COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDETNS **BOARD NO. 22378-98**

Dorothy Lawson	Employee
M.B.T.A.	Employer
M.B.T.A.	Self-insurer

REVIEWING BOARD DECISION
(Judges Wilson, McCarthy and Maze-Rothstein)

APPEARANCES
John F. Moran, Esq., for the employee at hearing
Joseph P. McKenna, Jr., Esq., for the employee on appeal
Gerald P. Noone, Esq., for the self-insurer at hearing
Christopher J. Connolly, Esq., for the self-insurer on appeal

WILSON, J. The employee appeals from a decision in which an administrative judge awarded her a closed period of incapacity benefits for a May 17, 1998 industrial injury to her lower back, but denied continuing benefits on the ground that the 1998 injury did not remain "a major" cause of her disability pursuant to G.L. c. 152, § 1(7A).[1] The employee argues that the judge erred in applying the provisions of § 1(7A) to her claim. We agree that the decision does not adequately address the nature of the employee's pre-existing lower back impairment by deciding whether the condition was causally related to earlier compensable injuries, thereby removing the employee's claim from the reach of § 1(7A). We therefore recommit the case for further findings.

[1] G.L. c. 152, § 1(7A), provides in relevant 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.

We also summarily affirm the judge's allowance of the self-insurer's motion to allow additional medical evidence due to the inadequacy of the § 11 A examiner's report, as the employee withdrew her opposition and joined in the motion by letter dated May 5, 2000. (Dec. 4.).

The employee began working for the employer in 1985. (Dec. 5.) She recalled that prior to that time, she had injured her lower back moving a motor at Honeywell in 1974, which resulted in disc surgery at the L5-S1 level, a year of incapacity and a lump sum settlement. (March 29, 2000 Tr. 15-16; Impartial Examiner Report.) While working for the employer, the employee experienced a number of incidents that caused further problems with her lower back. She testified that in 1987, she injured her back when the chair in her bus dropped out from under her, (March 29, 2000 Tr. 16-17), and was out of work for two weeks as a result of that incident. (Employee Ex. 3.) In 1989, and again in 1993, the employee claims she slipped on ice at work, and experienced low back pain without losing time from work.[2] (Employee brief 1.) The employee's back pain worsened and, early in 1997, an MRI showed degenerative changes in the lumbar spine, with a disc protrusion at L4-5. The employee underwent surgery to remove the disc protrusion. The employee was out of work for four months post-surgery. When she returned to work she continued to have back pain, which now radiated to her left leg. (Dec. 5; Impartial Examiner Report.) An MRI in August 1997 showed no more protrusion, but revealed degenerative changes between L4 and S1, with some degenerative spondylolisthesis at L4-5. (Impartial Examiner Report.)

On May 16, 1998, the employee fell on the stairs at work, and felt a pop in her back. The employee went to see her treating physician, Dr. James Rainville, who treated her conservatively. However, with the employee's symptoms becoming more severe following that accident, she finally stopped working on June 9, 1998. An MRI in August

[2] Without making a precise finding on whether these 1989 and 1993 incidents were compensable injuries, the administrative judge found: "While working for the employer, the employee twice slipped on ice, in 1989 and again in 1993, and on both occasions experienced low back pain." (Dec. 5.)

1998 revealed a new herniation at L4-5. Dr. Tromanhauser, the employee's orthopedic surgeon, recommended a surgical decompression at L4-5, which he performed in September 1998. After that surgery, the employee's back and leg symptoms improved significantly, and the employee returned to work on her doctor's recommendations on December 1, 1998. (Dec. 6.)

The employee continued to work until March 9, 1999, when her back pain again increased to the degree that she was unable to continue working. Dr. Tromanhauser recommended a three level fusion due to her spondylolisthesis, as revealed in a discogram taken about ten days prior to her May 1998 industrial accident. The doctor performed the fusion in March 1999. (Dec. 7; Employee Ex. 10.)

The employee claimed total temporary incapacity benefits, stemming from the May 16, 1998 industrial accident, from June 9, 1998 to December 1, 1998 and from March 9, 1999 to date and continuing, along with medical benefits. The self-insurer disputed liability, disability and extent thereof, and causal relationship under the § 1(7A) standard of "a major but not necessarily predominant contributing cause." See n. 1, supra. The judge awarded a closed period of § 34 benefits as a result of the conference proceeding, and the self-insurer appealed to a full evidentiary hearing. (Dec. 3.)

The employee underwent an impartial medical examination pursuant to the provisions of § 11A(2) on September 15, 1999. (Dec. 4.) The impartial physician opined that the employee suffered from disc herniations at both the L5-S1 and L4-5 levels with degenerative arthritis in the lumbar spine, which diagnoses were causally related to the employee's injuries of 1974, 1989, and 1993, as well as the subject 1998 injury. The doctor further opined that the May 16, 1998 injury represented a major but not predominant cause of the employee's present disability, with the other injuries representing similarly major but not predominant causes. Finally, the impartial physician opined that the March 1999 spinal fusion was causally related to the May 16, 1998 industrial injury. (Impartial Examiner Report.) The self-insurer moved that the impartial physician's report be declared inadequate, and additional medical evidence be allowed.

The employee ultimately joined in the motion, and the judge allowed additional medical evidence to be introduced. (Dec. 4; Letter of Attorney John Moran dated May 5, 2000.)

The self-insurer deposed the employee's treating physician, Dr. Rainville. Dr. Rainville opined that the employee's May 16, 1998 injury was not a major cause of her present disability, considering her severe three level disc degeneration as documented by the pre-injury discogram. (Dec. 7.) Dr. Rainville opined that the May 1998 injury was "a causal event in the development of a change in [the employee's] symptom pattern." (Dep. 81.) Dr. Rainville opined that the March 1999 three level fusion was causally related to the employee's pre-existing degeneration. (Dec. 7.)

The judge adopted Dr. Rainville's opinion, and found that the employee's disability from June 9, 1998 through December 1, 1998 was causally related to her May 1998 injury, but that the employee's March 1999 surgery and her subsequent disability were causally related to her "severe pre-existing back condition," not the May 1998 injury. The judge found that the May 1998 work injury was not "a major cause of her present disability." (Dec. 7.)

The employee's appeal presents a single issue: Whether the judge erred in applying the § 1(7A) heightened standard of "a major but not necessarily predominant contributing cause" to her claim for ongoing benefits under §§ 34 and 30. The employee argues that the judge did err, because the predicate for invoking the standard – a "pre-existing condition, resulting from an injury or disease not compensable under this chapter" with which the industrial injury combines – is not to be found in this record, due to the contribution of the many claimed work-related events to the employee's pre-existing degenerative condition. We agree that the judge's findings on this issue are inadequate, and recommit the case for further findings.

The case before us is governed by White v. Town of Lanesboro, 13 Mass. Workers' Comp. Rep. 343 (1999). In that case, we concluded that the compensable or non-compensable nature of the pre-existing condition – essential to a determination of whether the standard of "a major" cause under § 1(7A) is applicable – is a matter for the judge to weigh. Then the judge must apply the proper causal relationship standard, based

primarily on expert medical opinion evidence, as questions of medical causation are matters normally "beyond the common knowledge and experience of a layman." Galloway's Case, 354 Mass. 427, 431 (1968). White involved an employee with pre-existing disc disease, followed both by a 1987 industrial injury to his lower back, and by the 1993 industrial injury to his lower back that was the subject of the claim. Id. at 343-344. The judge had failed to address whether the 1993 industrial injury was "a major" cause of the employee's disability, under § 1(7A), and merely found that the 1993 industrial injury was "the cause" of the disability. Id. at 346. We recommitted the case, noting the appropriate analysis regarding the nature of the pre-existing condition:

> If the [earlier] 1987 injury continues to play any role in White's condition, then the judge's factual error about the extent of contribution of the 1993 injury is harmless. White may recover simply by proving that the 1987 injury continues to participate, even to the slightest extent, in his present incapacity. . . . [The judge] did not indicate whether White's underlying back condition was caused by his pre-existing non-compensable degenerative disc disease, by the residual effects of his compensable 1987 lower back injury, or by some combination of the injuries and the pre-existing disease.

Id. Thus, the pre-existing condition is assessed under the traditional "any causal connection" standard of Rock's Case, 323 Mass. 428, 429 (1948). If there is medical evidence that the pre-existing condition continues to retain any connection to an earlier compensable injury or injuries, then that pre-existing condition cannot properly be characterized as "non-compensable" for the purposes of applying the § 1(7A) requirement that the claimed injury be "a major" cause of disability.[3] Id.

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[3] Analogously, under the intervening cause analysis, the same result would obtain:

> "[O]nce the work-connected character of any injury . . . has been established, the subsequent progression of that condition remains compensable so long as the worsening of that condition is not shown to have been produced by an independent nonindustrial cause. . . . The issue in all of these cases is exclusively the medical issue of causal connection between the primary injury and the subsequent medical complications."

Kashian v. Wang Laboratories, 11 Mass. Workers' Comp. Rep. 72, 74 (1997), quoting 1 A. Larson, The Law of Workmen's Compensation, § 13.11(a)(1996).

The judge's findings in the present case indicate no such analysis. The judge found that the employee's incapacity and treatment as of March 1999 was due to "a severe preexisting back condition." (Dec. 7, 8.) Although the evidence unquestionably supports that finding, the decision does not go far enough. The question that remains unanswered is whether the severe, pre-existing back condition is causally connected, in any measure, to any one or more of the employee's prior compensated work injuries of 1974 and 1987, and the injuries of 1989 and 1993 that she argues are compensable.[4] If the judge so finds on recommittal, § 1(7A) does not apply and the employee need only prove that the March 16, 1998 industrial injury is a simple contributing cause to the ongoing incapacity and need for treatment.

Accordingly, we recommit the case for further findings consistent with this opinion.

So ordered.

Sara Holmes Wilson
Administrative Law Judge

Filed: **December 21, 2001**

William A. McCarthy
Administrative Law Judge

Susan Maze-Rothstein
Administrative Law Judge

[4] We emphasize that a "compensable" pre-existing injury – one which stands in opposition to the § 1(7A) provision, a "non-compensable" pre-existing injury – is not one for which compensation necessarily was paid. Just because the employee in this case did not make a claim for her 1989 and 1993 falls, it does not always follow that the resulting treatment which she did receive would not have been within the scope of G.L. c. 152, § 30, i.e. "compensable."