COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 010067-05**

Frances Margraf	Employee
Central Berkshire Regional School District	Employer
M.E.G.A. Property and Casualty Group	Insurer

REVIEWING BOARD DECISION
(Judges Calliotte, Fabricant and Koziol)

The case was heard by Administrative Judge Rose.

APPEARANCES
Patrick C. Gable, Esq., for the employee
Matthew F. King, Esq., for the insurer at hearing
John J. Canniff, Esq., for the insurer on appeal

CALLIOTTE, J. The insurer appeals from a decision ordering it to pay medical benefits and mileage reimbursement pursuant to G. L. c. 152, §§ 13 and 30. The insurer argues the judge's § 1(7A) analysis was flawed; that the judge erred by failing to consider the effect of supervening events on that analysis; and, that it was denied due process by the judge's review and analysis of medical evidence outside the record to determine whether the insurer had met its burden of production. We affirm the decision.

On March 29, 2005, the employee, a paraprofessional who worked with special needs students, suffered an industrial injury to her "lower back and right lower extremity (hip, thigh, hamstring and ankle)." (Dec. 4.) She subsequently had reconstructive surgeries on her right ankle. On March 30, 2007, she settled her case with liability accepted for the diagnoses of chronic lower extremity weakness, right ankle injury, and intervertebral displacement. Id.

The employee filed the present claim for §§ 13 and 30 benefits for prescription medications, which were primarily for chronic pain, and mileage reimbursement for medical appointments. Following a § 10A conference, the judge ordered the insurer to pay for all but one of the claimed prescriptions. (Dec. 2.) The insurer appealed.

On October 2, 2013, Dr. Marc Linson examined the employee pursuant to § 11A. The parties were granted permission to depose Dr. Linson prior to the hearing, and did so on February 24, 2014.[1] The insurer then filed a motion to submit additional medical evidence on grounds of medical complexity. Following a motion session on March 11, 2014, the judge denied the motion, with leave for the insurer to re-file and make an offer of proof, if it so desired. (3/11/14 Motion Session, Tr. 8-9.) The insurer renewed its motion at the close of the hearing, on May 19, 2014. As its offer of proof, the insurer cited the reports of Dr. Lebovits, which had been submitted at conference. The insurer also argued those reports supported its contention that the work injury was no longer a major cause of the employee's disability or need for treatment pursuant to § 1(7A). (Tr. 51-53.) Finding the matter was not medically complex, the judge again denied the motion to allow additional medical evidence. (Dec. 3.)

At hearing, the insurer raised § 1(7A) as an affirmative defense.[2] (Dec. 2.) The judge credited the employee's "subjective complaints of ankle and lower back pain, 'charlie horses' and gait difficulties." Id. at 4. Finding the impartial report adequate, id. at 2, the judge cited to and adopted Dr. Linson's, opinion:

> "I *still*[3] conclude that the work injury represents a major causal factor in her ongoing complaints of back and right leg pain, weakness of the right leg, pain,

[1] The judge's statement that the deposition was taken on February 24, 2013, is a scrivener's error. (See Dec. 2.)

[2] General Laws 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.

[3] Dr. Linson had previously examined the employee, pursuant to § 11A, on April 22, 2009. At that time, he opined that the employee's preexisting back and leg symptoms were major causal factors of her disability, but that the work injury also represented a major causal factor. Prior to hearing, the insurer withdrew its appeal of the October 2, 2008 order requiring the insurer to pay medical expenses for treatment at a pain clinic and for a massage chair. See Rizzo v. M.B.T.A.,

> paresthesias and sensitivity of the right foot and ankle and that the ankle surgery that she had, has a major causal factor to the work injury." (Exhibit 4, p. 2) See also Deposition of Dr. Marc Linson. (p. 11) I also accept and adopt the opinion of Dr. Linson that the requested prescriptions are reasonable and necessary and related to the injury. Id. Deposition (p. 11)

(Dec. 4; emphasis added.) Addressing the insurer's argument "that once § 1(7A) is triggered, it is the Employee's continuing burden to show causation remains a major but not necessarily predominant cause of the disability or need for treatment," (Dec. 5), the judge found, "Dr. Linson's opinions satisfy Section 1(7A)." Id. Responding to the insurer's argument that events after the 2007 lump sum agreement triggered a new § 1(7A) analysis, the judge held that the chain of causation was "not broken by post-injury everyday life events not the fault of the Employee, . . ." (Dec. 6.)

The judge found the employee had been "admirably tapered down" to 15 mg of Oxycodone three times a day, and ordered Oxycodone at that level, as well as prescription monitoring by one doctor only, as recommended by Dr. Linson. He also ordered payment for the other requested prescriptions, monitoring of those medications, and payment of the mileage request. (Dec. 5-6.)

In its appeal, the insurer first challenges the judge's § 1(7A) analysis. The insurer maintains that the judge erred by failing to make findings regarding the nature of the employee's pre-existing condition; by imposing a new burden of production on the insurer and assuming the lump sum agreement satisfied the employee's burden under § 1(7A); and by failing to do an analysis pursuant to Vieira v. D'Agostino Assocs. 19 Mass. Workers' Comp. Rep. 50, 53 (2005). We affirm.

With respect to the insurer's contention that the judge did not make findings regarding the nature of the employee's pre-existing condition(s), it was clear from the credited prima facie evidence of the § 11A examiner that those conditions involved the

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16 Mass. Workers' Comp. Rep. 160, 161 n.3 (2006)(reviewing board may take judicial notice of board file).

back and foot/ankle.[4] (Dec. 4.) The insurer, whose burden it was to produce evidence of the nature of the employee's pre-existing conditions, see MacDonald's Case, 73 Mass. App. Ct. 657, 659-661 (2009), clearly understood what they were, as it referenced her undisputed prior foot and low back conditions in its closing brief to the judge, ("Insurer's Brief on Application of M.G.L. c. 152, § 1(7A) and Medical Records to be admitted under M.G.L. c. 152, § 11A," [hereinafter "Insurer's Hearing br."], p. 6), and in the motion session for additional medical evidence. (3/11/14 Motion Session, Tr. 4.)[5] The employee did not challenge the applicability of § 1(7A) and, in fact, testified to prior problems with her back and ankle. (Tr. 16-17.) Accordingly, if there was any error in failing to make specific findings regarding those pre-existing conditions, it was harmless.

The insurer's contentions that the judge erred by imposing a new burden of production on it pursuant to § 1(7A), and by concluding the lump sum agreement foreclosed further inquiry into causation under the heightened § 1(7A) standard, are similarly unavailing. They are mooted by the judge's adoption of Dr. Linson's resounding opinion that the 2005 work injury *remains* a major cause of the employee's disability and need for treatment. (See Dep. 9-11, 17, 26, 31, 33-34; Ex. 4, § 11A report.)

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[4] In his deposition testimony, Dr. Linson opined that the employee

> has a *preexisting degenerative back condition that has been aggravated, exacerbated and symptomatically provoked and worsened by the work injury*, and that the work injury in 2005 has affected a vulnerable individual with regards to these conditions and caused her to experience pains that otherwise are speculative and may not have occurred within this time frame to the degree that it's bothered her—all of which makes me conclude that the work injury represents a single major causal factor in her *ongoing back trouble, as well as her ankle problem.*

(Dep. 26; emphases added.) In addition, in his report, he indicated that "the prior vulnerability of her *right foot and ankle due to pre-existing problems*" may have predisposed her to the work injury. (Ex. 4, § 11A report of Dr. Linson, 10/2/13; emphasis added.)

[5] See also 452 Code Mass. Regs. § 1.11(1)(f), which provides:

> In any hearing in which the insurer raises the applicability of the fourth sentence provisions of M.G.L. c. 152, § 1(7A), governing combination injuries, the insurer must state the grounds for raising such defense on the record or in writing, with an appropriate offer of proof.

This opinion clearly satisfies the employee's burden of proof under § 1(7A), regardless of what the insurer's burden of production was.[6] Once again, we note that the employee does not dispute the applicability of the heightened causation standard, or the judge's § 1(7A) analysis. We therefore affirm the judge's finding that it applies and is satisfied by Dr. Linson's opinion. In light of this holding, a further analysis pursuant to Vieira, supra, is unnecessary.

Next, the insurer argues the judge should have determined, pursuant to § 1(7A), whether the work injury remains a major cause of disability or need for treatment with respect to alleged *subsequent* non-work-related activities and events, such as leaf raking, falling on ice and motor vehicle accidents. We disagree. As we held in Tirone v. Mass. Bay Transportation Auth, 15 Mass. Workers' Comp. Rep. 283 (2001):

> There is no basis for mixing the employee's non-work-related medical condition *pre-existing* the industrial injury with the *subsequent* non-work-related

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[6] After finding Dr. Linson's opinion satisfied § 1(7A), the judge continued his analysis, apparently assuming, based on the insurer's statements at hearing, that § 1(7A)'s applicability had been determined by the prior lump sum agreement (Tr. 55; see also Insurer's Hearing Br., 7):

> Original Section 1(7A) causation was satisfied by the Lump Sum Agreement, a valid contract voluntarily entered into by the parties. In order to avoid re-litigating the same causation ground repeatedly, I find the Insurer must meet a new burden of production under the Claudette Stewart's Case, 74 Mass. App. Ct. 919, 920 (2009), namely, that there is a new weighing of the factors such that the industrial injury does not remain a major cause. As an offer of proof, the Insurer argues the reports of Dr. Lebovits satisfy a requirement of a new weighing of the factors. Taking judicial notice of the Board file, I have carefully analyzed his reports. I conclude that Dr. Lebovit[s'] conclusions as to causation go to the original 1(7A) analysis, and not a new evaluation based on the factors argued by the Insurer since the lump sum settlement. I therefore conclude that Dr. Lebovits' opinions do not require a new 1(7A) burden for the Employee.

(Dec. 5.) The finding that § 1(7A)'s applicability had been determined by the lump sum agreement does not appear to be correct, since § 1(7A) was not even mentioned in that agreement. However, whether the finding is correct is irrelevant because Dr. Linson's credited opinion satisfied any burden of proof the employee might have, regardless of when § 1(7A) became the "law of the case." Cf. Spencer-Cotter v. North Shore Med. Ctr., 25 Mass. Workers' Rep. 315 (2011)(prior acceptance of liability does not bar insurer from raising § 1(7A); insurer has burden of producing evidence of a non-compensable pre-existing condition which combines with work injury to cause or prolong disability or need for treatment), citing MacDonald's Case, supra, at 660.

> aggravation of that injury in the assessment of the employee's medical disability status. These are two discrete areas of inquiry and analysis having nothing to do with each other.

Id. at 286 (emphases in original). Thus, " 'the industrial injury remains compensable relative to [the later non-work-related events] if the employee can prove *any* continuing causal connection between the work and the resultant incapacity.' " Drumond v. Boston Healthcare for the Homeless, 22 Mass. Workers' Comp. Rep. 343, 345 (2008)(emphasis added), quoting Tirone, supra at 286-287. The judge found the insurer's argument was not developed in the medical evidence, and, even if it had been, Dr. Linson continued to causally relate the employee's ongoing disability to the work injury, even when presented with later alleged events. (Dec. 5-6.) The judge concluded, the " 'straight' causation chain is not broken by post-injury everyday life events not the fault of the Employee." (Dec. 6.) We affirm the judge's finding that subsequent events did not break the causal chain.[7]

Finally, the insurer argues the judge violated its due process rights by analyzing Dr. Lebovits' reports, which he did not admit as evidence, to determine the application of § 1(7A). See 452 Code Mass. Regs. § 1.11(f), supra note 5. This argument is disingenuous and inconsistent with the insurer's arguments at hearing. The insurer asked the judge to consider Dr. Lebovits' reports to determine whether to open the medical record on the ground of complexity, arguing that they demonstrated the work injury was no longer a major contributing factor in the employee's disability or need for treatment. (Insurer Hearing br. 3; Tr. 47-60). In response, the judge found that the medical issues were not complex, (Dec. 3), and that Dr. Lebovits addressed only original causation, thus failing to advance the insurer's argument it did not need to meet a new burden of production under § 1(7A). (Dec. 5.) The insurer may not claim prejudice when the judge simply did what it asked. Moreover, because applying § 1(7A)'s "a major cause" standard benefits the insurer by imposing on the employee a heightened burden of proof,

[7] Although the standard is whether the non-work related activities were "normal and reasonable and not performed negligently," Drumond, supra, the insurer does not argue there was error in the judge's finding on this issue.

the insurer's due process argument necessarily fails. In any event, the judge did not adopt Dr. Lebovits' opinion, but that of Dr. Linson, to satisfy the employee's elevated causation burden.

The decision is affirmed.[8] Pursuant to § 13A(6), the insurer is to pay employee's counsel a fee in the amount of $1,618.19.

So ordered.

Carol Calliotte
Administrative Law Judge

Bernard W. Fabricant
Administrative Law Judge

Filed: ***January 26, 2016***

Catherine Watson Koziol
Administrative Law Judge

[8] The insurer's contention in its conclusion that the judge erred when he failed to allow the submission of additional medical evidence, (Insurer br. 8), does not rise to the level of appellate argument.