# COMMONWEALTH OF MASSACHUSETTS

**DEPARTMENT OF INDUSTRIAL ACCIDENTS** — **BOARD NO. 055523-99**

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| Maria Resendes | Employee |
| Meredith Home Fashions | Employer |
| American Casualty of Reading, PA | Insurer |

## REVIEWING BOARD DECISION

(Judges Maze-Rothstein, Carroll and Wilson)

## APPEARANCES

Patrick T. Matthews, Esq., for the employee
Paul M. Scannell, Esq., for the insurer

**MAZE-ROTHSTEIN, J.** The insurer appeals from a decision awarding the employee G. L. c. 152, § 34, temporary total incapacity benefits for a back injury at work. Because the incapacity analysis may have been improperly compounded with a non-work-related medical condition, we recommit the case for further findings.

On December 1, 1999, Ms. Resendes, a forty-eight year old Portuguese immigrant, tripped and fell on curtains hanging from a table while working at her folding and packing job, injuring her back. She was able to continue working until December 17, 1999 in pain, but stopped that same day after seeking medical treatment. She had a history of leukemia, for which she received bone marrow treatments, but had no history of back problems. (Dec. 5-7; Statutory Exh. 1)

The insurer resisted the employee's claim for workers' compensation benefits. At conference, the judge ordered that the insurer pay a closed period of § 34 benefits at conference, and both parties appealed to an evidentiary hearing. At hearing the employee claimed ongoing temporary total incapacity benefits, and the insurer raised the issues of liability, causal relationship, extent of incapacity and § 1(7A). (Dec. 2-3.)

The employee underwent a § 11A medical examination. In his report, the § 11A physician diagnosed a L4-5 disc protrusion, for which the employee had undergone an unsatisfactory disc excision, leaving her with considerable residual functional deficits. (Dec. 7.) He also diagnosed that the employee was status post leukemia treatment, which had been potentially successful. (Statutory Exh. 1.) He opined that the work injury was the "proximate cause" of the employee's current disability and that she had reached maximum medical improvement. At his deposition, the § 11A doctor opined that the employee's pre-existing leukemia combined with her work-related back condition to render her totally medically disabled. (Dec. 7; Dep. 15-16.) The judge ruled that the § 11A report was adequate under § 11A(2), and adopted the doctor's opinions. (Dec. 4, 7.)

The judge found that the employee had suffered an industrial injury, and that her work-related back condition was "a major cause" of her disability. (Dec. 7, 8.) He credited the employee's report of severe and constant pain, and limited ability to sit or stand for extended periods of time without severe discomfort. (Dec. 7.) The judge concluded that the employee was totally incapacitated from work, and awarded ongoing § 34 weekly temporary total incapacity benefits. (Dec. 8-9.)

As an initial matter, we note a harmless error not argued by the insurer, but which may have unnecessarily obfuscated analysis of the claim. The judge erred by applying the provisions of § 1(7A) requiring that the combination of a compensable injury or disease with a pre-existing non-compensable injury or disease is "compensable only to the extent such compensable injury or disease remains a major but not necessarily predominant cause of disability or need for treatment."[1] The combination that the statute addresses is a *medical* combination:

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[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 this chapter, to cause or prolong disability or a need for treatment, the resultant condition shall be

an injury or disease that combines with an injury or disease. This most frequently involves aggravation injuries, such as back strains superimposed on degenerative disc conditions. See, e.g., Piekarski v. National Non-Wovens, 14 Mass. Workers' Comp. Rep. 407, 409-410 (2000). Other cases present more complicated combinations of medical conditions. See, e.g., Robles v. Riverside Mgt., Inc., 10 Mass. Workers' Comp. Rep. 191, 193-195 (1996)(toe injury superimposed on diabetes mellitus and arteriosclerosis that triggered cellulitis, vascular occlusive disease and eventually multiple organ failure and death).

However, the combination that exists in the present case is not a combination of medical factors impacting on each other "to cause or prolong disability or a need for treatment." See G. L. c. 152, § 1(7A). Rather there are two co-existent, but entirely independent, medical conditions, that separately cause different disabilities in the same person. The § 11A doctor improperly considered both the pre-existing leukemia and the industrial back condition to reach his opinion that the employee was totally medically disabled from all work. "People with any malignant condition, they get tired easily, and are not capable of sustaining physical efforts for any length of time." (Dep. 15.) "I factored the malignant condition she has [leukemia] in my decision, in my opinion, on how much she can work." (Dep. 16.) There is no evidence that the employee's leukemia had *anything medically* casually to do with her severe back impairment. Therefore, the judge should not have applied the "combination" provision of § 1(7A), dealing with such medical combinations. Contrast G. L. c. 152, § 37 (second injury fund reimbursement available to insurer when employee's "physical impairment which is due to any previous accident, disease or any congenital condition," and that which is due to his industrial injury, "results in a disability that is substantially greater by reason of the combined effects of such impairment and subsequent personal injury than the disability which would have

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compensable only to the extent such compensable injury or disease remains a major but not necessarily predominant cause of disability or need for treatment.

resulted from the subsequent personal injury alone"); Branconnier's Case, 223 Mass. 273, 274 (1916)(one-eyed employee's loss of his eye entitled him to compensation for total blindness, which opinion prompted the legislature to enact § 37, see Locke, Workmen's Compensation at § 173 (2d ed. 1981). Nonetheless, since the judge found causal relationship and awarded benefits, his erroneous analysis under the heightened § 1(7A) standard of a "major" causation did not prejudice either party, and is harmless.

However, the combination of causes of the employee's total medical disability does present a problem that the judge must handle on recommittal. That problem, which the insurer addresses in its appeal, is the judge's mixing together of the non-work-related leukemia and the work-related back injury, by way of his wholesale adoption of the § 11A physician's opinion. As discussed above, the §11A doctor does indeed factor the two causes into his disability opinion, which the judge specifically adopted: "the employee's pre-existing leukemia combine [sic] with the work related back condition to make the employee totally disabled. The leukemia is in remission and I find that the back condition is a major cause of the disability." (Dec. 7.) The judge's reliance on that aspect of the § 11A physician's opinion was misplaced.[2] Paraphrasing from Hummer's Case, 317 Mass. 617 (1945): "Disability due to [leukemia] having been found not to have a causal connection with the [work] injury cannot be considered in determining whether the condition of [her back] has rendered [her] totally . . . disabled." Id. at 623. See also Patient v. Harrington & Richardson, 9 Mass. Workers' Comp. Rep. 679, 682-683 (1995). Essentially, while the judge's attention was diverted to the inapplicable § 1(7A), he apparently forgot to address the Hummer's Case issue of how to handle multiple causes of medical disability, one compensable and one not compensable. See Patient, supra at 683 (judge must isolate, insofar as possible,

[2] There are other aspects of the § 11A physician's opinion that appear to relate to restrictions from the employee's back condition alone, (Dep. 53), contrary to the judge's finding in the decision. (Dec. 7-8.)

the work-related component of medical disability, and assess loss of earning capacity without effects of non-work-related medical condition).

Therefore, we recommit the case for the judge to revisit his assessment of the extent of the employee's disability, without the effects of the employee's leukemia and without the erroneous application of § 1(7A), which – although harmless – should be removed from the case on recommittal. In his discretion and the interests of justice, the judge may reconsider the question of whether additional medical evidence is warranted under the provisions of § 11A(2).[3]

So ordered.

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Susan Maze-Rothstein
Administrative Law Judge

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Sara Holmes Wilson
Administrative Law Judge

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Martine Carroll
Administrative Law Judge

Filed: October 1, 2003

[3] The insurer's motion for a ruling that the § 11A report was inadequate, made orally at the commencement of the hearing, was appropriately denied, as it was based on insubstantial arguments. (Tr. 6-9.) However, neither party filed a motion based on the § 11A physician's deposition testimony. (Dec. 4.)