COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 044481-05**

Donald L. Provost	Employee
Truss Engineering Corp.	Employer
A.I.M. Mutual Insurance Co.	Insurer

REVIEWING BOARD DECISION
(Judges Costigan, McCarthy and Koziol)

The case was heard by Administrative Judge Chivers.

APPEARANCES
Patrick C. Gable, Esq., for the employee
Ronald C. Kidd, Esq., for the insurer

COSTIGAN, J. The employee appeals from the administrative judge's decision allowing the insurer's complaint to discontinue his weekly incapacity benefits as of May 22, 2007, the filing date of the complaint. The employee argues the judge erred in denying his motion for additional medical evidence based on the inadequacy of the § 11A impartial medical report. We agree, reverse the judge's decision and vacate the order of discontinuance. We recommit the case for the introduction of additional medical evidence and for further findings of fact.

The employee, age sixty-one at the time of the hearing, had worked as a truck driver for his entire career. On December 12, 2005, he fell at work, striking his left knee and landing on his back and neck. He continued working and although his neck complaints improved, his knee pain worsened. He left work in January 2006 and underwent arthroscopic surgery on his knee in June 2006 with a poor result, and continuing knee problems. Thereafter, the employee's neck pain worsened and he developed right shoulder complaints. By the time of the hearing, the employee's physicians were recommending a total left knee replacement and cervical surgery. (Dec. 2-3.)

The insurer accepted liability for the left knee injury and paid § 34 total incapacity benefits. In May 2007 it filed a modification/discontinuance complaint which the judge denied following a § 10A conference. Prior to hearing, the employee was allowed to join claims for the knee and cervical surgeries recommended by his doctors. The insurer denied liability for both surgeries, and disputed the employee's neck problems were causally related to his 2005 industrial injury. (Dec. 2.) It also disputed the industrial injury remained a major cause of his disability and need for treatment, as provided in § 1(7A).[1]

Pursuant to § 11A, Dr. Alan H. Bullock performed an impartial medical examination of the employee on November 7, 2007. The doctor opined the employee suffered from pre-existing degenerative arthritis in the left knee, upon which the work injury was superimposed.[2] The doctor considered the work incident may have torn the employee's meniscus and aggravated the underlying arthritis, triggering the employee's knee pain. Dr. Bullock opined, however, that the employee's present disability and physical limitations were due to the underlying, pre-existing arthritis, and not the work-related left knee meniscal tear. The doctor testified that the pre-existing arthritis was, in fact, "*the* major part" of the employee's present disability. (Dec. 3-4; Dep. 41.) Dr. Bullock also opined the employee's medical records

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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.

[2] This reference, and the doctor's opinion that the 2005 work injury "aggravated" the employee's underlying degenerative arthritis, established the requisite combination injury, as a matter of law. Castillo v. Cavicchio Greenhouses, Inc., 66 Mass. App. Ct. 218 (2006); Johnson v. Center for Human Dev., 20 Mass. Workers' Comp. Rep. 351, 353 (2006). Cf. MacDonald v. Acme Waterproofing, 21 Mass Workers' Comp. Rep. 275 (2007)(given equivocal nature of medical opinions, judge not required to find combination as matter of law); *aff'd* MacDonald's Case, 73 Mass. App. Ct. 657 (2009).

reflected longstanding cervical degenerative arthritis, spinal stenosis and spondylolisthesis for which the employee had been treating since a 1993 motor vehicle accident,[3] notably with narcotic pain medication since 2003. (Dep. 46-57.)

The judge found:

> It is clear from the opinion of the impartial physician, Dr. Bullock, that by the time of his examination of November 7, 2007, and probably well before, there were no further limitations or need for treatment arising from the alleged work injury of 2005. Instead, any continuing symptoms and need for treatment for both the knee and the neck were as a result of pre-existing degenerative arthritis that had been present and are [sic] now well documented in the medical records prior to the work injury.

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[3] In his brief, the employee asserts this was a serious, *work-related* accident, resulting in neck and knee injuries, which occurred when he was driving a tractor trailer for the same employer. (Employee br. 2.) The employee testified he was taken from the scene by ambulance to a hospital, and he later treated with his own doctor for neck pain and fluid in the knee. (Tr. 14, 16.) A witness for the employer described the accident as "horrific," involving the truck rolling over and taking off the roof of a car. (Tr. 75-76.) Although he lost no time from work, (Tr. 14), the employee contends the same workers' compensation insurer as in the present case paid his medical bills, and that his neck and knee injuries were thus "compensable" for purposes of the insurer's § 1(7A) defense. (Employee br. 1, 2.) The employee also maintains he filed a discovery motion, seeking production of the insurer's claims file on his 1993 injury, but the judge never conducted a hearing on the motion. (Employee br. 1-2).

At the evidentiary hearing, however, employee's counsel did not argue the insurer had failed to meet its burden of production under § 1(7A) and Fairfield v. Communities United, 14 Mass. Workers' Comp. Rep. 79 (2000), that is, showing a pre-existing condition which resulted from an injury or disease *not* compensable under c. 152. To the contrary, counsel acquiesced to the applicability of § 1(7A) to the employee's claim:

> There is a preexisting condition in both of them. He had arthritis both in the neck and the knee. And the issue is going to be whether -- to us, is whether a major cause of his present disability is due to the injury that occurred in December of 2005.

(Tr. 5-6.) Thus, the issue of the employee's heightened burden of proof under § 1(7A) was tried by consent. See Blair v. Olympus Healthcare, 17 Mass. Workers' Comp. Rep. 37, 40 (2003), citing Hinton v. Massachusetts Mut. Life Ins. Co., 16 Mass. Workers' Comp. Rep. 342, 347-348 (2002); Debrosky v. Oxford Manor Nursing Home, 11 Mass. Workers' Comp. Rep. 243 (1997).

(Dec. 4.) The judge allowed the insurer's complaint to discontinue benefits as of May 22, 2007, the filing date of the complaint. (Dec. 5.)

The employee argues the judge erred in adopting Dr. Bullock's opinions because the doctor did not apply the correct standard of causation under § 1(7A). We agree. The doctor's cross-examination by employee's counsel is telling:

> Q.: . . . What type of limitations would you give him as to the - - due to the knee problem that he has right now?
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> A.: Right now, his problem is degenerative arthritis of the knee. That is significantly limiting him. This gentleman is not going back doing the work, be it without a knee replacement or if he has a knee replacement. This gentleman has enough disease there that he should not do a job that requires mostly standing and walking. He should do a sedentary job with occasional walking, occasional steps, but certainly not a major part of climbing steps, certainly not climbing a ladder, certainly not spending his day on his feet.
>
> Q.: And this is partially due to the injury that occurred in 2005?
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> . . .
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> A.: This is due to the arthritis that he has. How the injury . . . in December of '05 affected the arthritis, I think I stated that I don't think it affected the actual picture of the arthritis but he was working up until then and after then, the knee was too sore to work.
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> Q.: And I think you used the word aggravations?
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> A.: Aggravation.
>
> Q.: Okay. Now, Doctor, do you have a -- an opinion to a reasonable degree of medical certainty that the incident in December is a major but not necessarily predominant cause of those limitations that you have listed?
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> A.: Yes, it's very hard for me to put major and minor. If -- To be specific, his limitations now are because of the arthritis, not because of the twisting injury, not because of the torn cartilage. If he had no arthritis, just the torn cartilage, he would have been disabled for a period of weeks to maybe a few months, but the vast majority of people with just a torn cartilage do well. So I'd have to say the reason for his disability is the arthritis, and that's the major part, but what I can answer is . . . how do you interpret this twisting and aggravation bringing out the pain as related to the arthritis. And that I don't know how to say.
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> Q.: Well, would you call it a significant cause?
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> . . .

A.: No, I mean -- yeah. I think the cause for his disability is his arthritis and I can't say that the predominant is the twist. The predominant is the arthritis, but I think the way I have to have the judge interpret this is that . . . he was doing fine, he twisted the knee, aggravated and brought out the pain of the arthritis and it was that pain that . . . caused the symptoms that has [sic] required him to have treatment and is [sic] that symptoms that are the reason that the joint replacement surgeon has recommended replacing his knee joint.

Q.: You are aware that, under the law dealing with industrial accidents in the state, they have a legal standard in terms of preexisting conditions and they use the word a major but not necessarily predominant cause of -- whether -- disability or treatment. [Sic.] Are you aware of that standard?

A.: Yes, it's been mentioned to me on numerous times.

Q.: Do you believe that there can be a major but not necessarily predominant cause of a disability or need for treatment -- a major?

A.: *You know, I use major and predominant as interchangeable . . . I mean predominant, major, I use these to be the same*, I am not sure.

Q.: What about a major?

A.: *If there are two causes, I think one has to be major and one has to [be] minor or they are fifty-fifty percent down the middle. I don't see if there are two, they can have two major.* Major and minor is [sic] a relative term, I think. To have major you have to have minor. Good and evil, you can't have two goods and no evil.

Q.: So last question: In terms of your own analysis of this, can -- where you were just giving that fifty-fifty --

A.: Right.

Q.: *-- can an incident that you might view as forty percent, can that be a major cause but not necessarily the predominant one --*

A.: *It's a cause. If you have two causes, okay, if you have two causes for a problem, all right, and you say Tell me about these two causes, can they both be major. I don't think I can say they're both major.* I can say there [sic] both causes and if you said [sic] Well, you have to relate them, you know, one is major and one is minor -- you know, I don't know how else to better word it.

Q.: Okay.

(Dep. 39-44; emphases added.)

Doctor Bullock's interpretation of the "a major cause" standard in § 1(7A) cannot be reconciled with how this board and our appellate courts have construed the statute. "By equating predominant cause with a major cause, the § 11A medical

expert has impermissibly raised the burden of proof standard set by § 1(7A)." Siano v. Specialty Bolt & Screw, Inc., 16 Mass. Workers' Comp. Rep. 237, 239 (2002). Contrary to Dr. Bullock's view, "[t]here may . . . be multiple 'major' causes." Id. at 240. Moreover, even the "predominant cause" at issue in cases involving mental or emotional disabilities, can be an event less than fifty percent causative, so long as it is the major, important or primary cause. Lesoine v. Corcoran Mgmt. Co., 22 Mass. Workers' Comp. Rep. 153, 158-159 (2008), citing May's Case, 67 Mass. App. Ct. 209 (2006). "Logically, therefore, 'a major' cause can be something less than the most important cause or, stated differently, well under fifty percent causative of the employee's disability." Lesoine, supra at 159.

Given Dr. Bullock's misunderstanding of the legal meaning of "a major" cause, his causation opinion is inadequate as a matter of law. The employee's motion for the introduction of additional medical evidence, made before Dr. Bullock's deposition and renewed thereafter, should have been allowed. The judge's failure to do so was error. Cf. Viveiros's Case, 53 Mass. App. Ct. 296, 300 (2001)(employee failed to move for additional medical evidence; no error, as "it was not incumbent upon administrative judge to order it sua sponte").

Accordingly, we reverse the judge's decision and vacate his order allowing discontinuance of weekly incapacity benefits as of May 22, 2007.[4] We recommit this case for the judge to a) allow the parties to introduce their own respective medical evidence for the periods both before and after the date of the § 11A impartial medical examination; b) reconsider all of the medical evidence; and c) make further subsidiary findings of fact and general findings, consistent with this opinion.

So ordered.

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[4] Although the judge could not allow the insurer's discontinuance complaint any earlier than the date on which the complaint was filed, Cubellis v. Mozzarella House, Inc., 9 Mass. Workers' Comp. Rep. 354 (1995), "[w]e have consistently held that the modification or discontinuance of weekly incapacity benefits must be based on a change in the employee's medical or vocational status that is supported by the evidence." Jaho v. Sunrise Partition Systems, Inc., 23 Mass. Workers' Comp. Rep. 185, 190 (2009), quoting Bennett v. Modern Continental Constr., 21 Mass. Workers' Comp. Rep. 229, 231 (2008).

Patricia A. Costigan
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Filed: