**COMMONWEALTH OF MASSACHUSETTS**

**DEPARTMENT OF INDUSTRIAL ACCIDENTS** **BOARD NO. 011393-99**

John J. Kryger Employee
Victory Distribution Employer
Worcester Insurance Company Insurer

**REVIEWING BOARD DECISION**
(Judges McCarthy, Wilson and Maze-Rothstein)

**APPEARANCES**
John F. McGrail, Esq., for the employee
Diane Cole Lane, Esq., for the insurer

**MCCARTHY, J.** The insurer appeals from a decision in which an administrative judge awarded compensation benefits to an employee on his claim for an industrially based aggravation of his pre-existing asymptomatic aortic stenosis. (Dec. 6.) Because we agree with the insurer that the employee failed to prove that his industrial accident was a major cause of the resultant disability and need for treatment under G. L. c. 152, § 1(7A), we reverse the decision.[1]

Mr. Kryger, sixty-two years old at the time of the hearing, had been a meat cutter and meat manager for super markets for forty years. His job with the employer involved working approximately fifty hours per week, and included lifting, carrying and cutting

[1] General Laws c. 152, § 1(7A), as amended by St. 1991, c. 398 §§ 13 to 15, 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.

large cuts of meat. Mr. Kryger had a history of heart murmur and aortic stenosis. (Dec. 5.)

On March 19, 1999, Mr. Kryger loaded eight thirty to forty pound boxes of corned beef into his car to transport them from the employer's store in Hudson to the Uxbridge store. When he arrived in Uxbridge, the employee parked at the bottom of an incline, and loaded the meat, which weighed about 320 pounds, onto a cart. He then pushed the cart up the incline and into the store. Once in the store, the employee fainted and fell to the ground. (Dec. 6.) When he revived, he finished the delivery and went home. He was then taken to the Memorial Hospital for three days of observations and tests, which culminated in heart surgery on April 22, 1999. Mr. Kryger recovered and was cleared to return to work on August 5, 1999. (Dec. 6.)

The employee filed a claim for compensation benefits, which the insurer resisted. The judge awarded § 34 benefits as a result of the § 10A conference but stayed payment pending the insurer's appeal to a full evidentiary hearing.[2] (Dec. 2-3.) The parties opted out of the impartial physician examination, pursuant to 452 Code Mass. Regs. §§ 1.10(5) and (7), and submitted medical evidence of their own physicians.[3] (Dec. 4.) The insurer raised the issue of the § 1(7A) "a major" causation standard for injuries that are combinations of pre-existing non-compensable conditions and industrial accidents. (Dec. 3.) See n. 1, supra.

The employee introduced records from the University of Massachusetts Medical Center, (Employee Exhibit 5), and reports and records of his treating physicians, Edward Folland, M.D., and Andrew Miller, M.D. (Employee Exhibits 6 and 7.) The insurer introduced a report of Dr. Lawrence Baker. (Insurer Exhibit 2.)

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[2] The administrative judge does not identify the source of his authority to "stay payment" of the benefits ordered, nor does he give his reasons for doing it.

[3] Curiously, the decision lists as a Statutory Exhibit an Impartial Report of Dr. John Ritter. (Dec. 2.) No such report is to be found in the record or in the board file and, in fact, "[t]he parties agreed that an impartial physician is not required pursuant to Department regulation 452 C.M.R. § 1.10 (5) and (7)." (Dec. 4.)

The judge adopted the opinions of Dr. Folland as the basis for his finding that the employee suffered from a pre-existing condition of asymptomatic aortic stenosis; that on March 19, 1999 the employee passed out after pushing a very heavy cart up an incline at work; that the event at work aggravated the employee's underlying, pre-existing condition of aortic stenosis; that the employee required aortic valve replacement surgery; and that the employee was totally disabled from March 19, 1999 to August 1999. The judge rejected the opinions of Dr. Baker. (Dec. 6-8.) The judge concluded that the accident at work was a major but not necessarily predominant cause of the disability and need for treatment in that the accident aggravated an asymptomatic pre-existing condition, (Dec. 7), and awarded the claimed benefits. (Dec. 9.)

One issue raised by the insurer on appeal is dispositive. The insurer contends that the adopted medical opinion of Dr. Folland did not support the judge's conclusion that the industrial accident "remains a major but not necessarily predominant cause of disability or need for treatment" under the properly raised provision of § 1(7A). We agree. Dr. Folland opined merely that the event at work aggravated the employee's underlying, pre-existing condition of aortic stenosis. The doctor did not render an opinion as to the degree to which the event contributed to the employee's medical disability and need for the aortic valve replacement surgery.[4] Under these circumstances,

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[4] Doctor Folland's opinion on causal relationship is found in his response to two questions contained in a so called "Physician's Statement" prepared by employee counsel (Employee brief 1). This document is Employee's Exhibit 6.

Following are the two pertinent questions together with Dr. Folland's answers.

> 11. Was the accident as related by the employee:
> A. the cause of his/her injury? or:
> B. an aggravation of an underlying or pre-existing condition?

Doctor Folland circled both A. and B. and wrote that, "Both apply."

> 12. If the answer to question 11B is yes, then is the incident major but not necessarily predominant cause of any impairment or medical disability?

The doctor responded that, "The accident aggravated a pre-existing condition."

where the parties opted out of the § 11A medical examination and introduced their own expert medical evidence, there was no question of inadequacy of the medical report that might have arisen under § 11A. Doctor Folland's report – introduced by the employee – simply did not satisfy his burden of proving that the work incident remained "a major cause" of the resultant disability and need for treatment in this § 1(7A) combination injury. The judge's reliance on the opinion as support for that conclusion was erroneous.

The employee did introduce the medical report and records of another treating physician, Dr. Miller. The judge simply marked Dr. Miller's records and curriculum vitae as Employee Exhibit # 7 and never mentioned Dr. Miller or his opinion anywhere else in the decision.

Accordingly, as the adopted medical evidence fails to meet the heightened causal relationship standard established by § 1(7A), see Patterson v. Liberty Mut. Ins. Co., 48 Mass. App. Ct. 586, 598 (2000), we reverse the decision.

So ordered.

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William A. McCarthy
Administrative Law Judge

Filed: **March 3, 2003**

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Sara Holmes Wilson
Administrative Law Judge

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Susan Maze-Rothstein
Administrative Law Judge

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This question does not accurately track the language of § 1 (7A) and the answer will not support a finding that the work incident remains a major but not necessarily predominant cause of disability or need for treatment.