COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS

BOARD NO. 026572-05

Melanie Baldini	Employee
Dept. of Mental Retardation/DMR3	Employer
Commonwealth of Massachusetts	Self-Insurer

REVIEWING BOARD DECISION
(Judges Horan, Costigan and Koziol)

The case was heard by Administrative Judge Bean.

APPEARANCES
Stephen M. Forlizzi, Esq., for the employee
Terence H. Buckley, Esq., for the self-insurer

HORAN, J. The self-insurer appeals from an administrative judge's decision issued in response to our decision, and order of recommittal, in Baldini v. Department of Mental Retardation, 23 Mass. Workers' Comp. Rep. 159 (2009). In Baldini, we concluded the judge had failed to make findings on the properly raised defense of § 1(7A)[1] "major" causation. Id. In his second hearing decision, the judge found the employee had satisfied § 1(7A)'s heightened causation standard applicable to combination injuries, and awarded the employee §§ 13, 30 and 34 benefits. On appeal, the self-insurer argues the decision is contrary to law, because the adopted medical evidence fails to carry the employee's burden of proof on causation. We agree, reverse the decision, and vacate the award of benefits.

[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.

On August 16, 2005, the employee injured her back working as a mental health assistant. Baldini, supra at 160. The self-insurer denied the employee's claim for ongoing § 34 benefits and § 30 medical benefits. Id. at 161. Doctor Denis P. A. Byrne, the impartial medical examiner, diagnosed the employee's condition as low back strain superimposed on degenerative disc disease at L4-5 and L5-S1. Id. The judge allowed the parties to submit additional medical evidence for the period following Dr. Byrne's examination. Id. The parties submitted that evidence, and the judge adopted the opinions of Dr. Byrne and the employee's treating physician, Dr. Jeremy Shore. Id. Doctor Shore diagnosed a herniated nucleus pulposus at L5-S1, degenerative disc disease at L4-5, and recommended the employee undergo disc replacement surgery. Id.

On recommittal, the judge addressed the self-insurer's § 1(7A) defense, determining first that it did apply to the employee's injury:

> The employee does have a pre-existing condition, degenerative disc disease. This condition is not related to any industrial injury. The degenerative disc disease combines with the strain (Dr. Byrnes) [sic] or disc herniation (Dr. Shore) to disable the employee.

(Dec. 824.) The judge then addressed the question of whether the employee's "compensable injury . . . remains a major . . . cause of [her] disability or need for treatment." G. L. c. 152, § 1(7A). The judge found:

> Prior to the industrial injury the employee's degenerative disc disease was asymptomatic as is quite common in people of her young age. But since the industrial injury she has suffered continuing low back pain. Up to the date of the issuance of my original decision, the employee had treated conservatively, although her treating doctor had recommended surgery. This conservative treatment, through these many months had not in any significant way, relieved the employee's symptoms. The disc herniation, a substantial physical change in the condition of her back, continued to cause her significant pain. *These elements suggest to me, and I so find*, that the disc herniation, a result of her industrial accident, continues to be a major cause of her continuing disability and need for treatment.

(Dec. 824; emphasis added.)

The self-insurer argues, and we agree, the medical evidence of record fails to support the judge's conclusion. Although the employee is not required to submit medical evidence that specifically articulates the "a major, but not necessarily predominant cause" standard, the record here contains no medical evidence sufficient to meet that quantum of proof. "[A] finding of heightened causation under § 1(7A) must be supported by medical opinion that addresses – in meaningful terms, if not the statutory language itself – the relative degree to which compensable and noncompensable causes have brought about the employee's disability." Stewart's Case, 74 Mass. App. Ct. 919, 920 (2009). Only Dr. Shore opined the employee suffered from a disc herniation. However, that is the extent of his opinion. The judge's finding, suggesting that "a major cause" of the employee's disability is her disc herniation because it is – in the judge's words – a "substantial physical change," is not based on medical evidence sufficient to establish either fact. Because the employee did not carry her burden of proof under § 1(7A), the judge's decision to award benefits was arbitrary and contrary to law. See, e.g., Sponatski's Case, 220 Mass. 526 (1915); MacDonald's Case, 73 Mass. App. Ct. 657 (2009).

Accordingly, we reverse the decision and vacate the award of benefits.

So ordered.

Mark D. Horan
Administrative Law Judge

Patricia A. Costigan
Administrative Law Judge

Catherine Watson Koziol
Administrative Law Judge

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