COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS	**BOARD NO. 017924-12 029551-08**
Adrian Aleman	Employee
City of Boston	Employer
City of Boston	Self-Insurer

REVIEWING BOARD DECISION
(Judges Fabricant, Horan and Koziol)

The case was heard by Administrative Judge McDonald.

APPEARANCES
Diane M. Broderick, Esq., for the employee
John T. Walsh, Esq., for the self-insurer at hearing
Liam P. Curran, Esq., for the self-insurer at hearing and on appeal

FABRICANT, J. Both parties appeal from a decision awarding the employee § 34 benefits from January 23, 2013 and continuing, due to disability resulting from a July 25, 2012 "traumatic aggravation of underlying lumbar disc derangement." (Dec. 11.) The self-insurer argues the medical evidence supporting this finding is insufficient, and as a result the employee has not met his burden of proof pursuant to G. L. c. 152 § 1(7A).[1] We agree and reverse the decision. [2]

[1] 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.

[2] The employee argues error in the finding that he did not also suffer a work-related lower back injury on October 24, 2008. However, the employee concedes that finding may be based upon the credibility of the employee, the determination of which is the sole province of the trial judge. (Employee br. 4.) The employee's further argument that the judge failed to consider associated treatment records is not supported by the record. Moreover, the records referred to do not, in and

The employee graduated from high school in 1988, and, after briefly attending college, enlisted in the United States army in December of that same year. (Dec. 4; Tr. I, 16.)[3] While in the army, he served as a truck driver, light-weight vehicle mechanic and cook. In 1994, he began working for the City of Boston as a parking meter supervisor, while also continuing to serve in the army reserves. (Dec. 4; Tr. I, 16.)

The employee sustained a low back injury in a 1996 motor vehicle accident. However, there is no medical evidence regarding the nature or treatment of this injury. (Dec. 4; Tr. II, 35-37.) Later, in 2006, he sustained further injury to his back when his car was rear-ended by an MBTA bus. He was out of work for approximately seven weeks, and was treated with physical therapy and medication. He returned to work without restrictions. (Dec. 4; Tr. II, 28-35.) There is no evidence that either of these incidents was work related.

On October 24, 2008, the employee was injured while working when he stepped on uneven concrete, twisting his right foot and ankle.[4] (Dec. 5; Tr. I, 19-23.) He remained out of work, receiving §34 benefits, until July 4, 2009. At that time, he returned to limited duty work and began receiving § 35 benefits until returning to full duty work on October 7, 2009. (Dec. 5; Tr. I, 19-23.)

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of themselves, establish the required causal relationship. We therefore summarily dismiss the employee's appeal.

[3] The hearing in this matter was conducted on November 20, 2013 and continued on November 25, 2013 and April 9, 2014. The transcripts from these hearing dates are referenced throughout this decision as Tr. I, Tr. II and Tr. III.

[4] The employee testified that at the hospital he reported that his "ankle hurt and then I felt a sharp pain up though my leg, my calf up to my back." (Tr. I, 25.) The judge found that this testimony is unsupported by the contemporaneous hospital record. (Dec. 5, referencing Exhibit 6.2.) Likewise, the judge did not credit the employee's testimony that he complained about back pain to his treating physicians, Drs. Chase and Soslow, as their records through July 29, 2009 do not reflect this. (Dec. 5, Tr. I, 25, 26, 31-33, 35, 37-39.) While the judge ultimately found that the employee sustained a work-related injury to the right ankle and foot as a result of this incident, he also found that the employee had not met his burden of proof regarding the causal relationship of his low back pain. (Dec. 6-7.)

On November 10, 2009, following an MRI, the employee received two epidural steroid injections from Dr. Aaron Levine. The employee was out of work from November 12, 2009, until February 1, 2010, when Dr. Levine released him to return to work without restrictions.[5] (Dec. 6, Tr. I, 78.)

The employee then continued to work full time and without incident until July 25, 2012, when he fell while in the course of his employment, resulting in leg and back pain. The medical consensus appears to be that the resulting injury is an aggravation of pre-existing disc herniations at L1-L2 and L5-S1. On August 9, 2012, Dr. Aaron Levine opined that "in all likelihood [the employee] has aggravated the one or a combination of the L1-2 and the L5-S1 disks." (Dec. 8.) Dr. Suzanne Miller examined the employee at the self-insurer's request and, on November 15, 2012, opined that the July 25, 2012 injury "was an aggravation of a preexisting condition." (Dec. 8.) Dr. Joseph Abate, the impartial physician, examined the employee pursuant to § 11A(2) on April 22, 2013 and opined that he sustained "traumatic aggravation of underlying lumbar disc derangement, directly causing total disability since that time." (Dec. 8-9.) Dr. David H. Kim examined the employee on August 14, 2013, and concluded the employee's "ongoing back pain as well as the radiating pain into the hip, groin, and scrotal region can be directly attributed to the work-related injury he suffered on July 25, 2012." (Dec. 9.)

The judge adopted these opinions of Drs. Miller, Abate and Kim, and found that they provided sufficient evidence that the employee met his burden of proof pursuant to G. L. c. 152, § 1(7A), despite the absence of the specific statutory language stating that the July 25, 2012 incident is "a major but not necessarily predominant cause of disability or need for treatment." (Dec. 10-11.) The self-insurer argues the adopted medical evidence is insufficient to support a finding of "a major" causation pursuant to G. L. c. 152, § 1(7A). We agree.

[5] A §19 agreement was approved on March 9, 2010, providing for § 34 benefits to the employee, without prejudice, from November 12, 2009 to February 2, 2010, due to alleged injuries to the right ankle and low back. We take judicial notice of the board file. Rizzo v. M.B.T.A., 16 Mass. Workers' Comp. Rep. 160, 161 n.3 (2002).

While exact adherence to the specific statutory language is not necessarily required for a finding that the § 1(7A) burden of proof has been met, the medical evidence must, at the very least, be substantially equivalent to that statutory language. Stewart's Case, 74 Mass. App. Ct. 919, 920 (2009). The expert medical evidence here only establishes an aggravation of the pre-existing condition. Although the adopted evidence of aggravation satisfies the "combination injury" prong of § 1(7A), it does not support a finding that the compensable injury remains a major cause of the employee's disability or need for treatment. Castillo v. Cavicchio Greenhouses, Inc., 66 Mass. App. Ct. 218, 219-221 (2006). Even Dr. Kim's conclusion that the employee's "ongoing pain" can be "directly attributed" to the work injury is insufficient, as it fails to address, in meaningful terms, "the relative degree to which compensable and noncompensable causes have brought about the employee's disability." Stewart's Case, supra, at 920.

Accordingly, we reverse the decision in part,[6] and vacate the judge's award of benefits for the alleged July 25, 2012 back injury.

So ordered.

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Bernard W. Fabricant
Administrative Law Judge

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Mark D. Horan
Administrative Law Judge

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Catherine W. Koziol
Administrative Law Judge

Filed: **june 23, 2015**

[6] See footnote 2, supra.