COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO.:** 001564-05

Ronald Gleason	Employee
Toxikon Corp.	Employer
Chubb National Insurance Co.	Insurer

REVIEWING BOARD DECISION

(Judges Fabricant, McCarthy and Horan)

The case was heard by Administrative Judge Bean.

APPEARANCES

Charles E. Berg, Esq., for the employee
William C. Harpin, Esq., for the insurer

FABRICANT, J. The employee appeals from a recommittal decision in which the administrative judge awarded him a short closed period of § 34 benefits. The employee contends the judge mischaracterized the impartial medical evidence, which supported his claim that his work injury remained a major cause of his disability under G. L. c. 152, § 1(7A).[1] We agree, and reverse the decision in part.

The reviewing board recommitted this case on March 20, 2008 (22 Mass. Workers' Comp. Rep. 38), directing the judge to make findings on the insurer's duly raised § 1(7A) defense of "a major" causation applicable to combination injuries. On recommittal, the judge noted the exclusive impartial medical opinion diagnosing a sprain of the lumbosacral spine superimposed

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

on pre-existing spondylolisthesis, degenerative arthritis and degenerative disc disease. (Dec. 432.) The judge made findings on the applicability of § 1(7A) "a major" causation, and denied the employee's claim as of March 18, 2005, two months post-injury. The judge based his decision on the § 11A impartial examiner's medical opinion that a simple lumboscral sprain would have resolved within that period of time. (Dec. 434-435.)

On appeal, the employee challenges the judge's interpretation of the impartial medical evidence. We agree that the judge erred in his analysis of that evidence. Taken as a whole, the deposition testimony of the impartial physician requires reversal. Initially, the doctor supported the employee's claim:

> Q: [D]o you have an opinion as to whether that lumbosacral sprain sustained [at work] on January 18, 2005 remains a major, if not necessary [sic], predominant cause of the employee's disability or need for treatment at the present time?
>
> A: Yes, I do have an opinion.
>
> Q: And what is that opinion?
>
> A: My opinion is that it is a major cause.

(Dep. 11.) However, the insurer's cross-examination revealed the doctor's apparent acknowledgment of a resolution of the work-related injury:

> Q: Is it fair to say [the work injury] is like the straw that broke the camel's back? It was enough to make it symptomatic and that was it?
>
> A: I believe that's the case.
>
> . . .
>
> Q: [I]n terms of "the straw that broke the camel's back," in terms of the [work] injury[,] . . . [i]s it fair to state that as of two months after the injury, about the time the MRI was taken, it is . . . highly likely that sprain had resolved by that point?
>
> A: Probably.
>
> Q: And what was left over was his underlying condition that had been triggered by the industrial accident. Is that a fair statement?

A: Yes.

(Dep. 18, 22.) The doctor's redirect testimony on major causation is thus somewhat weakened:

Q: [W]hat is the ongoing relationship between that slip on January 18, '05 and the employee's current disability?

A: . . . I do believe that the injury caused the underlying and previously asymptomatic condition to become symptomatic.

Q: . . . And that's the basis for your opinion that the sprain remains a major, if not necessarily predominant cause, to use the language of our statute?

A: The injury is the major but not necessarily predominant. [Sic.]

(Dep. 23-24.) Quoting from the doctor's report, the insurer's re-cross-examination followed up:

Q: . . . You stated, "While the condition with regard to the back is worse by reason of underlying and pre-existing condition, the need for treatment following the injury, the current symptoms, the present disability are directly related to the injury of January 18 th, 2005." By that do you mean that the incident combined with the underlying condition to cause the disability and need for treatment?

A: Yes.

(Dep. 24-25.) With the employee's further examination, the doctor solidified his opinion on major causation :

Q: Because of that combination, it is the [work] incident in an individual who was previously asymptomatic that remains the major cause of his disability?

A: I believe I so testified, yes.

(Dep. 25.) The deposition concluded:

Q: And it is those underlying conditions that have now been triggered into symptomatology, if you will, that is causing his present disability as you see it?

A: That's correct.

> Q: So would it be fair to say that your diagnosis of lumbosacral sprain superimposed on the pre-existing condition that you list in your report, is of a chronic condition that results from the incident of January 18 th, 2005?
>
> A: Yes.

(Dep. 26.) Thus, the exclusive medical evidence is of a diagnosis of a lower back condition, to which the work-related sprain remained a major contributor.

The impartial doctor's opinions, as quoted above, are sufficient to satisfy the § 1(7A) heightened standard of "a major" causation. Even though the doctor testified the work incident was merely a trigger, he repeatedly characterized its quantum of causation as "major." Cf. Stewart's Case, Appeals Court No. 08-P-919 (August 4, 2009)(absence of opinion on relative degrees of contribution from work and non-work related causes in adopted medical evidence requires recommittal in § 1(7A) combination case). The impartial doctor also expressed this causal connection as existing in the present, i.e., that it " *remains* a major cause ." Cf. Larkin v. Feeney's Fence, Inc., 19 Mass. Workers' Comp. Rep. 78, 83 n.11 (2005)(adopted causation opinion of doctor expressed in past tense not usable for present causation).

We consider the judge's reliance on Shand v. Lenox Hotel, 12 Mass. Workers' Comp. Rep. 365 (1998), misplaced. In that case, the reviewing board reversed the judge's finding of a causal connection between a work injury and present disability, because the finding was completely unsupported by the medical evidence. Id. at 368. Shand does not stand for the proposition that the judge here took from it: "If the only medical opinion relates the employee's disability to her pre-existing condition, then the claim must fail." (Dec. 434.) Here the impartial physician related the employee's present disability to both the pre-existing degenerative condition *and* to the work incident, and he opined the work injury was a major cause of the employee's present disability. The employee met his § 1(7A) burden as a matter of law.

Accordingly, we reverse the decision insofar as it denied weekly incapacity benefits after March 18, 2005, and we award § 34 benefits from that date.

So ordered.

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Bernard W. Fabricant
Administrative Law Judge

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William A. McCarthy
Administrative Law Judge

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Mark D. Horan
Administrative Law Judge

Filed: **October 15, 2009**