COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 040177-99**

Claudette C. Stewart	Employee
Beth Israel Deaconess Medical Center	Employer
Caregroup, Inc.	Self-insurer

REVIEWING BOARD DECISION

(Judges Horan, Costigan and McCarthy)

APPEARANCES

Adelio DeMiranda, Esq., for the employee

Robert J. Riccio, Esq., for the self-insurer

Holly B. Anderson, Esq., for the self-insurer on appeal

HORAN, J. The self-insurer appeals from a decision awarding workers' compensation benefits for the employee's neck injury. It urges reversal of the decision, arguing the employee failed to sustain her "a major" causation burden as set forth in G. L. c. 152, § 1(7A). [1] We affirm the decision.

The employee injured her back and neck at work on September 30, 1999. (Dec. 8.) The self-insurer paid the employee weekly benefits on a without prejudice basis from October 3, 1999 to January 29, 2000. (Dec. 19.) The employee returned to work the next month, but left once again in May 2000 due to increasing pain in her back and neck. (Dec. 9.) On June 25, 2002, she underwent anterior microdiscectomies at C4-5, C5-6 and C6-7, with anterior fusions at these levels. (Dec. 10.) The employee filed a claim for workers' compensation benefits, which the self-insurer denied. When the claim was also denied

[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.

following a §10A conference, the employee appealed. At hearing the self-insurer raised the defense of § 1(7A) causation for "combination" injuries. (Dec. 3.)

The employee underwent a § 11A(2) medical examination by Dr. Michael H. Freed. He opined the employee suffered from a lumbar strain/sprain, lumbar stenosis, herniated cervical disc, cervical spondylosis and stenosis, and cervical spinal cord syndrome (cervical myelopathy). The doctor opined the employee's lumbar strain, but not her stenosis, was causally related to the work injury. The doctor also opined the employee's cervical herniation was causally related to her employment, but that her cervical spondylosis and stenosis were pre-existing conditions aggravated by the work injury. The doctor opined the cervical myelopathy was caused by the cervical herniation *in combination with* the work-aggravated cervical spondylosis and stenosis. He also opined the lumbar sprain/strain had resolved by the time of his examination, and that the cervical myelopathy was causing the employee's disability. (Dec. 10-11.)

Based on the opinions of the impartial physician, and the credited testimony of the employee, the judge found the employee's back condition had resolved. However, he also concluded the employee had sustained a work-related neck injury to justify an award of weekly incapacity and medical benefits. The judge analyzed the § 1(7A) issue as follows:

> It is true that Dr. Freed never wrote or uttered an opinion on causation that contained the words of § 1(7A). Nonetheless, I read his opinion to mean that the industrial accident was a major cause of where the employee ultimately ended up. Dr. Freed opined that the September 30, 1999 injury brought about an aggravation of the underlying condition. If this were all that happened . . . that answer would clearly beg the question . . . [of] how significant the aggravation was and what proportional role it played in the end result. However, Dr. Freed had more to say. He opined that the industrial accident caused a cervical disc herniation. He further opined that there was a separate condition, a cervical myelopathy, this arising from the injury-caused herniation and the injury-aggravated spondylosis. Thus, according to Dr. Freed, despite the existence of a serious condition before this accident, the accident was implicated significantly or wholly in each of the components that caused symptoms, led to the need for surgery, and left the employee with lasting disabilities. I find that to amount to an opinion that the industrial injury was and remains a major cause of the employee's cervical disability and need for treatment of that condition and I adopt that opinion.

(Dec. 18-19.)

The self-insurer takes issue with the judge's medical findings. It contends the impartial physician retracted his opinion that the disc herniation was a direct result of the industrial accident. Thus, it argues, the judge's finding on this point lacks evidentiary support. The self-insurer's argument is based on Dr. Freed's deposition testimony, where he allows for other possible causes for the herniation. (Dep. 78-79.) There is no basis for the self-insurer's assertion. [2] The doctor's opinion that the work injury was more likely than not the cause of the herniation is unaffected by subsequent statements that there could possibly be other causes. "It was not . . . incumbent upon the employee to exclude all other possibilities, Blanchard's Case, 277 Mass. 413 (1931); [her] burden was to prove a probable causal connection between [her] diagnosed condition[s] and the industrial injury." Gauthier v. General Dynamics Corp., 5 Mass. Workers' Comp. Rep. 231, 232 (1991). This being the case, we examine whether the judge's conclusion that the work injury was "a major" cause of the employee's disability is supported by the adopted medical evidence.

The employee had pre-existing non-compensable cervical spondylosis and stenosis. The work injury aggravated these conditions. Employee's counsel did not ask the impartial physician to quantify the degree of the aggravation for the purposes of the § 1(7A). [3] As the judge noted, had the medical evidence ended there, the result would be a denial of the employee's claim. (Dec. 18.) A simple aggravation, without more, cannot support a finding of "a major" causation. Castillo v. Cavicchio Greenhouses, Inc., 66 Mass. App. Ct. 218 (2006); Kryger v. Victory Distribution, 17 Mass. Workers' Comp. Rep. 78

[2] Our dissenting colleague disagrees with the judge's interpretation of Dr. Freed's testimony concerning the causal link between the employee's industrial accident and her cervical disc herniation. In the dissent's view, because Dr. Freed acknowledged, at his deposition, that the October 18, 1999 MRI report did not disclose a cervical disc herniation, the judge could not conclude it was work-related. This interpretation ignores the balance of Dr. Freed's testimony. Dr. Freed also opined the cervical disc herniation was "not so obvious" on the October 18, 1999 MRI as it was on the May 13, 2000 MRI. (Dep. 43.) In the end, he never recanted his opinion, initially expressed in his report, that the employee's cervical disc herniation was, more likely than not, causally related to the employee's industrial accident of September 30, 1999. (Dep. 78).

[3] His failure to do so would have resulted in a denial of the employee's claim, but for the complicating factor of the employee's work-related cervical disc herniation, which proved essential to the diagnosis of herdisabling medical condition: cervical myelopathy.

(2003), *aff'd* Mass. App. Ct., No. 2003 - J - 144, slip op. (February 23, 2005) (single justice).

However, the judge could reasonably conclude, based on his review of the medical evidence, that the § 1(7A) standard was satisfied. The "resultant condition" disabling the employee is her cervical myelopathy. Based on his reasonable interpretation, and adoption, of Dr. Freed's opinion, the judge could properly find the work-related injury aggravated the employee's underlying disc diseases, and directly caused her cervical disc herniation. [4] The judge could also find the combination of the employee's aggravated pre-existing conditions, and her work-related disc herniation, caused her disabling cervical myeopathy. Indeed, the employee's medical picture is akin to one of "an injury which . . . rather than [simply] adding to the prior disability is so devastating as to swamp it." Sliski's Case, 424 Mass. 126, 133-134 (1997); Manzanero v. Beth Israel Deaconess Med. Ctr., 21 Mass. Workers' Comp. Rep. 187, 189 (2007)(C6-7 disc herniation overwhelmed prior degenerative condition at same level).

In Durfee v. Baldwin Crane & Equip., 20 Mass. Workers' Comp. Rep. 163 (2006), this board affirmed an award of benefits under § 1(7A) attack on similar facts. The adopted medical opinion in Durfee was that the employee's disability was "causally related in equal parts to the work injury and the [employee's prior non-industrial] degenerative condition." Id. at 164. There was no finding in Durfee that the work injury aggravated the employee's degenerative condition. The facts of this case are more compelling. The employee's work injury both caused her disc herniation *and* aggravated her prior medical conditions. Moreover, the combination of these two work-related conditions caused the newly diagnosed, and disabling, "resultant condition" of cervical myeopathy.

On these facts, we cannot say the judge's decision is "beyond the scope of his authority, arbitrary or capricious, or contrary to law." [5] G. L. c. 152, § 11C.

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[4] The self-insurer advances no argument, and the judge did not find, that the cervical disc herniation resulted from a "combination" with any one of the employee's prior non-industrial medical conditions.

[5] The dissent would require, apparently as a condition precedent to a finding of compensability, that counsel ask the "magic" question concerning "a major" causation. While this is preferable, the failure to so inquire does not prevent a judge from reasonably interpreting the medical evidence to support a finding of "a major" causation. In our

The decision is affirmed. The self-insurer shall pay the employee's attorney a § 13A(6) fee in the amount of $1,458.01.

So ordered.

Mark D. Horan
Administrative Law Judge

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William A. McCarthy
Administrative Law Judge

Filed: **April 8, 2008**

COSTIGAN, J., dissenting. Although it is well-established that a medical expert need not use the "magic words" in addressing the causation standards of § 1(7A), [6] in my view, the employee, whose burden it is to prove every element of her claim, Sponatski's Case, 220 Mass. 526, 527-528 (1915), must be held to at least ask the "magic" question -- whether the alleged work injury was and remains a major contributing cause of disability and the need for medical treatment. If the question is

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view, as in Durfee, supra, the medical evidence in this case warranted a finding of "a major" causation.

[6] See May's Case, 67 Mass. App. Ct. 209, 213 (2006)(impartial medical examiner's use of terms, "the major cause" and "the primary cause" held "substantially equivalent" to statutory term, "the predominant contributing cause" of employee's claimed emotional disability); Robinson's Case, 416 Mass. 454, 460 (1993)(administrative judge's findings of direct causal relationship between work events and employee's emotional disability, and that disability was "principally caused" by same events, satisfied then statutory requirement of "a significant contributing cause"); Myers v. M.B.T.A., 19 Mass. Workers' Comp. Rep. 22 (2005)(expert medical opinion that work incident was the "significant" cause of employee's disability satisfied "a major cause" standard even though doctor opined unrelated surgery was "the major cause" of disability); Siano v. Specialty Bolt & Screw Co., 16 Mass. Workers' Comp. 237, 240 (2002)(impartial medical examiner's opinion that work injury played a "moderately significant" role in employee's post-injury disability and need for treatment synonymous with "a major" contributing cause).

asked of a § 11A impartial physician and the doctor declines to answer, the employee's recourse is to request the admission of additional medical evidence. Viveiros's Case, 53 Mass. App. Ct. 296, 299-300 (2001). Although additional medical evidence was allowed in this case, that is not what happened here. The question was never asked.

Over sixteen years have passed since the legislature amended § 1(7A) by adding the fourth sentence. See footnote 1, supra. In that period, scores of reviewing board decisions and several appellate court decisions have addressed what an insurer must do to properly invoke § 1(7A) in defense of an employee's claim, and what an employee must prove once that defense is deemed applicable. [7] Once additional medical evidence is authorized due to the inadequacy of the impartial medical report or the complexity of the medical issues, G. L. c. 152,§ 11A(2), an administrative judge is free to adopt other expert opinions over the impartial examiner's opinion, or, as here, he may adopt the impartial physician's opinion. Monterosso v. Gentiva Health Care, 21 Mass. Workers' Comp. Rep. 181, 184 (2007). The judge, however, is not free to mischaracterize the opinion he adopts. Zapata v. Demoulas Supermarkets, 18 Mass. Workers' Comp. Rep. 310, 315 (2004), citing LaGrasso v. Olympic Deliv. Serv., Inc., 18 Mass. Workers' Comp. Rep. 48, 58 (2004).

In my view, we are far beyond the point when an administrative judge should have to cobble together pieces of the expert medical opinion he adopts "to read [the doctor's] opinion to mean that the industrial accident was a major cause of where the employee ultimately ended up," (Dec. 18), when that physician was never even asked by employee's counsel to address "a major" causation. The majority endorses the judge's reading as permissible, largely because Dr. Freed opined the "resultant condition" disabling the employee was her cervical myelopathy which, in turn, arose from "the injury-caused herniation and the injury-aggravated spondylosis." (Dec. 18.) Based on Dr. Freed's own testimony, I disagree that the § 1(7A) causation standard was satisfied because the employee's cervical disc herniation was "caused" by the employee's work injury.

[7] See, e.g., Saulnier v. New England Window and Door, 17 Mass. Workers' Comp. Rep. 453 (2003); Rivera v. Conair Martin Indus., Inc., 17 Mass. Workers' Comp. Rep. 129 (2003); Jobst v. Leonard T. Grybko, 16 Mass. Workers' Comp. Rep. 125 (2002); Fairfield v. Communities United, 14 Mass. Workers' Comp. Rep. 79 (2000).

It is undisputed that the employee suffered from "pronounced" degenerative processes in her cervical and lumbar spine which pre-existed her industrial injury. (Dec. 15.) It is likewise undisputed that the employee's September 30, 1999 work incident resulted in a "combination injury" requiring the judge to apply and analyze the employee's claim under § 1(7A)'s "a major" standard of causation. [8] See footnote 1, supra. Dr. Freed testified unequivocally that although the employee's October 18, 1999 cervical MRI study, performed over two weeks after the work incident, showed degenerative spondylosis and stenosis, it did not show the cervical disc herniation that was present in her May 2000 repeat MRI. (Dep. 42-44, 54-55, 78.) Therefore, in my view, this is not a question of the disc herniation overwhelming, or swamping, the pre-existing conditions *at the time of the work injury*, and the requisite § 1(7A) analysis does not properly begin only with the later diagnosis of cervical myelopathy. Rather, the analysis in the first instance is of the relative causal contributions of the employee's pre-existing degenerative conditions and the physical effects of her work injury from September 30, 1999 forward. Vieira v. D'Agostino Assocs., 19 Mass. Workers' Comp. Rep. 50, 53 (2005). On this point, the judge acknowledged as insufficient, for purposes of § 1(7A), Dr. Freed's opinion that the work injury simply aggravated the underlying, pre-existing lumbar and cervical degenerative conditions. Thus, "a major" causation is not established at the outset, and the after-occurring cervical disc herniation, even if causally related to the work injury as Dr. Freed opined, must still be assessed vis a vis the continuing, non-compensable pre-existing degenerative conditions.

Because the judge's decision lacks sufficient findings parsing out the employee's diagnosed conditions, and addressing all elements of § 1(7A), at the time of her industrial accident and forward, I would otherwise recommit the case for the judge to reconsider the medical evidence and make further findings. However, because the employee never asked Dr. Freed the "magic" question about "a major" causation, and because I think the judge misconstrued the impartial medical evidence he adopted, I would reverse the decision for the employee's failure to meet her heightened burden of proof under § 1(7A).

[8] The employee did not appeal the judge's decision.

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Patricia A. Costigan
Administrative Law Judge

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