COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 001644-00 070482-01**

Gary Russell	Employee
Webb Supply Co.	Employer
AIM Mutual Insurance Company	Insurer
J.D. Daddario, Inc.	Employer
Arbella Indemnity	Insurer

REVIEWING BOARD DECISION
(Judges McCarthy, Carroll and Costigan)

APPEARANCES
J. Channing Migner, Esq., for the employee
Robert J. Riccio, Esq., for AIM Mutual
Armond C. Colombo, Esq., for Arbella Indemnity at hearing
William E. Holtz, Esq., for Arbella Indemnity on appeal

McCARTHY, J. AIM Mutual, the first insurer in this successive insurer case, appeals an administrative judge's decision finding it liable for the employee's ongoing weekly temporary total incapacity benefits. We summarily affirm the decision as to AIM's argument that the judge made inadequate findings regarding the liability of the successive insurer. Though the judge should have supported his finding more explicitly, none of the medical evidence supports a finding of a new injury or an aggravation during the employee's nine months with his successive employer. See Miranda v. Chadwick's of Boston, Ltd., 17 Mass. Workers' Comp. Rep. 644, 648-649 (2003)(award against first insurer will be sustained where employee suffered consistent symptoms after first injury, even in the face of worsening of symptoms at a second employment). We agree, however, that the judge failed to make necessary findings pursuant to § 1(7A), and recommit the case for that purpose. The judge also needs to make further findings identifying the medical evidence on which he has relied.

Gary Russell, a forty-three year-old truck driver, injured his neck and right arm on January 20, 2000, while unloading sheet metal for Webb Supply, a plumbing, heating and HVAC delivery company insured by AIM. He was out of work for four months, and then returned to light duty, experiencing constant pain. (Dec. 6.) After a month-long stint as a truck driver for another employer in the spring of 2001, the employee began doing counter work in May 2001 for J.D. Daddario, a plumbing supply company insured by Arbella Indemnity, the successive insurer in this case. The work was lighter and he was less busy than he had been at Webb. Nevertheless, his pain got worse. The employee left J.D. Daddario in February 2002. (Dec. 6-8; Arbella br. 7-9; AIM br. 4-8.)

AIM accepted liability for the January 20, 2000 date of injury. (Dec. 2.) However, it denied liability when the employee sought further benefits beginning October 27, 2001. At a § 10A conference, AIM filed a motion to join Arbella Indemnity, the insurer of J.D. Daddario, the employee's last employer, on the theory that the employee had suffered a subsequent injury or aggravation during the nine months he worked there. (Dec. 5.) The judge granted the joinder motion, but ordered AIM to pay periods of § 34 and § 35 weekly benefits. AIM appealed, and the case came on for a de novo hearing. (Dec. 2.)

At hearing, AIM raised the affirmative defense of § 1(7A).[1] (Dec. 3.) The § 11A examiner, Dr. Caprio, opined in his report of August 27, 2002, that the industrial accident of January 20, 2000 remains "the major but not necessarily predominant cause of the claimant's disability or need for medical treatment." He diagnosed Mr. Russell with atypical brachial plexopathy, which has not improved since January 2000, and cervical spine strain, resolved. The doctor's report indicated that he was not aware of any pre-existing conditions. (Ex. 1.) However, in his deposition of October 24, 2003, Dr. Caprio

[1] 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.

opined that the employee had a pre-existing degenerative condition, which became painful due to the traumatic event at work in January 2000, and that the combination of the employee's degenerative condition and his January 2000 work injury disabled him. He concluded that the January 2000 injury is the "prime cause" of the employee's disability which, he opined, was permanent and partial due to chronic pain syndrome of his right shoulder. (Dec. 7-8; Dep. 81; Ex. 1.)

The judge allowed the parties to submit additional medical evidence.[2] (Dec. 3.) The employee submitted the reports and deposition testimony of Dr. Joseph Harrington, an internist and the employee's primary care physician. (Dec. 8-9.) AIM submitted the report of Dr. Isadore Yablon, an orthopedic surgeon, who evaluated the employee for the insurer. (Dec. 9.)

Dr. Harrington diagnosed the employee with neck pain and spasms causally related to the January 2000 industrial injury. He noted that the employee did not attribute his pain to working at J.D. Daddario, though his pain had gotten worse. Dr. Harrington opined that, at the time of his examination in June 2003, the employee was suffering from severe chronic pain, and was permanently totally disabled. (Dec. 8-9.)

AIM's medical expert, Dr. Yablon, diagnosed non-organic neck and back pain unrelated to the employee's original injury. Dr. Yablon could find no objective reason why the employee could not return to his usual occupation. (Dec. 9-10.)

The judge credited the employee's complaints of constant pain in his neck, right hand numbness and shaking, and difficulty ambulating stairs and sleeping. He found that Mr. Russell did not exacerbate or aggravate the original injury suffered at Webb Supply while working for J.D. Daddario, and that his disability is causally related to his employment at Webb Supply. Adopting the medical opinion of Dr. Joseph Harrington, the judge found the employee totally incapacitated, and ordered AIM Mutual to pay ongoing weekly benefits. (Dec. 11-12.)

[2] However, the decision and the record are inconsistent regarding the purpose for which such evidence was admitted. See discussion below.

AIM first argues that it properly raised the affirmative defense of § 1(7A), but the judge failed to address it. AIM further contends the employee has failed to prove, as a matter of law, that his work-related injuries remain a major cause of his ongoing disability. The employee counters that AIM has not met its burden of producing evidence to trigger the application of § 1(7A), and that, even if § 1(7A) was properly raised, the employee has met his burden of proof through the adopted medical opinion of Dr. Harrington.

Notwithstanding that AIM listed § 1(7A) as a defense on its issues sheet and brought it up orally at hearing, and the judge acknowledged it as a defense in his decision, (Dec. 3; Ex. 3, Insurer Issues sheet, AIM Mutual,[3] Tr. 9-10), the judge made no findings at all regarding § 1(7A). The employee argues that this was not error because AIM did not present a medical report prior to hearing setting forth the medical condition which allegedly combined with the industrial injury to cause or prolong the employee's disability. (Employee br. 1.) Therefore, according to the employee, § 1(7A) was not properly raised.

It is clear that, had the insurer failed to mention § 1(7A) in its statement of issues or orally at the commencement of hearing, it would have effectively waived it as an affirmative defense, Saulnier v. New England Window and Door, 17 Mass. Workers' Comp. Rep. 453, 459 (2003); Frey v. Mulligan Inc., 16 Mass. Workers' Comp. Rep. 364, 367 (2002), unless the employee clearly accepted its applicability. See Hinton v. Mass. Mut. Life Ins. Co., 16 Mass. Workers' Comp. Rep. 342 (2002). However, the insurer has the burden not only to raise § 1(7A) as a defense but also to produce evidence to trigger its application. Jobst v. Leonard T. Grybko, 16 Mass. Workers' Comp. Rep. 125, 130 (2002), citing Fairfield v. Communities United, 14 Mass. Workers' Comp. Rep. 79, 83 (2003). This means the insurer must come forward with evidence to support a finding that a pre-existing noncompensable injury or disease combined with a compensable injury. Fairfield, supra.

[3] 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).

Here, AIM raised § 1(7A) both at conference and at hearing. (April 8, 2003 Tr. 6, 10.) At hearing, employee's counsel objected to AIM's raising § 1(7A) unless it could explain the basis for the affirmative defense. Id. at 9. Counsel for AIM responded, "the diagnostic testing and medical records show that Mr. Russell has spondylosis and cervical degenerative disk disease. And it is our argument that that is a degenerative condition, which is a non work related preexisting condition which is the current cause of his disability and need for treatment." Id. at 9-10. When the employee pressed AIM to show explicitly what opinion it relied upon to show any preexisting condition causing the employee's disability after February 2002, the judge stated that the issue was raised and would be dealt with.[4] Id. at 10.

Thus, at hearing AIM defined the alleged pre-existing condition, without explicitly identifying the medical evidence supporting the pre-existing condition. However, deposition testimony from both Dr. Caprio, the § 11A examiner, and Dr. Harrington, the employee's treating internist, confirmed that the employee had pre-existing cervical degenerative disc disease.[5] (Caprio Dep. 10-11, 15-16, 36, 48, 70, 73, 90; June 25, 2003 Harrington Dep. 19, 22, 25, 89; July 23, 2003 Harrington Dep. 25.) Under the circumstances, the evidence was sufficient to require the judge to address at least the first component of § 1(7A), whether the employee's degenerative disc condition is "a pre-existing condition, which resulted from an injury or disease not compensable under [chapter 152]." Vieira v. D'Agostino Assocs., 19 Mass. Workers' Comp. Rep. 50, 52-53 (2005), quoting G. L. c. 152, § 1(7A). But see Vasquez v. Sweetheart Cup Co., 19 Mass. Workers' Comp. Rep. 17, 20 n.4 (2005), citing Blais v. BJ's Wholesale Club, 17 Mass. Workers' Comp. Rep. 187 (2003)(not all pre-existing conditions require § 1(7A)'s

[4] At that point, it would have been appropriate for the judge to have asked the insurer for an offer of proof.

[5] The board file reveals, see Rizzo, supra, that, despite Dr. Caprio's statement in his report that the employee had no known pre-existing condition, the § 11A doctor had been provided, prior to conducting the impartial examination, with the cervical MRIs and other medical records on which he based his conclusion at deposition that the employee had a pre-existing cervical degenerative disc disease.

application, e.g., where degenerative disc condition is normal for a person of employee's age, first element of § 1(7A)'s application is missing since age is not a pre-existing illness or disease). If the judge answers that question in the affirmative, then he must go on to determine whether the degenerative disc disease "combines with" the January 20, 2000 work injury "to cause or prolong disability or a need for treatment." Section 1(7A). This combination is a "combination of medical factors impacting on each other," see Resendes v. Meredith Home Fashions, 17 Mass. Workers' Comp. Rep. 490, 492 (2003), and requires a medical opinion. Only if the judge also answers the question of combination affirmatively must he determine whether the work injury of January 20, 2000, "remains a major" but not necessarily predominant cause of the resulting disability or need for treatment. See Vieira, supra at 53. "Absent . . . findings on all 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 Ctr., Mass. App. Ct., No. 03-J-73 (February 16, 2005) single justice)]." Viera, supra at 53. (Emphasis added.) We do so here.

The insurer further contends that the judge did not list or address its additional medical evidence, which it claims to have submitted on October 7, 2003, after the close of testimony. On recommittal, the judge should indicate whether such evidence was admitted. In addition, he should make additional findings regarding what medical evidence he has adopted. Though he adopted Dr. Harrington's opinion on disability, (Dec. 12), it is not clear whether he also adopted it on causation. If he did not, he must identify what opinion he did adopt.

On recommittal, the judge should clarify the purpose for which he admitted additional medical evidence. The decision itself is internally inconsistent. In listing the exhibits, the judge states, "Motion for Additional Medical for Gap Period Allowed." (Dec. 1.) (Emphasis added.) The judge's notation on the motion (Ex. 5), as well as the transcript (April 8, 2003 Tr. 8), support this statement, indicating that additional medical evidence was allowed for the period prior to the August 27, 2002 impartial exam only. However, elsewhere in the decision, the judge states he allowed additional medical testimony due to "the inadequacy of the report of Dr. Caprio and the complexity of the

medical issues involved." (Dec. 3.) The judge went on to rely on some of this additional medical evidence--specifically Dr. Harrington's report--to support his award of ongoing incapacity. This would be improper if the additional medical testimony was submitted, as the transcript, board file and part of the decision indicate, only for the gap period prior to the impartial examination. Perez v. Work, Inc., 20 Mass. Workers' Comp. Rep. ___ (May 5, 2006); Mims v. M.B.T.A., 18 Mass. Workers' Comp. Rep. 96, 100 (2004).

Accordingly, we recommit this case to the administrative judge for further findings consistent with this opinion.

So ordered.

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William A. McCarthy
Administrative Law Judge

Filed: ***May 30, 2006***

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Martine Carroll
Administrative Law Judge

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Patricia A. Costigan
Administrative Law Judge