COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 002495-02**

Manuel Ribeiro	Employee
Sealy Corporation	Employer
American Casualty Insurance Co.	Insurer

REVIEWING BOARD DECISION
(Judges Horan, Carroll and Costigan)

APPEARANCES
James S. Aven, Esq., for the employee
Donald M. Culgin, Esq., for the insurer at hearing and on brief
Richard W. Jensen, Esq., for the insurer on brief

HORAN, J. Both parties appeal the decision of an administrative judge awarding the employee a closed period of § 34 benefits and ongoing § 35 benefits. We reverse the decision.

Manuel Ribeiro was a twenty-four year old parent of one minor child at the time of the hearing decision. He was born in Cape Verde and was pursuing a G.E.D. at Rockland High School. In 2000, he began working for the employer as a mattress builder. His work activities included repetitive lifting and bending during ten to twelve hour shifts. (Dec. 3-4.)

On January 7, 2002, Mr. Ribeiro experienced pain in his low back and legs when he bent down to flip over a mattress at work. He initially treated at the Good Samaritan Medical Center in Brockton. When his symptoms worsened, he began treating with John Marshall, a chiropractor. Mr. Ribeiro later came under the care of Dr. Leslie Stern, a neurosurgeon. (Dec. 4-5.)

A February 21, 2002 MRI scan indicated a right disc protrusion at L5-S1, mildly impinging the right S1 nerve, and degenerative changes.[1] The employee

[1] At hearing, there was no medical evidence causally relating the disc protrusion to the work injury. We also note the employee was injured in an automobile accident in May of

received epidural steroid injections to his low back. On November 18, 2002, lacking any long-term benefit from his conservative medical treatment, the employee underwent left S1 and right L5-S1 microdiscectomies. The operative diagnosis was a bilateral lumbar radiculopathy due to degenerative disc disease at L5-S1. (Dec. 5.)

The insurer voluntarily paid § 34 benefits from the date of injury. On March 4, 2003, the insurer filed a complaint to discontinue compensation raising, *inter alia*, the issues of causation and § 1(7A).[2] On June 13, 2003, a conference order entered denying the insurer's request. (Dec. 1-2.) The insurer appealed to an evidentiary hearing, placing the burden of proving ongoing incapacity on the employee. Sponatski's Case, 220 Mass. 526, 527-528 (1915); Viveiros's Case, 53 Mass. App. Ct. 296, 299 (2001); Patterson v. Liberty Mut. Ins. Co., 48 Mass. App. Ct. 586, 592 (2000).

Pursuant to § 11A, Dr. Stanley Hom examined the employee. (Dec. 2, 6.) Doctor Hom opined the employee suffered from lumbar degenerative disc disease, and that the employee's condition had developed into a chronic pain condition. (Ex. 1, p. 4; Dep. 22.) The § 11A physician also opined the employee's injury at work aggravated his pre-existing condition. (Dep. 26.) Although Dr. Hom opined

---

2001; there is no indication that accident was work-related. Dr. Stanley Hom, the §11A physician, reviewed medical evidence indicating the employee, in 2001, had sought treatment for low back and right thigh pain. (Dec. 4; Dep. 13.)

[2] 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.

See generally Castillo v. Cavicchio Greenhouses, Inc., Mass. App. Ct., No. 2005 – P – 1240, slip op. (April 26, 2006); Kryger v. Victory Distribution, 17 Mass. Workers' Comp. Rep. 78 (2003), *aff'd* Mass. App. Ct., No. 2003 – J – 144, slip op. (February 23, 2005) (single justice).

the employee could not return to unrestricted work activities, he felt the employee could work in a modified capacity. Doctor Hom's medical report was deemed adequate; neither party sought to introduce additional medical evidence. (Dec. 2-3.)

The judge adopted the medical opinions of Dr. Hom and found the employee was capable of performing work within the physical restrictions imposed. (Dec. 8.) The judge awarded a closed period of total incapacity benefits and ongoing partial incapacity benefits based on an assigned earning capacity. (Dec. 8, 10.) The judge also awarded reasonable and necessary medical expenses. (Dec. 10.)

The insurer contends the judge's denial of its discontinuance request is arbitrary, capricious, and contrary to law, because the medical evidence fails to satisfy the employee's burden of proof under G. L. c. 152, § 1(7A). The employee maintains there is ample support for the judge's determination that he sustained a compensable personal injury, and that his incapacity remains causally related to it. Because we agree the medical evidence does not permit a finding that the employee's industrial accident "remains a major" cause of his "disability or need for treatment," we do not reach the sole issue raised by the employee on appeal.[3]

For the § 1(7A) "a major" causation standard to apply, the medical evidence must show the employee had a non-industrial pre-existing condition that "combined with" an otherwise compensable industrial injury "to cause or prolong" his disability, or the need for treatment. See, e.g., Vieira v. D'Agostino Assoc., 19 Mass. Workers' Comp. Rep. 50 (2005). There is no evidence the employee's prior medical condition was work-related, nor did the judge so find. Further, Dr. Hom's opinion compels the conclusion the employee's disability was initially the result of a combination of a pre-existing condition and his industrial accident:

[3] The employee argues the assigned earning capacity is without sufficient evidentiary support.

Q. Did he have, nevertheless, significant degenerative, pre-existing conditions when you consider his age? For a 24-year-old, the amount of degenerative disease, do you feel it's common?

A. I would not say it's common.[4]

(Dep. 43.)

Q. Is it more likely than not that he aggravated that pre-existing condition when he did this heavy work back in early January of 2002?

A. That's a reasonable assessment.

Q. Based upon a reasonable degree of medical certainty?

A. Correct.

(Dep. 24-25.)

When employee's counsel asked Dr. Hom if he believed the employee's lifting injury at work was a major cause of "his current condition and his need for surgery," the doctor replied: "My assessment at that time was that his symptoms at that time were due to the development of a chronic pain-like syndrome *rather than any ongoing injury that he sustained on January 7th of 2002*."[5] (Dep. 25-26.) (Emphasis added.)

Therefore, the one time Dr. Hom was asked the question directly, he disassociated the cause of the employee's symptoms from the work injury. Id. Although the doctor also spoke of how the employee's pre-existing condition was

[4] Because Dr. Hom opined the employee's degenerative condition was uncommon for a man of his age, the employee could not defeat the application of § 1(7A) by arguing that his degenerative disease was normal for his age, and thus not a pre-existing medical condition. Cf. Blais v. BJ's Wholesale Club, 17 Mass. Workers' Comp. Rep. 187 (2005)(doctor opined that in light of the employee's age, his degenerative disc disease was not a pre-existing illness; § 1(7A) found inapplicable).

[5] At deposition, Dr. Hom explained that his diagnosis of "lumbar degenerative disc disease" was "in [the] category of a chronic pain syndrome." (Dep. 22.) He further opined the employee's "degenerative disc disease is probably unrelated to the events of 1/7/02 however, such activity could exacerbate such an underlying condition." (Rep. 4.)

"aggravated" and "worsened" by his work injury, he never offered any testimony sufficient to sustain the employee's burden of proof that his industrial accident remained a major cause of his present disability. (Dep. 24, 26, 32-33.) Castillo, supra (§ 1(7A) standard requires more than "but for" causation analysis); Kryger, supra (opinion that work "aggravated" underlying condition insufficient to support finding under § 1(7A)'s "a major" causation standard).

Accordingly, we reverse the administrative judge's decision, and vacate the award of benefits to the employee as of March 7, 2003,[6] the date the insurer filed its discontinuance complaint. Stowe v. M.B.T.A., 12 Mass. Workers' Comp. Rep. 458, 460 (1998); Picardi v. Bradlees, Inc., 11 Mass. Workers' Comp. Rep. 43, 44 (1997); Cubellis v. Mozzarella House, Inc., 9 Mass. Workers' Comp. Rep. 354, 356 (1995).

So ordered.

_____
Mark D. Horan
Administrative Law Judge

_____
Martine Carroll
Administrative Law Judge

_____
Patricia A. Costigan
Administrative Law Judge

Filed: June 19, 2006

[6] We note the decision incorrectly lists the filing date as March 4, 2003. Our examination of the board file reveals the complaint was filed on the 7th. See Rizzo v. M.B.T.A., 16 Mass. Workers' Comp. Rep. 160, 161 n.3 (2002)(judicial notice of the board file permissible).