COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO.:** 037919-05

Andrew Maiuri	Employee
M.B.T.A.	Employer
M.B.T.A.	Self-insurer

REVIEWING BOARD DECISION

(Judges Horan, McCarthy and Fabricant)

APPEARANCES

Michael J. Powell, Jr., Esq., for the employee
Joseph S. Buckley, Jr., Esq., for the self-insurer

HORAN, J. The self-insurer appeals from a decision awarding the employee § 34 benefits for an aggravation of a prior back injury. It argues the judge erred by failing to list or discuss the additional medical evidence introduced by the parties, and by failing to address its § 1(7A) "a major" causation defense.[1] Both issues require recommittal.

On November 14, 2005, the employee injured his previously impaired back when he fell down stairs at work. He underwent lumbar surgery on April 4, 2006, and returned to work on November 10, 2006. (Dec. 45-46.) The judge awarded the employee § 34 benefits at conference, and the self-insurer appealed. (Dec. 44.)

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[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.

On August 23, 2006, pursuant to § 11A, the employee was examined by Dr. Peter B. Germond. Dr. Germond opined the work injury was superimposed upon the employee's pre-existing L5-S1 disc herniation and spinal arthritis with stenosis. He causally related the employee's surgery to the work injury. At the time of his examination, Dr. Germond felt the employee would be able to return to work within three months with minor restrictions. Concerned that Dr. Germond did not meet the criteria to serve as an impartial medical examiner, the judge allowed the parties to introduce additional medical evidence. (Dec. 48.) Nevertheless, the judge adopted Dr. Germond's opinions, and concluded the employee had suffered a work injury that aggravated his pre-existing back condition to the point of total incapacity, resulting in surgery. The judge awarded benefits from November 14, 2005 to November 10, 2006, the date the employee returned to work. (Dec. 49.)

It is axiomatic that a decision's complete lack of reference to the evidence introduced at the hearing - either through findings or within the list of exhibits or witnesses - is grounds for recommittal. See Hamel v. Dela, Inc., 20 Mass. Workers' Comp. Rep. 233, 235 (2006), and cases cited. Here there is no disputing that the judge allowed additional medical evidence, that both parties submitted such evidence, and that the decision fails to refer to it. We therefore recommit the case for consideration of this evidence, particularly with respect to the issue of § 1(7A). See Russell v. Webb Supply Co., 20 Mass. Workers' Comp. Rep. 167, 171-172 (2006), and cases cited.

At hearing, the self-insurer raised § 1(7A), and the decision reveals it was *sub judice*. (Dec. 43.) However, the decision fails to discuss it. Based on the record, the self-insurer is entitled to findings on this issue. See Castillo v. Cavicchio Greenhouses, Inc., 66 Mass. App. Ct. 218 (2006); Vieira v. D'Agostino Assocs., 19 Mass. Workers' Comp. Rep. 50, 52-53 (2005).

Finally, given our disposition, at this point we need not address the self-insurer's argument that the impartial medical opinion of Dr. Germond should be stricken from the record. Should the judge, upon recommittal, choose not to adopt Dr. Germond's opinion, the issue will be moot.

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

So ordered.

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Mark D. Horan
Administrative Law Judge

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William A. McCarthy
Administrative Law Judge

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Bernard W. Fabricant
Administrative Law Judge

Filed: **November 25, 2008**