COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 012379-97**

Janice Silverman	Employee
Department of Transitional Assistance	Employer
Commonwealth of Massachusetts	Self-insurer

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

APPEARANCES
Ronald Malloy, Esq., for the employee
Daniel P. LePage, Esq., for the self-insurer

MCCARTHY, J. The self-insurer again appeals an administrative judge's decision which affirms a prior hearing decision awarding § 34 temporary total incapacity benefits, and orders anew § 34A permanent and total incapacity benefits. The judge found that the employee's injury at work remains a major cause of her ongoing incapacity and need for treatment as defined in G. L. c. 152, § 1(7A). The self-insurer argues that finding is not supported by the medical evidence submitted on the § 34A claim. We agree, and further hold that the medical opinions relating the employee's claimed knee problems to her fall at work are not supported by the employee's testimony. We therefore reverse the award of § 34A benefits.

Janice Silverman, a financial assistance social worker with a college degree and further education, was injured on April 3, 1997 when she slipped on ice and fell backwards. (Dec. 8.) At the time of the first hearing on her § 34 claim, the parties stipulated that the injury involved the employee's neck, back, left shoulder, right wrist and left elbow. In addition, the employee claimed she injured her right shoulder. Consistent with the stipulations, the § 11A impartial medical examiner, Dr. Hewson, examined the employee on December 21, 1998 and causally related to the work injury diagnoses of traumatic cervical and lumbar ligament strain with contusions of the left

elbow, left shoulder and right wrist. He opined that the employee's pre-existing osteoarthritis was "seriously aggravated" by the incident and had become more severe with time. Silverman v. Dept. of Transitional Assistance, 15 Mass. Workers' Comp. Rep. 176, 177-178 (2001). (Dec. 7.) The judge awarded ongoing § 34 benefits and § 30 medical benefits for all injuries stipulated to by the parties and causally related by the impartial examiner. The judge found that the employee had failed to sustain her burden of proof as to her right shoulder injury. Id. at 177-178. On appeal to the reviewing board, we found no error in the judge's finding that the heightened § 1(7A)[1] "remains a major" cause standard had been met by the totality of the medical evidence, even though none of the three medical opinions adopted by the judge used the exact language. Id. at 178, n.4. However, we recommitted the case for further findings on a single, narrow issue. We held that the judge had incorrectly applied the law with respect to the weight to be given to the impartial physician's opinion where there was other medical evidence in the case which would support a different result. The hearing judge was directed to review the medical evidence in light of the correct evidentiary standard, "make additional findings and file her decision anew." Id. at 180.

Prior to the issuance of our recommittal opinion, the employee filed a new claim seeking § 34A benefits and at a § 10A conference, the judge ordered payment of these benefits. (Dec. 2.) The self-insurer appealed the conference order and the § 34A claim and the recommittal on the underlying § 34 claim were joined at hearing. In her § 34A

[1] General Laws c. 152, § 1(7A), reads, 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 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.*

(Emphasis added.)

claim, the employee alleged for the first time that bilateral knee problems were the result of her work injury. (Dec. 3.)

The same impartial physician who had examined the employee three years before, re-examined her on September 25, 2001. In his new § 11A report, Dr. Hewson opined: "This is osteoarthritis of the cervical, thoracic and lumbar spine and knees and superimposed on this is the trauma of falling in 1997. The arthritic changes that she had predated the injury of 4/3/97 but were aggravated by this injury." (Stat. Ex. 1, p. 2.) He concluded:

> She has progressive osteoarthritis which has been aggravated by the incident of 4/3/97 and this will be a continuing and progressively severe problem for her. She takes 11 medications now for her heart, her lungs and her diabetes and blood pressure problems and in my opinion is totally disabled from the effective work force on a permanent basis.

Id. at III. In her decision, the judge stated that Dr. Hewson's report was deemed inadequate because it was silent on the extent of medical disability, so she allowed in additional medical evidence. (Dec. 2.) However, at the hearing itself, she had stated that "the record is open for the deposition of the 11A doctor, and for additional medical records from the parties addressing the Sec. 1(7A) issue, and addressing the claim going back to February of 1998." (January 3, 2002 Tr. 16.) In the end, neither party deposed the impartial physician, though each submitted additional medical evidence. (Dec. 4.)

In her hearing decision, the judge acknowledged the correct weight to accord the impartial opinion and reaffirmed her award of § 34 temporary total incapacity benefits. (Dec. 5-6.) Turning to the § 34A claim, the judge adopted the opinion of the impartial physician, Dr. Hewson, on causal relationship:

> [Dr. Hewson] opined that the employee had a pre-condition of arthritis of her cervical, thoracic and lumbar spine, and knees, and that the trauma of the fall at work on April 3, 1997 aggravated the pre-condition. [footnote omitted] See (Ex. 1.) When he examined her on December 21, 1998, he opined, and I adopted his opinion, that the pre-existing osteoarthritis was "seriously aggravated" by the April 3, 1997 work injury, as a result of which "[s]he has now a progressive osteoarthritis which has been aggravated by the incident of April 3, 1997 and this

> is a continuing problem for her which is becoming more severe as time passes." See (Ex. 7.) In his report dated September 25, 2001 he reiterated this opinion, which I adopt, that the aggravation of the pre-condition caused by the work injury of April 3, 1997 continued, and "this will be a continuing and progressively severe problem for her." See (Ex. 1.) Neither of his opinions indicates any movement toward nor returns [sic] to the baseline pre-existing yet progressive condition. I therefore infer from his statements that the effects of the April 1997 work injury remain a major cause of disability and need for treatment. See § 1(7A) and see Robles v. Riverside Mgmt., Inc., 10 Mass. Workers' Comp. Rep. 191, 198 at n. 6 (1996) (doctor need not incant particular magic words).

(Dec. 7-8.) She also adopted the opinion of the employee's treating physician, Dr. Wortman, that the employee was " 'totally and permanently disabled due to injuries and consequent progressive degenerative changes in both knees and [in her] cervical spine' " and that her disability " 'is causally related to accident at work on April 3, 1997.' " (Dec. 6.) Accordingly, the judge awarded § 34A benefits beginning on April 3, 2000. (Dec. 8-10.)

We agree with the self-insurer that the medical opinions relied on by the judge do not support her finding that the work injuries remain a major cause of the employee's incapacity. Even in a § 34A claim, an employee must prove every element of her claim, including continuing causal relationship. Lazarou v. City of Peabody, 13 Mass. Workers' Comp. Rep. 386, 390 (1999), citing L. Locke, Workmen's Compensation § 502 (1980); see Patterson v. Liberty Mut. Ins. Co., 48 Mass. App. Ct. 586, 592 (2000). In a case where § 1(7A) has been properly raised, the employee must therefore present evidence which would support a finding that the work injury "remains a major cause" of the employee's ongoing incapacity. Fairfield v. Communities United, 14 Mass. Workers' Comp. Rep. 79, 83 (2000).

Here, the judge adopted the opinion of Dr. Hewson that Ms. Silverman had a pre-existing condition of osteoarthritis, (Dec. 7), and § 1(7A) was raised at both the original hearing on § 34, Silverman, supra, at 178 n.4, and at the § 34A hearing. (Dec. 4.) In order to find that the heightened standard of causation was met at the time the employee became eligible for § 34A benefits in April 2000, the judge relied on Dr. Hewson's

opinion, offered in December 1998, that the fall at work "seriously aggravated" her pre-existing osteoarthritis. This was error. The "remains a major" requirement of § 1(7A) is necessarily time sensitive and requires an opinion that addresses whether the work injury remains a major cause of the employee's incapacity as of the time of the employee's § 34A claim. The December 1998 opinion of Dr. Hewson is too remote in time to support the § 34A claim.

Neither Dr. Hewson's 2001 report nor Dr. Wortman's January 2002 opinion contains language from which the judge could have inferred that the employee's work injury "remains a major cause" of her ongoing incapacity at the time she became eligible for § 34A benefits. Doctor Hewson opined that "[s]he has progressive osteoarthritis which has been aggravated by the incident of 4/3/97 and this will be a continuing and progressively severe problem for her." This statement does not establish that a major cause of the employee's ongoing incapacity is the continuing effect of the fall at work; it establishes only that the osteoarthritis, once aggravated by the fall, is a progressively severe problem for her. Doctor Wortman's opinion is similarly insufficient to satisfy the employee's burden under § 1(7A). He stated that Ms. Silverman was "totally and permanently disabled due to injuries and consequent progressive degenerative changes in both knees and cervical spine. It is my medical opinion that patient's disability is causally related to accident at work on April 3, 1997." These opinions satisfy the simple "as is" causation standard that a pre-existing condition be aggravated by a work injury, but that is not the standard here. As we recently stated:

> Nearly all § 1(7A) cases present as a work injury "waking up" an underlying, previously asymptomatic, pre-existing condition. In other words, § 1(7A) combination cases are necessarily about the work as a "trigger" for the emergence of medical disability and need for treatment that is, at its core, related to an underlying condition. If that, in and of itself, is a sufficient factual foundation for an administrative judge to find "a major" causation under § 1(7A), the statute is effectively rendered meaningless. We decline to do so.

Lyons v. Chapin Ctr., 17 Mass. Workers' Comp. Rep. ___ (January 13, 2003). Compare Siano v. Specialty Bolt and Screw, Inc., 16 Mass. Workers' Comp. Rep. 237, 240 (2002)

(medical opinion that work injury was a "moderately significant" cause of incapacity was substantially equivalent to statutory language "a major but not necessarily predominant cause").

At the hearing, the judge seemed to recognize the inadequacy of Dr. Hewson's report on the § 1(7A) issue when she demanded "a specific addressing on 1(7A)," (Tr. 9), and stated that "we agree that Dr. Hewson is silent on the question of a major – silent on some of the issues we need to have clarified." (January 3, 2002 Tr. 10.) Twice, the judge indicated that she was keeping the record open for additional medical records to address the § 1(7A) issue. (January 3, 2002 Tr. 16, 42.) Unfortunately for the employee, those records were not forthcoming. The judge's attempt to bolster an inadequate opinion on whether the work injury "remains a major" cause of the employee's ongoing incapacity with a medical opinion not relevant to the time at issue cannot stand.[2] Accordingly, we reverse the judge's finding, inferring from Dr. Hewson's 1998 opinion, read in conjunction with his 2001 opinion, that the 1997 injury remains a major cause of the employee's ongoing incapacity at the time of her claim for § 34A.[3]

The decision is fatally flawed for another reason. The employee claims that her bilateral knee problems are causally related to her work injury of 1997. The judge noted in her decision that Dr. Hewson lists the employee's knees among the body parts injured in her 1997 fall. (Dec. 7 n.5.) However, the employee never testified in either hearing that she hurt her knees when she fell. In both hearings she testified that she landed on her back, striking the area from the base of her skull to her spine, (October 25, 1999 Tr. 14;

[2] We also note that the judge adopted no medical evidence addressing ongoing causal relationship during the "gap" period between the employee's eligibility for § 34A benefits (April 3, 2000) and the impartial examination (September 25, 2001).

[3] Doctor Hewson's second impartial report further obscured his opinion as to whether the employee's work injury was a major cause of her ongoing incapacity, as well as the extent of her incapacity, in that he concluded, "[s]he takes 11 medications now for her heart, her lungs and her diabetes and blood pressure problems and in my opinion is totally disabled from the effective work force on a permanent basis." (Stat. Ex. 1.)

January 3, 2002 Tr. 18), and the judge so found. Silverman, supra at 177. Further, in the first hearing, the only part of her body she claimed to have injured in the fall, other than those parts stipulated to, was her right shoulder, as to which the judge found that she had failed in her burden of proof. Silverman, supra at 178. She never mentioned or claimed a knee injury in the course of the litigation of her § 34 claim. In fact, Ms. Silverman's testimony in the second hearing supports the conclusion that problems with her knees had only recently emerged. At the hearing on her § 34A claim, she was asked "to describe the most recent experience of pain that might be new for you, where would that be in your body?" Her response was: "My knees and across the shoulder blades. That's the newest one." [4] (January 3, 2002 Tr. 27.)

We therefore conclude that the history stated by Dr. Hewson in his 2001 report - - that Ms. Silverman injured her knees in the 1997 fall - - is not supported by the evidence. The history upon which a medical expert relies is crucial to his opinion. Cook v. Stop & Shop Co., 15 Mass. Workers' Comp. Rep. 252, 259 (2001). A causation opinion based on misstatements or omissions of material facts is entitled to no weight. Cook, supra, citing Reddy v. Charles P. Blouin, 14 Mass. Workers' Comp. Rep. 341, 345 (2000) and Buck's Case, 342 Mass. 766, 770-771 (1966). Thus, Dr. Hewson's opinion that the employee injured her knees in the fall at work, thereby aggravating the pre-existing arthritic changes in her knees, cannot be the basis for a finding of causal relationship of the knee pain to the work injury.

Similarly, Dr. Wortman's opinion that the employee is "totally and permanently disabled due to injuries and consequent progressive degenerative changes in both knees and cervical spine," (Ex. 11), appears to be based on the unsupported assumption that the employee injured her knees in the work fall, and is thus also inadequate to support the

[4] To the extent Ms. Silverman may be claiming that her fall caused her pre-existing osteoarthritis to run "rampant" throughout her body, (see January 3, 2002 Tr. 26-27), causing knee pain regardless of whether her knees were injured in the fall, the medical evidence adopted by the judge does not support or develop this theory.

judge's finding causally relating the knee problems to the work injury. Normally, we would recommit a case for the judge to determine whether, without considering the allegation of knee problems, the employee has proven that she remains incapacitated for all work. However, in light of our holding on the § 1(7A) issue, recommittal is inappropriate.[5]

Accordingly, we reverse the judge's finding that the employee is permanently and totally incapacitated for work and deny and dismiss the claim for § 34A benefits. The judge's decision is otherwise affirmed.

So ordered.

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William A. McCarthy
Administrative Law Judge

Filed: **March 20, 2003**

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Susan Maze-Rothstein
Administrative Law Judge

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Patricia A. Costigan
Administrative Law Judge

[5] The medical history gets more complicated because the employee testified that she had suffered a knee injury (as well as a right wrist injury) two years prior to her 1997 work injury. (See October 25, 1999 Tr. 16-17.) Dr. Hewson's newest report also contains the history of a 1995 fall in which she injured her right wrist and right knee "which have continued to bother her." (Stat. Ex. 1.) The fact that the employee had a prior knee injury further complicates any determination as to what is the cause of her current knee pain.