COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 008792-09**

Barbara Beth Soucy	Employee
Beacon Hospice, Inc.	Employer
Insurance Co. of the State of Pennsylvania	Insurer

REVIEWING BOARD DECISION
(Judges Costigan, Horan and Levine)

The case was heard by Administrative Judge Bean.

APPEARANCES
Daniel C. Finbury, Esq., for the employee
Merlene J. Rangulong, Esq., for the insurer
Erin Mullen, Esq., for the insurer on brief

COSTIGAN, J. We previously recommitted this case to the administrative judge for further findings addressing the insurer's duly raised defense of § 1(7A) "a major" causation[1] applicable to combination injuries. Soucy v. Beacon Hospice, Inc., 25 Mass. Workers' Comp. Rep. 311 (2011). In his recommittal decision, filed on October 18, 2011, the administrative judge wrote:

> The insurer raises section 1(7A) arguing that the employee had several signficant pre-existing conditions that are responsible for any alleged disability. This defense is ably addressed by Doctors Welter and Lopez who found these pre-existing conditions, fibromyalgia, degenerative disc disease, bipolar disorder, depression and anxiety to have been worsened by the industrial injury. In adopting the opinions of these two doctors, I must find that the insurer's 1(7A) defense has failed.

(Dec. 796.)

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[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.

The adopted medical opinions that the industrial injury worsened the employee's pre-existing conditions satisfied the insurer's burden of producing evidence that the industrial injury *combined* with those conditions. MacDonald's Case, 73 Mass. App. Ct. 657, 659-660 (2009), citing Johnson v. Center for Human Dev., 20 Mass. Workers' Comp. Rep. 351, 353 (2006). However, that worsening is not proof of "a major" causation. See Castillo v. Cavicchio Greenhouses, Inc., 66 Mass. App. Ct. 218, 220-221 (2006). Thus, the judge's finding that the insurer's § 1(7A) defense had once again failed was error. (Dec. 796.)

Even the parties recognized this error, and on October 31, 2011, they appeared before the judge to request an addendum to his hearing decision on recommittal. (Ins. br. 5; Employee br. 6.) Finding that the thirty-day appeal period under § 11C had not yet run, the judge purported to address the parties' concerns in an addendum to his decision, filed that same day:

> The parties are concerned that my findings on the issue of the insurer's section 1(7A) defense are not adequate to withstand appellate review. To address that issue I substitute the following paragraph for the second paragraph of the General Findings of my decision. The words that I add today are italicized.

The judge then changed the last sentence of his above-quoted finding:

> In adopting the opinions of these two doctors, *I find that the physical and psychiatric worsenings found by them are a major cause of the employee's disability and need for treatment, and therefore,* I must find that the insurer's defense has failed.

(Dec. 821; italics in original.) The insurer appealed both the decision on recommittal and the addendum, arguing the medical evidence did not support the judge's § 1(7A) finding. We agree. Instead of no findings on § 1(7A) "a major" causation, the deficiency in the first decision, we now have a finding which is unsupported by the adopted medical evidence. Therefore, we again vacate the decision and recommit the case for hearing de novo.

By way of background, the employee suffered from pre-existing, non-compensable fibromyalgia in her shoulders, back and hips, the residual effects of a 2004 motor vehicle accident that resulted in cervical surgery, lumbar degenerative

disc disease, bipolar disorder, anxiety and depression.[2] On February 15, 2009, while at work as a hospice nurse, the employee experienced low back pain while rolling the body of a dead patient. She continued working until February 27th when she left work, not to return. Since then, both the employee's pain and her mental problems have worsened. (Dec. 793-794.)

In his first hearing, the judge determined that the medical issues presented by the employee's claim were complex,[3] and he allowed the parties to introduce medical evidence in addition to that of the § 11A physician. The employee's evidence was "voluminous," (Dec. 311),[4] containing more than four hundred pages of medical records, (Ex. 9), which, if analyzed properly, might sustain the employee's burden of proof. [5] Therefore, recommittal is again necessary.

We note that, as concerns the psychiatric component of her case, the employee was required to prove "a major" work-related causation in this case of pre-existing

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[2] The employee concedes the applicability of § 1(7A)'s "a major" causation to these diagnoses. (Employee br. 15.)

[3] The sixteen diagnoses set out by the medical evidence were: "a small disc bulge with an anular tear that does not cause any significant impingement or narrowing of the thecal sac; early degenerative disc disease; a back strain; peripheral neuropathy; sacroiliitis; radiculitis; chronic pain; chronic fatigue; chronic opioid analgesic therapy; possible complex regional pain syndrome; depression; anxiety; post traumatic stress disorder; bipolar disease; psychiatric overlay; and fibromyalgia." (Dec. 794.)

[4] The judge employs a personal system of citation for his decisions, according to the year of filing, with consecutive pagination, i.e., 12 Bean 311. Because his original decision, the decision on recommittal and the addendum were all filed in 2011, we need not designate "Dec. I" or "Dec. II" or "addendum;" rather, we provide only the page citation.

[5] Given the multiple physical and psychiatric diagnoses involved in the employee's claim, it is understandable, although unfortunate, that the employee took a non-selective approach to her medical evidence. See Ex. 9. Certainly when faced with a request for production under 452 Code Mass. Regs. § 1.12(2), a party must produce complete medical records to the other side. However, in an effort to avoid the protracted and inconclusive results achieved here, the better practice would have been for the employee to limit her submission to the judge to a few pages of narrative reports addressing the medical issues, particularly the appropriate causation standard, and to confirm to the judge that complete medical records had been provided to the insurer.

mental conditions aggravated by a physical work injury. Cornetta's Case, 68 Mass. App. Ct. 107, 118-119 (2007). Dr. Lopez's psychiatric opinion of total disability due to work-related worsening contained no description of the degree of worsening, as is necessary for the appropriate § 1(7A) analysis. "[A] finding of heightened causation under § 1(7A) must be supported by medical opinion that addresses -- in meaningful terms, if not the statutory language itself -- the relative degree to which compensable and noncompensable causes have brought about the employee's disability." Stewart's Case, 74 Mass. App. Ct. 919, 920 (2009). Because the judge's ultimate finding on § 1(7A) causation specifically relied on Dr. Lopez's opinion to support his award of benefits, the error is not harmless. Therefore, the judge's award of benefits, based in part on the employee's psychiatric condition, cannot stand.

As concerns the employee's physical condition, the judge's adoption of Dr. Welter's opinion included, by reference, his earlier finding that the doctor expressly determined the industrial accident was a major cause of the employee's "injury" [sic] and need for treatment. (Ex. 9C, June 15, 2010 office note; Dec. 315, 793.) However, Dr. Welter rendered this opinion in terms of a work-related aggravation of the employee's pre-existing fibromyalgia, lumbar disc degeneration and bipolar disorder. Moreover, Dr. Welter's adopted opinion also causally related the "new diagnoses of peripheral neuropathy . . . and suspected reflex sympathetic dystrophy," (Dec. 315), which opinion the judge included again in his findings on recommittal. (Dec. 794.) As direct cause diagnoses, these are not subject to the application of § 1(7A).

On the other hand, the judge's new findings on recommittal -- that the employee's diagnoses of sacroiliitis, chronic pain syndrome and chronic low back pain are "as a result of the industrial injury," and therefore not pre-existing and not subject to § 1(7A),[6] (Dec. 794), -- lack an evidentiary foundation. Although the judge

[6] The judge comingled these diagnoses with the two direct cause diagnoses found by Dr. Welter: "The industrial accident also caused her to suffer the injuries of peripheral neuropathy, sacroiliitis, complex regional pain syndrome, complex pain syndrome and chronic low back pain." (Dec. 795.)

adopted the opinion of Dr. Maureen Hughes, who addressed these diagnoses, (Dec. 794-795), in fact, the doctor did not speak to causal relationship.[7] Moreover, as argued by the insurer, (Ins. br. 7, 16), the fact that the employee had low back and sciatic pain several months *before* her February 15, 2009, work injury, was established in the medical records of Dr. Welter, (Ex. 9C; Dec. 315-316), and by the employee's own testimony. (Tr. 14.)[8] Because this important component of the judge's findings on causal relationship is tainted by this two-fold mischaracterization of the medical evidence, the decision again cannot stand.[9]

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[7] The judge previously found that Dr. Hughes "never offered an express opinion on causal relationship or disability although her recitation of the facts of the industrial accident and her knowledge that the employee is not working can imply both a causal relationship of the insustrial accident to the diagnosis and a total disability." (Dec. 317.) On recommittal, the judge slightly rephrased the doctor's opinion, but still wholly mischaracterized it. He found that Dr. Hughes,

> credibly diagnosed chronic pain syndrome, sacroiliitis, anxiety, fibromylagia and a chronic back strain. By her recitation of the history of the industrial accident and medical treatment and her knowledge that the employee is not working she implicitly establishes causation.

(Dec. 795.) This finding simply miscontrues the doctor's opinion, and cannot stand. Toppi v. Turner Constr. Co., 25 Mass. Workers' Comp. Rep. 89, 96 (2011), citing Zapata v. Demoulas Supermarkets, 18 Mass. Workers' Comp. Rep. 310, 315 (2004)(judge may adopt all, part or none of a medical opinion, but may not mischaracterize it). We fail to see how the doctor's "recitation of the history of the industrial accident and medical treatment," (Dec. 795), says anything regarding causal relationship, given the prominent presence of pre-existing contributors to her disability.

[8] Likewise, Dr. Hughes's May 22, 2009 report lists "[t]his bilateral S1 radiculopathy" under "Past medical history," and describes the February 15, 2009, work injury as having caused "an episode of low back strain." (Ex. 9H; Dec. 316.))

[9] The employee argues that once *the judge* stated that the employee's "physical injury remains a major cause of her disabling pain," (Dec. 318), and concluded that she has an inability to work and needs appropriate care, which the insurer should pay for, (Dec. 318-319),

> [w]hat more need be done or said? Requiring a hypertechnical compliance with a strict reading of the law is not at all necessary. The Administrative Judge has raised and dealt with the issue adequately and come to his reasoned conclusion. A mere formulaic recitation of what the statute requires is not needed.

(Employee br. 18-19.) Requiring the judge's conclusions as to the duly raised defense of

Accordingly, we vacate the decision.[10] Because the medical evidence is not conclusive, we must recommit the case. Cf. Roney's Case, 316 Mass. 732, 739-740 (1944)(where evidence can support only one result, recommittal for further findings is not warranted). "However, we have no assurance that another recommittal to this judge would be anything but an exercise in futility. Therefore, 'we conclude that this is an extraordinary case, warranting assignment to a different administrative judge.' " Ellison v. NPS Energy Svcs., Inc., 23 Mass. Workers' Comp. Rep. 263, 264 (2009), quoting Joseph v. City of Fall River, 16 Mass. Workers' Comp. Rep. 261, 264 (2002), citing Gallant v. TRW, Inc., 13 Mass. App. Ct. 1003 (1982).

Accordingly, we transfer the case to the senior judge for reassignment to a `different administrative judge and a hearing de novo.

So ordered.

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Patricia A. Costigan
Administrative Law Judge

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Mark D. Horan
Administrative Law Judge

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Frederick E. Levine
Administrative Law Judge

Filed: **August 8, 2012**

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§ 1(7A) "a major" causation be supported by expert medical opinion is not, as the employee argues, tantamount to "a hypertechnical compliance" with the statute. (Id.) It is axiomatic that because causal relationship -- here, "a major" causation -- is a matter beyond the common experience of an ordinary layperson, expert medical testimony is required. Barbetta v. Port Morris Tile & Marble Corp., 22 Mass. Workers' Comp. Rep. 193, 196 (2008), citing Casey's Case, 348 Mass. 572, 574-575 (1965).

[10] We reinstate the conference order in the interim.