**COMMONWEALTH OF MASSACHUSETTS**

**DEPARTMENT OF INDUSTRIAL ACCIDENTS** **BOARD NO. 013994-04**

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| Susan L. Lefebvre | Employee |
| Sandelswood, Inc., d/b/a The Maids | Employer |
| American Home Assurance Company | Insurer |

**REVIEWING BOARD DECISION**
(Judges Costigan, McCarthy and Fabricant)

**APPEARANCES**
Justin F. X. Kennedy, Esq., for the employee
Wayne A. Gallo, Esq., for the insurer

**COSTIGAN, J.** The employee appeals from an administrative judge's decision denying and dismissing her claim for workers' compensation benefits. The insurer had raised the provisions of G. L. c. 152, § 1(7A),[1] in defense of the employee's claim, and the judge ruled that the employee failed to meet her burden of proving that her work-related right hip injury was, and remained, a major but not necessarily predominant cause of her disability and need for medical treatment. We summarize the pertinent facts.

Susan Lefebvre, aged fifty at the time of hearing, had worked as a housekeeper all of her adult life. In June 2000, she commenced employment as a residential housekeeper for a franchise named "The Maids," which was later sold to the employer, Sandelswood LLC. The employee worked with a team of two to

[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.

four other housekeepers that traveled to, and cleaned, up to seven clients' homes per day. (Dec. 4.) On March 29, 2004, while vacuuming at a client's home, she attempted to push a "Hoyer lift" she had moved back into place with the right side of her body. She heard a pop and felt immediate pain in her right hip. (Dec. 4-5.) The employee notified her supervisor of the incident, but continued to work for two more days. Initially she complained of pain only in her right hip and right buttocks, (Dec. 5), but by April 6, 2004, she was complaining of back pain as well. (Dec. 6.)

Following a § 10A conference in February 2005, a different administrative judge ordered payment of medical benefits for the employee's injury to her hip, but denied her claim for weekly incapacity benefits and statutory penalties. The employee appealed to a de novo hearing. (Dec. 2.)

On June 2, 2005, Dr. Henry S. Urbaniak, Jr. examined the employee pursuant to § 11A, and offered three diagnoses: 1) contusion of the right proximal femur; 2) degenerative lumbar disc disease, postoperative lumbar laminectomy, fifteen years prior; and 3) possible traumatic trochanteric bursitis. Dr. Urbaniak opined that the contusion to the right femur was causally related to the March 29, 2004 work injury, and the possible trochanteric bursitis *could* be related. He offered no opinion as to what caused the pre-existing degenerative changes in the employee's lumbar spine or what necessitated her prior laminectomy, but opined that both contributed to her continued back pain and right thigh numbness. He further opined that the employee was temporarily, partially disabled and could perform full-time, light duty work. (Dec. 7.)

At the hearing, the judge found the impartial medical report inadequate, and allowed the parties to submit additional medical evidence.[2] (Dec. 3.) The

[2] The employee submitted medical records from Dr. Oladipo, her treating physician, and from the Manet Community Health Center. Dr. Oladipo diagnosed right hip pain, posttraumatic trochanteric bursitis, and lumbar degenerative disc disease. Dr. Oladipo opined that the employee was totally disabled from work between April 15, 2004 and October 12, 2004, due to pain in her right hip, which was causally related to the March

employee testified that after the March 29, 2004 incident, her back pain lasted only a month, but her right hip pain was ongoing. (Dec. 6.) She also testified to three prior injuries, two of which she claimed were work-related. She alleged that fifteen years before the March 29, 2004 incident, she hurt her back performing a cleaning job. Then, in 2002, she claimed injuries to her right arm, right leg and the anterior portion of her pelvis on the right side, while working for the employer's predecessor. She was paid workers' compensation benefits for two months following the 2002 injury, after which she returned to work without restriction, experiencing no difficulty performing her regular job duties. (Dec. 5.)

In her decision, the judge discredited the employee's testimony that her back pain subsided a month after the March 29, 2004 accident. (Dec. 6.) Adopting the medical opinions of both Dr. Oladipo and Dr. Urbaniak, the judge found the employee sustained an injury to her right hip, consisting of a contusion of her right proximal femur and traumatic trochanteric bursitis. However, consistent with those opinions, the judge found the employee's inability to work was due to *both* her right hip pain and her ongoing back pain. (Dec. 8.) Finding no expert opinion in the adopted medical evidence that the employee's right hip injury was, and remained, a major cause of her disability, the judge denied and dismissed the employee's claim.

The employee maintains the judge erred by applying § 1(7A)'s "a major" cause standard to her claim, because her pre-existing low back condition, which

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29, 2004 work injury, as well as due to low back pain. He offered no opinion regarding the cause of the low back pain. In February and September 2005, Dr. Oladipo noted that the employee experienced ongoing disability due to pain in the right lower extremity and hip. (Dec. 6-7.) The insurer submitted the report of its medical expert, Dr. Yablon, who opined the employee did not injure her hip at work, but may have suffered a minor back sprain which caused transient pain. (Dec. 7.) Dr. Yablon opined the employee's right hip and thigh pain were related to degenerative changes in her lumbar spine. (Ins. Ex. 2.) The parties did not depose any of the medical experts for the purpose of cross-examination. (Dec. 3.)

the judge found did combine with her March 29, 2004 right hip injury, was causally related to prior industrial injuries she had sustained.[3] On that point, the judge found:

> The insurer has raised the issue of Section 1(7A). I find, based upon the adopted opinion of Dr. Urbaniak, that the degenerative changes in the employee's lumbar spine and her lumbar laminectomy predated the employee's injury of March 29, 2004, and that these conditions contribute to her back pain and right thigh numbness. . . . *I am not persuaded nor do I find that the employee's non-specific injury to her back that she sustained while performing a cleaning job fifteen years ago, was a compensable injury under Chapter 152. . . . I also am not persuaded, nor do I find, that the employee's non-specific injury to her back that she sustained while performing a cleaning job fifteen years ago, resulted in the employee's pre-existing degenerative changes in her lumbar spine and/or her lumbar laminectomy*. Based upon my findings, the adopted opinions of Dr. Oladipo, Dr. Urbaniak, and the records from Manet Community Health Center, I find that the employee's back pain combined with her right hip pain, so as to disable the employee from returning to work as a housekeeper. However, the employee has not met her burden of proving, for what if any time during her claimed period of incapacity, her right hip injury remained a major but not necessarily predominant cause of that disability or need for treatment. G. L. c. 152, Section 1(7A). Accordingly, the employee has failed to meet her burden of proving her entitlement to benefits under Sections 34, 35 or 30.

(Dec. 8-9; emphasis added.)

The employee complains that the judge "brushed off" her testimony regarding her two prior, allegedly compensable, injuries. (Employee br. 2.) That

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[3] The employee does not argue the insurer failed to meet its burden of production when it raised § 1(7A). See Mastrogiacomo v. Eastware, Inc., 20 Mass. Workers' Comp. Rep. 289, 292 (2006), citing Fairfield v. Communities United, 14 Mass. Workers' Comp. Rep. 79, 82 (2000)(as a threshold matter, insurer must produce evidence of pre-existing medical condition to even raise § 1(7A)). In any event, we see no error in the judge's finding that § 1(7A) was raised by the insurer, (Tr. 8-10), and that the insurer met its burden of production. See Statutory Ex. 1, report of Dr. Urbaniak ("the degenerative changes in the lumbar spine and the evidence of lumbar laminectomy predated the injury of March 20, 2004, and is [sic] a contributing factor to her continued back pain and numbness in the right thigh"); and Ins. Ex. 2, report of Dr. Yablon ("She has referred pain in her right thigh because of the degenerative changes in her lumbar spine, which were pre-existing and which were not caused by the work incident").

testimony stood alone as the only evidence of those alleged injuries.[4] The employee offered no medical records of treatment for those injuries, nor any documentation whatsoever corroborating the occurrence of the injuries and/or their compensability. Neither the reports of Drs. Urbaniak and Oladipo, nor the Manet Community Health Center records, even allude to any prior work injuries. Dr. Urbaniak, the § 11A examiner, reported that the employee had a lumbar laminectomy fifteen years earlier which contributed to her continuing back pain

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[4] Q: Had you had a back injury prior to [March 29, 2004]?
A: Yes, I did.
Q: When was that?
A: I would say 15 years ago.
Q: In a car accident?
A: No.
Q: What was it?
A: It was at my job.
Q: Another housekeeping –
A: Cleaning.
Q: Had you ever been hurt before with Sandelswood?
A: Yes, I did.
Q: In 2002?
A: Yes.
Q: What happened with them?
A: I was in a car accident.
Q: Did you lose time from work?
A: Yes, I did. Two months.
Q: And then you went back to work?
A: Yes.
Q: What was the injury in the car accident with Sandelswood?
A: It was my right arm and my right leg and the front part of my right here.
Q: Pelvis?
A: Yes.

. . .

Q: You were able to perform all your work duties fully after these injuries, and I think you said 15 years ago and the one in 2002?
A: Yes.
Q: Without any problems?
A: Yeah.

(Tr. 48-50.)

and right thigh numbness, but he offered no opinion as to what necessitated that surgery.

Credibility determinations are the sole province of the hearing judge, Lettich's Case, 402 Mass. 389, 394 (1988), and we will not disturb them unless they are arbitrary and capricious, Larti v. Kennedy Die Castings, Inc., 19 Mass. Workers' Comp. Rep. 362 (2005), or derived from inferences which are not reasonably drawn from the evidence. Truong v. Chesterton, 15 Mass. Workers' Comp. Rep. 247, 249 (2001). The judge was not persuaded by the employee's non-specific and uncorroborated testimony that she had suffered a work-related low back injury some fifteen years ago.[5] (Dec. 8.) We cannot say the judge's view of the employee's testimony was arbitrary or capricious.

The employee further argues that the judge had an affirmative duty to take judicial notice of the board files for her prior workers' compensation claims, even though she did not bring them to the judge's attention at hearing. She did not provide the judge with the board numbers for the prior claims, or indicate what records within those files she wanted the judge to notice. Even on appeal, we cannot discern from the employee's brief or oral argument precisely what information she believes the judge was required to judicially notice. In her brief, the employee finally provides the board numbers of three prior claims, but missing

[5] Certainly an employee's specific and detailed testimony about prior alleged work injuries, supported by corroborating documentation and medical reports, is evidence relevant to the determination of whether § 1(7A) applies to a new injury claim. See Elder v. Quabaug Corp., 20 Mass. Workers' Comp. Rep. 315, 317 n.3 (2006). Here, even if the judge had credited the employee's testimony that she had injured her back at work fifteen years ago, without more, such testimony would not necessarily establish the compensability of that injury, or that the employee had a residual condition causally related to that injury at the time of the new alleged injury. Where, as here, the insurer properly raises § 1(7A) and produces medical evidence of a pre-existing condition which combines with the new work injury, "[i]t is the employee's burden to prove the compensable nature of the pre-existing condition in order to invalidate a § 1(7A) defense. See LaGrasso v. Olympic Delivery, 18 Mass. Workers' Comp. Rep. 48, 54-55 (2004)." Vieira v. D'Agostino Assocs., 19 Mass. Workers' Comp. Rep. 50, 53 (2005).

is any further information on the nature or disposition of those claims, or how they relate to proving the elements of the instant claim.[6]

Matters are judicially noticed only when they are indisputably true. Dimino v. Secretary of the Commonwealth, 427 Mass. 704, 707 (1998); Liacos, Handbook of Massachusetts Evidence, (7th ed. 1999), § 2.6, 21. Quite apart from the issue of what kind of information could permissibly have been judicially noticed from another board file, if a party does not ask a judge to take judicial notice of appropriate information, the taking of such notice is discretionary.[7] We have found no cases, and the employee has cited none, holding that where, as here, a party has *not* requested the judge to judicially notice an "indisputably true" fact, the judge must do so sua sponte. Cf. Brookline v. Goldstein, 388 Mass. 443, 447 (1983)(judge took judicial notice of pleadings in other cases filed by defendant against plaintiff, *which were submitted to the judge*, solely to discover nature of claims asserted).[8]

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[6] Though endorsed by our dissenting colleague as statutory authority for recommitting this case, G. L. c. 152, § 11, is not even cited by the employee in support of her argument. Section 11 provides, in pertinent part:

> At the hearing, the member shall make such inquiries and investigations as [she] deems necessary, and may require and receive any documentary or oral matter not previously obtained as shall enable [her] to issue a decision with respect to the issues before [her].

Plainly, the "inquiries and investigations" authorized by § 11 are discretionary, not mandatory.

[7] Proposed Mass. R. Evid. 201 provides, in relevant part:

> (c) *When discretionary*. A court may take judicial notice, whether requested or not.
> (d) *When mandatory*. A court shall take judicial notice if requested by a party and supplied with the necessary information.

[8] Moreover, even where a party has requested a judge to judicially notice an appropriate fact, the proposed rule requires that judicial notice be taken only if the court is "supplied with the necessary information." Proposed Mass. R. Evid. 201(d). See Brookline v. Goldstein, supra. Here, in addition to failing to request that the judge take judicial notice

Given the employee's failure to request the judge to take judicial notice of the prior files or specific records within the files, the judge was not required to look beyond the evidence presented in an attempt to prove the employee's case for her. "It is not a judge's function to be the trial strategist for any litigant." Draghetti v. Chmielewski, 416 Mass. 808, 815 (1994). Given the employee's failure to produce any medical evidence linking the alleged prior work injuries to her pre-existing back condition, such a search, even if it had discovered prior compensable injuries, would not have relieved the employee of her burden of proof under § 1(7A).

We affirm the decision of the administrative judge.

So ordered.

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Patricia A. Costigan
Administrative Law Judge

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Bernard W. Fabricant
Administrative Law Judge

Filed: **May 15, 2007**

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of any prior board files, the employee has not indicated what specific records she would have had the judge notice. While it has sometimes been found appropriate for a court to take judicial notice of court records in a related action, Liacos, supra, § 2.8.1, 26, we have found no cases indicating that wholesale notice of records in other cases is appropriate. In fact, judicial notice of evidence from a record between different parties on a separate claim has been found impermissible. Great Northern Industries, Inc. v. Hartford Accident and Indemnity Co., 40 Mass. App. Ct. 686, 690 (1996); Liacos, supra. As a general rule, "[a] court cannot take judicial notice of the truth of allegations contained in court records, except as established by final judgment." 31A C.J.S. Evidence § 56 (1996/2005). See, e.g., Flynn v. Brassard, 1 Mass. App. Ct. 678, 680 (1974)(Appeals Court took judicial notice of opinion of Supreme Judicial Court decision and of original papers comprising record in earlier case to determine rights prior decision established regarding portion of street). Even on appeal, the employee does not allege that any of the prior board files contained a final judgment which would have been appropriate for judicial notice. Certainly, documents such as agreements to pay compensation without prejudice or lump sum agreements without the acceptance of liability could not be judicially noticed.

**McCARTHY, J., dissenting** Intriguing in its possibilities, G. L. c. 152, § 11, begins with the following directive: "At the hearing the member shall make such inquiries and investigations as he deems necessary, and may require and receive any documentary . . . matter not previously obtained as shall enable him to issue a decision with respect to the issues before him." Whether § 1(7A)'s "major" cause provision applied to this case was an issue squarely before the administrative judge. The employee offered testimony indicating that her pre-existing medical condition may have been connected to prior compensable injuries. If so, her case would have been removed from the thrust of § 1(7A)'s requisite element, a "pre-existing condition, which resulted from an injury or disease *not compensable* under this chapter." (Emphasis added.) The difference between the simple "as is" standard of causation and the heightened § 1(7A) "major" cause standard is quite often the difference between winning and losing a claim for compensation benefits. This appears to have been the case here.

Under such circumstances, recommittal is appropriate for further findings of fact, based on the board files for those prior work injuries.[9] I do not argue that these files (which are in the possession of the department) are necessarily a matter of judicial notice. I simply think that these statutorily mandated "simple and summary" proceedings (G. L. c. 152, § 11B) have become anything but that, particularly due to the multiple causation standards § 1(7A) now dictates for various types of industrial injuries. Under these circumstances, I am in favor of administrative judges making "such inquiries and investigations" necessary to determine *accurately* the § 1(7A) issues presented.

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William A. McCarthy
Administrative Law Judge

Filed: **May 15, 2007**

[9] The reviewing board may, when appropriate, recommit a case before it to an administrative judge for further findings of fact. G. L. c. 152, § 11C.