COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 026067-97**

Carlos Rivera	Employee
Conair Martin Industries, Inc.	Employer
Liberty Mutual Insurance Company	Insurer

REVIEWING BOARD DECISION
(Judges Levine, McCarthy and Costigan)

APPEARANCES
William J. Doherty, Esq., for the employee
Patricia Vachereau, Esq., for the insurer

LEVINE, J. The employee appeals from a decision in which an administrative judge denied and dismissed his claim for workers' compensation benefits due to a July 2, 1997 work injury. The employee argues that the judge erred (1) by imposing the heightened "a major cause" standard of § 1(7A) without the insurer having raised it; (2) by not striking the opinion of the impartial physician; and (3) by failing to find liability and award medical benefits for his low back injury. We recommit the case for further findings using the simple causation standard.

On July 2, 1997, the employee was hit from behind by a forklift while working for the employer. He felt a cramp in his lower spine, treated conservatively and was out of work for a period of time. (Dec. 3; Tr. 11.) The employee returned to light duty work four hours a day; he says he experienced tingling from his low back up into his neck. (Dec. 3.) A co-worker stated that after he returned to work, the employee complained of neck pain. (Dec. 4.) In September 1997, the employee had an MRI of his low back. The employee stated that by early October his back was still stiff and painful, his right leg hurt and he continued to have some tingling in his neck. (Dec. 3.)

On October 14, 1997, the employee was putting on his sneaker at home when he felt a sharp pain go through his spine into his neck. He lost feeling in his arms and hands,

and his hands shook. He was hospitalized for two weeks. At the time of the hearing, the employee's left arm was basically useless; his right arm remained weak. (Dec. 3.)

The insurer denied the employee's claim for further benefits, disputing liability for the employee's neck condition. The employee's claim was denied at conference; he appealed and underwent an impartial medical examination. (Dec. 2, 4.) The impartial physician diagnosed a work-related lumbar strain and contusion, from which the employee had essentially recovered, superimposed on degenerative disc disease. The physician also diagnosed a cervical myelopathy with extensive upper extremity loss, especially in the left hand, unrelated to the work injury. The doctor pointed out that there were underlying degenerative changes in the employee's neck, and that, most likely, the act of putting on the sneaker caused the degenerative changes to pinch the nerve. (Dec. 4-5.)

The judge ruled that the medical issues were complex, and allowed the parties to introduce additional medical evidence. (Dec. 5.) The employee introduced the testimony of Dr. Jay Ellis. Dr. Ellis opined that the employee suffered an acute spinal cord injury while bending over to tie his shoes in October 1997, which injury was the last step in a process of posterior arthritic abnormalities happening over a period of years. Dr. Ellis considered the July 1997 work injury to be a contributing factor in the eventual cervical myelopathy that occurred in October 1997. (Dec. 5-6.) Although Dr. Ellis was of the impression that the employee had been hit by the forklift in the mid to upper back, (Dec. 6), he discounted the difference between impact to the low back or impact to the mid-back, in terms of its effect on the employee's cervical condition. "[T]hat type of impact whether it was lower or mid back could result in a flexion/extension acceleration/deceleration injury to the neck which may have produced something different in his neck." (Ellis Dep. 62.)

The judge concluded that the employee had failed to prove that his neck condition was causally related to his July 2, 1997 work injury. He did not find Dr. Ellis's opinion persuasive enough to overcome the prima facie opinion of the impartial physician;[1] in addition, he discounted the opinion of Dr. Ellis as establishing less than "a major" causal

[1] See footnote 4, infra.

connection under § 1(7A).[2] (Dec. 7.) The judge therefore denied and dismissed the employee's claim. (Dec. 8.)

The employee argues that the judge erred by applying the "a major cause" standard of § 1(7A) to his claim. Despite that provision's obvious applicability to the employee's neck, which presented an undisputed, pre-existing, non-compensable arthritic degenerative condition, the employee is correct that the insurer never raised § 1(7A) at hearing. The insurer has the burden to do so in order to force the employee to satisfy the heightened causal relationship standard. Jobst v. Leonard T. Grybko, 16 Mass. Workers' Comp. Rep. 125, 130-131 (2002); Fairfield v. Communities United, 14 Mass. Workers' Comp. Rep. 79, 83 (2000); Frey v. Mulligan, Inc., 16 Mass. Workers' Comp. Rep. 364, 367 (2002)(§ 1(7A) issue waived if insurer fails to raise it in its issues statement or orally at the hearing); Capozzi, v. Allen Davis, 17 Mass. Workers' Comp. Rep. ____ (March 21, 2003)(same). Contrast Hinton v. Mass. Mut. Life Ins. Co., 16 Mass. Workers' Comp. Rep. 342, 347-348 (2002)(employee accepted that § 1(7A) applied). The judge's sua sponte imposition of the standard onto the employee's claim was error. We therefore recommit the case for the judge to reassess the medical evidence and make further findings using the "as is" standard of simple causation.[3]

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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.

[3] On that standard, see Dr. Ellis' testimony at Dep. 63:

> "Q. … To a reasonable degree of medical certainty is there a causal relationship between the July 2, 1997 work accident and the eventual development of cervical myelopathy?
>
> A. I believe that that's a reasonable conclusion."

We also note that although the judge recited evidence on the question whether the employee had neck symptoms between the July 1997 work injury and the October 1997 incident at home,

The employee also argues that his due process rights were violated by the impartial physician's refusal to answer his counsel's hypothetical questions at his deposition. We agree that the doctor was reluctant to answer the questions posed that did not comport with the doctor's understanding of the underlying facts. (Katzen Dep. 8-11.) A doctor's outright refusal to answer appropriate hypothetical questions would be equivalent to the doctor's "mak[ing] him or herself unavailable for deposition," 452 Code Mass. Regs § 1.12(5)(c), thereby rendering the doctor's testimony inadequate under § 11A(2). However, in the end, Dr. Katzen did answer the questions. (Katzen Dep. 12, 27-37.) In any event, the judge allowed additional medical evidence on the ground of medical complexity.[4]

The employee's final argument is that the judge should have at least ruled that the employee suffered an industrial injury on July 2, 1997, establishing liability for medical treatment to his lower back. The insurer accepted liability for the employee's accident at work. (Tr. 5.) There were no medical bills presented for payment, and no order under §§ 13 and 30 was therefore necessary. The only issue litigated was that of the employee's incapacitating neck condition. That is the issue which must be revisited on recommittal under the simple causation standard, applicable to this case due to the insurer's failure to raise the § 1(7A) "a major cause" defense.[5]

(see Dec. 3, 4), the judge did not make findings on that question. Such findings appear necessary to a determination of whether the employee's present cervical condition is causally related to the July 1997 work injury.

[4] We also note that once additional medical evidence, warranting a contrary conclusion, is admitted, the prima facie effect of the impartial physician's testimony ends. It no longer has special weight. "[T]he prima facie evidence in the impartial report loses its artificial legal force when it is met with other evidence that warrants a contrary conclusion." Bedugnis v. Paul McGuire Chevrolet, 9 Mass. Workers' Comp. Rep. 801, 803 (1995), citing Cook v. Farm Service Stores, 301 Mass. 564, 566 (1938).

[5] In addition, if causal relationship between the July 1997 work injury and the neck condition is found, the judge must also determine whether the October 1997 incident at home legally breaks the chain of causation. On that issue, see Twomey v. Greater Lawrence Visiting Nurses Ass'n., 5 Mass. Workers' Comp. Rep. 156, 158 (1991)(workers' compensation insurer remains liable if activity at home is normal and reasonable and the natural and proximate result of the original work related injury); Bemis v. Raytheon Corp., 15 Mass. Workers' Comp. Rep. 408, 412-413 (2001), and cases cited.

Accordingly, we recommit the case for further findings.

So ordered.

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Frederick E. Levine
Administrative Law Judge

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William A. McCarthy
Administrative Law Judge

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Patricia A. Costigan
Administrative Law Judge

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Filed: **March 31, 2003**