COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS	**BOARD NO. 027900-17**
Toye Tavares	Employee
Massachusetts Bay Transportation Authority	Employer
Massachusetts Bay Transportation Authority	Self-Insurer

REVIEWING BOARD DECISION
(Judges Long, Fabricant and Koziol)

This case was heard by Administrative Judge Fitzgerald.

APPEARANCES
Michael J. Powell, Jr., Esq., for the employee
Paul Brien, Esq., for the self-insurer

LONG, J. The self-insurer appeals from a decision ordering § 34 temporary total incapacity benefits from October 25, 2017, to April 25, 2018, and medical benefits pursuant to §§13 and 30, including recommended surgical procedures. The self-insurer's sole issue on appeal is whether "the administrative judge incorrectly shifted the burden of proof regarding the § 1(7A) issue to the self-insurer and incorrectly adopted the medical opinions of the treating physicians which did not address the 'a major cause' issue with regard to the left wrist injury." (Insurer br. 1.) We disagree with the self-insurer and affirm the hearing decision.

The employee's claim for § 34 temporary total incapacity benefits and §§ 13 and 30 medical benefits, was conferenced pursuant to §10A on February 13, 2018, and an order for payment of ongoing § 34 benefits and conservative medical treatment, was issued on February 14, 2018. Cross appeals by the parties prompted a § 11A impartial medical examination with Dr. Stanley Hom, on March 26, 2018, and on May 24, 2018, a hearing de novo was held. At the hearing, the employee sought § 34 benefits from the date of injury, October 25, 2017, to May 1, 2018, and §§ 13 and 30 medical benefits. The

self-insurer denied all aspects of the claim and sought the application of § 1(7A) as a defense.[1] As required by 452 Code Mass. Regs. § 1.11(1)(d)[2], the self-insurer presented an offer of proof at the commencement of the hearing, the entirety of which follows:

> Your Honor, I have a report from Doctor McGlowan dated 7/25/17 along with his x-ray that was done on 7/25/17 for the left wrist with a diagnosis of TFCC tear, the exact same diagnosis as being made now. And I have Mr. – the report actually states that she was in a motor vehicle accident on 7/18/1[7]. Referred for an x-ray, as well as an MRI. It's the same left wrist. The same diagnosis. She was actually given a note for disability for two weeks and actually did -- was out from -- not a workers' comp, she was out of work for two weeks after 7/18/1[7] according to an absence schedule and I have – Patrick McCann is here to testify that there was no such record of any motor vehicle accident involving a bus on 7/18/17, so obviously has to be something outside work.

(Tr. 4-5.)

Because the judge found the medical issues complex and allowed the parties to submit additional medical records, a joint exhibit consisting of fourteen additional medical records was admitted. (Ex. 6.) Included in the joint submission were the records referenced by self-insurer's counsel in his offer of proof, as well as an independent medical examination report of Dr. Samuel Doppelt dated January 31, 2018, and an addendum from Dr. Doppelt dated February 15, 2018. Neither these records, nor any others, address the interplay between the TFCC (triangular fibrocartilage complex)

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[1] G.L. 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] 452 Code Mass. Regs. § 1.11(1)(d) provides:

> In any hearing in which the insurer raises the applicability of the fourth sentence provisions of M.G.L. c. 152, Sec. 1(7A), governing combination injuries, the insurer must state the grounds for raising such defense on the record or in writing with an appropriate offer of proof.

diagnosis in July 2017, and the alleged injuries sustained at work on October 25, 2017. The employee and a claim representative from the self-insurer testified at the hearing, and, following the hearing, the deposition of the impartial examiner was taken.

In the hearing decision, the judge credited the employee's testimony that, while driving her bus for the MBTA on October 25, 2017, she was involved in a motor vehicle accident. At the moment of impact with the motor vehicle, the employee's left hand was on the side of her face and her left elbow struck the steering wheel. The employee reported the accident to dispatch and after the accident, felt anxious, and testified she felt discomfort in her left wrist and tingling and numbness in her left pinky and ring fingers. (Dec. 5.) The judge found:

> The Employee sustained an injury to her left wrist while working for the Employer on October 25, 2017. In making this determination, I have credited the Employee's testimony regarding the October 25, 2017 incident and the opinions of Dr. McGlowan and Dr. Muppavarapu.
>
> I have adopted the opinions of Dr. McGlowan and Dr. Muppavarapu and find there is a causal relationship between the Employee's left wrist injury and ligament tear and the industrial accident of October 25, 2017.
>
> I find the Employee to have been temporarily, totally incapacitated from gainful employment and entitled to Section 34 benefits from October 25, 2017 to April 25, 2018, the date Dr. Muppavarapu released her to full duty work as a result of the work injury of October 25, 2017. I have adopted the opinions of Dr. McGlowan and Dr. Muppavarapu that the Employee suffered a left wrist injury and ligament tear as a result of the industrial accident of October 25, 2017 and that the Employee was totally disabled from the date of injury until Dr. Muppavarapu released the Employee to full duty work after examining her on April 25, 2018.

(Dec. 13-14.)

The self-insurer's § 1(7A) defense was dispatched by the judge as follows:

> Having considered the Employee's credible testimony and the opinion of Dr. Muppavarapu, I have found that the Employee injured her left wrist and left elbow while working for the Employer on October 25, 2017 and she was out of work from the date of injury until May 1, 2018 for these injuries. Although the Self-Insurer presented evidence that the Employee suffered a non-work related injury to the left wrist a couple of months prior to the industrial injury, and one of

> the diagnosis [sic] is the same, the Self-Insurer did not present persuasive medical evidence that the industrial injury combined "with a pre-existing condition, which resulted from an injury or disease not compensable under this chapter, to cause or prolong disability or need for treatment…." Section 1(7A)[.] I find that the Self-Insurer has not met its burden of production.

(Dec. 11-12.)

Sensing the judge applied an incorrect, and more stringent, standard on its offer of proof, the self-insurer contends:

> [T]he administrative judge incorrectly shifted the burden of proof to the self-insurer after the self-insurer met its burden pursuant to section 1(7A) and adopted medical evidence that did not support a major cause regarding the left wrist sprain and cubital tunnel syndrome.
>
> The self-insurer presented medical evidence of the pre-existing condition at the commencement of the hearing and there was no objection to the application of section 1(7A) by the employee.[3] Further the employee confirmed the pre-existing condition in her testimony. This application of section 1(7A) was also confirmed by Dr. Hom during his testimony. The self-insurer met its burden of production. The self-insurer is not required to meet a burden of persuasion.
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> "The burden imposed on the insurer under s. 1(7A) is a burden of production only, not a burden of persuasion. McDonald's Case, 73 Mass. App. Ct. 660 (2009) In other words, the judge need not be persuaded by the insurer's evidence. Once the insurer meets its burden of production, and properly places "a major cause" at issue, the judge must undertake the s. 1(7A) analysis." Jean McCarthy v. Peabody Properties DIA No: 007656-02 (6-23-10).

(Insurer br. 5-6.)

While we can appreciate the self-insurer's concern with the judge's use of the word "persuasive," we find it merely superfluous and not even harmless error. Our review of the adopted evidence and hearing decision reveals a fatal flaw in the self-insurer's reasoning, which was referenced earlier in this decision. Without an expert opinion to address how the work injury combined with the prior non-work-related

[3] While employee's counsel did not object to the insurer raising its § 1(7A) defense, neither did he stipulate to its application as suggested by the self-insurer. No such objection is required for the self-insurer to be required to meet its burden of production.

condition, the self-insurer could not meet its burden of production. More importantly, our review of the record also reveals that the judge did not require the self-insurer to meet a burden of persuasion as it argues. While the judge used the word "persuasive" when describing the deficiencies in the self-insurer's § 1(7A) defense, her analysis demonstrates that she required the self-insurer only to meet its burden of production. The judge acknowledged the prior non-work-related incident occurred, and a similar medical diagnosis was made, but specifically noted the absence of a "combination" medical opinion. Because there was simply no "combination" injury opinion to consider at all, the self-insurer's §1(7A) defense was thereby defeated.

The self-insurer cites to McCarthy v. Peabody Properties, 24 Mass. Workers' Comp. Rep. 89 (2010), in support of its position that it met its burden of production. However, unlike the present claim, in McCarthy, the judge expressly adopted an expert medical opinion that "the employee had previous osteoarthritis of the right knee and this was accentuated and *aggravated* by the [work] incident…." Id at 94. (Emphasis in original.) As the judge here noted, the self-insurer did succeed in establishing the employee's non-work-related injury to the same wrist a couple of months prior to the work injury. Unfortunately for the self-insurer, simply injuring the same body part close in time prior to the work injury is not sufficient to meet its § 1(7A) burden of production.

Accordingly, the decision of the administrative judge is affirmed. The self-insurer is ordered to pay employee's counsel an attorney's fee pursuant to § 13A(6), in the amount of $1,705.66, plus necessary expenses.

So ordered.

Martin J. Long
Administrative Law Judge

Bernard W. Fabricant
Administrative Law Judge

Catherine Watson Koziol
Administrative Law Judge

Filed: **April 6, 2020**