COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 022569-10**

Frederick Opanasets	Employee
Suffolk County Sheriff's Department	Employer
Commonwealth of Massachusetts	Self-insurer

REVIEWING BOARD DECISION
(Judges Calliotte, Horan and Koziol)

The case was heard by Administrative Judge Novick and decided by Administrative Judge Taub.[1]

APPEARANCES
Michael C. Akashian, Esq., for the employee
Radha Tilva, Esq., for the self-insurer at hearing
Arthur Jackson, Esq., for the self-insurer at hearing and on appeal

CALLIOTTE, J. The employee appeals from a decision denying and dismissing his claim for a closed period of weekly benefits. The employee contends first that the judge erred by failing to notify the parties he was applying § 1(7A), despite a ruling by the prior judge that the self-insurer had not met its burden of production, and second that the judge further erred by finding he was not disabled. We affirm the decision.

The employee, a thirty-nine year-old corrections officer who had worked in that position since 1997, claimed he was incapacitated from August 18, 2010, to November 21, 2010, as a result of stressful incidents at work. He testified that on July 19, 2010, and August 15, 2010, incidents involving inmates yelling loudly, kicking doors, and fighting in their cells, caused him to visit the employer's infirmary complaining of high blood

[1] On June 18, 2012, lay testimony was taken before Administrative Judge Emily Novick, who tried the case to completion before she died in December 2012. The case was then assigned to Judge Taub, who wrote the decision. (Dec. 2-3.)

pressure, headache, and tiredness.[2] (Dec. 3-5.) On August 1, 2010, the employee requested light duty, involving no inmate contact, to run through October 30, 2010. The employer denied the request, stating that the position the employee held on the 11:00 p.m. to 7:00 a.m. shift met his needs, and that positions with absolutely no inmate contact were not available. Instead, the employer approved the employee for a medical leave of absence under the Family and Medical Leave Act for the period from August 16, 2010, to November 7, 2010. On August 15, 2010, the employee again visited the infirmary, complaining of being lightheaded and dizzy. (Dec. 5-6.) He last worked on August 17, 2010. (Dec. 2.) He returned to his regular position in November 2012, where he has remained, with the exception of a change to the 3:00 p.m. to 11:00 p.m. shift. (Dec. 4, 6.)

At hearing, the self-insurer raised liability, incapacity and extent thereof, and causal relationship, including § 1(7A).[3] For its offer of proof on its § 1(7A) affirmative defense,[4] the self-insurer relied on reports of its examining physician, Dr. Joseph Vita.[5] (Dec. 3; Tr. 5-6.) On June 19, 2012, Judge Novick ruled as follows:

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[2] The employee also testified that his blood pressure had been "out of control since 2004 . . . with episodes of spikes in his blood pressure, chest tightness, dizziness, and feeling faint that he associated with and attributed to the stressful atmosphere at work." (Dec. 4-5.) He saw his primary care physician or went to the emergency room for treatment on a number of those occasions. Id.

[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 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.

[4] 452 Code Mass. Regs. § 1.11(1)(f), 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.

[5] No impartial examination was necessary because the dispute was over a prior closed period of benefits. (Tr. 12; see 452 Code Mass. Regs. § 1.10[5].)

> [T]he self-insurer has not met its burden of production to show that the employee's claimed industrial injury or disease *combined* with a pre-existing condition to cause or prolong disability or the need for medical treatment. If the self-insurer intends to reassert this defense, it must do so within ten days of receipt of the deposition transcript of Dr. Vita.

(Ruling on Self-Insurer's Section 1(7A) defense; emphasis in original.)[6]

On July 31, 2012, the parties deposed Dr. Vita, who testified extensively regarding the "combination" and "a major cause" elements of § 1(7A). (Dep. 18, 22, 28, 35-43.) Following the deposition, the employee requested permission to "supplement the medical records with either additional reports or depositions of the treating and examining physician[s]," noting that this was necessary, "[a]lthough the answers to the questions regarding combination and 'a major cause' are somewhat convoluted." (August 1, 2012 letter from employee attorney to Judge Novick.) The employee then submitted "the supplemental report of Dr. [Charles J.] Schulman addressing the issue of § 1(7A)." (Dec. 3.) In his closing argument, the employee maintained, "the questions of causation and § 1(7A) were answered by all of the physicians in the affirmative." (Employee closing argument, 5.) The employee specifically cited Dr. Schulman's August 23, 2012 report that the work episodes aggravated the employee's condition of hypertension with end organ damage, and were a major cause of his disability and need for treatment. Id. at 2, 3-5.[7]

Following Judge Novick's death, the case was assigned to Judge Taub. Rather than re-try the case, the parties agreed to have the new judge decide it based upon a

[6] We take judicial notice of documents in the board file. See Rizzo v. M.B.T.A., 16 Mass. Workers' Comp. Rep. 160, 161 n.3 (2002).

[7] In addition to Dr. Schulman's report, a number of other medical reports and records from the employee's treating or consulting physicians were submitted as exhibits, including those of: Dr. Laura T. Cloukey, the employee's primary care physician from 1996 through 2009; Dr. Evan Weisman, the employee's more recent primary care physician; and Dr. William R. Bachman, a cardiologist, to whom the employee was referred by one of his primary care physicians. (Dec. 1-2, 6-7.)

review of the transcript of the June 18, 2012 testimony and the other evidence of record.[8] (Dec. 3.) In his July 9, 2014 decision, Judge Taub found § 1(7A)[9] to be applicable:

> Despite the ruling of Judge Novick that the self-insurer had not made a sufficient showing of there being a "combination" situation to have met its burden of production as of the time of her ruling, I find the needed showing was made as the expert opinion came in and I adopt the opinion of Dr. Vita in finding that the employee's episodic symptoms resulted from a combination of the pre[-]existing condition of hypertension and the employee's response to the stressful incidents at work.

(Dec. 10.) The judge adopted Dr. Vita's further opinion that "the event(s) at work acted in combination with a significant pre-existing condition and were not a major cause of the employee's need for treatment or of any disability that there might have been." Id. He credited Dr. Vita's opinion "as he last expressed it, that the pre-existing hypertension was vastly more important at 90% and that the work events were a minor aspect." Id. Rejecting the employee's testimony that he could have remained at work only if he were granted further accommodations, the judge adopted Dr. Vita's opinion that, "Mr. Opanasets did not require a change in his assignment at the jail; . . . there was no reason the employee could not stay in exactly the same situation to which he had been assigned . . . ." (Dec. 11.) The judge concluded:

> Regarding the specific period of alleged incapacity, I do not find Mr. Opanasets to have been incapacitated from work at all. He perhaps had brief periods of disability that lasted from when he had a spike in his blood pressure up to the point it was brought back to its customary level, but this claim was for the

[8] Where credibility is at issue, as here, the new judge should generally take testimony anew. O'Brien v. Gillette Co., 15 Mass. Workers' Comp. Rep. 289, 291 (2001). At a minimum, it would have proven helpful for the status conference before the new judge to have been transcribed. See Fleischmann v. Best Buy, 27 Mass. Workers' Comp. Rep. 107, 108 (2013)(all significant proceedings should be transcribed to assure record is adequate to address issues raised on appeal). However, the parties have not argued that any error occurred as a result of the judge deciding the case on the record, or not transcribing the status conference.

[9] The judge actually indicated he was applying § 11A's "major cause" standard, (Dec. 10), rather than § 1(7A)'s "a major cause" standard. (Dec. 3.) As does the employee, we view the judge's mention of the § 11A standard as a scrivener's error. (Employee br. 3.)

> period he was on leave of absence beginning August 18, 2010 and not for those various episodes.

(Dec. 10.)[10] The judge denied and dismissed the employee's claim, concluding that the employee did not sustain a personal injury arising out of and in the course of his employment, that the underlying "essential hypertension" was a pre-existing disease not caused by events at work, that stressful incidents at work were not a major cause of any disability or need for treatment, and that the employee was not disabled from the position to which he had been assigned. (Dec. 12.)

The employee's primary argument on appeal is that the judge erred in applying § 1(7A)'s "a major cause" standard without notice to the parties, because Judge Novick specifically ruled the self-insurer failed to meet its burden of production to raise § 1(7A), and gave the self-insurer ten days after Dr. Vita's deposition to reassert that affirmative defense. Accordingly, the employee argues, the appropriate causation standard is the "as is" standard, which he satisfied.

The employee's argument, that he was not aware § 1(7A) was in play, and would have taken further depositions had he known the judge was going to apply the "a major cause" standard, is unavailing. The self-insurer properly raised § 1(7A) before Judge Novick. Although it did not reassert this defense in writing after Dr. Vita's deposition, the self-insurer's attorney elicited testimony at the deposition from Dr. Vita, to which the employee did not object, that the employee's pre-existing hypertension combined with the stressors at work. (Dep. 18, 38, 41.) It thus clearly satisfied the self-insurer's burden to produce evidence of "combination." Dr. Vita also testified, without objection, that the stressful incidents at work were not a major but a minor cause of the employee's symptoms. (Dep. 37-38, 43.) Furthermore, the employee cross-examined Dr. Vita regarding his understanding of the meaning of "a major cause" under § 1(7A). (Dep. 39-

[10] Although the judge made no findings as to the extent of these "brief periods of disability," (Dec. 10), Dr. Vita testified that when a person with hypertension is under stress, and experiences an increase in blood pressure, his blood pressure can come back down within 15 to 30 minutes. (Dep. 20.)

41, 43.)[11] And, most importantly, following Dr. Vita's deposition, the employee requested, and was granted, permission to submit further medical evidence, including depositions, *specifically to address § 1(7A).* The employee then submitted Dr. Schulman's report, which provided an opinion that the work events combined with the employee's pre-existing conditions, and addressed the "a major cause" standard. Finally, the employee argued in his closing argument that § 1(7A)'s "a major cause" standard was satisfied. Under these circumstances, the employee effectively consented to trying the case under the § 1(7A) standard. See Freeman v. U. of Mass., Boston, 18 Mass. Workers' Comp. Rep. 138, 140 (2004)(occurrence of injury tried by consent where self-insurer did not object to employee's examination of impartial physician regarding causal relationship between workplace and injury, and engaged in extensive cross-examination regarding causation); Hinton v. Mass. Mut. Life Ins. Co., 16 Mass. Worker's Comp. Rep. 342, 347-348 (2002)(although § 1(7A) not invoked in issues sheet or in opening statement at hearing, case was tried by consent under that standard, where ample evidence was introduced regarding the pre-existing condition and employee, in brief, effectively accepted applicability of § 1[7A]); cf. Rivera v. Conair Martin Indus., Inc., 17 Mass. Workers' Comp. Rep. 129, 131 (2003)(despite obvious applicability of § 1(7A), issue waived because insurer never raised it in issues statement or orally at hearing).

Applying § 1(7A)'s "a major cause" standard, the judge adopted the opinion of Dr. Vita. The judge concluded the employee did not suffer a compensable personal injury under the act, finding that "the event(s) at work acted in combination with a significant pre-existing condition and were not a major cause of the employee's need for treatment or of any disability that there might have been." (Dec. 10.)[12] As we cannot conclude, on

[11] Despite some inconsistencies in Dr. Vita's testimony, the employee does not argue on appeal that Dr. Vita's opinion does not support the judge's finding that the employee failed to meet his burden of proof under § 1(7A).

[12] It is unclear whether the judge's conclusion that the employee did not sustain a compensable personal injury was based on his finding the employee failed to satisfy his burden of proof under the § 1(7A) causation standard, or whether it was a finding that the employee did not suffer a "personal injury" in terms of a "lesion or change" producing "harm or pain or a lessened facility

this record, that the employee suffered any denial of due process resulting from the judge's use of the "major" cause standard, there was no error.

Lastly, we need not address the employee's remaining argument that the judge erred in finding he was not disabled during the claimed period, as it is mooted by the judge's finding the employee did not sustain a personal injury arising out of and in the course of his employment. (Dec. 12.)

We affirm the decision.

So ordered.

Carol Calliotte
Administrative Law Judge

Mark D. Horan
Administrative Law Judge

Catherine Watson Koziol
Administrative Law Judge

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of the natural use of any bodily activity or capability." Burns's Case, 218 Mass. 8, 12 (1914). The judge found the employee suffered only "episodic" and "transient symptoms and spikes in blood pressure" which "returned to normal reading relatively quickly after being removed from the stress." (Dec. 10.) See Corazzini v. Diamond Chevrolet, 28 Mass. Workers' Comp. Rep. 49, 50-51 (2014), citing Havill v. Mead Westvaco/Willow Mill, 26 Mass. Workers' Comp. Rep. 255, 259-260 (2012)(transient increase in symptoms without worsening of underlying condition does not require, as a matter of law, a finding of a personal injury); cf. Long's Case, 337 Mass. 517, 521 (1958)("disabling increase of symptoms of some days' duration as a result of the stress and exertion of work *could be found* to be an injury" [emphasis supplied]). If the judge meant the latter, there would have been no need for him to perform a § 1(7A) analysis, as he did. Under either interpretation, the result is the same.