COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 003419-03**

Roland D. Libby	Employee
National Restaurants Corp.	Employer
A.I.M. Mutual Insurance Co.	Insurer

REVIEWING BOARD DECISION

(Judges Horan, McCarthy and Fabricant)

APPEARANCES

Edward J. Spence, III, Esq., for the employee
Kimberly Davis Crear, Esq., for the insurer

HORAN, J. The insurer appeals from a decision awarding the employee ongoing partial incapacity benefits for a February 4, 2003 industrial accident. The insurer argues the judge failed to properly apply the duly raised provisions of § 1(7A), [1] and that reversal of the decision is therefore warranted. We share some of the insurer's concerns, particularly with regard to the decision's lack of sufficient § 1(7A) findings. We do not think, however, that the ambiguous testimony of Dr. Silver is susceptible only to the insurer's interpretation. As a result recommittal, and not reversal, is appropriate.

The employee injured his back at work on February 4, 2003. He lost time from work and was paid without prejudice through July 5, 2003. He returned to work, but left again on August 24, 2003 due to his back pain. (Dec. 4-5.) The employee claimed § 34 benefits, and the insurer defended on grounds of liability, causal relationship, disability and extent thereof, and § 1(7A) "a major" causation. (Dec. 2.)

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[1] General Laws c. 152, § 1(7A), provides, in pertinent 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 employee underwent an impartial medical examination by Dr. Steven Silver. Dr. Silver's opinions stemming from this examination - expressed in his report and deposition testimony - were ambiguous and confusing. Dr. Silver opined the employee, upon examination, had cervical symptoms related to his industrial injury. (Dep. 59, 72.) However, Dr. Silver opined the employee's cervical pain did not correlate to his degenerative disc condition. Dr. Silver considered the employee to be partially disabled, with restrictions against sitting or standing for more than four hours, and bending or lifting objects greater than 10-20 pounds. (Dec. 6.) The judge considered the lack of a medical opinion on continuing aggravation of a pre-existing degenerative disc condition,[2] and the doctor's opinion on the employee's causally related cervical pain. The judge concluded the employee had met his burden of proving a disabling cervical sprain/strain, but had not met his burden of proving an aggravation of the pre-existing disc condition. (Dec. 6.) However, Dr. Silver did not connect the employee's disability to his cervical sprain/strain. (Dep. 42, 59, 72.)

The judge credited the employee's testimony at hearing. (Dec. 6.) The judge also concluded the employee had suffered an industrial injury, was totally incapacitated until December 8, 2003, and was partially incapacitated thereafter. The judge attributed the employee's incapacity to the work-related cervical and lumbar [3] conditions. (Dec. 8.)

Dr. Silver opined the employee's cervical symptoms (pain) and his cervical MRI findings (disc herniation and bulging) did not "correlate." (Dep. 58-60.) The doctor explained this by noting the employee's pain was on his left side, while the herniated disc was on the right. (Dep. 66.) Regarding the causal relationship between the industrial accident and the employee's cervical pain, the doctor's testimony is confusing: The industrial accident was "not the cause of the neck pain that he's continuing to experience," (Dep. 65-66), though it "may be a combination of degenerative joint disease and acute cervical strain." (Dep. 66-67.) He further opined "the symptoms that were caused by the accident were still active" at the time of the examination, and the injury "was in all probability the cause of

[2] MRI findings demonstrated that the employee suffered from pre-existing degenerative disc conditions of the cervical and lumbar spine. (Dec. 5; Impartial Report.)

[3] The judge's conclusion that the employee's incapacity was due in part to his lumbar condition is contrary to his subsidiary finding of fact that "[t]he employee admitted at hearing that his lower back pain is not the reason why he feels he cannot presently work." (Dec. 6.)

his pain." (Dep. 59,72.) The judge adopted the doctor's testimony expressing a causal relationship between the industrial accident and the employee's *symptoms*. The judge then dissociated the MRI cervical disc findings from the neck pain and found "that [the employee] has met his burden of causation in relationship to a cervical sprain/strain." (Dec. 6.)

The judge did not utilize the "a major" causation standard of § 1(7A). We surmise he considered the section's applicability was defeated in some manner. See Vieira v. D'Agostino Assocs., 19 Mass. Workers' Comp. Rep. 50, 53 (2005). He may have determined the cervical sprain/strain did not combine with the pre-existing degenerative disc condition, based on Dr. Silver's testimony that the employee's pain did not "correlate" to the MRI findings. However, the decision lacks findings on this important point.

> A further problem with Dr. Silver's hydra-headed testimony concerning causation warrants recommittal. Consider the following exchange at his deposition:
>
> Q: How long did he remain symptomatically active as a result of the accident, how long after the accident?
>
> A: He had symptoms when I saw him.
>
> Q: So, the symptoms that were caused by the accident were still active at that point in time?
>
> A: The symptoms, that's exactly right.
>
> Q: Were the symptoms still a substantial cause of whatever disability you saw at that point in time?
>
> A: No, I wouldn't say the symptoms were the cause, no.
>
> Q: What were [sic] the cause of his disability?
>
> A: I can't tell you, but he had symptoms.
>
> Q: If you can't tell me, that means you don't know?
>
> A: I don't know -- that's a good way of putting it.

(Dep. 59.)

To add to the confusion, in answer to the insurer's written hypothetical questions, Dr. Silver stated, "It is my opinion the patient has a mild to moderate, partial, temporary, *causally related disability . . . primarily on the basis of his* ***pre-existing difficulties*** *and* ***not*** *his acute injury of February 4, 2003*." (Impartial Report, 5; emphasis added.) Faced with this convoluted medical evidence, the judge could not, as he did, link the employee's injury to his neck pain, or to his alleged disability. Therefore, it is impossible for us to identify, with any confidence, what the impartial physician's testimony was on the issues of the combination of the employee's prior cervical condition, his symptomatic cervical condition, and its contribution to the employee's disability. We therefore cannot determine with sufficient certainty whether the judge applied the correct rules of law. E.g., Praetz v. Factory Mutual Eng'g & Res., 7 Mass. Workers' Comp. 45, 47 (1993).

A final point requires discussion. Recommittal is also warranted because the employee filed a motion charging that Dr. Silver's report was inadequate, and the motion was not addressed by the judge at hearing, [4] or prior to the issuance of his decision eleven days after the doctor's deposition was filed. (Tr. 5-6, 43-44; Employee's br. 14.) In the present case, the impartial physician's ambiguous opinion on the cervical condition was inadequate as a matter of law. See Nunes v. Town of Edgartown, 19 Mass. Workers' Comp. Rep. ___ (October 11, 2005); Brooks v. Labor Mgmt. Srv., 11 Mass. Workers' Comp. Rep. 575 (1997).

[4] Parties are entitled to a ruling on § 11A motions based solely on the report; whether either party intends to take the impartial physician's deposition is irrelevant to that inquiry. See Brackett v. Modern Continental Constr. Co., 19 Mass. Workers' Comp. Rep. 11, 13-15 (2005); LaGrasso v. Olympic Delivery Serv. Inc., 18 Mass. Workers' Comp. Rep. 48, 57 (2004). We recall the Supreme Judicial Court's opinion that "[c]ertainly 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). We are also mindful the reports of § 11A impartial medical examiners often fail to address the questions necessary for a proper Vieira § 1(7A) analysis.

Accordingly, recommittal is appropriate. The parties may introduce additional medical evidence concerning the cervical condition. The judge shall conduct further proceedings and make further findings consistent with this opinion. [5]

So ordered.

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Mark D. Horan
Administrative Law Judge

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William A. McCarthy
Administrative Law Judge

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Bernard W. Fabricant
Administrative Law Judge

Filed: February 21, 2006

[5] Because the employee did not cross-appeal, he may not obtain an increase in the benefits awarded in the decision as a result of the recommittal. Brackett, supra at 16; Williams v. Williams Forms, Inc., 16 Mass. Workers' Comp. Rep. 141, 142 (2002).