COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 01632-99**

Neil L. Fanjoy,	Employee
Norway Landscaping Corp.	Employer
Norguard Insurance Co.	Insurer

REVIEWING BOARD DECISION
(Judges Maze-Rothstein, Carroll and Wilson)

APPEARANCES
Carroll E. Ayers, Esq., for the employee
Pamela G. Smith, Esq., for the insurer

MAZE-ROTHSTEIN, J. The insurer appeals from a decision that awarded the employee temporary total incapacity benefits for an industrial back injury, which aggravated a pre-existing disc herniation. The insurer argues that because the employee either lost consciousness or had a seizure that precipitated the injury – which resulted in a collision while snow plowing – it did not arise out of the employment. We affirm the decision as to that issue. The insurer also argues that the exclusive G. L. c. 152, § 11A, medical evidence did not support the conclusion that the industrial injury constituted "a major cause" of the employee's medical disability under the applicable provisions of § 1(7A).[1] We agree, and reverse the decision.

[1] General Laws c. 152, § 1(7A), as amended by St. 1991, c. 398, §§ 13 to 15, provides, in pertinent part:

> If a compensable injury combines with a pre-existing injury or disease, which is 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.

Neil Fanjoy worked as a landscaper and performed snow removal for the employer from 1990 until his injury in 1999. During 1995, he suffered a herniated disc in his back in a non-work-related motor vehicle accident. He treated conservatively with various prescription pain medications, and did not lose any time from work due to that injury. (Dec. 5.)

Mr. Fanjoy was plowing snow on January 15, 1999. After a shift of over thirteen hours, he went home, but was called back to plow a parking lot at the Melrose-Wakefield Hospital. While driving the snow plow in the parking lot, Mr. Fanjoy lost consciousness. He did not wake up until he was in the emergency room of the hospital. He suffered from severe lower back pain, but could not remember what had happened. Mr. Fanjoy was hospitalized for six days after x-rays revealed that he had sustained compression fractures of the L2 and L3 vertebrae. (Dec. 6.)

A § 10A conference resulted in a denial of the employee's claim for benefits. After the ensuing § 11 hearing, the judge found that the employee's injury was causally connected to the employment by virtue of his snow plow incident, regardless of the possible occurrence of the seizure preceding the collision as a result of taking Ultram, a pain medication, for relief of his chronic back pain. "Even if he had experienced a seizure related to his medication, . . . the finding of a work injury would not be precluded. He suffered a fracture to the vertebrae in his lower back, which obviously was not caused by a seizure itself, but rather, more likely, by the impact of a collision between the snowplow he was driving and another vehicle or object." (Dec. 7.) See Cusick's Case, 260 Mass. 421, 421-422 (1927)(employee unconscious when he fell down flight of stairs at work resulting in death); Colantueno's Case, 275 Mass. 1, 3-4 (1931)(employee collapsed at work while digging trench and died due to heart disease and deep scalp laceration). The judge credited the employee's testimony regarding the constant pain and severe limitations that he continued to experience as of the time of the hearing. (Dec. 8, 10.)

The § 11A physician opined that the employee had suffered a compression fracture at L2-3 as a result of the January 15, 1999 industrial injury, and that pre-existing

severe lumbar disc disease – including a herniated disc at L5-S1 – and radicular symptoms were exacerbated by the injury. The doctor testified that the industrial injury was not a major cause of the employee's symptoms in light of the pre-existing disc condition. (Dep. 16.) The doctor also testified that he could not differentiate pain resulting from the pre-existing disc disease as opposed to the industrial compression fracture. The doctor opined that the industrial injury "certainly exacerbated his underlying problem and his new injuries added to that [, but] to what degree," he could not say. (Dep. 46.) The judge interpreted the medical evidence "as a whole" as establishing that the 1999 work injury was indeed a major cause of the employee's medical disability and need for treatment. The doctor considered that the employee was capable of performing work without bending, lifting, straining and squatting, and with the ability to sit and stand at will. (Dec. 9.) The judge adopted the medical findings and opinions of the § 11A physician. (Dec. 10.)

The judge concluded that the employee had suffered an industrial injury while snow plowing on January 15, 1999, which was an aggravation of his pre-existing disc problem, and "a major cause" of his disability. Based on the medical evidence and lay testimony, the judge awarded ongoing § 34 benefits, along with § 30 medical benefits. (Dec. 10-11.)

The insurer contends on appeal that the § 11A medical evidence did not support the judge's conclusion that the industrial injury was a major cause of the employee's disability. We agree.

This case is governed by Piekarski v. National Non-Wovens, 14 Mass. Workers' Comp. Rep. 407 (2000). There, we were called upon to analyze whether a § 11A physician's opinion supported the employee's claim that his industrial back injury, superimposed on a pre-existing degenerative disc condition, was a major cause of his resulting medical disability under § 1(7A). Id. at 408. The doctor testified that he did not know if he could use the word, "major," and that, if the employee had not had the degenerative disc condition, he would have recovered from his industrial injury. Id. at 409-410. He further testified that, " '[w]hen you get a bad strain, you have discomfort

for a prolonged time due to scarring in the muscles and ligaments so that's why I say [the industrial injury] does play some component now. How much is hard to say.' " Id. at 410, quoting § 11A Dep. 33. We concluded that the employee had failed to meet his burden of proving the requisite causal connection set forth in § 1(7A), i.e. "a major cause." Id.

The § 11A physician's opinion in the present case was that the industrial injury was "not a major component of [the employee's] problems" when the doctor examined him, (Dep. 16), and that he could not say to "what degree" the industrial injury "exacerbated his underlying problem and his new injuries added to that." (Dep. 46.) This opinion is essentially indistinguishable from the opinion found lacking in Piekarski. We reverse the decision as a result. See also Pandey v. Montgomery Rose Company, Inc., 15 Mass. Workers' Comp. Rep. 442, 444 (2001)(§ 11A opinion that work injury was "minor" cause of disability insufficient to satisfy § 1(7A) burden of proving "a major cause").

As such the decision is reversed

So ordered.

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Susan Maze-Rothstein
Administrative Law Judge

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Sara Holmes Wilson
Administrative Law Judge

SMR/lk
Filed: May 27, 2003

CARROLL, J., dissenting Consistent with my dissent in Lyons v. Chapin Ctr., 17 Mass. Workers Comp. Rep. _____ (January 13, 2003), I would recommit this case at least for allowance of additional medical evidence to address the issue of § 1(7A) "major" causation for the ten and a half month "gap" period before the impartial examiner saw the employee. There was no § 11A medical opinion evidence addressing causation for that disputed period of the employee's claim.

There is no dispute that the employee had a work-related new compression fracture at L2-3, (Dep. 32; Impartial Report), as well as a new tear of a muscle near the spinal fracture. (Dep. 36-37, 39.) The employee never missed time from work as a result of a 1995 motor vehicle accident injury, which was to a *different* level of the back. (Dec. 5, 10; Impartial Report). The impartial doctor did not see the employee until ten and a half months after the work accident, by which time he had difficulty sorting out what was then causing the employee's problems.[2]

Accordingly, I would recommit the case to the administrative judge to take additional medical evidence for the "gap" period to determine compensability for the initial period following the new fracture and muscle tear. As stated in my Lyons dissent, I would not have overruled Laredo v. Beth Israel Hosp., 14 Mass. Workers' Comp. Rep. 394 (2000). The overturned conclusion in that case, that an award of compensation in the face of inadequate § 11A medical evidence addressing § 1(7A) "major" causation warrants recommittal for additional medical evidence, would have had direct application to the present case. See Wilkinson v. City of Peabody, 11 Mass. Workers' Comp. Rep.

[2] Even then, as to the continuing nature of the employee's disability, the doctor's opinions vary, perhaps partly due to counsels' questions at the deposition. The doctor's first comment on the impact of the November 15, 1999 work injury is his singular diagnosis of "Compression fracture L2-3 by history." The report goes on to state "Review of the reports reveals that these are felt to be new . . . . This is related to the injury which took place on November 15, 1999." Later, the doctor describes the employee's pre-existing condition as having been "*slightly* exacerbated by this injury." (Emphasis added.) He comments that, at the point when he sees the employee approximately one year after the work injury, he has difficulties separating out the discomfort and disabilities from the new and the preexisting conditions. (Dep. 46.)

263 (1997)(authority for Laredo's recommittal). I would continue to apply Wilkinson, supra, and Laredo, supra, in appropriate situations, such as the present case.

I dissent.

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Martine Carroll
Administrative Law Judge