COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS	**BOARD NO. 033161-00**
Rufus Darby	Employee
City of Boston	Employer
City of Boston	Self-insurer

REVIEWING BOARD DECISION
(Judges Wilson, Costigan and Maze-Rothstein)

APPEARANCES
Justin F. X. Kennedy, Esq., for the employee
John T. Walsh, Esq., for the self-insurer

WILSON, J. The self-insurer appeals an administrative judge's decision ordering that it pay for cervical surgery recommended by the employee's treating physician, as well as ongoing weekly § 34 temporary total incapacity benefits. The self-insurer argues that the prima facie medical evidence neither causally relates all the underlying conditions for which surgery was authorized to the industrial accident, nor supports a finding of ongoing total incapacity. We agree and, therefore, vacate the decision and recommit the case for further findings based on the medical evidence.

Rufus Darby, age fifty-eight at the time of hearing, obtained a GED after completing the eleventh grade. His previous work history included reconditioning cars and working as a bus driver and collector for the M.B.T.A. In 1991, he began working for the City of Boston in the sign shop, making and hanging street signs, as well as jackhammering holes in the pavement to install signposts. At the end of his shift on Friday, August 4, 2000, the employee attempted to close an overhead garage door with his left hand while holding a forty-pound tool box in his right. Unable to get the door down, the employee reported the open, broken door to his supervisor and went home. The next morning around 3:00 a.m., the employee went to the hospital with severe neck

pain. He was sent home with pain medication, but he called in sick on Monday due to the pain. He saw his doctor later in the week and was ultimately referred to a specialist who recommended surgery. At the time of hearing, the employee had not had the surgery. (Dec. 500.)

Following a conference order awarding § 34 benefits for temporary, total incapacity, the self-insurer appealed to a de novo hearing. Dr. Lawrence Geuss examined the employee pursuant to § 11A on April 13, 2001, and supplemented his report with an addendum dated April 22, 2002. In his first report, Dr. Geuss diagnosed a disc herniation at C6-7 as well as degenerative disc disease. He causally related the herniation to the work injury, but opined that the degenerative disc disease pre-dated the work incident. Dr. Geuss recommended disc excision surgery at the C6-7 level and opined that the employee would be totally incapacitated for three months after the surgery, at which time he could return to his previous employment. (Dec. 501.)

In his second report, written more than a year after his examination, Dr. Geuss conducted a record review and attempted to clarify the level at which surgery should take place. He noted degenerative changes at both C3-4 and C4-5. Though he opined that the work incident "could have aggravated" the C4-5 condition, he felt that the aggravation " 'should have calmed down within a few months.' " (Dec. 501-502, quoting Exh. 3, Addendum to Impartial Report.) He again recommended surgery at the level of acute herniation, C6-7, and opined that surgery at C4-5 would not be causally related to the work incident. (Dec. 501-502.)

In his decision, the judge credited the employee's testimony that his neck pain radiates down his left arm, and that his pain medication interferes with his driving. The judge further found that the employee has no grip strength in his left hand, has difficulty concentrating, sleeps poorly for only three or four hours a night, and does not do household chores or cook. (Dec. 501, 502.) The judge stated that he relied on the opinion of Dr. Geuss that the work incident "could have aggravated the employee's C4-5 condition" to find that "[t]he recommended cervical surgery, *at whichever level* the

employee's doctor determines would be most advantageous to the employee, is causally related to the work injury." (Dec. 502, emphasis added.) However, he found the impartial doctor's statement that the aggravation should have subsided within a few months to be speculative. Id. Based on these findings, the judge concluded that the employee was temporarily, totally disabled as a result of his injury at work from August 5, 2000, and awarded the employee ongoing § 34 benefits. He also ordered the self-insurer to pay for "the cervical surgery recommended by the employee's treating surgeon." (Dec. 502-503.)

The self-insurer argues that the medical evidence does not support the judge's order that it pay for whatever cervical surgery the treating physician recommends or his award of temporary total incapacity benefits. We agree.

We first address the issue of the causal relationship of the ordered surgery. As we have stated many times, where the issue of medical causation is beyond the common knowledge and experience of the ordinary layman, a finding of causal relationship must be based on expert medical testimony. Josi's Case, 324 Mass. 415, 417-418 (1949). The medical evidence in the case consisted of the two reports by the impartial physician, Dr. Geuss, which had prima facie weight. See G. L. c. 152, § 11A(2), and Dodd v. Walter A. Furman Co., Inc., 16 Mass. Workers' Comp. Rep. 59, 61 (2002). In a complete departure from this principle and the admitted evidence, however, the judge left it to the discretion of the treating physician to determine the cervical level at which to perform surgery and, hence, indirectly found that the conditions at both cervical levels were causally related to the injury. According to Dr. Guess's addendum to the impartial report, Dr. Reed, the employee's treating physician, had suggested that surgery at C4-5 would be causally related to the industrial accident. But this was a premise with which Dr. Geuss specifically disagreed, since he believed changes at C4-5 were due to pre-existing degenerative processes:

> Initially the impression was that he had degenerative joint disease in his neck and a herniated disc that most likely occurred on the 8/4/00 injury of pulling the garage door. The acute herniation would be the C6-7 area on the left. It is felt that

> *certainly he could have aggravated the C4-5 area* on the left, but if he did aggravate that *that should have calmed down within a few months.* That is a markedly degenerative area of disc and foraminal stenosis. *That is something that has been there for a long time*. . . . I felt that he would benefit from a one level disc excision at C6-7 on the left. A fusion would be at the discretion of the surgeon. . . . I would *disagree with Dr. Reed's letter* of October 11, 2001 *suggesting that the surgery at C4-5 would be related to a workmen's*[1] *compensation injury*. Any aggravation at the C4-5 level would have been an aggravation of the degenerative process that should have calmed down with anti-inflammatory medications within a few months and gotten back to his previous level of general ache and pain in the neck.

(Exh. 3, April 22, 2002 Addendum to Impartial Report, emphasis added.)

The judge's reliance on the impartial opinion that the work incident "certainly *could have aggravated* the C4-5 area on the left," (Report dated April 22, 2002, emphasis added), to award surgery at whatever level the treating physician recommended was inappropriate.[2] A medical opinion on causation must be expressed in terms of probability, not possibility. Patterson v. Liberty Mut. Ins. Co., 48 Mass. App. Ct. 586, 592 (2000), citing Sevigny's Case, 337 Mass. 747, 749-754 (1958). The impartial opinion on the aggravation at C4-5 does not rise to that level of medical certainty. While in certain situations, an ambiguous expert opinion as to causation may be strengthened by other testimony of the expert or by lay testimony, see Bedugnis v. Paul McGuire Chevrolet, 9 Mass. Workers' Comp. Rep. 801, 803 (1995); Josi's Case, supra at 418, just the opposite occurred here, since the impartial doctor specifically opined that surgery at C4-5 would *not* be causally related to the employee's industrial accident. Thus, the judge's order that the self-insurer pay for "the recommended surgery, at whatever level would benefit the

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[1] In Zerofski's Case, 385 Mass. 590 n.1 (1982), the Supreme Judicial Court found the term "workers' compensation" more appropriate than the traditional title "Workmen's Compensation Act."

[2] We note that the self-insurer has not claimed either at hearing or on appeal that the § 1(7A) heightened "a major" causal relationship standard applies. Therefore, the simple "as is" causation standard is applicable. See Schmidt v. Nauset Marine Inc., 17 Mass. Workers' Comp. Rep. ___ (June 10, 2003), citing Jobst v. Leonard T. Grybko, 16 Mass. Workers' Comp. Rep. 125, 131 (2002).

employee the most," (Dec. 502), is not supported by the prima facie opinion of the impartial examiner.

The self-insurer also questions whether the medical evidence supports the reasonableness and necessity of *any* surgery.[3] Where the employee claims entitlement to medical services, such as surgery, the judge generally must base his findings regarding the reasonableness and necessity of such treatment on expert medical testimony. In addition, he must provide a brief statement of the grounds for his decision. Burnette v. Command Mktg. Corp., 13 Mass. Workers' Comp. Rep. 56, 59 (1999). Although Dr. Geuss did not waver in his reports on the causal relationship of the C6-7 herniation to the work incident, he did backpedal somewhat in his addendum from his original opinion that a C6-7 disc excision is appropriate, due to the passage of time. Cf. Buck's Case, 342 Mass. 766, 770 (1961), citing Perangelo's Case, 277 Mass. 59, 64 (1931)("[t]he opinion of an expert which must be taken as his evidence is the final conclusion at the moment of his testifying"). In his second report, Dr. Geuss suggested that the employee should have a repeat MRI to evaluate the C6-7 disc space since "[s]ometimes these disc[s] can dramatically improve and the need for surgery can decrease over time." (Exh. 3, April 22, 2002 Addendum to Impartial Report.) He also stated that Mr. Darby "*possibly* would benefit from a surgical procedure." (Id., emphasis added.) The judge has not addressed the significance of these qualifying statements by the impartial examiner. On recommittal, he should do so, making clear findings regarding the reasonableness and necessity of surgery at the C6-7 level, based on medical evidence stated with a sufficient degree of probability.

Lastly, the self-insurer contends that there is insufficient evidence to support an award of ongoing § 34 temporary total incapacity benefits. We agree. The judge based his finding of total incapacity on the assumption that the employee's work injury not only caused the herniation of his C6-7 disc, but aggravated his degenerative disc disease at C4-

[3] General Laws c. 152, § 30, provides, in relevant part, that, "The insurer shall furnish to an injured employee adequate and reasonable health care services . . . ."

5. Because, as discussed above, the assumption regarding the causal relationship of the C4-5 disc aggravation is not supported by the prima facie medical evidence, the judge must re-evaluate his incapacity findings, taking into consideration the sole condition causally related to the industrial accident, the C6-7 herniation. See Rodriguez v. Western Staff Services, 13 Mass. Workers' Comp. Rep. 91, 93 (1999), citing Hummer's Case, 317 Mass. 617, 620, 623 (1945)(judge may rely only on symptoms and limitations caused by work injury in assessing the nature and extent of incapacity).

One final point warrants mention. The self-insurer argues that the only restrictions the impartial physician places on the employee are post-surgery and that he offers no evaluation regarding extent of medical disability prior to that. On recommittal, the judge should examine the impartial reports for evidence of physical disability, and indicate on what he relies for his incapacity determination. See Cordi v. American Saw and Mfg. Co., 16 Mass. Workers' Comp. Rep. 39, 46 (2002)(conclusions on incapacity at any point in time ordinarily require expert medical testimony).

We vacate the decision and recommit the case for further findings consistent with this opinion.

So ordered.

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Sara Holmes Wilson
Administrative Law Judge

Filed: **September 25, 2003**

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Patricia A. Costigan
Administrative Law Judge

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Susan Maze-Rothstein
Administrative Law Judge