COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS	**BOARD NO. 032270-09**
Constance Dellarusso	Employee
Massachusetts General Hospital	Employer
Partners Healthcare System, Inc.	Self-insurer

REVIEWING BOARD DECISION
(Judges Fabricant, Horan and Levine)

The case was heard by Administrative Judge McDonald.

APPEARANCES
Alan S. Pierce, Esq., for the employee
Donald Culgin, Esq., for the self-insurer at hearing
John C. White, Esq., for the self-insurer on appeal
Richard W. Jensen, Esq., for the self-insurer on appeal

FABRICANT, J. The self-insurer appeals from a decision awarding the employee ongoing total incapacity benefits pursuant to § 34, and medical treatment pursuant to §§ 13 and 30, for the employee's cervical and lumbar injuries. The self-insurer argues that the judge erred by failing to address its § 1(7A)[1] defense with respect to the employee's cervical spine injury. Due to the absence of persuasive evidence of a pre-existing condition, we hold any error in failing to specifically address § 1(7A) harmless, and affirm the decision.

The employee, fifty years old at hearing, has worked for the employer for twenty-six years. For the last fifteen years, she has worked as a bone bank technologist in the hospital's orthopedic department. (Tr. 8.) On November 25, 2009,

[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.

while rushing to the main operating room to make a bone delivery, she slipped on water and fell, landing on her back. After resting over the Thanksgiving holiday, she attempted to return to work, but experienced pain in her back and neck, as well as difficulty moving her neck. By December 15, 2009, she had to stop work due to extreme low back pain. (Dec. 4-5.).

The employee came under the care of Dr. James Sarni, a physiatrist, who ordered lumbar and cervical MRIs on December 15, 2009.[2] The cervical MRI showed edema within the cervical cord from C5 through C7, representing a contusion or myelomalacia.[3] On May 21, 2010, the employee underwent an anterior cervical disc fusion, followed by physical therapy in the fall of 2010. (Dec. 5.) She has not returned to work.

Following the § 10A conference, the self-insurer was ordered to pay ongoing § 34 benefits beginning on December 15, 2009,[4] and both parties appealed. (Dec. 2.) The § 11A physician, Dr. Edward Wolpow, examined the employee on July 26, 2010, and his report and deposition testimony were admitted into evidence. (Dec. 1, 3.) On the employee's motion, the judge allowed the parties to introduce additional medical evidence for the "gap" period prior to the date of Dr. Wolpow's examination. (Dec. 3, Tr. 4-5.) Both parties did so. (Dec. 3.)

At hearing, the self-insurer completed an "Insurer's Hearing Memorandum" challenging liability as to the cervical injury,[5] disability, and causal relationship, and

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[2] Dr. Sarni opined that the employee did not have her present symptoms prior to November 25, 2009, and believed " 'her cervical spine symptoms are directly related to the fall she described at work, and [are] the main reason for her present significant impairment.' " (Dec. 5, quoting Ex. 4.)

[3] "Morbid softening of the spinal cord." Dorland's Illustrated Medical Dictionary, 27th ed. (1988).

[4] The employee attempted, unsuccessfully, to return to work for approximately a week in February 2010, and that period was omitted from the award. (Dec. 5, 10.)

[5] Liability was not at issue for the lumbar injury of November 25, 2009. (Dec. 9.)

specifically listing § 1(7A) as an issue.[6] However, the self-insurer also did not assert on the record that it was raising § 1(7A), nor did the judge state that the self-insurer raised that affirmative defense. (See Tr. 4.) Further, in the decision itself, the judge did not list § 1(7A) as an issue. Instead, consistent with his statement at the hearing, the judge listed the self-insurer's defenses as cause and extent of present disability, and liability as to a cervical injury. (Dec. 2.)

The judge found credible the employee's testimony that she "had absolutely no neck problems prior to November 25, 2009." (Dec. 5.) He adopted the opinion of the § 11A examiner, Dr. Wolpow, "that the employee's cervical contusion and its consequent myelopathy are causally related to the [work] injury. . ." and that the employee was totally disabled due to her cervical and lumbar injuries of November 25, 2009. (Dec. 9.) The judge also adopted the opinion of the self-insurer's examining physician, Dr. Kenneth Polivy, that the employee's medical treatment had been reasonable and necessary. However, the judge specifically rejected Dr. Polivy's opinion that the employee's cervical symptoms were pre-existing and not causally related to the work injury. (Dec. 6, 9.)

Accordingly, the judge ordered the self-insurer to pay § 34 temporary total incapacity benefits from December 15, 2009 and continuing, except for the approximately one-week period in February 2010 when the employee returned to work. See footnote 4, supra. The judge also ordered benefits pursuant to §§ 13 and 30 for medical treatment related to the employee's cervical and lumbar injuries. (Dec. 10.)

On appeal, the self-insurer argues that it properly raised § 1(7A) by listing it on its conference and hearing memoranda, thus requiring the judge to make findings on § 1(7A)'s applicability. The self-insurer further maintains that Dr. Wolpow's § 11A opinion supports a finding that the employee suffered from a pre-existing non-compensable condition. (Self-ins. br. 13.) In addition, the self-insurer contends that

[6] See Rizzo v. M.B.T.A., 16 Mass. Workers' Comp. Rep. 160, 161 n. 3 (2002)(reviewing board may take judicial notice of documents in the board file).

the reports of Dr. Polivy and Dr. Mansfield (one of the employee's treating physicians), admitted for the limited purpose of establishing disability for the "gap" period, should have been considered by the judge in evaluating the impartial examiner's opinion. (Self-ins. br. 14.) We agree with the employee that the judge's failure to make findings on § 1(7A) is harmless error.

The impartial opinion could not support a finding that the self-insurer had satisfied the first element of its burden of production under § 1(7A), showing a pre-existing condition. See Baldini v. Department of Mental Retardation/DMR3, 23 Mass. Workers' Comp. Rep. 159, 163 (2009), citing MacDonald's Case, 73 Mass. App. Ct. 657, 660 (2009)("There are two essential elements of an insurer's burden of production in establishing the threshold requirements for § 1(7A) applicability: the existence of a pre-existing condition, and the combination of that pre-existing condition with the alleged work injury"). The self-insurer misreads Dr. Wolpow's opinion. Dr. Wolpow never identified a pre-existing condition. Rather, he consistently related the employee's cervical and lumbar spine symptoms to her November 25, 2009 fall at work.[7] To the extent Dr. Polivy's opinion could have been used to support such a finding,[8] the judge clearly rejected that part of it.[9] (Dec. 6.)

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[7] Dr. Wolpow opined that there had been no previous trauma to the employee's head or spine. (Ex. 2.) Upon questioning at deposition, Dr. Wolpow did not agree that "chronic innervation and reinnervation in muscles innervated by C7," as diagnosed by Dr. Mansfield, would be a degenerative condition. Rather, he opined that such damage may occur after trauma or for many other reasons. Though it could have occurred some months or years before the work injury, he could not determine that. (Dep. 10-11.) He further opined that "the spinal cord edema with contusion is something ongoing and related to a fairly recent injury." (Dec. 7; Dep. 15.) His final conclusion, to a reasonable degree of medical certainty, was that the fall at work was causally related to the employee's symptoms of lower extremity and finger problems, necessitating the anterior cervical discectomy and fusion. (Dep. 23-24.)

[8] But see Serabian v. Herb Chambers Ford, 23 Mass. Workers' Comp. Rep. 57 (2009)(where judge admitted additional medical evidence solely for the purpose of addressing disability during the gap period, it was error to use gap medical evidence to support finding of no pre-existing shoulder condition, and thus to find causal relationship between the shoulder condition and the industrial accident).

Thus, further consideration of the remaining elements of § 1(7A), was mooted by the judge's rejection of Dr. Polivy's opinion that the employee suffered from a non-industrial pre-existing condition. Therefore, the judge's failure to specifically address § 1(7A) as an issue was harmless. See Spencer-Cotter v. North Shore Med. Ctr., 25 Mass. Workers' Comp. Rep. ___ (September 19, 2011)(though judge erred by finding self-insurer waived § 1(7A), the error is harmless because insurer failed to meet burden of producing evidence to support statute's application).

Accordingly, we affirm the decision. Pursuant to § 13A(6), we order the self-insurer to pay employee's counsel an attorney's fee in the amount of $1,517.62.

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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Frederick E. Levine
Administrative Law Judge

Filed: **December 7, 2011**

[9] Had the judge adopted Dr. Polivy's opinion, it would have only satisfied the self-insurer's burden of establishing that the employee had a non-industrial pre-existing condition. See MacDonald's Case, supra at 660. Dr. Polivy's opinion does not contain evidence of an injury in combination with a pre-existing condition as prescribed by § 1 (7A). (Ex. 10.)