COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 018303-00**

Rebeca Mercedes Gonzales	Employee
City of Lynn	Employer
City of Lynn	Self-insurer

REVIEWING BOARD DECISION
(Judges Levine, Maze-Rothstein[1] and Costigan)

APPEARANCES
John J. Sheehan, Esq., for the employee
Thomas F. Finn, Esq., for the self-insurer

LEVINE, J. Both the employee and the self-insurer appeal the decision of an administrative judge awarding the employee a closed period of G. L. c. 152, § 34, temporary total incapacity benefits. We find merit in the employee's argument that the heightened causation standard in § 1(7A) was not raised by the self-insurer or tried by consent. However, we also agree with the self-insurer that the judge erred in finding the employee incapacitated up to the date of the impartial examination, since the opinion of the impartial physician, on whom the judge relied, does not support the judge's finding that any incapacity experienced by the employee was causally related to her work injury. We recommit the case to the judge for consideration of whether and to what extent the "gap" medicals support any incapacity causally related to the work injury under the simple causation standard.

Rebeca Mercedes Gonzales came to the United States from the Dominican Republic in 1989; her education includes four years of study at a Dominican university without obtaining a degree. (Dec. 3.) In 1998, she was involved in a

[1] Judge Maze-Rothstein is no longer a member of the reviewing board.

motor vehicle accident and received treatment for injuries to her neck and upper back. Also in 1998, she began working for the Lynn public schools as a teacher's aide, primarily with special needs children. On May 1, 2000, Ms. Gonzales injured her back lifting an autistic child. (Dec. 4.) She returned to work the following day, but also sought medical care that day and the next. On May 19, 2000, she filed an accident report with her employer. Ms. Gonzales had intermittent medical treatment until she began treating with Dr. Mark Weiner on December 11, 2000. Dr. Weiner referred her for epidural injections and prescribed physical therapy. The employee testified that the injections did little to reduce her back pain. (Dec. 5.) A MRI performed in January 2001 revealed a small central disc protrusion at L4-5. (Dec. 5, 7.) Ms. Gonzales stopped treating with Dr. Weiner on June 20, 2001, and eventually sought emergency treatment at Union Hospital in Lynn; she was prescribed various pain medication. (Dec. 5.)

The self-insurer paid the employee § 34 benefits without prejudice from May 3, 2000, until July 24, 2000.[2] Following a § 10A conference, the administrative judge awarded § 34 benefits from July 24, 2000 to September 13, 2000; § 35 benefits from September 14, 2000 to December 10, 2000; and ongoing § 34 benefits thereafter. The self-insurer appealed to a de novo hearing. (Dec. 2.)

On June 26, 2001, Dr. Michael DiTullio examined the employee pursuant to § 11A. (Dec. 2.) In his written report, Dr. DiTullio opined that Ms. Gonzales had suffered a lumbosacral sprain causally related to her work injury. However, his examination did not reveal any residual disability, and he felt the employee had reached a medical end result with a good prognosis. Since he had not seen the January 2001 MRI study, he could not determine if she had any ongoing restrictions. (Dec. 6-7; Exh. 4.) At his deposition on December 11, 2001, Dr. DiTullio reviewed the MRI, which revealed an L4-5 disc protrusion indenting the ventral surface of the thecal sac. (Dep. 15.) When asked his opinion on the cause

[2] This information is not in the decision. We take judicial notice of the documents in the board file. See Rizzo v. M.B.T.A., 16 Mass. Workers' Comp. Rep. 160, 161 n.3 (2002).

of the L4-5 disc protrusion in light of Ms. Gonzales' 1998 motor vehicle accident and resulting physical therapy, Dr. DiTullio stated: "I think there is an equal probability that it could have resulted from either the motor vehicle accident or the work injury with this additional piece of history." (Dep. 22.) He went on to state that, based on the MRI finding of L4-5 disc protrusion, and regardless of whether it was a result of the work injury, he would restrict the employee from lifting over thirty pounds and from standing or sitting in one position for too long. (Dep. 26; see Dec. 7.) The judge admitted additional medical evidence from both parties to address the "gap" period prior to the June 26, 2001 impartial examination, which took place more than a year after the work injury. (Dec. 1, 2, 3, 7; see Exhs. 3 and 9.)[3]

In his decision, the judge credited the employee's testimony that she was no longer suffering any adverse effects from the 1998 motor vehicle accident, (Dec. 4), but referred to her as having a "pre-existing condition." (Dec. 11.) He purported to analyze her case under the heightened standard of causation set out in § 1(7A),[4] as well as under the "its major or predominant contributing cause" standard of § 11A(2).[5] (Dec. 8-11.) The judge acknowledged that Dr. DiTullio

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[3] The judge also referenced in his decision to "additional medical evidence from September 25, 2001, supplied by the employee." (Dec. 10). Although September 2001 Union Hospital records are not included in the list of exhibits in the decision, (see Dec. 1-2), the board file does reveal that those records were admitted in evidence in December 2001 when the judge allowed the employee's motion that the impartial report was inadequate. The judge marked those records as Exhibit 10. (Board file.)

[4] General Laws c. 152, § 1(7A), provides, 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.

(Emphasis added.)

[5] General Laws c. 152, § 11A(2), provides, in relevant part:

had indicated that both the 1998 motor vehicle accident and the 2000 work injury were equally likely causes of the L4-5 disc protrusion, and he could not definitely attribute the employee's disc problem to either event. (Dec. 11.)

> The employee had a back problem before the May incident. She testified to this and medical records attest to the veracity of this testimony. The 11A physician determined that the employee had a lumbosacral sprain, and, later during deposition, that the employee had a disc protrusion. He could not attribute the disc protrusion definitely to one or the other event, but as likely attributable to either. Since the employee had past back problems, it could reasonably be found, and I do find, that the May event exacerbated this pre-existing condition.

(Dec. 10-11.) He further concluded, "[f]rom the medical testimony and various medical reports," that she suffered a lumbosacral sprain attributable to her work injury. (Dec. 11.) Adopting Dr. DiTullio's opinion that the employee could return to full-time work with a thirty pound lifting restriction and no prolonged periods of sitting or standing, (Dec. 7, 11), the judge ordered the self-insurer to pay § 34 benefits from December 11, 2000 to June 28, 2001 (the date of the impartial report). (Dec. 12.)[6]

The employee argues on appeal that the judge erred in applying § 1(7A) where the self-insurer failed to properly raise it as a defense. The self-insurer does not argue that it explicitly raised § 1(7A), but maintains that the issue was tried by consent as in Hinton v. Massachusetts Mut. Life Ins. Co., 16 Mass. Workers'

> The report of the impartial examiner shall, where feasible, contain, a determination of the following: . . . (iii) whether or not within a reasonable degree of medical certainty any such disability has as *its major or predominant contributing cause* a personal injury arising out of and in the course of the employee's employment.

(Emphasis added.)

[6] The decision is not entirely consistent as to the dates of payment. At one point, the judge stated that the employee was entitled to benefits from the date of injury until the § 11A deposition. (Dec. 11.) Later, he indicated that her entitlement ran from the "date of the last time she worked until the date of the § 11A examiners [sic] report." Id. Neither party has complained about these discrepancies.

Comp. Rep. 342 (2002). We agree with the employee that the issue was not tried by consent.

The self-insurer has the burden of raising the defense of § 1(7A) as well as producing evidence to trigger its application. Jobst v. Grybko, 16 Mass. Workers' Comp. Rep. 125, 130 (2002), citing Fairfield v. Communities United, 14 Mass. Workers' Comp. Rep. 79, 83 (2000). Even where the applicability of § 1(7A) is obvious, because, for instance, the adopted medical evidence clearly diagnosed a pre-existing condition which combined with the work injury to cause or prolong disability, the defense is waived if it is not properly raised. Saulnier v. New England Window and Door, 17 Mass. Workers' Comp. Rep. 453, 459-460 (2003); Rivera v. Conair Martin Indus., Inc., 17 Mass. Workers' Comp. Rep. 129, 131 (2003); Frey v. Mulligan, Inc., 16 Mass. Workers' Comp. Rep. 364, 367 (2002).

In Hinton, we held that § 1(7A) applied even though the insurer failed to list the defense on its issues sheet or to raise it in its opening statement at hearing. First, there was ample evidence introduced at hearing relating to the pre-existing condition; specifically, the adopted medical evidence indicated that the employee had a pre-existing condition, on which the employee's work injury was super-imposed, triggering her symptoms. Hinton, supra at 347-348. Second, the employee accepted in her brief that § 1(7A) was applicable. Id. at 347. Accord Blair v. Olympus Healthcare, 17 Mass. Workers' Comp. Rep. 37, 38, 39-40 (2003) (§ 1(7A) applied, despite insurer's failure to explicitly raise it, where § 11A physician diagnosed a musculoligamentous strain superimposed upon degenerative disc disease, and the employee in her brief accepted that § 1(7A) applied). See also Saulnier, supra at 460 n.10.

Hinton and Blair are inapposite here. Certainly, there was evidence introduced that Ms. Gonzales had been involved in a motor vehicle accident in 1998 and that she had undergone some treatment for the resulting back and neck injuries. (Dec. 4.) However, the self-insurer cites no medical opinion that the employee had a pre-existing condition which combined with her work injury of

May 1, 2000.[7] The impartial physician's opinion that the motor vehicle accident and the work injury were equally likely causes of the disc protrusion does not indicate such a combination, or even state to a reasonable degree of medical certainty that the employee had a pre-existing condition.

Moreover, the employee has not accepted the applicability of § 1(7A). She has argued strenuously that § 1(7A) was not raised or tried by consent. (Employee br. 5-7; Employee reply br. 1-2.) The self-insurer, however, argues that the employee impliedly accepted the § 1(7A) standard by arguing against its application in its proposed findings of fact to the judge. (Self-insurer br. 5-6.) We disagree.

First, the self-insurer, itself, in its proposed findings, did not suggest that §1(7A) applied. Instead, it argued that the employee did not suffer an industrial injury, but rather had a pre-existing back condition. Alternatively, it proposed that, if the judge found that the employee suffered a work injury, he also find that she was able to return to full-time work with the restrictions imposed by Dr. DiTullio. Nowhere did it argue that a pre-existing back injury combined with the employee's work injury. In her proposed findings of fact, the employee never conceded that § 1(7A) applied. Rather than accepting the applicability of § 1(7A), the employee argued that she was no longer having any problems with her back as a result of the motor vehicle accident at the time of her work injury. In other words, she claimed that she had no pre-existing condition which combined with her industrial injury. See Schmidt v. Nauset Marine, Inc., 17 Mass. Workers' Comp. Rep. 326, 331 (2003)(where insurer failed to raise § 1(7A) and failed to produce any evidence that the industrial injury combined with the employee's pre-existing condition, § 1(7A) was waived). Therefore, we decline to hold that the case was tried by consent under the § 1(7A) causation standard.

[7] The judge found that the employee injured her "upper back" in the 1998 motor vehicle accident. (Dec. 4.) The employee suffered a lumbosacral sprain in the 2000 industrial injury. (Dec. 6, 11.)

In any case, it is not clear that the judge even applied § 1(7A). Despite discussing § 1(7A) and § 11A(2)(iii)[8] at length, he made no findings as to whether the work injury was a major cause of the employee's ongoing incapacity or need for treatment. (Dec. 8-11.) After finding credible the employee's testimony that she was no longer suffering any adverse effects from the 1998 motor vehicle accident, (Dec. 4), the judge concluded that "the employee had past back problems" and that the work injury in May "exacerbated this pre-existing condition." (Dec. 11.) He then awarded benefits up to the approximate date of the impartial examination, without making a finding as to whether the work injury remained a major cause of the employee's incapacity for the benefits period. In finding that the employee suffered an exacerbation of a pre-existing condition, which entitled her to benefits, the judge, in effect, applied a simple causation standard.

But, even under the simple "as is" causation standard applicable here, the judge has not relied on any medical evidence to support his finding of a closed period of total incapacity prior to the impartial examination. Under this standard, if the employee's 2000 work injury was "even to the slightest extent a contributing cause of [her] subsequent disability," the self-insurer would be liable. Rock's Case, 323 Mass. 428, 429 (1948). However, the impartial doctor did not opine to a reasonable degree of medical certainty that the employee's work injury, contributed in any way to any period of incapacity. Prior to reviewing the MRI study, the impartial physician opined only that the employee had suffered a back strain, but stated that he could not find any residual disability. (Exh. 4.) After viewing the MRI results and being informed of the motor vehicle accident, Dr. DiTullio opined that he would impose restrictions on the employee because of her disc protrusion, which he could not relate to her work injury with the requisite

[8] The "its major or predominant cause" standard of § 11A(2)(iii) does not apply to cases where the simple "as is" standard of causation is applicable. See Sawicka v. Archdiocese of Boston, 14 Mass. Workers' Comp. Rep. 362, 367-369 (2000).

degree of medical certainty. (Dec. 9) The judge adopted these restrictions, not in support of a finding that the employee was incapacitated during the period he awarded benefits (i.e., prior to the impartial examination), but in support of his finding that the employee could return to full-time work at the time of the impartial examination. (Dec. 7.)

Nevertheless, the employee may still prevail since there is other medical evidence in the case, which the judge has not addressed. Although the judge discussed only the impartial opinion in his decision, the employee and the self-insurer both submitted "gap" medicals. (Dec. 1, 2; Exhs. 3 and 9). In basing his decision that the employee suffered a disabling back strain causally related to work on "the medical testimony and various medical reports," (Dec. 11), the judge failed to specify on what medical evidence he relied in finding the employee incapacitated. This was error. See Beverly v. M.B.T.A., 17 Mass. Workers' Comp. Rep. 621, 624 (2003), citing Cordi v. American Saw & Mfg. Co., 16 Mass. Workers' Comp. Rep. 39, 46 (2002). On recommittal the judge should examine the "gap" medicals and make findings on whether, under the simple "as is" causation standard, they support any incapacity causally related to the employee's lumbosacral strain during the gap period. See Warnke v. New England Insulation Co., 11 Mass. Workers' Comp. Rep. 678, 680 (1997)(judge must weigh and consider evidence he has admitted).[9]

This case is recommitted to the administrative judge for further findings consistent with this opinion.

So ordered.

[9] Hospital records for a September 25, 2001 visit by the employee to the Union Hospital were admitted as Exhibit 10. Although these records relate to a time period after the June 26, 2001 impartial examination, they lack any opinion that the employee's condition at that time is causally related to the subject industrial injury. They therefore cannot be a basis for finding incapacity.

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Frederick E. Levine
Administrative Law Judge

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Patricia A. Costigan
Administrative Law Judge

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