COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 009219-01**

Robert J. Dorsey	Employee
Boston Globe	Employer
New York Times	Self-Insurer

REVIEWING BOARD DECISION
(Judges Horan, McCarthy and Fabricant)

APPEARANCES
Edward F. McGourty, Esq., for the employee
W. Todd Houston, Esq., for the self-insurer

HORAN, J. Both parties appeal from a decision awarding the employee ongoing weekly partial incapacity benefits. They argue the judge misapplied the provisions of G. L. c.152, § 1(7A),[1] and also fault her decision to assign the employee an earning capacity.[2] With one modification, we affirm the decision.

Robert Dorsey, a fifty-five year-old high school graduate with one year of college, was employed by the self-insurer as a machinist. The employee's job essentially consisted of repairing and maintaining press room equipment. It involved lifting of up to 100 pounds, climbing, and working in tight spaces. On or about March 14, 2001, the employee slipped at work, injuring his back, neck and shoulder. The self-insurer eventually accepted the claim, and paid the employee

[1] General Laws c. 152, § 1(7A), provides, 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.

[2] With this finding, the judge denied the employee's § 34A claim, and rejected the self-insurer's complaint to discontinue his incapacity benefits.

§ 34 benefits. The employee filed a claim requesting permanent and total incapacity benefits under § 34A from May 6, 2003 and continuing. At the conference on the § 34A claim, the judge joined the self-insurer's complaint to discontinue or modify the employee's benefits. The judge denied the § 34A claim, and placed the employee on § 35 benefits from the expiration of § 34 benefits. Both parties appealed. (Dec. 3, 5-6.)

Prior to 2001, the employee had suffered work-related back injuries in 1976, 1986 and 1991, resulting in four surgeries.[3] When he returned to work after his fourth surgery, a lumbar laminectomy in 1992, he testified he was on a "somewhat reduced schedule," and that he had not been pain free since his initial industrial injury. (Dec. 8-9.)

Following his industrial injury in March of 2001, the employee had his fifth back surgery, a microsurgical discectomy at L3-4, on September 10, 2001.[4] He also underwent a course of physical therapy. His pain persisted, but he has declined a recommended sixth back surgery. (Dec. 6.)

On November 21, 2003, prior to the hearing,[5] the employee underwent a § 11A examination by Dr. Michael Freed. In his report, Dr. Freed proffered eight diagnoses, which at deposition he reduced to seven.[6] The seven remaining diagnoses were: herniated lumbar disc at L3-4, herniated cervical disc at C5-6,

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[3] The report of the impartial medical examiner, Dr. Freed, whose opinion the judge adopted, indicated the first three surgeries in 1976 and 1986 were L4-5 discectomies. (Statutory Ex. A, 6.) The fourth surgery was a L4-5 hemilaminectomy and discectomy. Id. at 8.

[4] We note all of the employee's back surgeries were work-related. (Statutory Ex. A, p. 6, 8, 11; Tr. I, 21-28.)

[5] The hearing took place on June 22, 2004, October 21, 2004 and March 9, 2005. References to the hearing transcript in this decision are designated Tr. I, Tr. II and Tr. III, respectively.

[6] At his deposition, Dr. Freed conceded that, of the eight listed diagnoses in his report, only seven were actual diagnoses; he characterized one as simply a summary of the employee's prior back surgeries. (Statutory Ex. A, 14-15; Dep. 20-21.)

lumber strain/sprain, cervical strain/sprain, lumbar post laminectomy syndrome, lumbar degenerative disc disease, and cervical degenerative disc disease. (Dep. 20-21.) The doctor opined the first four conditions were direct results of the employee's 2001 work injury. He also opined the last three conditions predated that injury, but were aggravated by it. (Dec. 11-12; Statutory Ex. A, 14-15; Dep. 20-21.)

In light of the impartial examiner's opinion, at hearing the self-insurer raised § 1(7A)(pre-existing condition).[7] (Tr. I, 7.) At hearing, the employee testified about his longstanding history of back pain, dating back to his original industrial accident in 1976. He complained of neck pain, radiating into his arm with numbness and tingling, back pain radiating down his right leg and into his foot, pain in his left buttock, and headaches. He takes Vicodin for pain, which adversely affects his ability to read, recall and concentrate. (Dec. 7; Tr. I, 33-34, 38-40, 48-49 and 106-107.)

The judge rejected the medical opinions offered by both parties, and adopted the opinion of the impartial physician, Dr. Freed. (Dec. 13.) Noting the employee's history of prior industrial injuries to his neck and back, as well as new

[7] Although the issue was not raised until the hearing commenced, the employee voiced no objection at that time. (Tr. I, 7-8.) However, at the end of the first day of hearing, when the judge initiated a discussion about it, the employee objected to the self-insurer's right to raise § 1(7A) for the first time at hearing. (Tr. I, 110.) Even if this tardy objection could be considered timely, it is of no consequence in light of the judge's decision to open the record and permit the parties to address § 1(7A) with additional medical evidence. (Tr. II, 132-133; Tr. III, 87-88.) Moreover, because Dr. Freed was deposed on June 24, 2005, both parties had the opportunity to question how the statute applied to the employee's medical condition. Finally, we note that following the close of the evidence, the judge notified the parties by letter that she was *re-opening* the record for thirty days, and advised them to submit *additional* medical evidence regarding causal relationship pursuant to § 1(7A), which could include written or deposition testimony from treating physicians, independent medical examiners, or the impartial physician. (August 11, 2005 letter from the administrative judge to parties.) (Dec. 4, n.1.) Again, both parties submitted additional medical evidence. (Dec. 1-3.) On these facts, the parties' due process rights were clearly honored.

complaints related to his March 14, 2001 injury, the judge analyzed the case under § 1(7A):

> To begin, it must first be determined whether there was a pre-existing condition, which resulted from an injury or disease not compensable under this chapter. In reviewing the evidence presented at Hearing, it is clear that the Employee did have a history of prior back and neck injuries and complaints and that the Employee sustained work-related injuries to his back in 1976, 1986 and 1991, with the last two occurring while in the employ of The Boston Globe. It is also evident that the Employee suffered from degenerative disc disease in his cervical and lumbar areas. In reviewing the adopted opinions of the Impartial physician, the Employee's herniated lumbar disc at L3-4 is a new finding and as such, with no clear indication that this combines with any other injury to this area, § 1(7A) does not apply to this diagnoses (sic) and the "as is standard" remains applicable. I find similarly with respect to the Impartial's diagnoses of lumbar strain/sprain, cervical strain/sprain and herniated disc, C5-6. These diagnoses are set forth unequivocally by the Impartial, as being "more likely than not" causally related to the accepted injury of March 14, 2001. As such, because the first requirement of § 1(7A) is not met, further analysis of these conditions is not required.
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> However, this is not the case for the diagnoses of post laminectomy syndrome, lumbar degenerative disc disease, and cervical degenerative disc disease. The Impartial physician has indicated that these diagnoses pre-dated this industrial injury, but were aggravated by it. . . .
>
> As such, the last test applied is whether the work injury remains a major but not necessarily predominant cause of the Employee's resultant disability and need for treatment. Here, because I have adopted the expert opinions of the Impartial physician as credible and convincing, and specifically with regard to causal relationship and disability, I find the Employee has not met his burden on these diagnoses under § 1(7A).

(Dec. 13-14.)(Footnotes omitted.)

Thus, the judge concluded the employee's "complaints of pain, need for treatment and ongoing disability as to his herniated L3-4 lumbar disc, lumbar strain/sprain, cervical strain/sprain and herniated C5-6 cervical disc [were] causally related to the industrial injury of March 14, 2001." (Dec. 18.) However,

she found the cervical and lumbar degenerative disc disease, and lumbar post-laminectomy syndrome, were not causally related to the industrial accident. Id.

Regarding incapacity, the judge credited the employee's testimony that he could not perform the page proofing job, offered by the employer, chiefly because his medication would not permit him to concentrate sufficiently. This finding was made in spite of Dr. Freed's opinion the employee could perform that job, and other sedentary work. However, the judge did not credit the employee's testimony as to the extent of his pain and, utilizing Dr. Freed's opinion, found the employee could work part-time in a position such as parking lot attendant, store greeter, customer service representative, or in a job answering phones, since these positions allow him to stand or sit as needed, and do not require the same level of intense concentration as the page proofing job. Accordingly, the judge assigned the employee a weekly earning capacity of $160, based on a twenty-hour work week earning $8 per hour, and awarded weekly § 35 benefits from November 21, 2003 and continuing. (Dec. 8, 12, 15-16, 19.)

On appeal, the employee argues the judge erred in applying § 1(7A)'s "a major cause" standard. The employee maintains because the medical evidence indicates the employee's prior conditions were all work-related, the "as is" causation standard applies. Ergo, the employee contends, any aggravation of those prior work-related conditions would carry the employee's burden of proof. In reply, the self-insurer maintains the judge's decision to apply § 1(7A)'s "a major cause" standard was correct, but that the employee failed to carry his burden of proving that his March 14, 2001 accident was responsible for his ongoing disability or need for treatment.

Though the employee argues the judge erroneously applied § 1(7A)'s "a major" cause standard, the judge did not, as noted above, apply it to all seven diagnoses. Adopting only Dr. Freed's opinion, the judge correctly concluded the "a major" cause standard did not apply to the above "new" diagnoses, since they were directly caused by the 2001 industrial accident, and did not "combine" with a

pre-existing condition. However, she further found that § 1(7A) *did* apply to the remaining diagnoses, as Dr. Freed opined the 2001 industrial accident had aggravated these pre-existing conditions. The "combination" element of § 1(7A) was thus established with respect to the diagnoses of lumbar post-laminectomy syndrome and lumbar and cervical degenerative disc disease, and the judge concluded the employee had failed to prove that his 2001 industrial accident was "a major cause" of his disability or need for treatment for these conditions. (Dec. 13-14.)

With one exception, we find no fault with the judge's handling of the § 1(7A) issue. Dr. Freed's final opinion, delivered at his deposition, supports the judge's findings with respect to all but one of the seven diagnoses: lumbar post-laminectomy syndrome. The credited medical evidence, and the employee's testimony, compel the conclusion that this condition is the result of his prior work-related back injuries and resulting surgeries.[8] That being so, Dr. Freed's opinion that the employee's industrial accident in 2001 aggravated the employee's lumbar post-laminectomy syndrome satisfies the employee's burden of proof under the "as is" standard. (Dec. 8-9.)

The judge did address the compensable nature of the pre-existing cervical and lumbar degenerative disc disease, but did not adopt any medical evidence relating those conditions to the employee's prior compensable injuries:

> No expert has definitively addressed the nature or extent of the pre-existing degenerative conditions and whether they did or do retain any connection to the earlier compensable injury. . . .
>
> Here, because I have adopted the expert opinions of the Impartial physician as credible and convincing, and specifically with regard to causal relationship and disability, I find the Employee has not met his burden on these diagnoses under § 1(7A).

[8] See footnote 4, supra.

(Dec. 14.) We note Dr. Freed's report and deposition testimony fail to ascribe the degenerative cervical and lumbar disc disease to the employee's 2001 industrial accident, or to his prior work-related accidents or injuries, except to state that the 2001 incident aggravated these pre-existing conditions. Accordingly, the judge correctly concluded the employee failed to establish that these conditions directly resulted from his prior industrial accidents, or that the 2001 industrial accident was "a major" cause of his disability or need for treatment. This is because an opinion that a work-related event "aggravated" a pre-existing condition, without more, is insufficient to satisfy the elevated "a major" causation standard of § 1(7A). Castillo v. Cavicchio Greenhouses, Inc., 66 Mass. App. Ct. 218 (2006); Kryger v. Victory Distribution, 17 Mass. Workers' Comp. Rep. 78 (2003), *aff'd* Mass. App. Ct., No. 2003 – J – 144, slip. op. at 3 (February 23, 2005)(single justice)("[s]ection 1(7A) requires more than a showing that an incident aggravated an underlying condition").

Both parties claim the judge erred by assigning the employee an earning capacity. The employee seems to argue[9] that the judge *should* have found him to be permanently and totally disabled under the standards enunciated in Scheffler's Case, 419 Mass. 251 (1994) and Frennier's Case, 318 Mass. 635 (1945). On the facts as found by the judge, we cannot say the employee is entitled to § 34A benefits as a matter of law. The judge explicitly discredited the degree to which the employee complained of pain. She also took note of his physical restrictions, education and age, and revealed the types of jobs the employee could perform in light of these factors. (Dec. 8, 15-16.)

The self-insurer argues the judge erred by failing to assign the employee an earning capacity consistent with the full time page proofing position that Dr. Freed said he could perform. It cites our decision in Stamatopoulos v. Morgan Constr.,

[9] The employee's brief ends in mid-sentence prior to the heading, "Conclusion," after which it requests us to "enter a decision awarding § 34A benefits. . . ." (Employee's br. 14-15.)

10 Mass. Worker's Comp. Rep. 738 (1996), in support of its position. In that case, as here, the judge adopted the opinion of the impartial medical examiner. Id., at 740. The impartial physician opined the employee was capable, with accommodations due to his work-related medical restrictions, of performing the full-time job offered by the employer. Id., at 741, n.2. The judge failed, however, to make findings on that evidence, and awarded the employee partial incapacity benefits. Id. We recommitted the case for further findings, stating:

> Although it is well established that the determination of loss of earning capacity is the exclusive burden and responsibility of the hearing judge, Raposo v. McDonald's Restaurant, 8 Mass. Workers' Comp. Rep. 286 (1994), and such determination involves not only a medical evaluation of the employee's physical impairment but consideration of other factors such as education, training, age, experience and the nature and requirements of the employee's former job and any modified job offered to him, Scheffler's Case, 419 Mass. at 256, 643 N.E.2d at 1026, [1994] . . . [t]he administrative judge could reject the impartial medical examiner's uncontroverted medical opinion only if the reasons for rejecting the opinion are drawn from evidence from which findings could properly be made and only if his reasons are set out clearly. Galloway's Case, 354 Mass. 247 (1968); Jones v. Sylvania Products, 7 Mass. Workers' Comp. Rep. 347, 349 (1993).

Stamatopoulos, *supra* at 744. In this case, the judge *did* set forth her reasons for rejecting Dr. Freed's opinion that the employee could perform the page proofing job. She explicitly found the employee's inability to concentrate, caused by his use of Vicodin to combat his work-related pain, rendered him unfit to perform the tasks associated with the job. She also credited, to some extent, the employee's complaints of pain. (Dec. 8, 15.) As her findings are grounded in the evidence, we will not disturb them.

The decision of the judge is affirmed, but for that part which fails to find a causal relationship between the March 14, 2001 injury and the employee's lumber

post laminectomy syndrome.[10] On this record, we conclude that condition is related to the employee's industrial accident as a matter of law. Pursuant to § 13A(6), the self-insurer is directed to pay employee's counsel a fee of $1,407.15.

So ordered.

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Mark D. Horan
Administrative Law Judge

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William A. McCarthy
Administrative Law Judge

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Bernard W. Fabricant
Administrative Law Judge

Filed: December 21, 2006

[10] We need not recommit the case on the issue of what more incapacity, if any, is related to the lumber post laminectomy syndrome, as Dr. Freed's disability assessment was based upon all seven diagnosed conditions. Because the self-insurer has not appealed the judge's resort to Dr. Freed's *disability* opinion, we see no need to recommit the case for a reassessment of what the employee's earning capacity might be based on only five of the seven diagnosed conditions. Even if we were to do so, our review of Dr. Freed's deposition reveals he was not asked to give a disability opinion based on all possible combinations of the seven proffered diagnoses. In cases such as this, where multiple diagnoses, which may or may not be related, are made regarding several conditions -- some pre-existing, some not -- attorneys (especially employees' counsel) are advised to carefully solicit medical opinions on causation *and* extent of disability on each viable causation standard and scenario. Neglect of the exercise may result in harsh consequences for employees, and their counsel, charged with the burden of proof on the elements necessary to establish compensability.