COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS	**BOARD NO. 006419-94**
Pedro Laredo	Employee
Beth Israel Hospital	Employer
Arrow Mutual Liability Ins. Co.	Insurer

REVIEWING BOARD DECISION
(Judges Wilson, McCarthy and Smith[1])

APPEARANCES
Paul F. Murphy, Esq., for the employee
John T. Underhill, Esq., for the insurer

WILSON, J. The insurer appeals an award of § 34A weekly benefits for permanent and total incapacity. In particular, the insurer maintains that the evidentiary record fails to support the administrative judge's findings on causal relationship and degree of incapacity. We summarily affirm the decision as to incapacity, but conclude that the finding on continuing causal relationship lacks sufficient support in the record.

Pedro Laredo, the employee, worked concurrently as a housekeeper at the Children's Hospital and at Beth Israel Hospital. While working with cleaning liquids at the Beth Israel Hospital, Mr. Laredo developed a cough for which he sought treatment. By the fall of 1993, his cough worsened and he began to expectorate blood. In January 1994, on the advice of his treating physician, Dr. Booker Bush, Mr. Laredo left work and has not returned since. (Dec. 4-5.)

As a result of a prior administrative judge's decision, Mr. Laredo was awarded § 34 benefits for temporary and total incapacity. (Dec. 3.) Upon exhaustion of those benefits, the employee filed a claim for § 34A benefits. A § 10A conference was held

[1] Judge Smith no longer serves as a member of the reviewing board.

before a new administrative judge and the employee's claim was denied. The employee appealed to a hearing de novo. (Dec. 2.)

Pursuant to § 11A, the employee was examined on December 29, 1997 by Dr. Thomas Morris, whose medical report and deposition were admitted into evidence. (Dec. 1-3.) As the parties were authorized to submit additional medical evidence for the period prior to the date of the impartial examination, an April 23, 1997 letter written by the employee's treating physician was submitted on behalf of the employee. The insurer did not submit any additional medical documentation. (Dec. 1, 3.)

Doctor Morris diagnosed ongoing bronchiectasis that resulted in exertional dyspnea, but it was unclear to him if this condition was causally related to the chemical exposure in the work place. (Rep. of §11A Examiner, 4; Dep. of §11A Examiner, 11-12; Dec. 5.) He opined only that the work exposure may have exacerbated the employee's condition. (Dec. 5.) Additionally, the §11A physician opined that there was no evidence of total disability and that the employee could perform sedentary work without exposure to irritants or any lifting activities that would set off his coughing. (Dep. of §11A Examiner, 12-13; Dec. 5.) Although Dr. Bush, the treating physician, stated that the employee was totally disabled from work due to his brochiectasis and that the condition, which causes profound fatigue, shortness of breath and chronic cough, was permanent and progressive, he offered no opinion on causal relationship. (Employee Ex. 2.)

The administrative judge noted that the parties stipulated that the chemical exposure at Beth Israel Hospital initially aggravated the employee's underlying bronchiectasis condition. (Dec. 5 n.2.) Based on both the medical evidence and the employee's credible testimony, the administrative judge was persuaded that the chronicity of the employee's symptoms supported a finding that the exposure at Beth

Israel Hospital continued to be "the major cause" of the employee's disability. [2] (Dec. 5-6.) She found that he "continues to suffer from a chronic cough and production of excess sputum, and continues to require medication and daily chest physical therapy to assist him in breathing." (Id.) In considering the employee's age, limited education and lack of transferable skills, in combination with the chronicity of his condition and the lifting restriction imposed by the impartial examiner, the administrative judge determined that the employee was incapable of performing any work other than of a trifling nature. (Id.) The judge ordered the insurer to pay weekly benefits for permanent and total incapacity, medical benefits and counsel fees for the employee. (Dec. 7.)

The insurer takes issue with the judge's ruling that the major cause of the employee's ongoing pulmonary condition was the January 1994 workplace exposure, and asserts that the ruling is without support in the evidentiary record. The insurer maintains as well that the judge's finding as to permanent and total incapacity is neither supported by competent medical or factual evidence. The first contention has merit.

The administrative judge allowed additional medical evidence for the gap period between February 10, 1997, the date from which § 34A benefits are claimed, and December 29, 1997, the date of the § 11A medical expert's examination. (Dec. 3.) Where, as here, the medical issue in a case is beyond the realm of a lay person's common knowledge and experience, expert medical testimony is required to establish a causal connection between a claimed incapacity and an industrial injury. Josi's Case, 324 Mass. 415-417, 418 (1949). For the gap period, however, the sole medical evidence is the report of the employee's treating physician, Dr. Bush, who rendered no opinion at all on continuing causal relationship. It was the employee's burden to submit medical evidence that showed that the employee's work injury remains a major cause of

[2] Although original liability was previously established, the burden upon the employee, who seeks continuing weekly benefits for permanent and total incapacity, includes meeting the causal relationship standard established by G.L. c. 152, § 1(7A) (claimant must prove that his work-related injury "remains a major but not necessarily predominant cause of disability or need for treatment[ ]" where, as here, the injury occurred on or after December 23, 1991) (emphasis supplied).

his chronic symptoms and condition rather than causing only a temporary aggravation of his pre-existing, progressive pulmonary disease. Having failed to do so, the employee cannot prevail for this period as he did not meet his burden of establishing all the elements of his claim, including the essential fact of continuing causal relationship between his medical condition and the work injury. See Sponatski's Case, 220 Mass. 526, 527-528 (1915); Patterson v. Liberty Mutual Insurance Company, 48 Mass. App. Ct. 586, 592-593 (2000). We therefore reverse the order of benefits for the approximately ten month period of the claim up to the December 29, 1997 date of the impartial examination.

Turning to the period that begins with the impartial examination, two deficits in the causal relationship opinion of the § 11A examiner are apparent. First, the impartial report and deposition testimony failed to meet the requirement that causal relationship be expressed in terms of probability rather than mere possibility. See Patterson, id. at 592, citing Sevigny's Case, 337 Mass. 747, 749-750 (1958). In his report, the impartial examiner stated that: "It is unclear to me whether the patient's exposure to chemicals at work actually caused his condition. They *may have* exacerbated it, however." (Rep. of § 11A Examiner, 4, emphasis added.) Consistent at deposition, the § 11A physician stated: "Since leaving the workplace he [the employee] has felt better. One can reason that there was something in the work environment that could well have irritated his airways . . . ." (Dep. of § 11A Examiner, 9, emphasis added.) This opinion falls well short of the degree of probability necessary to find a continuing causal relationship to the workplace exposure. Secondly, the impartial opinion is completely lacking in any language that could be construed as stating that the work exposure remains a major but not necessarily predominant cause of disability or need for treatment as required by § 1(7A) of the Act. See Robles v. Riverside Mgmt., Inc., 10 Mass. Workers' Comp. Rep. 191, 197 (1996).

The administrative judge attempted to buttress and overcome these dual deficiencies with other lay and medical evidence of the chronicity of the employee's symptoms since leaving work. Indeed, we have followed Josi's Case, 324 Mass. 415,

417-418 (1949), and cautiously endorsed a judicious use of lay and medical evidence to "bridge the gap between a mere possibility and probability of medical causation." See Bedugnis v. Paul McGuire Chevrolet, 9 Mass. Workers' Comp. Rep. 801, 804 (1995). But where there is not only a speculative medical opinion on continuing causation, but also a structively defective opinion in that it does not meet the heightened § 1 (7A) causation standard, the § 11A opinion is facially inadequate and the order of continuing benefits cannot be affirmed. See Patterson, supra at 593.

This said, we conclude that, in the circumstances before us, it is appropriate to recommit the case for further findings on causal relationship. "[F]aced with a claim [s]he believed to be meritorious and with an inadequate impartial report, the judge should have exercised [her] authority to sua sponte require additional medical evidence." Wilkinson v. City of Peabody, 11 Mass. Workers' Comp. Rep. 263, 265 (1997). This approach would have provided each party with the opportunity to effectively present its position on the disputed issue of causal relationship as of the date of the medical examination and continuing. See O'Brien's Case, 424 Mass. 16, 22-23 (1996).

We reverse the award of benefits for the gap period prior to the impartial examination. The case is recommitted to the administrative judge for the allowance of additional medical evidence on the issue of causal relationship from the impartial examination forward. Due to the passage of time, the judge may take such other evidence as she deems appropriate. The judge's decision as to the extent of incapacity is summarily affirmed.

So ordered.

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Sara Holmes Wilson
Administrative Law Judge

Filed: October 26, 2000

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William A. McCarthy
Administrative Law Judge