COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 015020-14**

Anthony M. Catalano	Employee
Massachusetts Bay Transportation Authy. (M.B.T.A.)	Employer
M.B.T.A.	Self-Insurer

REVIEWING BOARD DECISION
(Judges Koziol, Fabricant and Calliotte)

The case was heard by Administrative Judge Bean.

APPEARANCES
Patrick F. Keady, Esq., for the employee
Paul A. Brien, Esq., for the self-insurer

KOZIOL, J. The employee appeals from a hearing decision ordering the self-insurer to pay him § 35 benefits from February 1, 2018, and continuing, at a rate of $885.96 per week, based on a minimum wage earning capacity of $440.00 per week and an average weekly wage of $1,181.28, along with payment of §§ 13 and 30 medical benefits for treatment stemming from his June 20, 2014, industrial injury. (Corrected Order, Dec. 511.)[1] We agree with the employee that the judge erred as a matter of law in applying the § 1(7A) "a major cause" standard of causation to his analysis of the employee's low back injury, requiring us to vacate the decision and recommit the case for further findings of fact.

[1] The judge's September 25, 2018, decision ordered the self-insurer to pay the employee § 35 benefits at a rate of $907.94 per week, based on a minimum wage earning capacity of $440.00 per week and an average weekly wage of $2,017.65. Rizzo v. M.B.T.A., 16 Mass. Workers' Comp. Rep. 160, 161 n.3 (2002)(judicial notice taken of board file). Although the judge did not issue a new decision, and as a result the decision that is attached to the employee's appeal contains the original order, the judge issued a one-page "Corrected" order after the self-insurer alerted his office that the employee's workers' compensation rate under § 34 was capped at the State Average Weekly Wage on the date of the employee's accident, June 20, 2014, which was $1,181.82. Rizzo. supra. As a result, pursuant to § 35, the maximum partial incapacity benefits were capped at $885.96 per week.

The employee was sixty-seven years old at the time of the hearing in April of 2018. He is a high school graduate who worked as a union iron worker for twenty-eight years. While working as an iron worker, he also started and ran his own business building homes. In that business, he performed the framing and finishing work and subcontracted out the plumbing and electric work, while his wife kept the books for the business. (Dec. 508.) In 1990, he left union iron work to take a job at the MBTA as a bridge man. He continued operating his home building business through 2004 or 2005, when he stopped because of an increase in overtime work for the MBTA. (Dec. 508.)

The judge found the employee "suffered a back injury" that caused him to miss a year of work; however, the employee could not recall when this occurred, "guessing it was 1996 or 2006." (Dec. 508.) The judge made no finding as to whether this injury was work-related or not. In 2013, the employee was installing a chain link fence on top of a wall for the MBTA, which required him to pull 50-pound rolls of fencing off of a truck, carry them to the wall without help, and then lift them onto the wall, with help. After performing this task several times, he began to experience back and shoulder pain; he reported the incident but continued to work. (Dec. 508.) The judge found the MBTA denied this claim. Id.

On June 20, 2014, the employee was working a night-time overtime shift for the MBTA, moving 50-pound sand bags from a truck to a fence where the sandbags were being used to strengthen fence posts. He felt low back pain and pain in his dominant right shoulder while doing this job, and he reported the incident. (Dec. 508, 509.) When he returned to work his regularly scheduled shift the following morning, "the pain was too intense," and he left work before the end of his shift because "[he] could barely walk and his right arm felt 'frozen.' " (Dec. 508.) He also was unable to "lift his arm above his head." (Dec. 509.)

On July 28, 2014, the employee filed a claim for weekly incapacity and medical benefits stemming from the June 20, 2014, injury. Rizzo, supra. Pursuant to a December 4, 2014, § 10A conference order, the self-insurer was ordered to pay the employee § 34

temporary total incapacity benefits from July 19, 2014, to November 25, 2014, at the maximum rate of $1,181.28 per week, followed by payment of partial incapacity benefits at the maximum rate, based on a $541.05 earning capacity, from November 26, 2014, and continuing. Id. The judge also ordered the insurer to pay medical benefits, including surgery if recommended by the § 11A examiner, and further ordered the self-insurer to pay the employee § 34 benefits from the date of any recommended surgery. Both parties appealed, and the employee underwent an impartial medical examination conducted by Dr. Hillel D. Skoff, on March 27, 2015. (Dec. 508, Ex. 3.)

Ultimately, the parties resolved the pending issues through a § 19 agreement that was executed with prejudice and approved by the judge on September 22, 2015. Rizzo, supra. Pursuant to that agreement, the parties agreed that, 1) the employee underwent shoulder surgery on May 29, 2015; 2) the self-insurer placed the employee on § 34 benefits as of the date of surgery; 3) the self-insurer withdrew its appeal of the conference order; and, 4) the parties "agreed to resolve the matter by splitting the difference between § 34 and § 35 benefits for the period 11-26-14 through 5-28-15." Rizzo, supra. ; (Dec. 509.)

After the surgery on May 29, 2015, the employee's right shoulder "remained frozen," so he underwent a second shoulder surgery in January of 2016, which "improved" his condition, although his shoulder "was still weak." (Dec. 509.) Meanwhile, the employee remained on § 34 benefits. On August 4, 2017, the employee filed the present claim for § 34A benefits. Rizzo, supra. On September 27, 2017, the employee's § 34 benefits exhausted and the self-insurer placed the employee on maximum partial incapacity benefits from September 28, 2017, and continuing. At the § 10A conference the employee sought payment of § 34A from September 28, 2017, and continuing at the maximum rate of $1,181.23. Id. By an Amended Conference order issued on November 21, 2017, the judge ordered the self-insurer to pay the employee § 34A benefits from September 28, 2017, and continuing, along with medical benefits pursuant to § 30. Only the self-insurer appealed.

Pursuant to § 11A(2), the employee was examined again by Dr. Hillel D. Skoff, on February 1, 2018. (Dec. 508.) At the hearing, the employee was the sole lay witness, Dr. Skoff's report and deposition testimony were the only medical evidence admitted, and Susan Chase, who testified on behalf of the self-insurer, provided the only vocational testimony. Both parties agree that after the employee testified, "the self-insurer obtained documents regarding an accepted lumbar injury suffered by [the employee] on 12-31-01 while employed by the MBTA." (Self-ins. br., 2; Employee br. 12.) The parties then stipulated that § 1(7A) was not applicable to the employee's lumbar spine, and communicated the stipulation to the judge. Id. Nonetheless, the judge's decision shows that he employed § 1(7A)'s "a major cause" standard of causation when considering the employee's low back injury of June 2014, despite the parties' stipulation to the contrary. The judge stated:

> I find that the employee remains partially disabled as a result of his industrial accident of June 20, 2014. This disability is related to his work related shoulder injury which precludes him from all but the lightest work with his right upper extremity. His low back condition was exacerbated by the industrial accident but it no longer serves as a major cause of his continuing disability. In making these findings I rely on the credible testimony of the employee and Susan Chase the vocational expert and the persuasive medical opinions of the impartial medical examiner, Dr. Hillel D. Skoff.[2] I accept the employee's testimony concerning the events surrounding the date of the industrial accident, his continuing shoulder complaints and his difficulty performing some of his activities of daily living. I do

[2] Earlier in his decision, the judge made the following subsidiary findings of fact:

> The employee suffered from sciatica before the industrial accident but now it is worse. He also suffered from low back pain. But these ailments did not cause him to miss work before June 20, 2014. Now these ailments are much more severe, and the pain they cause is of a different kind than the pain he suffered before the industrial accident. The pain is in his low back and radiates down his leg to his calf. The pain is continuous and it causes him to have difficulty walking and standing. He has received three injections for his back pain. The shots have reduced his pain and have allowed him to walk better. But he continues to suffer from low back and leg pain that increases if he increases his physical activity. He cannot sit or walk for very long. He has right shoulder and arm weakness and fatigues easily. He swims regularly and uses a Jacuzzi every day. He sleeps poorly.

(Dec. 509.)

> not accept his claim that the low back injury continues to be a major cause of his disability.

(Dec. 510.) Because the employee suffered a prior work-related low back injury, the low back injury is governed by the simple "as is," or "but for," standard of causation. Bourassa v. D.J. Reardon Co., 10 Mass. Workers' Comp. Rep. 213, 217 (1996). Thus, the judge erred in applying the more stringent § 1(7A) "a major cause" standard regarding the employee's low back injury. Nonetheless, the self-insurer argues this is harmless error and urges us to affirm the decision. (Self-ins. br. 7.) Specifically, the self-insurer argues the employee did not meet the "as is" standard because, when asked, "[w]ould you say that this event was the proverbial straw that broke the camel's back, with his years of work with regard to his back," (Dep. 23), "Dr. Skoff testified it was not." (Self-ins. br. at 9.) The self-insurer mischaracterizes Dr. Skoff's answer to this question, which was, "[w]ell, no. I mean it was an exacerbating event." (Dep. Tr. 23, line 14-15.) The self-insurer's argument also ignores the judge's findings of fact on this issue. (Dec. 510.) The judge found Dr. Skoff diagnosed "an exacerbation of his pre-existing sciatica," and in his report he causally related the low back diagnosis "to the 2014 industrial accident." (Dec. 509-510.) The judge then made the following findings:

> However, in his deposition [Dr. Skoff] stated that the 2014 industrial accident was not a major but not necessarily predominant cause of his back condition. Deposition, page 22, line 23, page 23, line 6. *But, the 2014 industrial accident 'was an exacerbating event' for the employee's back. Deposition, page 23, line 14.*

(Dec. 510; emphasis added.) The judge's decision shows that he found the employee met the "as is" causation standard regarding his low back injury. Thus, the judge's error in using the "a major cause" standard cannot be considered harmless because it resulted in the judge removing from consideration, any facts he may have found concerning disability and the extent of incapacity related to the low back injury.

Accordingly, we vacate the decision and recommit the matter for the judge to consider both the employee's right shoulder injury and his low back injury, and to make

further findings of fact and rulings of law addressing the employee's disability and extent thereof, resulting from both injured body parts. The employee's remaining arguments concern the judge's earning capacity analysis. We do not address those arguments here because the judge is required to perform a completely new incapacity analysis after making additional findings of fact concerning the effects of both the low back and right shoulder injury. "We reinstate the conference order, pending receipt of the judge's decision on recommittal." Carmody v. North Shore Medical Center, 33 Mass. Workers' Comp. Rep. ___ (4/17/19), citing Lafleur v. Department of Corrections, 28 Mass. Workers' Comp. Rep. 179, 192 (2014).

Because the employee appealed the hearing decision and prevailed, an attorney's fee may be appropriate under § 13A(7). Employee's counsel must submit to this board, for review, a duly executed fee agreement between the employee and counsel. No fee shall be due and collected from the employee unless and until the fee agreement is reviewed and approved by this board.

So ordered.

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Catherine Watson Koziol
Administrative Law Judge

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Bernard W. Fabricant
Administrative Law Judge

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Carol Calliotte
Administrative Law Judge

Filed: **July 31, 2019**