COMMONWEALTH OF MASSACHUSETTS

**DEPARTMENT OF INDUSTRIAL ACCIDENTS** **BOARD NO. 030723-06**

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| Nancy Scott | Employee |
| City of Boston | Employer |
| City of Boston | Self-Insurer |

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

The case was heard by Administrative Judge Taub.

**APPEARANCES**
Robert L. Noa, Esq., for the employee
John T. Walsh, Esq., for the self-insurer

**HORAN, J.** The employee appeals from an administrative judge's decision authorizing the self-insurer to discontinue the employee's § 34 benefits. We recommit the case for further findings consistent with this opinion.[1]

The employee, fifty-five years old at the time of the hearing, was employed by the self-insurer as a data entry clerk. On August 24, 2006, the employee's foot became entangled in wiring near her desk, and she started to fall. She was caught and jerked to her feet by a co-worker. About two days later she experienced back pain and, to a lesser extent, pain in her legs. Her back pain caused her to leave work on September 23, 2006. (Dec. 3-4.)

The self-insurer paid § 34 benefits from September 23, 2006 through January 11, 2007. Following a conference on the employee's claim, the judge ordered the self-insurer to pay § 35 benefits ongoing from January 12, 2007. Both parties appealed. On June 7, 2007, Dr. Douglas A. Patch, an orthopedic surgeon, evaluated the employee pursuant to § 11A. In his report, Dr. Patch noted and referred to the employee's five-year history of rheumatoid arthritis as a "well-

[1] Following oral argument on January 5, 2010, the parties requested we defer our decision to give them time to resolve the case. We were later informed they could not do so.

established preexistent condition." (Stat. Ex. 1.) Accordingly, at the hearing, the self-insurer raised, *inter alia*, § 1(7A) as a defense.[2] (Dec. 2.)

The judge allowed the parties to submit additional medical evidence on the grounds of complexity. (Dec. 2.) Among the Harvard Vanguard Medical Associates medical records submitted by the employee were the office notes of Dr. David Meenan, her treating osteopath, and the August 17, 2007 report of Dr. Raymond Pertusi, a rheumatologist. (Employee Ex. 3.) The employee also submitted Dr. Meenan's January 25, 2008 report. (Employee Ex. 2.) The self-insurer submitted the April 3, 2007 report of Dr. Steven Sewall. (Self-ins. Ex. 1.)

In his decision, the judge adopted Dr. Meenan's opinion and concluded the employee's "disabling pain and resulting incapacity from work were sufficiently related" to her work injury "for a period of time." (Dec. 6-7.) However, the judge terminated the employee's entitlement to weekly incapacity benefits as of August 17, 2007, the date of Dr. Pertusi's examination of the employee. (Dec. 7.) The judge found:

> As of August 17, 2007, I adopt the opinion of Dr. Pertusi that the employee's "main pain generator" was fibromyalgia. With Dr. Pertusi, having concluded that the diagnosis of rheumatoid arthritis was incorrect despite its having been the operative diagnosis for a number of years and that she actually had fibromyalgia, *I find that the fibromyalgia was the pre-existing condition that had troubled the employee for those many years.* With the fibromyalgia becoming the "main pain generator" *and the back injury at work something that Dr. Pertusi did not even see* [sic] *important enough to mention,* I find that the injury at work had *ceased to be a major cause* of [the employee's] disability and need for treatment.

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

(Dec. 7; emphasis added.) The judge also noted, and arguably adopted, Dr. Patch's opinion the employee's ongoing disability was caused by her underlying systemic disorder.[3] (Dec. 7; Stat. Ex. 1.)

On appeal, the employee argues the adopted opinion of Dr. Pertusi fails to establish the employee's fibromyalgia pre-existed her work accident, and cannot be read to entirely rule out her industrial accident as, at least in part, causative of her symptoms. She also maintains the judge applied § 1(7A)'s "a major" causation standard without sufficient attention to its elements. For the reasons that follow, we agree, and recommit the case for the judge to perform the necessary § 1(7A) analysis. See MacDonald's Case, 73 Mass. App. Ct. 657, 660 (2009); Vieira v. D'Agostino Assocs., 19 Mass. Workers' Comp. Rep. 50 (2005).

The employee is correct Dr. Pertusi did not opine how long the employee had suffered from fibromyalgia, or that she had been suffering from fibromyalgia for a number of years.[4] He merely stated, "[h]er main pain generator appears to be fibromyalgia." (Employee Ex. 2.) We also agree with the employee the judge's adoption of Dr. Pertusi's opinion to resolve the causation issue is flawed. Skipping past the requirement the employee's pre-existing non-industrial condition must combine with the industrial accident to trigger § 1(7A)'s heightened causation standard, MacDonald's Case, supra, the judge found the work injury "had ceased to be a major cause" of the employee's disability because Dr. Pertusi failed to mention the employee's back injury at work. In fact, there is no evidence Dr. Pertusi knew about the employee's back injury. The doctor's

[3] Dr. Patch identified the employee's underlying disorder and "well established preexistent condition" as rheumatoid arthritis; Dr. Pertusi diagnosed the employee as suffering from fibromyalgia, and did not indicate how long the employee had suffered from it. Dr. Meenan, it should be noted, opined the employee had been diagnosed with fibromyalgia subsequent to her injury at work. (Employee Ex. 2.)

[4] Following his examination of August 17, 2007, Dr. Pertusi wrote: "[the employee] has had a positive RF for at least 13 years" and that "[t]his is most likely due to reasons other than RA." (Employee Ex. 3.) His report contains no explanation of what "RF" means. Dr. Pertusi was not deposed.

report is addressed "[d]ear Colleague" and states, in the first paragraph, "I will limit my evaluation or intervention to the rheumatologic condition." (Employee Ex. 3.) While it is true Dr. Pertusi's evaluation fails to mention the employee's back injury, that fact, in view of the above quoted express limitation, cannot be relied upon to support the conclusion the employee is no longer suffering from the effects of her industrial accident.[5]

We recommit the case for the judge to reconsider the elements of § 1(7A) in light of the record medical evidence, and to make further findings consistent with this opinion.[6]

So ordered.

Mark D. Horan
Administrative Law Judge

Catherine Watson Koziol
Administrative Law Judge

William A. McCarthy
Administrative Law Judge

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[5] As the employee points out, there may be two independent medical conditions affecting the employee which do not "combine" to cause the employee's resulting disability or need for treatment. See Dorsey v. Boston Globe, 20 Mass. Workers' Comp. Rep. 391, 395-396 (2006)(board affirmed judge's finding that "a major cause" standard did not apply to new diagnoses directly caused by industrial accident which did not combine with the employee's pre-existing condition).

[6] If, on recommittal, the judge finds the insurer has met its burden of production to trigger the application of § 1(7A)'s "a major cause" standard, we note a finding that fibromyalgia is "the" major cause of the employee's incapacity does not preclude the work injury from being "a" major cause of her ongoing disability or need for treatment. See Lesoine v. Corcoran Mgmt. Co., Inc., 22 Mass. Workers' Comp. Rep. 153, 159 (2008)(while only one cause can properly be labeled "the" major cause, multiple causes may qualify as "a" major cause of the employee's disability); Provost v. Truss Eng'g Corp., 24 Mass. Workers' Comp. Rep. ___ (May 18, 2010) ("the" major cause and "a" major cause can each be less than fifty percent causative).