COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO.:** 02657205

Melanie K. Baldini	**Employee**
Department of Mental Retardation/DMR3	**Employer**
Commonwealth of Massachusetts	**Self-Insurer**

REVIEWING BOARD DECISION

(Judges Costigan, Horan and Fabricant)

The case was heard by Administrative Judge Bean.

APPEARANCES

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

COSTIGAN, J. The self-insurer contends the administrative judge erred by failing to address its duly raised defense of § 1(7A) "a major" causation in this claim involving a lumbar strain superimposed on a degenerative disc condition. We agree this was error and, as the self-insurer requests, recommit the case for further findings.

The employee, age twenty-five at the time of hearing, had worked for the Massachusetts Department of Mental Retardation (DMR3) since 2004. She worked twenty hours per week in a residential setting doing housework and laundry, and helping the four patients in the home with personal hygiene. (Dec. 79.) On August 16, 2005, she injured her back while attempting to place an unruly patient in a chair. The employee returned to work briefly the following day but left due to back pain. (Dec. 80.)

The self-insurer disputed the employee's claim but by § 10A conference order filed in May 2006, it was ordered to pay ongoing § 34 total incapacity benefits and § 30 medical benefits. The self-insurer appealed and, pursuant to the provisions of § 11A, the employee was examined by impartial physician Dr. Denis P. A. Byrne on July 18, 2006. (Dec. 78-79.) The doctor offered the diagnosis of low back strain

superimposed on degenerative disc disease at L4-5 and L5-S1. (Dec. 81.) Because there was a lapse of seven to eight months between the impartial medical examination and the hearing, the judge allowed additional medical evidence for the post-§ 11A examination period. (Dec. 81.) Both parties submitted such evidence, and the judge adopted the opinions of the impartial physician, Dr. Byrne, and the employee's treating physician, Dr. Jeremy Shore. Dr. Shore diagnosed a herniated nucleus pulposus at L5-S1 and degenerative disc disease at L4-5, and recommended a Charite disc replacement. The doctor opined the employee was disabled due to low back pain caused by her work injury. (Dec. 81-82.) The judge concluded:

> I find that the employee suffered an industrial injury on August 16, 2005 that continues to temporarily totally disable her. She is in need of disc fusion or disc replacement surgery. In making these determinations, I rely on the credible testimony of the employee and the persuasive medical opinions of Doctors Byrne and Shore.

(Dec. 82.) We agree with the self-insurer that the judge's decision is unsupported by sufficient subsidiary findings of fact, and cannot stand.

It is beyond dispute that the self-insurer raised the defense of § 1(7A) "a major" causation applicable to combination injuries.[1] It is listed in the self-insurer's issues sheet, (Ex. 2), the judge identified § 1(7A) as one of the issues before him at hearing, (Tr. 3), and he included it among the "[i]ssues presented" noted in his decision. (Dec. 78.) Regrettably, that is the extent of the attention the judge paid to the issue. His decision is devoid of any subsidiary findings addressing the well-

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[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.

established analysis required of the trier of fact when § 1(7A) is raised as a defense.

Over four years ago, we set out, "in exquisite detail," the elements of the requisite § 1(7A) analysis, Vieira v. D'Agostino Assocs., 19 Mass. Workers' Comp. Rep. 50 (2005), and since then, we have concluded in multiple cases that subsidiary findings of fact on § 1(7A) are necessary in the first order, before appellate review of the decision for errors of law is possible. Silva v. M.B.T.A., 22 Mass. Workers' Comp. Rep. 167 (2008); Doucette v. TAD Technical Institute, 22 Mass. Workers' Comp. Rep. 99 (2008); see also, Dussault v. Ryder Systems, Inc., 21 Mass. Workers' Comp. Rep. 7 (2007), citing Russell v. Webb Supply Co., 20 Mass. Workers' Comp. Rep. 167 (2006); Ricard v. Seven Hills Foundation, 19 Mass. Workers' Comp. Rep. 328 (2005); and Beuth v. Buxton School, Inc., 19 Mass. Workers' Comp. Rep. 300 (2005). The instruction bears repeating:

We will continue to require that judges make explicit findings as to these § 1(7A) elements, where the section is appropriately raised by the insurer. See Saulnier v. New England Window and Door, 17 Mass. Workers' Comp. Rep. 453, 459-460 (2003). Addressing the necessary analysis in exquisite detail, we note that the administrative judge must first address the nature of the pre-existing condition: whether it stems from an injury or disease, (see Vasquez v. Sweetheart Cup Co., 19 Mass. Workers' Comp. Rep. 17, 19 n.4 (2005) and cases cited) and, if so, whether it is appropriately characterized as "not compensable under [c. 152]." As to the latter inquiry, "[i]f there is medical evidence that the pre-existing condition continues to retain any connection to an earlier compensable injury or injuries, then that pre-existing condition cannot properly be characterized as 'non-compensable' for the purpose of applying the § 1(7A) requirement that the claimed injury remain 'a major cause' of disability." Lawson v. M.B.T.A., 15 Mass. Workers' Comp. Rep. 433, 437 (2001). [Citation omitted.] It is the employee's burden to prove the compensable nature of the pre-existing condition in order to invalidate a § 1(7A) defense. See LaGrasso v. Olympic Delivery, 18 Mass. Worker's Comp. Rep. 48, 54-55 (2004). If the pre-existing condition is not compensable, the judge must then address the effect of its combination with the subject work injury. See Resendes v. Meredith Home Fashions, 17 Mass. Workers' Comp. Rep. 490 (2003). If the employee has not defeated § 1(7A) by successfully attacking either of these first two elements of the statute, the judge must then make findings on the last element:

whether the work injury remains a major but not necessarily predominant cause of the resultant disability or need for treatment. [Citation omitted.] Vieira, supra at 53.

There are two essential elements of an insurer's burden of production in establishing the threshold requirements for § 1(7A) applicability: the existence of a pre-existing condition, and the combination of that pre-existing condition with the alleged work injury. MacDonald's Case, 73 Mass. App. Ct. 657, 660 (2009), citing Johnson v. Center for Human Dev., 20 Mass. Workers' Comp. Rep. 351, 353 (2006). Here, given the expert medical opinions the judge adopted, we are satisfied that the self-insurer met its burden of production under Jobst v. Leonard T. Grybko, 16 Mass. Workers' Comp. Rep. 125, 130-131 (2002), and Fairfield v. Communities United, 14 Mass. Workers' Comp. Rep. 79, 83 (2000), as to both elements. Dr. Byrne and Dr. Shore both diagnosed the employee with degenerative disc disease of the lumbar spine. (Dec. 81.) Moreover, the adopted diagnosis of Dr. Byrne that the employee had a low back strain *superimposed* on degenerative disc disease at L4-5 and L5-S1 established combination as a matter of law. See MacDonald v. Acme Waterproofing, 21 Mass. Workers' Comp. Rep. 275, 280 (2007)(expert opinion as to work-related "aggravation" of pre-existing condition, or to work injury being "superimposed" on pre-existing condition, indicative of § 1(7A) combination), *aff'd* MacDonald's Case, supra.

Because the self-insurer met its two-fold burden of production under the statute, the employee in turn bore a burden of proof as to the inapplicability of the statute. The employee was required to show the pre-existing condition resulted from an injury or disease *compensable* under c. 152.[2] MacDonald's Case, supra at 660, citing Castillo v. Cavicchio Greenhouses, Inc., 66 Mass. App. Ct. 218, 220-221

[2] In MacDonald's Case, supra, the Appeals Court, in dicta not essential to its holding, identified as part of the insurer's burden of production the raising of evidence that the employee's "prior injury," i.e., pre-existing condition, is noncompensable. Id. at 659. We have never imposed such a burden on an insurer asserting a defense under § 1(7A). To the contrary, "[i]t is the employee's burden to prove the compensable nature of the pre-existing condition in order to invalidate a § 1(7A) defense." Vieira, supra at 53, citing LaGrasso, supra at 54-55. See also, Jobst, supra, and Fairfield, supra.

(2006).[3] The judge, however, entirely failed to address the issue, thereby improperly relieving the employee of her burden of proving either that her pre-existing condition was compensable, or that her work-related injury was, and remained, a major cause of her disability and the need for treatment.

The error is clear. It is axiomatic that the judge must address all issues before him. We will not pass on appellate issues concerning § 1(7A), where the judge does nothing more than list the statute as a defense and an issue. (Dec. 78.) See Gleason v. Toxikon Corp., 22 Mass. Workers' Comp. Rep. 39 (2008). As we articulated in Vieira, supra, recommittal is mandated where the decision does not address the various issues attendant to the applicability of § 1(7A) "a major" causation.

Accordingly, we recommit the case for further findings, based on the medical evidence of record, on the insurer's duly raised defense of § 1(7A) "a major" causation. As such findings could affect the judge's view of the compensability, initial or continuing, of the employee's work injury, on recommittal, he should also revisit the issue of the recommended lumbar surgery for which he ordered the self-insurer to pay. (Dec. 83.)[4]

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Patricia A. Costigan
Administrative Law Judge

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Mark D. Horan
Administrative Law Judge

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[3] In her brief to this board, the employee asserts she had "no prior back symptoms, injuries or treatment," before her 2005 work injury. (Employee br. 4.)

[4] The employee states in her brief that she has initiated an enforcement action in the superior court, relative to the insurer's obligation to pay for her back surgery. (Employee br. 5.) Notwithstanding the provisions of G. L. c. 152, § 12(1), in light of this recommittal, it may be advisable to stay the enforcement action pending the judge's § 1(7A) findings in his decision on recommittal.

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Bernard W. Fabricant
Administrative Law Judge

Filed: **April 23, 2009**