COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 055915-95**

Robert Zimont	Employee
New England Industrial Truck, Inc.	Employer
Eastern Casualty Inc. Co.	Insurer

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

APPEARANCES
Nancy L. Hall, Esq., for the employee
John A. Smillie, Esq., for the insurer

MAZE-ROTHSTEIN, J. The claimant appeals from a decision that dismissed her workers' compensation claim for benefits as a result of her husband's death alleged to be causally related to his employment. The employee, Robert Zimont, died on September 30, 1995 due to complications from triple bypass surgery following a July 8, 1995 heart attack. The claimant asserts that the failure to apply the prima facie effect of G.L. c. 152, § 7A is error. While the judge should have applied § 7A, we agree with the insurer that the failure to do so is harmless error given his adoption of a medical opinion that the work effort in no way contributed to the employee's death. We therefore affirm the decision.

The employee worked repairing forklifts, at various job sites. (Dec. 121.) The job required lifting medium to heavy articles. On July 7, 1995, Zimont worked on repairs at two different sites. When he arrived home that night, he was limping. He told his wife that he had dropped a propane tank on his foot. He went to bed early and woke up later sweating profusely. (Dec. 122.) He was rushed to the hospital, where he was diagnosed as having a myocardial infarction while there. He was hospitalized for a week. When he got home, he was completely depleted and unable to walk more than fifty yards. On

September 28, 1995, he underwent triple bypass surgery. That day he suffered a stroke, which caused brain damage. Two days later he died. (Dec. 122-123.)

The employee's wife (the claimant) sought workers' compensation dependency benefits. See G.L.c. 152, § 31. The claim was denied after a § 10A conference. At a de novo hearing on the appeal, the claimant introduced the expert medical opinion of Lawrence Baker, M.D. He opined that the employee's July 7, 1995 work exertions represented "the major"[1] and predominant cause of his myocardial infarction, which in turn made the triple bypass surgery necessary. In Dr. Baker's opinion, the employee's demise bore a direct relationship to the original work related myocardial infarction on July 8, 1995. (Dec. 125.) The claimant also introduced reports of the employee's treating physicians, Drs. Robert Orr and William Bradley. Dr. Orr reported that it was quite possible that the heavy work exertion contributed to the employee's demise. Dr. Bradley offered no causal relationship opinion. (Dec. 123-124.)

The insurer introduced the expert medical testimony of Elliot Sagall, M.D. He opined that the employee suffered from severe underlying three vessel coronary artherosclerotic heart disease that caused his myocardial infarction. He believed that the employee's fatal heart disease arose not from work, but from multiple background risk factors, such as longstanding hypertension, elevated blood cholesterol, a history of cigarette smoking, a family history of stroke and peripheral vascular arteriosclerotic disease. (Dec. 126-127.)

The judge adopted Dr. Sagall's medical opinion, concluding that the employee died from the natural spontaneous progression of his pre-existing heart disease and that the work exertions played no role. The opinions of the claimant's experts were rejected as unpersuasive. See (Dec. 123.) The claim for benefits was dismissed. (Dec. 128.) Mrs. Zimont appeals to the reviewing board.

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[1] As will be discussed, there was erroneous use of a § 1(7A) analysis in the development of what should have been the § 7A phase of the case because the employee had an unrelated preexisting cardiac condition. In any event, § 1(7A) does not require that "the major" cause be work activities. The work effort need only be "a major" cause of the disability or need for treatment. G. L. c. 152, § 1(7A).

The claimant argues one issue which bears discussion. She contends that the failure to apply -- or even mention -- the duly-raised provisions of G.L. c. 152, § 7A was error. (Tr. 4-5.) The insurer concedes that the judge's failure to address § 7A was erroneous. However, it contends that the error is harmless given the adoption of the insurer's expert medical evidence that the employee's death was unrelated to his employment. (Insurer's Brief, 3.) For the reasons that follow, we agree with the insurer.

Section § 7A was inserted by St. 1947, c. 380. It was and is, despite modifications in 1991, an aid to enable a claimant to sustain her burden of proof. Lysaght's Case, 328 Mass. 281, 284-285 (1952); Goddu's Case, 323 Mass. 397 (1948). The assistance established by the Legislature in § 7A provides prima facie "help [for an] employee where he cannot help himself." Zavalia v. City of Salem, 6 Mass. Workers' Comp. Rep. 276, 280 (1992). This purpose still holds true today, albeit more selectively by distinguishing between those found killed or dead at work and those who died some time after leaving work or who are alive but incompetent to testify.

General Laws c. 152, § 7A (as amended by St. 1991, c. 398, § 21) provides, in pertinent part:

> In any claim for compensation where the employee has been killed or found dead at his place of employment, or in the absence of death, is physically or mentally unable to testify, and such testimonial incapacity is causally related to the injury, it shall be prima facie evidence that the employee was performing his regular duties on the day of injury or death and that the claim comes within the provisions of this chapter . . . .

Since the 1991 modification to categories of testimonial incompetence, the reviewing board has struggled with § 7A's interpretation. Compare Wyman v. Courier Citizen Co., 9 Mass. Workers' Comp. Rep. 333 (1995) and Mills v. Light Metal Platers, 11 Mass. Workers' Comp. Rep. 563 (1997) with Costa v. Colonial Gas Co., 12 Mass. Workers' Comp. Rep. 483 (1998) (overruling Wyman and Mills). Most recently the reviewing board interpreted this section in relation to cases such as the present one, where the employee's death, alleged to be causally related to his employment, did not

occur at the place of his employment. We construed § 7A to mean that "in the absence of" "the employee [being] killed or found dead at the place of his employment," the claimant has the burden to show that the employee's testimonial incapacity was causally related to his work activities. Costa, supra at 486. Upon presentation -- and the judge's adoption -- of such evidence, which will almost always be in part based on expert medical opinion evidence,[2] "the claimant (or employee) has met his burden of proof in some key areas, including but not necessarily limited to the propriety of the employee's activities at the time of injury or death, and notice was not late and claim made timely." Id., n. 1.

In order to get the benefit of the §7A presumption, the claimant needed to show only that her husband's death-induced "testimonial incapacity" was "causally related," to any degree, to a work "injury." See G.L. c. 152, § 7A. The decision here, and the evidence on which it rests, makes no clear application of that simple "as is" analysis to determine whether the employee's testimonial incapacity was caused by a work injury.[3] The determination of whether the prima facie effect of § 7A applied here should have been addressed by explicitly using that simple causation analysis, even though the case involved an alleged work injury that combined with pre-existing advanced coronary artery disease.[4]

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[2] Proof of medical causation that is beyond the knowledge and experience of the ordinary layperson must be based on expert medical testimony that states more than a possible causal relationship between the employment and its medical consequences, disability or death. See, e.g., Josi's Case, 324 Mass. 415, 417-418 (1949).

[3] The parties asked the expert doctor questions using both the simple contributing cause standard and an erroneously stated version of the § 1(7A) "major but not necessarily predominant" standard. See note 1 supra. (Sagall Dep. 13-16.) Nor does the decision clarify the causation standard confusion. (Dec. 125, 127.)

[4] If the § 7A simple causation between the work and testimonial incapacity is established, then the claimant acquires prima facie evidence of all aspects of the statute including that the "claim comes within the provisions of this chapter." Id. Section 1(7A) is, of course, a "provision[s] of this chapter."

General Laws c. 152, § 1(7A) reads in pertinent part:

However, the judge's failure to apply § 7A is inconsequential here because he adopted the opinion of Dr. Sagall who felt, due largely to the lack of reported cardiac symptoms while at work on July 7, 1995 and to the time lapse between the work exertions and the onset of the heart attack, that there was simply no contribution from work activities to the employee's death. (Dec. 128; Dr. Sagall Dep. 21-23, 27-29.) See La Plante v. Maguire, 325 Mass. 96, 98 (1949); Bendett v. Bendett, 315 Mass. 59, 65-66 (1943). Thus, implicit in the adoption of a "no causation" medical opinion is a finding that the § 7A simple causation standard was not met.

The decision is affirmed. So ordered.

Susan Maze-Rothstein
Administrative Law Judge

Martine Carroll
Administrative Law Judge

> 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 predominant cause of disability or need for treatment.

St. 1991, c. 398, § 14.

Thus, by way of § 7A the claimant has prima facie evidence that the work " remains a major . . . cause of the [medical] disability or need for treatment." G. L. c. 152, § 1(7A). If there is contrary evidence that has been introduced, then the judge must decide whether the § 7A prima facie case has been met and overcome.

Frederick E. Levine
Administrative Law Judge

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