COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 054706-98**

Stella Lyons	Employee
Chapin Center	Employer
Managed Comp. Insurance Co.	Insurer

REVIEWING BOARD DECISION
(Judges Wilson, Carroll and Levine)

APPEARANCES
William J. Doherty, Esq., for the employee
Robert J. Riccio, Esq., for the insurer on appeal
Peter P. Harney, Esq., for the insurer at hearing

WILSON, J. The insurer appeals from a decision in which an administrative judge awarded compensation benefits to the employee for industrial low back injuries occurring in June and December 1998. One of the insurer's arguments is dispositive. Because the insurer raised the defense of § 1(7A), the employee was called upon to prove that her industrial injuries were "a major cause" of her disability and need for treatment in light of her pre-existing, non-compensable, back condition. As the employee failed to meet this burden of proof, we reverse the decision.

The employee, a nursing assistant, suffered two low back injuries while lifting patients at work in June and in December 1998. (Dec. 2-3.)[1] The employee claimed compensation benefits for a June 10, 1998 date of injury and a subsequent aggravation in

[1] Although the judge found that the employee's first back injury was in August 1998, the employee's undisputed testimony was that the incident occurred in June 1998. (Tr. 14.) The discrepancy is harmless in light of the judge's failure to address the employee's claim under the appropriate § 1(7A) standard of "a major" cause.

December 1998,[2] and both parties appealed from the administrative judge's award of a closed period of partial incapacity benefits following a § 10A conference. (Dec. 2; Employee brief 1.) The insurer raised § 1(7A) as a defense at the hearing, on the basis that the employee suffered from pre-existing, non-compensable, medical conditions that combined with the industrial injuries to cause or prolong her disability.[3] (Tr. 7.) The insurer's contention that § 1(7A) applied to the case was based on the report of the impartial physician, who had examined the employee on December 8, 1999. (Statutory Ex.) In that report, the doctor opined in the section entitled "Causal Connection and Supporting Reasoning:"

> It is my professional opinion, based on the history obtained, performance of the physical examination and review of medical records, there is, beyond a reasonable degree of medical certainty, a causal relationship with the injury sustained and the disability claimed.
>
> This individual has spinal canal stenosis. She has developed chronic low back pain. I believe the spinal canal stenosis is a pre-existing condition and is the reason the operative procedure was performed. She developed a foot drop, which was the reason the decompression laminectomy was performed.

Id. at 4. The impartial physician was deposed, and his testimony is discussed below. In his hearing decision, the judge relied on the opinion of the impartial physician "that Ms. Stella Lyons suffered a work injury that resulted in back pain and eventually the need for surgery," which "surgery was done to correct both an underlying stenosis and a herniated disc." (Dec. 3; Dep.16, 98-102). The judge concluded that the employee's incapacity –

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[2] As the claim in this case is for the June 10, 1998 date of injury, there is no need to analyze this claim in accordance with principles of Lawson v. M.B.T.A, 15 Mass. Workers' Comp. Rep. 433 (2001), and White v. Town of Lanesboro, 13 Mass. Workers' Comp. Rep. 343 (1999). In those cases, unlike here, there were assertions of compensable work injuries prior to the claim at hand.

[3] 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.

which was total, based on the opinion of the impartial physician – was related to her work injuries. (Dec. 3-4.) The judge awarded benefits under §§ 34 and 30 accordingly. (Dec. 5.)

Although the employee contends, in answer to the insurer's argument, that the insurer was without right to raise § 1(7A) in this claim, the contention is without merit. We have stated that the insurer must bring forward some evidence that § 1(7A) should apply in order to trigger its application in any given case. Fairfield v. Communities United, 14 Mass. Workers' Comp. Rep. 79, 82 (2000). As set out above, the impartial report satisfied the insurer's burden of *production* with a clarity that few such cases exhibit.

This being the case, it was the employee's burden to meet the applicable standard of "a major" causation.[4] See Dodd v. Walter A. Furman Co., Inc., 16 Mass. Workers' Comp. Rep. ___ (February 12, 2002). The employee's argument on appeal, that the insurer never established during the 126 page deposition of the impartial physician that the industrial injuries did *not* remain a major cause of the employee's disability and need for treatment, erroneously and impermissibly shifts the burden of proof. It was the *employee's* burden to establish, through the deposition testimony of the impartial physician, that the industrial injuries remained a major cause of her disability and need for treatment. The employee's evidence clearly fell short of this elevated standard.

The deposition testimony established that the employee presented a pre-existing spinal stenosis (narrowing of the spinal canal), which was unrelated to any industrial cause, (Dep. 59-60), and which became symptomatic with the aggravating incidents at work in 1998. (Dep. 85.) Moreover, the employee apparently suffered back pain resulting from at least one non-work-related motor vehicle accident in 1997, for which she had treated. (Dec. 2; Dep. 10, 15, 40-43.) In the face of such classic predicate

[4] We note that this is not a case where the employee has argued, either at hearing or in her brief, that the § 1(7A) "a major" cause standard does not apply due to a pre-existing back condition that resulted in part from a *compensable* injury. See White, supra at 346; Lawson, supra at 433-434. We decline to raise the issue *sua sponte.*

evidence that triggers the application of § 1(7A), the deposition of the doctor includes not one reference to "a major cause," or even any language from which such a reference could be inferred. There are constant and repeated statements of causal relationship that would suffice to prove only a pre-1991 Act, traditional "as is" industrial injury:

> Q: Do you think that the medical treatment she received, including Dr. Linson's operation was *causally connected* to the work injuries?
>
> A: Yes, I did.

(Dep. 16; emphasis added.)

> Q: How long does it take normally for the back pain to -- the incident causing back pain to aggravate the spinal stenosis?
>
> A: If the pain doesn't get any better over a certain period of time, you have ongoing back pain, you probably have to attribute *some* of it to the work incident as well as the underlying spinal canal stenosis. It's like you wake up the condition.

(Dep. 86; emphasis added.)

> Q: If you go to the bottom of that [CT scan], doctor, in addition to the stenosis there is also a suggestion of a disc herniation, correct?
>
> A: There is a suggestion of a right asymmetrical extradural defect suggesting disc herniation or asymmetric annular bulging. There is that notation.
>
> Q: So in addition to the stenosis there was a suggestion there was a disc herniation as well?
>
> A: That's correct.
>
> Q: Doctor, assuming there was a disc herniation in addition to the stenosis your history would remain the same in terms of there being *a causal connection* between the work incident and the medical treatment and the need for surgery?
>
> A: I will not change my report, that is correct.

(Dep. 97-98; emphasis added.)

> Q: And there is *a causal relationship* between the incidents and the disability?
>
> A: Yes, there is.

(Dep. 102; emphasis added.) At the end of his deposition, the doctor's testimony is somewhat at odds with his earlier opinions with regard to the footdrop, but it is only an opinion of *possible* causal relationship, in any event:

> Q: Based upon your review of that report, of those reports [CT scan and myelogram] I should say and the medical records of the various treating physicians, do you believe that the employee had a herniated disc or is it just spinal stenosis?
>
> A: I think she had a herniated disc. Must have had some defect on the right side that *might* have caused the footdrop in looking in hindsight.
> She did have the footdrop on the right side. There was an extradural defect suggesting disc herniation so *it's possible that could create* the footdrop in hindsight.

(Dep. 112; emphasis added.)

Unless we are to adopt a rule that a disc herniation, of whatever size or formation (see Dep. 12: "asymmetrical right extradural defect suggesting disc herniation or asymmetric annular bulging"), superimposed on a pre-existing spinal disease or injury is, *per se*, "a major" cause of whatever condition results, the sole conclusion we can reach in this case is that the employee has failed to meet her burden of proving the applicable standard under § 1(7A). The most the doctor ever states with regard to the *quantum* of causal connection between the work injuries and the employee's surgery and physical disability – the necessary inquiry for the employee's carrying the burden of proving her medical case – was that the work bore *some* relation to the disability. Even that testimony, however, was in the context of the work incidents "waking up" the stenosis. (Dep. 86.) We are not ready to interpret the Massachusetts Legislature's addition of "a major" cause to the proof of combination injuries to be a truism. 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. An

employee must show something more than what we have before us in this case in order to satisfy § 1(7A). See Hammond v. Merit Rating Board, 9 Mass. Workers' Comp. Rep. 708, 710 (1995).

Finally, we must address our decision in Laredo v. Beth Israel Hospital, 14 Mass. Workers' Comp. Rep. 394 (2000), cited in the dissent as support for recommitting this case for additional medical evidence. We agree with our colleague that Laredo does, in fact, drive that result. We now believe that Laredo was wrongly decided and overrule it. Moreover, because the case that drove the Laredo disposition, Wilkinson v. City of Peabody, 11 Mass. Workers' Comp. Rep. 263 (1997), is itself of questionable legal grounding, we now conclude that we will no longer apply it to future proceedings.

Laredo, supra, was a § 34A claim presenting a § 11A examiner's opinion, which fell "well short of the degree of probability necessary to find a continuing causal relationship to the [subject] workplace exposure." Id. at 397. That opinion merely established that the exposure *may have* exacerbated the employee's bronchiectasis. The judge awarded the claimed § 34A benefits based on this speculative opinion, and we determined that to be erroneous. Id.

Unfortunately, the analysis did not stop there. Recognizing that the case was governed by the appropriately raised and argued major cause provision of § 1(7A), we noted that the § 11A opinion was "structurally defective . . . in that it [did] not meet the heightened § 1(7A) causation standard . . . ." Id. We continued:

> [I]n the circumstances before us, it is appropriate to recommit the case for further findings on causal relationship. "[F]aced with a claim [s]he believed to be meritorious and with an inadequate impartial report, the judge should have exercised [her] authority to sua sponte require additional medical evidence." Wilkinson v. City of Peabody, 11 Mass. Workers' Comp. Rep. 263, 265 (1997). This approach would have provided each party with the opportunity to effectively present its position on the disputed issue of causal relationship as of the date of the medical examination and continuing. See O'Brien's Case, 424 Mass. 16, 22-23 (1996).

Laredo, supra at 397-398.[5]

[5] The judge had already allowed additional medical evidence for the so-called "gap" period prior to the § 11A examination.

We now believe that the judge did not err in Laredo by not allowing, sua sponte, additional medical evidence on continuing major causation, where the § 11A's opinion was clear that he did not find even the causal connection that would be required for an "as is" causation case. The case should not have been recommitted for that purpose. More to the point for the present discussion, we think that we erred in applying Wilkinson, supra, to require recommittal where the § 11A evidence does indeed address causal relationship, but the opinion does not reach the quantum of proof required under the applicable provision of § 1(7A). We have concluded that it is the employee's burden to prove the requisite causal connection appropriately raised under § 1(7A), be it a major or predominant. See Piekarski v. National Non-Wovens, 14 Mass. Workers' Comp. Rep. 407, 409-410 (2000)(§ 11A physician's opinion that there was causal relationship, but that he had "no way of saying that [the work injury] was the major thing, major component[,]" did not satisfy employee's burden to prove such causation); Joyce v. City of Westfield, 15 Mass. Workers' Comp. Rep. 101, 105-106 (2001)(§ 11A psychiatrist's failure to opine that work event was predominant cause of the employee's emotional disability did not support employee's burden to prove that required measure of causation). To the extent that the § 11A medical evidence was inadequate to sustain the employee's burden in these cases, the employee was obliged to prosecute his or her claim and duly move for additional medical evidence.[6] Therefore, we now overrule Laredo, as it is inconsistent with this approach.

However, we are now convinced that Wilkinson, supra, the controlling authority for Laredo's recommittal, was based on a questionable premise. In Wilkinson, we determined that the complete absence of a § 11A orthopedic surgeon's opinion on causal relationship between a secondary psychological diagnosis and the work injury warranted recommittal for additional medical evidence, where the judge awarded benefits in the face of that omission. Id. at 264-265. We so concluded, in spite of the fact that the employee had not moved for additional medical evidence at the hearing, thereby

[6] We express no opinion as to whether additional medical evidence would have been required in either Piekarski or Joyce, i.e., whether the respective § 11A medical opinions were "inadequate" as a matter of law.

interpreting § 11A's grant of *permissive* sua sponte power – "judge may, on his own initiative . . . authorize the submission of additional medical testimony" – as *mandatory* in the circumstances of that case.[7] Id. at 265.

Since Wilkinson issued, the Appeals Court issued Viveiros' Case, 53 Mass. App. Ct. 296 (2001), in which it upheld a denial of benefits based on the failure of proof of medical disability during the "gap" period prior to the § 11A medical examination. Id. at 299-300. The employee had not moved for additional medical evidence at hearing, based on the well-established ground of claiming inadequacy where the § 11A evidence failed to address that "gap" period. The court responded, "Given the traditional roles of the parties, however, it was Viveiros, not the administrative judge, who had the burden of moving to expand the medical record." Id. However, the court did note in dicta that Wilkinson, argued by the employee as a basis for recommitting the case, was distinguishable in that it involved an *award* of benefits:

> These cases [Wilkinson and progeny] stand for the proposition that where the administrative judge is faced with an inadequate IME report and an employee's claim that the judge believes to be meritorious, the judge is empowered to authorize further medical evidence sua sponte, even though neither party has requested it, rather than rely on the judge's own lay medical opinion. These cases are distinguishable from that case at hand.

Viveiros, supra at 299-300 n.6.

We do not think that the Viveiros dicta addressing Wilkinson is of any moment here. The distinction that it draws – Wilkinson being an award, whereas benefits were denied in Viveiros – is only an observation. Moreover, under the statute, "the judge is *empowered* to authorize further medical evidence sua sponte," upon determining the § 11A evidence to be inadequate or the medical issues complex, *regardless* of whether the claim is believed to be meritorious. Viveiros, supra, emphasis added. But in Wilkinson, we went further and *required* the judge on recommittal to open up the medical evidence: The judge was not only *empowered* to do so, he was *obligated*. We

[7] It is beyond reasonable dispute that, had the employee in Wilkinson moved for additional medical evidence due to the referenced flaw in the § 11A opinion, it would have been an abuse of discretion for the judge to deny it.

are troubled by the hindsight nature of the assessment, making the judge's result define the error. To the extent that Wilkinson was seemingly based on due process concerns, those concerns regard the *opportunity to be heard* on the medical issues pertinent to proving one's case, not the *guarantee to be heard again*. See O'Brien's Case, 424 Mass. 16, 23 (1996)("A second reason that O'Brien's facial [due process] challenge [to § 11A] must fail is that there is, in a very real sense, an opportunity for the claimant to develop and put before the relevant decision makers medical testimony she considers favorable to her claim.").

We think that Wilkinson has outlasted its usefulness. Certainly, when § 11A was newly enacted, it assisted attorneys practicing in this unusual, new realm of statutory limitation on medical evidence. It has been eleven years, however, since that fundamental change in the structure of presenting expert evidence and the addition of the heightened causation standards in § 1(7A). As the scope of what is, and is not, an inadequate § 11A opinion has been fairly well delineated in our decisions, Wilkinson's assistance to those who fail to file a motion (its only practical effect) now seems unwarranted. Attorneys must be diligent in developing the § 11A medical evidence to their advantage, whether by hypothetical questions sent to the doctor or by cross-examination at deposition. As we cautioned several years ago in Bourassa v. D.J. Reardon Co., 10 Mass. Workers' Comp. Rep. 213, 218 n.4 (1996), "at any deposition of the § 11A examiner, the attorneys must gear their questions to the applicable definition of personal injury[,]" i.e., an "as is" injury or one requiring "a major" causation. Moreover, attorneys well know that failure to object puts appellate rights at severe risk. What is different about the § 11A motion? Litigants are hereby put on notice that any decision emanating from a hearing that commences after the filing date of this decision will no longer be subject to a Wilkinson-type recommittal. We point out that, in every instance that Wilkinson applies, the denial of a motion for additional medical evidence – had one been filed – would have necessarily been an abuse of discretion. In other words, absent

an inadequacy, Wilkinson's application would have no foundation, in any event. Litigants must only bring the asserted inadequacy to the administrative judge's attention, like every other issue, or risk waiver. See Viveiros, supra.

In the present case, no motion for inadequacy was filed by the employee either prior to or after the 126-page deposition in which not one question was asked using the applicable major causation standard. This is simply not a case in which recommittal is appropriate as there is no opinion on the necessary § 1(7A) "a major" causation.

Accordingly, we reverse the decision.

We hereby overrule our decision in Laredo v. Beth Israel Hospital, 14 Mass. Workers' Comp. Rep. 394 (2000). We will not follow Wilkinson v. City of Peabody, 11 Mass. Workers' Comp. Rep. 263 (1997) as to any appeal of a proceeding in which the lay hearing takes place from this day onward. See Commonwealth v. Moreira, 388 Mass. 596, 601 (1983).

So ordered.

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Sara Holmes Wilson
Administrative Law Judge

Filed: **January 13, 2003**

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Frederick E. Levine
Administrative Law Judge

CARROLL, J., dissenting While I agree that the decision is flawed by the administrative judge's failure to apply the appropriate standard of "a major" causation under § 1(7A), I would recommit the case for further findings on that issue, rather than reverse the decision, as the deposition testimony of the impartial physician can reasonably be read to meet that standard. In addition, I disagree that Wilkinson, supra,

was wrongly decided, and would continue to apply it in appropriate situations, such as the present case.

The doctor's opinion regarding the contribution of the work incidents developed through the course of the deposition. Whereas the doctor's opinion in his report was simply that the stenosis and the footdrop were the reasons for the decompression laminectomy in October 1999, he added to that opinion after a review of the diagnostic testing results not provided to the doctor at the time of the examination. (Dep. 10-17.) The doctor opined that the employee had a work-related herniated disc, (Dep. 119), and testified that the decompression laminectomy was performed to address that injury. (Dep. 87, 121.) Moreover, the footdrop – which emerged at some undetermined time (Dep. 120) – was arguably caused by that disc herniation:

> Q: What are the symptoms of a herniated disc at that level?
>
> A: That can be one of them. Footdrop, numbness in the leg, pain down the leg. That's *very consistent with* the reason why she had that footdrop.

(Dep. 112; emphasis added.) The judge could find that the opinion of footdrop being "very consistent with" the disc herniation established more than a possibility of causal relationship between the two. See Josi's Case, 324 Mass. 415, 417-418 (1949); Bedugnis v. Paul McGuire Chevrolet, 9 Mass. Workers' Comp. Rep. 801, 802-803 (1995) (medical opinion of "quite possible" causal connection when combined with credited lay testimony can meet employee's burden of proof).

The doctor's opinion by the conclusion of his deposition – based on the complete medical record not available to him at the time of the examination, see Perangelo's Case, 277 Mass. 59, 64 (1931) – that the decompression surgery was treatment for the work-related herniated disc, the footdrop (very consistent with the herniation), and the previously asymptomatic stenosis, could certainly support the judge's conclusion that the work injuries were "a major cause" of the treatment. The last time I checked, two out of three still constituted a *major*ity. I urge that recommittal is not just appropriate on such a medical record; it is mandated.

To what extent causal relationship then "remained" under § 1(7A) would, of course, be the next question. Therefore, as this medical evidence says absolutely nothing on that issue, I would instruct the judge to allow additional medical evidence on that issue. See Laredo v. Beth Israel Hosp., 14 Mass. Worker's Comp. Rep. 394, 397-398 (2000) (§ 11A examiner's lack of opinion on § 1(7A) causation issue warranted recommittal where judge awarded benefits in spite of that omission).

The foregoing citation, of course, indicates my disagreement with the majority that Laredo, supra, should be overruled, and Wilkinson, supra, should no longer be followed. First, as to Laredo, we should all be able to agree that a § 11A medical report that utterly fails to address the issue of "a major" causation legitimately raised under § 1(7A) is an inadequate report, because it renders no opinion on a necessary piece of the employee's burden of proof. There is no reasoned distinction between the lack of a causal relationship opinion on the secondary psychiatric diagnosis in Wilkinson, and the lack of a causal relationship opinion on the required § 1(7A) standard of "a major" causation in Laredo. On that point, I agree with the majority. However, rather than throw the baby out with the bath water, I would endorse the application of Wilkinson to § 1(7A) "a major" causation in Laredo.

It is exactly the confused and confusing interplay between §§ 11A and 1(7A), as evidenced in the present case, that renders the Wilkinson recommittal safeguard particularly appropriate. What Wilkinson sought to redress, by invoking the broad considerations of fair play laid out in O'Brien's Case, 424 Mass. 16, 22-23 (1996), were the pernicious procedural pitfalls of the § 11A mechanism, when it is put to work in the everyday grind of trying and deciding workers' compensation cases. How is a judge to know, when the parties convene for the lay hearing and only a short report of the impartial physician is in hand, whether a particular record or report of the underlying medicals might end up being necessary to fairly adjudicate a claim for benefits? In hindsight, when the judge is sitting down to draft his decision weeks or months after the close of the record, it might seem obvious that the § 11A did not adequately address some aspect of the medical case. It is absurd to expect all of the nuances the medical evidence

presents to be readily apparent at the outset of the case, especially in the complicated area of § 1(7A) "a major" causation. Even the greatest chess player cannot forecast what moves will need to be made to win the game before it starts. Moreover, it is inherently unfair to expect counsel for the employee to argue against his client's interest, and ask that the judge regard the § 11A opinion as inadequate, when a reasoned appraisal of the evidence might find that it satisfies, *quite adequately,* the "a major" causation standard. This, I believe, could be the wise tactical decision/omission on the part of counsel in the present case. Well-advisedly, we have concluded that "a major" causation may be met by language that does not use that "magic word." See, e.g., Nee v. Boston Medical Center, 16 Mass. Workers' Comp. Rep. 265, 268 (2002)(doctor's testimony that work was "good cause" could be read under the circumstances of that case to meet "a major cause" standard of § 1(7A)). Why then should counsel be forced to ask the question that, as a practical matter, very few doctors feel comfortable answering: "Is it a major?" See id. (impartial doctor testified that he could not "give percentages, major, minor and all that").

The result of putting Wilkinson into moth balls and overruling Laredo's application of that case is to unnecessarily and unfairly constrain the practice in the § 11A arena, when we should be allowing broad latitude to the parties to present medical testimony favorable to their claims. O'Brien, supra at 23. After all, as in the present case, the § 11A physician often renders insightful, albeit honestly equivocal testimony, on some element of causation. The vagaries of medical evidence abound; only in the most obvious cases, or with the most one-sided expert, is the "a major" cause question going to be answered without a struggle. While we may salute employee counsel in Piekarski, supra, for his extraordinary effort in probing the § 11A physician's understanding of "a major" causation as it applied to that case, I question whether that is the only way that these cases can be tried. My frustration stems largely from the fact that this reviewing board has only in the recent years even begun to decide how § 1(7A) cases can be presented, tried and defended.[8] If *we* barely know what the statute is about, how

[8] See, e.g. Fairfield v. Communities United, 14 Mass. Workers' Comp. Rep. 79, 82-83 (2000)(concluding that insurer has burden of producing some evidence to trigger application of § 1(7A) "major" cause standard if it is to raise that defense at hearing); Lawson v. M.B.T.A., 15

can we reasonably expect that unjust results will not emanate from less-than-perfectly tried cases, or from counsel's reasonable reluctance to inquire into "a major" cause directly, with full knowledge that the answer could cast an otherwise favorable – but perhaps ambiguous – medical opinion onto the trash heap of "Don't ask me about 'a major'!"

Whatever the difficulties that the handling of § 11A medical evidence presents for simple causation cases, they appear meager in comparison to the dizzying array of calculations and comparisons that judges and counsel must now undertake in order to ferret out what a doctor is saying as to the relative contributions of various causes from seeing the employee for a one half hour, one time examination. This being said, I think that Wilkinson should be available to require recommittal for additional medical evidence, when a § 11A physician fails to opine on the applicable standard of § 1(7A) "a major" causation.

Finally, there is one additional issue regarding § 1(7A) that would support recommittal. The employee's claim was for *two* separate industrial injuries, in June and

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Mass. Workers' Comp. Rep. 433, 437 (2001)(elaborating on White v. Town of Lanesboro, 13 Mass. Workers' Comp. Rep. 343 (1999), and concluding that medical evidence of any industrial component to "pre-existing injury or disease" renders § 1(7A) inapplicable).

There is also an open question that we will need to address regarding whether an employee should be required under the statute to prove "major" causation from the outset of incapacity, or whether it only needs to be applied to the duration of incapacity, once liability of a personal injury has been established under the Act as it always has been, namely, "as is." See Tektronix, Inc. v. Nazari, 853 P.2d 315 (Or. App. 1993), in which the Appeals Court of Oregon concluded, as to the statute that was the model for our § 1(7A),

> . . . that the statute is applicable in the context of an initial injury claim if the injury combines with a preexisting, noncompensable condition to cause or prolong disability or a need for treatment. If, in an initial claim, there is disability or a need for treatment as a result of the injury *alone*, then the claim is compensable if the injury is a material contributing cause [read, "as is" for the purposes of c. 152] of disability or need for treatment.

Id. at 317. (Emphasis added.)

in December 1998.[9] Under such circumstances, we have concluded that an employee's pre-existing medical condition should be analyzed, for the purposes of determining whether § 1(7A) even applies, with a view toward its proper characterization as "compensable" or "non-compensable:"

> [T]he pre-existing condition is assessed under the traditional "any causal connection" standard of Rock's Case, 323 Mass. 428, 429 (1948). If there is medical evidence that the pre-existing condition continues to retain any connection to an earlier compensable injury or injuries, then that pre-existing condition cannot properly be characterized as "non-compensable" for the purposes of applying the § 1(7A) requirement that the claimed injury be "a major" cause of disability.

Lawson v. M.B.T.A., 15 Mass. Workers' Comp. Rep. 433, 437 (2001), citing White v. Town of Lanesboro, 13 Mass. Workers' Comp. Rep. 343, 346 (1999)(footnote omitted).

Thus, on recommittal the judge could address this aspect of the § 1(7A) analysis as well. If the June 1998 injury had any causal connection to the employee's pre-existing medical status, as it stood at the time of the December 1998 injury, she did not have to prove § 1(7A) "a major" causation. See Dep. 102 (opinion of causal relationship between the *incidents* and disability post-December, necessarily inferring causal connection between earlier incident and December injury existed at that time). For all we know, this is what the judge had in mind when he did not apply § 1(7A)! Clearly, this is another good reason to recommit the case, rather than reverse outright.

Accordingly, I would send the case back to the judge for further findings on § 1(7A) causation. I respectfully dissent.

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Martine Carroll
Administrative Law Judge

[9] Moreover, in addition to the claimed two separate industrial injuries in June and in December 1998, the judge found that the employee had two other incidents in which she injured her back while helping lift patients in 1996.