COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS	**BOARD NOS. 045127-05 039240-08**

Clarissa Perez	Employee
Department of Employment and Training	Employer
Commonwealth of Massachusetts	Self-Insurer

REVIEWING BOARD DECISION
(Judges Horan, Costigan[1] and Koziol)

The case was heard by Administrative Judge Hernandez.

APPEARANCES
Teresa Brooks Benoit, Esq., for the employee at hearing
James N. Ellis, Esq., for the employee on appeal
Radha Tilva, Esq., and Arthur Jackson, Esq., for the self-insurer

HORAN, J. The self-insurer appeals from a decision awarding the employee medical benefits and attorney's fees for treatment of an alleged work-related cervical injury. We affirm.

The employee filed claims for weekly incapacity and medical benefits based on two injury dates. She alleged that on May 10, 2005, she suffered work-related injuries to "the left side of her body, back, left hip and left knee." (Dec. 5.) On October 15, 2008, she allegedly injured her neck while lifting a printer at work. Id. The judge denied the employee's claims relative to her May 10, 2005 injury date,[2] but ordered the self-insurer to "pay reasonable and necessary medical expenses . . . for solely the cervical injuries [sic] experienced by the Employee on October 15, 2008. . . ."[3] (Dec. 12.)

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[1] Judge Costigan no longer serves with the department.

[2] The employee did not appeal the decision. Rizzo v. M.B.T.A., 16 Mass. Workers' Comp. Rep. 160, 161 n.3 (2002)(we take judicial notice of the board file).

[3] Specifically, the judge found "that the Employee's physical therapy treatment was reasonable and necessary for a four month period . . . following the October 15, 2008

The self-insurer raises one issue on appeal. It argues the judge erred in finding that the employee had satisfied her burden of proving that her October 15, 2008 injury was a major cause of her need for treatment under § 1(7A).[4] Although we agree that such evidence was lacking, we conclude the medical evidence also failed to support the judge's finding that the self-insurer introduced sufficient evidence to place that heightened burden of proof upon the employee.[5] (Dec. 9.)

The only medical evidence at hearing was supplied by Dr. Steven A. Silver, the impartial medical examiner.[6] See G. L. c. 152, § 11A. In his March 8, 2010 report, Dr. Silver opined, inter alia, that the employee suffered from degenerative disc disease of the cervical spine and a chronic cervical strain. (Ex. 1, p. 3.) However, as the judge found, Dr. Silver also opined that only the cervical strain

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injury." (Dec. 10-11.) This was consistent with the opinion of the impartial medical examiner. (Dep. 26-28.)

[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 . . . 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 [the] . . . need for treatment.

[5] 452 Code Mass. Regs. § 1.11(1)(f), provides:

> In any hearing in which the insurer raises the applicability of the fourth sentence provisions of M.G.L. c. 152, § 1(7A), governing combination injuries, the insurer must state the grounds for raising such defense on the record or in writing, with an appropriate offer of proof.

We observe that the record, 1) lacks the self-insurer's requisite offer of proof and, 2) fails to indicate that the employee stipulated that she suffered from a "combination" injury.

[6] On the second day of the hearing, counsel for the self-insurer expressed his intention to file a motion "to open up the medical record due to complexity. . . ." (March 11, 2011 Tr. 46.) The judge asked him to "file a written motion so I can have that on the record, and I can rule on it that way." Id. at 47. There is no evidence in the record that such a motion was filed.

bore a causal relationship to employee's work. (Ex. 1, p. 3; Dec. 6.) Dr. Silver's opinion, as contained in his report, did not endorse a "combination" between the employee's degenerative cervical disc disease and her work-related chronic cervical strain.[7] See MacDonald's Case, 73 Mass. App. Ct. 657, 660 (2009) (insurer has burden of producing evidence of "combination" injury to place burden of proof of "a major" causation on employee); Peeler v. M.B.T.A., 26 Mass. Workers' Comp. Rep. ___ (April 2, 2012)(insurer failed to produce medical evidence of "combination" injury). In fact, the doctor opined, "[t]he disc problems on the MRI of the cervical spine are on the side opposite of the patient's pain." (Ex. 1, p. 3.) The judge acknowledged this fact. (Dec. 7.) When Dr. Silver was deposed, he was not asked if the employee's cervical strain had been the product of a § 1(7A) "combination" injury. Rather, both counsel repeatedly asked the doctor whether the employee's work-related neck injury was a major cause of her disability and/or her need for medical treatment. (Dep. 14, 20-23).

When presented with a more comprehensive version of the employee's medical history,[8] Dr. Silver repudiated his original opinion that the employee's back pain was work-related; however, he did not alter his opinion, expressed initially in his report, that her chronic cervical strain was work-related. (Ex. 1, p. 3; Dep. 13-22.) Because the employee carried her burden of proof under the "but for" causation standard respecting treatment for her neck injury, we affirm the decision. Peeler, supra. Pursuant to G. L. c. 152, § 13A(6), we order the self-insurer to pay employee's counsel an attorney's fee in the amount of $1,517.62.

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[7] This is apart from the question whether, without more, the judge could have concluded that the employee's degenerative cervical disc disease existed prior to October 15, 2008. See n.3, supra.

[8] After reviewing the employee's medical records from May and August of 2005, the doctor no longer endorsed a causal relationship between the employee's work and her back condition. (Dep. 11.)

So ordered.

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Mark D. Horan
Administrative Law Judge

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Catherine Watson Koziol
Administrative Law Judge

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