

COMMONWEALTH OF MASSACHUSETTS

**DEPARTMENT OF
INDUSTRIAL ACCIDENTS**

BOARD NO. 007175-01

Eleanor Zapata
Demoulas Supermarkets
Demoulas Supermarkets

Employee
Employer
Self-insurer

REVIEWING BOARD DECISION
(Judges Costigan, McCarthy and Levine¹)

APPEARANCES

Gregory C. Joy, Esq., for the employee at hearing
Michael Ready, Esq., for the employee on appeal
Thomas P. O'Reilly, Esq., for the self-insurer at hearing
Paul M. Moretti, Esq., for the self-insurer on appeal

COSTIGAN, J. The self-insurer appeals from a decision in which an administrative judge awarded the employee ongoing temporary total incapacity benefits and medical benefits for a work-related infection called toxoplasmosis.² Because all of the medical experts³ agreed that the employee at least had an acute toxoplasma infection, manifest as a right cervical lymphadenitis, causally related to her workplace exposure to

¹ Judge Levine no longer serves on the reviewing board.

² Toxoplasmosis is “[a] severe generalized or [central nervous system] disease caused by *Toxoplasma gondii*.” *Toxoplasma gondii* “is a small intracellular protozoan parasite that can infect any warm-blooded animal.” Merck Manual, 165 (13th ed. 1977). Acquired toxoplasmosis, as opposed to neonatal congenital toxoplasmosis, manifests itself in one of two forms relevant to this case: “The more common mild lymphatic form resembles infectious mononucleosis. It is characterized by cervical and axillary lymphadenopathy, malaise, muscle pain, and irregular low fever. Mild anemia, hypotension, leukopenia, lymphocytosis, and slightly altered liver function may be present.” Its other form, “[a]n acute, fulminating, disseminated infection occurs primarily in immunologically incompetent patients, often with a rash, high fever, chills, and prostration. Some patients may develop meningoencephalitis, hepatitis, pneumonitis, or myocarditis.” *Id.*

³ There were six. Doctors Richard Fraser and Michael P. Biber served as the § 11A impartial medical examiners. Doctors Richard L. Levy and Michael A. Kane were the self-insurer’s medical experts. The reports of Drs. Donald Craven and Gregory Allam, the employee’s treating physicians, were introduced into evidence by the employee. (Dec. 3.)

raw meats, we affirm so much of the judge's decision as finds that the employee suffered a compensable personal injury. We also affirm the award of §§ 13 and 30 benefits for the employee's initial medical treatment for that diagnosis. However, because the medical evidence does not support the judge's finding that the employee's disability from and after January 19, 2001⁴ was causally related to her initial infection, we reverse that aspect of the decision and vacate the award of § 34 benefits.

In early 2000, the employee began working for Demoulas Supermarkets. In August 2000, she was transferred to the employer's Lowell, Massachusetts store where she worked in the meat department, and was frequently exposed to many types of raw meat. (Dec. 4-5.) In November and December 2000, the employee found herself becoming forgetful and losing concentration. She then noticed a lump on her head, directly behind her right ear. Biopsy results were positive for toxoplasmosis. The employee was referred to an infectious disease specialist and a neurologist, with whom she was still treating at the time of the hearing in June 2002. She was treated primarily with medication, including antibiotics, antidepressants and anticonvulsants. However, she continued having problems with headaches, memory and concentration, and episodes of shaking and falling down. (Dec. 5-6.)

The employee's claim for workers' compensation benefits was denied by the self-insurer, and by the administrative judge following a § 10A conference. The employee appealed, and by agreement of the parties, she was examined by two impartial physicians, each having a different specialty. (Dec. 1.) The judge allowed additional medical evidence due to the complexity of the medical issues. (Dec. 2.) See § 11A(2). The first impartial physician, Dr. Richard Fraser, an internist with infectious disease experience, opined that the employee probably suffered from toxoplasmosis, as a result of working with raw meat. The doctor felt that the toxoplasmosis infection reached only the employee's lymph node, and did not involve the central nervous system. Thus, Dr. Fraser ruled out encephalitis and seizure disorder. He related the employee's mental difficulties to depression or anxiety. (Dec. 7.)

⁴ The first date of disability claimed by the employee. (Dec. 2.)

The second impartial physician was Dr. Michael Biber, a neurologist. Dr. Biber opined that the employee suffered from the following diagnoses: 1) right cervical lymphadenitis from toxoplasmosis gondii; 2) toxoplasma encephalitis; 3) obesity; and 4) seizures. As to causation, the doctor opined that the employee's "toxoplasma infection and its consequences, including her behavioral disturbances, seizures and head pain, were all caused by her exposure to infected meat at her place of employment." (Dec. 7, quoting DIA Ex. 2, p. 5.) In his April 23, 2002 report, under the heading, "Reason for Causal Relationship Opinion," the doctor explained: "Mrs. Zapata developed documented right cervical lymphadenitis and subsequent encephalitis with probable lesions in her right centrum semiovale after working as a meat wrapper and sometimes doing cutting of goat meat at Demoulas Market." (DIA Ex. 2, p. 5.)

Introduced by the self-insurer as additional medical evidence was the deposition testimony of Dr. Richard N. Levy, who opined that the employee suffered from a toxoplasmosis lymphadenitis as a result of her work exposure, but that no central nervous system involvement was indicated. Dr. Levy agreed with Dr. Fraser that the employee's apparent neurological symptoms probably were caused by depression and anxiety. (Dec. 7-8.)

The employee introduced the reports of Dr. Donald Craven, one of her treating physicians and an infectious disease specialist, who opined that the employee suffered from acute toxoplasmosis manifest as cervical lymphadenitis. Dr. Craven felt that the employee's central nervous system might have been affected, though he could not be certain. The employee's neurologist, Dr. Gregory Allam, was similarly equivocal on the causal relationship of the toxoplasmosis to the employee's neurological symptoms, noting only that "it does seem to be *temporally related*." (Dec. 8-9, quoting Fraser Dep., Ex. 4.) (Emphasis added.)

Having considered all of the expert medical opinions, the judge concluded:

[M]ore likely than not, the employee, Eleanor Zapata, developed a toxoplasmosis infection as a result of exposure to raw meat in the course of her employment with the self-insurer, Demoulas Supermarkets. As a result of her toxoplasmosis

infection, the employee became disabled and required treatment, including the excision of a lump on her head behind her right ear.

The more difficult question is whether the toxoplasmosis caused any pathology within the employee's central nervous system. I am not persuaded that the employee here had any central nervous system disorder related to toxoplasmosis. Dr. Fraser and Dr. Levy make a persuasive case refuting the possibility of a central nervous system process, and Dr. Kane essentially agrees. Neither Dr. Craven nor Dr. Allam states, even to a probability, that the toxoplasmosis caused a nervous system injury. The reasoning expressed by Dr. Biber in his report and deposition is less persuasive than that of Dr. Fraser and Dr. Levy.

(Dec. 9-11.) The most critical of these findings is that the employee did not suffer a central nervous system injury resulting from the toxoplasmosis infection. The judge expressly rejected the only expert medical opinion in evidence that the employee did have central nervous system pathology -- that of the impartial neurologist, Dr. Biber -- but he adopted Dr. Biber's opinion that the employee's totally disabling neurological complaints were causally related to her initial infection. (Dec. 10-11.)

Here lies the rub. The reasoning expressed by Dr. Biber to causally link the employee's toxoplasmosis to her "behavioral disturbances, seizures and head pain," was that the initial infection progressed to, and resulted in, central nervous system pathology, to wit, encephalitis. "Mrs. Zapata developed documented right cervical lymphadenitis and *subsequent encephalitis* ^[3] *with probable toxoplasma lesions in her right centrum semiovale . . .*" (DIA Ex. 2, p. 5.) However, the judge expressly rejected that reasoning, finding more persuasive the contrary opinions of Drs. Levy and Fraser, the latter of whom directly opined that the employee did not have encephalitis, nor did she have a true seizure disorder. (Dec. 7, citing DIA Ex. 1, February 2, 2002 § 11A Fraser report, and Fraser Dep. 13, 17, 24 and 45.)

⁵ Encephalitis is "[a]n acute inflammatory disease of the brain due to direct viral invasion or to hypersensitivity initiated by a virus or other foreign protein." Merck Manual, 1432 (13th ed. 1977).

The judge contradicted himself, and therefore erred, when he used Dr. Biber's opinion to find the employee's depression, anxiety, behavioral disturbances, headaches and seizures were causally related to the toxoplasmosis infection:

I credit the employee's testimony about her symptoms and limitations. I find that, on and after January 9 [sic], 2001, the employee suffered from headaches, memory and concentration problems, sleeping difficulties, and episodes of shaking and falling down, all of which combined to render her incapable of sustaining any substantial gainful employment.

According to Dr. Fraser and Dr. Levy, the employee's symptoms probably relate to a depression or anxiety disorder. I adopt these opinions. It seems more than mere coincidence, however, that all of these symptoms developed at the same time the employee's toxoplasmosis infection became manifest. More likely than not, the employee's depression or anxiety, and her resulting symptoms, are related to the infection. I therefore adopt the portion of the opinion of Dr. Michael Biber, set forth in his report . . . that the employee's behavioral disturbances, "seizures" and head pain were all caused by her exposure to infected meat at her place of employment. Although the infection probably did not cause a central nervous system pathology, per se, I find it likely that the infection is ultimately responsible for her ongoing symptomatology.

(Dec. 10-11.) (Emphasis added.)

The judge found that the employee's toxoplasmosis infection did not cause a central nervous system pathology. The very foundation of Dr. Biber's causation opinion, which the judge purported to adopt, is that the infection did cause such pathology, that is, it resulted in encephalitis. It is here that the syllogism crumbles. There is no other expert medical opinion which supports the judge's award of benefits. See Patterson v. Liberty Mutual Ins. Co., 48 Mass. App. Ct. 586, 597-599 (2000).

The judge's disbelief in "mere coincidence" notwithstanding, without the encephalitis connection, the employee's disabling symptoms can be linked to the toxoplasmosis only by way of a temporal relationship, which is insufficient, as a matter of law, to establish medical causation in a workers' compensation case. See Allie v. Quincy Hosp., 12 Mass. Workers' Comp. Rep. 167, 169 (1998) ("In complex matters, a mere temporal correlation does not establish medical causation"). While it is well-

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established that a judge may adopt all, part or none of an expert medical opinion in evidence, Amon's Case, 315 Mass. 210 (1943), Hovey v. Shaw Indus., Inc. 12 Mass. Workers' Comp. Rep. 442, 443 (1998), he is not free to mischaracterize or misconstrue it. LaGrasso v. Olympic Delivery Serv., Inc., 18 Mass. Workers' Comp. Rep. 48, 58 (2004), citing Cook v. Stop & Shop Co., 15 Mass. Workers' Comp. Rep. 252, 266 (2001).

Because the judge did so here, and there is no other expert medical opinion which supports his finding of causally related incapacity, we reverse that aspect of his decision and vacate the award of benefits from January 19, 2001 and continuing. The judge's liability finding and the award of medical benefits for the employee's initial infection are affirmed.

Pursuant to § 13A(6), the self-insurer is ordered to pay employee's counsel a fee of \$1,312.21.

So ordered.

Patricia A. Costigan
Administrative Law Judge

William A. McCarthy
Administrative Law Judge

Filed: **December 15, 2004**