

COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS

BOARD NO.: 018358-03

Christopher Boucher
Edward Buick, Inc.
Associated Employers' Insurance Co.

Employee
Employer
Insurer

REVIEWING BOARD DECISION

(Judges Horan, McCarthy and Fabricant)

APPEARANCES

Paul L. Durkee, Esq., for the employee
Peter P. Harney, Esq., for the insurer at hearing and on appeal
Holly B. Anderson, Esq., for the insurer on appeal

HORAN, J. The insurer appeals from a decision awarding the employee permanent and total incapacity benefits for a work-related back injury sustained in a June 10, 2003 motor vehicle accident. We address the insurer's argument that the judge failed to make adequate findings with respect to its § 1(7A) "a major" causation defense. See Vieira v. D'Agostino Assoc., 19 Mass. Workers' Comp. Rep. 50 (2005). We conclude the judge was not arbitrary or capricious in declining to apply § 1(7A), insofar as he found the employee's pre-existing conditions did not contribute to the "resultant condition" responsible for his disability. (Dec. 15.) Accordingly, we affirm the decision.

The pertinent medical evidence adopted by the judge was provided by the employee's physicians, Dr. Gregory Malloy and Dr. Roland Caron. (Dec. 16.) The focus of the doctors' expert testimony concerned whether the employee's work injury was a major cause of his disability and need for treatment, given that he suffered from back and left leg pain, and from pre-existing non-industrial degenerative conditions. (Dec. 9, 14-15.) The insurer raised the relevant fourth sentence of G. L. c. 152, § 1(7A),¹ in defense of the

¹ G. L. c. 152, § 1(7A), provides, in pertinent part:

employee's claim for benefits. (Dec. 2.) Dr. Malloy rendered the following opinion at his deposition regarding the employee's work-related thoracic syringomyelia and cervical radiculopathy:

Q: Now, with respect to the neck and the left arm, Doctor, I think primarily the left arm, but maybe both arms, do you have an opinion as to whether or not his work injury has acted as at least a major contributing cause in producing the neck and left arm problems?

A: Yes, I believe that these symptoms are related to his syrinx caused by his accident.

Q: And would you agree with me, Doctor, again based upon the studies reviewed and the benefit of the earlier records, that the injury of June 10th, '03, has acted as a contributing cause with respect to the development of this syrinx problem.

A: Yes.

Q: Do you have an opinion as to whether or not the work injury acted as a major cause of creating the headaches he's been having?

A: Yes, I believe that those are related to his syrinx as well.

Q: And can I ask you the same question, Doctor, with respect to the mid back? Would you agree with me that the work injury of June 10th, '03, has acted as a major contributing cause with respect to his mid back problems?

A: Yes.

(Dep. 29-30.) As to the employee's lumbar condition, Dr. Roland Caron diagnosed "a massive large protruded disc at L4-5 on the left side" and "failed low back syndrome."

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 a need for treatment.

Dr. Caron assessed causal relationship: "It is my medical opinion that this work injury on June 10, 2003 continues to act as the major contributing cause producing this patient's total and permanent disability and need for medical treatment with question [sic] surgery." (Employee Ex. 4.) While Dr. Caron noted "some lumbosacral spondylosis or so-called arthritis of his neck and low back," his report is silent as to any contribution from that pre-existing condition to the employee's resultant disability. *Id.* To the extent the arthritic condition might play a part in the employee's "failed back syndrome," Dr. Caron's report is unclear, and the parties chose not to depose him to explore this issue.

The judge adopted the opinions expressed by Drs. Malloy and Caron. (Dec. 15-16.) We believe these opinions would be sufficient to support the employee's burden of proving the § 1(7A) heightened causation standard, were it necessary for the employee to meet that burden of proof. However, the doctors' opinions support the conclusion that the employee's disability is caused directly and solely by the industrial accident, without contribution from his pre-existing degenerative condition. Dr. Malloy is clear the employee's syring, along with the related headaches, is caused solely by the work injury. (Dep. 29.) The judge also chose to resolve any ambiguity in Dr. Caron's opinion in the employee's favor: "The June 10, 2003 industrial injury on its own without any contribution from any pre-existing condition has caused by itself Mr. Boucher's incapacity and impairment." (Dec. 15.) This finding stands as a reasonable interpretation of Dr. Caron's opinion that the work injury "continues to act as the major contributing cause" of the employee's resultant disability. (Employee Ex. 4.)

In his report, Dr. Caron mentions the employee's pre-existing arthritis, but he never expressly factors it into his final causal relationship opinion. The doctor's characterization of the work injury as "major" does not mandate the application of § 1(7A), because he never opines that the work injury combined with the employee's non-industrial pre-existing condition to cause his disability or need for treatment. Thus, there is no error. The judge could adopt and apply the opinions of the two doctors without contradiction or conflict. See Amon's Case, 315 Mass. 210 (1943)(judge free to adopt all, part or none of expert medical opinion evidence).

Accordingly, we affirm the decision.² Pursuant to G. L. c. 152, § 13A(6), the insurer shall pay employee's counsel a fee in the amount of \$1,495.34.

² We summarily affirm the decision with respect to all other issues raised on appeal.

Christopher Boucher
Board No. 018358-03

So ordered.

Mark D. Horan
Administrative Law Judge

William A. McCarthy
Administrative Law Judge

Bernard W. Fabricant
Administrative Law Judge

Filed: November 17, 2008