COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 054043-00**

Michael K. Escalante	Employee
Reidy Heating and Cooling	Employer
Maryland Insurance Company	Insurer

REVIEWING BOARD DECISION
(Judges Carroll, McCarthy and Levine)

APPEARANCES
John E. Jerzyk, Esq., for the employee
Anthony D. DaDalt, Esq., for the insurer

CARROLL, J. The insurer appeals from a decision in which an administrative judge awarded the employee ongoing § 34 benefits for bilateral carpal and cubital tunnel syndromes. The insurer argues that the judge a) erred with regard to two motions it filed in the course of the proceedings, b) mischaracterized the impartial medical evidence, and c) failed to perform a vocational profile analysis in reaching his conclusion on the employee's incapacity. We agree with some of the insurer's arguments and therefore recommit the case.

The employee fixed and installed air conditioner units for the employer. In May 2000, he began noticing numbness and pain in his hands. He first sought treatment in September 2000. His symptoms worsened to the point that on June 19, 2001, he underwent surgery on his left hand. Thereafter, his symptoms improved but did not disappear. (Dec. 2.)

The employee claimed workers' compensation benefits, and the insurer resisted on the grounds of liability, causal relationship and disability. (Dec. 1, 2.) The insurer appealed the judge's conference order of benefits to a full evidentiary hearing. (Dec. 2.) The employee underwent an impartial medical examination on November 15, 2001. (Dep. 5-6.) The impartial physician diagnosed bilateral cubital tunnel syndrome of the elbow with early friction neuritis of the ulnar nerve, as well as

bilateral carpal tunnel syndrome, causally related to the employee's work. The doctor felt that surgical intervention on the right hand was warranted, and the surgery took place on December 20, 2001. (Dec. 3.) At the February 13, 2002 hearing, the insurer moved for the introduction of additional medical evidence due to the inadequacy of the impartial physician's opinion. The judge denied the motion. (Tr. 76-79.)[1] The judge concluded that the employee suffered a work injury that totally incapacitated him from the time of his leaving employment to date and continuing. (Dec. 4-5.)

The insurer argues that the judge should have allowed additional medical evidence for the post-right hand surgery period of ongoing disability. We agree that the judge erred by denying the insurer's motion for additional medical evidence, based on the inadequacy of the impartial physician's opinion on continuing disability in light of the post-§ 11A examination surgery on the employee's right hand/wrist.[2] An important event or development subsequent to the § 11A medical examination can render the physician's opinion emanating from that examination inadequate as a matter of law. Deleon v. Accutech Insulation and Contract, 10 Mass. Workers' Comp. Rep. 713, 715 (1996). Surgery is such an important event. Pelletier v. McKinney Bus Co., 12 Mass. Workers' Comp. Rep. 290, 294 (1998).

Under the circumstances presented here, the judge's denial of the insurer's motion was error. While cross-examination of the impartial physician yielded an opinion on the amount of time that it probably took the employee to recover from his December 20, 2001 right carpal tunnel surgery, (Dep. 24-27), the doctor had not re-examined him and could not opine on the status of the employee's right wrist/hand as a result of the surgery. (Dep. 33.) We therefore recommit the case for the

[1] The insurer had also moved that a successive insurer be joined in the proceeding, as the employee had performed other work after he had stopped working for the employer against which benefits were claimed. (Tr. 40-64.) The judge denied the motion.

[2] The judge appeared to consider allowing additional medical evidence post surgery, but then deferred a decision until after deposition of the impartial doctor. (Tr. 77-78.) Thereafter, the insurer renewed its "Motion to Open Medicals" and the judge denied the motion on May 17, 2002.

introduction of additional medical evidence to address the question of the employee's medical condition post-surgery.

Next, the judge on recommittal must perform a vocational analysis, which is entirely missing from the decision as it now stands. The impartial physician restricted the employee from work with lifting over twenty pounds, repetitive use of his hands and the use of vibrating tools. (Dep. 23.) However, with the employee's work experience as testified to at hearing,[3] there may be realistic options open for light duty work. The judge disregarded the employee's vocational profile as articulated in Frennier's Case, 318 Mass. 635, 639 (1945), and Scheffler's Case, 419 Mass. 251, 256 (1994), in his award of temporary total incapacity benefits. This was error. Moreover, the insurer contends that the employee's work capacity varied over the period of time at issue in that the employee performed some work activities, (Dec. 3, 4), and also had surgeries. Although the judge found the work to be "minor," the judge should factor this into his earning capacity analysis. Further, the fact of surgery does not in and of itself justify a particular period of medical disability and thus, incapacity. DeJesus v. Morgan Goodwill Indus. 14 Mass. Workers' Comp. Rep. 381 (2000).

Finally, the insurer urges that the judge erred by denying its motion to join a successive insurer to the proceeding, arguing that the employee worked for another insured employer after he left work with the employer in this claim. However, the judge credited the employee's testimony to the effect that those later work activities, doing painting and wallpapering, were minor, and that he had to hire someone to finish the jobs for him due to pain. (Dec. 3, 4.) While the impartial physician's opinion could support that the work performed at the latter employment constituted an aggravation of the employee's medical impairment, (Dep. 22-23), the medical testimony also could be read to support the judge's conclusion that such contribution

[3] This 40 year old high school graduate has experience in several construction related trades, (Tr. 37-38), can read blueprints, (Tr. 36), has supervisory experience, (Tr. 40), has training in drafting, (Tr. 36), and completed a course in real estate sales. (Tr. 36.) (Insurer Br. 6.)

was merely a temporary exacerbation of the employee's symptoms, and did not worsen the underlying medical condition. (Dec. 3; Dep. 19-20.) Under such circumstances, we have concluded that the judge's fixing of liability onto the first of two insurers was sustainable. See Boughton v. Guardian Indus., 9 Mass. Workers' Comp. Rep. 561, 564-565 (1995); Costa's Case, 333 Mass. 286, 289 (1955)(court affirmed where equivocal medical evidence supported administrative judge's conclusion that liability continued with first insurer, even though employee had recurrences over years of successive work). See also Thompson v. Tambrands, Inc., 9 Mass. Workers' Comp. Rep. 282 (1995)(doctor's use of word, "aggravation," does not dictate legal result as to occurrence of c. 152 injury). Therefore, given the judge's sustainable findings, his failure to join an alleged successive insurer is now moot.[4]

We therefore recommit the case for the introduction of additional medical evidence post-right hand/wrist surgery, and for further findings consistent with this opinion.

So ordered.

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Martine Carroll
Administrative Law Judge

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William A. McCarthy
Administrative Law Judge

Filed: **May 20, 2003**
MC/jdm

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Frederick E. Levine
Administrative Law Judge

[4] To the extent that it would have been better practice to have allowed the motion to join, we agree with the insurer.