COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 039016-96**

Enid S. Liberman	Employee
McLean Hospital	Employer
Partners Healthcare System, Inc.	Self-insurer

REVIEWING BOARD DECISION
(Judges Carroll, Levine and Wilson)

APPEARANCES
J. Channing Migner, Esq., for the employee
Joseph S. Buckley, Jr., Esq., for the self-insurer

CARROLL, J. The employee and self-insurer cross-appeal from a decision in which an administrative judge awarded the employee a closed period of temporary total benefits and ongoing partial benefits for a 1996 lower back injury. The parties are in agreement that the judge erred by awarding temporary total incapacity benefits for fifty-three weeks beyond the three-year statutory maximum entitlement. See G. L. c. 152, § 34. The employee argues that she proved entitlement to § 34A permanent and total incapacity benefits, continuing from the exhaustion of § 34 benefits. The self-insurer disagrees and argues that the judge's incapacity assessment and earning capacity assignment were arbitrary and capricious, that he erred in allowing the employee to join her claim for permanent and total incapacity benefits at hearing, and that he erred by failing to address the properly raised issue of § 1(7A) major causation. We disagree with the employee's assertion of entitlement to § 34A benefits, and summarily affirm the decision as to her appeal. The self-insurer's argument on § 1(7A) has merit, but the judge's error is harmless in light of the adopted medical evidence. We otherwise affirm the decision, with the exception of reversing the erroneous award of fifty-three weeks of § 34 benefits, and assign maximum § 35 benefits for that period pursuant to Marino v. M.B.T.A., 7 Mass. Workers' Comp. Rep. 140, 141-142 (1993).

The employee, a psychiatric nurse, hurt her neck and arm in 1991 while working, when called upon to restrain an agitated patient. The employee was out of work for six months, and then returned to work without restriction or medical treatment until her 1996 work injury. On October 4, 1996, while transferring a patient from one stretcher to another, the employee felt an excruciating pain in her neck, which eventually radiated into her arms. She finished her shift, left work and has not returned. (Dec. 262-263.) The insurer accepted the claim and paid the employee § 34 benefits. (Dec. 259.)

The present action came before the judge for a § 10A conference on August 16, 2000 as a claim for permanent and total incapacity benefits. The judge ordered the self-insurer to pay the employee partial incapacity benefits; the parties cross-appealed to a full evidentiary hearing. The employee later withdrew her appeal, but asserted it again at the hearing de novo triggered by the self-insurer's appeal of the conference order. The judge correctly allowed the employee's claim to go forward at the de novo proceeding. (Dec. 261.) The self-insurer raised the defense of § 1(7A) "major" causation attributable to work injuries that combine with pre-existing non-compensable injuries or diseases.[1] (Exhibit 2.)

The employee underwent a medical examination pursuant to G. L. c. 152, § 11A. (Dec. 261.) The judge allowed the employee's motion for additional medical evidence and the employee introduced records of her orthopedic surgeon, Dr. Howard Blume; an office note of a neurologist, Dr. Ernest S. Mathews; and records, a report and the deposition of her treating pain specialist, Dr. Cynthia Kahn. (Dec. 266-269.) The self-insurer introduced a report of its expert physician, Dr. Thomas L. Antkowiak. (Dec. 270.)

The § 11A physician diagnosed a pulling injury to the employee's neck, degenerative joint disease and chronic pain. He opined that cervical disc surgery that the

[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.

employee underwent on January 7, 1997 was causally related to that work injury. He found that the employee was partially disabled. He opined that her current disability was causally related primarily to her degenerative disc disease, but also to the 1991 and 1996 work injuries. (Dec. 264-265.)

Dr. Kahn offered the diagnosis of degenerative disc disease, cervical radiculopathy and cervical facet disease. (Dec. 267.) Dr. Kahn assessed the nature and development of the employee's medical condition as follows:

> [P]utting her whole history together and looking at how spinal disease occurs and progresses over time, my initial impression of her, as she presented to me post-surgically, was that this was a woman who had been functioning fully as a psychiatric nurse who sustained in [sic] injury in 1991, and was symptomatic but was able to recover from that injury without a surgical intervention. And, as such, she – anytime we have an injury in our, anywhere in our body, we're weaker at the point where we've been injured. And as such, she was prone to have a recurrence in the area where she had been injured before.
>
> She was performing her usual duties, at least as they were described in the documents I've read, and she, again, noted a snap or a pop. And that can happen because of ligaments going over bones that are enlarged and improperly moving upon one another, or actually the joints can actually snap and move. So you can actually hear snaps. She said she heard a snap, and began to experience pain again. Because of her prior injury, the disc didn't have as much resilience or reserve for healing that it had prior, and so, she had persistent pain and progressive neurological deficit, enough so that she agreed with her surgeon that she needed to proceed with surgery.
>
> Unfortunately, by having the surgery, there was some improvement, a slight improvement in the neurological weakness that she was having, and reflex deficit she was having, but her pain did not improve. And when she was examined by a neurologist and by myself and other members of the Pain Management Center, we noted marked muscle spasm, severe limitation in the . . . range of motion of her neck, and pretty good motor strength, meaning muscle strength. There wasn't any loss of function, per se. What was limiting was the severe spasm and pain.
>
> So, that's the progress that we see, and we often see this. This is not an unusual phenomenon that occurs.

(Kahn Dep. 15-17.) The doctor found the employee was totally disabled as of the time of her August 14, 2000 report. At her deposition on February 5, 2001, Dr. Kahn opined that the employee could return to stringently restricted work. (Dec. 267-268.)

The judge concluded that the employee was partially disabled and capable of returning to some kind of limited and restricted work, based on her vocational profile, the testimony of two vocational experts, and the medical opinions of the § 11A physician and Dr. Kahn. (Dec. 271-272.) The judge specifically relied "upon Dr. Kahn to find a continuing causal relationship of [the employee's] present partial disability to the 1996 work injury." The judge also relied "upon an amalgamation of both doctors' opinions [in his] extent of disability finding [, using the § 11A physician's] examination date of October 12, 2000 as the date for converting the employee's § 34 benefits to § 35 benefits." The judge awarded the § 35 benefits using a $270.00 per week earning capacity. (Dec. 272.)

The self-insurer is correct that the judge failed to address the appropriately raised issue of § 1(7A) "major" causation. See n.1, supra. The medical evidence of pre-existing spinal degeneration, upon which the employee's 1991 and 1996 work injuries were superimposed, clearly triggered that analysis. Fairfield v. Communities United, 14 Mass. Workers' Comp. Rep. 79, 83 (2000). Nonetheless, the employee, the self-insurer and the judge all missed the next vital step in the § 1(7A) analysis. That step is the necessary determination of whether the pre-existing injury or disease alleged to combine with the 1996 work injury is "not compensable" for the purposes of applying the statutory provision. This inquiry is key in the assessment of the present case, due to the presence of the earlier 1991 work injury.

We have concluded that the analysis regarding the nature of the pre-existing condition for the purposes of § 1(7A) "major" causation should proceed as follows: If the earlier work injury continues to play any role, even to the slightest extent, in the employee's medical condition (see Rock's Case, 323 Mass. 428, 429 (1948)) i.e., "the pre-existing condition continues to retain any connection to an earlier compensable injury or injuries, then that pre-existing condition cannot properly be characterized as 'non-compensable' for the purposes of applying the § 1(7A) requirement that the claimed injury be 'a major' cause of disability." Lawson v. M.B.T.A., 15 Mass. Workers' Comp. Rep. 433, 437 (2001). See also White v. Town of Lanesboro, 13 Mass. Workers' Comp. Rep. 343, 346 (1999). If the pre-existing condition is so determined to be

"compensable," i.e., work-related, (see Lawson, supra at 437-438, n.4), the employee is only charged with carrying the burden of proving traditional simple causation, not the heightened § 1(7A) standard.

The present case presents a set of facts, which, on the adopted medical evidence of the § 11A physician and Dr. Kahn, leads to one result as a matter of law, and obviates the necessity of a recommittal. Roney's Case, 316 Mass. 732, 739 (1944). The impartial physician's opinion was that the employee's disability was related to all three factors: pre-existing degeneration, *the 1991 work injury*, and the 1996 work injury. (Dec. 265.) The opinion of Dr. Kahn, quoted above, was also that the 1991 work injury continued to have a direct and important causal connection to the employee's disability:

> [S]he was prone to have a recurrence in the area where she had been injured before. . . . Because of her prior injury, the disc didn't have as much resilience or reserve for healing that it had prior, and so, she had persistent pain and progressive neurological deficit, enough so that she agreed with her surgeon that she needed to proceed with surgery.

(Kahn Dep. 16.) As the earlier work injury continued to be causally related after the occurrence of the 1996 work injury, it logically must have been present within the pre-existing condition at the time of that 1996 incident. Moreover, Dr. Kahn's opinion that the employee was prone to recurrence due to the 1991 work injury explicitly establishes that the 1991 injury continued to play an important role in her medical condition as it existed at the time of the 1996 work injury. The adopted medical evidence therefore established that, notwithstanding the judge's failure to perform the proper analysis, § 1(7A) did not govern this case. See Schwartz v. Partners Healthcare Sys., Inc., 16 Mass. Workers' Comp. Rep. ___ (July 23, 2002)(recommittal unnecessary when, despite judge's error in failing to address § 1(7A) causation issue, the adopted medical evidence supported that work injury was "major" cause of disability). The error is harmless. See Maxwell v. North Berkshire Mental Health, 16 Mass. Workers' Comp. Rep. 108, 109 (2002)(affirming decision for reasons different from those which judge relied upon in reaching conclusion).

The only issue that further needs to be addressed in the self-insurer's appeal is the judge's award of fifty-three weeks of § 34 benefits after such benefits were exhausted. We note that the judge's findings that the employee was still totally disabled for that period of time, (October 4, 1999 until October 11, 2000), are clear and supported by the record evidence. The judge's subsequent finding of partial incapacity also eliminates any argument that he should have awarded permanent and total incapacity benefits for that period. Under such circumstances, we have concluded that the only reasonable alternative is for the judge to award partial benefits at the maximum allowable amount, i.e., 75% of the § 34 entitlement. See Marino, supra at 141-142; Mansfield v. Emery Worldwide Freight Corp., 15 Mass. Workers' Comp. Rep. 318, 319 (2001).

We therefore reverse the award of § 34 benefits from October 4, 1999 until October 11, 2000, and award § 35 benefits at the rate of $465.26 per week for that period, 75% of the employee's § 34 rate of compensation.

The decision is affirmed in all other respects. Pursuant to § 13A(6), the self-insurer is ordered to pay employee's counsel a fee of $1,321.63.

So ordered.

_____
Martine Carroll
Administrative Law Judge

_____
Frederick E. Levine
Administrative Law Judge

Filed: **January 7, 2003**
MC/jdm

_____
Sara Holmes Wilson
Administrative Law Judge