COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 032800-01**

Robert Horr	Employee
G & C Concrete Construction	Employer
American Protection Insurance Company	Insurer

REVIEWING BOARD DECISION
(Judges Costigan, Horan and Koziol)

The case was heard by Administrative Judge Bean.

APPEARANCES
Teresa Brooks Benoit, Esq., for the employee at hearing
James N. Ellis, Esq., for the employee on brief
Charles E. Berg, Esq., for the employee at oral argument
Christopher J. Connolly, Esq., for the insurer

COSTIGAN, J. The employee appeals from the administrative judge's decision that his present claim for his August 25, 2001 injury, was barred under the successive insurer rule because he had resolved his claim for a May 17, 2006 injury against a different insurer by lump sum settlement under G. L. c. 152, § 48. We agree the judge erred, reverse his decision and recommit the case for further findings.

We summarize the pertinent facts and procedural history. The employee, age forty-eight at the time of the hearing, suffered three industrial accidents while employed as a concrete foreman for the employer.[1] Two are relevant to this appeal. On August 25, 2001, he sustained lumbar compression fractures, a dislocated shoulder and a broken foot,[2] when he fell approximately twenty feet off of a rebar cage; he

[1] His job involved building concrete superstructures, high-rise buildings, bridges, dams and tunnels. (Employee br. 4.)

[2] Although neither the judge nor the parties identified which shoulder and which foot were injured, our review of the board file reveals the employee injured his right upper extremity and fractured a bone in his right foot. See Rizzo v. M.B.T.A., 16 Mass Workers' Comp Rep. 160, 161 n.3 (2002)(proper to take judicial notice of contents of board file).

landed on his feet on an elevated footing, but then rolled off and fell another six feet to the ground. (Dec. 228; Tr. 10-11.) The employer was then insured for workers' compensation by American Protection Insurance Company (American), which accepted the employee's claim and paid total incapacity and medical benefits for approximately three months. The employee then returned to work part-time, eventually resuming full-time work. Although it was not formal light duty, the employee's co-workers assisted him with some of the heavier, more difficult aspects of his job. The employee thereafter never had a pain free day. (Id.)

On May 17, 2006, when the employer was insured for workers' compensation by Liberty Mutual Insurance Company (Liberty), the employee fell at work again, injuring his nose, right wrist, left knee and right eye socket. That claim was the subject of litigation before the administrative judge, culminating in a hearing decision filed on December 8, 2008.[3] The judge adopted the opinions of several medical experts, including the § 11A orthopedic impartial examiner and the employee's evaluating psychiatrist, as well as the opinion of the employee's vocational expert, and found the employee totally incapacitated as a result of both physical and psychiatric injuries, except for brief periods when the employee attempted to return to light duty work for the employer. In his 2008 decision, the judge recounted the twelve diagnoses which Dr. Robert Pennell made after evaluating the employee, all of which, the doctor opined, were causally related to the May 17, 2006 work injury:

> cerebral concussion; right orbit fracture; fracture of the nose; severe open fracture of the digital right radius and ulnar [sic] with nerve damage; status post surgery to repair the right radius and ulnar [sic]; residuals of the radius and ulnar fractures with persistent pain, numbness, loss of motion and disfigurement; triggering of the right middle, ring and little fingers; numbness anterolateral right and left thighs with the need to rule out lumbar disc disease and neuralgia parasthesia; displaced fracture of the left patella; status post patella surgery; internal derangement of the left knee with medial joint line pain and the need to rule out a torn meniscus; and an injury to the lateral aural cutaneous nerve of the left knee and leg with numbness.

[3] The 2008 decision was entered into evidence as Exhibit 4 to the 2010 decision now on appeal.

(Ex. 4, 691.) The judge further noted that Dr. Pennell also diagnosed the employee as having chronic low back pain and chronic right foot pain causally related to the employee's prior industrial accident on August 25, 2001. (Id. at 692.)

Some six months after the decision, the employee and Liberty entered into a lump sum settlement of his May 17, 2006 injury, which was approved by the judge on June 9, 2009.[4] (Ex. 5.) The diagnoses listed in the lump sum agreement are: "Fractures to nose and R wrist, Shattered R eye socket and left patella. S/P surgical repair R wrist and L knee. Depression." The same diagnoses are recounted in the narrative. The lump sum settlement agreement is devoid of any reference to the employee's low back and right foot complaints. (Id.)

In July 2008, the employee filed a claim for §§ 13 and 30 medical benefits against American, citing his August 25, 2001 industrial injury. The judge denied that claim following a § 10A conference, and the employee appealed. Pursuant to § 11A, the employee underwent an impartial medical examination by Dr. Kenneth J. Glazier on April 21, 2009. (Dec. 230.) By the October 6, 2009 hearing date, the employee had settled his 2006 injury claim with Liberty, and he amended his claim "to include a claim for weekly indemnity benefits, and the claim for particular medical treatments was abandoned." (Dec. 227.) The employee sought § 34 total incapacity benefits or, in the alternative, § 35 partial incapacity benefits, from June 11, 2009 to exhaustion, and § 34A permanent and total incapacity benefits thereafter. (Dec. 226.)

In his decision, under the heading, "Subsidiary Findings of Fact," the judge discussed the aftermath of the employee's 2001 injury:

> He returned home in a body cast covering his torso and a cast covering his foot. He received care from a visiting nurse and workers' compensation benefits. He was out of work for several months before he returned to work part time. At first he worked one day a week and then two. Eventually he made it back to full time work. The work was without restriction, but his co-workers helped him with some of the more difficult tasks and he was often

[4] The judge's decision states the settlement occurred on June 10, 2010. (Dec. 227.) Page two of the document in fact states, "Signed this 10th day of June 2009," but the judge's stamp of approval on page one is dated June 9, 2009. (Ex. 5.)

> given lighter tasks. They brought tools to him allowing him to trim his 75 pound tool belt to 30 pounds. *He never had a pain free day. His foot hurt with every step.* He felt that he had to remain at work as he was a single father of several children. His children helped out at home, doing the household chores. His daughter did the shopping and his sons did the yard work. When his job sites were a great distance from home he would drive part of the way and pull over and rest. He took no drugs stronger than aspirin.

(Dec. 228-229; emphases added.) The judge further noted the employee's testimony that by the time of the lump sum settlement of his 2006 injury claim against Liberty, from which he netted $126,163.25, (Dec. 229; Ex. 5), his symptoms "had returned to the pre-May 17, 2006 level," that is, "to his pre-second injury baseline." (Dec. 229.)

> He described his pain as three to four on the 1-10 pain scale before May 17, 2006 and three or four again since June, 2009. However, instead of returning to work at the May 16, 2006 level -- full duty with some help from friendly co-workers, he remained out of work and now claims total disability dating back to the first day after the approval of the June 9, 2009 lump sum agreement. Inconsistently, he later stated that he cannot return to work due to the combined effects of the two industrial injuries. He explained that he always believed that he would not be able to be a construction worker forever due to his back pain. The time to stop has arrived.

(Id.)

The judge recounted at length the opinions expressed by Dr. Glazier, the impartial physician, both in his report, (Ex. 3), and at deposition: 1) the diagnoses were [right] foot/ankle fracture and compound fractures of the lumbar spine, causally related to the August 25, 2001 injury, which left the employee partially disabled; 2) it was "possible" that the employee's 2006 injury aggravated the 2001 injury,[5] but "the majority of his current back complaints and leg symptoms are related to the initial injury in 2001;" 3) a "minority" of the employee's continuing pain is related to the 2006 industrial injury; 4) the primary cause of the employee's disability was not his back condition but his "wrist and knee (2006 injuries) and other things," which were

[5] "The opinion of a medical expert which amounts to no more than an expression indicating the possibility or chance of the existence of a causal connection is not enough to meet the claimant's burden of proof." Nason, Koziol & Wall, Workers' Compensation, § 17.24 (3rd ed. 2003).

"even more of a factor than the back;" 5) the knee and wrist are more limiting than the back, but the back is still disabling due to his symptoms; 6) the 2001 injury is the cause of the "majority" of the employee's complaints; and 7) the 2006 injury is also a "contributing cause" of the employee's disability. (Dec. 230-231.)

Characterizing Dr. Glazier's opinions as "seemingly inconsistent statements on which injury is the major cause," the judge nevertheless determined that,

> both injuries continue to substantially affect the employee and are significant causes for his inability to return to unrestricted work. I find that the effects of both the 2001 industrial injury and the 2006 industrial injury remain a major cause of the employee's disability and need for treatment.

(Dec. 231.) The nature of prima facie evidence under § 11A is inherently compromised where there is a self-contradictory opinion. Kennedy v. City of Chicopee School Dep't, 23 Mass. Workers Comp. Rep. 107 (2009). Whether the judge could properly rely on an expert medical opinion he deemed internally inconsistent and, therefore, arguably inadequate, would be of concern, were it not for two overriding errors of law afflicting the judge's decision.

First, by requiring the employee to prove that his 2001 injury remained "a major" cause of his disability, the judge improperly expanded the scope of the dispute before him. Where a claim or, as here, an affirmative defense, is not before the judge, it is error for him to address it. Gleason v. Toxicon Corp., 22 Mass Workers' Comp. Rep. 39, 41 (2008), citing Medley v. E. F. Hausermann Co., 14 Mass. Workers' Comp. Rep. 327 (2000). The "a major" causation standard under § 1(7A) is an affirmative defense which, in the first instance, must be raised by the insurer. Vieira v. D'Agostino Assocs., 19 Mass. Workers' Comp. Rep. 50 (2005); Fairfield v. Communities United, 14 Mass. Workers' Comp. Rep. 79, 83 (2000). The insurer did not do so in this case.[6] At the outset of the hearing, the judge identified the issues before him as "disability and extent of disability and causal relationship as it relates to the employee's back." (Tr. 5.) The Insurer's Hearing Memorandum reflected that

[6] Moreover, the judge misapplied the § 1(7A) standard as between two industrial injuries, impermissibly importing it into the successive insurer analysis.

disability and extent thereof, and causal relationship, were the only issues raised by the insurer, apart from its denial that the employee was entitled to §§ 13 and 30 medical benefits. (Ex. 2.) The judge's decision identifies the "Issues Presented" as "Disability, extent of disability, causal relationship and the successive successive [sic] insurer rule." (Dec. 226.) Thus, the employee's burden of proof was limited to showing simple causation between the residuals of his 2001 work-related injury and his disability from and after June 11, 2009.[7]

Moreover, the judge's application of the so-called "successive insurer rule" ran afoul of the provisions of G. L. c. 152, § 48(4):

> Whenever a lump sum agreement has been perfected in accordance with the terms of this section, such agreement shall affect only the insurer and the employee who are parties to such lump sum agreement and shall not affect any other action or proceeding arising out of a separate and distinct injury under this chapter, whether the injury precedes or arises subsequent to the date of settlement, and whether or not the same insurer is claimed to be liable for such separate and distinct injury.

See also Kszepka's Case, 408 Mass. 843 (1990)(language of § 48 applies whether the same or another insurer is involved). We do not say it was error for the judge to admit into evidence the June 9, 2009 lump sum settlement agreement between the employee and Liberty. (Ex. 2.) At the very least, the agreement confirms that no diagnoses accepted by Liberty as causally related to the employee's 2006 injury were similar, let alone identical, to those resulting from his 2001 injury. What is troubling, however, is the judge's pointed reference to the amount of money the employee netted from the settlement, (Dec. 229), and his mischaracterization of the employee's testimony that by the time of the settlement, his symptoms had returned to their pre-May 17, 2006 level, which the judge equated with a full duty work capacity. (Id.)

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[7] Because the judge considered Dr. Glazier's opinions "seemingly inconsistent" only as to "a major" causation, and that standard under § 1(7A) did not apply to the employee's claim, we think the impartial medical report retained its prima facie effect as to the matters contained therein. See G. L. c. 152, § 11A(2). In any event, as the judge did not admit additional medical evidence, it appears he found the impartial medical report adequate and the medical issues not complex. Id.

The sole expert medical opinion in evidence establishes that the employee's 2001 work injury continued to contribute to his disability as of the April 21, 2009 impartial medical examination, less than two months before the first date of disability claimed.

For these reasons, we reverse the decision and recommit the case to the administrative judge for reconsideration of the medical evidence and for further findings as to the nature and extent of the employee's incapacity, if any, from and after June 11, 2009, resulting from his August 25, 2001 injuries, applying a simple causation standard.

So ordered.

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Patricia A. Costigan
Administrative Law Judge

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Mark D. Horan
Administrative Law Judge

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Catherine Watson Koziol
Administrative Law Judge

Filed: **July 5, 2011**