COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS

BOARD NO.: 011290-02

Davis P. LaBonte	Employee
D. A. Sullivan and Sons, Inc.	Employer
Eastern Casualty Insurance Co.	Insurer

REVIEWING BOARD DECISION

(Judges Costigan, Fabricant and Horan[1])

APPEARANCES

Arthur G. Zack, Esq., for the employee

Elizabeth A. Fleming, Esq., for the insurer

The case was heard by Administrative Judge Chivers.

COSTIGAN, J. The insurer appeals from an administrative judge's award of § 34A permanent and total incapacity benefits for the employee's work-related failed back syndrome.[2] Because the judge did not address the insurer's duly raised defense of § 1(7A) "a major" causation applicable to combination injuries, we recommit the case for further findings.

The employee injured his back on January 24, 2002 while working as a brick layer. He underwent two surgeries, but his back remained painful and subject to spasms. He cannot bend over or drive for more than one hour. The employee suffered from some measure of pre-existing arthritis in his right hip and back. (Dec. 2-3.)

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[1] Judge Horan recused himself from this case and did not participate in panel deliberations.

[2] The genesis of the second round of litigation in this case was the insurer's complaint for modification or discontinuance of compensation, filed on June 30, 2006. 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 board file). At the § 10A conference, the employee was allowed to join a claim for § 34A benefits. By conference order filed on November 16, 2006, both the employee's § 34A claim and the insurer's complaint were denied. Only the employee appealed from that conference order. (Dec. 2.)

The § 11A impartial medical examiner, Dr. Allan H. Bullock, opined that the employee suffered from failed back syndrome due to the work injury and subsequent surgeries,[3] [3] which condition was unlikely to improve. He restricted the employee from prolonged sitting and repetitive bending, and limited his lifting and carrying. (Dec. 3.)

The judge concluded that the employee's work history of performing only heavy labor precluded him from transitioning to the "lightest type of sedentary work" to which his serious physical restrictions limited him. (Dec. 3.) The judge therefore found the employee was permanently and totally incapacitated, and awarded § 34A benefits from January 3, 2007, the date of the § 11A impartial medical examination, and continuing. (Dec. 4.)

Both the judge's decision, (Dec. 1), and the insurer's hearing memorandum, (Ins. Ex. 1), confirm the insurer raised the heightened causation standard under § 1(7A) in defense of the employee's claim. That statute 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

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[3] Dr. Bullock testified that the diagnosis of failed back syndrome meant "a person who has a problem with his back, has had an extensive amount of care, has sort of reached the end point of what medicine in 2007 can offer him, and he is still having significant trouble." (Dep. 15.) He further testified:

> And that, certainly, is where David (sic) Labonte is. He's still having trouble with his back, he's undergone two operations, a lot of treatment, he's wearing a brace, he's had a lot of extensive work. The only little complicating (sic) with that is that he also has, on top of this disk, which I think was related to his injury, and that was requiring two surgeries, by his own admission, he did have some trouble with his back before then. And he does have significant degenerative changes at other levels, other than this disk.
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> So the picture is a little muddied, if you will, because I'm seeing him now, a man who definitely has a failed back syndrome from his disk problem and his surgery, but also has other reasons for his back being sore.

(Dep. 16.)

> 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.

General Laws c. 152, § 1(7A). It is clear, however, that the judge failed to perform the analysis necessary to determine whether this statutory provision applied to the employee's claim and, if it did, whether the employee met his burden of proving his industrial injury remained "a major" cause of his disability. See Vieira v. D'Agostino Assocs., 19 Mass. Workers' Comp. Rep. 50, 53 (2005).

The employee does not dispute that the insurer raised § 1(7A), (Employee br. 4), but he argues recommittal is unwarranted because the insurer did not meet its burden of producing evidence that any pre-existing condition combined with the work injury. (Employee br. 9-11, citing Jobst v. Leonard T. Grybko, 16 Mass. Workers' Comp. Rep. 125, 130-131 [2002], citing Fairfield v. Communities United, 14 Mass. Workers' Comp. Rep. 79, 83 [2000]). We disagree. It is the duty of the judge to make that initial determination as to combination, based on the evidence before him. See, e.g., Gleason v. Toxicon Corp., 22 Mass. Workers' Comp. Rep. 39, 41 (2008); MacDonald v. Acme Waterproofing, 21 Mass. Workers' Comp. Rep. 275, 277-278 (2007); and Elder v. Quabaug Corp., 20 Mass. Workers' Comp. Rep. 315, 320-321 (2006). Because the judge's decision is devoid of any findings addressing the insurer's § 1(7A) defense, we recommit the case for further findings on that issue. See, e.g., Pukt v. Sanmina SCI Corp., 22 Mass. Workers' Comp. Rep. 27, 29 (2008).

Accordingly, we recommit the case for further findings consistent with this opinion. We summarily affirm the decision as to the insurer's argument that the judge's vocational analysis was arbitrary and capricious.

So ordered.

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Patricia A. Costigan
Administrative Law Judge

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Bernard W. Fabricant
Administrative Law Judge
Filed: **August 27, 2009**