COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS	**BOARD NOS. 007365-14 022260-12 017964-08**
Ralph Seney	Employee
Department of Youth Services	Employer
Commonwealth of Massachusetts	Self-Insurer

REVIEWING BOARD DECISION
(Judges Calliotte, Koziol and Harpin)

The case was heard by Administrative Judge Sullivan.

APPEARANCES
John J. King, Esq., for the employee
Nicole M. Allen, Esq., for the self-insurer

CALLIOTTE, J. Both parties appeal from a decision in this factually complex case involving three work-related accidents and multiple non-work-related motor vehicle accidents. Although the judge erred in his § 1(7A)[1] analysis, he reached the correct result. We therefore affirm the judge's decision ordering the self-insurer to pay the employee a closed period of § 34 temporary total incapacity benefits, and continuing § 35 partial incapacity benefits, for his low back condition, but denying his request for back surgery.

The employee, forty-five years old at the time of hearing, is a native of Haiti who graduated from Boston Technical High School in 1990. After working for several years as a dishwasher and kitchen worker, he began working in 2000 for various agencies performing direct care and supervision of client inmates. In 2006, he began working for

[1] General Laws c. 152, § 1(7A), states, in relevant 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 employer in a similar type of position, in which restraining juvenile resident inmates was an essential part of his job. (Dec. 4.)

On March 3, 2014, the employee was involved in a physical altercation with a 350-pound juvenile inmate, during which he fell on his back, with the inmate on top of him, and then fell several more times before other facility personnel were able to restrain the inmate. The employee filled out an accident report indicating he felt pain in his low back, right shoulder and right arm, and sought medical treatment the next day. (Dec. 7.) The employee filed a claim for compensation, and a conference was held on November 13, 2014, after which the judge ordered the self-insurer to pay a closed period of § 35 partial incapacity benefits, as well as medical benefits for treatment for the right shoulder, excluding surgery. Both parties appealed to hearing. (Dec. 1.)

On February 12, 2015, the impartial physician, Dr. Hillel Skoff, examined the employee, primarily for his right shoulder and upper extremity condition. However, by the time of hearing on June 24, 2015, the shoulder injury had resolved, and, by the employee's own admission, his low back condition had become the only reason he could not return to work. (Dec. 2, 9.) At the hearing, the judge therefore allowed the employee's motion to join two prior work-related low back injuries, of July 9, 2008, and September 5, 2012, both of which involved injuries to other body parts as well. On July 9, 2008, the employee fell twice while trying to control inmates, suffering pain in his low back and left ankle, as well as a human bite. He sought treatment at Morton Hospital and with a chiropractor, Dr. Terrence Aussant. He returned to work on December 1, 2008. (Dec. 5.) The second injury of September 5, 2012, occurred when the employee went to the aid of a fellow employee who was being assaulted by an inmate. He was transported by ambulance to Morton Hospital, complaining of mid-back and right shoulder pain. (Dec. 6.) The judge made no finding regarding when the employee returned to work, but the employee testified he did so on April 27, 2013. (Tr. 66.) The self-insurer paid the employee on a without-prejudice basis after both the 2008 and 2012 injuries. (Dec. 2.)

The judge found the impartial report adequate for the shoulder problem, but allowed the parties to submit additional medical evidence for the back condition on grounds of medical complexity. Both parties submitted additional medical reports and records, but took no depositions. (Dec. 2, 10.)

The self-insurer raised the affirmative defense of § 1(7A) with respect to both the back and shoulder. The employee contested its applicability only with respect to the back. (Dec. 2.) The self-insurer based its § 1(7A) defense on multiple "motor vehicle accidents that resulted in . . . back injuries," (Tr. 7), and represented that Dr. Patrick Connolly, its IME physician, "[s]pecifically . . . states . . . the preexisting conditions are the major cause for the examin[ee] not being able to return back to work . . . ." (Tr. 8.) The employee took the position that § 1(7A) did not apply to the back because, first "he didn't have a prior back condition. And two, if he did have a prior back condition, it was at least partially work related which takes it out of § 1(7A)." (Tr. 9.)

In his decision, the judge found that the employee admitted to "a long history of involvement in motor vehicle accidents (MVA's), perhaps as many as 13."[2] (Dec. 5.) However, the judge found that "neither party offered direct evidence for medical care provided prior to July 2008." Id. Nonetheless, the judge found that § 1(7A) had been effectively raised as to the back claim. (Dec. 2; Tr. 9.) The judge specifically addressed only three motor vehicle accidents: one, on September 3, 2008, [3] after the employee's

[2] Neither party challenges this finding. The employee himself testified, "I can't keep count," but agreed with the self-insurer's suggestion that it was "probably between 11 and 13." (Tr. 82.)

[3] The judge found that, on September 3, 2008, approximately two months after his first industrial accident, the employee was involved in a motor vehicle accident. At that time, the employee was treating with a chiropractor, Terrence Aussant, for his low back pain following the July 9, 2008, work incident. The judge found that Dr. Aussant "immediately suspended care for the workplace event and continued low back care in connection with the MVA." (Dec. 5.) The employee continued to treat with Dr. Aussant until January 9, 2009, after he had returned to work. Id. The judge adopted Dr. Aussant's opinion that, as of February 6, 2009, the employee needed continuing care for his "lumbar spine, exacerbation of work-related injury." (Dec. 13.)

first work injury; and two more motor vehicle accidents, on October 3, 2013,[4] and February 5, 2014,[5] after his second work injury.

The judge adopted the impartial opinion of Dr. Skoff that the employee's right shoulder injury, which he found was directly caused by the March 3, 2014, work altercation, had "resolved without active intervention, ongoing impairment or disability" by the time of his examination on February 12, 2015.[6] (Dec. 9.) However, he did not adopt Dr. Skoff's opinions regarding the employee's low back, because the employee had provided a "grossly insufficient history to the physician." (Dec. 10.)

The judge adopted parts of the opinions of numerous other physicians. Notably, he adopted portions of the third narrative report of Dr. Patrick Connolly, dated September 8, 2015, the only one in which Dr. Connolly acknowledged the employee's numerous motor vehicle accidents. Dr. Connolly opined the employee "suffered from chronic low back pain with exacerbation and a CT scan suggestive of degenerative disc disease at the L3-4 level." (Dec. 15.) The employee's prognosis was "fair to poor," and the recommended back surgery was extremely unlikely to improve the employee's condition. Although the employee was "unable to return to his usual employment due to his continuing inability to use force to restrain the residents, he was capable of full-time work which did not require such activity." (Dec. 15.)

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[4] The judge also found that, following the employee's second work injury on September 5, 2012, he was involved in a head-on collision on October 3, 2013, in which he suffered alleged injuries to his neck, mid-back, low-back and both knees. The judge noted that the only evidence of treatment submitted by either party was contained in North South Physical Therapy records, which contained no reference to a history of prior motor vehicle accidents or workplace events. (Dec. 6.) However, the judge made no findings regarding the North South PT office notes from October 17, 2013 through March 21, 2014, because they contained "[n]o probative medical opinions offered by physicians." (Dec. 16; see Ex. 8B.)

[5] The motor vehicle accident of February 5, 2014, occurred while the employee was still under active care with the physical therapist for the prior motor vehicle accident. After that non-work accident, he reported his back pain worsened. (Dec. 7.)

[6] The judge ultimately found § 1(7A) did not apply to the shoulder, (Dec. 18), although he had earlier found the employee "waived objection to the 1(7A) defense as to the shoulder . . . ." (Dec. 2.) The self-insurer does not appeal on this issue, however.

The judge concluded that the employee had been involved in three work-related accidents with the employer in which he suffered injuries to his back: 1) a low back sprain or a lumbar sprain/strain on July 9, 2008; 2) a contusion to his back and right shoulder, and an exacerbation of his chronic low back pain on September 5, 2012; and 3) a low back strain, and an aggravation of the AC joint arthritis of his right shoulder on March 3, 2014. (Dec. 17.)

Turning to causal relationship, the judge adopted Dr. Connolly's opinion as follows:

> Dr. Connolly was clear in his initial opinion on that subject. "The examinee's current complaints are in my opinion, *exacerbations of longstanding problems to his lower back . . . and that the event of March 3, 2014 represents another exacerbation of a pre-existing condition*." . . . Although the physician did not specifically examine Mr. Seney as to the 2008 or 2012 dates of injury, he did offer an opinion on those events, essentially a record review. He opined as to the 2008 events. "Records indicate, however, he sustained an injury to his low back at work while restraining inmates." He opined as to the 2012 events. "Based on the history as well as my prior report, Mr. Seney sustained an exacerbation of his chronic low back pain which had resolved by the time I had evaluated him on February 1, 2013."

(Dec. 16; emphasis added.) Addressing the self-insurer's § 1(7A) affirmative defense regarding the employee's low back condition, the judge made the following findings:

> Mr. Seney alleged injury to his low back as the result of his workplace accident of March 3, 2014. I have made detailed factual findings as to his medical history in the context of numerous accidents, MVAs and workplace events. In general, the most effective medical opinion benefits from a complete factual foundation. I am not satisfied that Mr. Seney has been a sufficiently honest historian with those who have offered a medical opinion. Nevertheless, I rely on the following medical opinions as to the applicability of this [§ 1(7A)] defense. Dr. Drew examined Mr. Seney one month after this [March 3, 2014] workplace event and opined that Mr. Seney had suffered a low back strain without evidence of disc injury. Dr. Duloy echoed that opinion on July 24, 2014. Neither physician offered the opinion that Mr. Seney had suffered a worsening of a pre-existing condition. *Dr. Drew reiterated his diagnosis of lumbar pain with mild disc bulge status-post his work place injury*. Upon his final exam on December 11, 2014, Dr. Drew did not offer any further opinion as to causation. *In reliance upon the opinions of Dr. Drew and Dr. Duloy, I find that Mr. Seney suffered a low back sprain*. That finding, however, does not end my analysis in this case.

> I have also adopted certain opinions offered by Dr. Connolly, the IME, who did have a broad understanding of the factual and medical history. He opined finally in his report of September 8, 2015[,] "The good news is that there is no significant identifiable damage associated with the date of March 3, 2014 and that his complaints represent exacerbation of preexisting condition." Dr. Zampini assumed orthopedic care for the low back in late 2014 through May 2015. I have not adopted that Physician's opinions as they were not premised upon an accurate factual history nor did he offer an opinion sufficient to meet the challenge of the Section 1(7A) defense. *I find that Mr. Seney's low back condition, as of September 8, 2015, was caused by the combination of the compensable low back injury of March 3, 2014 with his preexisting condition which resulted from compensable low back injuries of July 9, 2008 and September 5, 2012 suffered in the course of employment with the DYS. I find, therefore, that the claimant met his burden [of] proof sufficient to overcome the Section 1(7A) affirmative defense*.

(Dec. 18-19; emphases added.)

With respect to disability, the judge adopted the employee's testimony that he had "chronic daily low back discomfort radiating to his knees," along with "discomfort with sitting, standing or driving for extended periods." (Dec. 9.) He relied, in part, on the opinion of Dr. Michael A. Drew, who treated the employee for his back problems that, as of June 24, 2014 and October 23, 2014, the employee remained totally disabled due to his low back condition, which he diagnosed as "lumbar pain with mild disc bulge status post a work injury." (Dec. 12, 19-20.)[7] In addition, the judge relied on the opinion of Dr. Connolly who, in his third report of September 8, 2015, opined the employee could not return to his regular work, but could perform full-time work not requiring that he have the physical capacity to restrain inmates. (Dec. 20.) Accordingly, the judge found the employee totally incapacitated from March 4, 2014, through September 7, 2015, and partially incapacitated thereafter as a result of his chronic low back condition, with a minimum wage earning capacity. (Dec. 20-22.)

Both parties appealed. We address the self-insurer argument that the judge's

[7] The judge noted that, on the employee's last visit to Dr. Drew on December 11, 2014, the doctor "did not comment specifically as to disability beyond his general opinion that he could find no *objective* basis to substantiate the ongoing physical complaints offered by Mr. Seney." (Dec. 20; emphasis added.)

§ 1(7A) analysis is flawed because he failed to consider the employee's prior back injuries from multiple non-work-related motor vehicle accidents. We also address the self-insurer's further contention that the judge's award of § 34 benefits from March 3, 2014, through September 7, 2015, was improper because it was based on medical records containing an inaccurate medical history. We summarily affirm the decision as to the employee's allegations of error in the judge's denial of his request for lumbar surgery and in his assignment of a minimum wage earning capacity.

The self-insurer argues that, "[w]hile the Judge worked through the § 1(7A) analysis for the 2 prior work injuries, he did not perform any type of analysis related to the multiple car accidents. Thus, he ended his § 1(7A) analysis prematurely and the case should be remanded." (Self-insurer br. 12.) Specifically, the self-insurer argues that the judge failed to address the "combination" aspect of § 1(7A), i.e., "whether or not the non-work-related motor vehicle accidents, particularly those two that occurred just prior to the [March] 3, 2014 work injury," combined with the 2014 work injury. (OA Tr. 7-8.)

Section 1(7A) is an affirmative defense which must be appropriately raised by the self-insurer to come into play. Thus, the self-insurer has the burden to produce evidence of a non-compensable pre-existing condition that combines with the alleged work injury to cause or prolong his disability. MacDonald's Case, 73 Mass. App. Ct. 657, 660 (2009). If the self-insurer fails to meet this burden of production, the heightened "a major cause" standard of § 1(7A) does not apply. Id. If the self-insurer does meet its burden of production, the employee may defeat the applicability of § 1(7A) by showing the pre-existing condition is compensable. Ballou v. Briscon Electric, 31 Mass. Workers' Comp. Rep. 7, 9 (2017).

Here, although the judge stated that § 1(7A) "was effectively raised as to the back claim," (Dec. 2), he did not find, nor does the evidence support a finding, that any non-work-related motor vehicle accident, before the July 9, 2008, work injury, resulted in a pre-existing condition that combined with that July 9, 2008, work injury. The judge found that the employee testified to a "very serious" 1997 motor vehicle accident, but "[n]either party offered direct evidence for medical care provided prior to July 2008."

(Dec. 5.) The only other reference in the decision to the 1997 car accident was in connection with the employee's September 5, 2012, work-related injury. The judge found the employee "referenced only a distant history of a low back injury in 1997 without residual symptoms."[8] (Dec. 6.) Accordingly, as there was no medical evidence of a non-work-related pre-existing condition prior to the first work injury in 2008, the self-insurer failed to meet its burden of production to bring § 1(7A) into play, and it does not apply. Consequently, the judge's § 1(7A) analysis, in which he concluded the employee had "overcome" the § 1(7A) affirmative defense, was superfluous and erroneous. However, as discussed below, the error is harmless because the correct result was reached.

The self-insurer's further argument that the judge was required to perform a § 1(7A) analysis with respect to the motor vehicle accidents *subsequent* to the first work injury on July 9, 2008, thus misses the mark. The self-insurer argues,

> By adopting Dr. Connolly's opinion in the 9/08/15 report that [the employee's] complaints were an exacerbation of a pre-existing condition, one which Dr. Connolly clear[ly] stated involved MVAs, the Judge needed to consider whether the back injuries the [employee] testified he sustained as a result of these MVAs combined with the 3/03/14 work injury. If he found they did combine, as Dr. Connolly's opinion stated, then the Judge would need to address whether the 3/03/14 work injury was a major cause of the [employee's] current disability and need for treatment. By failing to address the multiple motor vehicle accidents and instead considering only the prior work injuries, the Judge ended his Section 1(7A) analysis prematurely.

(Self-insurer br. 13-14.) The self-insurer confuses the § 1(7A) analysis required where a pre-existing non-compensable medical condition combines with a later work injury, with the intervening cause analysis which applies when a compensable injury is followed by non-work-related injuries. See Margraf v. Central Berkshire Regional School District, 30

[8] Referring to the employee's "long history" of motor vehicle accidents, the judge found, "In many of those he experienced low back pain for which he required medical care." (Dec. 5.) However, other than the 1997 accident, the judge did not find the employee had been involved in any specific pre-July 9, 2008, motor vehicle accidents, nor did he refer to or adopt any medical evidence regarding any such accidents prior to the 2008 work injury.

Mass. Worker's Comp. Rep. 7, 9 (2016), quoting Tirone v. M.B.T.A., 15 Mass. Workers' Comp. Rep. 283, 286 (2001)("These are two discrete areas of inquiry . . . .).

> The subsequent [non-work-related] motor vehicle accident[s] . . . require[] an entirely different approach to the causal relationship question[, as compared to pre-existing non-work-related medical impairments subject to major cause analysis under § 1(7A)]. The industrial injury remains compensable relative to that later event, if the employee can prove any continuing causal connection between the work and the resultant incapacity.

Drumond v. Boston Healthcare for the Homeless, 22 Mass. Workers' Comp. Rep. 343, 345 (2008)(first three alterations added), quoting from Tirone, supra at 287. See also Davoll v. Parmenter VNA & Community Care Inc., 24 Mass. Workers' Comp. Rep. 15, 19 (2010); Lawson v. M.B.T.A., 15 Mass. Workers' Comp. Rep. 433 (2001); Powers v. Teledyne Rodney Metals, 16 Mass. Workers' Comp. Rep. 229 (2002); Nason, Koziol and Wall, Workers' Compensation, § 9.7 (3rd ed. 2003). Thus, under the intervening cause analysis, if the 2008 and 2012 work injuries continue to retain any connection, "even to the slightest extent," Lawson, supra at 437, to the employee's resultant incapacity prior to the March 3, 2014, industrial accident, the March 3, 2014, injury is analyzed under the simple "as is" causation standard. See Davoll, supra; Drumond, supra; Lawson, supra.[9]

Here, neither the self-insurer nor the judge addressed the intervening cause standard at any point during the proceedings below, or on appeal.[10] Moreover, even though many medical records were introduced, none gave a clear opinion as to the effect

[9] Cf. Briere v. Lowell General Hospital, 30 Mass. Workers' Comp. Rep. 277 (2016, aff'd Briere's Case, 92 Mass. App. Ct. 1118 (2017)(Memorandum and Order Pursuant to Rule 1:28)(where employee suffered a number of work-related and non-work-related accidents prior to the last work injury, and raised § 1(7A), the "a major cause" analysis is unnecessary because the judge adopted medical opinions that the employee's medical issues were due to the employee's work over many years). In Briere, there was no discussion as to whether the factual predicates to put § 1(7A) into play were met, although the decision seems to assume that they were.

[10] At oral argument, counsel for the self-insurer agreed that she had not argued that the motor vehicle accidents were intervening causes either at hearing or in her brief, and that she was not making a different argument at the oral argument. (OA Tr. 12-13.)

the motor vehicle accidents played in the employee's disability, much less an opinion that any of the motor vehicle accidents overwhelmed the first two work accidents to break the causal chain. See supra notes 3-5. The judge found the September 3, 2008, motor vehicle accident exacerbated the employee's July 9, 2008, work injury, (Dec. 13), but he did not find the injuries suffered in the car accident overwhelmed the work injury. The judge adopted Dr. Connolly's opinion that the 2012 work-related accident caused "an *exacerbation* of his chronic low back pain, which had resolved by the time [he] evaluated him on February 1, 2013." (Dec. 16; emphasis added.) However, Dr. Connolly never opined, and the judge did not find, that either of the subsequent car accidents in 2013 and 2014 broke the causal chain. " 'As a practical matter, the insurer has the burden of producing evidence against the claimant when it seeks to deny a claim by contending that . . . causal relation was interrupted by an[] independent intervening cause . . . . ' ". See Drumond, supra at 346. The insurer here failed to do so.

Accordingly, the correct causal standard applicable to the March 3, 2014, work injury was the simple "as is" standard, which the adopted medical evidence satisfied. Dr. Drew opined that the employee suffered "lumbar pain with mild disc bulge status-post his work place injury" in 2014. (Dec. 15.) Dr. Connolly opined that the employee had a diagnosis of "chronic low back pain with exacerbation," and "the event of March 3, 2014 represents another exacerbation of a pre-existing condition." (Dec. 15-16, 19.)

In sum, we hold that, although the judge erred in finding the self-insurer effectively raised the affirmative defense of § 1(7A), and further erred in finding the employee overcame that defense when he was not required to do so, the result is the same under the appropriate simple "as is" causation standard. See Lupa v. United Parcel Service, 30 Mass. Workers' Comp. Rep. 27, 31 n.5 (2017), and cases cited (reviewing board will affirm decision with right result, although judge gave wrong reason). We therefore affirm the judge's finding as to causation.

Next, the self-insurer argues the judge erred in awarding § 34 total incapacity benefits from the date of the third work accident, March 3, 2014, until September 8, 2015, the date of Dr. Connolly's last report, because the medical records he relied on

contained an inaccurate history. We find no error. The judge acknowledged that the employee was not a "sufficiently honest historian," and factored that conclusion into his causal relationship and disability analysis. (Dec. 18.) Once the judge concluded (correctly, though for the incorrect reason) that the employee's disability was causally related to his work injuries, the fact that Dr. Drew did not have a complete medical history, as the self-insurer argues, became irrelevant to his disability determination. Dr. Drew opined on April 8, 2014 that the employee was disabled due to a low back strain and gave him a disability note for work. (Dec. 19; Ex. 7B.) On July 1, 2014, Dr. Drew again signed a total disability note. (Dec. 19.) On October 23, 2014, Dr. Drew restated his opinion the employee was totally disabled due to his low back condition. (Dec. 20.) The judge also relied on Dr. Connolly, who opined that, on September 8, 2015, the employee was unable to return to his usual employment due to the inability to use force and restrain the residents," but "was capable of full-time work which did not require such physical activity." (Dec. 20.) Thus, he was capable of less physically demanding full-time employment at that time, and the judge ordered his benefits be reduced to partial. Id. The judge's findings regarding the duration of the employee's total incapacity were anchored in the evidence, and we will not disturb them. See Gurey v. Tables of Content, 27 Mass. Workers' Comp. Rep. 173, 175 (2013), and cases cited (judge has discretion to adopt all, part or none of a medical opinion, as long as he does not mischaracterize it).

The decision is affirmed. Pursuant to G.L. c. 152, § 13A(6), the self-insurer shall pay the employee's counsel a fee in the amount of $1,654.15, plus necessary expenses.

So ordered.

Carol Calliotte
Administrative Law Judge

Catherine Watson Koziol
Administrative Law Judge

William C. Harpin
Administrative Law Judge

Filed: ***May 8, 2018***