COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 028372-03**

Michael W. Cox	Employee
Fallon Services, Inc.	Employer
Savers Property & Casualty	Insurer

REVIEWING BOARD DECISION
(Judges Costigan, Carroll and Fabricant)

APPEARANCES
James C. Bradford, Esq., for the employee at hearing
Bruce S. Lipsey, Esq., for the employee on appeal
Donald M. Culgin, Esq., for the insurer at hearing and on appeal
Richard W. Jensen, Esq., for the insurer on appeal

COSTIGAN, J. The employee appeals from a decision in which the administrative judge awarded him closed periods of § 34 total and § 35 partial incapacity benefits, but discontinued all weekly benefits as of August 7, 2004. Because the judge mishandled evidence of the employee's post-injury activities in the context of his § 1(7A) analysis, we recommit the case for further findings of fact consistent with this opinion.

The employee had worked as a paramedic for the employer since 1996. On August 18, 2003, he injured his neck while he and a co-worker were lifting a heavy woman on a stretcher.[1] (Dec. 3.) The employee already had chronic degenerative and arthritic changes in his cervical spine, as evidenced by a MRI study performed about a month after the injury. The MRI also showed disc protrusions at the C4-5 and C5-6 levels. The employee treated conservatively, and did not return to work. In January 2004, he began looking for sedentary work. In the fall of 2004, he secured a part-time job doing data entry on a computer billing system. (Dec. 4-5.)

[1] The employee testified the patient was transported from her home to the ambulance on a "stair chair," a lightweight aluminum chair to which she was strapped. (Tr. 14-15.)

The employee filed a claim for workers' compensation benefits, which the insurer resisted. (Dec. 2.) Benefits were awarded at conference, and the insurer appealed. (Dec. 2.) The employee underwent a § 11A impartial medical examination by Dr. Frederick S. Ayers on April 30, 2004. The impartial physician opined that, as of that date, the employee suffered from a permanent, partial disability, with restrictions against lifting in excess of ten pounds, stooping, bending, and performing repetitive motions requiring frequent neck movement. Dr. Ayers causally related the employee's disability and physical restrictions to the August 18, 2003 lifting injury. His diagnosis was cervical strain with disc protrusions, and he also opined that the employee's pre-existing degenerative conditions had combined with the work-related neck strain to worsen and lengthen the employee's impairments. (Dec. 5.)

Fourteen months after the § 11A examination, Dr. Ayers was deposed, and presented with evidence that the employee was occasionally engaged in the activity of playing drums for a rock band in a bar. A surveillance video introduced at the hearing showed the employee moving musical equipment on two dates, August 7, 2004 and March 27, 2005. On the latter date, the employee was also filmed playing drums with the band inside a bar. The judge observed, "[h]is movements were fluid, repetitive and without any outward indication of pain." (Dec. 6.) At his deposition, Dr. Ayers was not shown the video, but was presented a hypothetical question describing what the video depicted.[2] The doctor opined

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[2] Q: Okay. Your restrictions were set out in your report. And, again, you saw Mr. Cox in April of '04, and you accepted his history in terms of what he was experiencing and the limitations in his movements and so forth; is that right?
A: That's right.
Q: At that point in time would you have recommended to Mr. Cox that of all the activities that he might avoid[,] playing the drums in a nightclub as part of a band for seven to eight hours at a time might be a good idea?
Mr. Bradford: Objection.
A. I –
Mr. Bradford: I object. Before you answer that, I'm objecting to the facts not in evidence, assumption of facts not in evidence.

that such repetitive activity would not comport with the medical restrictions he had set for the employee when he examined him, and could aggravate his underlying degenerative and arthritic neck condition.[3] (Dec. 5-6; Dep. 13-15, 22-23.)

Because the insurer had raised the defense of § 1(7A)'s "a major" causation

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In his decision, the administrative judge indicated "no ruling" on the first objection, because the reason for the objection was not stated. (Dec. 11.) However, he neither recorded nor ruled on employee's counsel's second objection, the reason for which was stated. (Dep. 13.) The only evidence on the frequency and duration of the employee's drumming was his own testimony. He testified that the band played three sets per "gig" (night) and that each set lasted between forty-five and sixty minutes. (Tr. 65.) Thus, the hypothetical question as posed should have been stricken as assuming facts not in evidence. After employee's counsel's second objection, virtually the same hypothetical question was posed to the doctor, but with the added fact that there would be breaks during the seven to eight hours the band was in the bar. No objection to that question was voiced, and Dr. Ayers ultimately agreed that "activities such as drumming and participation in a band, a drummer, would be the very type of activity that *might* continue to aggravate an underlying condition long after a temporary strain had resolved. . . ." (Dep. 13-14; emphasis added.)

[3] The foundation for Dr. Ayers's opinion as to the physical effects of the employee's drumming seems far from solid. The doctor testified:

> Q: In regards to Mr. Cox playing drums – is it fair to say Mr. Cox's injury was primarily to the cervical region?
> A: Yes.
> Q: Is it fair to say that playing the drums primarily uses the hands and wrists?
> A: Again, I'm not much of a connoisseur of drumming, but it would appear to be primarily hands and wrists. Sometimes it appears to be total body from what I've observed.
> Q: Depends on the nature of the drummer, if you're playing drums in a rock band as opposed to maybe playing drums at a more gentle tempo, let's say?
> A: Yes.
> Q: You have not seen any evidence of Michael Cox playing drums?
> A: No, sir.
> Q: You have no way of determining whether playing drums – what regions of the body he was using?
> A: That's correct.
> Q: And whether it involved the neck at all?
> A: That's correct.

(Dep. 19-20.)

standard applicable to combination injuries,[4] the judge conducted the three-prong analysis required under Vieira v. D'Agostino Assoc., 19 Mass. Workers' Comp. Rep. 50, 52-53 (2005). Adopting the impartial physician's opinion, the judge first found the employee had a non-compensable, pre-existing condition, documented by MRI study, and second, that the condition had combined with the work injury to prolong disability. Accordingly, the judge found that § 1(7A) applied to the employee's claim. Addressing the third prong of the Vieira analysis -- whether the employee satisfied his burden of showing the work injury was and remained "a major" cause of his incapacity -- the judge found:

> In this regard the employee has not met his burden to receive ongoing benefits. I have adopted the opinion of Dr. Ayers. His testimony is clear that as of April 30, 2004 the industrial accident was still *the* major factor in the employee's incapacity. He was equally clear that since he had not examined the employee subsequent to that date he had no opinion as to the subsequent state of health of the employee. He did state, however, that the employee would recover to a baseline in due course unless he suffered other exacerbation to the underlying pre-existing condition. He made clear that the lifting of objects beyond [the employee's] restrictions and that repetitive activity, such as drumming, were exactly the types of activities likely to cause such an exacerbation. The employee began to engage in these types of activities as of August 2004. Pursuant to the third prong of the § 1(7A) analysis the employee has the burden of demonstrating that the industrial accident remains *the* major, but not necessarily predominate [sic], cause of the ongoing disability. Thus as of August 7, 2004, the date the employee began to act in a manner that would necessarily exacerbate his underlying neck condition, it can no longer be stated that his impairments *remain exclusively related* to the industrial accident and he must meet the burden established by § 1(7A). The evidence submitted fails to satisfy the employee's burden under the third prong of the analysis subsequent to August 7, 2004.

[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.

(Dec. 9; emphases added.) The employee contends this rationale for discontinuing payment of incapacity benefits is based on an improper conflation of the analyses required for § 1(7A) causation and subsequent intervening causation, and thus is contrary to law. We agree.

Based on the adopted opinion of Dr. Ayers, the judge found that the industrial injury remained a major cause of the employee's partial medical disability as of the April 30, 2004 § 11A examination.[5] There is nothing in the medical evidence, subsequent to that date, changing that causal relationship opinion vis-à-vis the interplay between the industrial injury and the employee's pre-existing degenerative and arthritic conditions. That the employee lifted some musical equipment and played drums three months later, in August 2004, is not a factor in the analysis of § 1(7A) "a major" causation. Moreover, Dr. Ayers acknowledged his opinion, relied on by the judge, "that the employee would recover to a baseline in due course unless he suffered other exacerbation to the underlying pre-existing condition," (Dec. 9), was speculative. (Dep. 24-25.) Thus, that opinion was not a competent basis on which to discontinue the employee's incapacity benefits. See Tautkus v. City of Brockton, 20 Mass. Workers' Comp. Rep. 27 (2006), citing Russell v. Micron, 12 Mass. Workers' Comp. Rep. 183 (1998).[6] The judge therefore must consider the additional

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[5] The employee testified he joined the band in February 2004, (Tr. 56), and the band got together a dozen or so times [to practice] between February 2004 and their first "gig" in August 2004. (Tr. 63.) Thus, it appears the employee was already drumming by the time of the impartial medical examination. However, Dr. Ayers was not asked to assume any drumming activity prior to August 2004.

[6] Dr. Ayers conceded as much at his deposition, which took place fourteen months after his examination of the employee:

> Q. Would it be fair to say, Doctor, that given just the mere passage of that much time you're not in a position to offer much in the way of an opinion as to what Mr. Cox's restrictions are today?
> A. I could give no opinion on it. My only opinion would be based on the date of April 30, 2004.

(Dep. 6.)

medical evidence he allowed which post-dates the § 11A examination, and make subsidiary findings thereon.

We chart the analytical course the judge must follow on recommittal. First, we point out two errors in the judge's findings that require correction. The proper causal standard under § 1(7A) is that the work injury "remains *a* major" cause of the resulting disability; the judge's reference to "*the* major," (Dec. 9), is incorrect. Further error afflicts the judge's pronounced requirement that the employee's neck condition remain "exclusively related to the industrial accident." (Id.) This imposes a standard even higher than the misstated "the major" cause. While it is unclear how the "exclusive" cause concept impacted the judge's causal relationship analysis, it has no origin in our workers' compensation act.

Against the backdrop of his finding that the work injury remained a major cause of the employee's disability as of April 30, 2004, the judge must next determine whether there was still "a major" causation in August 2004, when the employee was first observed playing drums. If the judge determines the employee's work injury remained "a major cause" of his disability at that time, he must then determine whether the activity of drumming was reasonable and normal, and not negligent, in light of the employee's physical impairment and the restrictions imposed by Dr. Ayers. " 'If an employee engages in reasonable and normal movements or activities and thereby reactivates or aggravates a compensable injury, the insurer will be obliged to pay compensation for the consequences.' " Doten v. Barletta Co., 10 Mass. Workers' Comp. Rep. 423, 426 (1996), quoting L. Locke, *Workmen's Compensation* § 224 (2d ed. 1981). In Doten, the post-injury activity was the employee working in his yard, raking leaves and the like. Here, the judge must make factual findings addressing the activity of playing drums for three forty-five minute sets on two occasions some seven months apart -- in August 2004 and in March 2005. See Houghton v. Maaco, 17 Mass. Workers' Comp. Rep. 571 (2003).

Should the judge find the employee's drum playing to be reasonable and not negligent in light of his impairment, the judge then must revisit his causal relationship findings. Only if playing drums is of such a nature to sever the connection between the employee's disability and his work injury will the insurer's liability end, and expert medical opinion to that effect must exist.[7] In Tirone v. M.B.T.A., 15 Mass. Workers' Comp. Rep. 283 (2001), we considered a medical presentation in which the employee's combination injury under § 1(7A) was aggravated by a subsequent non-work-related motor vehicle accident. We viewed the judge's discontinuance of benefits based on that later event as contrary to law:

> The only medical evidence in the case . . . [pursuant to § 11A] did not eliminate causal connection between the industrial injury and the employee's present complaints. The doctor opined that the employee's symptoms could be attributable to the subsequent motor vehicle accident. (Dep. 49-50.) We do not understand this opinion to express that the work-related status of the employee's impairment no longer obtained, or that the doctor retracted his prior opinion on such causal relationship. Cf. Perangelo's Case, 277 Mass. 59, 64 (1931). At no time was he asked whether he would consider that the work injury ceased to be related to the employee's present medical impairment, in view of the subsequent motor vehicle accident. Liability for the industrial injury is not cut off by such conjectural medical opinion testimony as a matter of law. See Roderick's Case, [342 Mass. 330 (1961)]; Whitehead's Case, 312 Mass. 611, 613 (1942); L. Locke, Workmen's Compensation § 502, n. 15 (2d ed. 1981)("as

[7] On recommittal, the judge needs to clarify that he allowed additional medical evidence to be introduced under § 11A(2), for what purpose, and exactly what evidence did make it into the record. At the outset of the hearing, the judge stated he would allow additional medical evidence for the so-called "gap period" between the date of injury and the § 11A impartial medical examination. (Tr. 5.) He also invited motions for post-impartial examination additional medical evidence following Dr. Ayers's deposition. (Tr. 6, 96.) The list of exhibits, (Dec. 1), however, includes Exhibit 4, "Office note of John J. Looney, M.D.," which was admitted into evidence at the hearing. That report, when offered, was identified as dated May 5, 2005, (Tr. 81), more than a year outside the "gap period." Exhibit 6 is described only as "Employee's Expert Medical Opinions." Moreover, the decision lists as Exhibit 2 the "Chiropractic records of Deborah A. Fudge, D.C.," whereas the hearing transcript reflects that Dr. Ayers's impartial medical report was marked and admitted into evidence as Exhibit 2. We find nothing in the record indicating the employee ever treated with chiropractor Deborah A. Fudge.

> a practical matter, the insurer has the burden of producing evidence against the claimant when it seeks to deny a claim by contending that the employee had deviated from the employment, *that causal relation was interrupted by an independent intervening cause*, and the like.")(Emphasis added).

Tirone, supra at 286.

With these legal principles in mind, we recommit the case for further findings of fact.

So ordered.

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Patricia A. Costigan
Administrative Law Judge

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Martine Carroll
Administrative Law Judge

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Bernard W. Fabricant
Administrative Law Judge

Filed: **June 25, 2007**