COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 034611-12**

Kelly Anne Martinson	Employee
Atlantic Hospitality Group, LLC	Employer
Massachusetts Retail Merchants SIG	Insurer

REVIEWING BOARD DECISION
(Judges Horan, Fabricant and Koziol)

The case was heard by Administrative Judge Vieira.

APPEARANCES
Laurie B. McGhee, Esq., for the employee at hearing
Joseph S. Provanzano, Esq., for the employee at hearing and on appeal
Kenneth A. Swartz, Esq., for the employee on appeal
Thomas P. O'Reilly, Esq., for the insurer at hearing
Paul M. Moretti, Esq., for the insurer on appeal

HORAN, J. The employee appeals from a decision denying her claim for §§ 13, 30, 34 and 35 benefits.[1] Because the employee's claims of error prove harmless, we affirm the decision.

At the outset, we note the employee concedes that her alleged work-related incidents combined with her pre-existing, non-industrial, medical condition to cause her injury.[2] As provided by the fourth sentence of § 1(7A), the aggravation or exacerbation of a pre-existing, non-industrial, medical condition causative of a disability, or a need for treatment, is "compensable only to the extent such

[1] The insurer defended the employee's claims, inter alia, on the grounds of liability, causal relationship, including § 1(7A)(combination injury), and extent of disability and incapacity. (Dec. 4.)

[2] "The Appellant admittedly has a preexisting condition. The Appellees raised Massachusetts General Laws , Chapter 152, Section 1(7A) as an affirmative defense. Thus, the Appellant must meet the 'heightened standard' of proving the compensable injury is a major cause of the disability and/or need for treatment." (Employee br. 21.) (See also Oral Argument Transcript, pp. 5-8, 13.) Oral argument was held on February 17, 2016.

compensable injury [the work component] . . . remains a major . . . cause of [the employee's] disability or need for treatment." See MacDonald's Case, 73 Mass. App. Ct. 657, 659 (2009). Because the employee carries the burden of proving her claim, the absence of medical evidence sufficient to support a finding of "a major" cause is fatal to it. Castillo v. Cavicchio Greenhouses, Inc., 66 Mass. App. Ct. 218, 221 (2006).

The employee worked at the Sea Glass Restaurant as a self-described "hands on manager" who would "bus tables, carry trays, bring food out and assist the wait staff if it was busy." (Dec. 7.) On December 16, 2012, the employee was assigned to work the buffet attendant to a concert performance on the employer's premises.[3] (Dec. 7-8.) The employee transported food and stacks of plates to the buffet table throughout the day, and also cleaned and set up tables for the next crowd. At the end of the day she experienced pain in her low back and legs, which she felt was different than "what she had been experiencing for the previous ten years." (Dec. 8.) The next two days the employee was not scheduled to work. She rested and then returned to work, although in pain. (Dec. 9.) On the advice of her doctor, she left work on February 16, 2013. (Dec. 11.) After declining an offer of light duty work with the employer, the employee commenced employment elsewhere on June 20, 2013. (Dec. 13.)

On January 28, 2014, the employee was examined by Dr. Kenneth J. Glazier, the impartial medical examiner. G. L. c. 152, § 11A. Dr. Glazier did not causally relate the employee's symptoms to any specific injury at work. (Ex. 1; Dec. 19.)

At the May 15, 2014 hearing, the employee moved to allow for the submission of additional medical evidence. The judge denied the motion, without prejudice, as the employee "stated she would hold off on her request . . . until she had an opportunity to depose [Dr. Glazier]." (Dec. 5; Tr. 15.) The judge informed

[3] On that day the employee worked at the Blue Ocean Music Hall, on the premises of the Sea Glass Restaurant. Both entities are owned by the insured. (Dec. 7.)

employee's counsel that, "if you are going to renew that motion, I would suggest that you do it right after the deposition." (Tr. 15.)

At the hearing, the employee also moved to join February 16, 2013, her last day of work, as a second date of injury. Over the insurer's objection, the judge allowed the motion. (Tr. 5-10.) Because the employee's new "cumulative injury" claim, resulting in the new February 16, 2013 date of injury, was made at the hearing, Dr. Glazier could not have addressed it previously. Accordingly, the employee was free to question the doctor about it at his deposition. The judge also permitted the parties to introduce "gap" medical evidence addressing the period prior to Dr. Glazier's examination. (Tr. 15-16.) Both parties submitted medical records and reports for the gap period. (Ex. 27-28.)

Dr. Glazier was deposed on June 25, 2014. He did not alter his opinion that there was no causal relationship between the employee's December 16, 2012 work activity and her disability. Although the doctor was not asked specifically about the February 16, 2013 "cumulative" injury date, he agreed that, "if there is any injury involved, this would be a so-called combination injury, whether it's an aggravation or exacerbation." (Dep. 44.) When asked whether the employee's "work activities were a major cause of any disability or need for treatment," the doctor testified, "[i]t would not be a major cause." Id.

The employee did not re-file her motion to submit additional medical evidence until July 14, 2014, the day the evidence closed. The judge denied the motion. (Dec. 5.)

Applying the § 1(7A) standard of proof, the judge found that only two physicians, Dr. Glazier and Dr. Michael DiTullio, expressed opinions addressing that key issue.[4] Neither doctor found the employee's work was a major cause of her resulting disability or need for treatment. (Dec. 22-23.) The judge adopted

[4] Dr. DiTullio's July 10, 2013 opinion was submitted by the insurer to address the gap period prior to Dr. Glazier's January 28, 2014 impartial examination. (Ex. 27.)

their opinions, and denied and dismissed the employee's claim. (Dec. 18-20, 22-23.)

On appeal, the employee advances several claims of error. First, the employee argues the judge erred by relying on Dr. DiTullio's gap medical opinion to address an issue, namely causation, *outside* the gap period. There was no error, as Dr. DiTullio's opinion addressed causal relationship *within* the gap period. The judge placed no limit on the use of the gap medicals, (Tr. 15-16), as the judge did in Villard v. Rogers Insulation Specialist, 27 Mass. Workers' Comp. Rep. 1, 3 (2013)(and cases cited). Therefore, both parties were free to admit medical evidence addressing whether the employee's incidents at work were a major cause of her alleged resultant condition, disability, or need for treatment.[5] Accordingly, there was no due process violation.

Next, the employee avers the judge erred by mischaracterizing Dr. Glazier's opinion to find that § 1(7A) applied to her claim. The employee's concession at oral argument, and elsewhere in her brief, that this *is* a combination injury case moots this argument. See footnote 2, supra. In any event, the judge did not mischaracterize the doctor's opinion, which supports the conclusion that the employee suffered a "combination" injury. See Castillo, supra.

The employee also argues the judge failed to entertain "the appellant's theory of a gradually developing and/or cumulative injury. . . ." (Employee br. 13.) It is true the judge did not specifically address the "cumulative injury" theory, but it is also true that, even if she had done so, there was no medical evidence, based on the employee's testimony, that her work up to and including February 16, 2013, was ever a major cause of her disability or need for treatment. Accordingly, the error is harmless. Had there been an appropriate offer of proof made by the employee at hearing (containing an affirmative medical opinion of

[5] The employee could have used gap medicals to prove entitlement to benefits for a closed period of time prior to the impartial medical examination. (Oral Argument Tr. 20-21.)

major causation), in support of her motion, a different result might obtain. But the employee's motion was unaccompanied by an offer of proof. (Oral Argument Tr. 26.) Moreover, at oral argument, the employee could not identify *any* medical evidence that, if allowed to be considered, would have carried her § 1(7A) burden of proof. (Oral Argument Tr. 10-14.)

The employee's final argument, that the judge erred by denying her renewed motion to open the medical evidence, fails for the same reason as discussed above: the employee cannot identify any medical evidence of major causation which, if considered at hearing, would have enabled her to prevail. See Castillo, supra.

The decision is affirmed.

So ordered.

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Mark D. Horan
Administrative Law Judge

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Bernard W. Fabricant
Administrative Law Judge

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Catherine Watson Koziol
Administrative Law Judge

Filed: **March 8, 2016**