COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS	**BOARD NO. 037589-98**
Martin Peeler	Employee
Massachusetts Turnpike Authority	Employer
Massachusetts Turnpike Authority	Self-insurer

REVIEWING BOARD DECISION
(Judges Horan, Costigan and Levine)

The case was heard by Administrative Judge Taub.

APPEARANCES
Judson L. Pierce, Esq., for the employee
Elizabeth A. Fleming, Esq., for the self-insurer at hearing
Arthur Jackson, Esq., for the self-insurer on appeal

HORAN, J. The self-insurer appeals from a decision awarding the employee § 34A permanent and total incapacity benefits from September 25, 2005 to date and continuing. It argues the judge erred by failing to require the employee to prove his case under the "a major" causation standard in § 1(7A).[1] We affirm.[2]

In 1992, the employee began working full time as a custodian for the self-insurer. (Dec. 3.) The judge found that, early in his employment with the self-insurer, the employee suffered two work-related back injuries that incapacitated him for a few days. The judge also found that on November 3, 1993, the employee fell at

[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.

[2] On November 18, 2011, the employee filed a motion to dismiss the self-insurer's appeal alleging that it was not filed within thirty days of the filing date of the hearing decision. In fact, the appeal was timely filed.

work and suffered a "serious back injury," for which he received weekly workers' compensation benefits for about two years. Id. He returned to work and, on September 17, 1998, in the course of his employment, he tripped and fell on stairs, "twisted his back while up in the air, and landed on his knees. . . ." (Dec. 4.) As a result, the self-insurer paid the employee periods of §§ 34 and 35 incapacity benefits until September 24, 2005, when his statutory right to receive those benefits expired. (Dec. 1.) Thereafter, the employee filed his § 34A claim.[3] (Dec. 2.)

At hearing, the November 20, 2006 report of Dr. Frederick S. Ayers, the § 11A impartial medical examiner, was admitted into evidence.[4] (Dec. 1; Stat. Ex. 1.) Although the self-insurer requested permission to depose Dr. Ayers, he was not deposed. Neither party moved to introduce additional medical evidence. (Tr. 6.) Therefore, the only medical opinion in evidence was contained in Dr. Ayers's November 20, 2006 report.

The self-insurer raised, inter alia, § 1(7A) in defense of the employee's claim. When the judge asked what the basis of this defense was,[5] counsel for the self-insurer replied:

> I would include the 1(7A) based on the impartial physician reports of Doctor Ayers who examined Mr. Peeler [on] December 8th of 2000 and 9/15, 2002, and most recently November 20, 2006, including the fact that Mr. Peeler has underlying degenerative disk disease and that *in the earlier reports there was a combination of those.*

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[3] The judge noted that "[t]here was never a hearing decision issued and never any specific findings as to the nature of Mr. Peeler's condition or the extent of his disability and incapacity from work" prior to the filing of the employee's § 34A claim. (Dec. 2.)

[4] The record reveals that Dr. Ayers had conducted two § 11A examinations of the employee prior to 2006. (Tr. 5-6.)

[5] See § 452 Code Mass. Regs. § 1.11(1)(f), which provides, in pertinent part:

> In any hearing in which the insurer raises the applicability of . . . § 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.

(Tr. 5; emphasis added.) The judge replied, "Okay. Thank you very much." (Tr. 5.) However, the self-insurer never offered the "earlier reports" of Dr. Ayers into evidence and, because he was not deposed, the doctor was not asked about them. See footnote 3, supra.

In his decision, the judge listed § 1(7A) as one of the issues raised by the self-insurer. (Dec. 2.) He adopted the opinion of Dr. Ayers, noting that he

> diagnosed degenerative disc lumbar disease at L4-5 on the right with a right L5 radiculopathy. Dr. Ayers was of the opinion that there was a causal relationship between the industrial injury and the diagnosed condition – that the September 17, 1998 injury, the second significant injury to the employee's back while at work, was sufficient to cause the activation of the L4-5 disc lesion.

(Dec. 5.) The judge acknowledged Dr. Ayers's opinion that the employee had a "permanent partial physical disability which restricts [him] from lifting greater than 10 pounds and from any squatting, stooping, or bending; and requires that he be able to stand and sit at will." (Dec. 6.) The judge then credited the employee's complaints of pain, rejected the opinion of the self-insurer's vocational expert, and concluded the employee was "unable to sustain even the least demanding of employments." Id. Accordingly, he awarded the employee § 34A benefits as claimed. (Dec. 7.)

The self-insurer raises one issue on appeal. It argues the judge committed reversible error by failing to require the employee to "prove that his work injury remained 'a major cause' of his disability." (Self-ins. br. 1.) This argument is based on the self-insurer's contention that "the Sec. 1(7A) defense was accepted by the Judge and the employee's attorney. . . ." (Self-ins. br. 3.) We disagree on both counts.

The self-insurer's brief does not reveal the source of its claim that the judge and employee's counsel "accepted" its § 1(7A) defense. Our review of the record reveals the employee did not stipulate that the defense applied to his claim, and that the judge, other than acknowledging the self-insurer's expressed intention to rely on the prior reports of Dr. Ayers, did not address the matter further. Because the prior

reports were never admitted into evidence, nor even marked for identification[6] for use at a later deposition of Dr. Ayers,[7] the judge could not consider them and adopt the opinions contained therein. Indeed, it would have been error for him to do so. E.g., Morini v. Wood Ventures, Inc., 17 Mass. Workers' Comp. Rep. 427, 432 (2003); Demartino v. New Bedford Inst. For Sav., 10 Mass. Workers' Comp. Rep. 535, 537 (1996).

Nor was the judge obliged to assist the self-insurer in maintaining its affirmative defense by searching the board file, locating the prior reports of Dr. Ayers, and placing them into evidence sua sponte. In Lefebvre's Case, 71 Mass. App. Ct. 1125 (2008)(Memordandum and Order Pursuant to Rule 1:28), the court rejected the proposition that the workers' compensation act "imposed an obligation on the administrative judge to investigate, and take judicial notice of, files in the Department of Industrial Accidents . . . to determine whether [the employee's] pre-existing back injury was owing to a compensable injury."[8] Accordingly, just as the judge in Lefebvre was not obligated to help the employee prove her claim, the judge here was not obligated to assist the self-insurer in defending Mr. Peeler's § 34A claim.

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[6] Even if the doctor's prior reports had been marked for identification, this would not, without more, qualify them as evidence in the case. See Lingis v. Waisbren, 75 Mass. App. Ct. 464, 470 (2009)(barring extenuating circumstances or agreement, documents marked for identification are not in evidence); see also Commonwealth v. Hanley, 337 Mass. 384, 396 (1958)(court unable to review propriety of ruling below where record fails to indicate the contents of an "offered" document); Commonwealth v. Vernazzarro, 10 Mass. App. Ct. 897 (1980)(failure to identify contents of documents in offer of proof at trial precludes their appellate review).

[7] The self-insurer informed the judge of its intention to depose Dr. Ayers. (Tr. 6-7.)

[8] The court also made it clear that even if the judge had acted sua sponte to take judicial notice of prior medical opinions, "we are skeptical that inquiry . . . would have afforded the administrative judge a basis to conclude that it was indisputably true that Lefebvre's pre-existing condition was owing to, and caused by, an earlier compensable injury. . . ." Lefebvre, supra at n.3. In Lefebvre, the insurer had produced evidence, which the judge credited, that the employee's disability was partially due "to a pre-existing injury."

In the end, the only opinion of Dr. Ayers that was in evidence, included in his November 20, 2006 report, fails to support the contention that the employee's "[d]egenerative lumbar disk disease of L4-5 . . . with L5 radiculopathy" was the product of a combination of a prior non-compensable condition and his industrial injury. (Stat. Ex. 1.) In fact, Dr. Ayers opined the employee's "resultant condition"[9] was the product of *work-related* injuries in 1993[10] and 1998: "[t]he reason for the causal connection is that the injury described on September 17, 1998, a second injury to his back while at work is sufficient to cause activation of the L4-L5 disc lesion." (Stat. Ex. 1, p. 3.) There being no indication in the doctor's report that the employee had a disc lesion prior to working for the self-insurer, Dr. Ayers's opinion was sufficient to carry the employee's burden of proof on the causation issue. There was no error.

Accordingly, we affirm the decision. Pursuant to G. L. c. 152, § 13A(6), we order the self-insurer to pay employee's counsel an attorney's fee in the amount of $1,517.62.

So ordered.

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Mark D. Horan
Administrative Law Judge

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Patricia A. Costigan
Administrative Law Judge

[9] See footnote 1, supra.

[10] The doctor mentions the 1993 work-related back injury earlier in his report, and a fair reading of his opinion supports the view that the employee never fully recovered from the effects of that industrial accident. (Stat. Ex. 1, p. 1.) The report also states the employee's L4-L5 degenerative disc disease was revealed in an August 4, 2000 MRI. There is no evidence in the record that the employee suffered from this condition prior to his two injury dates.

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Frederick E. Levine
Administrative Law Judge

Filed: **April 2, 2012**