COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS

BOARD NO.: 003089-07

Joseph D. Brooks	**Employee**
Hoboken Floors	**Employer**
Crum & Forster Indemnity Co.	**Insurer**

REVIEWING BOARD DECISION

(Judges Koziol, Costigan and Fabricant)

The case was heard by Administrative Judge Brendemuehl.

APPEARANCES

Bernard J. Mulholland, Esq., for the employee
James P. McKenna, Esq., for the insurer at hearing and on appeal
David M. O'Connor, Esq., for the insurer on brief

KOZIOL, J. The insurer appeals from an administrative judge's decision ordering it to pay the employee § 34 total incapacity benefits from January 16, 2007 to date and continuing, as a result of post traumatic brachial plexopathy affecting the right C5 and C6 nerve root. (Dec. 8-9.) The insurer argues that recommittal is required because the judge failed to make any findings of fact showing that she performed the analysis required by § 1(7A). Vieira v. D'Agostino Assocs., 19 Mass. Workers' Comp. Rep. 50, 52-53 (2005). We affirm the decision.

On January 15, 2007, the employee was working as a helper/laborer for the employer, delivering approximately 150 to 160, one hundred pound boxes of wood flooring to a residential customer. (Dec. 6.) The employee and one coworker carried these boxes into the home by placing each box on their right shoulders, easing the box to the floor once they were inside the house. (Dec. 6.) While setting down one of these boxes, the employee felt his right shoulder "give" and experienced immediate pain. (Dec. 6.) The employee sought medical treatment the following day and has not returned to work. (Dec. 7.) He continues to experience shaking, twitching, and pain in the front of his right shoulder, has difficulty sleeping, and needs assistance dressing. (Dec. 7.)

The sole medical evidence was the report and deposition testimony of the § 11A impartial medical examiner, Dr. John McConville. The judge expressly accepted and adopted Dr. McConville's opinion and made the following findings regarding the issue of causation:

> I find that the employee suffers from post traumatic brachial plexopathy effecting [sic] the right C5 and C6 nerve root with marked residual supraspinatus and infraspinatus muscle wasting of both shoulders. He had no history of previous problems or complaints with his right shoulder. He had pre-existing arthritis in his neck. The employee's work incident, is "a major" but not necessarily predominant cause of his current symptoms.

(Dec. 8.)

The judge listed § 1(7A)[1] as a defense, but she made no findings as to whether the defense was properly raised, nor did she engage in the analysis mandated by Vieira, supra. ("We will continue to require that judges make explicit findings as to these § 1[7A] elements, where the section is appropriately raised by the insurer.")[2] Although "the judge's failure to address § 1(7A) would ordinarily require recommittal," that action is not necessary here because "the exclusive prima facie medical testimony of the impartial physician satisfies the applicable causation standard under § 1(7A), 'a major but not necessarily predominant cause'. . . ." King v. APA Transport, 22 Mass. Workers' Comp. Rep. 179, 181 (2008). In his report, Dr. McConville opined that the work

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[1] General Laws c. 152, § 1(7A), states, 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] Findings must be made as to whether the employee has, "1) 'a pre-existing condition, which resulted from an injury or disease not compensable under this chapter,' which 2) 'combines with' the . . . work related injury ('a compensable injury or disease') 'to cause or prolong disability or a need for treatment:' and, if so, 3) whether that 'compensable injury or disease remains a major but not necessarily predominant cause of disability or need for treatment.' " Vieira, supra, quoting from § 1(7A).

incident was a major cause of the employee's present complaints. (Stat. Ex. A.) At his deposition, Dr. McConville unequivocally endorsed the opinions set forth in his report, even after the insurer brought to his attention the pre-existing arthritis in the employee's neck. (Dep. 27, 30-31.) Assuming, without deciding, that § 1(7A) was properly raised in this case,[3] "the § 1(7A) standard of showing the work injury to be a 'major cause' of disability was satisfied as a matter of law." King, supra at 181. Accordingly, the decision is affirmed.

Pursuant to § 13A(6), the insurer is directed to pay employee's counsel a fee of $1,495.34.

So ordered.

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Catherine Watson Koziol
Administrative Law Judge

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Patricia A. Costigan
Administrative Law Judge

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Bernard W. Fabricant
Administrative Law Judge

Filed: ***June 23, 2009***

[3] Arguably, the insurer may not have met its burden of production on the issue of § 1(7A). The only question asked by the insurer on the issue of combination was the following:

> Q: Could Mr. Brooks' ongoing problems be from that arthritis?
>
> A: Yes.

(Dep. 33.)