COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **Board No.:** 026669-05

Jean P. Celko	**Employee**
PJ Overhead Door, Inc.	**Employer**
AIM Mutual Insurance Co.	**Insurer**

REVIEWING BOARD DECISION

(Judges McCarthy, Horan and Fabricant)

The case was heard by Administrative Judge Taub.

APPEARANCES

Teresa Brooks Benoit, Esq., for the employee at hearing
Matthew W. Gendreau, Esq., for the employee on brief
Robert J. Riccio, Esq., for the insurer

McCARTHY, J. The insurer appeals from the decision of an administrative judge awarding workers' compensation benefits for the employee's lower back injury. It seeks reversal, arguing that the medical evidence does not meet the employee's "a major" causation burden of proof as set forth in G. L. c. 152, § 1(7A).[1] We recommit the case for further findings.

The employee alleged injury to his back at work on August 15, 2005. The insurer paid the employee § 34 total incapacity benefits without prejudice from August 16,

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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.

2005 through October 4, 2005. Thereafter, the employee filed a claim seeking further compensation benefits. A § 10A conference ensued, and an order issued calling for the insurer to pay § 35 partial incapacity benefits from October 5, 2005 and continuing. Both parties appealed and the matter came on for hearing de novo under § 11.

Dr. David J. Cicerchia, an orthopedic surgeon, examined the employee pursuant to § 11A on July 6, 2006. The parties were permitted to submit additional medical evidence for the so-called "gap period," which ran from the date of alleged injury to the date of the § 11A examination.

Dr. Cicerchia diagnosed the employee with: 1) muscular lumbosacral strain; 2) L4-5 and L5-S1 disc degeneration; 3) left L4-5 stenosis, disc protrusion, and herniated nucleus pulposis (HNP); and 4) left L5-S1 stenosis. The doctor opined that the muscular lumbosacral strain, disc protrusion, HNP, and spinal stenosis are related to the work incident but that underlying spondylosis and disc degeneration pre-existed the incident. Dr. Cicerchia opined that as of the date of his examination, the employee was disabled from being a heavy manual laborer, but could do light duty or office-type work. (Dec. 5.) The insurer raised the defense of § 1(7A) "major" causation applicable to "combination" injuries. (Dec. 2.) See footnote 1, supra.

Based on the opinions of Dr. Cicerchia, and the credited testimony of the employee, the judge found that the employee sustained a personal injury arising out of and in the course of employment while assisting in the removal of a heavy garage door. (Dec. 6.) The judge analyzed the application of § 1(7A):

> I find the employee's symptoms and resulting incapacity to be causally related to the August 15, 2005 industrial injury. In so finding, I adopt the opinion of Dr. Cicerchia that much of the employee's diagnoses are related to the industrial injury despite there being some pre-existing condition. I find it to be clear from Dr. Cicerchia's characterization of the way in which the employee's current state involves such significant diagnoses-including a disc protrusion, a herniation, and spinal stenosis-that were directly caused by the injury, that the injury was and remains a major cause of the employee's overall condition.

(Dec. 7.)

The insurer argues that the finding of "a major" causation is not supported by the medical evidence. The insurer's argument is based on Dr. Cicerchia's opinion that the employee was suffering from four distinct diagnoses, some pre-existing, all of which contributed to his resulting disability and need for treatment. The insurer asserts that the doctor did not indicate the relative degrees to which the various work related and non-work-related diagnoses caused the employee's "resultant condition" and present incapacity. G. L. c. 152, § 1(7A).

Preliminary to the causation issue is the unanswered question of whether the non-work related spondylosis and disc degeneration combined in some way with the back injury found to have happened on August 15, 2005. Absent a finding of combination, the heightened standard set out in § 1(7A) does not apply.

The employee had a non-compensable pre-existing spondylosis and disc degeneration. (Stat. Ex. 1.) With regard to the employee's disc protrusion, herniation and spinal stenosis, the administrative judge weighed this evidence and adopted the opinion of Dr. Cicerchia that "much of the employee's diagnoses are related to the industrial injury despite there being some pre-existing condition." (Dec. 7.) Determinations of the weight to be given to the evidence are the exclusive function of the administrative judge. See Pilon's Case, 69 Mass. App. Ct. 167, 169 (2007). However, we agree with the insurer that the doctor's opinion is insufficient to carry the employee's burden of proving "major" causation under § 1(7A).

A medical opinion that establishes a work injury as a fifty percent contributor to a disability satisfies § 1(7A)'s a major cause standard as a matter of law. Durfee v. Baldwin Crane & Equipment, 20 Mass. Workers' Comp. Rep.163 (2006). The employee argues that more than fifty percent of his resultant disability was attributable to his industrial injury, given Dr. Cicerchia's opinion that three of his four separate diagnoses are causally related to the work-injury. The argument fails, for the simple reason that nothing in the evidence establishes the relative weight of the diagnoses. Even assuming a combination of the non-work conditions with the work injuries, it is speculative to assume that all of the diagnoses noted by the impartial medical examiner are of equal weight. Without knowing *something* about how much each diagnosis contributed to the employee's present incapacity, we are at a loss as to whether the evidence satisfies the § 1(7A) "major" causation

standard. See Dorsey v. Boston Globe, 20 Mass. Workers' Comp. Rep. 391 (2006)(affirming, with one modification, judge's handling of § 1(7A) issue in the context of multiple diagnoses).

Moreover, the judge's findings on the application of § 1(7A) "major" causation insufficiently address the second of the factors set out in Vieira v. D'Agostino Assocs., 19 Mass. Workers' Comp. Rep. 50 (2005): whether the non-compensable pre-existing condition *combined with* the subject work injury to cause or prolong disability or need for treatment. The employee's neurologist, Dr. Kereshi (whose report was introduced by way of the allowance of "gap" medical records), opined simply that the employee's "symptoms are directly related to the [industrial] accident in August 2005," even in light of the "severe disc degeneration at L5-S1 level and small disc herniation at L4-L5 level." (Employee Ex. 6.) Therefore, where a finding of "combination" is not compelled by all of the medical evidence introduced, a finding on the issue is required under Vieira, and the rule of Roney's Case, 316 Mass. 732, 739 (1944)(failure to make findings harmless where evidence supports only one result, which the judge reached) is inapplicable. If the judge on recommittal determines that there was no combination, § 1(7A) will not apply and the error as to his "a major" cause analysis will be rendered harmless. If the judge finds a § 1(7A) combination, the analysis must turn to "a major" causation.

With respect to the latter potential outcome on recommittal, we note that the judge specifically asked, in a question added to the standard impartial physician cover letter, for an opinion regarding § 1(7A) "a major" causation: whether the work injury was "a major but not necessarily predominant cause" of the employee's resulting disability and need for treatment. (Stat. Ex. 1.) Moreover, the insurer posed hypothetical questions to the impartial physician, which requested an opinion on the § 1(7A) causation standard. Dr. Cicerchia did not respond to these inquiries in any way. If necessary, Dr. Cicerchia should prepare an addendum to his report, in which he addresses the questions that have been posed to him. Section 11A cannot function properly, where information necessary to accurate adjudication of the medical issues is sought from - but not provided by - the impartial physician.

Accordingly, we recommit the case for further proceedings and findings consistent with this opinion.

So ordered.

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William A. McCarthy
Administrative Law Judge

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Mark D. Horan
Administrative Law Judge

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Bernard W. Fabricant
Administrative Law Judge

Filed: January 20, 2009