COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 025919-09**

David Corazzini	Employee
Diamond Chevrolet	Employer
Automotive Industry SIG	Insurer

REVIEWING BOARD DECISION
(Judges Horan, Levine and Calliotte)

The case was heard by Administrative Judge Hernandez.

APPEARANCES
Joseph F. Agnelli, Jr., Esq., for the employee
Martin B. Schneider, Esq., for the insurer

HORAN, J. Both parties appeal from a decision awarding the employee §§ 13, 30 and 34 benefits for a neck injury, and denying and dismissing his claimed back injury. We affirm.

We state only those facts pertinent to the issues raised on appeal. The employee worked as a salesperson/manager for the insured. Among his many duties, the employee "maintained the grounds including planting flowers and snowplowing. . . ." (Dec. 4.) In early January, 2009, the employee was operating a front-end loader to remove snow from his employer's lot. (October 28, 2011 Tr. 22-21; Dec. 5.) He "slipped backwards onto the concrete" while dismounting the machine. (Dec. 5.) On February 28, 2009, he treated at a local emergency room; he continued to work until October of that year. Id.

At hearing, the insurer "accepted liability for the industrial accident . . . as for cervical injury only." (Dec. 3.) It denied liability for the employee's lumbar condition, and raised, inter alia, § 1(7A)(combination injury), in defense of the

employee's claim for benefits.[1] Id.

Pursuant to § 11A, the employee was examined by Dr. Charles Kenny. Dr. Kenny issued his medical report on November 6, 2010, and was later deposed. (Ex. 1.) The judge allowed the parties to submit additional medical evidence. (Dec. 2.) The insurer submitted two reports from Dr. Michael DiTullio; the employee submitted a report from Dr. George Whitelaw. (Exs. 8a, 8b; Ex. 9; Dec. 2.)

Adopting "the opinions of Dr. Kenny and Dr. DiTullio and credit[ing] the Employee's testimony that his cervical pain symptoms prevent[ed] him from performing and sustaining work," the judge found the employee was totally incapacitated, and that his incapacity was causally related to work. (Dec. 17.) However, the judge rejected the employee's claim that his lumbar condition was work-related. (Dec. 15-17.)

On appeal, the employee maintains the judge erred by concluding his lumbar condition was unrelated to his work. The insurer argues the judge's incapacity analysis is flawed.

The employee advances two arguments supporting his claim of error. He challenges the judge's finding, based on the adopted opinion of Dr. Kenny, that "there was no lumbar injury as a result of the work accident." (Dec. 11.) Although Dr. Kenny initially testified there was a connection between the employee's neck injury and his lumbar *symptoms*, the doctor denied the employee had suffered a work-related lumbar *injury*. (Dep. 9-10, 22-27, 33-36, 38.) An increase in symptoms does not require a finding of an injury as a matter of law. See Havill v. Mead Westvaco/ Willowmill, 26 Mass. Workers' Comp. Rep. 255, 259 (2012)(and cases cited).

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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.

Next, without citation to any authority, the employee argues that because his work-related neck injury "caused him to over use his lumbar spine, which aggravated his pre-existing [lumbar] condition and brought his [lumbar] symptoms to life," he "has satisfied his burden of causation under [§]1(7A)." (Employee br. 7-8.) We disagree. Dr. Kenny opined "it hasn't been established that [the employee] injured his back, so much as he's having symptoms from his back due to a pre[-]existing condition." (Dep. 26.) To the extent Dr. Kenny's testimony could have been interpreted by the judge to constitute an opinion that the employee's neck injury aggravated his pre-existing lumbar condition, the doctor did not opine the work injury was a major cause of the employee's disability or need for treatment. G. L. c. 152, § 1(7A). While an adopted medical opinion attesting to the aggravation of a non-industrial, pre-existing medical condition satisfies the "combination injury" prong of § 1(7A), it does not support a finding that the compensable injury remains a major cause of the employee's disability or his need for treatment. Castillo v. Cavicchio Greenhouses, Inc., 66 Mass.App.Ct. 218 (2006). See Stewart's Case, 74 Mass. App.Ct. 919, 920 (2009)(a finding of major cause requires a medical opinion "that addresses . . . the relative degree to which compensable and noncompensable causes have brought about the employee's disability").[2] Accordingly, the judge's denial and dismissal of the employee's lumbar injury claim was proper.

The insurer argues the judge's incapacity analysis is "unsupported and inconsistent with the adopted medical opinon(s)." (Ins. br. 7.) First, it maintains the adopted opinions of Dr. Kenny and Dr. DiTullio support only a partial disability.

[2] Compare Cornetta's Case, 68 Mass.App.Ct. 107 (2007). There, the employee suffered a compensable physical injury which aggravated a pre-existing noncompensable psychological condition. Applying the fourth sentence of § 1(7A), the court held that "[b]ecause the employee's compensable injury was found to remain a major cause of her ongoing emotional disability, she was entitled to receive compensation." Id. at 119. Unlike the employee in Cornetta, the employee's noncompensable pre-existing condition was physical, not psychological. However, this distinction is immaterial to the analysis under the fourth sentence of § 1(7A).

Second, it argues Dr. Kenny did not impose a five pound lifting restriction on the employee. (Ins. br. 7-8.) Lastly, it asserts the record fails to support the judge's finding that the employee's "work as a sales manager involved frequent driving, bending, and overhead reaching." (Ins. br. 9, quoting Dec. 5.) We address these arguments in turn.

While it is true doctors Kenny and DiTullio attested to the employee's work-related partial medical disability, the judge also credited "the Employee's testimony that his cervical pain symptoms prevented him from performing and sustaining work." (Dec. 17.) Not only was the judge free to credit the employee's complaints of pain to award total incapacity benefits in the face of a medical opinion of partial disability, see, e.g., Brown v. Northeast Underpinnings, Inc., 22 Mass. Workers' Comp. Rep. 329, 331 (2008), aff'd sub nom. Brown's Case, 76 Mass. App. Ct. 1105 (2009) (Memorandum and Order pursuant to Rule 1:28); Anderson v. Anderson Motor Lines, 4 Mass. Workers' Comp. Rep. 65 (1990), the judge could also "give decisive weight to the credible testimony of the worker about his limitations." Dalbec's Case, 69 Mass.App.Ct. 306, 314 (2007).

Although Dr. Kenny imposed a ten pound lifting restriction on the employee, we note the judge also adopted Dr. DiTullio's opinion to the extent it supported the employee's claimed incapacity owing to his neck injury. (Dec. 15, 17.) Dr. DiTullio opined:

> Based solely on the persistence of his emphatic subjective complaints, I feel he presently is *unable to participate in any activities that would require his lifting over 5 pounds*, frequent overhead use of the upper extremities, repetitive bending, excessive spinal loading, prolonged postural fixation, or direct injury to either the head or neck region.

(Ex. 8a, p. 14; Emphasis added.) And on page eight of his decision, the judge specifically references the foregoing restrictions imposed by Dr. DiTullio.[3] There was no error.

Lastly, contrary to the insurer's assertion, the record reveals the employee testified his job involved frequent driving, bending, and overhead reaching. (October 28, 2011 Tr. 18-19.) The judge credited this testimony. (Dec. 5, 16-17.)

The decision is affirmed. Pursuant to G. L. c. 152, § 13A(6), the insurer is ordered to pay the employee $1,574.83 in attorney's fees.

So ordered.

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Mark D. Horan
Administrative Law Judge

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Frederick E. Levine
Administrative Law Judge

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Carol Calliotte
Administrative Law Judge

Filed: **April 15, 2014**

[3] The judge cited to page thirteen of Exhibit 8a. (Dec. 8.) The five pound restriction actually appears on page fourteen of the exhibit. We regard this as a scrivener's error.