COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS	BOARD NO. 035613-04
Greg Nassios	Employee
Allied Building Products	Employer
Liberty Mutual Insurance Co.	Insurer

REVIEWING BOARD DECISION
(Judges Horan, Costigan and McCarthy)

APPEARANCES
Peter T. Toland, Esq., for the employee
Dennis M. Maher, Esq., for the insurer

HORAN, J. The employee appeals from a decision authorizing the insurer to terminate his § 34 benefits, and denying his claim for further medical benefits, including surgery. We recommit the case for further findings of fact.

On November 4, 2004, the employee, age thirty-seven at hearing, and a truck driver with a ninth grade education, injured his back while unloading a truck at work.[1] He sought immediate treatment, but continued to work in a light duty job with the employer. On December 22, 2004, he underwent a MRI, which reported both as normal, *and* as demonstrating lumbosacral disc degeneration and disc protrusion at L5-S1. Dr. John McConville, the impartial physician, opined the MRI report appeared to suffer from "some form of error in transcription." (Stat. Ex. 2.) In March 2005, increased driving at work aggravated the employee's back pain. (Dec. 3.) He underwent a second MRI on February 8, 2006 that demonstrated a "large posteriorly extruded left L5-S1 disc fragment with impingement." (Dep. Ex. 4.) The employee then left work. The insurer voluntarily commenced payment of § 34 benefits to the employee on July 28, 2005. (Dec. 3, 5.)

[1] The record reveals the employee, prior to November 4, 2004, had degenerative disc disease in his lumbar spine. (Dec. 5.)

The insurer filed a complaint to modify or discontinue the employee's benefits and, by conference order filed on October 20, 2005, his weekly benefits were reduced. Both parties appealed. On December 29, 2005, prior to the hearing, Dr. McConville examined the employee pursuant to § 11A. In January 2006, the employee experienced increased pain following a twisting incident that occurred while he was spreading sand during a winter storm. The employee was hospitalized for several days in February 2006. On March 1, 2006, Dr. Brian Kwon, the employee's treating physician, recommended the employee undergo a microdiscectomy. (Dec. 1-2, 4-5.)

Prior to the hearing on June 13, 2006, the judge joined the employee's claim for surgery under §§ 13 and 30. (Dec. 2.) Dr. McConville's report and deposition are the only medical exhibits listed in the decision. (Dec. 1.) The decision indicates that at his deposition, Dr. McConville reviewed the February 8, 2006 MRI, and Dr. Kwon's March 1, 2006 report.[2] The judge adopted the impartial physician's opinion that, due to his November 4, 2004 injury, the employee was disabled from work only until December 29, 2005. Accordingly, the judge denied the employee's claim for weekly incapacity and medical benefits after December 29, 2005. (Dec. 6-8.)

The employee raises two issues on appeal. The first challenges the judge's application of § 1(7A).[3] The second concerns the judge's failure to rule on the

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[2] Dr. Kwon's report is mentioned in the decision, but it is unclear whether it was admitted into evidence. The judge does note that Dr. McConville, at his deposition, reviewed Dr. Kwon's report. (Dec. 5.)

[3] 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.

employee's second motion for leave to introduce additional medical evidence, resulting in the failure to consider that evidence. We address these issues in turn.

With respect to § 1(7A), the judge found the employee suffered from a pre-existing degenerative condition in his lumbar spine, but found no evidence it combined with his industrial injury during the period the judge deemed him incapacitated.[4] (Dec. 5.) The judge also found, "[t]here can be no question that the twisting incident [of January 2006] aggravated the employee's previously injured back and that this injury combined with his prior *conditions* to cause him significant distress, hospitalization and the potential for a surgical intervention." (Dec. 7; emphasis added.) The judge then utilized the wrong standard, and focused on the wrong event, to deny the employee's claim for benefits subsequent to January 2006. He found that Dr. McConville

> . . . concluded that the *twisting incident* was a major, but not necessarily predominate [sic] cause for the employee's need for surgery. What was not addressed, however, was what, *if not the twisting incident*, was the *predominate* [sic] *cause* of the employee's subsequent symptoms and need for surgery.

(Dec. 7; emphasis added.) Assuming the statutory preconditions are met, § 1(7A) does not require that the compensable condition,[5] or the twisting incident, be the predominant cause of the employee's disability or need for surgery after January 2006. The statute requires the compensable injury to be only "a major" cause of either. See Viera v. D'Agostino Assoc., 19 Mass. Workers' Comp. Rep. 50, 52-53 (2005); see also Houghton v. Maaco Auto Paint, Inc., 17 Mass. Workers' Comp.

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[4] Although Dr. McConville opines the work injury of November 4, 2004 "was an aggravation of [the employee's] underlying chronic lumbosacral derangement," the judge found "no evidence of a combining of the employee's preexisting condition and his industrial accident during the period which I am finding him disabled as a result of his industrial accident." (Dec. 6-7.) Because the insurer did not appeal the hearing decision, this finding cannot be revisited on recommittal. G. L. c. 152, § 10A(3).

[5] On recommittal the judge should specifically identify the nature of the employee's compensable industrial injury.

Rep. 571 (2003); Bemis v. Raytheon Corp., 15 Mass. Workers' Comp. Rep. 408 (2001)(where "a major" cause standard not implicated, any contribution to the work injury sufficient to establish liability).[6]

The employee maintains the judge also erred by failing to rule on his second motion to submit additional medical evidence, which was filed before the close of the evidence on August 18, 2006.[7] We agree. See generally Mayo v. Save On Wall Co., 19 Mass. Workers' Comp. Rep. 1 (2005). With that motion, the employee submitted certified copies of medical records from Newton-Wellesley Hospital, Quincy Medical Center and South Shore Health Center.[8] We are aware the judge had previously granted the parties permission to submit additional medical evidence, which appears to have been offered. (See Tr. 5; Employee's Motion to Submit Additional Medical Evidence, Due to Medical Complexity of the Issues, dated May 3, 2006 with handwritten allowance dated June 3, 2006.) However, as noted, the decision lists only Dr. McConville's opinion as medical evidence. It is unclear what other medical evidence, if any, the judge admitted prior to issuing his decision.

Given our disposition of the § 1(7A) issue, on recommittal the judge should rule on the employee's second motion, and specifically identify all of the additional medical evidence admitted. He must also make further findings of fact concerning § 1(7A)'s application to the employee's claim for incapacity benefits and surgery as of January 2006.

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[6] "[W]here a compensable injury recurs or is aggravated by a non-compensable activity, the causal chain will not be broken, so long as the activity producing the recurrence or aggravation was normal, and not grossly negligent." Nason, Koziol and Wall, Workers' Compensation, § 9.7 (3rd ed., 2003); see Gomes v. Bristol Cnty. House of Correction, 13 Mass. Workers' Comp. Rep. 128, 133 (1999).

[7] The original deadline to submit medical evidence was August 11, 2006. On July 31, 2006 the judge, in response to the employee's request dated July 28, 2006, extended the deadline to August 18, 2006.

[8] 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 board file).

So ordered.

Mark D. Horan
Administrative Law Judge

Patricia A. Costigan
Administrative Law Judge

William A. McCarthy
Administrative Law Judge

Filed: February 5, 2008