COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO.:** 037312-04

Andrew J. Fucillo	Employee
M.I.T.	Employer
M.I.T.	Self-Insurer

CORRECTED
REVIEWING BOARD DECISION
(Judges Fabricant, McCarthy and Horan)

The case was heard by Administrative Judge Heffernan.

APPEARANCES
Judson L. Pierce, Esq., for the employee at hearing
Christopher S. O'Connor, Esq., for the employee on appeal
Peter F. Brady, Jr., Esq., for the employee at oral argument
Thomas P. O'Reilly, Esq., for the self-insurer at hearing
Paul M. Moretti, Esq., for the self-insurer on appeal

FABRICANT, J. The self-insurer appeals from a decision awarding the employee ongoing § 34 benefits for a work injury to his lower back. Among the many issues argued by the self-insurer, one has merit. Thus, we recommit the case to the judge for reconsideration using the correct standard of proof.

The employee had a history of back injuries, including a work-related incident in 1983, and non-work-related motor vehicle accidents in 2000 and 2001. (Dec. 4-5.) On September 16, 2004, the employee was moving a mattress when he felt a pinch and pain in his back, radiating down his leg. The employee continued to work light duty, but underwent an L3-4 discectomy on December 2, 2004. The surgery was not successful, and the employee has not returned to work due to unremitting pain. (Dec. 5.)

After a denial of the claim at conference, and the employee's appeal under § 10A(3), the employee underwent an impartial medical examination. (Dec. 3-4.) The judge allowed the employee's motion for additional medical evidence based on the inadequacy of the impartial

report. (Dec. 8.) The employee submitted a report of Dr. Frank Pedlow, an orthopedist who opined the employee had significant pain in his back and right lower extremity as a result of the September 16, 2004 work injury. The doctor diagnosed a fracture through, and widening of, the right L3-4 facet joint, and noted pre-existing degenerative problems at the L4-5 and L5-S1 levels. Dr. Pedlow opined the employee was totally disabled from working. (Dec. 8-9.) The judge adopted Dr. Pedlow's opinions. (Dec. 10.)

The self-insurer raised the defense of "a major" causation pursuant to § 1(7A). The judge found the provision did not apply to the employee's claim and that he had suffered a compensable work injury under simple "as is" causation. The judge awarded ongoing § 34 benefits, concluding:

> I find, in a close call, and *looking at the evidence in a light most favorable to the employee* that he has sustained a personal injury arising out of and in the course of employment.

(Dec. 9-10; emphasis added.)

The self-insurer argues the judge applied an incorrect standard of proof in deciding the case. We agree. "[T]he standard to be applied is not 'the light most favorable to the employee.' " Costello v. JJS Services, Inc., 11 Mass. Workers' Comp. Rep. 620, 622 (1997)(internal quotations omitted). It is axiomatic that the employee must prove his case by a preponderance of the evidence, i.e., that more likely than not, he has established all elements necessary to his claim for worker's compensation benefits. See Patterson v. Liberty Mut. Ins. Co., 48 Mass. App. Ct. 586, 592 (2000); Sponatski's Case, 220 Mass. 526, 528 (1915). The error is not harmless, as it appears to have been a factor in the judge's finding in the employee's favor. As a result, we must recommit the case for the judge to revisit the case, holding the employee to his burden of proving his claim by the preponderance of evidence.

Although the self-insurer makes numerous other arguments, we do not find merit in any of them, and address only one.[1] The self-insurer argues that the judge erred by failing to apply the heightened standard of causation imposed by § 1(7A) for "combination" injuries:

> 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

[1] We summarily affirm the decision as to all arguments not discussed.

> disability or 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.

General Laws c. 152, § 1(7A). While the evidence established the employee had various pre-existing medical conditions due to injuries (motor vehicle) or diseases (e.g., degenerative disc disease, arthritis), the judge properly found the provisions of § 1(7A) did not apply to the employee's claim.

Dr. Pedlow opined the September 16, 2004 work injury caused acute trauma with significant pathology in the right facet joint of the L3-4 disc, with back and right extremity pain, resulting in a discectomy on December 2, 2004. (Dec. 5, 8.) Dr. Pedlow also noted the employee's past back complaints stemmed from problems in the L4-5 and L5-S1 discs. (Dec. 9.)

The self-insurer asserts that Dr. Pedlow's opinion was based on an incomplete and inaccurate history, given the employee's injury to his L3-4 disc in a 1983 motor vehicle accident. (Self-ins. br., 29.) What the self-insurer omits is that the 1983 motor vehicle accident, which it argues is a factor in the employee's present medical picture, was indisputably *work-related.* (Dec. 4; Tr. 9-10, 49-50.)[2] This fact renders § 1(7A) inapplicable for failure to show a pre-existing *non-compensable* condition resulting from an injury or disease. See Powers v. Teledyne Rodney Metals, 16 Mass. Workers' Comp. Rep. 229, 231-232 (2002); Viera v. D'Agostino Assocs., 19 Mass. Workers' Comp. Rep. 50, 53 (2005). Therefore, whatever history the doctor obtained with regard to the continuing effects of the 1983 injury is simply not relevant to § 1(7A)'s application.[3]

Moreover, the pre-existing L4-5 and L5-S1 conditions are also irrelevant to the § 1(7A) issue pressed by the self-insurer. Nothing in the adopted medical evidence established the effects of the pre-existing condition at those levels *combined with* the effects of the 2004 industrial injury

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[2] The judge's finding that the 1983 injury to the L3-4 disc that occurred while working for Federal Express was an injury to the L4-5 disc is clearly a scrivener's error. (Dec. 4.)

[3] The judge's finding that, "[g]iven Dr. Pedlow's medical opinions, I am not convinced that any medical condition and or disease derived from any non-compensable injury," reflects these facts, albeit vaguely. (Dec. 9.)

to the employee's L3-4 disc "to cause or prolong disability or need for treatment." See MacDonald's Case, 73 Mass. App. Ct. 657, 660-661 (2009)(once insurer produces evidence of combination of medical factors, employee may rebut with evidence of no combination which, if adopted, defeats § 1(7A)'s application). Here, Dr. Pedlow's opinion, as found by the judge, fails to satisfy the necessary element of "combination."[4] Thus, there is no error in the judge's rejection of the self-insurer's § 1(7A) defense of "a major" causation.

Accordingly, we recommit this case for reconsideration and further subsidiary findings within the bounds of the standard of proof set forth in this opinion.

So ordered.

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Bernard W. Fabricant
Administrative Law Judge

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William A. McCarthy
Administrative Law Judge

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Mark D. Horan
Administrative Law Judge

Filed: November 24, 2009

[4] "Dr. Pedlow does note past back complaints coming from the L4-5 and L5-S1 levels, however he points out that the September 16, 2004 industrial accident has caused ongoing trouble specifically at the *L3-4 level."* (Dec. 9; emphasis in original.) "[T]he medical evidence suggested nothing to the question of any interplay between the pre-existing lumbar condition and the work-related lumbar impairments." (Dec. 9-10 n.2.)