COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 000099-03**

Michael P. Buckley Employee
Stahl USA Employer
Royal Insurance Company of America Insurer

REVIEWING BOARD DECISION
(Judges Horan, Carroll and Fabricant)

APPEARANCES
Emmanuel N. Papanickolas, Esq., for the employee
David G. Braithwaite, Esq., for the insurer

HORAN, J. The insurer appeals from a decision awarding the employee permanent and total incapacity benefits for a chronic ilioinguinal pain syndrome stemming from an accepted work-related hernia in 1996. Because the judge adopted a medical opinion that was not in evidence, we recommit the case for further findings on the extent of incapacity. We otherwise affirm the decision.

The employee worked for several years after suffering his right inguinal hernia injury on October 29, 1996. He eventually had surgery, with the insertion of a screen mesh, in 1999. Thereafter, he experienced severe pain, and underwent additional surgeries. (Dec. 7.)

The insurer accepted the employee's claim, and paid § 34 benefits from October 29, 1999 to November 22, 2002, and § 35 benefits thereafter. (Dec. 5-7.) The employee then filed a claim for § 34A benefits. (Dec. 4.) At the hearing, the judge found the impartial physician's report to be adequate, but allowed additional medical evidence based on medical complexity. See § 11A(2). The judge adopted the impartial physician's opinion that the employee continues to experience pain due to his work-related injury, but did not adopt the doctor's opinion on the extent of the employee's disability. (Dec. 7-8.)

The judge found the employee's complaints of pain credible, and adopted the "total disability" opinion contained in Dr. Robert C. Eyre's report, which was not in evidence. (Dec. 2, 9.) The judge awarded the employee § 34A benefits. (Dec. 11.) The insurer correctly points out the judge erred by basing his award on the opinion of Dr. Eyre. Therefore, we must recommit the case for the judge to reassess the medical evidence without reference to Dr. Eyre's report. See Flaherty v. Browning-Ferris Indus., Inc., 9 Mass. Workers' Comp. Rep. 630, 631-632 (1995); Paveo v. Chase Collections, 13 Mass. Workers' Comp. Rep. 39 (1999).

The insurer also argues the judge misapplied § 1(7A) by ignoring the impartial physician's deposition testimony that the work injury was a "continuation of a hernia" which pre-existed the work injury. (Dep. 79.) The insurer maintains this evidence required the employee to satisfy the "a major but not necessarily predominant contributing cause" standard in the statute.[1]

We think the judge correctly addressed and disposed of the insurer's defense of § 1(7A) "a major" causation. We set out the doctor's entire testimony addressing the statute's "combination" element:

> Q: And this document is dated just over a month prior to the work incident, correct, which is October 29, 1993 [sic]?
>
> A: Yes, it is.
>
> Q: It reports at that time that Mr. Buckley did have a right inguinal hernia at that point, correct?
>
> A: At this point, yes.
>
> Q: So is it fair to say that the right inguinal hernia pre-existed the October 1996 work incident?

[1] The employee never challenged the insurer's right to raise § 1(7A); accordingly, we do not address this issue.

A: Yes. We have evidence right here that it did.

Q: So it would be fair to say that [the] 1996 work incident was an aggravation of that condition?

A: You mean where they said it was a strain; is that what you are referring to? They told him he had a strain.

Q: Well, I'm asking you, Doctor.

A: Okay. Was it an aggravation of that condition? I don't know. It was a continuation of a hernia.

Q: But would that be exacerbated by a specific workplace incident?

A: It could be.

Q: Is it possible that the right inguinal hernia reported in September 1996 became symptomatic because of the October 1996 work incident?

A: Possible.

Q: Do you have an opinion to a reasonable degree of medical certainty whether the October 1996 work incident aggravated the pre-existing right inguinal hernia noted in September 1996?

A: All I can say is it's possible. People have hernias and they can have them for a long time. And then one day, they say, you know, this thing started hurting me yesterday. What caused it? A variety of things.

(Dep. 78-80.)

After considering the doctor's testimony *in toto*, the judge found the "insurer has not established that employee's current disability is the result of a combination with the pre-existing condition." (Dec. 10.) We cannot say the judge's interpretation of this testimony was arbitrary and capricious, and discern no error in his rejection of the insurer's proffered § 1(7A) defense, because the evidence upon which it

was based said nothing definitive regarding whether there was a combination "with a pre-existing condition." G. L. c. 152, § 1(7A).

Accordingly, we recommit the case for further findings of fact on the extent of disability, excluding the opinion of Dr. Eyre. We summarily affirm the decision with respect to the insurer's remaining arguments on appeal.

So ordered.

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Mark D. Horan
Administrative Law Judge

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Bernard W. Fabricant
Administrative Law Judge

Filed: May 25, 2006

CARROLL, J., concurring. I write separately to emphasize the importance of the requirement that insurers have an adequate basis for raising the defense of § 1(7A)'s heightened causal standard. The acceptance of a claim does not prohibit the insurer from raising the § 1(7A) defense further down the road, but the specific circumstances of each case should dictate whether it is appropriate to do so.

Here, the insurer accepted liability for an inguinal hernia due to moving heavy barrels on October 29, 1996, and, once Mr. Buckley became disabled after hernia surgery in 1999, paid § 34 temporary total incapacity benefits to exhaustion.[2] After an initial surgery for the accepted inguinal hernia, the employee experienced multiple complications and underwent more than a half dozen surgeries, whose causal relationship was never questioned. Six and one half years after the accepted industrial accident, at the conference on the employee's claim for § 34A benefits, the insurer did not raise § 1(7A).

[2] The employee lived with the hernia for several years, ultimately undergoing his first surgery in February 1999. (Impartial report, 1.)

See Temporary Conference Memorandum form dated April 22, 2003.[3]

At hearing, without a motion to add a defense, the insurer "raise(d) Section 1(7A). Pre-existing right inguinal hernia." (Tr. 4, June 24,2004.) At that time the insurer put forth no medical opinion to trigger the application of § 1 (7A) – i.e., no evidence of a non-compensable pre-existing injury that combined with a compensable injury to prolong the employee's disability.

A pre-existing hernia does not necessarily meet the predicate of "combining with". The insurer apparently hoped to elicit the requisite opinion from Dr. Jaffee, the impartial doctor, at deposition, as there was no such opinion in his exam report, and/or to get such an opinion from the insurer's second examining physician, Dr. Sabra. No such opinion was given by Dr. Sabra. (Ins. Ex. 9.) At the deposition of Dr. Jaffee, seven years after the accepted work hernia, and multiple surgeries, including two orchiectomies, all of which were accepted as causally related, the impartial physician says absolutely nothing about a pre-existing hernia combining with the accepted injury, and accepted aftermath to the injury, in causing the present incapacity that was the subject of the litigation.

"*In the first instance*, the insurer has the burden to raise the statutory provisions of § 1 (7A) as a defense *and* produce evidence to trigger its application." Jobst v. Leonard T. Grybko, 16 Mass. Workers' Comp. Rep. 125, 130-131 (2002), (emphasis added), citing Fairfield v. Communities United, 14 Mass. Workers' Comp. Rep. 79, 83 (2000)(insurer has burden to produce evidence that would support finding that a pre existing noncompensable injury or disease combined with a compensable injury [to . . . prolong disability at issue]). Not only case law, see supra, but also statutory and procedural requirements for properly raised defenses, and due process considerations,

[3] Judicial notice is taken of this document in the board file. See Rizzo v. M.B.T.A., 16 Mass. Workers' Comp. Rep. 160, 161 n.3 (2002).)

require an insurer to produce evidence that § 1(7A) is applicable at the time § 1(7A) is raised.

Massachusetts Rules of Civil Procedure, Rule 11 (and similarly, Federal Rule 11) states that "the signature of an attorney to a pleading constitutes a certificate by him that he has read the pleading; that to the best of his knowledge, information, and belief there is a good ground to support it." The requirement that there be "good ground to support" a pleading at the time it is made, is reflected in our statute's requirement that there be "reasonable ground for a defense". General Laws c. 152 § 14 (1).[4]

The insurer has the burden of producing evidence against the employee at the time it raises an affirmative defense. To do otherwise would be to deprive the employee of notice as to what will be required to substantiate his claim. See L. Locke, Workemen's Compensation, § 502, n.15 (2nd ed. 1981). Due process implications require that the employee have the opportunity to meet his burden of proof.

If the employee is to be required to offer further evidence to substantiate his claim, the existence of good and reasonable grounds for a defense must be demonstrated at the outset of raising the defense.

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Martine Carroll
Administrative Law Judge

Filed: May 25, 2006

[4] This does not preclude the insurer from raising § 1 (7A) at a later time in the proceeding if, for example, the impartial doctor's deposition develops the predicates to § 1 (7A). The insurer could then bring a motion to add the defense and the employee could then ask for the opportunity to meet his increased burden of proof.