COMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 044156-06**

Scott Dyan	Employee
S&F Concrete	Employer
American Home Assurance	Insurer

REVIEWING BOARD DECISION
(Judges Fabricant, Koziol and Levine)

This case was heard by Administrative Judge Benoit.

APPEARANCES
Judson Pierce, Esq., for the employee
David G. Shay, Esq., for the insurer

FABRICANT, J. The insurer appeals from a decision ordering the payment of benefits pursuant to §§ 13 and 30. For the following reasons, we reverse the judge's finding that the insurer waived its § 1(7A) affirmative defense, and vacate the award of medical benefits. We recommit the case for reconsideration of the employee's motion for additional medical evidence, and for further findings addressing causal relationship.

On July 3, 2006, the employee, a forty-eight year-old construction foreman and laborer, fell six feet from a stack of concrete forms. He was treated immediately for lumbar, rib and chest pain, (Ex. 1),[1] and returned to light duty two days later. He resumed his regular job as a construction foreman within three weeks. However, in June 2007, after assuming laborers' duties, he began to have difficulty performing his job. At his request, the employer laid him off so he could have non-work-related hernia surgery, and he collected unemployment compensation from June 30, 2007 until January 12, 2008. (Dec. 4-5.)

[1] We take judicial notice of documents in the board file. Rizzo v. M.B.T.A., 16 Mass. Workers' Comp. Rep. 160, 161 n.3 (2002).

In March 2007, the employee underwent a lumbar MRI, which was essentially normal. The record reveals no other treatment for back or hip pain between July 10, 2006 and May 2007. The employee later treated for back pain following several non-work-related incidents, including two falls, a lifting incident, and an incident while doing yard work. Beginning in December 2007, he reported persistent hip problems after engaging in activities related to deer hunting. Another MRI of his lumbar spine on June 17, 2008, was again unremarkable, as was a September 10, 2007 MRI of his hip. (Dec. 5-7.)

On July 31, 2008, two years after the work injury, the employee filed a claim for disability and medical benefits for his back, neck, ribs, chest wall, and right hip. (Employee's Form 110.) The claim was denied following a § 10A conference, and the employee appealed. (Dec. 3.)

On January 6, 2009, Dr. Nabil Basta examined the employee pursuant to § 11A, and his report was admitted into evidence. (Dec. 7.) Athough Dr. Basta reported that the employee denied any past history of back problems, he opined the employee had sustained "an injury on 7/3/06 consistent with a back strain with a flare-up of his degenerative disc disease." (Ex. 1.) The insurer listed § 1(7A) as an affirmative defense in its hearing memorandum, and stated at hearing:

> The issue under Section 1(7A) is raised only to make an argument that there may be evidence of a pre-existing non-work-related condition and if the employee, even if he could, [sic] could not satisfy his argument under Section 1(7A).

(Tr. 19.) The insurer stipulated to an industrial injury on July 3, 2006, (Dec. 2, Tr. 7), and asked the judge to adopt Dr. Basta's opinion limiting the employee's disability to six months. (Tr. 18-19, 148.) The employee filed a motion to allow the submission of additional medical evidence due to the inadequacy of Dr. Basta's report, arguing that the pre-existing degenerative disc disease Dr. Basta mentioned was actually caused by repetitive heavy work. (Tr. 5-8; 14.) The judge denied the motion. Following Dr. Basta's deposition, the judge allowed the employee's renewed motion

for additional medical evidence, but only for the "gap period" from the date of injury until the impartial examination. (Dec. 3.) Both parties submitted gap medical evidence. (Dec. 2-3.)

In his decision, the judge found the insurer had "waived the § 1(7A)[2] defense with respect to the Employee's back condition when it failed to make an offer of proof as required under 452 CMR 1.11(1)(f) prior to the Employee's presentation of his first witness." (Dec. 10.) The judge addressed compliance with the regulation, sua sponte, without notifying the parties at hearing that non-compliance with it was at issue. The judge adopted Dr. Basta's opinion that the employee suffered a soft tissue injury on July 3, 2006 and that the recommended fusion surgery was not causally related to the industrial accident. (Dec. 7-8.) The judge also credited Dr. Basta's statement that he had been "generous" in opining the employee could still experience symptoms as late as six months after the accident. (Dec. 8.) Finally, again relying on Dr. Basta's opinion, the judge found the industrial injury did *not* cause the employee's condition on the date of his examination, January 6, 2009, but that the employee could be rehabilitated, and his "[t]reatment . . . at a rehabilitation facility where they treat the patient as a whole on an outpatient basis *is causally related* to the industrial injury." (Dec. 9.)(Emphasis added.) Attempting to reconcile these opinions, the judge wrote: "These may seem contradictory until one considers that an injured Employee can require reasonable and related medical services without necessarily being incapacitated from work because of the industrial injury." Id.

The judge denied the employee's claim for weekly benefits, finding he had no causally related incapacity, since he continued to work until receiving a requested

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[2] General Laws c. 152, § 1(7A), provides, in relevant 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.

layoff to have non-work related hernia surgery, and then collected unemployment benefits. (Dec. 9-10.) However, the judge found the employee had "met his burden of proof" for medical benefits "insofar as said benefits are for treatment at a rehabilitation facility where they treat the patient as a whole on an outpatient basis." (Dec. 10.) The judge ordered the insurer to pay for such treatment, although the employee had made only a general claim for §§ 13 and 30 benefits. Accordingly, the judge found the employee had prevailed on his claim, and awarded employee's counsel a fee. (Dec. 11.)

Only the insurer appeals. We first address its argument that the judge erred in holding it waived its § 1(7A) defense by failing to satisfy the requirements of 452 Code Mass. Regs. § 1.11(1)(f). That regulation, effective March 21, 2008, provides:

> In any hearing in which the insurer raises the applicability of the fourth sentence provisions of M.G.L. c. 152, § 1(7A), governing combination injuries, the insurer must state the grounds for raising such defense on the record or in writing, with an appropriate offer of proof.

The insurer maintains the judge misstated the regulation, and that it properly raised and preserved its § 1(7A) defense.

The burdens of the parties in raising, maintaining and defeating § 1(7A), as well as the judge's responsibilities to make findings thereon, have been the subject of much litigation and explication by this board and the courts. See, e.g., MacDonald's Case, 73 Mass. App. Ct. 657 (2009); Vieira v. D'Agostino Assocs., 19 Mass. Workers' Comp. Rep. 50 (2005). However, the regulation at issue here has never been interpreted.[3] We are troubled by the judge's reliance on the regulation, sua

[3] Though we have not previously interpreted the regulation, we have referred to it in several cases in which it was inapplicable because its effective date (March 28, 2008) was after the filing date of the decisions. See Dias v. Harvard Univ., 24 Mass. Workers' Comp. Rep. 189, 191, n.6 (2010); Posusky v. Unicco Servs. Co., 23 Mass. Workers' Comp. Rep. 69, 70 n.4 (2009); Motherway v. City of Westfield, 23 Mass. Workers' Comp. Rep. 23, 28 n.9 (2009). The only mention of the regulation by the courts was in Blanchette's Case, 77 Mass. App. Ct. 1111 (2010)(Memorandum and Order Pursuant to Rule 1:28), where it was similarly inapplicable. However, in dicta, it was noted that "the proceedings . . . complied with the

sponte and without prior notice to the parties, to find the insurer waived its § 1(7A) affirmative defense.

First, as the insurer argues, the judge misstated the regulation. On its face, there is no requirement that the insurer "make an offer of proof *prior to the employee's presentation of his first witness,*" (Dec. 10, emphasis added); the regulation only requires that an "appropriate offer of proof" be made at some unspecified point in the hearing.[4] Thus, while the insurer's statement at the beginning of the hearing regarding § 1(7A) was somewhat vague, (see Tr. 19), the regulation does not preclude the development of a § 1(7A) defense later in the hearing, including during a medical deposition.

Moreover, it was clear from the outset of the hearing that the parties were aware of the nature of the alleged pre-existing condition and that § 1(7A) was an issue. The insurer listed § 1(7A) as a defense at conference and on its hearing memorandum, and the judge noted it at hearing. (Dec. 1; Tr. 4; Exhibit 4; Temporary Conference Memorandum). Dr. Basta's impartial opinion, in evidence at the hearing, indicates the employee's work injury caused a "flare-up of his degenerative disk disease." (Ex. 1.) See Motherway v. City of Westfield, 23 Mass. Workers' Comp. Rep. 23, 27 and n.6 (2009)(insurer may rely on a § 11A report to support a § 1(7A) defense); Blanchette's Case, supra, (evidence of combination presented at hearing through impartial report). At the outset of the hearing, in arguing his motion for

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amended regulation because the evidence of a 'combination' was presented on the record at the hearing through the IME [impartial]").

[4] Compare 452 Code Mass. Regs. § 1.11(3), which reads, in pertinent part:

> *Before the taking of testimony* in a hearing before an administrative judge, the insurer shall state clearly the grounds on which the insurer either has declined to pay compensation, or the grounds on which it seeks modification or discontinuance, provided that such statements are based on grounds and factual basis reported by the insurer or based on newly discovered evidence . . . .

(Emphasis added.)

additional medical evidence, employee's counsel acknowledged the existence of pre-existing degenerative disc disease as determined by Dr. Basta, but maintained that it was caused by the employee's many years of repetitive work.[5] (Tr. 6-8.) In addition, during the deposition of the impartial examiner, employee's counsel not only questioned Dr. Basta regarding whether the work accident was a major or minor cause of his present status, (Dep. 21-22, 118), but also argued, in opposition to the insurer's motion to strike a question, that "17A [sic] is in play here" and "this line of questioning is relevant in terms of trying to overcome the 17A [sic] hurdle that the employee is faced with." (Dep. 116.) Given the parties' clear acknowledgement of the parameters of the § 1(7A) dispute throughout the hearing, the finding that § 1(7A) was waived is arbitrary and capricious.

Finally, the employee did not allege noncompliance with the regulation either at the hearing or thereafter. The judge's sua sponte application of the regulation in his decision, without giving the parties any indication at hearing that he believed the insurer had not fulfilled the provisions of the regulation, effectively deprived the insurer of the opportunity to cure the problem perceived by the judge. See Conrad v.

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[5] Employee's counsel stated in his argument for additional medical evidence:

> Doctor Basta references in the body of his examination report that Mr. Dyan had quote, flair up [sic] of the *degenerative disk disease* in his back, and that 7/3/06 injury was consistent with a strain causing his flair [sic] up.
>
> What he does not articulate in the body of the report is whether or not the *degenerative disk disease* is in any anyway [sic], shape or form, caused by his over twenty-five years experience as a heavy construction laborer. . . .
>
> And we would say that the 7/3/06 fall is the proverbial straw that broke the camel's back. That he had many years of repetitive heavy work that caused his back injury and was not out of work for any time up until the date of accident. And we would argue that the date of accident was the precipitating and aggravating event. And that the *degenerative disk disease* was not really a 17A [sic] issue, but that it was misplaced. We would argue that the *degenerative disk disease* rather formulated [sic] because of his many years of work and only that.

(Tr. 7.)(Emphasis added.)

McClean Hosp., 19 Mass. Workers' Comp. Rep. 292, 293 (2005), citing Commonweath v. Roth, 437 Mass. 777, 795-796 (2002)(self-insurer's failure to object to medical testimony deprived employee of opportunity to cure opinion's alleged defect); Smith v. Northeastern Univ., 24 Mass. Workers' Comp. Rep. 229 (2010)(technical defects raised at trial may be readily cured). Accordingly, we reverse the finding the insurer waived the affirmative defense of § 1(7A), and recommit the case to the judge to perform a § 1(7A) analysis. See MacDonald's Case, supra; McCarthy v. Peabody Props., 24 Mass. Workers' Comp. Rep. 89, 92-94 (2010); Vieira v. D'Agostino Assocs., supra.

On recommittal, the employee may renew his motion for additional medical evidence to support his allegation that his pre-existing degenerative disc disease is compensable. See McCarthy, supra, citing Vieira, supra (if insurer meets burden of production under § 1(7A), employee may nonetheless invalidate § 1(7A) defense by proving compensable nature of pre-existing condition). Dr. Basta did not address in his report whether the employee's pre-existing degenerative disc disease was caused by the repetitive nature of his work, a key factor in determining compensability. See Brackett v. Modern Continental Constr. Co., 19 Mass. Workers' Comp. Rep. 11 (2005)(judge must rule on motions to submit additional medical evidence on inadequacy based on contents of impartial report). Furthermore, when asked to give an opinion on this issue at deposition, Dr. Basta could not do so. (Dep. 114-115.) Because a failure of due process may occur when a party is denied the opportunity to offer testimony necessary to present fairly the medical issues, the employee is entitled to the opportunity to bring his motion for additional medical evidence again. See O'Brien's Case, 424 Mass. 16, 22-23 (1997). However, since the employee did not appeal the hearing decision, he cannot do better than the award of rehabilitative treatment ordered by the judge. Ormonde v. Choice One Communications, 24 Mass.

Workers' Comp. Rep. 149, 157 n.7 (2010), and cases cited (employee who fails to appeal may not achieve a more favorable result on recommittal).[6]

We briefly address the other issues raised by the insurer. First, the insurer argues that Dr. Basta's opinion changed in the course of his deposition from causally relating the need for rehabilitative treatment to the work injury, to relating *any* disability or need for treatment to the employee's pre-existing degenerative disc disease, so that his final opinion does not even satisfy the simple "as is" causation standard. We agree that the judge must re-examine Dr. Basta's testimony to determine his final opinion.[7] See Perangelo's Case, 277 Mass. 59, 64 (1931)(final opinion of expert must be taken as evidence). On recommittal, if the judge finds Dr. Basta's opinion changed, he must determine whether the change was based on new evidence, or alternatively, whether it is simply self-contradictory. See La v. Pre-Owned Elecs. Co., 24 Mass. Workers' Comp. Rep. 199 (2010)(expert's repeated contradictions on causation do not constitute new evidence on which change of opinion can be based). If he finds Dr. Basta's testimony to be self-contradictory, it cannot constitute prima facie evidence, and the judge must allow the employee's

[6] We disagree with the insurer's argument that the award of rehabilitative treatment cannot stand because it was not specifically claimed by the employee and is thus not before the judge. The employee claimed medical benefits pursuant to §§ 13 and 30, and that is sufficient to put the issue of rehabilitative treatment at issue. The cases cited by the insurer holding that a judge may not decide issues not before him are inapposite. (See Ins. br. 16-17.)

[7] We agree that Dr. Basta's opinion was not entirely clear. For instance, he initially testified that, if the employee were his patient, he would send him to a "rehab facility" "where they treat the patient as a whole, not just the back spasm," (Dep. 44), and that this treatment would be causally related to the industrial accident. (Dep. 45-46.) Later, he testified that, after considering the employee's history of pre-existing back problems, the July 3, 2006 work injury caused a flare-up or aggravation of his degenerative disc disease. When questioned regarding whether the employee's degenerative disc disease was new evidence, his testimony varied. (Tr. 71, 73, 77, 111-112.) He opined that after January 3, 2007, any disability or need for medical treatment would not be causally related to the work injury, but to his prior condition. (Dep 103-105; 106-107.) However, the doctor also testified that the work injury, though not a major component, was a minor component in "all this." (Dep. 118.) But it "is not *the* cause of his lingering effect right now." (Dep. 120; emphasis added.)

motion for additional medical evidence. See La, supra at 201 (where employee had moved to introduce additional medical evidence at hearing, case recommitted for such evidence where impartial testimony was self-contradictory, even though only insurer had appealed).

Based on Dr. Basta's opinion, the judge made inconsistent findings which he must resolve on recommittal. See Wiswell v. Massachusetts Inst. of Tech., 24 Mass. Workers' Comp. Rep. 233 (2010)(recommittal for judge to resolve internal inconsistency in findings); Tower v. Massachusetts Highway Dept., 17 Mass. Workers' Comp. Rep. 368, 372 (2003)(where subsidiary findings are lacking, imprecise or internally inconsistent, a decision cannot stand). The judge found that "the July 3, 2006 industrial injury *did not cause* the employee's condition on the date of the impartial examination, January 6, 2009," and that the employee's need for outpatient rehabilitation (at the time of hearing) "*is causally related* to the industrial injury." (Dec. 9.)(Emphasis added.) The judge's attempt to reconcile these inconsistent findings, by reasoning that "an injured Employee can require reasonable and related medical services without necessarily being incapacitated from work because of the industrial injury," (Dec. 9), though accurate, misses the point. If the employee's medical condition is no longer causally related to the work injury, then, without more, it does not logically follow that the employee's need for treatment is causally related to the industrial injury. See Crowell v. New Penn Motor Express, 7 Mass. Workers' Comp. Rep. 3, 4 (1993)(we should be able to look at the judge's subsidiary findings and understand the logic behind his ultimate conclusion).

In addition, as the insurer argues, the judge must address the nature of the employee's injury with clarity. LaFleur v. M.C.I. Shirley, 24 Mass. Workers' Comp. Rep. 301, 305 (2010), citing Stecchi v. Tewksbury State Hosp., 23 Mass. Workers' Comp. Rep. 347, 349 n.5 (2009). Although the judge found the employee "suffered a soft tissue injury, meaning that he had injuries to muscles and ligaments supporting the spine," (Dec. 7), he confused this finding by adopting the further opinion of Dr. Basta that:

> [T]he Employee's condition involved the piriformis muscle, which he described as " . . . a muscle deep under the buttock [which] . . . within the last couple of years we have been looking into . . . as a cause of leg pain. It can come with back pain and without back pain." He opined that the piriformis syndrome was separate from the sacroiliac problems that the employee had suffered in the past.

(Dec. 8.) It is not possible to tell from the above statements what the causally related injury or condition is. The insurer is "entitled to a decision which addresses all of the issues in controversy with sufficient clarity to allow the reviewing board to decide whether the fact-finding is sound and untainted by error of law." LaFleur, supra, citing Ballard's Case, 13 Mass. App. Ct. 1068, 1069 (1982). As the insurer points out, the judge's failure to clearly identify the condition caused by the industrial accident puts the insurer at risk for future claims for medical treatment for conditions not causally related to the industrial accident. (Ins. br. 27-28.)

Finally, the judge should address the issue of whether the intervening events to which the employee testified broke the causal chain, or whether the work injury continued to have any causal connection to the employee's need for treatment. See Davoll v. Parmenter VNA & Community Care Inc., 24 Mass. Workers' Comp. Rep. 15, 19 (2010), citing Drumond v. Boston Healthcare for the Homeless, 22 Mass. Workers' Comp. Rep. 343, 345 (2008)(normal and reasonable non-work-related activity which is not performed negligently is not an intervening cause if some causal connection to industrial injury remains). See also Morgan v. Seaboard, 14 Mass. Workers' Comp. Rep. 280, 282-283 (2000). We summarily affirm the judge's decision as to the other issues raised by the insurer.

Accordingly, we reverse the finding that the insurer waived its § 1(7A) affirmative defense, vacate the §§ 13 and 30 award for treatment at a rehabilitation facility, and recommit the case to the judge for further findings consistent with this opinion. Because the employee has not succeeded in his claim for medical or weekly benefits, we vacate the attorney's fee award. See Gonzalez's Case, 41 Mass. App. Ct. 39, 42 (1996). Following recommittal, should the employee prevail on any

"significant litigation issue," Connolly's Case, 41 Mass. App. Ct. 35, 38 (1996), employee's counsel is not precluded from a fee award. Davoll, supra at 21.

So ordered.

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Bernard W. Fabricant
Administrative Law Judge

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Catherine Watson Koziol
Administrative Law Judge

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Frederick E. Levine
Administrative Law Judge

Filed: **December 2, 2011**