COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO:** 007568-01

James Silva	Employee
Massachusetts Bay Transportation Authority	Employer
Massachusetts Bay Transportation Authority	Self-Insurer

REVIEWING BOARD DECISION

(Judges McCarthy, Costigan and Horan)

APPEARANCES

James J. Carrigan, Esq., for the employee

Donald M. Culgin, Esq., for the self-insurer

McCARTHY, J. The self-insurer appeals the decision of an administrative judge awarding the employee § 34A permanent and total incapacity benefits, reasonable and related medical costs, attorney's fees and expenses. The self-insurer contends the employee failed to carry the heightened burden of proof necessary to satisfy the requirements of § 1(7A).[1] (Self-Ins. br. 1-2). After review, we recommit the case to the administrative judge for findings on the issue of § 1(7A).

At the time of the hearing judge's decision, James Silva, the employee, was a married, sixty-three year old father of adult children.[2] Mr. Silva has an eighth grade education and served in the National Guard from 1962 to 1969. He also drove a cab from 1963 to 1984 and a truck for

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[1] 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.

[2] The employee and his spouse were separated at the time of the decision. (Dec. 860.)

Somerville Lumber Company from 1965 to 1975. In 1984, Mr. Silva commenced employment with the MBTA as a bus driver. He had held this position continuously, except for a brief stint in 1993-1994 selling tokens.[3] (Dec. 860-861.)

On February 22, 2001, the employee was involved in a motor vehicle accident while at work. In order to avoid an oncoming car, the employee turned his bus and struck a pole. He injured his back and the bus was towed from the scene. Mr. Silva was diagnosed with herniated and bulging discs. He experienced pain in his left leg and ultimately began to experience pain in the right leg as well. The employee has refused recommended back surgery and steroid injections. He takes Vicodin for pain and other medications for depression, anxiety and asthma. (Dec. 861.)

The employee filed for § 34A permanent and total incapacity benefits. At conference, the judge awarded § 34 temporary total incapacity benefits. The parties filed cross appeals which brought the claim back to the same judge for a hearing de novo. On October 13, 2006, the employee was examined by Dr. David C. Morely, Jr., the § 11A examiner. The medical report of the § 11A impartial physician was admitted into evidence. (Dec. 860.) Dr. Morely diagnosed acute flexion/extension injury superimposed on pre-existing, multiple-level degenerative changes with multiple bulges and pre-existing spinal stenosis. The doctor causally related the diagnosis to the employee's industrial injury of February 2001. (Dec. 862.) Further, the doctor opined that the employee was totally and permanently disabled, from a medical standpoint, and was unable to do any lifting or bending. (Dec. 862.)

The administrative judge adopted the medical opinion of the impartial examiner and found the employee totally and permanently disabled as a result of the February 2001 incident. (Dec. 862.) Accordingly, the judge awarded ongoing § 34A benefits and ordered the self-insurer to pay for the employee's reasonable and necessary medical treatment. Additionally, the judge ordered the self-insurer to pay employee's counsel a fee and expenses. (Dec. 863.)

At hearing, among other issues raised, the self-insurer raised the issue of § 1(7A). (Dec. 859.) On appeal, the self-insurer claims that the employee did not sustain the heightened burden of proof required pursuant to § 1(7A). Here, contends the self-insurer, the medical evidence supports a

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[3] On several occasions, while employed with the MBTA, the employee missed extended periods of work due to health reasons. At least one such extended absence, due to a 1988 slip and fall injury, was work-related. As a result, the employee remained out of work from 1988 until 1993. (Dec. 860-861.)

finding of only an exacerbation of the employee's established pre-existing degenerative disc disease. "Moreover, Dr. Morley's statement that 'The patient's ongoing back condition is the major and predominant cause of his ongoing disability' rather than attributing ongoing disability to the subject industrial injury of February 22, 2001, reinforces the failure of this opinion to satisfy Section 1(7A)." (Self-ins. br. 1-2, quoting the § 11A medical report, and citing Healey v. Tewksbury Hosp., 21 Mass. Workers' Comp. Rep. 87 (2007)(emphasis in original .)[4]

When § 1(7A) is properly invoked and applicable to a case, an employee must present medical evidence sufficient to meet the burden of proof that the *injury* remains "a major" but not necessarily a predominant cause of disability. See G. L. c. 152, § 1(7A)(relevant portion set forth in footnote 1, supra); and Vieira v. D'Agostino Assocs., 19 Mass. Workers' Comp. Rep. 50 (2005). The only medical evidence presented in this case was the impartial examiner's report. (Dec. 860.) The physician diagnosed an "acute flexion/extension injury superimposed on preexisting multiple level disk degenerative changes with multiple bulges and preexisting spinal stenosis." The doctor further noted "[t]he patient did have significant back symptoms prior to the accident. However, he noted an exacerbation of his back problems causally related to the accident of 2/22/01." (Stat. Ex. 2.) Later in his report, the physician concluded that the employee was "permanently and totally disabled due to the back injury causally related to the 2/22/01 injury. The patient's ongoing back condition is the major and predominant cause of his ongoing disability." Id.

It is the medical examiner's use of the cryptic phrase "back condition" that causes concern. We are unable to clearly determine whether the medical expert opined that the employee's work-related back *injury* was "a major" cause of continuing disability. Further, as the judge's decision lacks any analysis or findings as to the § 1(7A) issue that was properly raised by the self-insurer at hearing,[5] The case must be recommitted. Vieira, supra at 53 ("We will continue to require that

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[4] The self-insurer improperly cites to the case as Healy v. Tewskbury Hosp., Vol. 21, No. 1, P. 287, 2007. The case, as published in Volume 21, is spelled Healey v. Tewksbury Hosp., and begins on page 87, not 287. Additionally, the self-insurer cites to the case of Diaz v. Professional Profiles, Inc., 21 Mass. Workers' Comp. Rep. 53 (2007) as Diez v. Professional Profiles, Inc., Vol. 21, No. 1, P. 53, 2007.

[5] The judge's failure to address the § 1(7A) issue also results in abdication of basic duties incumbent upon a judge pursuant to the Act. General Laws, Chapter 152, § 11B requires the administrative judge to "set forth the issues in controversy, [a] decision on each and a brief statement of the grounds for each such decision."

judges make explicit findings as to these § 1(7A) elements, when the section is appropriately raised by the insurer.")

For the foregoing reasons, we recommit the case to the administrative judge.

So ordered.

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William A. McCarthy
Administrative Law Judge

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Patricia A. Costigan
Administrative Law Judge

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Mark D. Horan
Administrative Law Judge

Filed: ***July 3, 2008***