COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS

BOARD NO. 014582-08

Salvatore Lazzari	Employee
DCR Conservation and Recreation	Employer
Commonwealth of Massachusetts	Self-insurer

REVIEWING BOARD DECISION
(Judges Horan, Fabricant and Levine)

The case was heard by Administrative Judge Tirrell.

APPEARANCES
Louis deBenedictis, Esq., for the employee
Arthur Jackson, Esq., for the self-insurer

HORAN, J. The employee appeals from a decision denying and dismissing his claim for weekly incapacity and medical benefits. We affirm the decision.

On June 4, 2008, the employee slipped and fell at work, and claimed injuries to his neck, back, and right shoulder. (Dec. 5.) The insurer paid the employee total incapacity benefits on a without prejudice basis from June 5, 2008 through July 14, 2008. See G. L. c. 152, § 8. Following a conference on his claim for additional compensation, the judge ordered the insurer to pay the employee total incapacity benefits from July 14, 2008 through October 22, 2008. Both parties appealed the conference order. (Dec. 3, 5.)

Prior to the hearing, the employee was examined on February 2, 2009 by Dr. Joseph M. DeMichele, the § 11A impartial medical examiner. Dr. DeMichele diagnosed the employee as suffering from cervical and lumbar sprains, and right shoulder and wrist injuries. (Stat. Ex.) In his report, the doctor also opined the employee's "present symptoms and disability, although exacerbated by the work related injury of 6-4-08, are predominantly related to the degenerative changes of the preexisting condition." (Stat. Ex. at 4). Armed with this opinion, the self-

insurer raised § 1(7A), applicable to "combination" injuries, in defense of the claim.[1] (Dec. 3-4.) In turn, the employee moved for leave to introduce additional medical evidence "based upon the inadequacy of Dr. DeMichele's report." (Dec. 4.) The judge initially denied the motion. Later, acting *sua sponte,* he "opened the record for additional [medical] evidence for all purposes," including those to address the employee's claim for shoulder surgery. (Dec. 3-4.) The judge never expressly ruled that Dr. DeMichele's impartial report was inadequate.[2]

The employee introduced medical reports from his treating physician, Dr. Bryon Hartunian, who diagnosed the employee as suffering from chronic cervical and right shoulder strains, protruding discs at C4-5, C5-6 and C6-7, and "[s]ubluxation of the right shoulder with glenoid labrum tear, rotator cuff tendonitis/tear." (Employee Ex. 6.) Dr. Hartunian noted that as of February 19, 2009, the employee's right elbow, right wrist and lumbar strain had resolved. Id. He also opined the employee's diagnoses were "directly related" to the industrial

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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.

[2] General Laws c. 152, § 11(A)(2), provides, in pertinent part:

> [T]he administrative judge may, on his own initiative or upon a motion by a party, authorize the submission of additional medical testimony when such judge finds that said testimony is required due to the complexity of the medical issues involved or the inadequacy of the report submitted by the impartial medical examiner.

The employee maintains the judge "changed his mind with respect to his decision to deny [his] Motion to Submit Additional Medical Testimony," and granted his motion by allowing additional medical evidence. (Employee br. 2.) The record does not support this view, insofar as it infers the judge, when he opened the evidence *sua sponte*, necessarily deemed Dr. DeMichele's report to be inadequate. See discussion, infra.

accident. Id. The employee also introduced the reports of other physicians in support of his claim. (Employee Exs. 9, 10.)

The judge adopted Dr. DeMichele's opinion that the employee's industrial injury exacerbated his pre-existing medical condition.[3] This established the "combination" element of § 1(7A) as a matter of law. See MacDonald's Case, 73 Mass. App. Ct. 657, 660-661 (2009); Castillo v. Cavicchio Greenhouses, Inc., 66 Mass. App. Ct. 218 (2006); McCarthy v. Peabody Props., 24 Mass. Workers' Comp. Rep. 89 (2010). The judge also adopted the opinion of Dr. DeMichele to find that the employee's work related injury was not a major cause of his symptoms, disability, or need for treatment at the time of the examination.[4] (Dec. 6-7.) With respect to the other medical opinions in evidence, the judge noted:

> None of the reports authored by Dr. Awbrey, Dr. Hartunian . . . Dr. Younan, Dr. DeVellis or any other medical provider offer an opinion that the industrial injury was, or had been, a major cause of [the employee's] disability or the need for medical treatment.

(Dec. 8.) Concluding the employee had failed to carry his burden of proving that his work injury was a major cause of his disability or need for medical treatment, the judge denied and dismissed the employee's claim. (Dec. 9-10.) See MacDonald, supra.

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[3] The judge found there was no evidence "that the [employee's] pre-existing degenerative conditions were work related." (Dec. 7.) The employee does not challenge this finding on appeal.

[4] The judge noted that "Dr. DeMichele . . . was not asked by the parties at deposition whether the work related exacerbation of the preexisting conditions remained a major cause of [the employee's] ongoing disability and need for medical treatment." (Dec. 7.) In fact, counsel for the self-insurer did ask the doctor whether "the injury of June 4th, 2008, was . . . a major cause of his disability when you examined him in February, 2009?" The doctor replied: "it was a temporary disability factor but not permanent." (Dep. 13.) He went on to say "[t]here was no evidence I could put my finger on that he had permanent damage as a result of the injury." (Dep. 14.) Respecting the employee's shoulder condition, Dr. DeMichele testified: "[t]here was exacerbation but not any evidence of significant deterioration or aggravation." (Dep. 22.) Upon further questioning, he did not change his opinion. (Dep. 25, 27, 31.)

As best we can discern,[5] the employee raises four issues on appeal. We address them in turn.

The employee first argues the judge erred by adopting Dr. DeMichele's opinion that he had a "pre-existing condition," which is required for § 1(7A) to apply, because the medical record is void of any evidence that he suffered from "any prior trauma to his right shoulder." (Employee br. 3.) The argument lacks merit, as the statute does not speak of "prior trauma," or of a prior injury, but requires only evidence of a "pre-existing condition." Dr. DeMichele's adopted medical opinion supports the judge's finding that the employee had a pre-existing degenerative condition. (Stat. Ex.)

Next, the employee asks us to weigh the medical evidence: "[t]he Administrative Judge chose to ignore the medical opinions of three treating physicians in favor of the opinion of an Impartial Physician. . . ." (Employee's br. 4.) This is exactly what the judge is authorized to do in his capacity as fact-finder.[6] See Labadie v. Raytheon Co., 17 Mass. Workers' Comp. Rep. 626, 629 (2003), citing Amon's Case, 315 Mass. 210, 215 (1945)(judge free to adopt all, some or none of expert opinions). This is so, notwithstanding his admission of additional medical evidence. See Coggin v. Mass. Parole Bd., 42 Mass. App. Ct. 584, 589 (1997), citing Robinson v. Contributory Retirement Appeal Bd., 20 Mass. App. Ct. 634, 639 (1985)("probative value of medical testimony is to be weighed . . . by the administrative judge").

The employee also maintains the judge erred as a matter of law by adopting Dr. DeMichele's "inadequate" impartial medical opinion. The employee's assertion assumes erroneously that the judge's ruling was based upon the inadequacy of the doctor's report. See footnote 2, supra. Indeed, we cannot tell

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[5] The employee's brief did not contain a "statement of the issues presented for review; stated with particularity." See 452 Code Mass. Regs. § 1.15(4)(a)(1). Nevertheless, we do our best to address the arguments advanced in support of the employee's appeal.

[6] This is not our function. See General Laws c. 152, § 11C.

the basis for the judge's *sua sponte* action of allowing additional medical evidence "for all purposes," as it was accompanied by no articulation of the reasons underlying the ruling. See Coggin, supra at 588 & n.7 (better practice to include reasons for allowance of additional medical evidence in subsidiary findings); compare May v. Alpha Indus., Inc., 24 Mass. Workers' Comp. Rep. 175, 176 (2010)(arbitrary and capricious for judge, on recommittal, to discontinue disability benefits based on medical opinion which Appeals Court ruled was inadequate to address disability). Even so, Dr. DeMichele's opinion respecting the "combination" element of § 1(7A) *was* adequate; accordingly, the judge did not err by adopting it, and there is no cause for recommittal. Compare May, supra.

Finally, the employee argues the judge erred by concluding that none of the medical evidence of record sufficed to carry the employee's "a major" causation burden of proof under § 1(7A). We disagree.

The employee's additional medical evidence simply comes up short. It does not answer the question of whether the work was "a major" cause of the employee's resultant disability and need for treatment. Instead, it speaks only in terms of a "direct" causal connection between the industrial accident and the employee's disability. Such an opinion does not adequately address the quantum of proof necessary to meet the heightened causation standard of § 1(7A). "[A] finding of heightened causation under s. 1(7A) must be supported by medical opinion that addresses – in meaningful terms, if not the statutory language itself – the relative degree to which compensable and noncompensable causes have brought about the employee's disability." Stewart's Case, 74 Mass. App. Ct. 919, 920 (2009); Foundas v. Leonard Morse Hosp., 12 Mass. Workers' Comp. Rep. 192, 194 (1998)(direct cause opinion insufficient to carry employee's burden of proof under § 1[7A]); see Castillo v. Cavicchio Greenhouses, Inc., 66 Mass. App. Ct. 218, 219 (2006)(rejecting argument that "but for" causation opinion sufficient to carry employee's "a major" cause burden).

Because there is no evidence in the record to satisfy the employee's burden of proof under § 1(7A), we affirm the decision. Compare Stewart, supra at 920 (recommittal appropriate in § 1[7A] case where "other medical evidence, if credited, would . . . support the conclusion that the employee's industrial injury was a major cause of her ultimate disability").

So ordered.

Mark D. Horan
Administrative Law Judge

Frederick E. Levine
Administrative Law Judge

Bernard W. Fabricant
Administrative Law Judge

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