COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 010528-98**

Harvey Saulnier	Employee
New England Window and Door	Employer
Credit General Insurance Co.[1]	Insurer

REVIEWING BOARD DECISION
(Judges Costigan, Maze-Rothstein and Wilson)

APPEARANCES
Peter H. Collins, Esq., for the employee
William C. Harpin, Esq., for the insurer

COSTIGAN, J. The insurer appeals from a decision in which the administrative judge found that the employee's psychiatric condition was causally related to his accepted 1998 orthopedic injury, and awarded permanent and total incapacity benefits under G. L. c. 152, § 34A. The insurer argues that neither the judge's findings of fact, nor the expert medical opinions in evidence, support the finding of permanent and total incapacity. It also argues that the judge failed to properly apply the provisions of § 1(7A)[2] to the employee's claim and, thus, committed an error of law in finding that the employee's work-related neck and shoulder injury was "a major cause" of his psychiatric disability. We disagree on both counts, and affirm the decision.

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[1] Due to the insurer's bankruptcy, the Massachusetts Insurers' Insolvency Fund assumed the prosecution of the insurer's modification/discontinuance complaint and the defense of the employee's claim.

[2] 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 employee, age forty-four at the time of hearing, is a high school graduate with special training and/or skills in the printing trade. (Dec. 5.) On April 6, 1998, while working as a truck driver/deliveryman for the employer, the employee was moving a glass door slider, weighing several hundred pounds, to the rear of his truck, when he felt a "pop" in the area of his left shoulder, followed by pain in the shoulder, neck and upper back. He stopped work that day, was out for a week, and then returned to work, with a helper assigned to him for one week. The employee continued to experience pain in the injured areas. Around that time, after being given a wrong address for a delivery, the employee returned to his employer's office, where he and his supervisor engaged in a heated verbal confrontation. The employee "ended his employment with the Employer" and has not worked for the employer since that time. (Id.)

The insurer ultimately accepted liability for the employee's April 6, 1998 orthopedic injury and paid him § 34 temporary total incapacity benefits. It filed a complaint for modification or discontinuance of weekly compensation which was the subject of a § 10A conference on September 25, 2000. Prior to the conference, the employee moved to join a claim for payment of his psychiatric treatment. His motion was allowed but his claim was denied, as was the insurer's discontinuance complaint. Both parties appealed from the conference order. Prior to the April 24, 2001 hearing de novo, the employee moved to join a claim for § 34A permanent and total incapacity benefits or, alternatively, for § 35 temporary partial incapacity benefits. The judge allowed the employee's motion. (Dec. 4.)

Also prior to the hearing, on November 28, 2000, the employee submitted to a § 11A impartial medical examination by Dr. Leonard Popowitz, an orthopedic surgeon. In his report, (Statutory Ex. 1), the impartial physician opined that "with a certain degree of medical certainty" [sic], the employee's work injury was the causative factor for his left shoulder discomfort, for which he had undergone two surgeries. The doctor opined that although the employee had not then reached maximum medical improvement, his disability was minimal as of the exam date.

Dr. Popowitz noted that a final disability evaluation should be deferred for a six to eight week period, during which time the employee would reach maximum medical improvement. (Dec. 7.)

On June 13, 2001, the employee deposed the § 11A examiner for the purpose of cross-examination. See § 11A(2); 452 Code Mass. Regs. § 1.12(5) and § 1.14(2). Dr. Popowitz, who had not previously received the hospital records of the employee's two left shoulder surgeries, reviewed those records as submitted to him at the deposition, (Dep. 7), but he did not change his causal relationship opinion. He opined that the surgeries were performed to reattach the left biceps tendon to the humerus and/or correct a biceps tendonitis, diagnoses which were causally related to the employee's work injury. (Dep. 7-8.) Based on a hypothetical question posed by the insurer, which asked the doctor to assume the employee's testimony at hearing that he experienced no pain whatsoever in his left arm and shoulder, except on the extremes of motion, Dr. Popowitz opined that the employee should be able to return to work with restrictions against overhead lifting and repetitive lifting. (Dep. 32-34.)

Based on the employee's psychiatric claim, as well as his complaints of neck pain and headaches, the judge declared the medical issues complex[3] and

[3] The insurer wrongly argues that additional medical evidence was allowed only for the pre-§ 11A examination gap period and, therefore, the judge erred in failing to accord prima facie weight to the impartial physician's opinion that the employee, upon reaching maximum medical improvement, would have a minimal physical disability. (Insurer br. 5-7.) Prima facie evidence retains its artificial legal force to compel the conclusion "that the evidence is true" only until other "evidence appears that warrants a finding to the contrary." Silverman v. Department of Transitional Assistance, 15 Mass. Workers' Comp. Rep. 176, 179, quoting Coggin v. Massachusetts Parole Bd., 42 Mass. App. Ct. 584, 589 (1997), and Cook v. Farm Servs. Stores, 301 Mass. 564, 566 (1938). Once additional medical evidence was allowed, based on the judge's ruling that the medical issues presented by the employee's claim were complex, the § 11A opinion no longer carried prima facie weight, and the judge properly could have adopted none, part or all of any of the other expert medical opinions in evidence. Although he discussed at length the § 11A physician's opinions, (Dec. 7-8), and those of the other non-psychiatric medical experts, (Dec. 15-17), the judge did not expressly adopt any of those opinions. Recitations of testimony without clear subsidiary findings of fact do not enable the

allowed the parties to submit additional medical evidence. The judge also deemed the impartial medical report inadequate for the so-called "gap period" from the date of the employee's injury to the date of the § 11A examination.[4] (Dec. 8.)

His decision reflects that the judge carefully reviewed and considered the extensive medical evidence submitted by both parties. (Dec. 9-21.) He also considered the testimony of a vocational expert called by the insurer,[5] but found it "to have limited probative value." (Dec. 21.)

At hearing, the employee acknowledged what the reports of his psychiatric medical providers reflected: that prior to his April 6, 1998 industrial injury, he had experienced anxiety attacks and depression, for which he was treated with counseling and medication.[6] (Dec. 22.) As was his prerogative, see Moskovis v. Polaroid Corp., 13 Mass. Workers' Comp. Rep. 273, 276 (1999), citing Coggin, supra, the administrative judge rejected the opinions of the insurer's psychiatric

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reviewing board to determine with reasonable certainty whether correct rules of law have been applied. Messersmith's Case, 340 Mass. 117, 119 (1959), citing Judkins's Case, 315 Mass. 226, 227 (1943); Cicerone v. Quincy Adams Restaurant & Pub., 14 Mass. Workers' Comp. Rep. 62, 66 (2000). This deficiency would otherwise require recommittal, but for the fact that the judge found permanent and total incapacity based on the employee's psychiatric condition alone, and he made sufficient subsidiary findings of fact on which we can determine the correctness of his conclusion in that regard.

[4] Because the insurer had accepted liability for the employee's industrial injury and had paid § 34 benefits, the gap period did not track from the date of injury, as stated by the judge, but rather only from the filing date of the insurer's modification/discontinuance complaint. See Cubellis v. Mozzarella House, 9 Mass. Workers' Comp. Rep. 354 (1995). At hearing, the judge correctly identified the gap period. (Tr. 126-127.)

[5] The vocational expert, a licensed and certified rehabilitation counselor, performed a labor market survey and transferable skills analysis, and opined that there were several unskilled and semi-skilled, sedentary and light, positions in the open labor market which the employee could perform. (Dec. 21; Ins. Ex. 2.)

[6] In 1994, the employee experienced panic attacks for which he was treated with Klonopin. (Dec. 22; Tr. 22.) In early 1998, prior to his work injury, he began experiencing anxiety attacks and mild depression for which he was treated with counseling and Paxil. (Dec. 22; Tr. 23-24.) The employee testified that both problems "went away" before his April 6, 1998 work injury. (Tr. 22, 24.)

expert that the employee's emotional problems pre-existed, and were not caused by, his work-related injury of April 6, 1998, and that from a psychiatric standpoint, the employee was not disabled from work. (Dec. 19.) The judge instead adopted, in part, the opinions of the employee's treating psychiatrist, (Employee Ex. 5), and treating psychiatric nurse practitioner, (Employee Ex. 2), to find that

> the compensable work injury sustained by the Employee on April 6, 1998 was also an exacerbation of the Employee's underlying psychiatric condition [which] . . . is a major cause of the Employee's ongoing total disability and incapacity.

(Dec. 23.) The judge also found that the employee's psychiatric treatment was reasonable, necessary and related to the accepted work injury. (Id.) Based on the employee's age, education, work history, training and disability, the judge, in what he termed "a close call," found that the employee "is incapacitated from performing meaningful work," (id.), and ordered the insurer to pay permanent and total incapacity benefits under § 34A from and after April 21, 2001.[7] (Dec. 24.)

On appeal, the insurer correctly argues that there was no expert medical opinion in evidence that the employee was permanently disabled by his orthopedic injury. That deficiency, however, does not constitute reversible error for the simple reason that, as we discuss below, the judge did not find permanent and total incapacity based on the employee's physical restrictions.[8]

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[7] The employee exhausted the 156-week statutory maximum for § 34 benefits on April 20, 2001, four days prior to the evidentiary hearing.

[8] When the § 11A physician examined the employee on November 28, 2000, Mr. Saulnier was some seven weeks post his second left shoulder surgery of October 9, 2000. (At the § 11A deposition, both the doctor and the attorneys questioning him repeatedly and incorrectly referred to the employee as being only three weeks post-surgery. Dep. 8, 9, 30, 31.) The doctor opined that when examined, the employee had restrictions against lifting more than five to ten pounds, (Dep. 9), and that heavy work was contraindicated. (Dep. 10.) The impartial physician also testified that as of the date of the § 11A examination, he "did not feel that [the employee] was able to return to work at that time," (Dep. 31), but that "maximal [sic] medical improvement would be obtained approximately six to eight weeks" from the time of the exam, "and with a certain [sic]

The insurer also argues that the judge failed to properly apply the provisions of § 1(7A) to the employee's acknowledged underlying, pre-existing psychiatric condition, and thus erred in finding that the 1998 industrial injury is "a major cause of the Employee's ongoing total disability and incapacity." (Dec. 23.) Again, we disagree. Despite the obvious applicability of that statute to the employee's pre-existing psychiatric condition, the insurer never raised § 1(7A) at hearing. The insurer has the burden to do so in order to force the employee to satisfy the heightened causal relationship standard. Rivera v. Conair Martin Indus., Inc., 17 Mass. Workers' Comp. Rep. 129, 131 (2003), citing Jobst v. Leonard T. Grybko, 16 Mass. Workers' Comp. Rep. 125, 130-131 (2002); Fairfield v. Communities United, 14 Mass. Workers' Comp. Rep. 79, 83 (2000); Frey v. Mulligan, Inc., 16 Mass. Workers' Comp. Rep. 364, 367 (2002)(§ 1(7A) issue waived if insurer fails to raise it in its issues statement or orally at the hearing).

Here, § 1(7A) is not listed in the decision as an issue raised by the insurer. (Dec. 3.) The transcript reflects that the insurer did not object when the judge identified the issues it was raising at hearing: "The insurer raises the issues of disability and extent of incapacity, causal relationship, deny entitlement to

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degree of medical certainty it would seem that this patient was going on to an excellent recovery." (Dep. 31-32.) In response to a hypothetical question posed by the insurer, the impartial physician opined that as of the June 13, 2001 deposition date, the employee would have restrictions against overhead lifting and repetitive lifting, but "would be capable of sitting somewhere and using his arms at a bench or something where he didn't have to have any extremes of motion" for "hours a day." (Dep. 33-34.) Although the doctor conceded that his opinion as to the employee's post-examination improvement and work capacity was speculative, (Dep. 35), the administrative judge construed the doctor's opinion to be that the employee "could work in a sitting position while using his arms without restriction as long as the job did not require any extremes of motion." (Dec. 8). As the employee has not appealed the decision, however, we do not address the correctness of the judge's finding as to the employee's physical capacity for work.

Section 13 and 30 benefits for psychiatric treatment." (Tr. 4.) Moreover, having examined the insurer's issues statement, which was not marked as an exhibit but is contained in the board file, see Rizzo v. M.B.T.A., 16 Mass. Workers' Comp. Rep. 160, 161 n.3 (2002), we confirm that the judge placed on the record exactly what the insurer had listed as its issues on that statement. Thus, we deem the insurer's § 1(7A) argument, advanced for the first time in its brief on appeal, waived. Green v. Brookline, 53 Mass. App. Ct. 120, 128 (2001).

It is well-established that "mental and nervous disorders resulting from physical trauma are compensable" under the workers' compensation act. McEwen's Case, 369 Mass. 851 (1976). Mental injuries that derive after, and solely from, compensable physical injuries, are not governed by the § 1(7A) standards for mental harm arising directly from work events. The applicable standard in such cases is "as is" causation. Cirignano v. Globe Nickel Plating, 11 Mass. Workers' Comp. Rep. 17, 23-24 (1997). However, when the evidence establishes that an employee has a pre-existing psychiatric condition which combines with a physical work injury to cause psychiatric disability, that employee must satisfy the "a major but not necessarily predominant cause" standard set forth in the fourth sentence of § 1(7A),[9] see footnote 2, supra, but only if the insurer raises that statute in defense of the employee's claim. Such was not the case here. "When an insurer fails to properly raise § 1(7A) as a defense . . . then the employee is taken 'as is,' " Schmidt v. Nauset Marine, Inc. 17 Mass.

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[9] Cases of mental or emotional sequelae to work-related physical injuries are not governed by the 1991 amendment to the third sentence of § 1(7A), which instituted for some cases of mental or emotional disability directly caused by work place events the new and higher causal relationship standard:

> Personal injuries shall include mental or emotional disabilities only where *the predominant* contributing cause of such disability is an event or series of events occurring within any employment.

G. L. c. 152, § 1(7A), as amended by St. 1991, c. 398, § 14. (Emphasis added.) See Lagos v. Mary A. Jennings, Inc., 11 Mass. Workers' Comp. Rep. 109, 111-112 (1997).

Workers' Comp. Rep. ___ (2003), citing Jobst, supra at 131, and the employee's burden is to prove simple causation only.

Although Mr. Saulnier did not have to prove that his physical work injury was "a major" cause of his subsequent psychiatric disability, he offered expert medical evidence that it was,[10] and the judge adopted that evidence. The judge cited the opinion of the employee's treating psychiatrist, Dr. Elizabeth Blencowe, in her June 14, 2001 report, (Employee Ex. 5), "that based upon reasonable medical certainty, the Employee's April 6, 1998 work injury was a major, if not the predominant, cause of his psychiatric difficulties, resulting in total disability from gainful employment." (Dec. 14.)[11]

Lastly, we see no merit in the insurer's challenge to the finding of permanent and total incapacity. Because the employee had exhausted his statutory entitlement to § 34 temporary total incapacity benefits, see footnote 7, supra, albeit for his physical injury, he had to prove only that he had remained totally disabled since April 21, 2001 and that such disability "will continue for an indefinite period of time which is likely never to end, even though recovery at some remote or unknown time is possible. . . ." Sylvester v. Town of Brookline, 12 Mass.

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[10] Beyond offering into evidence expert psychiatric opinions which addressed the § 1(7A) standard of causation, the employee, in his brief on appeal, argues only that the administrative judge properly applied § 1(7A) to his claim. (Employee br. 10-11.) He does not contend that the insurer waived the applicability of that statute by failing to raise it as an affirmative defense. Therefore, "in light of the ample evidence introduced relating to the pre-existing condition and of the employee's acceptance that § 1(7A) was at issue, it appears the parties tried the case under that standard by consent." Hinton v. Mass. Mutual Life Ins. Co., 16 Mass. Workers' Comp. Rep. 342, 348 (2002).

[11] The judge also adopted in part the opinion of the employee's psychiatric/mental health practitioner, Lauretta S. Mona. (Employee Ex. 2.) He cited Ms. Mona's opinion that prior to the employee's industrial injury, his depression was managed with medication and he was able to continue to work, but that since his injury, his symptoms were aggravated to the extent that he became disabled. As did Dr. Blencowe, Ms. Mona opined, "based on her experience as a psychiatric nurse practitioner and with reasonable certainty that the Employee's work injury was 'a major, if not predominant cause of his psychiatric disability, which resulted in his total disability." (Dec. 12.)

Workers' Comp. Rep. 227, 231 (1998), quoting Yoffa v. Metropolitan Life Ins. Co., 304 Mass. 110, 111 (1939). Based on the expert psychiatric opinions he adopted,[12] the administrative judge found that the employee met his burden of proof. We agree, and therefore affirm the decision.

Pursuant to § 13A(6), the employee's attorney is awarded a fee of $1,273.54. So ordered.

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Patricia A. Costigan
Administrative Law Judge

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Susan Maze-Rothstein
Administrative Law Judge

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Sara Holmes Wilson
Administrative Law Judge

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[12] In her April 21, 2001 report, the employee's psychiatric nurse practitioner opined that the employee's diagnosis was major depression, recurrent, severe, and that he "has been totally disabled from work" as a result of his symptoms. (Employee Ex. 2; Dec. 12.) In her May 3, 2001 report, the employee's treating psychiatrist opined that the employee's diagnosis was panic disorder without agoraphobia, and depression, that his psychiatric problems were due to the ongoing chronic pain resulting from his injury, and frustration and worry over his finances and inability to work, and that his prognosis was fair. (Employee Ex. 5; Dec. 14.)