COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **Board No.:** 014063-03

Paul Fahey **Employee**
Suffolk County Sheriff's Dept. **Employer**
City of Boston **Self-insurer**

REVIEWING BOARD DECISION

(Judges Fabricant, McCarthy and Horan)

The case was heard by Administrative Judge Dike

APPEARANCES

J. Channing Migner, Esq., for the employee
Charles J. Abate, Jr., Esq., for the self-insurer

FABRICANT, J. The self-insurer appeals the administrative judge's award of benefits for a work-related aggravation of the employee's pre-existing osteoarthritic knee condition. The self-insurer challenges the judge's conclusion that § 1(7A)[1] "a major" causation, applicable to industrial aggravations of non-work-related impairments, did not apply to the employee's 2003 work aggravation of prior injuries. Because the judge applied the law on the scope of § 1(7A) properly, we affirm the decision.

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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.

The employee initially injured his knee in 1980 playing college hockey, resulting in a surgical repair performed in either 1980 or 1981. (Dec. 4.) The judge found the employee subsequently suffered a work-related knee injury in 1988 followed by another work-related knee injury in 1990. Neither of these subsequent work injuries resulted in lost time or otherwise required the payment of any benefits. (Dec. 4-5, 8.)

The employee sustained the subject industrial injury on May 19, 2003. In his decision, the judge acknowledged the self-insurer's defense of "a major" causation pursuant to § 1(7A). (Dec. 2-3.) The judge found:

> Given that these two [work] injuries [in 1988 and 1990] occurred before the applicability of § 1(7A) their impact on the employee's condition must be evaluated under the prior rubric which controlled at the time. Prior to the enactment of § 1(7A) the standard was that the insurer took the employee as they were [sic] such that any increase in impairment or advancement of a condition, no matter how slight, required the insurer to take full responsibility for the employee's condition. Under this standard the insurer must be found responsible for the state of the employee's knee subsequent to the two identified incidents because, as Dr. Hom made clear, these injuries did impact the progression of the employee's degenerative condition at least slightly. As such at the time of the industrial accident at issue here the employee's knee condition can no longer be considered a non-work-related condition. As such I find that the § 1(7A) analysis and standard [sic] does not apply in this case.

(Dec. 8-9.)

We discern no error in the judge's treatment of § 1(7A). The impartial physician opined that the prior work incidents played a role in the employee's osteoarthritic knee condition. (Dep. 37-38, 42, 58.) This eliminates any application of § 1(7A) "a major" causation, because the employee's pre-existing condition became compensable as a result of his 1988 and 1990 work related injuries. See Powers v. Teledyne Rodney Metals, 16 Mass. Workers' Comp. Rep. 231-232 (2002); White v. Town of Lanesboro, 13 Mass. Workers' Comp. Rep. 343, 346 (1999)("any causal connection" standard under Rock's Case, 323 Mass. 428 [1948] applies to assessment of compensability of pre-existing condition). Therefore the employee

needed to prove only that his 2003 industrial injury was an aggravation of that pre-existing osteoarthritic condition, which burden was carried by the impartial medical evidence.

The self-insurer's argument that the two prior work incidents should not be considered "compensable" injuries because the employee did not claim or receive benefits of any kind, lacks merit. These "injur[ies are] . . . 'compensable' irrespective of whether compensation for his injury is available under the act." Saab v. Massachusetts CVS Pharmacy, 452 Mass. 564, 570 (2008)(analyzing exclusivity bar where employee suffered work-related death, but had no dependents to claim § 31 benefit payments). A restatement of the Saab proposition in the § 1(7A) context would be: *payment* of c. 152 compensation is not necessary for "compensability" under the act. The 1988 and 1990 work injuries were "compensable," because the judge found they arose "out of and in the course of his employment." G. L. c. 152, § 26. Finally, the syntax of the § 1(7A) "a major" cause provision lends further support for our construction: if a *compensable* injury or disease combines with a pre-existing non-compensable condition, it can only be the source of *payment* of compensation if it is a major cause of the resultant incapacity.[2] In other words, the legislature characterized such a § 1(7A) "combination" injury first as a "compensable injury," and then added the qualifications necessary for it to support an award of benefits.

The decision is affirmed. Pursuant to § 13A(6), the self-insurer is directed to pay the employee's counsel a fee in the amount of $1,495.34.

So ordered.

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Bernard W. Fabricant
Administrative Law Judge

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William A. McCarthy
Administrative Law Judge

[2] See St. 1991, c. 398, §106.

Mark D. Horan
Administrative Law Judge

Filed: **January 30, 2009**