COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 017582-98**

Paul Powers	Employee
Teledyne Rodney Metals	Employer
CNA Insurance Co.	Insurer

REVIEWING BOARD DECISION
(Judges Wilson, Carroll and Levine)

APPEARANCES
Leonard Schneider, Esq., for the employee at hearing and on appeal
Cyril E. O'Leary, Esq., for the employee at hearing
Michael Ready, Esq., for the insurer at hearing and on appeal
Alexander Borre, Esq., for the insurer at hearing

WILSON, J. The employee appeals from a decision of an administrative judge awarding him a closed period of temporary and total incapacity benefits. The employee argues that the judge should not have discontinued benefits based on the provisions of § 1(7A), and that the judge erroneously excluded certain evidence, which the employee sought to introduce as additional medical evidence. We agree with the employee that 1) the judge's analysis under G. L. c. 152, § 1(7A), was insufficient; 2) letters of his treating physician (Employee Exhibits F, G, and I for identification) should have been admitted in evidence; and 3) the letters from the employee's counsel to the doctor (Employee Exhibits A, B and H for identification), which laid a foundation for the opinions expressed in the doctor's letters, should have been admitted, although not as evidence, but for that limited foundational purpose only. Therefore, the case must be recommitted.[1]

[1] We affirm the judge's determination that the other documents sought to be introduced as additional medical evidence -- and objected to by the insurer -- were not medical records and inadmissible for that purpose. See Employee Exhibits C, D, E for identification.

The employee injured his low back at work on May 13, 1998, lifting a roll of sheet metal. The employee had previously claimed back injuries while working for the employer in 1987 and 1989. In 1990, he injured his low back, was out of work for six months, and collected workers' compensation benefits. During that time, the employee underwent back surgery at the L4-5 level. The employee did not have significant problems with his back during the next several years, until the May 13, 1998 incident. Thereafter, he came under the care of Dr. Stephen Lipson, who performed surgery at the L4-5 level on November 16, 1999. (Dec. 8-10.)

The insurer accepted the employee's 1998 industrial injury and paid § 35 benefits, but resisted the employee's claim for § 34 benefits and ongoing medical benefits on the basis of extent of incapacity and its causal relationship. The insurer's motion to join a discontinuance complaint was allowed. (Dec. 4.) The employee underwent medical examinations pursuant to § 11A(2) on May 3, 1999, and on April 4, 2000, post-surgery. The impartial physician testified that the employee's initial symptoms after his 1998 injury were causally related to that incident, but that he was suffering from pre-existing degenerative arthritis of the lumbar spine by the time of his first examination on May 3, 1999. (Dec. 11.) The doctor opined that he could not say that the employee's degenerative disease was caused by the 1990 industrial injury or the resultant surgery, (Dep. 45), even though he earlier testified that the 1990 injury did cause the employee's degenerative condition. (Dep. 12.) The judge adopted the doctor's final opinion on the matter: that the 1990 injury did <u>not</u> cause the degeneration. (Dec. 11-12.) The doctor could not opine as to whether the 1998 industrial injury remained a major cause of the employee's disability. (Dec. 12.)

The judge allowed the parties to introduce additional medical evidence due to the inadequacy of the impartial medical evidence and the complexity of the medical issues. (Dec. 5.) The employee entered numerous medical records spanning the time from his 1990 industrial injury until the present. (Dec. 2.) The employee also attempted to introduce the letters from his attorney to his treating physician, Dr. Lipson, workers' compensation insurance correspondence, lost time documents and letters from Dr. Lipson

to the employee's attorney. (Dec. 3.) The insurer objected to the introduction of these documents on the grounds that they were hearsay (attorney's letters), were based on hearsay (Dr. Lipson's letters) or were non-medical documents beyond the scope of § 11A(2) (insurance and lost time documents). The judge sustained the insurer's objections, and excluded the proposed exhibits, marking them for identification only. (Dec. 8.)

The judge concluded, based on the impartial physician's testimony, that the employee suffered from significant degenerative disease of the lumbar spine with multi-level stenosis and that the employee's symptoms, post-injury, were the result of an aggravation of his pre-existing degenerative disease. He determined that there was no evidence that the employee's 1998 injury "remained a major" cause of his incapacity, at least as of the April 4, 2000 date of the second impartial medical examination. (Dec. 14.) The judge relied somewhat on the opinion of Dr. Lipson, allowed into evidence as employee's Exhibit 12, that as of June 29, 1999, the 1998 industrial accident remained a major cause of the employee's medical disability. (Dec. 12, 14.) The judge awarded § 34 incapacity benefits through April 3, 2000, and discontinued incapacity benefits as of the April 4, 2000 impartial examination. (Dec. 16-17.)

The employee challenges the judge's application of the heightened standard of "a major" cause under § 1(7A), which states in relevant 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.

The issue here is whether the employee's earlier 1990 industrial injury continues to play any role in the employee's condition.[2] If such is the case, the employee need not meet the § 1(7A) standard of causation, because his pre-existing condition would

[2] The administrative judge should make findings as to whether either of the earlier claimed work injuries were compensable and, if so, whether they contribute in any way to the employee's condition.

appropriately be characterized as "compensable," rather than "non-compensable," for the purposes of § 1(7A). White v. Town of Lanesboro, 13 Mass. Workers' Comp. Rep. 343 (1999), involved a decision in which the judge had failed to address whether the subject industrial injury was "a major" cause of the employee's disability, where the employee had suffered an earlier industrial injury to his back, and also had a prior history of pre-existing disc disease. Id. at 346. Recommitting the case, we set out the analysis that the judge should apply:

> If the [earlier industrial] injury continues to play any role in [the employee's] condition, then the judge's factual error about the extent of contribution of the [subject industrial] injury is harmless. [The employee] may recover simply by proving that the [earlier] injury continues to participate, even to the slightest extent, in his present incapacity . . . . [The judge] did not indicate whether [the employee's] underlying back condition was caused by his pre-existing non-compensable degenerative disc disease, by the residual effects of his compensable [earlier] lower back injury, or by some combination of the injuries and the pre-existing disease.

Id. See Rock's Case, 323 Mass. 428, 429 (1948). "If there is medical evidence that the pre-existing condition continues to retain any connection to an earlier compensable injury or injuries, then that pre-existing condition cannot properly be characterized as 'non-compensable' for the purposes of applying the § 1(7A) requirement that the claimed injury be 'a major' cause of disability." Lawson v. M.B.T.A., 15 Mass. Workers' Comp. Rep. ___ (December 21, 2001).

The opinion of the impartial physician with regard to the nature of the employee's pre-existing condition is internally inconsistent. Early in his deposition the doctor answered the examination of the insurer's attorney in the following manner:

> A: [The employee] had an injury of 1990, had surgical intervention, and it is not unusual to have degenerative changes occur in the lumbosacral spine as a result of old injury and surgery. . . . [I]f you look at a situation like this where you see degenerative changes in the spine, the patient had had surgery before and an injury, you assume there's a cause and effect relationship.

> Q: So your opinion is that there's a causal relationship between the 199[0] injury and the degenerative changes?
>
> A: That would be my opinion.
>
> Q: Is that opinion to a reasonable degree of medical certainty?
>
> A: Yeah. . . . I could make a better opinion if I knew what his X-ray status was in 1990, but I don't know if that's available.

(Dep. 12.) The doctor then responded to the insurer attorney at the end of the deposition:

> Q: [C]an you say to a reasonable degree of medical certainty that the degenerative changes are related to the 1990 incident?
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> A: Once again, we went through this right from the beginning. Logically this is what any one of us would say. Can I prove it, no.
>
> Q: But can you say it to a reasonable degree of medical certainty?
>
> A: What, that the --
>
> Q: The 1990 incident was what triggered the degenerative changes?
>
> A: I can't say that.

(Dep. 45.) The judge relied on the later version of the impartial physician's opinion in reaching his conclusion that the employee's pre-existing condition was non-compensable for the purposes of applying the § 1(7A) heightened standard of causation. (Dec. 11-12.) The judge's adoption of this evidence is supported by authority: "[T]he opinion of an expert which must be taken as his evidence is his final conclusion at the moment of his testifying." Buck's Case, 342 Mass. 766, 770 (1961), citing Perangelo's Case, 277 Mass. 59, 64 (1931).

However, since the earlier opinion – based, as it was here, on exactly the same facts and history – is in direct conflict with the later opinion, some additional analysis is necessary.

> The unexplained, internally inconsistent opinion of the § 11A physician in the present case cannot be accorded *prima facie* force under the Cook [v. Farm

> Service Stores, Inc., 301 Mass. 564 (1938)] reasoning. It should therefore "retain only its inherent persuasive weight as a piece of evidence *to be considered with other evidence* . . . ." Cook, id. at 566 (emphasis added). It logically follows that additional medical evidence is mandated under the circumstances presented by this
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> case. The impartial physician's opinion evidence is inadequate because it is too self-contradictory to [compel] the conclusion that the evidence is true . . . ." Id. As a practical matter, if the evidence cannot stand alone as *prima facie*, it cannot be exclusive. § 11A. The doctor's opinion retains status only as ordinary evidence to be weighed with any other medical evidence, within the parameters set by Perangelo's Case . . . .

Brooks v. Labor Mgt. Servs., 11 Mass. Workers' Comp. Rep. 575, 580 (1997). Thus, while the judge allowed additional medical evidence to be introduced for reasons other than the contradictory nature of the § 11A physician's opinions, the result is correct. The problem in the present case arises with the judge's ruling that the letters of the employee's treating physician, Dr. Lipson – in which he opines on § 1(7A) causal relationship issues – were inadmissible. We agree with the employee that this was error, and that recommittal is therefore appropriate.

The fact that the causal relationship opinions of Dr. Lipson were contained in letters to the employee's attorney is of no moment. The parties stipulated to Dr. Lipson's qualifications. (Dec. 8.) The matter is governed by 452 Code Mass. Regs. § 1.11(6):

> At a hearing pursuant to M.G.L. c. 152, § 11 in which the conference appeal was filed prior to July 1, 1992, or in which the case does not involve a dispute over medical issues as defined in 452 C.M.R. 1.02, or 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. The administrative judge may admit such medical report as if the physician so testified, provided that where specific facts are in controversy, the administrative judge shall, on motion by a party, strike any part of such report that is not based on:
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> (a) the expert's direct personal knowledge;
> (b) evidence already in the record; or
> (c) evidence which the parties represent will be presented during the course of the hearing. Pursuant to 452 C.M.R. 1.12(5), any party may, for the purpose of cross-examination, depose the physician who prepared an

> admitted medical report. After such cross-examination, the parties may conduct further examination pursuant to the rules of evidence applied in courts of the Commonwealth.

Of particular importance to the present inquiry is Dr. Lipson's letter marked for identification only as Employee Exhibit I.[3] Certainly, Dr. Lipson's direct, personal knowledge of the employee's medical condition is beyond doubt, as he is the employee's treating physician. Because the regulation specifically provides an exception to any hearsay objection for such qualifying medical reports,[4] we see no merit in the insurer's objection to the letter form of Dr. Lipson's medical reports. Dr. Lipson's letter stands as a competent medical report of the employee's treating doctor, opining on the basis of his

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[3] Exhibit I states, in relevant part, as follows:

> It is my opinion that there was a connection existing between the condition of Mr. Powers' back at the time of the 5/13/98 injury and his prior injuries which included the sequela of the 1990 surgery. . . . [T]he L4-5 spinal stenosis was existing in 1990 and was partially approached through his discectomy in 1990. It meant that he had degenerative disc changes which were existing in 1990 and which would be expected to exist and possibly progress since his 1990 surgery.
>
> The prior injuries can be felt to cause and accelerate the degenerative change and symptoms which culminated in the surgery of November 1999.
>
> Mr. Powers' thirty years of work involved in continuous and repetitive bending and lifting of heavy objects of 60 pounds can be considered, in my opinion, to aggravate his prior injuries and cause an accelerating degenerative change and the pain accompanying it. It is my opinion with a degree of medical certainty that his back was in worse condition in November 1999 than at the time of the 1990 surgery. The sequela of the 1990 surgery and his continuous repetitive bending and lifting could underlie or accelerate the worsening of his back to its condition in both 1998 and November 1999.

[4] General Laws c. 152, § 20, which provides an analogous exception for hospital records, states in relevant part:

> Copies of hospital records kept in accordance with section seventy of chapter one hundred and eleven, certified by the persons in custody thereof to be true and complete, shall be admissible in evidence in proceedings before the division or any member thereof. The division or any member, before admitting any such copy in evidence, may require the party offering the same to produce the original record.

personal knowledge and facts in evidence. Cf. Patterson v. Liberty Mut., 48 Mass. App. Ct. 586, 596 (2000)(error to admit medical opinion that was "contrary to the governing regulations"). We note that medical reports, including addenda to § 11A reports, often take the form of letters to counsel or the judge. See, e.g., Gordon v. H & W Motor Lines, Inc., 10 Mass. Workers' Comp. Rep. 563, 564 (1996)(judge solicited, and received, addendum letter from § 11A physician; case recommitted due to failure to notify parties of this action); Hicks v. Boston Medical Ctr., 15 Mass. Workers' Comp. Rep. 1, 4 (2001)(additional medical evidence of employee's treating doctor admitted in form of "reports, letters and deposition testimony"); Perkins v. Eastern Transfer, Inc., 12 Mass. Workers' Comp. Rep. 370 (1998); Matthews v. Hollingsworth & Vose, 7 Mass. Workers' Comp. Rep. 130 (1993). Of course, it remains the judge's prerogative to weigh this evidence and assess its probative value.

Finally, as to the letters from the employee's counsel to Dr. Lipson, these were simply foundational in nature. Although the employee could not introduce these letters in order to prove the truth of the matters contained therein; i.e., to corroborate the employee testimony as to his medical history and the industrial accident, the judge should have allowed and considered these letters, *but only for the limited purposes of providing a factual foundation for the doctor's opinions,* rather than as evidence for the purpose of inducing belief as to the contentions therein. See Department of Youth Services v. A Juvenile, 398 Mass. 516, 531 (1986)(eliminating need to produce "exhibits and witnesses whose sole function is to construct a proper foundation for the expert's opinion"). We see nothing in A Juvenile standing for the proposition that a party may *not* introduce the factual, foundational letter in such a limited capacity, so long as that factual foundation is "independently admissible and [is] a permissible basis for an expert to consider in formulating an opinion." Id. It is for the administrative judge, however, to determine the accuracy of the foundation as part of his assessment of the probative value of the expert opinion.

Accordingly, we reverse the judge's ruling on the admissibility of the Employee Exhibits F, G, and I, as well as on Employee Exhibits A, B and H for limited

foundational purposes, and recommit the case for further findings on the § 1(7A) issue of the employee's pre-existing condition, with Dr. Lipson's opinions included in the judge's assessment. If either the insurer or the employee wishes to take Dr. Lipson's deposition, pursuant to 452 Code Mass. Regs. § 1.11(6), that party may do so.

So ordered.

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Sara Holmes Wilson
Administrative Law Judge

Filed: **June 10, 2002**

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Martine Carroll
Administrative Law Judge

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Frederick E. Levine
Administrative Law Judge