COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS	**BOARD NO. 045362-96**
Roger H. Piekarski	Employee
National Non-Wovens	Employer
AIM Mutual Insurance Company	Insurer

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

APPEARANCES
Charles F. O'Brien, Esq., for the employee at hearing
Donald W. Blakesley, Esq., for the employee on brief
Kimberly Davis Crear, Esq., for the insurer

MCCARTHY, J. Roger H. Piekarski, the employee, is fifty-three years old, a high school graduate and a resident of Easthampton, Massachusetts. He was hired by National Non-Wovens in 1973 as a line machine operator and later became a general foreman. On September 24, 1996, while pulling a heavy skid in the course of his employment, he twisted his body and felt a snap in his back.

"He continued to work but his back continued to hurt, and now pain started down his right leg. He went on light duty for about six weeks and his back again improved somewhat. He went back to line operator and again the pain worsened. This back and forth continued for a about a year." (Dec. 2.)

In December 1997, the employee experienced a severe aggravation of pain while trimming his Christmas tree. Due to increased pain that radiated down his leg, he went on a part time, light duty work schedule. In February 1998, the leg pain subsided. Mr. Piekarski continued on light duty at reduced hours. On October 20, 1998, the employee

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

was laid off. Although he continues to experience pain, the employee has looked for work and feels that he is capable of light duty work in an appropriate job. (Dec. 3.)

The employee filed a claim for § 34 temporary, total incapacity benefits from December 1, 1997 to March 15, 1998 and § 35 partial incapacity benefits thereafter. He also sought payment of his medical bills under § 30. The insurer denied the claim. Following a § 10A conference, the employee was awarded § 35 benefits at the weekly rate of $94.72 from January 5, 1998 and continuing, based upon an assigned earning capacity of $400.00 per week, together with medical benefits. Both parties appealed to a hearing de novo. (Dec. 2.)

Mr. Piekarski was examined by Dr. Alan H. Bullock as called for by § 11A. (Dec. 3.) Both the medical report and the physician's depositional testimony were admitted into the evidentiary record. (Dec. 1.) The § 11A examiner opined that the employee suffered a back strain at work that was superimposed on a pre-existing, degenerative condition. (Dep. 22-23; Statutory Ex. 1, 3; Dec. 3.) Dr. Bullock also noted a displaced disc, although he was not entirely sure if it preceded or was caused by the work injury. He concluded, however, that the injury is a component of the disc problem. (Dep. 12-14; Statutory Ex. 1, 3; Dec. 3.) The § 11A examiner further opined that, while the September 1996 injury, inclusive of scarring in the muscles and ligaments that resulted from the injury, continued to play a part in the employee's disability, the employee's non-work-related degenerative changes "play more of a role." (Dec. 4.) Restrictions imposed upon the employee included no heavy lifting, carrying, bending or prolonged sitting. (Dep. 17-18; Statutory Ex. 1, 3; Dec. 6.)

At the conclusion of the lay testimony, the employee filed a motion to submit additional medical evidence. The motion was denied as the judge found that the medical picture was not complex. (Tr. 44.) Notwithstanding this ruling, the judge in his decision contradicted himself stating that "the case was declared complex, but no additional medical records were entered." (Dec. 2.)

The judge acknowledged that causal relationship was the most difficult issue facing him. (Dec. 4.) He took note of the sentence in G.L. c. 152, § 1(7A), which

provides that: "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 judge determined that the § 11A examiner's opinion, when taken as a whole, supported the employee's claim that his work-related injury remained a major cause in his continuing disability. (Dec. 4-5.) As to the December 1997 Christmas tree incident, the judge determined that the event did not break the causal connection and cited Twomey v. Greater Lawrence Visiting Nurses Assoc., 5 Mass. Workers' Comp. Rep. 156, 158 (1991), in support of this finding. (Dec. 5.)

Based on the employee's education, work history and physical restrictions, the judge assigned an earning capacity of $275.00 per week and ordered payment of § 35 benefits from January 5, 1998 and continuing at the weekly rate of $169.72. Further, the judge ordered the insurer to pay medical benefits pursuant to § 30 and legal fees and costs to the employee. (Dec. 6.) The insurer appeals.

The insurer contends that the only medical opinion in evidence, namely the report and deposition of the § 11 A examiner, does not support the finding that the work injury remains a major but not necessarily predominant cause of Mr. Piekarski's ongoing back pain and problems. We agree. Doctor Bullock diagnosed the condition as a "back strain that was superimposed upon a preexisting, non-work-related osteophyte formation at L4-5." (Bullock Dep. Page 11). According to Dr. Bullock, the degenerative changes found in Mr. Piekarski's spine took a long time to develop, and were present before the industrial injury. (Bullock Dep. 12). Doctor Bullock "cannot say, within a reasonable degree of medical certainty, whether the disc was there prior to the industrial accident or not." (Bullock Dep. 12). He states "[t]here is certainly a good chance that it related to his previous problem and was there before the injury, but I can't tell you for sure." Id.

When asked if the industrial injury (strained back) of September 24, 1996 was a major cause of the ongoing medical disability, Dr. Bullock responded,

> Well, I don't know if I can use the word 'major.' I mean, he had pain since that time, you know, but the injury was just a strain. So I don't know if I can say that that's the major reason. I think I need to word it the way I'm comfortable. I have no way of saying that that was the major thing, major component. He had no pain, he strained his back, and then, for some three years, almost three years since then, he has been having back pain. But I don't know if I can say that that is the major cause, because a strain should not be continued back pain.[2]

(Bullock Dep. 27.)

In Hammond v. Merit Rating Bd., 9 Mass. Workers' Comp. Rep. 708 (1995), the reviewing board stated:

> conceivably, if a minor event is the proverbial 'straw that breaks the camel's back' when a previously stable non-work related pre-existing condition needs only a small trigger to blossom into incapacity, then such triggering work event could arguably be [a] "major" cause of medical disability. In such instances, in order to determine whether that disability has 'as a major cause the work-related injury' the judge will have to determine if the work injury set off an identifiable causal chain that would otherwise have remained quiescent.

In the case at hand, the judge made that determination; he stated as follows:

> Taking Dr. Bullock's medical testimony as a whole, particularly his views that the work injury and subsequent scarring and disc protrusion do continue to play some role in Disability, and also that previous to the work injury Mr. Piekarski had no history of back pain, and combining that medical testimony with facts as to the particular onset of symptoms, Mr. Piekarski's long work history for this employer in a labor intensive job, and his credible testimony of no previous back pain, I find that the work injury is indeed a "major" cause of Mr. Piekarski's continuing disability. I do this with the understanding that the degenerative disease is the more immediate cause. However, there can be more than one major cause (although not more than on [sic] predominant). Such is the case here, despite the impartial's misgivings in defining it in exactly those terms.

(Dec. 4-5.)

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[2] Although the question put to Dr. Bullock was whether the industrial injury was a major cause of the ongoing medical disability, Dr. Bullock framed his rambling response in terms of the major cause of the disability.

In drawing his conclusion, we think the judge has read too much into Dr. Bullock's opinion. Doctor Bullock testified that if Mr. Piekarski did not have the pre-existing degenerative condition, his back would be better. (Bullock Dep. 32). Doctor Bullock did go on to testify that he could not relate all of the employee's pain to the degenerative condition. He stated that "[w]hen you get a bad strain, you have discomfort for a prolonged time due to scarring in the muscles and ligaments so that's why I say it does play some component now. How much is hard to say." (Bullock Dep. 33). In our view, "some component" does not meet the standards set forth in § 1(7A).

We agree then with the insurer that the employee had failed to prove that his ongoing medical disability and resultant incapacity is legally causally related to the September 24, 1996 industrial injury. However, we do not agree with the insurer that the decision should simply be reversed and the employee's weekly incapacity and medical benefits discontinued. In response to the employee's motion to open the case for further medical evidence based on the complexity of the medical condition, the judge gave two diametrically opposite signals. At the conclusion of the hearing when the motion was argued, the judge denied it, agreeing with counsel for the insurer that the medical picture was not complex. (Tr. 44.) Yet in his decision, the judge writes, "[A]t hearing the case was declared complex, but no additional records were entered." (Dec. 2.) We think the judge's finding of complexity on page two of his decision was the correct one. The judge should have allowed the parties to submit additional medical evidence to support their claims. Coggin's Case, 42 Mass. App. Ct. 584 (1997).

Guided by what the reviewing board said in Wilkinson v. City of Peabody, 11 Mass. Workers' Comp. Rep. 263 (1997), we point out again that the impartial medical examiner provided the only medical evidence in this case. His opinion did not meet the causal relationship standard established by § 1 (7A). "The judge was not competent to fill that evidentiary gap on his own. He needed expert medical evidence." Wilkinson, supra at 264.

"Certainly a decision by the administrative judge to foreclose further medical testimony where such testimony is necessary to present fairly the medical issues would

represent grounds either for reversal or recommittal." O'Brien's Case, 424 Mass. 16, 22-23 (1996); accord Lorden's Case, 48 Mass. App. Ct. 274 (1999). Faced with a medically complex case, and a claim he believed to be meritorious the judge should have granted the employee's motion and allowed additional medical evidence.

Accordingly, we reverse the finding of causal relationship and recommit the case to the administrative judge for further findings after the allowance of additional medical evidence together with such additional lay evidence as he finds justice requires.

So ordered.

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William A. McCarthy
Administrative Law Judge

Filed: ***December 29, 2000***

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Sara Holmes Wilson
Administrative Law Judge