COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS

BOARD NO. 010731-07

Maria Dias	Employee
Harvard University	Employer
Harvard University	Self-Insurer

REVIEWING BOARD DECISION
(Judges Horan, Fabricant and Koziol)

The case was heard by Administrative Judge Taub.

APPEARANCES
Gregory D'Ambrosio, Esq., for the employee
Thomas P. O'Reilly, Esq., for the self-insurer at hearing
Paul M. Moretti, Esq., for the self-insurer on appeal

HORAN, J. The employee appeals from a decision denying and dismissing her claim that she was injured in the course of her employment with the self-insurer. We affirm the decision.

The employee, a dining service worker, claimed to suffer a repetitive stress injury to her neck and right shoulder as a result of constant heavy lifting at work. (Dec. 2-3, 7.) Her claim was denied at conference, and she appealed. Pursuant to § 11A, the employee was examined by Dr. Edgar Robertson, whose report and deposition testimony were admitted in evidence. The judge also allowed the parties to submit additional medical evidence. (Dec. 2.)

Arguing that because the self-insurer's Notification of Denial (Form 104) was untimely filed and not sufficiently specific or accurate, at hearing the employee filed a motion requesting the judge to bar the self-insurer's defenses to her claim.[1] (Dec. 2.) The judge denied the motion, concluding the self-insurer's

[1] See General Laws c. 152, § 7(1), which provides:

> Within fourteen days of an insurer's receipt of an employer's first report of injury, or an initial written claim for weekly benefits on a form prescribed by the

payment of the § 7(2)[2] penalty had resolved the issue, and that the self-insurer's Form 104 provided adequate notice to the employee of its intended defenses. (Dec. 3, 8.) Consequently, the self-insurer was permitted to defend against the employee's claim on the grounds of causal relationship, including § 1(7A),[3] liability, extent of incapacity, and entitlement to medical benefits. (Dec. 2.)

The judge concluded the employee did not sustain a compensable personal injury as claimed:

> department, whichever is received first, the insurer shall either commence payment of weekly benefits under this chapter or shall notify the division of administration, the employer, and, by certified mail, the employee, of its refusal to commence payment of weekly benefits. The notice shall specify the grounds and factual basis for the refusal to commence payment of said benefits and shall state that if no claim has yet been filed, benefits will not be secured for the alleged injury unless a claim is filed with the department and insurer within any time limits provided under this chapter. *Any grounds and basis for noncompensability specified by the insurer shall, unless based upon newly discovered evidence, be the sole basis of the insurer's defense on the issue of compensability in any subsequent proceeding. An insurer's inability to defend on any issue shall not relieve an employee of the burden of proving each element of any case.*

(Emphasis added.)

[2] General Laws c. 152, § 7(2), provides, in pertinent part:

> If an insurer fails to commence such payment or to make such notification within fourteen days, it shall pay to the employee a penalty in an amount equal to two hundred dollars. . . . No additional penalties shall be levied for continuing violations under this section, *but the insurer shall be allowed no defenses against any initial claim for weekly benefits until any penalty owed under this section has been paid. . . . An insurer's inability to defend on any issue shall not relieve an employee of the burden of proving each element of any case.*

(Emphasis added.)

[3] 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.

> Regarding the neck condition, I adopt the opinion of the impartial physician, Dr. Robertson, that neither the employee's complaints nor her condition could be attributed to work *at all.* Convincing to me was his opinion that the cervical MRI findings were not suggestive of acute injury, but rather were consistent with degenerative changes.
>
> Regarding the shoulder condition, I adopt the opinion of Dr. Shirazi [the self-insurer's examining physician] that the MRI findings for the right shoulder were of a degenerative nature and *not caused by trauma at work.*
>
> It is to be clear that in rejecting the claimant's argument that she sustained a repetitive stress injury, developed neck and shoulder problems from the repeated heavy lifting on her job, I am not rejecting the idea that under certain circumstances repeated heavy work can cause an injurious condition to develop or be sufficiently aggravated so as to amount to a compensable injury. I am simply and strongly unconvinced that such was more likely than not the case here.

(Dec. 6-7; emphasis added.)

On appeal, the employee propones, *inter alia*,[4] the judge erred by allowing the self-insurer to raise § 1(7A) as a defense at hearing because, as required by 452 Code Mass. Regs. § 1.04, its Form 104 did not reference it.[5] The employee further argues the judge erred by failing to apply the "as is" causation standard to her claim.

The employee's arguments ignore the plain fact the judge *did* evaluate her claim under the "as is" causation standard, and denied and dismissed her claim because the medical evidence he adopted failed to support any causal relationship

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[4] We summarily affirm the decision with respect to the remaining issues raised by the employee on appeal.

[5] 452 Code Mass. Regs. § 1.04, provides, in pertinent part:

> Subject to the provisions of M.G.L. c. 152, § 7(1) and 8(1), as to newly discovered evidence, no grounds for refusal to pay compensation shall be allowed as a defense unless the insurer's notice of refusal contains a statement of the factual basis supporting such grounds. No ground or factual basis sought to be raised by an insurer on newly discovered evidence shall be allowed as a defense unless the insurer reports each such ground or factual basis to the injured employee and the Department not less than five working days before any conference or hearing. . . .

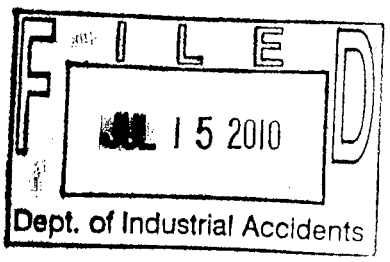
between her work and her injuries. Accordingly, because the judge found the employee failed to prove a causal relationship between her work activities and her injuries, the issue respecting the self-insurer's entitlement to raise § 1(7A)[6] in defense of her claim is moot. We affirm the decision.

So ordered.

Mark D. Horan
Administrative Law Judge

Bernard W. Fabricant
Administrative Law Judge

Catherine Watson Koziol
Administrative Law Judge

Filed: 

[6] We note the hearing in this case was held on March 6, 2008, and that 452 Code Mass. Regs. §1.11(1)(f), effective March 21, 2008, provides: "[i]n any hearing in which the insurer raises the applicability of the fourth sentence provisions of MGL c. 152, § 1(7A), governing combination injuries, the insurer must state the grounds for raising such defense on the record or in writing, with an appropriate offer of proof."