COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO.:** 029117-02

Thomas R. Beuth Employee
Buxton School, Inc. Employer
Legion Insurance Co. (by Guaranty Fund Management Services) Insurer

REVIEWING BOARD DECISION
(Judges McCarthy, Horan and Fabricant)

APPEARANCES
W. Stanley Cooke, Esq., for the employee
Robert J. Riccio Esq., for the insurer at hearing and on brief
Holly B. Anderson, Esq., for the insurer on brief

McCARTHY, J. Thomas R. Beuth, a sous chef at Buxton School in Williamstown, Massachusetts, filed a claim seeking weekly incapacity benefits as a result of a slip and fall at work on January 7, 2002. The insurer[1] denied the claim and the matter came on for a § 10A conference before an administrative judge. Following the conference, the judge issued an order directing the insurer to pay temporary total incapacity benefits under § 34 at the rate of $349.66, based on an average weekly wage of $582.76, from July 1, 2002 and continuing, together with medical benefits under § 30. The insurer appealed this order and Dr. Armand Aliotta, a board-certified neurologist, was appointed as the § 11A impartial medical examiner. Dr. Aliotta examined the employee and issued a report dated May 12, 2003.

At the hearing, the insurer denied the employee suffered an injury arising out of and in the course of his employment, contested incapacity and the extent thereof and also placed § 1(7A) in issue. Asserting that Dr. Aliotta's report was inadequate, the employee moved for permission to submit additional medical evidence. When the insurer indicated that it would take Dr. Aliotta's deposition, the judge deferred action on the employee's motion pending receipt of the deposition, transcript and renewal of the employee's motion, which

[1] Because the named insurer, Legion Insurance Co., is in bankruptcy, the defense of the claim was undertaken by the Massachusetts Insurers Insolvency Fund.

he directed the employee to do in writing.[2] (Employee br. 2; Insurer br. 3.) The insurer deposed Dr. Aliotta on February 3, 2004. The employee did not renew his motion to submit additional medical evidence; thus, the sole medical opinion in the case was Dr. Aliotta's report and deposition testimony.

The judge's decision directed the insurer to pay temporary total incapacity benefits under § 34 from August 23, 2002 through May 12, 2003, (the date of the impartial medical exam), partial incapacity benefits under § 35 from May 13, 2003 and continuing, and medical expenses under § 30. The insurer[3] on appeal contends the administrative judge misconstrued the impartial physician's opinion and failed to apply the heightened causal relationship standard found in § 1(7A).

Although the insurer raised § 1(7A) as a defense, the judge failed to make any findings addressing whether it applied, and if so, whether its heightened causation standard was met.[4] Under these circumstances, we must recommit the case. See Green v. Safe Passage, Inc., 19 Mass. Workers' Comp. Rep. ____ (September 28, 2005), citing Viera v. D'Agostino Assocs., 19 Mass. Workers' Comp. Rep. 50, 52-53 (2005)(which provides the analysis necessary when § 1(7A) is invoked). "Absent such findings on all of the fine points that apply in any given § 1(7A) case, we will recommit the case, as per the decision of the single justice in Lyons v. Chapin Center, Mass App. Ct., No. 03-J-73 (February 16, 2005)(single justice)]." Viera, supra at 53.

Accordingly, the case is recommitted for further findings consistent with this opinion.

So ordered.

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[2] We have disapproved of this procedural action as unsupported by the plain language of § 11A(2). See Brackett v. Modern Cont'l Constr. Co., 19 Mass. Workers' Comp. Rep. 11 (2005); LaGrasso v. Olympic Del. Serv., 18 Mass. Workers' Comp Rep. 48 (2004).

[3] The employee filed a written appeal to the reviewing board dated September 21, 2004. In as much as the employee's brief asks that we affirm the hearing judge's decision we read the brief as a tacit withdrawal of the employee's appeal.

[4] We note that a medical opinion that an industrial injury "aggravated" a pre-existing noncompensable medical condition, without more, does not satisfy the § 1(7A) standard of "a major cause." See Kryger v. Victory Distribution 17 Mass. Workers' Comp. Rep. 78 (2003), aff'd Mass. App. Ct., No. 03-J-144 (February 23, 2005)(single justice).

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William A. McCarthy
Administrative Law Judge

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Mark D. Horan
Administrative Law Judge

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Bernard W. Fabricant
Administrative Law Judge

Filed: October 26, 2005