COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 037366-05**

Juan Alicea	Employee
John B. Cruz Construction	Employer
American Home Insurance Company	Insurer

REVIEWING BOARD DECISION
(Judges Fabricant, Horan and Levine)

The case was heard by Administrative Judge McDonald.

APPEARANCES
John J. Morrissey, Esq., for the employee
Diane Cole Laine, Esq., for the insurer
Erin M. Mullen, Esq., for the insurer on brief

FABRICANT, J. The insurer appeals from a decision awarding the employee §§ 34 and 34A benefits for both physical and emotional injuries, related to events on November 5 and 14, 2005. We agree with the insurer that the judge's findings on the claimed physical injury cannot stand due to the absence of support in the medical evidence. We affirm the findings of an emotional injury and the attendant award of ongoing total incapacity benefits. We recommit the case for the judge to reassess his award of an enhanced attorney's fee.

The employee's alleged November 5, 2005 physical injury was a myocardial infarction caused by moderately strenuous activity while climbing ladders to repair a skylight. (Dec. 14.) According to his treating physician, Dr. Eric Ewald, the employee suffered from pre-existing quiescent hyperlipidemia and "markedly elevated cholesterol," which caused the build-up of plaque, otherwise known as coronary artery disease. Smoking was also a risk factor in the employee's clinical picture. The work activity ruptured the plaque, thereby causing the employee's heart attack. (Dec. 20.) The total disability related to the employee's heart attack was limited to no more than twelve weeks. (Dec. 28.)

The insurer raised the application of § 1(7A) "a major" causation,[1] due to the combination injury issue presented here. We note at the outset that smoking, by itself, is not a pre-existing condition due to a disease or injury within the meaning of § 1(7A). Cf. Fairfield v. Communities United, 14 Mass. Workers' Comp. Rep. 79, 82 (2000)(no medical evidence employee's morbid obesity is a "disease"); Errichetto v. Southeast Pipeline Contrs., 11 Mass. Workers' Comp. Rep. 88, 91 (1997)(age not considered a pre-existing condition due to injury or disease). However, the plaque build-up is a § 1(7A) pre-existing condition, which resulted from the hyperlipidemia and coronary artery disease. The plaque rupture, triggered by work activity, was the proximate cause of the heart attack. Thus, the § 1(7A) "combination" of non-work and work causes was established.

Nonetheless, the judge found that § 1(7A) did not apply:

> According to Dr. Ewald, the employee had risk factors for the occurrence of a myocardial infarction (hyperlipidemia, smoking) that predisposed the employee to a myocardial infarction. Neither the presence of a preexisting medical condition, nor any predisposition created by that condition rise to the necessary status of "combining with" that is requisite to establishing a defense under § 1(7A). Dr. Ewald was clear that it was the physical activity that triggered the plaque disruption that caused the myocardial infarction.

(Dec. 21.)

We agree with the insurer that the above analysis is erroneous. The judge's fact-finding authority does not extend to characterizing pre-existing plaque build-up, caused by markedly high cholesterol, as *not combining* with the work-related activity triggering the plaque to rupture and cause the heart attack. The judge unambiguously

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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.

adopted Dr. Ewald's opinion that the work activity aggravated/exacerbated the pre-existing condition, "converting [the employee's] previous unstable angina to an acute ST elevation myocardial infarction." (Dec 20, quoting Ex. 7; internal quotations omitted.) Because this evidence establishes a combination injury as a matter of law, see Castillo v. Cavicchio Greenhouses, Inc., 66 Mass. App. Ct. 218 (2006), we reverse the judge's finding. Further, because the record lacks a medical opinion to satisfy the employee's burden of proving "a major" cause under § 1(7A), the employee's claim for a compensable work-related myocardial infarction fails. MacDonald's Case, 73 Mass. App. Ct. 657, 659 (2009).

The employee's emotional injury claim stands on a different foundation, as it is not based solely upon the heart attack, but also upon an independent work-related cause. On November 14, 2005, the employer's personnel administrator, without the authority to do so, told the employee he was fired.[2] The employee believed what he was told, and suffered a severe emotional reaction to the news. (Dec. 16-18.) See Robinson's Case, 416 Mass. 454, 460 (1993)(work event as foundation for emotional injury claim need not be unusually or objectively traumatic). The judge implicitly and correctly found the administrator's action did not fall within the bona fide personnel action exemption to emotional injury claims under § 1(7A).[3] Both the heart attack and the "termination" were supported by Dr. Daniel Shaw's medical opinion addressing the requisite "predominant contributing cause" standard: "[T]he employee's heart attack and termination *each* constituted a predominant factor in the

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[2] The termination did not, in fact, occur. (Dec. 18.)

[3] General Laws c. 152, § 1(7A), provides, in pertinent part:

> Personal injuries shall include mental or emotional disabilities only where the predominant contributing cause of such disability is an event or series of events occurring within any employment. . . . No mental or emotional disability arising principally out of a bona fide, personnel action including a transfer, promotion, demotion, or termination except such action which is the intentional infliction of emotional harm shall be deemed to be a personal injury within the meaning of this chapter.

employee's depression, anxiety and disability ([Shaw Dep.] at 17, 21, 29, 23, 33, 34, 64, 121, 124, 129)." (Dec. 24; emphasis added.) It is the emotional disability which the judge, based on Dr. Shaw's opinion, found to be the reason for the employee's ongoing permanent and total incapacity. (Dec. 28.)

The insurer does not challenge the legal sufficiency of Dr. Shaw's medical opinion in its brief. Instead, the insurer merely asserts that "both the myocardial infarction and the perceived termination are identified by [the judge] as being independent predominant causes of the Employee's disability. (Dec. 28)." (Ins. br. 8.) This one sentence does not rise to the level of appellate argument. See Mancuso v. MIIA, 453 Mass. 116, 128 n. 28 (2009); Adoption of Kimberly, 414 Mass. 526, 537-538 (1993). Although the insurer did attack the sufficiency of Dr. Shaw's opinion at oral argument, this dilatory attempt does not accord the employee fair notice of this challenge to the award of benefits. See 452 Code Mass. Regs. § 1.15(4)(a)(1) (brief must contain statement of issues presented for review). Indeed, at the outset of his argument, employee's counsel duly objected to the insurer's attempt to expand its argument. We decline to exercise our discretion to entertain the argument. See 452 Code. Mass. Regs. § 1.15(4)(a)(3)("The Reviewing Board need not decide questions or issues not argued in the brief"). Thus, the judge's finding of an emotional injury on November 14, 2005, supported by Dr. Shaw's predominant contributing cause opinion, stands.

Finally, the insurer challenges the judge's award of an enhanced attorney's fee under § 13A(5). We note that while the insurer's appeal has successfully challenged a part of the award, we do not know the extent to which the judge based the enhanced fee award on the employee's presentation of the now-reversed physical injury portion of the case. Therefore, we recommit the case for the judge to revisit the § 13A(5) fee issue.

Accordingly, we vacate the award of all benefits for the myocardial infarction, including weekly incapacity benefits from November 6, 2005 until the November 14, 2005 "termination." We affirm the award of ongoing weekly benefits under §§ 34

and 34A attributable to the employee's November 14, 2005 emotional injury. We summarily affirm the decision as to the insurer's argument that the employee's claim was barred by inadequate notice. We order the insurer to pay counsel for the employee a § 13A(6) attorney's fee in the amount of $ 1,517.62, and recommit the case for further findings on the § 13A(5) attorney's fee.

So ordered.

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Bernard W. Fabricant
Administrative Law Judge

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Mark D. Horan
Administrative Law Judge

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Frederick E. Levine
Administrative Law Judge

Filed: **January 24, 2012**