**COMMONWEALTH OF MASSACHUSETTS**

**DEPARTMENT OF INDUSTRIAL ACCIDENTS** **BOARD NO. 043436-04**

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| Wendy Spencer-Cotter | Employee |
| North Shore Medical Center | Employer |
| Partners Health Care System, Inc. | Self-insurer |

**REVIEWING BOARD DECISION**
(Judges Levine, Costigan and Horan)

The case was heard by Administrative Judge Taub.

**APPEARANCES**
Judson L. Pierce, Esq., for the employee
Donald M. Culgin, Esq., for the self-insurer at hearing and on brief
Richard W. Jensen, Esq., for the self-insurer at oral argument

**LEVINE, J.** The self-insurer appeals from a decision awarding the employee § 34A permanent and total incapacity benefits for a December 1, 2004, accepted bilateral upper extremity injury. Although the judge erred as to his reason for rejecting the application of § 1(7A)'s combination injury provisions[1] to the employee's claim, the error is harmless. We affirm the decision.

In contesting the employee's claim for § 34A permanent and total incapacity benefits, the self-insurer raised the defense of §1(7A)'s combination injury provisions. (Dec. 2.) The judge addressed § 1(7A):

> By its own actions [of accepting the injury and paying benefits], the insurer has accepted continued responsibility for the orthopedic aspect of the employee's condition. Further, there is nothing in the record to indicate that the employee's upper extremity problems are anything other than one continuum

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

> from the outset, going on uninterrupted from the self-insurer's acceptance of liability for the condition. For a circumstance such as this, with an uninterrupted continuum of the condition with the potential controversy involving which or how many of several risk factors were involved in its onset, the time to have raised a § 1(7A) defense may have been at the beginning before acceptance of the condition.

(Dec. 8.) The judge therefore declined to apply § 1(7A) to the employee's § 34A claim, and, based on simple causation, awarded the benefits sought. (Dec. 8-9.)[2]

The self-insurer argues that the decision must be reversed due to the judge's erroneous finding that the self-insurer had effectively waived the defense of § 1(7A) "major" causation. We agree that the judge's reasoning is flawed. Just as continuing causal relationship is never decided as a matter of res judicata, see, e.g., Burrill v. Litton Indus., 11 Mass. Workers' Comp. Rep. 77 (1997),[3] an insurer is entitled to raise the affirmative defense of § 1(7A) "major" causation at any point in the proceedings. Cf. Saulnier v. New England Window and Door, 17 Mass. Workers' Comp. Rep. 453, 459-460 (2003)(failure to raise § 1[7A] at hearing bars its use at that hearing; no mention of any further preclusive effect). Where the statute directs the judge to determine whether the work injury "remains" causally connected to the disability, there can be no final adjudication of the defense. The judge erred by concluding that the self-insurer had waived § 1(7A) by failing to raise it earlier in the proceedings.

However, the result remains the same. Because § 1(7A) is an affirmative defense, the self-insurer had the burden of producing evidence supporting its application. MacDonald's Case, 73 Mass. App. Ct. 657, 660 (2009). The first

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[2] Alternatively, the judge found that if § 1(7A) applied to the employee's claim, the industrial injury satisfied the "a major" cause standard. (Dec. 8, 9.) We agree with the self-insurer that the medical evidence was not sufficient to meet that standard. See Silverman v. Department of Transitional Assistance, 17 Mass. Workers' Comp Rep. 111, 115 (2003).

[3] "[A] new claim or complaint on present incapacity or causal relationship between the original work injury and the present incapacity presents a new and different issue from that of original liability, and as such is not barred from adjudication by the prior judgment." Id. at 79. See also G. L. c. 152, § 16.

predicate of § 1(7A) is the existence of a pre-existing condition resulting from a non-compensable injury or disease. The self-insurer failed to produce evidence to satisfy this predicate. The only pre-existing conditions noted by the impartial doctor were "age and gender," which he characterized as two of the leading risk factors for development of bilateral first carpometacarpal joint arthritis as well as carpal and cubital tunnel syndromes. (Stat. Ex. 1.) We have concluded that all-too-general factors such as these cannot be characterized as "pre-existing condition[s], which resulted from an injury or disease not compensable under this chapter." Neither age nor gender is "an injury or disease." See Blais v. BJ's Wholesale Club, 17 Mass. Workers' Comp. Rep. 187, 192 (2003)(evidence that degenerative disc disease a normal condition for heavy duty worker of employee's age defeated § 1[7A]); Lovely v. Spinelli's Function Facility, 22 Mass. Workers' Comp. Rep. 9, 11-12 (2008) (evidence that kyphosis – humpback – is a "variant of normal," not a condition "resulting from an injury or disease," defeated § 1[7A]).

Therefore, without evidence of a qualifying pre-existing condition, § 1(7A) did not apply. For this reason, the judge was correct in requiring the employee to prove only simple causation. The medical evidence satisfied the employee's burden of showing that the work injury contributed to her underlying upper extremity degeneration, which condition is not uncommon in middle aged women. The impartial doctor's opinion -- that the employee was totally disabled from returning to her usual occupation -- and the employee's treating psychiatrist's opinion -- that the employee also suffered from a major depressive disorder causally related to the work injury -- adequately supported the judge's conclusion that the employee was entitled to § 34A benefits for permanent and total incapacity.

Accordingly, we affirm the decision. Pursuant to G. L. c. 152 § 13A(6), the self-insurer shall pay counsel for the employee a fee in the amount of $1,488.30.

So ordered.

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Frederick E. Levine
Administrative Law Judge

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Patricia A. Costigan
Administrative Law Judge

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Mark D. Horan
Administrative Law Judge

Filed: **September 19, 2011**