dismissed her claim for workers' compensation benefits arising from an alleged November 20, 1995 work injury to her back. For the reasons that follow, we reverse the decision and recommit the case.

The fifty-three year old Portuguese speaking employee has worked as a sewing machine operator in the clothing manufacturing business all of her vocational life. She worked forty hours a week for the employer from November 1989 until March 1996, and was paid on a piece work basis. Her duties consisted of taking dresses from a bundle on her left side, running them through the sewing machine to put in a zipper, and then placing the completed items on the right. When she completed a bundle she would retie it and place it in a box on the floor. She sewed one hundred to two hundred zippers per day. Ms. Pavao performed her work in a seated position. (Dec. 4-5.)

On or about November 20, 1995, the employee began to feel pins and needles in her left leg while working. She had experienced low back pain radiating down her left leg at intermittent times prior to the November 1995 occurrence. The employee continued to experience left leg symptoms with lower back pain after that November onset of pain. She saw her regular physician, Dr. John Costa, on January 16, 1996. The

employee continued to work in pain until March 15, 1996. She underwent surgery on a herniated L5-S1 disc on March 26, 1996. (Dec. 5-6.)

Ms. Pavao maintained that her back problems were work-related, and the insurer resisted the claim. The claim was denied at conference, and the employee appealed to a full evidentiary hearing. (Dec. 2.) A § 11A medical examination took place on January 30, 1997. The impartial physician opined that the employee suffered from a herniated L6-S1 disc, post-discectomy. The doctor conceded that the lack of any objective diagnostic testing prior to the November 1995 incident meant that he could not actually say when the herniation first arose. Because of that, the judge discounted the doctor's opinion that the herniation was caused by the employment. (Dec. 6.) The judge allowed the parties to introduce additional medical evidence due to the inadequacy of the impartial report and complexity of the medical issue. (Dec. 3.)

The insurer introduced, by way of the impartial doctor's deposition, reports of the employee's treating physician, Dr. Costa. (Dec. 3.) Those reports, Dep. Exs. 2-5, indicated nothing in the way of work trauma or injury. (Dec. 7.) On this basis, and due to his general discrediting of the employee's testimony, the judge found insufficient evidence to support the employee's claim of a work-related injury, and denied the claim. (Dec. 7-8.) The employee appeals to the reviewing board.

Of the several grounds for reversal put forward by the employee, one has merit. The judge's allowance of additional medical evidence, while in and of itself a sound exercise of judicial discretion, resulted in the insurer's introduction into evidence of the reports and records of the employee's treating physician, Dr. Costa. (Dec. 3.) In doing so, the insurer ran afoul of the departmental regulation, 452 C.M.R. § 1.11(6), which provides:

> At a hearing pursuant to M.G.L. c. 152, § 11 . . . in which the administrative judge has made a finding under M.G.L. c. 152, § 11A(2) that additional testimony is required due to the complexity of the medical issues involved or the inadequacy of the report submitted by the impartial medical examiner, a *party may offer as evidence medical reports prepared by physicians engaged by said party*, together with a statement of said physician's qualifications.

(emphasis added). Since the insurer had not engaged Dr. Costa to testify as its expert in the proceeding, it could not rely upon this rule to introduce the otherwise hearsay reports as additional medical evidence when the judge allowed its motion. (Dec. 3.)[1] The employee timely objected to the introduction of Dr. Costa's reports as substantive evidence during the deposition of the impartial physician. (Dep. 35, 37.) "An administrative judge has no power to admit evidence at a hearing in a manner contrary to the department's rules. . . . The error [in admitting the opposing party's report] is not harmless as the judge specifically adopted [the doctor's] opinion and based [his] decision on it." Flaherty v. Browning-Ferris Industries, 9 Mass. Workers' Comp. Rep. 630, 632 (1995). See Wodzenski v. Hilltop Steak House; 6 Mass. Workers' Comp. Rep. 105, 106 (1992); Wheat v. Mass. Dept. of Social Services, 9 Mass. Workers' Comp. Rep. 207 (1995); Yuksel v. Davidson Chevrolet, 9 Mass. Workers' Comp. Rep. 757 (1995). We conclude that the reports of Dr. Costa were erroneously admitted and improperly relied upon by the judge in reaching his conclusion denying compensation benefits. We therefore reverse the decision, and recommit the case. As the judge who originally presided no longer serves the department, a new hearing is required.

As we return the case for a new hearing, we note that the evidence in this case raises the question of the applicability of the second prong of the test of compensability established in Zerofski's Case, 385 Mass. 590 (1982). A compensable injury must arise either from a specific work-related incident or series of incidents at work, *or from an identifiable condition that is not common and necessary to all or a great many occupations.* Id. at 594-595 (emphasis added). A compensable injury can develop gradually and over time from the cumulative effect of stresses and aggravations at work. Trombetta's Case, 1 Mass. App. Ct. 102, 105 (1973). It is up to the administrative judge to determine from the evidence presented at the new hearing whether there was a cumulative injury here that arose from a condition not common or necessary to all or a great many occupations. (June 24, 1997 Tr. 59-69.) If on recommittal, a cumulative

[1] The reports did not comply with the authentication requirements of G.L. c. 233, § 79G, and therefore were not admissible under that statutory exception to the hearsay rule.

injury theory is asserted, the employee should amend her claim to indicate an alternative date of injury that corresponds to the last day of work, March 15, 1996, rather than the November 20, 1995, the first day the employee felt symptoms at work. (June 24, 1997 Tr. 28; Dec. 6.) See Bernardo v. Hallsmith Sysco, 12 Mass. Workers' Comp. Rep. 397, 402 n.5 (1998); Massarelli v. Acumeter Labs, 10 Mass. Workers' Comp. Rep. 703, 707, n. 2 (1996); 452 C.M.R.
§ 1.23.

We return the case to the senior judge for reassignment to an administrative judge for further proceedings consistent with this opinion. In the interests of judicial economy and efficiency the case may be decided, insofar as practicable and where there is no issue of witness credibility, on the transcript and evidence admitted by the former judge. See Nartowicz's Case, 334 Mass. 684, 686 (1956).

So ordered.

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Sara Holmes Wilson
Administrative Law Judge

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Suzanne E.K. Smith
Administrative Law Judge

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William A. McCarthy
Administrative Law Judge

Filed: February 17, 1999