COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS

BOARD NO. 006332-02

Ilidio Cruz	Employee
Smith & Wesson	Employer
Smith & Wesson	Self-insurer

REVIEWING BOARD DECISION
(Judges Koziol, Fabricant and Horan)

The case was heard by Administrative Judge Chivers.

APPEARANCES
Joseph Guerreiro, Esq., for the employee at hearing
Douglas F. Boyd, Esq., for the employee at deposition and on appeal
Joseph J. Durant, Esq., for the self-insurer at hearing
John J. Canniff, Esq., for the self-insurer on appeal

KOZIOL, J. The self-insurer appeals the decision of the administrative judge, awarding the employee § 35 partial incapacity benefits and attorney fees.[1] The self-insurer argues the judge erred by mischaracterizing the sole medical opinion in evidence which, it contends, failed to satisfy the employee's burden of proof under § 1(7A).[2] (Self-ins. br. 9, 10-12.) We agree, and reverse the decision. Therefore, we do not reach the other issues raised by the self-insurer.

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[1] In his May 12, 2009 decision, the judge ordered the self-insurer to pay the employee "Section 35 benefits from June 1, 2007, to date in the amount of $356.15 per week, based on an average weekly wage of $918.58 and an earning capacity of $320.00 per week." (Dec. 5.) However, the self-insurer states the judge awarded "ongoing" § 35 benefits, (Self-ins. br., 8), which coincides with the award entered in our department's electronic Case Management System (CMS).

[2] 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 compen-

The employee was fifty-eight years old at the time of the judge's decision. (Dec. 2.) He immigrated to the United States from Portugal thirty-four years earlier. The employee has a fourth grade education, acquired in his native land, and speaks some English. He began working for the employer in 1974, mainly as a metal forger of gun frames and barrels. (Dec. 2.)

On February 16, 2002, while in the course of his employment, the employee "was struck in his left arm and shoulder, and then smashed his left finger."[3] (Dec. 2.) Initially, the employee lost time from work but then returned to light duty. He testified that, for the next few years, he alternated between light and regular duty work.[4] (Dec. 2.) In 2006, the employee left work to undergo an unrelated surgical procedure, returning to light duty work in 2007. (Dec. 2.) On June 1, 2007, the employee was notified there was no more light duty work, and he was instructed to go home. He has been out of work since. Eventually, he began receiving social security disability benefits. (Dec. 1-2.)

The self-insurer denied the employee's claim for § 34 benefits from June 1, 2007 and continuing. Following a § 10A conference, the judge denied the claim and the employee appealed to a de novo hearing. (Dec. 2.) The employee was examined by a § 11A impartial physician, Dr. Demosthenes Dasco. (Dec. 1, 3.) The administrative judge adopted Dr. Dasco's opinions that the employee suffers from chronic left shoulder pain due to tendonitis of the left shoulder joint, related to the work injury of February 16, 2002, and is capable of limited lifting not to exceed twenty-five pounds with no lifting above his shoulder level. (Dec. 3.)

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sable only to the extent such compensable injury or disease remains a major but not necessarily predominant cause of disability or need for treatment.

[3] Any injury to the employee's finger had completely resolved prior to the impartial examination. (Dep. 10.)

[4] Witnesses for the self-insurer provided testimony that differed from the employee's in several significant areas, but for the reasons set forth herein, we need not address those discrepancies. (Tr. 46-54, 55-75).

The judge made the following findings and conclusions relevant to the self-insurer's § 1(7A) defense:

> A closer reading of the complete medical record also shows the employee has a pre-existing degenerative disease in the shoulder, unrelated to the work injury. (Dep. p. 28, lines 1-19). However, the work injury to the left shoulder caused the pain in the shoulder, (Dep. p. 34, line to [sic] p. 35, line 10) and Dr. Dasco would say the work injury is still a "significant contributing cause." (Dep. p. 39, lines 1-7).
>
> While the employee's medical history and work history were not, on their own, particularly clear as to the course of Mr. Cruz's shoulder problems, the impartial physician is able to assess the whole medical record and comes to the conclusion that Mr. Cruz's present shoulder complaints are still related to the work injury. His formulation of the work injury as a "significant contributing cause" meets the major cause requirement of Section 1(7A). See **Siano v. Speciality Bolt and Screw**, 16 Mass. Workers' Comp. Rep. 237, 240 (2002)(the use of the phrase "moderately significant" is substantially equivalent to ". . . a major but not necessarily predominant cause . . .")

(Dec. 3-4.)(Emphasis original.) Having made these findings and conclusions, the judge awarded the employee weekly incapacity benefits.

After a review of the expert medical testimony, we conclude the evidence fails to meet the heightened standard of causation imposed by § 1(7A). At deposition, Dr. Dasco expanded upon his written report, (Stat. Ex. 1), opining the work incident had aggravated the pre-existing degenerative osteoarthritis in the employee's left shoulder. [5]

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[5] The doctor testified:

> I'm under oath. And after reviewing the records and preparing for this deposition today, I should have added one more statement in my diagnosis that I issued when I examined him March 31, 2'08 [sic]. It does make a little bit of a change. Not – not tremendous, but it does.
>
> The injury to the left shoulder, which I believe caused the pain to the shoulder, played a role. But there was also [sic] preexisting condition of the left shoulder, consisting of degenerative disease, as reported in two MRIs of the shoulder.
>
> So to correct - - if you ask me today, I would change it to state that chronic left shoulder pain due to tendonitis of the left shoulder joint and a mild hypertrophic degenerative - - which I did state, but I should have said that the injury aggravated the

(Dep. 34-35, 38-39.) He also made clear the degenerative changes in the employee's shoulder were not caused by the February 2002 work injury. (Dep. 28.) Consistently throughout his deposition, Dr. Dasco used the past tense when describing the impact the work injury had on the employee's condition, and failed to address any present condition or ongoing causation.[6] In addition, Dr. Dasco denied the work injury remains a major contributor to any ongoing disability experienced by the employee.

> Q: Now, when you say it aggravated - -
>
> A: Yes.
>
> Q: - - the condition of the left shoulder - -
>
> A: Mm-hmm.
>
> Q: I can understand that, certainly, for the period of time that the employee was out of work and returned to light duty in 2002, there was a clear aggravation. Once he's back to work for three and a half years, is there still an aggravation?

> preexisting condition of the left shoulder. My diagnosis was correct, and it is correct, except for the fact that I should have added that the work injury at Smith & Wesson played the role to the extent that it aggravated a preexisting condition of the shoulder, consisting of degenerative changes.

(Dep. 34-35.) It is the final conclusion of the physician at the moment of testifying that is taken as the expert's medical opinion. Breslin v. American Airlines Corp., 22 Mass. Workers' Comp. Rep. 215, 217 n.1 (2008)(citations omitted).

[6] It appears the administrative judge was aware of this deficiency as he found, "Dr. Dasco would say the work injury is still a 'significant contributing cause.'" (Dec. 3, citing Dep. 39, lines 1-7; emphasis added). However, Dr. Dasco did not say anything to support that finding. The question posed was limited to the date of Dr. Dasco's evaluation of the employee. In addition, the doctor's response failed to address the relative impact the injury had on the resultant condition, even for that discrete time period.

> Q: Okay. So would you consider the injury at Smith & Wesson in 2002 to have been a significant contributing cause of the condition in the shoulder at the time of your evaluation?
>
> A: It was a significant contributing cause that aggravated the preexisting degenerative osteoarthritis.

(Dep. 38-39.)

A: There could be. It doesn't have to be. And there is aggravation and aggravation. I can assume, like you can assume, that the aggravation, or the ache, was of a mild degree, not enough to prevent him from doing his regular work. And this is what he told me. I mean, the history that the man gave me when I examined him was, yeah, that he did have pain in his shoulder, but he was able to work and was able to do his work because it wasn't severe.

Q: Would it be fair to state, then, that the work injury in February of 2002 is not a major - - a major cause of the employee's ongoing disability?

A: Is not a major, but not predominant.

Q: But not necessarily predominant.

A: You want to go –

Q: That's the elephant in the room.

A: - - to the neutral - -

Q: That's the elephant in the room. Thank you.

A: I don't want to insult the Court.

Q: No.

A: But this is a very, very incorrect English expression, and it should be - - it should be eliminated. And I know that because I've been dealing with this for years now.

Q: Yes, Doctor.

A: It comes back again and again. Yes. You want me to put it that way? Yes. It's acceptable. I accept it.

Q: Though it is not, maybe - -

A: Not necessarily - - not a major, but not necessarily predominant cause of. Right.

Q: Thank you.

(Dep. 35-37.)

Notwithstanding the employee's diligent efforts to elicit the requisite medical testimony from the expert, the necessary opinion was never provided. Later during the deposition, the following exchange occurred:

> Q: And does that indication in the record support [reviewing a medical note] your finding of causal relationship between the injury and the shoulder symptoms?
>
> A: And the preexisting – and the preexisting condition, I'm adding to your statement.
>
> Q: No, that's fine. I appreciate that.
>
> A: Yes, it does. It does correlate with the preexisting degenerative condition of the shoulder aggravated by the work injury.

(Dep. 42.) This, however, is not enough to carry the day for the employee. Even if we were to extend the most generous interpretation of the impartial physician's opinion, the medical evidence in the record provides no more than simple "but for" causation, failing to satisfy the heightened § 1(7A) causation standard. See Stewart's Case, 74 Mass. App. Ct. 919, 920 (2009)(no need for "magic words" but a combination injury case under § 1(7A) requires competent medical evidence providing some indication of "the relative degree to which compensable and noncompensable causes have brought about the employee's disability"). Dr. Dasco was unwilling to provide such an opinion. (Dep. 19, 28, 34-35, 36, 37, 38, 39, 42.) Where § 1(7A) has been raised and the sole medical evidence appearing in the record[7] rules out "a major" causation, the employee's claim for benefits fails.[8] The decision of the administrative judge is reversed.

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[7] At the hearing, there was extensive testimony about the actions and opinions of various physicians and nurses whose reports and records make up a large portion of the employee's personnel file. (Tr. 55-75.) Despite the nature of its contents, the employee's personnel file was admitted in evidence its entirety, without objection or a request that it be considered for limited purposes. (Employee Ex. 2.) We observe, however, that all the medical documents contained in the personnel file bear dates, and render opinions concerning the status of the employee's condition, for time periods prior to June 1, 2007. Id. As such, none of them provides competent evidence bearing on the issues of causal relationship and disability for the time period in issue in this case, June 1, 2007 and continuing. More importantly, the judge's decision makes no mention of the opinions contained in these documents and his findings

So ordered.

Catherine Watson Koziol
Administrative Law Judge

Bernard W. Fabricant
Administrative Law Judge

Mark D. Horan
Administrative Law Judge

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clearly show that in determining causal relationship, § 1(7A), and disability, the judge limited his review of the evidence and his findings to the opinions of the impartial medical examiner. (Dec. 3-4.)

[8] The employee never moved to admit additional medical evidence and the judge was not required to open the medical evidence sua sponte. Viveiros's Case, 53 Mass. App. Ct. 296, 299-300 (2001).