COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 030839-14**

Christine Litch	Employee
American Airlines	Employer
National Union Fire	Insurer

REVIEWING BOARD DECISION
(Judges Long, Koziol and Calliotte)

This case was heard by Administrative Judge Bean.

APPEARANCES
Alan S. Pierce, Esq., for the employee
Donna J. Gully, Esq., for the insurer at hearing
John J. Canniff, Esq., for the insurer on appeal

LONG, J. The insurer appeals from a decision ordering ongoing § 34 temporary total incapacity and § 30 medical benefits, including surgery, for the employee's cervical condition. The insurer argues the administrative judge erred when he relied for support upon a § 11A report that predated its discontinuance request to support the award and to defeat the insurer's § 1(7A) defense.[1] In addition, the insurer argues that the medical opinions on which the judge relied did not sufficiently address the § 1(7A) heightened causation standard. For the following reasons, we vacate the decision, in part, and recommit the case to the judge for further findings.

The employee was forty-eight years old at the time of hearing. She is married with two children, earned an associate's degree, and worked as a flight attendant for American

[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.

Airlines from 1989 to 2015. (Dec. 285.) The employee suffered an industrial injury to her left elbow in 2009, underwent surgery, and was out of work for one and one half years before returning to work without restriction. She worked full duty from the time she returned until November 19, 2014, when she left work due to increasing pain in her right arm and neck. Id.

The employee filed a prior claim for §§13 and 30 medical benefits only, which included a claim for treatment of an alleged cervical injury.[2] The insurer denied the medicals-only claim on the grounds of insufficient credible evidence of causal relationship of the requested medical treatment to the industrial accident; it also raised § 1(7A). Rizzo v. MBTA, 16 Mass. Workers' Comp. Rep. 160, 161 n.3 (2002)(permissible to take judicial notice of Board file.) A § l0A conference was held on July 22, 2015, and an order for the payment of the claimed cervical medical treatment was issued on the same day. The insurer timely appealed the §§ 13 and 30 conference order. Rizzo supra.

The employee was examined by Dr. Victor Conforti pursuant to § 11A; his report, dated October 1, 2015, provides:

> Diagnoses:
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> 1. Aggravation of underlying degenerative arthritis and disk disease, cervical spine.
> 2. Right medial epicondylitis.
> 3. Bilateral carpal tunnel syndrome, right greater than left.
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> It is my opinion that there is a causal relationship established by the history of the injury, which occurred as a result of repetitive activity at work, and the above diagnoses. That is based on the history, examination of the claimant, review of records and my experience treating such injuries.
>
> . . . .

[2] As the employee points out in her brief, the judge mistakenly stated that he ordered weekly benefits at conference. In fact, the employee was already collecting weekly incapacity benefits and the claim was only for medical benefits, which was what he ordered. (Employee br. 1-2.) Rizzo v. M.B.T.A., 16 Mass. Workers' Comp. Rep. 160, 161 n. 3 (2002)(reviewing board may take judicial notice of board file).

> The repetitive activity at work, combined with the underlying cervical degenerative arthritis and degenerative disk disease of the cervical spine made the problem worse for her neck.
>
> The repetitive activity at work is the sole cause of her right medial epicondylitis and bilateral carpal tunnel syndrome.

(Ex. 6.)

After receipt of Dr. Conforti's report, the insurer withdrew its appeal of the §§13 and 30 conference order, (Dec. 286), thereby accepting initial liability for the cervical injury and related medical treatment. See G. L. c. 152, § 10A("withdrawal of a timely appeal shall be deemed to be acceptance of the administrative judge's order and findings . . . "); see also McCarthy v. Peabody Properties, Inc., 29 Mass. Workers' Comp. Rep. 31, 38 (2015)(where a claim is initially accepted, subsequent proceedings may not challenge the establishment of liability); Kareske's Case, 250 Mass. 220, 224 (1924)(with insurer's acceptance, "basic questions of liability under the law are not open for further consideration or different determination").

On July 21, 2016, the insurer filed the present complaint for discontinuance, alleging that the employee's ongoing disability was no longer causally related to work, again raising § 1(7A) as a defense. (Dec. 283.) A § 10A conference was held on October 31, 2016, and the judge denied the insurer's discontinuance complaint. A timely appeal by the insurer followed.

A different impartial physician, Dr. Murray Goodman, conducted a § 11A examination on February 23, 2017, and presented opinions that differed from Dr. Conforti's prior § 11A opinions. Dr. Goodman stated:

> Assessment:
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> Diagnosis:
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> 1. Cervical degenerative disc disease
> 2. Cervical radiculitis C7
> 3. Mild medial epicondylitis right elbow
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> Causation: The first 2 diagnoses are unrelated to any injury at work. There is no evidence clinical or electrical for carpal tunnel

> syndrome. There is mild medial epicondylitis which may be related to repetitive use at work[;] however at the present time the symptoms are not sufficient to warrant treatment. Predominant cause of this patient's symptoms in my opinion are related to her cervical spine and related to degenerative disc disease. There is no evidence that her work caused or permanently aggravated this condition.

(Ex. 3, Impartial medical examiner's report.)

The hearing on the insurer's discontinuance request was held on April 7, 2017, at which time the insurer raised as issues disability, extent of disability, and causal relationship and § 1(7A) as to the neck; it also denied entitlement to §§ 13 and 30 benefits for the neck. (Ex. 2, Dec. 283.) The employee sought § 34 temporary total incapacity benefits from July 21, 2016, and medical benefits pursuant to §§ 13 and 30, including cervical surgery. (Ex. 1; Tr. 4; Dec. 283.) The employee's motion for the introduction of additional medical evidence was allowed by the judge. Dr. Conforti's prior § 11A report of October 1, 2015, was one of the additional medical records admitted into evidence, together with notes from the employee's treating physician, Dr. Jeremy Shore, and reports from physicians retained by the insurer, Dr. Andrew Terrono and Dr. Suzanne Miller.[3] (Exs. 6, 13, 14, 16, 19, 20; Dec. 284.)

In his hearing decision, the judge found the employee continued to be totally disabled since leaving work on November 19, 2014.[4] He ordered the payment of § 34 temporary total incapacity benefits from November 19, 2014, to the present and continuing, and §§ 13 and 30 medical benefits for the cervical condition. (Dec. 290.) The judge's "General Findings" state as follows:

> I find that the employee suffered an industrial injury that caused her to leave work on November 19, 2014. This injury continues to totally disable her and may

[3] Other medical records were also introduced; however, the records cited above were the only medical records relied upon by the judge. While the judge adopted only the opinions of Dr. Conforti and Dr. Shore, he referenced Dr. Miller's report as supporting Dr. Conforti's opinion.

[4] The judge never explicitly denied the insurer's discontinuance request. This may be due to the judge's misunderstanding of the procedural posture of the case. See Dillingham v. Brewer Petroleum Service, Inc., 32 Mass. Workers' Comp. Rep.__ (08/31/18).

> benefit from the cervical surgery recommended by her treating doctor. In making these determinations, I rely on the credible testimony of the employee and the persuasive medical opinions of Doctors Conforti and Shore. All of the doctors presented agree that the employee is presently (at the time of their examinations) injured and suffering from pain. The disagreements between them are on the issues of causation and the extent of her existing disability. The withdrawn appeal of my 2015 conference order establishes that the employee suffered a work injury in 2014 that continued to disable her in 2015. That withdrawal, after the issuance of Dr. Conforti's impartial medical examiner's report, establishes his findings as controlling that the employee was totally disabled due to an aggravation of her pre-existing degenerative condition in her neck in 2015. Dr. Miller's opinion supports that finding. This defeats the insurer's § 1(7A) defense.

(Dec. 289-290.)

The insurer raises two issues on appeal. First, the insurer argues that, since Dr. Conforti's report pre-dated its discontinuance request, the judge erred in relying upon the report to establish that the employee's ongoing total incapacity was due to an aggravation of her pre-existing cervical condition, and also to defeat the insurer's § 1(7A) defense. Next, the insurer argues that the medical opinions relied upon by the judge fail to adequately address the heightened § 1(7A) causation standard. We agree with both of the insurer's arguments.

The judge was obligated to determine, from the date of the insurer's discontinuance request, July 21, 2016, forward, whether the accepted cervical injury "remains a major but not necessarily predominant cause of disability or need for treatment." G. L. c. 152, § 1(7A). The issues before the judge at hearing were "causal relationship and extent of disability *as of the time of the insurer's discontinuance*, not causal relationship from the outset of the claim." Cubellis v. Mozzarella House, Inc., 9 Mass. Workers' Comp. Rep. 354, 356 (1995). Here, the insurer filed its discontinuance request on July 21, 2016, rendering Dr. Conforti's October 1, 2015, impartial report stale and irrelevant to the § 1(7A) analysis of *ongoing* causation and extent of disability *post* July 21, 2016.

Furthermore, the judge implies that because of the insurer's prior withdrawal of its appeal of the §§ 13 and 30 order for cervical medical treatment, the insurer is thereby

foreclosed from raising § 1(7A) in this claim or future discontinuance requests. However, exactly the opposite is true. The insurer's decision to withdraw its appeal of the §§ 13 and 30 order for medical benefits after the prior § 10A conference does not foreclose further utilization of its § 1(7A) defense. See Spencer-Cotter v. North Shore Medical Ctr., 25 Mass. Workers' Comp. Rep. 315, 317 (2011)(where the statute directs the judge to determine whether the work injury "remains" causally connected to the disability, there can be no final adjudication of the defense; insurer is entitled to raise the affirmative defense of § 1(7A) "major" causation at any point in the proceedings.) See, e.g., Larkin v. Feeney's Fence, Inc., 19 Mass. Workers' Comp. Rep. 78 (2005)(insurer's initial acceptance of a case does not deprive it of the opportunity to raise the issue of § 1[7A] thereafter).

The employee in her brief implicitly endorses the judge's erroneous use of Dr. Conforti's opinion regarding the § 1(7A) issue, and goes one step further than the judge. She argues that "the proper recourse for the insurer would have been to not withdraw its appeal of the Conference Order and to litigate the § 1(7A) defense it had raised at the time of the Section 13 and 30 claim." (Employee br. 4.) In essence, the employee's position is that, since the insurer withdrew its conference appeal, it is forever barred from challenging ongoing disability or causal relationship using § 1(7A) as a basis to do so.[5] We disagree. After an initial award of compensation, the parties may seek to modify a previous order as changes occur in the condition of the injured employee. Ongoing causal relationship and the need for medical treatment, like incapacity, change over time. McCarthy, supra at 39, 40. In addition, by statutory directive, an unappealed conference order binds the party to all matters necessarily covered by it, but no further. Aguiar v. Gordon Aluminum Vinyl, 9 Mass. Workers' Comp. Rep. 103, 107, 110; citing MacKinnon's Case, 286 Mass. 37, 39 (1934), and Mozetski's Case, 299 Mass. 370, 372,

[5] The employee also argues that res judicata applies in this instance; however, res judicata was not raised as an issue by the employee at the time of the hearing and the employee has thus waived the issue on appeal. Aguinaga v. Sage Engineering and Contracting, Inc., 32 Mass. Workers' Comp. Rep. Inc.__ (March 26, 2018).

13 N.E. 2d 10, 11-12 (1938). See Nason, Koziol and Wall, Workers' Compensation § 16.20 (3rd Ed. 2003). Thus, the applicability of § 1(7A), was not necessarily decided by the prior conference order; the judge could have ordered §§ 13 and 30 medical benefits regardless of whether he believed § 1(7A) applied. In other words, we have no way of knowing what standard of causation the judge applied in ordering §§ 13 and 30 medical benefits at the prior conference. Cf. Grant v. Fashion Bug, 27 Mass. Workers' Comp. Rep. 39 (2013)(where insurer did not appeal from prior hearing decisions in which it failed to establish a combination injury under § 1(7A), findings under simple causation standard are law of case, and § 1(7A)'s applicability may not be raised in subsequent litigation; Spencer-Cotter, supra, distinguished: "there being no prior adjudication respecting whether the employee suffered a 'combination' injury,' it presented an open question").

The employee attempts to distinguish the holding of Spencer-Cotter, supra (insurer is entitled to raise the affirmative defense of § 1(7A) "major" causation at any point in the proceedings), by arguing that because the insurer here "had already raised Section 1(7A) for the first time [at] the proceeding from which it withdrew its appeal," (Employee br. 4), it is precluded from further challenges pursuant to § 1(7A). In other words, since the insurer raised § 1(7A) for the *second* time in the present action it is not allowed to pursue the issue any more. The employee's reading of Spencer-Cotter is too narrow and ignores the overriding rule that "an insurer is entitled to raise the affirmative defense of § 1(7A) 'major' causation at any point in the proceedings." Id. at 317. The employee similarly argues that in order for the insurer to challenge the opinion of Dr. Conforti in this proceeding, it was required to produce or ascertain evidence that something else occurred after its withdrawal of the prior appeal that might cause the work activities to no longer be a major cause of the employee's disability and need for treatment. (Employee br. 4.) This standard proposed by the employee is likewise rejected for the reasons stated above. Larkin, supra. See also MacDonald's Case, 73 Mass. App. Ct. 657, 659-661 (2008)(setting out insurer's burden of production and employee's burden of proof in § 1[7A] cases).

Next, the insurer argues that none of the medical opinions the judge adopted sufficiently address the heightened § 1(7A) causation standard. We agree. The insurer succinctly argues as follows:

> Dr. Conforti from October 1, 2015 gives the employment as the sole cause for the right elbow and the bilateral CTS, but only describes a combination in the neck making "the problem worse for the neck." This statement pertaining to the cervical condition does not fulfill "a major, not necessarily predominant" standard.
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> . . . .
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> Dr. Shore also does not provide the requisite statement of § 1(7A) causation. His opinions are contained within Exhibits 13, 14, 15, 16, 17 and 22. His office notes from February 19, 2015 and May 24, 2016 merely mention cervical treatment that is being provided. The closest he comes to qualifying the standard is on February 2, 2017 when he describes "a (w)ork related cervical spine injury." (Dec. 14 Bean 297; Ex. # 13). This statement does not fulfill the "a major but not necessarily predominant" standard. See Stewart's Case, 74 Mass. App. Ct. at 920.

(Insurer br. 7, 8.)

The determination of causation in a combination injury case, as in any case involving a complicated medical issue, must be grounded in competent expert medical evidence that satisfies the applicable standard. See Patterson v. Liberty Mut. Ins. Co., 48 Mass. App. Ct. 586, 592-599 (2000). Accordingly, a finding of heightened causation under § 1(7A) must be supported by a 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).

Neither Dr. Conforti nor Dr. Shore, nor any of the other physicians whose opinions were admitted, provides the requisite § 1(7A) heightened causation analysis "in meaningful terms." The employee has therefore failed to carry her burden of proof for the cervical spine condition, and the insurer's § 1(7A) defense is not defeated. Accordingly, we vacate the judge's findings regarding the employee's cervical spine condition, including his order the insurer pay for cervical surgery, and remand the case for further findings of fact and assessment of disability, factoring in only the employee's epicondylitis and carpal tunnel syndrome conditions, without considering the cervical

condition.

So ordered.

Martin J. Long
Administrative Law Judge

Catherine Watson Koziol
Administrative Law Judge

Carol Calliotte
Administrative Law Judge

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