COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO.: 047208-97**

Roberta J. Blair	Employee
Olympus Healthcare	Employer
Wausau Insurance Company	Insurer

REVIEWING BOARD DECISION
(Judges Levine, Wilson and McCarthy)

APPEARANCES
Daniel F. Clifford, Jr., Esq., for the employee
Dennis M. Maher, Esq., for the insurer

LEVINE, J. The employee appeals from the decision of an administrative judge which discontinued the employee's weekly benefits. We affirm the decision.

At the time of the decision, Roberta Blair was a married, fifty-two year old mother of two adult children. (Dec. 322.) She is a high school graduate. She worked as a licensed practical nurse from 1972 to 1974 and again from 1990 to 1997. In between, she worked as a clerk, school bus monitor and library aide. Id.

On November 24, 1997, while in the course of her employment as a nurse, the employee injured her neck. The injury resulted from her attempt to move a 180 pound patient. (Dec. 322-323.) The employee felt a popping sensation and immediate pain in her neck. Within two weeks she developed low back pain. In addition to physical therapy, the employee has undergone chiropractic treatment and diagnostic testing. An MRI revealed a C6-7 disc herniation and spondylosis. Aside from one brief attempt, the employee has not worked since the incident. (Dec. 323.)

The insurer accepted the employee's claim; later, it sought to modify or discontinue benefits. On the day of the conference, the employee joined a claim for § 34 temporary total incapacity benefits. The judge denied both claims. Both parties appealed to a hearing de novo. (Dec. 321-322.)

Pursuant to § 11A, Dr. Christopher Rynne examined the employee. Dr. Rynne diagnosed a musculoligamentous strain superimposed upon degenerative disc disease of the cervical spine and degenerative disc disease of the lumbar spine. (Dec. 323.) He opined that the neck strain was causally related to the work incident, (Dec. 324), but expressly declined to relate the low back pain to the work injury. (Dec. 324; Dep. 34, 42-43.)

At several points in his deposition, Dr. Rynne expressed his opinion that the work injury contributed to the employee's neck symptoms. For example, he testified: "the [work] incident did not cause the arthritis and cause all the symptoms but seem [sic] to have triggered off something that was lying dormant . . . . In her case something in the injury seemed to have triggered off the symptoms." (Dep. 18, 18-19.) "If the stated history is correct that she had no prior history of neck symptoms . . . and that there was a significant incident that resulted in neck pain and assuming that she then continued to experience neck pain after that incident, then more likely than not one could say that there appeared to have been an aggravation of this pre-existing condition." (Dep. 21-22.) "[Y]ou could make a relationship between her neck symptoms and the incident." (Dep. 43.)

The judge allowed the employee's motion to submit additional medical evidence. (Dec. 322, 325.) The employee submitted the report of Dr. John P. Hayes, Jr., the employee's treating chiropractor; the report of Dr. James Gilbert; and the note and deposition of Dr. Frank Paolitto, her treating psychiatrist.[1] The insurer submitted the report of Dr. Robert M. Weiner, a psychiatrist. (Dec. 325.)

In his November 15, 2000 report, Dr. Hayes stated that MRIs "showed marked spondyloarthrotic changes in the cervical region. Lumbar spine MRI's demonstrated multiple level disease as well as facet joint degeneration, especially at the L5/S1 level." (Ex. 4.) He then expressed the following opinion:

[1] The June 18, 2001 report of Dr. Kevin C. Flynn, the employee's treating psychologist, was also admitted into evidence since it was adopted by Dr. Paolitto as his own. (Dec. 325.) Dr. Gilbert's report does not bear on the issues before us.

> This patient sustained direct injury to her neck and back as a result of the on the job incident . . . . Unfortunately, this incident occurred superimposed upon the patient's marked underlying degenerative spondyloarthropathy. Based upon a reasonable degree of certainty the injury of November 24, 1997 may be directly responsible for the disc herniation seen on her MRI studies. These findings certainly correlate well with the patient's physical impairment and clinical history.

Id. (emphasis added).

The judge found that "there is no competent medical evidence to causally relate the employee's present disability to her work injury." (Dec. 328.) The judge stated that, in his unequivocal statements on causal relationship, Dr. Rynne related the employee's orthopedic disability to her pre-existing degenerative disc disease. Id. The judge adopted the § 11A examiner's medical opinion over the opinion of Dr. Hayes. (Dec. 329.) Finding no causal relationship of the industrial injury to the orthopedic pain, the judge determined that the psychological claim was without any relation to the work incident. Accordingly, the judge denied and dismissed the employee's claim for further compensation and discontinued the employee's benefits. (Dec. 329.)

The employee first argues on appeal that the judge mischaracterized the impartial examiner's medical opinion on causal relationship by describing the opinion as unequivocal. The employee contends that the § 11A examiner's causal relationship opinions were not unequivocal "and were ambiguous as to whether her work-related injuries were the major cause of her ongoing disabilities." (Employee brief, p. 6.) The employee next argues that the judge improperly rejected the opinion of the employee's treating chiropractor. And the employee finally argues that the judge failed to adequately integrate the employee's testimony into his findings "to determine whether the major cause [of the] employee's disabilities are from her work-related injury or her pre-existing degenerative disc disease." (Employee brief, p. 7; see also id. at p. 8.)

Contrary to its obligation, the insurer did not invoke § 1(7A) in defense of the employee's claim. Hinton v. Mass. Mut. Life Ins. Co., 16 Mass. Workers'

Comp. Rep. 342, 347-348 (2002). However, as in Hinton, the employee effectively accepts that § 1(7A) applies in this case. (Employee brief, pp. 6, 7, 8.)[2] And there was ample evidence introduced relating to the pre-existing condition. Hinton, supra. Cf. Debrosky v. Oxford Manor Nursing Home, 11 Mass. Workers' Comp. Rep. 243, 245 (1997)(issue tried by consent).

Expert medical opinion is generally necessary to show causal relationship between an industrial injury and disability. See Robles v. Riverside Mgt., Inc., 10 Mass. Workers' Comp. Rep. 191 (1996). Where § 1(7A) applies, such expert opinion is also necessary to prove that the industrial injury is a major cause of ongoing disability. Bernardo v. Hallsmith Sysco, 12 Mass. Workers' Comp. Rep. 397, 404-405 (1998).

None of the expert evidence admitted as to the employee's physical condition[3] can be read as an expression of an opinion that the industrial injury is "a major" cause of the employee's present disability. Therefore, we affirm the decision.[4] Dr. Rynne, the impartial physician, testified that the industrial injury "seemed to have triggered," (Dep. 18), or "appeared to have been an aggravation of this pre-existing condition," (Dep. 22); or "you could make a relationship between her neck symptoms and the incident." (Dep. 43.) Dr. Hayes, whose opinion the administrative judge rejected, testified as to the employee's pre-

---

[2] General Laws c. 152, § 1(7A), states, in pertinent part, as follows:

> 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 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.

[3] The employee's psychiatric condition is, at best, a sequella of the employee's orthopedic condition. (Dec. 329.)

[4] As a result, we do not consider the correctness of the administrative judge's finding that the employee's present disability is not at all causally related to the industrial injury. (Dec. 328-329.)

existing condition, and then opined that the industrial injury "may be directly responsible for the disc herniation. . . . " (Ex. 4; emphasis added.)

We have recently held that such expressions of opinion are insufficient to satisfy the "a major" requirement of § 1(7A):

> Nearly all § 1(7A) cases present as a work injury "waking up" an underlying, previously asymptomatic, pre-existing condition. In other words, § 1(7A) combination cases are necessarily about the work as a "trigger" for the emergence of medical disability and need for treatment that is, at its core, related to an underlying condition. If that, in and of itself, is a sufficient factual foundation for an administrative judge to find "a major" causation under § 1(7A), the pertinent statutory language is rendered meaningless. We decline to do so.

Lyons v. Chapin Ctr., 17 Mass. Workers' Comp. Rep. ___ (January 13, 2003) (emphasis in original). The opinions of Dr. Rynne fall squarely within Lyons's description of an opinion that is insufficient. Similarly, Dr. Hayes's opinion is deficient. His opinion that the industrial injury "may" be directly responsible for the disc herniation is speculative and therefore insufficient. See Tartas's Case, 328 Mass. 585, 587 (1952)(proof of causal relationship may not be left to speculation). Caron v. Resi Comm. Constr., 6 Mass. Workers' Comp. Rep. 167, 170 (1992). L. Locke, Workmen's Compensation § 522 (2d. ed. 1981). Furthermore, even if the industrial injury were responsible for the disc herniation, that would not necessarily be enough to satisfy § 1(7A). "[A] disc herniation . . . superimposed on a pre-existing spinal disease or injury is [not], per se, 'a major' cause of whatever condition results." Lyons, supra at ____.

Since the medical evidence is inadequate to satisfy § 1(7A), as a matter of law, the employee could not prevail. Because the necessary expert testimony to support her claim is lacking, the employee's testimony could not change the outcome.

The decision is affirmed.

So ordered.

_____
Frederick E. Levine
Administrative Law Judge

_____
Sara Holmes Wilson
Administrative Law Judge

_____
William A. McCarthy
Administrative Law Judge

FEL/kai
Filed: **February 7, 2003**