COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 034168-17**

Jemma Tinnis	Employee
Visiting Nurse Association of Boston	Employer
Atlantic Charter Ins. Co.	Insurer

REVIEWING BOARD DECISION
(Judges Long, Koziol and Calliote)

This case was heard by Administrative Judge Fitzgerald.

APPEARANCES
Boaz Levin, Esq., for the employee
Ana Mari de Garavilla, Esq., for the insurer

LONG, J. The insurer appeals from a hearing decision ordering ongoing § 34 temporary total incapacity benefits and §§ 13 and 30 medical benefits for the employee's low back injury. The insurer presents two issues on appeal, only one of which requires discussion, while the other is summarily affirmed. The insurer alleges "the administrative judge erred finding that the employee met her burden in overcoming the insurer's M.G.L. chapter 152 section 1(7A) defense and [the decision was] thereby contrary to law[.] " (Insurer br. 10.) While we find no error in the judge's findings and uphold the September 9, 2020, hearing decision, we take this opportunity to address the insurer's argument.

The employee's claim for indemnity and medical benefits was heard at conference on April 3, 2019, and an order was issued for § 34 temporary total incapacity benefits from October 20, 2018, to date and continuing, along with medical benefits under §§ 13 and 30. (Dec. 2.) The insurer's appeal of the conference order led to a § 11A impartial examination with Dr. Kenneth Polivy on July 8, 2019. At the January 6, 2020, hearing, Dr. Polivy's report was deemed adequate by the judge; however, additional gap medicals

were allowed for records dated prior to the impartial examination.[1] Both parties submitted additional medical records, and no depositions were conducted. The insurer accepted liability for the employee's December 23, 2017, low back injury but denied disability and extent of incapacity and denied causal relationship between the industrial injury and disability. The insurer also raised § 1(7A), and its pre-existing condition terms.[2]

The September 9, 2020, hearing decision ordered § 34 benefits from October 20, 2018, to date and continuing and § 30 medical benefits for the low back injury. (Dec. 14.) The judge adopted portions of four different physicians' opinions to support the decision, which included the impartial report and an IME submitted on behalf of the insurer. The judge rejected the insurer's defense asserted pursuant to § 1(7A), finding:

> The insurer raises Section 1(7A) as a defense in this case with respect to the employee's back. . . . I have found the employee's testimony to be credible that she injured her back at work approximately five years prior to the December 23, 2017 work related injury while working for the employer. Therefore, the injury sustained on December 23, 2017 follows a prior compensable injury to the employee's back. In addition, I have adopted the opinion of Dr. Friedberg who opines that the work injury remains a major cause of the employee's need for treatment including the proposed surgery. As such, the insurer has not met its burden under 1(7A).

(Dec. 11-12.)

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[1] We have repeatedly observed that a report cannot be adequate and have an alleged "gap" in the medical evidence. An impartial report is, by definition, inadequate if "gap" medical evidence is allowed for any period of time, either pre or post § 11A examination. Hinanay v. DMHNS 1 North Shore Area, Danvers, 35 Mass. Workers' Comp. Rep. __ (July 30, 2021); citing Spencer v. JG MacLellan Concrete Co., 30 Mass. Workers' Comp. Rep. 145, 148-150 (2016).

[2] General Laws c. 152, § 1(7A), states, in relevant 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 is a major but not necessarily predominant cause of disability or need for treatment.

The insurer argues that the judge erred when she found the employee's prior injury while working for the employer served to defeat its § 1(7A) defense:

> The administrative judge writes that she finds the employee's testimony regarding an injury at work 5 years prior to the injury claim[ed] at bar was credible. The employee testified that she reported the injury, that there was treatment, and that there was, as she recalled, a brief time out of work. However, there was no production of any medical report documenting a prior history to the low back at work. There was no production of a report of injury or any First Report of Injury having been filed with the Department of Industrial Accident[s] or any insurer. Without any supporting documentation the employee's claim of a prior work related injury is not supportable.

(Insurer br. 10-11.)

While the insurer's argument has some surface appeal, we disagree with its analysis. The judge's finding that the prior injury was "compensable" based solely upon the employee's testimony was not error. See Pollard v. MBTA, 35 Mass. Workers' Comp. Rep. __ (2021)(judge permissibly found prior injury "compensable" based upon employee's testimony); see also Doherty v. Union Hospital, 31 Mass. Workers' Comp. Rep. 195, 205-206 (2017), citing Faieta, III v. Boston Globe Newspaper Co., 18 Mass. Workers' Comp. Rep. 1, 6 (2004)(to the extent the judge's finding the employee suffered a prior "compensable personal injury was based on her belief of the employee's testimony, it is final and immune from appellate review"). The insurer's argument would gain more traction if the defeat of its § 1(7A) defense was based solely upon the finding of a prior "compensable" work injury, since none of the medical evidence addressed the nature and effect of the prior "compensable" injury upon the employee's pre-existing condition and present incapacity. See Pollard, supra ("the appropriate analysis in assessing whether the employee has met his burden of proof to defeat § 1[7A] involves a determination of whether the pre-existing condition is a result of a compensable injury, not simply a finding that the prior injury is compensable. Such proof must include medical evidence, except where, as a matter of 'general human knowledge,' the judge can make such causation findings on his own"). See also Dorsey v. Boston Globe, 20 Mass. Workers' Comp Rep. 391, 395-396 (2006)(where there was no medical evidence of

nature or extent of pre-existing conditions and whether they retain any connection to the earlier compensable injury, employee was required to prove his industrial accident was a major cause of his disability and need for treatment under § 1[7A]).

However, unlike in Pollard and Dorsey, the judge here adopted expert medical evidence that defeated the insurer's § 1(7A) defense, independently of the valid finding of a prior "compensable" injury.[3] The judge adopted the following portions of Dr. Friedberg's opinion found in his March 20, 2019, report:

> Dr. Friedberg diagnosed the employee with a lumbar strain, exacerbation of pre-existing degenerative disc disease, lumbar spine, disc herniation at L5-S1 with left-sided lumbar radiculopathy. [Id.] I adopt these opinions and so find.
>
> Dr. Friedberg further opined that "I believe the work injury remains a major cause of Ms. Tinnis' current need for treatment, including the proposed surgery." [Id.] I adopt this opinion and so find.

(Dec. 7.)

While we have consistently required judges to follow explicitly the steps of the analysis outlined in Vieira v. D'Agostino Assocs., 19 Mass. Workers' Comp. Rep. 50, 53 (2005), here, the judge's decision skips the step of analyzing whether the pre-existing condition continues to be causally related to the earlier compensable injury. Nonetheless, the judge progressed, correctly, to the remaining steps of the analysis, finding a combination of the new injury with a pre-existing condition and requiring the injury to be "a major cause" of the employee's disability and need for medical treatment. Since Dr. Friedberg's adopted "a major cause" opinion supports the judge's finding that the insurer's § 1(7A) defense was defeated, we affirm the decision.

[3] In further support of its position, the insurer supplemented its brief with a citation to Pires Case, 85 Mass. App. Ct. 1109 (2014)(Memorandum and Order Pursuant to Rule 1:28), which is again, distinguishable. In Pires, the judge did not credit the employee's testimony of a prior work injury, nor was there any medical evidence to overcome the § 1(7A) defense, both of which are present here.

Pursuant to G.L. c. 152, § 13A(6), the insurer shall pay employee's counsel a fee in the amount of $1,745.44.

So ordered.

Martin J. Long
Administrative Law Judge

Catherine Watson Koziol
Administrative Law Judge

Carol Calliotte
Administrative Law Judge

Filed: **September 16, 2021**