COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 052169-99**

Anne Marie Tripp	Employee
Cape Cod Hospital	Employer
Cape Cod Hospital	Self-insurer

REVIEWING BOARD DECISION
(Judges Carroll, Maze-Rothstein and McCarthy)

APPEARANCES
Deborah G. Kohl, Esq., for the employee
Linda D. Oliveira, Esq., for the self-insurer at hearing
Paul M. Moretti, Esq., for the self-insurer on appeal

CARROLL, J. The employee appeals from a decision in which an administrative judge concluded that she had suffered an industrial accident, but that she had failed to prove any compensable incapacity beyond the without-prejudice period paid by the self-insurer. Because the G. L. c.152, § 11A, physician explicitly rendered no opinion on causation, making his opinion inadequate as a matter of law, we reverse the decision and recommit the case for the introduction of additional medical evidence, and for further findings of fact.

The employee was injured at her job as a housekeeper on December 18, 1999, when she caught her right arm on a door, and twisted her body. She experienced tightness and pain in her mid and low back the next day, (Dec. 6-7), and treated at the Cape Cod Hospital Emergency Room, where she gave a history of having three ruptured discs. The employee had undergone a lumbar MRI on November 4, 1999, which demonstrated L4-5 spondylosis and small left lateral/intraforaminal disc herniation narrowing the proximal left L4 neural foramen and mild spondylosis L3-4 and T11-12. These pre-existing conditions were not work related. (Dec. 7, 9.) The employee treated with a chiropractor after the December 18, 1999 work incident, describing low back pain and right sided muscle spasm, mid back pain and muscle spasm, right buttock and hip

joint pain, right leg numbness, right upper arm and elbow pain and right neck pain. (Dec. 7.)

The employee underwent a cervical MRI in March 2000, which indicated cervical spondylosis and a right sided disc herniation at C6-7. In July 2000, a thoracic and lumbar MRI indicated degenerative changes at T8-9, a small ventral right T12-L1 disc herniation, and the pre-existing left L4-5 disc herniation appearing slightly increased with newly extruded intraforaminal matter. The employee treated with physical therapy at Cape Cod Rehabilitation and at Brigham and Women's pain management clinic with epidural and facet blocks, and other pain management tools and medications. (Dec. 7-8.)

The self-insurer paid benefits without prejudice until May 6, 2000, and then resisted the employee's claim for ongoing benefits. The judge awarded ongoing § 34 temporary total incapacity benefits as a result of the § 10A conference, and the self-insurer appealed to an evidentiary hearing, at which it raised as issues liability, extent of incapacity, and causal relationship. (Dec. 2-3.)

The employee underwent a § 11A impartial medical examination. The judge granted the employee's motion to allow additional medical evidence for the pre-examination "gap" period, see G. L. c. 152, § 11A(2), but denied the employee's motion for additional medical evidence based on the impartial physician's opinion being otherwise inadequate. (Dec. 3; employee's Motion for Additional Medical Evidence dated May 3, 2002.)

The judge concluded that the employee suffered an industrial injury on December 18, 1999. (Dec. 10.) However, after not allowing additional medical evidence, except for the 'gap' period, the judge went on to use the heightened § 1(7A) causal standard – whether the work injury remained a major but not necessarily predominant cause of the employee's disability and need for treatment – and concluded that the employee had failed to prove that her December 18, 1999 industrial injury was a major cause of any

disability that she suffered after the self-insurer had terminated its payment of without-prejudice benefits on May 6, 2000.[1] Id.

The employee argues on appeal that the judge erred, when he failed to allow her motion for additional medical evidence. The employee's motion was based, inter alia, on the § 11A physician's inability to render an opinion on the causal relationship between the industrial injury of December 18, 1999 and her medical disability. The judge found, and the insurer agrees, that the impartial physician, Dr. Thomas Galvin, was unable to give opinions as to the etiology of the employee's pain, and as to whether the work incident was a causative factor in the employee's pain and disability. (Dec. 8; Self-Insurer's Br. 8; Dep. 13-14.) Additional medical evidence was required under the circumstances of this case. "Where, as here, the § 11A report fails to adequately address causal relationship, it is inadequate as a matter of law." Bean v. Tenavision, 15 Mass. Workers' Comp. Rep. 217, 220-221 (2001), citing Mendez v. The Foxboro Company, 9 Mass. Workers' Comp. Rep. 641 (1995). See Allie v. Quincy Hospital, 12 Mass. Workers' Comp. Rep. 167 (1998); Kane v. Mediplex Rehab of Holyoke, 14 Mass. Workers' Comp. Rep. 179, 180-181 (2000). As the employee adequately preserved the issue by moving for additional medical evidence on that basis, see Viveiros' Case, 53 Mass. App. Ct. 296, 299-300 (2001), we recommit the case for the introduction of additional medical evidence without limitation.[2] See also, Beckwith v. Willowood of Pittsfield, 14 Mass. Workers' Comp. Rep. 353 (2000); Brown v. Star Market, 12 Mass. Workers' Comp. Rep. 282 (1998); Safford v. Worcester Hous. Auth., 10 Mass. Workers' Comp. Rep. 339 (1996).

On recommittal, the question of the appropriate causal standard will likely arise. The employee is correct that the self-insurer did not raise the issue of § 1(7A)'s application either in its issues/defense sheet, or at the commencement of the hearing. We

[1] In fact the judge lapses into referring to the standard as "the" major cause, an incorrect view of 1(7A).

[2] The judge has already allowed additional medical evidence for the pre-examination "gap" period. (Dec. 3.)

have stated that the insurer indeed must put the employee on notice as to what causal standard it is holding her to prove, and that the application of § 1(7A) is not triggered merely by evidence that indicates the existence of a pre-existing medical condition.[3] Jobst v. Grybko, 16 Mass. Workers' Comp. Rep. 125, 130-131 (2002). Our approach in this area is consistent with 452 Code Mass. Regs. § 1.11(3), which states that "the insurer shall state *clearly* the grounds on which the insurer . . . has declined to pay compensation . . . ." (Emphasis added.) In Phillips's Case, 41 Mass. App. Ct. 612 (1996), the Appeals Court applied that regulation, and held that the insurer could not claim the benefit of § 35E at hearing, when it had not raised the section as an issue. This was so, even though the evidence adduced at hearing clearly satisfied the predicates to its application. The court reasoned:

> By virtue of this regulation, Phillips' rights under G. L. c. 152, were deemed established before the judge notwithstanding the provisions of § 35E. . . . In a workers' compensation case, the claimant shoulders the burden of proof as to all elements of the claim: employment within the coverage of the act, injury arising out of and in the course of employment, causal relation between injury and disability, extent of disability and a timely claim. Locke, Workmen's Compensation, § 502 (2d ed. 1981). *The Legislature has, however, placed the burden on insurers to inform claimants of the issues it will contest. See G. L. c. 152, § 7. . . . The board committed no error of law in preventing [the insurer] from introducing issues which had not been raised before the judge and which were not based on newly discovered evidence.*

Phillips's Case, supra at 618 (emphasis added). We disagree with the self-insurer that "causal relationship" raised as an issue necessarily brings in § 1(7A) "a major" causation, merely due to the presence of a pre-existing condition in the evidence. Moreover, the fact that the self-insurer raised "a major" causation as a basis for termination of without-prejudice benefits has no bearing on the analysis. The hearing was de novo.

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[3] On the other hand, we have also stated that insurers may not invoke "a major" causation provisions of § 1(7A) without some evidence to support the proposition that the employee does present a pre-existing medical condition that arguably could combine with the subject industrial injury. Fairfield v. Communities United, 14 Mass. Workers' Comp. Rep. 79, 83 (2000); Jobst, supra.

Nonetheless, in light of the recommittal for the introduction of additional medical evidence, the judge may, in his discretion, hear any motion the self-insurer might choose to file in order to amend its defenses to the employee's claim, analogous to Regulation 1.23(1).[4]

Accordingly, we reverse the decision and recommit the case for the introduction of additional medical evidence, and further proceedings consistent with this opinion.

So ordered.

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Martine Carroll
Administrative Law Judge

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Susan Maze-Rothstein
Administrative Law Judge

Filed: **November 26, 2003**

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William A. McCarthy
Administrative Law Judge

[4] 452 Code Mass. Regs. § 1.23(1) reads:

> A party may amend his claim or complaint as to the time, place, cause, or nature of the injury, as a matter of right, at any time prior to a conference on a form provided by the Department. At the time of a conference or thereafter, a party may amend such claim or complaint only by filing a motion to amend with an administrative judge. Such a motion shall be allowed by the administrative judge unless the amendment would unduly prejudice the opposing party.