**COMMONWEALTH OF MASSACHUSETTS**

**DEPARTMENT OF INDUSTRIAL ACCIDENTS** **BOARD NO. 007656-02**

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| Jean McCarthy | Employee |
| Peabody Properties | Employer |
| United States Fire Insurance Co. | Insurer |

**REVIEWING BOARD DECISION**
(Judges Costigan, McCarthy and Horan)

The case was heard by Administrative Judge Preston.

**APPEARANCES**
Ronald L. St. Pierre, Esq., for the employee at hearing and on appeal
Laura E. Caron, Esq., for the employee at oral argument
James P. McKenna, Esq., for the insurer at hearing and on appeal
David M. O'Connor, Esq., for the insurer on appeal

**COSTIGAN, J.** The insurer appeals from the judge's award of § 34A permanent and total incapacity benefits for the employee's accepted, work-related right knee injury. The insurer argues, inter alia, that given the employee's pre-existing osteoarthritis, the administrative judge erred by failing to apply the heightened causal relationship standard of § 1(7A).[1] We agree, reverse the decision and recommit the case for the judge to reconsider the medical evidence and conduct the requisite § 1(7A) analysis set forth in Vieira v. D'Agostino Assocs., 19 Mass. Workers' Comp. Rep. 50 (2005).

We summarize the pertinent facts found by the judge and the procedural history. On January 7, 2002, the employee, while working as a supervisor at a

[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 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.

construction site, tripped over a cord and fell, injuring her right knee. The injury was diagnosed as a torn medial meniscus, for which she underwent arthroscopic surgery on March 8, 2002. A problem with intubation during the surgery left her with permanent throat damage, and the knee surgery was not successful. The employee underwent another surgical procedure in June 2003. During that procedure, the spinal anesthesia was improperly administered, and the employee suffered nerve damage resulting in left leg numbness and pain. After the second surgery, the employee continued to have significant right knee pain. Due to her many medical travails, she developed psychiatric problems. (Dec. 4-5.)

The employee's claim at the center of this appeal was for § 36 benefits for permanent loss of bodily function and disfigurement. At conference, the judge awarded § 36 benefits totalling $20,812.33. Only the insurer appealed. At hearing, the employee's motions to join a § 34A permanent and total incapacity claim and a claim of psychiatric injury were allowed. (Dec. 2.)

On grounds that are not clear in the record,[2] the parties opted out of the § 11A impartial medical examination, and offered their own medical evidence. The employee's consisted of reports from her treating orthopedic physician, psychiatrist and psychologist, as well as the § 11A impartial medical report from an earlier proceeding. (Dec. 5-7.) The judge granted the insurer permission to depose that impartial physician, Dr. James Hewson. (Dec. 3.)

Dr. Hewson, who had examined the employee on November 8, 2005, over two years prior to his March 4, 2008 deposition, opined in his written report, (Ex. 1), that the employee's right knee surgeries were causally related to her January 7, 2002 work injury, she had restricted ranges of motion of both knees, and she should not engage in bending, twisting or lifting activities. He also opined the employee's severe right

[2] The judge's decision states, "[e]ntitlement to an 11A medical report was waived at the 10A conference and no later request was made by the parties' [sic] through this hearing. Both parties furnished medical evidence on all issues raised." (Dec. 3.)

knee osteoarthritis was aggravated and accentuated by the acute January 7, 2002 right knee meniscal tears. The judge adopted these opinions. (Dec. 6.)

Included in the employee's medical evidence were the reports of her treating physicians. Dr. James A. Karlson, her orthopedist, opined the employee was permanently and totally disabled as of October 10, 2007, due to her work-related right knee meniscal tears, and the two surgeries for her increasing knee pain and swelling, with complications from the second procedure of a pemanent nerve injury to her left leg. The judge adopted these opinions. (Dec. 5-6.) Dr. Kenneth Larsen, her psychiatrist, and Dr. Ronald Longpre, her psychologist, opined the employee suffered from panic attacks, anxiety and depression causally related to her physical injuries and the complications from her surgeries. Dr. Longpre further opined the employee had a diagnosis of adjustment disorder with mixed anxiety, depressed mood and panic disorder, and that she required psychological therapy and management to deal with her stress, behavior and emotions. The judge adopted these opinions. (Dec. 7.)

The judge concluded that although the employee was only partially medically disabled as of October 10, 2007, she was "permanently and completely incapacitated from any non-trivial remunerative work from that date and for the foreseeable future." (Dec. 7-8.) He wrote:

> I accept the credible testimony of the Employee and the medical opinions as referenced in concluding that although the Employee has limited vocational transferable skills in construction supervision, she lacks marketable clerical/ computer/office sedentary skills. I find she is permanently on the sidelines because of the physical and emotional sequelae from the January 7, 2002 industrial accident. Her physical injuries have resulted in permanent restricted ability to perform walking, standing, sitting, climbing, crouching, and driving. Her overwhelming right leg pain and occasional left leg pain and numbness have produced profound emotional effects. She is tearful, experiences nightmares, interrupted sleep, lack of concentration and focus, suffers panic attacks, and episodes of shortness of breath, despair and anxiety. She requires medication for her physical and emotional conditions. She is limited in mobility and needs a cane for support. I do not find she has physical capacity to perform any meaningful work and earn a wage. She is homebound from her physical and later emotional conditions.

(Dec. 8.)

Stating he relied on the medical opinions he adopted, the judge concluded "that the factual predicates do not exist to mandate the Employee to prove the heightened standard of causation." He found "the painful right leg sequelae, and to a lesser extent the left leg pain and numbness are the direct result of the surgical procedures to repair the accepted industrial accident right knee meniscus tears and the medical mishaps occurring during the arthroscopies." (Id.) The insurer insists this finding was error. We agree.

It is well-established that an insurer raising the affirmative defense of § 1(7A) bears the burden of *producing* evidence of a) a pre-existing condition, resulting from a non-compensable injury or disease, which, b) combined with the employee's compensable work injury. MacDonald's Case, 73 Mass. App. Ct. 657, 660 (2009), citing Johnson v. Center for Human Dev., 20 Mass. Workers' Comp. Rep. 351, 355 (2006); see also, Doucette v. TAD Technical Institute, 22 Mass. Workers' Comp. Rep. 99, 103 (2008); Jobst v. Leonard T. Grybko, 16 Mass. Workers' Comp. Rep. 125, 130-131 (2002), citing Fairfield v. Communities United, 14 Mass. Workers' Comp. Rep. 79, 83 (2000). The burden imposed on the insurer under § 1(7A) is "*a burden of production only, not a burden of persuasion*." MacDonald's Case, supra at 660 (emphasis added). In other words, the judge need not be persuaded by the insurer's evidence. Once an insurer meets its burden of production, and properly places "a major" causation at issue, as did the insurer here, the judge must undertake the § 1(7A) analysis set forth in Viera, supra at 52-53 (2005).[3] The employee can

[3] As the Appeals Court noted:

> [I]n considering a § 1(7A) defense as to which the insurer has met its burden of production, the administrative judge is to make findings of fact addressing whether the employee's [current injury] is "(1) a pre-existing condition, which resulted from an injury or disease not compensable under this chapter," which (2) "combines with" the [compensable injury or disease] "to cause or prolong disability or a need for treatment;" and, if so, (3) whether that "compensable injury or disease remains a major but not necessarily predominant cause of disability or need for treatment."

either meet that heightened burden of proving "a major" causation, or defeat the application of the statute entirely by showing that at least one of its predicates was not met. The employee,

> may produce persuasive evidence that the pre-existing condition did not combine with the industrial injury. If that burden is persuasively met, then the judge need go no further with a § 1(7A) analysis; the employee's medical disability is analyzed under a simple 'as is' causation standard."

Cook v. Stop & Shop Co., 15 Mass. Workers' Comp. Rep. 252, 258 (2001). See, e.g., Manzanero v. Beth Israel Deaconess Med. Ctr., 21 Mass. Workers' Comp. Rep. 187, 188-189 (2007)(disc herniation did not combine with pre-existing degenerative disc disease; no § 1(7A) application). Even if the employee has a pre-existing condition which combines with the work injury, she may prove the compensable nature of the pre-existing condition in order to invalidate the § 1(7A) defense. Vieira, supra at 53, citing LaGrasso v. Olympic Delivery Srv., 18 Mass. Workers' Comp. Rep. 48, 54-55 (2004). See also, Baldini v. Department of Mental Retardation, 23 Mass. Workers' Comp. Rep. 159, 162-163 (2009). "If there is medical evidence that 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).

Here, although the insurer mets it burden of production, the employee was not held to defeating the application of § 1(7A) to her claim by proving, with persuasive medical evidence, that either statutory predicate was not met. The judge simply circumvented the analysis of the employee's claim under Vieira by finding the "factual predicate" of combination was not met. The error, however, lies in the judge's *express adoption* of Dr. Hewson's opinion the employee "had previous osteoarthritis of the right knee and this was accentuated and *aggravated* by the

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MacDonald's Case, supra at 660, quoting from § 1(7A).

incident of 1/7/02." (Dec. 6; Ex. 1, emphasis added). Thus, combination was established as a matter of law, rendering § 1(7A) applicable to the employee's claim. MacDonald v. Acme Waterproofing, 21 Mass. Workers' Comp. Rep. 275, 280 (2007)(expert opinion as to work-related "aggravation" of pre-existing condition, or to work injury being "superimposed" on pre-existing condition, indicative of § 1(7A) combination), *aff'd* MacDonald's Case, supra at 660 (2009).

It is true that at his 2008 deposition, Dr. Hewson waffled a bit. Upon direct examination by the insurer, the doctor clarified the opinions he had given in his 2005 report:

> Q.: . . . So in your opinion, the tear was distinct from the osteoarthritis?
> A.: Yes.
> Q.: And you think it was probably caused by the fall [at work]?
> A.: I said more likely than not it was caused by the incident of 1/7/02. . . .

(Dep. 13-14.) At first blush, this testimony appears to support the judge's conclusion on the issue of § 1(7A):

> [T]he factual predicates do not exist to mandate the Employee to prove the heightened standard of causation. I am satisfied the painful right leg sequelae, and to a lesser extent the left leg pain and numbness are the direct result of the surgical procedures to repair the accepted industrial accident right knee meniscus tears and the medical mishaps occurring during the arthroscopies.

(Dec. 8.) However, nowhere in his decision did the judge reference or adopt that specific aspect of Dr. Hewson's testimony and, in any event, it was not the doctor's final opinion. See Perangelo's Case, 277 Mass. 59, 64 (1931). On cross-examination by the employee, the doctor testified:

> Q.: . . . With respect to your evaluation in November of '05, you stated that she had *previous osteoarthritis of the right knee. And this was accentuated and aggravated by the incident of 1/7/02*, is that right?
> A.: That's right.
> Q.: Is that still your opinion today?
> A.: Yes.

(Dep. 15; emphasis added.) Having adopted that opinion, and in the absence of any adopted medical evidence the employee's pre-existing osteoarthritis retained any

causal connection to a prior compensable injury, it was both inconsistent and improper for the judge to conclude the factual predicates of § 1(7A) did not exist. It is not for us to resolve the inconsistency; we recommit the case for the judge to do so.

Lastly, we address the insurer's argument the judge erred by failing to make findings regarding its medical evidence, introduced pursuant to § 11A(2). (Ex. 5.) Where the judge did not adopt any of the insurer's medical evidence, but it was referenced in the decision, albeit without specificity, as an exhibit, there was no error in omitting to narrate the contents of those reports. Moreover, the opinions contained in the insurer's medical reports were discussed by Dr. Hewson at his deposition.[4] There is no question but that the judge must have been well aware of the insurer's medical evidence, most certainly by way of Dr. Hewson's testimony, whose opinions the judge adopted. Thus, this case is not governed by the cases cited by the insurer, \see, e.g., Larti v. Kennedy Die Castings, Inc., 19 Mass. Workers' Comp. Rep. 362, 366-367 (2005), in which the decision and record are both utterly silent as to whether the judge reviewed certain unreferenced evidence.

We reverse the judge's decision and recommit the case for the § 1(7A) analysis required by Vieira, supra, and for further subsisidary findings of fact consistent with this opinion.

So ordered.

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Patricia A. Costigan
Administrative Law Judge

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William A. McCarthy
Administrative Law Judge

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Mark D. Horan
Administrative Law Judge

Filed: **June 23, 2010**

[4] Identified as exhibits to Dr. Hewson's deposition were a September 14, 2005 report of Dr. Robert Y. Pick; a June 29, 2006 report and August 2, 2006 addendum report of Dr. Richard Warnock; and a March 8, 2006 report of Dr. James Bono. (Dep. 3.)