**COMMONWEALTH OF MASSACHUSETTS**

**DEPARTMENT OF INDUSTRIAL ACCIDENTS** **BOARD NO. 004506-04**

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| Kimberly Johnson | Employee |
| Center for Human Development | Employer |
| Arch Insurance Co. | Insurer |

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

**APPEARANCES**
Katherine Lamondia-Wrinkle, Esq., for the employee
Douglas F. Boyd, Esq., for the insurer

**McCARTHY, J.** Kimberly Johnson appeals from a decision in which an administrative judge denied and dismissed her claim for weekly incapacity benefits. The employee argues that the judge erred by applying the heightened § 1(7A) "major but not necessarily predominant" causation standard.[1] We agree and therefore reverse the decision and recommit the case.

Kimberly Johnson was thirty-seven years old at the time of hearing. She is a high school graduate. She then attended school with the goal of becoming a licensed practical nurse but did not complete the required course of studies. She did, however, obtain certification as a nursing assistant. (Dec. 3.)

At the time of her injury she held two jobs, one as a direct care worker for the Center for Human Development, which involved managing the cases of mentally

[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 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.

disabled adults in their homes, and the other as the animal control officer for the town of Southwick. (Dec. 3-4.)

In April 2002, Ms. Johnson had a non-work related low back injury, which eventually resulted in surgery. After four months she returned to full work duty and to a varied regimen of vigorous exercises. Then, on February 21, 2004, while working for the Center for Human Development, the employee tripped over a vacuum cord in a client's home. She fell to the floor, landing on her right hip and thigh. She experienced immediate pain in her lower back and right thigh and, within a month of the fall, developed left leg pain. She has not returned to work. (Dec. 4.)

The insurer resisted the employee's claim for weekly compensation benefits and, following a § 10A conference, the administrative judge issued an order for payment of weekly § 34 benefits. Both parties appealed and sought a hearing de novo. (Dec. 2.) The employee was examined by Dr. Vincent Giustolisi under the provisions of § 11A. He diagnosed a soft-tissue back injury causally related to the February 21, 2004 industrial accident. It was his opinion that the employee was totally disabled from her work as a direct health care worker as she could not do the required bending and lifting. (Dec. 5, Ex. 1.)

At his deposition, the § 11A examiner stated that Ms. Johnson had some sciatica at the time of her December 21, 2004 examination; however, he was unable to opine as to how much of her standing limitation was as a result of the 2004 work injury as opposed to her 2002 non-work related back injury. (Dec. 5; Dep. 23, 26.) The judge granted the employee's motion for the submission of additional medical evidence on the basis of inadequacy, (Dec. 2), and the employee submitted the office notes and report of her attending physician, Dr. Christopher Comey. (Dec. 1; Ex. 6.) The insurer in turn submitted the report of Dr. George Ousler. (Dec. 1; Ex. 5.)[2] At hearing, the insurer contested incapacity and the extent thereof, and placed causal relationship and § 1(7A) in issue. (Dec. 2.)

[2] Dr. Ousler's report is silent on the pivotal issue before us and the judge's decision makes no reference to the doctor's report or opinions when discussing the medical issues.

The § 11A examiner agreed with Dr. Comey that the "[e]mployee's current disability was as a direct result of the February 21, 2004 fall." The judge explicitly accepted and adopted these opinions. (Dec. 5.) Nevertheless, the judge denied the employee's claim for failure to sustain her burden of showing that "when combined with the other pre-existing disease or injury, the employee's 2004 injury is a major, important or significant cause of her current disability." (Dec. 6.)

The employee argues error in the judge's application of § 1(7A). We agree that there was no evidence of the requisite "combination" of the employee's current work related disability with her prior non-work related condition to trigger the application of § 1(7A).

The insurer must raise § 1 (7A) as a defense *and produce evidence to trigger its application*. Jobst v. Leonard T. Grybko, 16 Mass. Workers' Comp. Rep. 125, 130-131 (2002), (emphasis ours), citing Fairfield v. Communities United, 14 Mass. Workers' Comp. Rep. 79, 83 (2000)(insurer has the burden to produce evidence that would support finding that a pre-existing noncompensable injury or disease combined with a compensable injury to . . . prolong disability at issue). An essential element of proof in establishing this threshold requirement is a showing by the insurer that there is a "combination" of the industrial injury with the pre-existing condition. See Robles v. Riverside Mgmt. Co., 10 Mass. Workers' Comp. Rep. 191 (1996). If the insurer fails to meet its burden of producing evidence to put § 1(7A) in play, the employee is taken "as is" and the causation standard is more probable than not. See Jobst, supra at 131. It is enough for the employee to show that it is more likely than not that the facts warrant an award of benefits. Carter v. Yardley, 319 Mass. 92, 95 (1946).

By our examination, the record is devoid of any evidence which might establish that Ms. Johnson's 2002 back condition combined with the work injury suffered on February 21, 2004. The § 11A examiner diagnosed the employee with a soft tissue injury and opined that it was causally related to the employee's February 21, 2004 industrial injury. (Ex. 1; Dec. 5.) At deposition, he stated that the employee's pre-existing back problem played no role in her present diagnosis and condition. (Dep. 46.) That was his

last word on the subject. Perangelo's Case, 277 Mass. 59 (1931)(the opinion of an expert which must be taken as his evidence is his final conclusion at the moment of testifying).

The October 21, 2004 narrative report of the employee's treating neurosurgeon, Dr. Comey, is of no help to the insurer's cause. Dr. Comey writes that, "[w]hile she clearly had degenerative disc disease preceding her accident, the fall she sustained while at work has produced new symptoms that may ultimately require treatment with further surgery." (Ex. 6.)[3] The § 11A examiner concurred with Dr. Comey, and the judge adopted their opinions. (Dec. 5.)[4]

Since there is no evidence to support a combination of the pre-existing condition with the work injury, § 1(7A) does not apply to this case as a matter of law. The insurer failed to meet its burden of producing evidence of the predicates to § 1(7A)'s application, i.e., the existence of an injury combination, which caused or prolonged disability. Fairfield, supra.

Given the absence of evidence of any "combination" of the employee's 2002 back condition to her 2004 work injury, the heightened causation standard of § 1(7A) does not apply and the employee is to be taken as is.

We therefore reverse the dismissal of the employee's claim, and recommit the case to the administrative judge for further proceedings and findings consistent with this opinion.

So ordered.

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[3] Dr. Comey performed the micro-discectomy on 4/23/02 associated with the employee's prior back condition and continued to treat her as recently as April 7, 2005. (Ex. 6.)

[4] We also note the judge's extensive findings of fact relative to the employee's condition after the 2002 surgery and leading up to the 2004 injury. The employee was able to return to work at full-duty three to four months following the surgery of 2002, and she had no problems performing the duties of that position. Also, at the time of her work injury, she was an animal control officer, a very physical position, which required that she pick up and care for a variety of animals such as cats, dogs, pigs and horses. Following the surgery of April 23, 2002, she was able to resume a number of physical activities, including "biking, running, kickboxing, hiking, and aerobic exercise." (Dec. 4.)

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William A. McCarthy
Administrative Law Judge

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Martine Carroll
Administrative Law Judge

Filed: ***November 9, 2006***

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Mark D. Horan
Administrative Law Judge