**COMMONWEALTH OF MASSACHUSETTS**

**DEPARTMENT OF INDUSTRIAL ACCIDENTS** **BOARD NO. 006818-96**

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| Russell Cook | Employee |
| Stop and Shop Company | Employer |
| Stop and Shop Company | Self-insurer |

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

**APPEARANCES**
Paul S. Kelly, Esq., for the employee
William J. Doherty, Esq., for the self-insurer

**MAZE-ROTHSTEIN, J.** In this complex case involving industrial injuries in 1994 and 1996, and non-industrial injuries in 1992 and 1995, the self-insurer appeals an award of G.L. c. 152, § 34A, permanent and total incapacity benefits. Two issues raised by the self-insurer warrant recommittal. First, the self-insurer argues that the judge should have applied § 1(7A) because the employee had a pre-existing cervical condition resulting from a prior noncompensable motor vehicle accident. Second, the self-insurer contends that the judge misstated, and then relied upon, the opinion of the self-insurer's psychiatric expert regarding mental disability. We agree in part with the self-insurer on the first issue and hold that further analysis under § 1(7A) is necessary. We also agree that the psychiatric disability opinion relied upon by the judge was misstated. Therefore, we recommit the case for further findings consistent with this opinion. See G.L. c. 152, § 11C.

Russell Cook, age fifty-one at the time of hearing, had worked as a meat manager for the employer since 1984. Not infrequently, his duties required that he lift and carry large boxes of meat weighing over one hundred pounds. Before that, he had done heavy work as a ship's painter and maintenance man, compositor's apprentice, stone worker and meat cutter. (Dec. 6.) In 1992, prior to either of the subject industrial injuries, the

employee injured his neck and back in a non-work-related car accident. (Dec. 6-7.) Two years later, on October 24, 1994, Mr. Cook sustained injuries to his head, face, neck, shoulder, and arm, when a heavy metal door struck him in the face at work. (Dec. 7.) An MRI two days after the injury revealed two herniated cervical discs. A subsequent EMG and nerve conduction study revealed cervical radiculopathy and bilateral carpal tunnel syndrome. The employee returned to work after several days. (Dec. 7.)

In July 1995, the employee was involved in a second non-industrial vehicular accident, and received treatment for injuries to his neck. He lost no time from work, (Dec. 7), and continued to perform his usual job duties until February 16, 1996. At work on that date, he bent to lift a ninety-pound box from a pallet onto a cart. Extreme pain shot through his low back, neck and shoulder. He dropped to the floor and could not get up. (Dec. 8.) Since then he has not returned to work. (Dec. 3.) In 1996, he had bilateral carpal tunnel surgeries. (Dec. 11.) On February 14, 1997, he underwent cervical disc removal and fusion. (Dec. 8.) After the February 1996 work injury, he also began treating with a clinical psychologist for depression and other problems. (Dec. 12.)

At the threshold of this case lie the obscurities of exactly what was in dispute. The parties did little at the hearing to crystallize their differences for the judge. The self-insurer conceded liability for the October 24, 1994 neck and shoulder injuries.[1] (Dec. 3-4, 7; Self-insurer br. 1-2.) It further accepted liability for the second work injury in 1996, and paid § 34 temporary total weekly benefits from February 16, 1996, until exhaustion, (Dec. 3), without ever specifying what injuries it had acknowledged. (Dec. 8; Self-insurer br. 1; Employee br. 1.) Thereafter, the employee filed a claim for § 34A permanent and total incapacity benefits, alleging that his neck, back and shoulder injuries, as well as his carpal tunnel syndrome and his psychiatric condition, were work-related. A § 10A conference resulted in a § 34A benefits award, and a medical benefits

[1] The judge does not indicate that compensation was paid after the 1994 injury, but both the self-insurer and the employee agree that it was. The self-insurer states that it paid two days of weekly benefits and medical benefits. (Self-insurer br. 1-2.) The employee states only that the self-insurer paid benefits associated with head, face, cervical and shoulder injuries. (Employee br. 1.)

order for treatment of depression, physical therapy, and a diagnostic MRI of the employee's back.[2] (Dec. 4.)

The self-insurer appealed to a de novo hearing. (Dec. 4.) Prior to the hearing, the employee was examined pursuant to § 11A by an orthopedic physician, whose report and deposition testimony were admitted into evidence. The judge found the medical issues to be complex and allowed the submission of additional medical evidence. (Dec. 5.) Both the employee and the self-insurer submitted a number of medical reports and records. (Dec. 1-2.)[3]

At hearing, the employee sought to establish the causal relationship of his various medical problems—neck, back, shoulder, carpal tunnel, and psychiatric—to his work injuries. (Dec. 3-4.) The self-insurer raised a number of issues, including § 1(7A), (Dec. 4), specifically with respect to the employee's neck condition. (Self-insurer br. 2.) The self-insurer also disputed liability for the employee's carpal tunnel syndrome and psychiatric problems.[4] (Dec. 4; Self-insurer br. 2.) In addition, the self-insurer contested present causal relationship for the neck injury. (Dec. 6; Self-insurer br. 2.)[5]

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[2] The judge also ordered that the employee's compensation rate be corrected, retroactively, per agreement of the parties. (Dec. 4.)

[3] General Laws c. 152, § 11A, gives an impartial medical examiner's report the effect of "prima facie evidence [with regard to the medical issues] contained therein," and expressly prohibits the introduction of other medical testimony unless the judge finds that additional medical testimony is required due to the complexity of the medical issues involved or the inadequacy of the report. See O'Brien's Case, 424 Mass. 16 (1996); See also Mendez v. Foxboro Co., 9 Mass. Workers' Comp. Rep. 641, 646-648 (1995) (§ 11A(2)'s reference to "testimony" was interpreted as consistent with the requirements of G.L. c. 233, § 79G).

[4] We take judicial notice that the issues sheet filed by the self-insurer at hearing does not indicate that "liability" was in issue, but rather that the self-insurer contested causal relationship, extent of disability, psychiatric treatment, and raised § 1(7A) as a defense. Since the self-insurer acknowledged liability for an industrial injury, but disputed which bodily injuries it accepted, (Dec. 8), we take this "liability" contest to mean that the self-insurer contests causal relationship of the employee's bilateral carpal tunnel syndrome and psychiatric problems to the employee's work injuries.

[5] Though it is clear that the self-insurer contested present causal relationship of the employee's neck condition to his work injuries, it is not clear whether it contested that a neck injury occurred

In her decision, the judge adopted various doctors' reports to support her findings. She found the employee's present neck and radiating shoulder and left arm complaints as well as his need for neck surgery, to be causally related to both the February 16, 1996 work injury and the prior October 24, 1994 work injury. She found his back symptoms to be causally related to the 1996 industrial injury, and his bilateral carpal tunnel syndrome to be causally related to his repetitive and heavy duties as a meat cutter and meat room manager. In addition, she found that he was depressed as a sequela of his work-related physical injuries and ongoing work-related pain. She ruled that § 1(7A) was in-applicable since no persuasive evidence of any residual medical problems from the 1992 motor vehicle accident had been produced, (Dec. 6-7), and since the neck, radiculopathy, and arm problems are the combined result of the industrial injuries. (Dec. 9.) She further found that the 1995 motor vehicle accident did not aggravate or worsen the October 1994 industrial injury, and thereby failed to break the causal chain of liability for the neck problems. (Dec. 7-8.) She concluded that the employee remains incapacitated for all work as a result of his industrial injuries and that his work-related impairment is permanent. (Dec. 13-14.) Accordingly, she awarded § 34A benefits, and ordered medical bills paid for the head, neck, left arm and shoulder, back and bilateral carpal tunnel injuries.[6] (Dec. 14.)

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in 1996. The judge states that the self-insurer stipulated to work-related neck injuries in 1994 and 1996, but contested liability as to the back. (Dec. 4.) However, neither the transcript nor the paperwork filed at hearing reflect such a stipulation. To the contrary, the self-insurer, in its brief to the reviewing board, argues that the employee did not suffer a neck injury in 1996, but rather incurred a lumbar injury. (Self-insurer br. 2.) The judge's understanding of whether the insurer conceded or contested a neck injury in 1996 may have affected her ultimate determination that the employee's neck condition was causally related to the 1996 work injury. Since ongoing causal relationship of the employee's neck condition is an issue on appeal, and since the judge and the self-insurer are not in agreement as to whether the self-insurer contested neck injuries or back injuries in 1996, on recommittal the judge should clarify this issue.

[6] The administrative judge did not order medical benefits for psychiatric treatment, but such an order would follow from her finding that the employee had a medically disabling psychiatric condition causally related to his work injuries. ( Dec. 12, 13-14.)

The self-insurer appeals, urging two issues which have merit. First, it argues that § 1(7A) should have been applied with respect to the employee's neck injury. That section modified the general understanding of "personal injury," to provide, in pertinent part:

> If a compensable injury or disease combines with a preexisting 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 that such compensable injury or disease remains a major but not necessarily predominant cause of disability or need for treatment.

G.L. c. 152, § 1(7A), amended by St. 1991, c. 398, § 14. In finding § 1(7A) inapplicable the judge reasoned:

> While it is known that the employee sustained neck and back injuries in a motor vehicle injury in 1992, there is no evidence about what particular aspects of the neck and back were involved in that incident. There is no persuasive evidence of any residual medical problems from the 1992 incident. The insurer did not introduce sufficient evidence to trigger the application of § 1(7A), and thus I do not apply it.

(Dec. 6-7.) In so stating, the judge seems to have enlarged the self-insurer's burden in establishing the applicability of § 1(7A) and appears to have overlooked the treating chiropractor's October 16, 1993 report following Mr. Cook's 1992 non-compensable motor vehicle accident. To trigger analysis under § 1(7A), the self-insurer must only produce evidence which would support a finding of a non work-related pre-existing condition. Fairfield v. Communities United, 14 Mass. Workers' Comp. Rep. 79, 82 (2000). Here, without objection,[7] the self-insurer submitted the report of the employee's treating chiropractor, who opined that "Mr. Cook suffers essentially constant neck pain and regular upper extremity pain. It is evidence that he has suffered a significant injury as a result of the motor vehicle accident of February 23, 1992." (Ex. 7, report of Dr. McLaughlin dated October 16, 1993.) The chiropractor went on to estimate that due to

[7] Pursuant to 452 Code. Mass. Regs. § 1.11(6), "a party may offer as evidence medical reports prepared by physicians engaged by said party . . . ." (Emphasis added.)

the auto accident neck injury, the employee's "permanent whole person impairment [is] six percent." Id.

The chiropractic report is sufficient to meet the insurer's burden of producing evidence of a pre-existing condition. See Fairfield supra. As we stated in Fairfield, "While the employee has the burden of proving every element required to establish entitlement to benefits under c. 152, see Sponatski's Case, 220 Mass. 526 (1915), some of the § 1(7A) 'laundry list' of limitations and exceptions are, at minimum, part of the insurer's burden of producing evidence." 14 Mass. Workers' Comp. Rep. at 82. The burden of production merely requires the self-insurer to come forward with some evidence of a non work-related pre-existing condition that could combine with the work injury, see Russell v. Red Star Express Lines, 8 Mass. Workers' Comp. Rep. 404, 406 (1994), citing Lawrence v. Commissioners of Pub. Works, 318 Mass. 520, 527 (1945), sufficient to convince a judge that a reasonable fact finder could find that said condition exists. Russell, supra at 406, citing P.J. Liacos, Massachusetts Evidence § 5.1 (6th ed. 1994.)

Once the self-insurer met its burden of production to show a potentially combining pre-existing condition, the employee's burden of proof, also known as the burden of persuasion, increased. Fairfield, supra at 83; see Russell, supra at 406, citing Liacos, supra, § 5.1. Mr. Cook has two options. He may produce persuasive evidence that the pre-existing condition did not combine with the industrial injury. If that burden is persuasively met, then the judge need go no further with a § 1(7A) analysis; the employee's medical disability is analyzed under a simple "as is" causation standard. See Robles v. Riverside Mgmt., Inc.,10 Mass. Workers' Comp. Reg. 191, 195 (1996). However, if the judge finds that the pre-existing condition did combine with the work injury, then the employee has the burden of proving that the work injury remains a major cause of the medical disability or need for treatment. Fairfield, supra at 83.

We note that the judge relied on a number of medical opinions which reflect no history of the pivotal 1992 motor vehicle accident.[8] This is an issue because " 'the history upon which the medical expert relies is crucial to his opinion.' " Saccone v. Department of Pub. Health, 13 Mass. Workers' Comp. Rep. 280, 282 (1999), citing

[8] The judge adopted the opinion of Dr. Scott Masterson, who treated the employee following his cervical fusion, that the employee's present neck and left arm radiculopathy were causally related to both the October 24, 1994 and February 16, 1996 industrial injuries. (Dec. 8-9, 13.) She further adopted Dr. Masterson's opinion that the employee's lumbar spine problems were causally related to the 1996 work injury. (Dec. 8-9, 14.) Dr. Masterson's reports do not relate a history of either the 1992 or 1995 motor vehicle accidents. In addition, the judge adopted Dr. John Doherty's opinion that, though the neck surgery had partially alleviated some of the residual problems of the 1994 injury, the employee could not return to work as a meatcutter, and that he was permanently and totally disabled as a result of the 1996 industrial injury to his lumbar spine. (Dec. 10.) Dr. Doherty's reports reflect no knowledge of the 1992 or 1995 non-work accidents. Finally, she adopted the opinion of the impartial examiner, Dr. DeMichele, that the 1994 work injury necessitated neck surgery, and that the 1996 industrial injury caused a lumbosacral sprain superimposed on degenerative disc disease and spinal stenosis. She further adopted Dr. DeMichele's opinion that the 1994 neck injury and the 1996 back injury were "each a major contributing cause of the employee's problems when examined." (Dec. 9; Dep. 9.) Dr. DeMichele testified at deposition that he was aware of the 1992 motor vehicle accident from the medical records, though the employee had not told him about it. (Dep. 18-20.) He had not seen Dr. McLaughlin's October 16, 1993 report, which gave the employee a residual permanent impairment as a result of that accident, however, until the deposition. (Dep. 20.) He had not known of the 1995 motor vehicle accident until the deposition. (Dep. 22.) The opinion, which the judge portrayed as being the work injuries were a major cause of the employee's problems, preceded his being shown Dr. McLaughlin's report, (Dep. 9), and no opinion on that issue was elicited after that. Furthermore, it is not clear from the deposition transcript that, even taking into account the motor vehicle accidents, Dr. DeMichele's opinion was that the work injuries were a major cause of the employee's incapacity and need for treatment:

> Q: Going further, what did you consider to be the cause of these conditions?
> A: It's a combination of significant problems; the preexisting disease, the degenerative cervical disc disease, as well as lumbar disease, and the injuries that occurred on two occasions, one involving the neck on [October 24, 1994], and the other one involving the back on [February 16, 1996].
> Q: And these would be considered a major contributing cause of his problems in your opinion?
> Mr. Doherty: Objection. [Overruled].
> A: Yes. They did aggravate the preexisting condition, and the neck problem was significant enough to require surgery by Dr. Cox.

(Dep. 9.)

Both the questions posed and the answers given, lack exactitude.

Patient v. Harrington & Richardson, 9 Mass. Workers' Comp. Rep. 679, 682 (19995), quoting Scali v. Mara Products, Inc., 6 Mass. Workers' Comp. Rep. 78, 80 (1992). In fact, an expert causality opinion whose foundation is based on misstatements or omissions of material facts is entitled to no weight. Reddy v. Charles P. Blouin, 14 Mass. Workers' Comp. Rep. 341, 345, citing Buck's Case, 342 Mass. 766, 770-771 (1966). Though, in the decision on appeal, the judge dismissed the 1992 motor vehicle accident as irrelevant and relied on medical opinions of physicians who were unaware of, or did not give opinions regarding it, on recommittal, she must now factor into her analysis the pre-existing condition that the 1992 noncompensable accident engendered. Thus, the medical opinions on which she relies in her decision following recommittal should reflect an accurate history, inclusive of the 1992 prior non-work injury.

Finally, we agree with the self-insurer that the judge misstated the opinion of the self-insurer's psychiatric expert, Dr. Weiner. The judge found: "Dr. Robert M. Weiner felt the employee had a psychiatric disorder that disabled him from employment when he examined him at the self-insurer's request on August 10, 1999." See (Ex. 10; Dec. 12.) She then adopted Dr. Weiner's opinion as to psychiatric disability, along with the opinion of the § 11A examiner, as to diagnosis, and the opinion of the employee's treating psychologist, on causal relationship. (Dec. 12, 13.) However, Dr. Weiner had the exact opposite view. He felt that the employee was not disabled as the result of any psychiatric condition. In his report of August 10, 1999, cited by the judge, he wrote: "In my medical opinion, Russell Cook is not mentally ill and does not have a psychiatric disorder that disables him from employment." (Ex. 10.) (Emphasis added.)

While a judge is free to adopt all, part or none of an expert's testimony, she is not free to mischaracterize it. Bernardo v. Hallsmith Sysco, 12 Mass. Workers' Comp. Rep. 397, 405 (1998); Ata v. KGR, Inc., 10 Mass. Workers' Comp. Rep. 56, 57 (1996). Without Dr. Weiner's opinion as to mental disability, the remaining two expert opinions establish only that the employee has a causally related psychiatric condition. Since the employee claims that his alleged psychiatric condition contributed to his status as permanently and totally disabled, (Tr. 6.), the judge's misstatement of Dr. Weiner's

disability opinion is a material error. Where, as here, a factual error goes to the heart of an incapacity determination and we cannot tell to what extent it influenced the judge's conclusion that the employee was permanently and totally incapacitated, recommittal is necessary. Pelletier v. McKinney Bus Company, 12 Mass. Workers' Comp. Rep. 290, 293 (1998); Triolo v. Commonwealth of Massachusetts, 14 Mass. Workers' Comp. Rep. 246, 250 (2000). See also O'Neil v. E.G. & G., 9 Mass. Workers' Comp. Rep. 211, 212 (1995) (recommittal required where reviewing board could not tell how much the judge's erroneous findings may have affected his conclusions).

For the above reasons, this case is recommitted for further findings consistent with this opinion. The judge may take such further evidence as is necessary to do justice.

So ordered.

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Susan Maze-Rothstein
Administrative Law Judge

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William A. McCarthy
Administrative Law Judge

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Sara Holmes Wilson
Administrative Law Judge

Filed: June 28, 2001