COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 019717-02**

Terrell R. Elder	Employee
Quabaug Corp.	Employee
Atlantic Charter Insurance Co.	Insurer

REVIEWING BOARD DECISION
(Judges Carroll, McCarthy and Costigan)

APPEARANCES
Richard D. Surrette, Esq., for the employee
Kevin P. Jones, Esq., for the insurer

CARROLL, J. The insurer appeals from a decision in which an administrative judge awarded the employee ongoing total incapacity benefits for a repetitive overuse injury involving his upper extremities. The insurer argues, among other things, that the judge erred by failing to apply the heightened causation standard applicable to "combination" injuries – "a major but not necessarily predominant cause" – to deny the employee's claim. Without deciding whether § 1(7A) applies to the employee's claim, we agree that the judge utterly failed to confront this issue. We therefore recommit the case for the judge to make findings on § 1(7A). See § 11B (decision must address each issues raised in hearing).

Terrell Elder began working for the employer in 1994, (Employee Ex. 2), as a production helper and mill operator transforming raw rubber into sheets of rubber for the shoe industry. (Dec. 5.) The job was "extremely repetitive and difficult", requiring him to roll, stretch and pull large amounts of rubber with his upper extremities. (Dec. 8, 10.)

The administrative judge found that the employee "sustained a personal injury that arose out of and in the course of his employment . . . due to the repetitive overuse of his upper extremities on or about May 7, 2002." (Dec. 5.)

The claim for a repetitive use injury, and the defense by the insurer of § 1(7A), necessitate looking at the employee's work and non-work history. Although he adopted the opinions of doctors who referenced prior work and non work injuries, the judge never discussed a 1994 motorcycle accident injury[1] to the employee's 4th and 5th left metacarpals; only obliquely acknowledged the employee's treatment for upper extremity pain in the 1998/99 time period; but directly acknowledged a August 30, 2001 left hand strain and overuse strain at work, before finding a repetitive overuse injury on May 7, 2002. (Dec. 5.) The judge questioned the employee about 1997, 1998 and 1999 work incidents involving his upper extremities, (Tr. II,[2] 66-67, 69), and found the employee to be sincere and credible, (Dec. 10), but did not make specific findings on these events.[3]

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[1] There is testimony that the motorcycle accident was in 1995. (Tr. II, 4).

[2] The February 2, 2004 hearing transcript is being referred to as Tr. I, and the February 3, 2004 hearing transcript as Tr. II.

[3] Our review of the board file, see Rizzo v. M.B.T.A., 16 Mass. Workers' Comp. Rep 160,161 n.3 (2002), including the transcripts, incident reports in evidence, and medical evidence, (see last paragraph below), reveals the employee testified to alleged work incidents, symptoms and treatment which may be germane to the question of whether there are prior compensable workers' compensation claims related to the body parts at issue. Among those not commented upon by the judge are:

1997 injury to upper extremities at the mill and treatment at Mary Lane Hospital. (Tr. II, 7, 66, 69; Employee Additional Medical Evidence);

1998 injury to shoulder and upper extremities performing job duties, (Tr. II 8, 66-67, 69; Impartial Medical Report, Ex. 1; Employee Additional Medical Evidence);

1999 injury to back and both elbows (tendonitis). (Tr. II, 8, 67; Impartial Medical Report, Ex. 1; Employee Additional Medical Evidence).

The employee also alleges the following: In August 2001, he reported sharp pain in his left hand to his employer, and was put on "light duty" for a few weeks, and then returned to his usual work in the mill. (Tr. I, 29, 32-33; Incident Report, August 9, 2001, Ex. 6.) Upon returning to the mill, he re-injured his hand, reported this to his employer, (Tr. I, 33-35; Incident Report, September 6, 2001, Ex. 7), and returned to the "light duty" stacking job, (Tr. I, 35), which involved cutting rubber with a knife, feeding the rubber into a machine and stacking. (Tr. I, 17-18.) By November 2001, Mr. Elder gave notice that he was going to leave the job because he had difficulty doing it. He testified that he could not use his left hand anymore, could not feel his left arm, and started using his right hand while using his left arm only when necessary (Tr. I, 36, 43-44); that the employer

From August 2001 until May of 2002, the employee treated at Mary Lane Hospital, as arranged by the employer. Mr. Elder testified that by May 2002, he could no longer do any job, even light duty, because both upper extremities had become too painful and useless. He refused to continue with care at Mary Lane Hospital and the employer arranged for him to see Dr. Terrill. (Dec. 5; Tr. I, 49-50). On June 15, 2002 he saw Dr. Terrill "who, put [him] out of work." (Tr. I, 49.) Since then, he has treated with multiple doctors of various specialties for a myriad of symptoms related to both arms and his upper body. (Dec. 5; Impartial Medical Report.)

Mr. Elder was diagnosed with bilateral carpal tunnel syndrome and bilateral ulnar neuropathy. In the spring of 2003, he underwent decompression surgeries of the cubital tunnel and carpal tunnel on both upper extremities. Later that year he

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offered him a production helper's job to get him away from the repetitive functions (Tr. I, 36); that the job was no lighter, and by May 2002, his attempts at using his right upper extremity failed and he was no longer able to continue work as a production helper (Tr. I, 43-46); that he again reported this to his employer, (Tr. I, 46; Incident Report, May 13, 2002, Ex. 8.), but continued to try to work, again back to stacking, using mainly his right hand; and that his right hand then got progressively worse to the point that he could not hold anything with his right hand. (Tr. I, 47-48.)

As to the medical evidence, the employee's motion for additional medical evidence was allowed, (Ex. 4; Dec. 1, 3, 4), with the assent of the insurer, (Tr. I, 7), but the only medical report listed as an Exhibit is that of Eric K. Chung, M.D., the impartial physician. (Dec. 1.) Under the heading, "Medical Evidence," several doctors' reports are listed, (Dec. 3), and the judge discusses those reports at Dec. 7-10. A letter of April 30, 2004, hand delivered and received at the Department of Industrial Accidents on that date, enclosed the employee's additional medical evidence which consisted of twenty reports and records, only some of which are from the doctors listed by the judge. We take judicial notice of the contents of the board file. Rizzo, supra. There is no indication that these medical records were objected to by the insurer or refused by the judge. To the contrary, the insurer states in its July 15, 2004 written closing argument that the medical evidence in this case consists of twenty exhibits submitted by the employee. Id. See also Dec. 4. This correlates with the packet in the board file and we consider those medical records to be in evidence.

was diagnosed with left thoracic outlet syndrome and left shoulder impingement process. In March 2004, the employee underwent rib resection surgery to treat his thoracic outlet syndrome. He later had an electric spinal cord stimulator implanted. (Dec. 6.)

The employee claimed workers' compensation benefits for his medical travails. At conference, the insurer was ordered to pay § 34 total incapacity benefits for a year and ongoing § 35 partial benefits. The insurer appealed to a de novo hearing, at which it raised liability, causal relationship, disability and extent thereof, as well as § 1(7A) "major" causation.[4] The employee claimed ongoing § 34 benefits.[5] (Dec. 2-3.)

With reference to the insurer's raising the heightened causal standard of § 1(7A), applicable to "combination" injuries, the judge's decision is silent.[6] The impartial medical report of Dr. Chung supplies a history of a pre-existing injury to the employee's *left* extremity, which may satisfy its burden of production as to that one aspect of this employee's multifaceted bilateral medical presentation. See

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[4] 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.

[5] On appeal the insurer challenges the employee's right to claim total incapacity benefits beyond those awarded in the conference order, as the employee did not appeal from that order. We need not address this argument, however, as the insurer acceded to the employee's claim at hearing, and the issue is waived. (Tr. I, 5.)

[6] Although the judge made a finding pertinent to the § 1(7A) standard, he never once invoked § 1(7A). The judge stated: "According to Dr. Chung the injury of repetitive strain at work to both elbows and hands is a major cause of Mr. Elder's disability and need for treatment." (Dec. 6.) The judge adopted the medical opinion of Dr. Chung that the employee is totally incapacitated, and then more generally stated he adopted the medical opinion of Dr. Chung and other doctors, but did so only under the category of "Disability/Incapacity." He did not mention any doctor's opinion to support his causal relationship finding, or with specificity with regard to § 1(7A). (Dec. 11.)

Jobst v. Leonard T. Grybko, 16 Mass. Workers' Comp. Rep. 125, 130-131 (2002). Dr. Chung addressed the employee's motorcycle accident in 1994, in which he sustained fractures of the 4th and 5th left metacarpals. The doctor opined that the fractures "healed well without any problem for the following 2 ½ years." (Impartial Medical Report, 1.) Dr. Chung further discounted the effects of that injury:

> He had [an] old injury to the left wrist from [a] motor vehicle accident in 1994 and this left some deformity at the 5th carpometacarpal joint, but the pre-existing paresthesia was not caused by this injury and it is rather repetitive strain to the ulnar nerve at the elbow and probably carpal tunnel syndrome as well.

(Id. at 7.) Dr. Chung also reported the history that the employee experienced left extremity pain, numbness and tingling around January 19, 1998, and treated for epicondylitis in 1999. In his "Causal connection" opinion, the doctor stated:

> There is causal connection between the current conditions of both upper extremities and repetitive accumulated injuries to the extremities from the work as a production helper requiring constant pulling sticky rubber at work with the onset of symptoms as far back as early 1998.

(Id. at 1-2, 6.) Finally, Dr. Chung answered a hypothetical question posed by one of the parties: "The alleged industrial injury of repetitive strain to the both [sic] elbows and hands is a major, but not necessarily dominant [sic] cause of the current disability of the employee and need of medical treatment." (Id. at 8.) As to disability, the doctor opined the employee's causally related upper extremity problems (bilateral cubital and carpal tunnel syndromes and residual ulnar neuropathy) rendered him totally disabled. (Id. at 7; Dec. 6.) The judge adopted the opinions of the impartial physician. (Dec. 11.)

The judge allowed additional medical evidence based on inadequacy (the impartial physician did not render an opinion on the employee's thoracic spine and/or left shoulder conditions) and complexity. (Dec. 3.) Dr. John Mahoney, the

employee's neurologist, viewed a videotape of the employee's job duties[7] and opined that the employee suffered from a totally disabling left neck and shoulder girdle problem causally related to his repetitive work. He also identified, without coming to a firm conclusion, likely thoracic outlet syndrome. (Dec. 8.) The judge adopted these opinions. (Dec. 11.) Additionally, the judge adopted the opinions of the employee's treating doctors, Dr. Ralph Bueno, a thoracic surgeon, and Dr. Christopher Scola, a rheumatologist, that the employee is totally disabled due to his causally related thoracic outlet syndrome. (Dec. 7-8, 11.)

The judge concluded that the employee had suffered a repetitive injury while working for the employer causing all of the above-discussed diagnoses, and that he was totally incapacitated as a result. Finally, the judge found that the employee's part-time painting business did not contribute to the development of his impairments. (Dec. 10.)

What is clear in this case is that the employee suffers from multiple medical conditions with multiple diagnoses. The impartial physician addressed the bilateral carpal and cubital tunnel conditions, with residual left ulnar nerve neuropathy. The employee's additional medical evidence addressed left thoracic outlet syndrome and left shoulder impingement syndrome. Even the insurer's additional medical evidence spoke in terms of a thoracic outlet-like overuse syndrome. (Dec. 9; Sabra report, 12.)

The insurer's argument that the judge erred by not applying § 1(7A)'s heightened standard of "a major" cause, must be addressed with this evidence in mind. Administrative judges are charged with the duty of addressing every issue raised for determination in a hearing. The judge's failure to address

[7] The insurer's argument that the judge erred by allowing the doctor to view the videotape, (Ins. br. 10-11), is without merit. There is no contention that the job duties changed over the four years of employment, so the date of the videotape was not a legitimate issue for objection. Moreover, since the injury alleged was cumulative, the four-year old videotape *was*, in fact, relevant to the employee's claim for benefits.

§ 1(7A) in the present case, therefore, was error. See Vieira v. D'Agostino Assoc., 19 Mass. Workers' Comp. Rep. 50 (2005). We therefore recommit the case for further findings relative to the complex and detailed factual and medical history presented by the employee's claim, consistent with Vieira:

> Addressing the necessary analysis in exquisite detail, we note that the administrative judge must first address the nature of the pre-existing condition: whether it stems from an injury or disease, see Vasquez v. Sweetheart Cup Co., 19 Mass. Workers' Comp. Rep. 17, 19 & n.4 (2005) and cases cited, and, if so, whether it is appropriately characterized as "not compensable under [c. 152]." As to the latter inquiry, "[i]f there is any connection to an earlier compensable injury or injuries, then that pre-existing condition cannot properly be characterized as 'non-compensable' for the purposes of applying the § 1(7A) requirement that the claimed injury remain 'a major' cause of disability." Lawson v. M.B.T.A., 15 Mass. Workers' Comp. Rep. 433, 437 (2001). See also Powers v. Teledyne Rodney Metals, 16 Mass. Workers' Comp. Rep. 229, 231-232 & n.2 (2002). It is the employee's burden to prove the compensable nature of the pre-existing condition in order to invalidate a § 1(7A) defense. See LaGrasso v. Olympic Delivery, 18 Mass. Workers' Comp. Rep. 48, 54-55 (2004). If the pre-existing condition is not compensable, the judge must then address the effect of its combination [if any] with the subject work injury. See Resendes v. Meredith Home Fashions, 17 Mass. Workers' Comp. Rep. 490 (2003). If the employee has not defeated these two elements of the statute, the judge must then make findings on the last element, whether the work injury remains a major but not necessarily predominant cause of the resultant disability or need for treatment. See, e.g., Myers v. M.B.T.A., 19 Mass. Workers' Comp. Rep. 22 (2005) and cases cited.

Vieira, supra at 53.

Important here are the prior injuries of 1994, 1997, 1998, 1999 and 2001,[8] and the extent to which they enter into the employee's pre-existing upper extremity condition. Moreover, the employee's testimony that the 1997, 1998 and 1999 injuries were work-related would appear to be relevant evidence in

[8] The judge must consider not only the single incident of May 7, 2002, (Dec. 5, 11), but the cumulative effect of the repetitive work done by the employee over the years, including also the 2001 reported incidents.

determining whether § 1(7A) applies to the employee's present claim. See LaGrasso, supra. This is for the judge to sort out and decide.

Accordingly, we recommit this case for further findings on whether or not § 1(7A) applies to all, a part, or none, of the employee's claim and, if it applies, whether the employee has met his burden of proof.

So ordered.

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Martine Carroll
Administrative Law Judge

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William A. McCarthy
Administrative Law Judge

Filed: **September 25, 2006**

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Patricia A. Costigan
Administrative Law Judge