COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **Board No.:** 038999-05

Francis Motherway	**Employee**
City of Westfield	**Employer**
City of Westfield	**Self-insurer**

REVIEWING BOARD DECISION

(Judges Horan, McCarthy and Fabricant)

The case was heard by Administrative Judge Rose.

APPEARANCES

Charles E. Berg, Esq., for the employee at hearing
James N. Ellis, Esq., for the employee on appeal
Matthew W. Gendreau, Esq., for the employee at oral argument
Peter H. Martin, Esq., for the self-insurer at hearing
Donald E. Wallace, Esq., for the self-insurer on appeal

HORAN, J. The employee, who prevailed in his claim for § 34 benefits, appeals the denial of his claim for § 14(1) [1] costs against the self-insurer. Although the

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[1] General Laws c. 152, § 14(1), provides, in relevant part:

> Except as provided in subsection three, if any administrative judge or administrative law judge determines that any proceedings have been brought, prosecuted, or defended by an insurer without reasonable grounds:
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> > the whole cost of the proceedings shall be assessed upon the insurer; and
> >
> > (b) . . . If any administrative judge or administrative law judge determines that any proceedings have been brought or defended by an *employee or counsel* without reasonable grounds, the whole cost of

self-insurer has not appealed the decision, it nevertheless urges us to assess § 14(1) costs on the employee's attorney for pursuing this appeal without reasonable grounds. We affirm the judge's decision to deny the employee's § 14(1) claim. We also decline to assess § 14(1) costs against employee's counsel.

On November 7, 2005, the employee, a sixty year-old painter and maintenance worker for the employer, injured his back at work lifting a bucket of paint. On April 4, 2006, he underwent back surgery. (Dec. 3-4.) The self-insurer resisted the employee's claim for weekly incapacity and medical benefits based, in part, on medical records submitted by the employee at conciliation indicating the employee had pre-existing back problems.[2]

Prior to conference, the self-insurer served on employee's counsel a request for production of the employee's medical records, relative to the employee's back treatment from June 18, 1987 forward. (Self-Insurer's Request for Production of Documents dated May 31, 2006.) The employee failed to produce all the records. At the conference, the self-insurer raised the defense of § 1(7A). [3] On June 23,

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> the proceedings shall be assessed against the *employee or counsel*, whomever is responsible.

(Emphasis added.)

[2] 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 the board file). At conciliation, the employee submitted a report from Dr. Paul Filippini dated February 2, 2006, which indicated the employee "has a long history of repeated injuries to the lumbar spine," and that "approximately one year ago, he was told that he did have a prior HNP on the right with a history of ?decompression and fusion."

[3] 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

2006, the judge denied the employee's claim "due to the employee's attorney['s] ill-advised failure to provide all the records for the employee's pre-existing conditions, and/or injuries." (Dec. 2.) The judge further ordered that scheduling of the § 11A impartial medical examination be suspended until the employee produced all the requested medical records. [4] The employee appealed the conference order, and forwarded the requested documents to the judge and the self-insurer by letter dated January 2, 2007. The records were then forwarded to the impartial examiner, Dr. Charles Kenny, and the employee's examination was scheduled for January 31, 2007. (Dec. 1.) Dr. Kenny's report revealed the employee had experienced multiple incidents of back pain since 1988. Most of these incidents, but not all, were reportedly work-related. Dr. Kenny also noted the employee's MRI of October 19, 2004, done over a year before his last claimed industrial accident, revealed a disc herniation at L5-S1. Dr. Kenny diagnosed the employee with a herniated disc at L5-S1, and with post-surgical arthrodesis, causally related to the November 7, 2005 work incident. (Stat. Ex. 4.)

At the hearing on April 30, 2007, the impartial report was the only medical evidence submitted. (Dec. 2.) Neither party filed motions to have the impartial report declared inadequate or the medical issues complex. The self-insurer raised the defenses of § 1(7A), liability, disability and extent thereof, and causal

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> 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.

[4] The statute gives an administrative judge the right to "require and receive reports of injury . . . and any . . . medical . . . records" at the conference level. G. L. c. 152, § 10A. In addition, at hearing, a judge is empowered to "make such inquires and investigations as he deems necessary, and may require and receive any documentary or oral matter not previously obtained as shall enable him to issue a decision with respect to the issues before him." G. L. c. 152, § 11. The applicable regulation, 452 Code Mass. Regs. § 1.12, grants any party the right to request the production of medical records, and empowers the judge to require compliance with such a request.

relationship. (Dec. 2.) The employee moved to strike the § 1(7A) defense, arguing the self-insurer's failure to produce medical evidence supporting the defense deprived the self-insurer of the right to raise it. (Tr. 6; Employee's Memorandum of Law Regarding § 1(7A) Burden of Production Issue.) In addition, the employee claimed § 14(1) costs should be imposed against the self-insurer for asserting its § 1(7A) defense without reasonable grounds. (Dec. 2; Tr. 8.) The judge denied the employee's motion to strike the § 1(7A) defense, stating he was "not going to strike a defense prior to the trial when there's some indication in the [§] 11A [impartial report] that he [the employee] did have a preexisting back problem." (Tr. 8.)

Following the hearing, the self-insurer deposed Dr. Kenny. (Dec. 2.) In his decision, the judge found, in accordance with Dr. Kenny's testimony, the employee had a pre-existing herniated disc at L5-S1, and that he suffered from a long history of pre-existing degenerative arthritis. However, citing Dr. Kenny's deposition testimony, the judge also found the November 7, 2005 work incident made the herniated disc significantly worse, and that the employee's degenerative disc disease was caused by his years of heavy work. (Dec. 5; Dep. 33-34, 47.) The judge concluded that although the employee had previously suffered a non-industrial injury to his back while launching a boat on May 5, 2003, he had been able to return to work without limitation a day or two later. (Dec. 4; Tr. 16-18.) Accordingly, the judge found "the employee's symptoms and disability after November 7, 2005 are not related to the non-work related incident nor does it rise to the level of a [§]1(7A) factor." [5] (Dec. 4.) The judge awarded the employee § 34 benefits, but denied his claim for § 14(1) costs against the self-insurer, stating:

> Given the medical picture described above, the boating incident, and in the context of the employee's counsel['s] inexcusable failure to provide all medical records at conference, I find that the self-insurer proceeded in good faith in denying this claim and defending the claim.

[5] Although he found § 1(7A) inapplicable, the judge nevertheless adopted Dr. Kenny's opinion "that the incident on November 7, 2005 was 'the predominate [sic] cause of his ensuing disability and need for treatment.' " (Dec. 5, citing Dep. 50.) This finding would be sufficient to satisfy the "a major" cause standard of the statute's fourth sentence.

(Dec. 6.)

On appeal, the employee maintains the judge's denial of his § 14(1) claim is contrary to law because the self-insurer did not have reasonable grounds to maintain the affirmative defense of § 1(7A) at conference or hearing. The employee asserts the judge shifted the burden of production with respect to § 1(7A) from the self-insurer to the employee by ordering him to comply with the self-insurer's request for production of medical records, thereby violating his due process rights. The employee further avers that in order to raise § 1(7A), and meet its burden of production, the self-insurer was required to submit a medical report prepared by a physician *employed by the self-insurer* supporting the necessary § 1(7A) predicates, which it failed to do.[6] We disagree, and address these arguments in turn.

We reject the employee's contention that the judge should have stricken the self-insurer's § 1(7A) defense ab initio. In fact, the record reveals the self-insurer was alerted to the possibility of a valid § 1(7A) defense upon receipt of the *employee's own medical submission* at conciliation, which is the initial stage of our dispute resolution process. See footnote 2, supra.

The judge's post-conference order requiring the employee to comply with the self-insurer's production request neither violated the employee's due process rights, nor shifted the self-insurer's burden of production under § 1(7A). [7] In fact, in these

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[6] In support of this contention, the employee cites our decision in Pike v. Trial Court Courthouse Facilities, 17 Mass. Workers' Comp. Rep. 101 (2003), rev'd on other grounds, Mass. App. Ct. 03 - J - 178 (May 18, 2005)(single justice). Pike does not stand for this general proposition. We noted, only in dicta, that the insurer could not raise § 1(7A) by submitting into evidence, and relying upon, a narrative report prepared at the employee's behest. See 452 Code Mass. Regs. § 1.11(6). Here, the only medical report was the § 11A impartial medical examiner's report. Nothing in c. 152, or in the applicable regulations, operates to prevent an insurer from relying on the § 11A report to support a § 1(7A) defense.

[7] To invoke the heightened causation standard under § 1(7A), the insurer has the burden not only to raise it as a defense, but also to "produce" evidence to trigger its application. Doucette v. TAD Technical Institute, 22 Mass. Workers' Comp. Rep.

circumstances, had the employee withheld from the self-insurer, the impartial examiner, and the judge, relevant medical information about his prior back problems and treatment, the self-insurer, and not the employee, could claim a due process violation. Cf. Nesly v. Varian Vacuum, 7 Mass. Workers' Comp. Rep. 343, 344 (1993)(where insurer failed to produce documents requested by employee and authorized by judge, employee's due process rights to present his case violated). [8]

Finally, at hearing, the self-insurer was entitled to rely upon the § 11A report of Dr. Kenny as a basis for raising § 1(7A). Dr. Kenny's report, produced prior to

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99 (May 20, 2008); Jobst v. Leonard T. Grybko, 16 Mass. Workers' Comp. Rep. 125, 130 (2002); Fairfield v. Communities United, 14 Mass. Workers' Comp. Rep. 79, 83 (2000)(insurer has burden to produce evidence that would support finding that a pre-existing noncompensable injury or disease combined with a compensable injury). By "produce," we do not suggest that in all instances the insurer must finance the actual medical report or record as a precondition to using such evidence to trigger the statute's application. Only 452 Code Mass. Regs. § 1.11(6), would appear to limit the use of medical reports for this purpose. See n.6, supra.

[8] See also General Laws c. 152, § 14(2), which provides, in pertinent part:

> If it is determined that in any proceeding within the division of dispute resolution, a party, including an attorney or expert medical witness acting on behalf of an employee or insurer, concealed or knowingly failed to disclose that which is required by law to be revealed, knowingly used perjured testimony or false evidence, knowingly made a false statement of fact or law, participated in the creation or presentation of evidence which he knows to be false, or otherwise engaged in conduct that such party knew to be illegal or fraudulent, the party's conduct shall be reported to the general counsel of the insurance fraud bureau. Notwithstanding any action the insurance fraud bureau may take, the party shall be assessed, in addition to the whole costs of such proceedings and attorneys' fees, a penalty payable to the aggrieved insurer or employee, in an amount not less than the average weekly wage in the commonwealth multiplied by six.

hearing, clearly indicated the employee had numerous prior back injuries, at least one of which was admittedly not work-related, and a pre-existing herniated disc. When the parties received the report, no lay testimony had been taken, and the impartial physician had not been deposed. The self-insurer had the right, via cross-examination of the employee at hearing, to delve into his history of back problems and, pursuant to § 11A(2), to depose Dr. Kenny in the hope of soliciting testimony to develop a successful § 1(7A) defense. Although Dr. Kenny's testimony, in the end, did not carry the day for the self-insurer, this does not mean the self-insurer's original decision to raise the defense was without support ─ especially in light of the employee's conciliation submission and his initial, unjustifiable refusal to comply with a reasonable discovery request.

Although we reject the employee's arguments, we also decline to impose § 14(1) costs on employee's counsel. The fourth sentence of § 1(7A) is subject to myriad interpretations, and the nature of its application and meaning have been the subject of legitimate debate since its enactment. Given the shifting state of the law then in effect with respect to raising and maintaining the § 1(7A) defense,[9] we cannot say it was unreasonable for the employee to appeal the judge's denial of his § 14(1) claim.

The decision is affirmed.

So ordered.

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Mark D. Horan
Administrative Law Judge

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William A. McCarthy

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[9] See 452 Code Mass. Regs. § 1.11(1)(f), effective March 21, 2008 (after the filing date of the decision in this case) 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.

Administrative Law Judge

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Bernard W. Fabricant
Administrative Law Judge

Filed: **January 23, 2009**