COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS

Board No.: 009526-08

Brian LaFleur	**Employee:**
M.C.I. Shirley	**Employer:**
Commonwealth of Massachusetts	**Self-Insurer**:

REVIEWING BOARD DECISION

(Judges Koziol, Costigan and Horan)

The case was heard by Administrative Judge Benoit.

APPEARANCES

Paul S. Danahy, Esq., for the employee
Robin Borgestedt, Esq., for the self-insurer at hearing
Vincent F. Massey, Esq., for the self-insurer on appeal

KOZIOL, J. The self-insurer appeals the judge's decision ordering it to pay the employee ongoing § 34 total incapacity benefits based on a "combination" injury within the meaning of G. L. c. 152, § 1(7A).[1] Agreeing with the self-insurer that the decision contains inadequate finding of facts regarding the application of § 1(7A), we recommit the case. We also vacate the judge's award of interest. G. L. c. 152, § 50. [2]

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

[2] General Laws c. 152, § 50, provides, in pertinent part:

The employee, a corrections officer, first injured his left knee in 1993 while playing basketball. The judge found the 1993 injury was not a work-related injury, but it was "the most serious" of a series of "relatively minor injuries through the years," requiring "arthroscopic surgery to repair a torn medial collateral ligament," and resulting in the employee's absence from work for approximately six weeks. (Dec. 4.) In 1998, the employee again injured his left knee playing basketball, this time in an employer-sanctioned tournament. The employee received workers' compensation benefits for medical treatment and about "four to eight weeks" of incapacity.[3] (Dec. 4.) In 2003, the employee slipped and fell on a wet floor at work, again injuring his left knee, but he sought no medical treatment for that injury and received no weekly incapacity benefits. Instead, he continued to perform his regular work without restrictions. (Dec. 4.) The judge found all but the first injury in 1993, to be compensable injuries. (Dec. 7.)

On April 9, 2008, the employee was working as an officer in charge of inspecting vehicles entering and exiting the employer's facility. While the employee was inspecting the cargo of a box van, his left foot became caught between some of the cargo and the vehicle's wheel well. (Dec. 5.) When the employee tried to turn, he felt immediate pain and heard a crunch and pop in his left knee. (Dec. 5.) He was taken to the emergency room and has not returned to work. (Dec. 5.) Prior to the April 9, 2008 incident, the employee had filed for retirement benefits to be effective June 12, 2008. After the incident, he received those benefits.

The employee treated with several physicians and filed the present claim seeking weekly incapacity and medical benefits as a result of the April 9, 2008 injury. At

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> Whenever payments of any kind are not made within sixty days of being claimed by an employee, dependent or other party, and an order or decision requires that such payments be made, interest at a rate of ten percent per annum of all sums due from the date of the receipt of the notice of the claim by the department to the date of payment shall be required by such order or decision.

[3] The judge found the employee's treatment consisted of wearing a knee immobilizer, followed by ten rehabilitation sessions. (Dec. 4.)

the § 10A conference, the judge determined there was no medical dispute requiring a § 11A(2) impartial medical examination because the self-insurer did not have the employee examined under the provisions of § 45. (Dec. 3.) The judge issued a conference order requiring the self-insurer to pay the claim, and the self-insurer appealed to an evidentiary hearing. (Dec. 3, 5-6.)

The medical evidence admitted at the hearing consisted of the reports and records of the employee's treating and examining physicians, Dr. James F. Fluet, Dr. Peter B. Brassard, Dr. Michael A. Brown, and Dr. Robert Fraser, and the self-insurer's § 45 examiner, Dr. Ryan Friedberg, who examined the employee after the conference. The judge adopted parts of each doctor's opinion.

The judge adopted Dr. Friedberg's opinion that as a result of the April 9, 2008 injury, the employee suffered a work-related aggravation of a pre-existing condition, consisting of a partial tear of the anterior cruciate ligament (ACL), and found the self-insurer had satisfied its burden of production under § 1(7A). (Dec. 7-8.) The judge adopted Dr. Fluet's May 1, 2008, opinion and Dr. Brassard's May 5, 2008, opinion that the employee was unable to return to work and was totally disabled. (Dec. 8.) The judge adopted Dr. Fraser's August 9, 2008, opinion that the employee was capable of sedentary employment, with a ten pound lifting restriction, and Dr. Friedberg's November 11, 2008, opinion that the employee was capable of performing sedentary work "and is also able to ambulate." (Dec. 8.) Lastly, the judge adopted Dr. Fraser's April 1, 2009, opinion that the employee was capable of performing sedentary employment with a fifteen to twenty pound lifting restriction. (Dec. 9.)

The judge expressly credited the employee's testimony regarding his physical capacities and concluded the employee had no transferable skills. The judge found that the April 9, 2008 work injury remained a major cause of the employee's incapacity and need for treatment, and awarded the employee ongoing § 34 benefits. (Dec. 8, 10.)

In regard to the issue of causation, the judge adopted only Dr. Friedberg's medical opinions, expressly adopting the following statements from the doctor's report:

> It is my opinion, based on his history and his previous injury, that it appears the patient had a previous ACL tear causing instability and that his

> [industrial] injury was an exacerbation of a previous condition. . . . It is apparent that he has an ACL injury. The issue in question is whether this injury that occurred on April 9, 2008 caused a partial tear of the ACL to become a complete tear or if there was just an acute injury in the knee causing swelling due to the fact that he had a previously torn ACL. It is my opinion that based on his history of instability since his initial injury 15 years ago I feel this is an exacerbation of his previous injury. . . . I feel from the injury on April 9, 2008 since his knee was already unstable, he aggravated a preexisting condition.

(Dec. 8.) The judge then made the following findings:

> The employee had not missed time from work for knee problems since 1998. I find that the Employee's injury in 2008 was a significant aggravation of one or more earlier partial tears of his left knee anterior cruciate ligament, and a major cause of his incapacity.

(Dec. 8.) We agree with the self-insurer that Dr. Friedberg's adopted opinion is insufficient to meet the employee's burden of proof under § 1(7A). See Castillo v. Cavicchio Greenhouses, Inc., 66 Mass. App. Ct. 216, 221 (2006)(proof of "major" causation under § 1(7A) requires more than simple aggravation opinion); Stewart's Case, 74 Mass. App. Ct. 919, 920 (2010)("a finding of heightened causation under § 1(7A) must be supported by medical opinion that addresses - in meaningful terms, if not the statutory language itself - the relative degree to which compensable and noncompensable causes have brought about the employee's disability").

The employee argues the judge did not have to perform a § 1(7A) analysis because he found the employee suffered a work-related tear of his ACL as a result of the 1998 injury. Indeed, the judge also found:

> The single noncompensable injury, which took place fifteen years prior to the industrial injury, resulted in surgery in 1993 for meniscal tear repair, from which the Employee had completely recovered. Although there was a partial tear, the surgeon did not feel that it warranted repair, even though the surgeon would be performing a repair of an adjacent ligament. The 1998

> incident also involved a partial tear of the ACL, but again the doctor(s) did not feel that surgery was warranted.

(Dec. 7.)

The judge's determination that the 1998 injury was a prior compensable injury, was supported by the evidence at the hearing; accordingly, we will not disturb that finding. Fahey v. Suffolk County Sheriff's Dept., 23 Mass. Workers' Comp. Rep. 35 (2009), aff'd Fahey's Case, 77 Mass. App. Ct. 1113 (2010)(Memorandum and Order Pursuant to Rule 1:28). However, the judge's findings of fact concerning the nature of the 1998 injury are insufficient to support the proposition espoused by the employee. The judge failed to state the precise nature of the 1998 injury, see Stecchi v. Tewksbury State Hosp., 23 Mass. Workers' Comp. Rep. 347, 349 n.5 (2009), and failed to identify what, if any, medical opinion(s) he was adopting to supply the required foundation for his findings.[4] Moreover, the judge's latter findings appear to equivocate on whether an additional tear occurred at all, as he concluded that prior to the 2008 injury, the employee suffered "one *or more* earlier partial tears of his left knee anterior cruciate ligament." (Dec. 8; emphasis supplied.) The self-insurer is entitled to a decision which addresses all of the issues in controversy with sufficient clarity to allow the reviewing board to decide whether the fact-finding is sound and untainted by error of law. Ballard's Case, 13 Mass. App. Ct. 1068, 1069 (1982). Accordingly, we recommit the matter for the judge to make further findings of fact and, if need be, to perform the analysis set forth in Vieira v. D'Agostino Assocs., 19 Mass. Workers' Comp. Rep. 50, 52-53 (2005).

We briefly address the other issues argued by the self-insurer on appeal. First, in light of our decision to recommit this case for further findings of fact respecting § 1(7A), we express no opinion regarding the sufficiency of the judge's findings pertaining to his vocational analysis. The self-insurer may make its arguments regarding this issue to the administrative judge upon recommittal.

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[4] Although the judge adopted Dr. Freidberg's opinion on the issue of causation, and Dr. Freidberg's report states the employee's ACL was torn in the 1993 incident, his report does not state that it was torn again in 1998. (Ex. 8.)

Second, the self-insurer argues the judge erred in ordering it to pay § 50 interest on the employee's claim. The employee concedes interest is not payable in this case. Russo's Case, 46 Mass. App. Ct. 923 (1999); May v. MCI Framingham, 23 Mass. Workers' Comp. Rep. 257, 262 (2009). Accordingly, that order is hereby vacated.

The remainder of the self-insurer's arguments lack merit. The judge did not act arbitrarily or capriciously in finding Dr. Fluet's May 1, 2008, opinion that the employee could return to work on June 1, 2008, was nothing more than a "prediction." (Dec. 8.) A medical opinion which "predicts" a cessation of disability is speculative, and does not support a discontinuance of benefits. See Gallo v. Angel Enterprises, 9 Mass. Workers' Comp. Rep. 453, 455 (1995).

Lastly, the mere application for, and receipt of, retirement benefits does not bar an award of incapacity benefits. Arslanian v. Department of Mental Retardation, 21 Mass. Workers' Comp. Rep. 83 (2007). The only statutory provision imposing such a bar on an otherwise compensable claim appears in G. L. c. 152, § 35E.[5] The predicates for § 35E's application are not present here. The employee was forty-nine years old at the time of hearing, and little over one year had elapsed since the date the employee last worked. (Dec. 1-3.) Moreover, the judge found the employee intended to work after his retirement. (Dec. 9.) Cf. Baribeau v. General Elec. Co., 15 Mass. Workers' Comp. Rep. 263, 264-265 (2000) (employee's claim for § 34 benefits post-retirement denied where employee, who had returned to light duty position earning his pre-injury wage, "chose not to earn wages" by voluntarily removing himself from the labor market, for reasons "unrelated to his ability to perform the modified job").

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[5] General Laws c. 152, § 35E, states in pertinent part,

> Any employee who is at least sixty-five years of age and has been out of the labor force for a period of at least two years and is eligible for old age benefits pursuant to the federal social security act or eligible for benefits from a public or private pension which is paid in part or entirely by an employer shall not be entitled to benefits under sections thirty-four or thirty-five unless such employee can establish that but for the injury, he or she would have remained active in the labor market.

Accordingly, the decision is reversed in part, we vacate the award of § 34 benefits and § 50 interest, and we recommit the case for further findings consistent with this opinion.

So ordered.

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Catherine Watson Koziol
Administrative Law Judge

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Patricia A. Costigan
Administrative Law Judge

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Mark D. Horan
Administrative Law Judge

Filed: ***December 7, 2010***