COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS — **BOARD NO. 024038-16**

Jeana M. Naticchioni	Employee
Maxim Healthcare Services, Inc.	Employer
Ace American Insurance Company	Insurer

REVIEWING BOARD DECISION

(Judges Fabiszewski and Koziol[1])

This case was heard by Administrative Judge Maher.

APPEARANCES

Stephen P. Brendemuehl, Esq., for the employee

Brian J. Riedel, Esq., for the insurer

FABISZEWSKI, J. The insurer appeals from a decision allowing the employee's claim for § 34A benefits as of September 1, 2019, along with medical benefits pursuant to §§ 13 and 30. The insurer raises three issues on appeal. We affirm the decision in all respects but address one of the insurer's arguments that warrants discussion.

On September 9, 2016, the employee was employed as a pediatric LPN, providing in-home care to children, when she injured her back carrying a patient down the stairs. (Dec. 5-6.) She initially treated conservatively with home care, ibuprofen, chiropractic care, and cortisone injections, which did not relieve her pain. (Dec. 6; Insurer br. 5.) On September 15, 2017, she underwent a microdiscectomy at L4-5, L5-S1, performed by Thomas Kesman, M.D. (Dec. 6; Insurer br. 6.) Subsequent physical therapy provided some relief, but her pain returned. Id. On July 23, 2018, she underwent a multilevel fusion, performed by Mark Lapp, M.D. (Dec. 6.) After this surgery, she continued to experience unpredictable stabbing and shooting pain, including spasms in her left leg which sometimes wake her from sleep. Id.

[1] Administrative Law Judge Carol Calliotte was assigned to the original panel but has since retired from the department.

The insurer voluntarily commenced payment of § 34 benefits.[2] The employee subsequently filed a claim for § 34A permanent and total incapacity benefits and, pursuant to a § 10A conference order, was awarded such benefits from September 1, 2019, to date and continuing. (Dec. 3.) The insurer filed a timely appeal. Id. Pursuant to § 11A(2), the employee was examined by David Morely, M.D., on January 14, 2020.[3] On March 10, 2022, a hearing was held. Id. On May 19, 2022, the administrative judge issued a decision allowing the employee's claim for permanent and total incapacity benefits pursuant to § 34A as of September 1, 2019, along with medical benefits pursuant to §§ 13 and 30. (Dec. 14.) In the decision, the administrative judge found that the insurer "did not prove the necessary predicates to support the Section § 1(7A) defense failing to show a combination injury." (Dec. 13.) The insurer filed a timely appeal to the Reviewing Board. Rizzo at 160.

On appeal, the insurer asserts that the administrative judge's decision was arbitrary, capricious or contrary to law in determining that the insurer failed to prove the necessary predicates to support a defense under § 1(7A).[4] (Ins. br. 1.) The insurer argues that it satisfied its burden of production by submitting into evidence an independent medical examination report by Kenneth Polivy, M.D. (Ins. br. 19.) We disagree and affirm the administrative judge's decision.

General Laws, c. 152, § 1(7A) is an affirmative defense which must be raised by the insurer. Seney v. Commonwealth of Massachusetts, 32 Mass. Workers' Comp. Rep.

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[2] Rizzo v. M.B.T.A., 16 Mass. Workers' Comp. Rep. 160, 161 n.3 (2002)(reviewing board may take judicial notice of the board file.)

[3] On page 1 of the hearing decision, the impartial examiner is incorrectly listed as Jerome Katz, M.D. However, the administrative judge correctly states in the decision itself that the impartial examiner is David Morely, M.D., and discusses Dr. Morely's opinion. (Dec. pp. 1, 9.)

[4] G.L. c. 152, section 1(7A) states, in relevant part:

> If a compensable injury or disease combines with a pre-existing condition not compensable under this chapter, to cause or prolong disability or a need for treatment, the resultant condition is compensable only to the extent such compensable injury or disease remains a major but not necessarily predominant cause of disability or need for treatment.

65, 72 (2018). To trigger the heightened causation standard under § 1(7A), the insurer must first carry the burden of production, which includes providing evidence that a non-compensable pre-existing condition has combined with an industrial injury. Bell v. Electronic Data Systems, 33 Mass. Workers' Comp. Rep. 221, 225 (2019)(citing MacDonald's Case, 73 Mass. App. Ct. 657, 660 [2008].) If the insurer meets its burden of production, then the employee has the burden of proving that either the pre-existing injury was compensable or that the industrial injury did not combine with a pre-existing non-compensable condition. MacDonald at 660. However, if the insurer fails to meet the threshold burden of production, then the heightened "a major cause" standard does not apply. Id.

The insurer initially sought the application of § 1(7A) relating to the employee's alleged pre-existing L4-L5 and L5-S1 disc degeneration. (Ex. 1.) At hearing, the employee testified that she had been diagnosed with fibromyalgia in or about 2021, although she was unsure of the date. (Tr. 91.) Following the conclusion of the hearing, the insurer submitted a medical opinion from Dr. Polivy in support of its § 1(7A) defense. (Ex. 8; Ins. br. 18, 19.)

In his report dated April 6, 2022, Dr. Polivy opined that the employee "had a pre-existing non-work related condition [*sic*] which included lumbar degenerative spondylitis, facet arthropathy, and fibromyalgia" and that these conditions "combined with the work injury to cause and prolong her disability." (Ex. 8.) The problem with the insurer's reliance on Dr. Polivy's opinion to meet its threshold burden of production is that it includes three alleged pre-existing conditions – spondylitis, facet arthropathy and fibromyalgia - and concludes that these conditions combined with the employee's work injury to cause and prolong her disability. (Ex. 8.) However, the administrative judge disagreed that two of these conditions – the spondylitis and facet arthropathy – combined with the employee's industrial injury. Instead, he adopted the opinion of George P. Whitelaw, M.D., (Ex. 7), that the employee's disability was directly causally related to her industrial accident. (Dec. 13.) He further adopted Dr. Whitelaw's opinion that although the employee did have some slight pre-existing degenerative arthritis in her

back, "this was of no consequence and not causing her any difficulties" prior to her industrial accident. (Dec. 11, 13.) Thus, the judge did not agree with, nor did he adopt, the opinion of Dr. Polivy regarding the existence of a combination injury involving the employee's pre-existing degenerative changes and her work injury.[5] Although the judge did not reference the third condition – fibromyalgia – in his discussion of the insurer's failure to establish the necessary § 1(7A) predicates, there is no error. The earliest record of fibromyalgia, upon which Dr. Polivy's opinion is based, was from July of 2019, almost 3 years after the injury. See Simoes v. Town of Braintree School Dept., 10 Mass. Workers' Comp. Rep. 772, 774 (1996)(Section 1[7A] analysis does not apply to situation where a work injury "is followed by a disease process unrelated to employment"). By failing to produce evidence that the employee's fibromyalgia existed prior to her 2016 industrial accident, the insurer clearly did not satisfy the necessary predicates to support its § 1(7A) defense.[6] Further, we observe that even if the employee's fibromyalgia were pre-existing, the administrative judge could not properly adopt Dr. Polivy's opinion regarding the alleged combination injury because his opinion is expressed collectively with respect to two other alleged pre-existing conditions that the judge rejected. Thus, there was no error in the administrative judge finding that the insurer did not meet its

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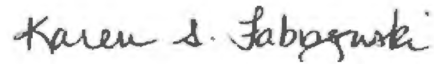
[5] An administrative judge is not required to adopt a medical opinion in evidence that supports an insurer's assertion of a combination injury. Kelly v. Boston University, 26 Mass. Workers' Comp. Rep. 27, 28 (2012). Additionally, Dr. Polivy also based his opinion that the work injury was only a minor cause of ongoing disability and need for treatment, in part, on the surveillance video of the employee "being able to paint doors and windows outside over a period of a day." (Ex. 8.) However, the administrative judge differed in his assessment of the surveillance video, finding that it appeared to confirm the employee's testimony that she sat on a stool during part of the painting or while taking a break and that the portion of the fence painted by the employee over seven hours was not substantial. (Dec. 12.)

[6] In its brief, the insurer also referenced a treatment note by Dr. Lapp dated July 19, 2019, who noted the employee had developed "recent" issues with her upper extremities, theorizing that the employee may be suffering from fibromyalgia and recommended that she undergo a rheumatology consultation. (Ins. br. 18; Ex. 8.) As this note is dated almost three years **after** the employee's industrial accident, it is not helpful in establishing the insurer's burden of production that the employee suffered from a pre-existing condition. Dr. Polivy's report shows that he expressly relies on Dr. Lapp's July 2019 note in rendering his opinion.

burden of production. Accordingly, we affirm the decision of the administrative judge. The insurer is ordered to pay employee's counsel an attorney's fee pursuant to § 13A(6), in the amount of $1,866.87, plus necessary expenses.

So ordered.



Karen S. Fabiszewski
Administrative Law Judge

Catherine Watson Koziol
Administrative Law Judge

Filed: ***December 22, 2023***