COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 042316-04**

Scott D. MacDonald	Employee
Acme Waterproofing	Employer
Ohio Casualty Insurance Co.	Insurer

REVIEWING BOARD DECISION
(Judge Costigan, Carroll and Fabricant)

APPEARANCES
William E. Howell, Esq., for the employee
Peter P. Harney, Esq., for the insurer at hearing and on brief
Holly B. Anderson, Esq., for the insurer on brief

COSTIGAN, J. The insurer appeals from a decision in which the administrative judge awarded weekly incapacity and medical benefits for an industrial injury to the employee's low back. The insurer argues the judge erred by failing to apply the heightened "a major . . . cause" standard of G. L. c. 152, § 1(7A), because the employee had pre-existing degenerative disc disease that was not work-related.[1] Upon review of the judge's findings and the medical evidence in the record, we conclude there was no error.

The employee, then aged twenty-five, had been employed as a waterproofer for some three months prior to December 31, 2004,[2] when he sustained a lower

[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] Throughout his decision, the judge identifies the employee's date of injury as December *13*, 2004. (Dec. 3, 4, 5 and 7.) We treat this as a scrivener's error of transposition.

back injury while lifting at work. He rested over the weekend, but was unable to return to work the following Monday. (Dec. 3.) The employee treated with Dr. Deborah A. Fudge, a chiropractor, for complaints of low back pain with right leg radiculopathy. The employee suffered from pre-existing degenerative disc disease from L2-3 to L5-S1. He underwent a MRI examination on January 26, 2005, which indicated a moderately prominent central and right paracentral disc herniation at L4-5, and degenerative changes. The employee also sought care at the New England Neurological Associates, where he received steroid injections to relieve his right-sided nerve root irritation. Dr. Fudge released the employee to return to work on May 10, 2005. (Dec. 4-5.)

Because the employee's claim sought a past, closed period of weekly incapacity benefits, and because the insurer contested liability, the parties opted out of the § 11A impartial medical examination,[3] and submitted their own medical evidence. The employee introduced several medical reports and records of Dr. Fudge, and of New England Neurological Associates, where he was seen by three neurologists. (Dec. 1, 4.) The insurer introduced a peer chiropractic records review of Dr. Fudge's treatment notes by its own expert, Dr. David Quinn. (Ex. 6.) The judge was not persuaded by Dr. Quinn's opinion that the chiropractic services rendered by Dr. Fudge were excessive and not medically reasonable. (Dec. 4.)

The judge also rejected the insurer's assertion that the heightened causation

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[3] 452 Code Mass. Regs. § 1.10(5) provides:

> No impartial physician shall be required in disputed matters concerning death and matters where the dispute over entitlement to weekly benefits concerns a specific period(s) of prior disability.

452 Code Mass. Regs. § 1.09(7) provides:

> In claims where initial liability has not been established, subject to the provisions of M. G. L. c. 152, § 11A(2) and 452 CMR [§] 1.02, the parties may agree in writing at the time of the conference that an impartial physician is not required.

standard under § 1(7A) applied to the employee's claim. He found "[t]he medical records are clear that the employee suffered from some degenerative disc disease from L2-3 to L5-S1 that pre-existed the industrial accident of December 13, [sic] 2004." (Dec. 5.) The judge also identified the first prong of the three-prong analysis outlined in Vieira v. D'Agostino Assoc., 19 Mass. Workers' Comp. Rep. 50, 52-53 (2005): "Whether a pre-existing condition which resulted form [sic] a non compensable injury exists." (Dec. 6.) His conclusion in this regard is curious:

> The first leg of this analysis has been met by the evidence presented at Hearing. The evidence demonstrated that the employee had suffered a neck and back injury when the employee fell from a truck while working for BMI [sic] and that the employee was also involved in at least one automobile accident. That he suffered from pre-existing degenerative disc disease from the L2-3 level to the L5-S1 level of his spine. This moves the analysis to the second prong of the evaluation.

(Dec. 6.)[4]

When the judge turned to the second prong of the Vieira analysis -- whether the pre-existing condition combined with the industrial injury so as to cause or prolong the disability, or the need for treatment -- he made something of a misstep:

> The evidence demonstrates that the employee was receiving sporadic chiropractic care from July 2003 through December 2003 and that thereafter he had one chiropractic visit in June of 2004. Thus *there is insufficient evidence to conclude that the employee continued to suffer from or receive treatment for [an] ongoing pre-existing condition of a non-work related nature at the time of the date of injury in this case*. Further evaluation of the employee's medical health at the time of the injury makes clear that he was suffering some degree of degenerative disc disease prior to the work-related incident. The insurer contends that this evidence is sufficient to bring the matter to the third prong of the analysis and requiring the employee to meet the heightened standard of 1(7A) in this matter.

[4] Having identified a prior work-related back injury in the employee's medical history, the judge nevertheless concluded the pre-existing degenerative disc condition resulted from a noncompensable injury or disease. The employee, however, has not appealed from the decision to challenge that finding.

> However this evidence alone is insufficient to meet the second prong as *there was no evidence to suggest the pre-existing condition combined in any way with the injuries the employee suffered on December 13,* [sic] *2004.* As such the second prong has not been met and the affirmative defense of 1(7A) may be dismissed.

(Dec. 6-7; emphasis added.) A pre-existing condition of degenerative disc disease does not cease to exist when an employee is asymptomatic, or not in treatment for the condition. The absence of symptomatology and/or medical treatment may be relevant to the issues of combination and causation under § 1(7A), but it is not necessarily dispositive of them. That said, we think the judge's misstep was harmless, as the evidence warranted the judge's finding of no combination.

The insurer contends the medical evidence was sufficient to support the insurer's burden of production under § 1(7A). We have said:

> The insurer must raise § 1(7A) as a defense *and produce evidence to trigger its application.* Jobst v. Leonard T. Grybko, 16 Mass. Workers' Comp. Rep. 125, 130-131 (2002), (emphasis ours), citing Fairfield v. Communities United, 14 Mass. Workers' Comp. Rep. 79, 83 (2000) (insurer has the burden to produce evidence that would support finding that a pre-existing noncompensable injury or disease combined with a compensable injury to . . . prolong disability at issue). An essential element of proof in establishing this threshold requirement is a showing by the insurer that there is a "combination" of the industrial injury with the pre-existing condition. See Robles v. Riverside Mgmt. Co., 10 Mass. Workers' Comp. Rep. 191 (1996). If the insurer fails to meet its burden of producing evidence to put § 1(7A) in play, the employee is taken "as is" and the causation standard is more probable than not. See Jobst, supra at 131.

Johnson v. Center of Human Development, 20 Mass. Workers' Comp. Rep. 351, 353 (2006). Of course, because the insurer's sole expert medical opinion addressed only the reasonableness and necessity of the employee's chiropractic treatment with Dr. Fudge, it necessarily follows that the insurer relied on the employee's medical evidence to satisfy its burden of production under § 1(7A). That being so, the insurer can hardly be surprised that the evidence yields an ambiguous medical picture subject to different interpretations. We examine that evidence.

The employee's treating chiropractor, Dr. Fudge, addressed only the causal relationship of the employee's disability to the work injury. She did not grapple with the issue of combination. (Ex. 2.) The three neurologists at New England Neurological Associates, whose reports the employee offered into evidence, spoke variously of "back pain that seems to be related to lumbar sprain with underlying lumbar degenerative disc disease," (Dr. Scott Masterson); "lumbar spondylosis with multiple degenerative disc changes," and symptoms related to a "right sided L4-5 disc herniation with moderate stenosis at this level," (Dr. Henry Y. Ty); and "neuropathic pain component related to nerve root irritation" with a possible "nociceptive pain component from his degenerative spine disease." (Dr. Shihab U. Ahmed). (Ex. 4.) None of these doctors gave an express opinion of combination.

Conspicuously missing from this medical picture is any reference to a work-related "aggravation" of the pre-existing condition, or of the work injury being "superimposed" on the degenerative arthritic condition. Cf. Piekarski v. National Non-Wovens, 14 Mass. Workers' Comp. Rep. 407, 409-410 (2000). We point this out, not to limit those descriptions as the only ones indicative of § 1(7A) "combination," but to contrast the ambiguous references in the medical evidence here with those conventional triggers for the statute's application. We need not decide whether the judge here permissibly could have used any of the neurologists' diagnoses and opinions to find combination. We say only that given the equiviocal nature of those opinions, he was not required to do so as a matter of law. On this record, we cannot say the judge erred in finding no combination of causes, and therefore, in finding § 1(7A) inapplicable to the employee's claim. We summarily affirm the judge's decision as to all other arguments advanced by the insurer on appeal.

The decision is affirmed. Pursuant to § 13A(6), the insurer shall pay employee's counsel a fee in the amount of $ 1,458.01.

So ordered.

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Patricia A. Costigan
Administrative Law Judge

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Martine Carroll
Administrative Law Judge

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Bernard W. Fabricant
Administrative Law Judge

Filed: **December 11, 2007**