COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 016880-09**

Douglas Cook	Employee
Starbucks Coffee Company	Employer
Zurich American Insurance Company	Insurer

REVIEWING BOARD DECISION
(Judges Fabricant, Koziol and Calliotte)

The case was heard by Administrative Judge Benoit.

APPEARANCES
Charles E. Berg, Esq., for the employee at hearing
James N. Ellis, Esq. for the employee on appeal
Brenda J. McNally, Esq., for the insurer

FABRICANT, J. The employee appeals from an administrative judge's decision terminating § 34 total incapacity benefits, and awarding continuing § 35 partial incapacity benefits. The employee argues that the judge erred by denying his motion for the admission of additional medical records pursuant to G. L. c. 152, § 11A (2).[1] We find no error, and affirm the judge's decision.

The employee sustained a work-related injury to his left achilles tendon on June 4, 2009. (Dec. 9; Insurer br. 4; Employee br. 5.) The insurer accepted the case, and in July of 2011, the employee filed a claim for specific benefits for disfigurement pursuant to § 36(1)(k). Rizzo v. M.B.T.A., 16 Mass. Workers'

[1] General Laws c. 152, § 11A(2), provides, in relevant part:

> [N]o additional medical reports or depositions of any physicians shall be allowed by right to an party; provided, however, that the administrative judge may, on his own initiative or upon a motion by a party, authorize the submission of additional medical testimony when such judge finds that said testimony is required due to the complexity of the medical issues involved or the inadequacy of the report submitted by the impartial medical examiner.

Comp. Rep. 160, 161 n.3 (2002). At the January 19, 2012 conference, the judge: 1) allowed the employee to join a claim for loss of function benefits, pursuant to § 36(1)(g); 2) denied without prejudice the employee's motion to join a claim for § 14(1); and 3) allowed the insurer's motion to join a complaint for modification or discontinuance of the employee's § 34 benefits. Payment of the section 36 claims was ordered, and the insurer's complaint to modify or discontinue weekly benefits was denied. (Dec. 3.)

Challenging only the denial of its January, 2012 complaint, the insurer appealed, and pursuant to § 11A(2), the employee was examined by orthopedic surgeon, Dr. Charles Kenny, on May 5, 2012. (Dec. 3, 8.) Dr. Kenny diagnosed "left Achilles tendon rupture; status post Achilles tendon repair; bilateral lower extremity deep venous thrombosis; pulmonary embolism," and opined that "a causal relation exists between the work-related incident of 6/4/2009 and the aforementioned diagnoses." (Dec. 6; Ex. 1, p. 5.) The judge accepted and adopted Dr. Kenny's diagnoses and causal relationship opinion.[2] (Dec. 6.)

At his subsequent deposition, Dr. Kenny testified that a definitive opinion on any continuing disability resulting from the deep venous thrombosis and pulmonary embolism may be beyond his expertise. (Dep. 9-12.) That testimony was the basis for the employee's motion to admit additional medical evidence pursuant to § 11A(2). The only additional evidence proffered by the employee in support of that motion was a November 15, 2010 medical report of Dr. Harvey G.

[2] The judge's observation that "Dr. Kenny's finding of the deep venous thrombosis and pulmonary embolism was the first time that this diagnosis was presented to any judge," (Dec. 9), is inaccurate, as the employee's conference submissions contained the November 15, 2010, and June 17, 2011, reports as well as a July 5, 2011 addendum from Dr. Harvey G. Clermont, who addressed both diagnoses. Regardless, the judge clearly accepted and adopted Dr. Kenny's opinion that the deep vein thrombosis and pulmonary embolism were causally related to the industrial accident. (Dec. 6; Insurer br. 10.) We do not address the insurer's arguments to the contrary here, as the insurer did not appeal. McGahee v. Milton Bradley, 25 Mass. Workers' Comp. Rep. 329 (2011).

Clermont. No further records or testimony were proffered by either the employee or the insurer. (Dec. 10.)

The judge did not err in denying the employee's motion. The proffered medical report does not provide an opinion on disability due to deep venous thrombosis or pulmonary embolism. See Vasilenko's Case, 83 Mass. App. Ct. 1124 (2013)(Memorandum and Order pursuant to Rule 1:28)(where impartial examiner did not render explicit opinion on disability, judge did not err in requesting employee submit offer of proof on disability as condition for allowing additional medical evidence, and in subsequently denying motion). Moreover, as the employee admitted at hearing, and as the judge found, the employee was no longer taking any medication for deep venous thrombosis or pulmonary embolism, (Dec. 7, 9, 10), and he had not been given any restrictions on his activities by any doctor as a result of those conditions. (Dec. 10.)

The employee has the burden of proof for every aspect of his claim. Sponatski's Case, 220 Mass. 526, 527-28 (1915). In the absence of any relevant proffered evidence of disability related to the diagnosis of deep venous thrombosis and pulmonary embolism, the denial of the employee's motion was without error.

Accordingly, we affirm the decision of the administrative judge.

So ordered.

_____
Bernard W. Fabricant
Administrative Law Judge

_____
Catherine W. Koziol
Administrative Law Judge

_____
Carol Calliotte
Administrative Law Judge

Filed: **March 20, 2014**