**COMMONWEALTH OF MASSACHUSETTS**

**DEPARTMENT OF INDUSTRIAL ACCIDENTS** **BOARD NO. 036471-11**

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| Cheryl Briere | Employee |
| Lowell General Hospital | Employer |
| Circle Health Insurance | Insurer |

**REVIEWING BOARD DECISION**
(Judges Harpin, Horan and Fabricant)

The case was heard by Administrative Judge Bean.

**APPEARANCES**
Jeffrey A. Young, Esq., for the employee
Phillip R. Ronan, Esq., for the insurer at hearing
John J. Canniff, Esq. for the insurer on appeal

**HARPIN, J.** The insurer appeals from a decision awarding the employee § 34A benefits. We vacate the award of those benefits, award § 34 benefits in their stead, and affirm the remainder of the decision.

The employee worked as a certified nurse's assistant from 1972 to 2011. (Dec. 451.) Over the years the employee sustained a number of injuries, some of them work-related. In 1994 she hurt her back lifting a 350 pound man into a car, for which she received compensation benefits. Id. On August 27, 1998, the employee injured her back and neck in a car accident, but did not lose time from work. Id.

The employee began working for the employer in 1999. While there, she injured her back and hips on unspecified dates, with injury reports filed for some, but not all, of these injuries. (Dec. 451.) On February 28, 2004, the employee was involved in another car accident, for which she sought medical treatment. She treated for hip and back pain in 2005, and for neck and back pain in 2008. (Dec. 451.)

On December 4, 2011, the employee sustained a work-related injury to her hands, neck and back when she helped her co-workers lift a 400 pound patient. (Dec. 451.) Although she finished her shift and worked the next day, by December 6, 2011, the employee sought a leave of absence from her job. She told the employer the pain she felt, from wear and tear on the job, work injuries, and the lifting injury on December 4, 2011, made it impossible for her to perform her job. (Dec. 452.) She left work and has not returned. Id.

On April 23, 2012, the employee filed a claim for §§ 34, 13 and 30 benefits from December 6, 2011, and continuing.[1] The insurer filed a timely denial, raising liability, disability, causal relationship, and the applicability of § 1(7A) as defenses. After a conference, the judge issued an order on July 19, 2012, ordering the payment of § 34 benefits from December 6, 2011, and continuing, as well as medical benefits. (Dec. 450.) The insurer was allowed to file a late appeal, and the matter was scheduled for a hearing on May 22, 2013. (Dec. 450.) At the hearing the employee sought the payment of § 34 benefits from December 6, 2011, and continuing, reserving any claim for § 36 benefits. The insurer raised the same defenses it previously raised at the conference. In his decision the judge awarded the employee § 34A benefits, and denied the insurer's § 1(7A) defense, on the ground that he found the lifting incident of December 6, 2011, to be a major cause of her disability. The insurer appeals raising three issues, which we address in turn.

The insurer first argues the judge erred in awarding the employee § 34A benefits retroactive to her December 6, 2011, date of injury, when the employee never claimed such benefits. We agree.

The employee's hearing memorandum is clear: she sought only § 34 benefits from December 6, 2011, and continuing. Rizzo, supra. At the onset of

[1] See Rizzo v. MBTA, 16 Mass. Workers' Comp. Rep. 160, 161 n.3 (2002)(permissible to take judicial notice of documents in Board file).

the hearing the judge stated: "[t]he employee is seeking section 34 compensation from December 6, 2011 to the present and continuing. She's also seeking medical benefits pursuant to sections 13 and 30." (Tr. I, 2-3)[2] At no time did the employee claim entitlement to § 34A benefits.

We have held that a judge must decide the issues presented before him, but may not stray from the parameters of the dispute between the parties. Burgos v. Superior Abatement, Inc., 14 Mass. Workers' Comp. Rep. 183, 185 (2000). When there is no claim before a judge for § 34A benefits, as here, and the issue was not tried by consent, it is error for the judge to award such benefits. Gebeyan v. Cabot's Ice Cream, 8 Mass. Workers' Comp. Rep. 101, 103 (1994); Medley v. E.F. Hauserman Co, 14 Mass. Workers' Comp. Rep. 327, 330 (2000). The judge's award of § 34A benefits is thus vacated.

Nevertheless, there was sufficient evidence to find that the employee was totally disabled due to the December 4, 2011, incident. We thus amend the decision and order that § 34 benefits, in a weekly amount of $355.23, based on her average weekly wage of $592.85, be awarded from December 4, 2011, to exhaustion. The employee is free to file a further claim for weekly benefits if she so wishes. See Halama v. Mestek, Inc., 17 Mass. Workers' Comp. Rep. 245, 247 (2003).

The insurer also argues the judge erred in not only improperly discounting its § 1(7A) defense, but in mischaracterizing the medical evidence to find that the employee's 2011 industrial accident remained "a major" cause of her total disability. It seeks the denial and dismissal of the employee's claim, on the basis that the employee failed to present any medical opinion evidence that would meet her burden of proof under § 1(7A).

At the hearing the insurer asserted that the impartial physician, Dr. Warnock, had identified "several non-work related pre-existing medical issues to

[2] The transcript of the hearing on May 27, 2013, is designated as "Tr. I," and that of the hearing on September 19, 2013, is designated as "Tr. II."

her back, her neck, her arms and her hips." (Tr. I. 4.) The insurer then noted "language . . . from some treating physicians that there might have been an exasperation (sic)." Id. It argued that this satisfied its burden to show a combination injury. MacDonald's Case, 67 Mass.App.Ct. 650, 660 (2009).

While the judge acknowledges the raising of the defense in the decision, (Dec. 1), he does not conduct the requisite § 1(7A) analysis. See Vieira v. D'Agostino Assocs. 19 Mass. Workers' Comp. Rep. 50 (2005). Instead, he adopts Dr. David Morley's opinion that the employee's back pain, which stemmed from an L4-5 herniation and L5-S1 degenerative changes, was due to "the heavy stresses imposed on [the employee] while performing the physical duties of a CNA." (Dec. 453, 456, citing Dr. Morley's report of June 26, 2013 [Ex. 9], p. 3 and his deposition, pp. 14, 16, 34, 41, 42.). He also adopts the opinions of Dr. Jessica Wieselquist, the employee's primary care physician, who found the employee to be disabled due to anxiety, sleep issues, neck, back and hand pain, with the back pain causally related to the employee's work as a CNA. (Dec. 454, 456; Ex. 8.) The judge then finds the December 2, 2011, incident was a major cause of the employee's disability, "but the more important cause of her disability and need for treatment is the many years of heavy work required of a certified nursing assistant, including much heavy lifting, pushing and pulling patients . . . which caused both the employee's lumbar and upper extremity injuries." (Dec. 455.) He concludes that as her CNA work was a major cause of her disability, "the insurer's section 1(7A) defense fails." Id.

The insurer is correct that neither Dr. Worley nor Dr. Wieselquist ever stated the December 4, 2011, incident was a major cause of the employee's disability or need for treatment. However, they both did state that the employee's back pain was causally related to her work as a CNA, (Exs. 8 & 9), with Dr. Wieselquist stating that the employee's anxiety and sleep problems were also causally related as well. (Dec. 454; Ex. 8.).

The insurer's argument fails due to a basic tenet of § 1(7A). When there is a combination of a prior condition and the industrial accident, the employee is not subject to the higher burden of proving "a major cause," when the prior condition is work-related. Martinez v. Georges Renovations LLC, 28 Mass. Workers' Comp. Rep. 73, 76 (2014). That is the case here. The judge adopted the doctors' opinions that the employee's pre-existing orthopedic, anxiety and sleep issues were due to her prior work as a CNA. Those issues "caused both the employee's lumbar and upper extremity injuries," which then led to her disability. (Dec. 455.) That being the case, there was no need to require the employee to meet the enhanced "a major" burden of proof of § 1(7A).[3]

We find the insurer's third argument to be without merit.

We therefore vacate the award of § 34A benefits and award in its stead § 34 benefits, in the amount of $355.23 per week, from December 5, 2011, to exhaustion.

Pursuant to G. L. c. 152, § 13A(6), the insurer is directed to pay the employee's counsel a fee of $1,613.55.

So ordered.

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William C. Harpin
Administrative Law Judge

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Mark D. Horan
Administrative Law Judge

[3] The judge did find that the "lifting incident of December 4, 2011 is a major cause of her disability." (Dec. 455.) This was a mischaracterization of the doctors' opinions, as neither gave the "a major cause" statement, but in the context of the "as is" standard, this misstatement was harmless error, given the doctors' clear opinions on simple causal relationship of the employee's disability to the lifting incident. See Dellarusso v. Mass. Gen. Hosp., 25 Mass. Workers' Comp. Rep. 415, 417-418 (2011).

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Bernard F. Fabricant
Administrative Law Judge

Filed: **October 17, 2016**