**COMMONWEALTH OF MASSACHUSETTS**

**DEPARTMENT OF INDUSTRIAL ACCIDENTS** **BOARD NO. 037158-09**

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| Francisco Flores Martinez | Employee |
| Georges Renovations, LLC | Employer |
| AIM Mutual Insurance Co. | Insurer |

**REVIEWING BOARD DECISION**
(Judges Fabricant, Horan and Harpin)

The case was heard by Administrative Judge Poulter.

**APPEARANCES**
David K. Chivers, Esq., for the employee
Ronald C. Kidd, Esq., for the insurer

**FABRICANT, J.** The insurer appeals from a decision awarding ongoing § 34 temporary total incapacity benefits resulting from incidents occurring on October 26, 2009, and November 19, 2009. Because there is adequate evidence to support the findings of a work-related disability, we affirm the decision.

At the time of the hearing, the employee was twenty-eight years old and had worked for the employer since 2004 as a carpenter/laborer. Originally from the Dominican Republic, he has difficulty communicating in English. (Dec. 3, 5.) On October 26, 2009, while working on a roof and maneuvering a sheet of plywood, a gust of wind pulled the board away from him causing pain in his shoulder. That same day, he hit his finger with a hammer, and was treated at Baystate Medical Center for both his injured finger and a dislocated shoulder. (Dec. 4.)

Upon returning to work on November 19, 2009, the employee was moving a bathtub down a flight of stairs when his co-employee slipped and left him bearing the weight of the tub. (Dec. 4.) The employee felt a pop in his right shoulder and went to the emergency room at Mercy Medical Center the next day. Because the emergency room was crowded, he left before seeing a doctor. (Dec.

4.) When he told his employer about his shoulder, he was told to go home. For the next eight months he continued to work, sometimes going home early due to the pain. He did not return to the hospital during this time because he was worried about paying for treatment. (Dec. 4).

On July 13, 2010, he finally returned to the emergency room at Mercy Medical Center because his shoulder continued to give him problems. (Dec. 4.) He was then seen on November 10, 2010 at Baystate Medical Center, and diagnosed with a shoulder strain. (Dec. 4.) On November 28, 2010, he returned to the hospital, and was treated for a right shoulder dislocation. (Dec. 4.) A December 7, 2010 MRI revealed abnormalities which "could be degenerative or post traumatic." (Ex. 7, at Ex. 7-9.) He underwent surgery[1] on March 3, 2011. He has not returned to work since November of 2010. (Dec. 5.)

The judge adopted the opinion of the § 11A examiner, Dr. Charles Kenny, who opined that the employee suffered from a right shoulder strain and chronic instability with recurrent dislocations. (Ex. 1, p. 5.) Dr. Kenny felt the employee was permanently and partially disabled due to a pre-existing condition. (Ex. 1, p. 5.) He also opined that there was a causal relationship between the work-related incident of November 19, 2009, and the diagnosis. (Ex. 1, p. 5.)

Dr. Kenny initially stated in his § 11A report that "the current diagnosis and disability, while causally related, was not a major cause of the employee's disability." (Ex. 1, p. 5.) However, the judge found that Dr. Kenny's opinion was based on an incorrect history. Although Dr. Kenny had relied on a medical record referring to a six-year history of shoulder problems, that history was refuted by the credited testimony of the employee, who denied ever reporting it. (Dec. 5, n.3).

[1] According to the March 3, 2011 operative note, the surgery involved "[r]ight shoulder operative repair of [a] recurrent dislocated Bankart lesion." (Ex. 7, report 13.)

The only evidence of a six-year history of shoulder dislocation comes from a single, disputed reference in a medical record.[2] The employee was, by all accounts, a poor historian who had great difficulty communicating in English. These factors were considered by the judge in crediting the employee's testimony denying the medical history in question. Credibility determinations are the sole province of the hearing judge, Lettich's Case, 402 Mass. 389, 394 (1988), and the judge is free to reject opinions that are not based on the employee's credited testimony. Brommage's Case, 75 Mass. App. Ct. 825 (2009)(judge may give "decisive weight" to testimony of employee where the factual foundation of a § 11A report is in question).

At his deposition, Dr. Kenny causally related the employee's shoulder condition and subsequent surgery to the October 26, 2009 industrial accident. (Dep. 33-35.) Significantly, Dr. Kenny also testified that his examination findings on causal relationship would remain unchanged even if the October 26, 2009 injuries were the only pre-existing condition at the time of the November 19, 2009 industrial accident. (Dep. 33-35.) Thus, the judge's credibility findings eliminating other pre-existing conditions are consistent with the §11A examiner's conclusion:

> At trial [the employee] testified and I find, he had not had any shoulder problems until the plywood and tub incidents on or about October 26, 2009 and November 19, 2009.

(Dec. 5.)

The insurer contends the judge misstated Dr. Kenny's opinion by concluding that the employee's disability was related to the work incidents of

[2] The 12/27/10 progress note from Dr. Richard C. Mindess includes the following history:

> Patient here for follow up of right shoulder pain. He states that he has dislocated his right shoulder multiple times over the last 6 years and he dislocated it again on 12/21/10 when he went to put his hands behind his head.

(Ex. 7, at Ex. 12.)

October 26, 2009, and November 19, 2009, and that Dr. Kenny never stated the disability of the employee, "in the absence of any prior injury," is related to the industrial accident of October 26, 2009. (Ins. br. 8.) We disagree. Contrary to the insurer's argument, this is precisely Dr. Kenny's testimony. When asked if it would change his causal relationship finding were he to assume that the first time the employee injured his shoulder was in October of 2009, he replied that it would not.[3] Thus, the evidence supports a finding that the employee is disabled due solely to the only credited pre-existing condition (the October 26, 2009 incident) as noted in Dr. Kenny's June 22, 2011 report. (Ex. 1.) Maldonado v. Tubed Prods., Inc., 19 Mass Workers' Comp. Rep. 221, 225 (2005)(no error by judge in adopting § 11A opinion on causal relationship where opinion is given in response to proper hypothetical question assuming facts found).

Finally, the insurer argues that, once it establishes a pre-existing condition, the employee must show the claimed compensable injury is a major cause of his

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[3] Dr. Kenny testified:

> Q. Now, assume only that the six-year history was a mistake, that there is no six-year history of chronic instability, but there is whatever happened in October. How would that change, given that history, how would that change his presentation?
> A. I wonder if you could be a little more – let me see if I can understand your articulated condition that you are hypothetically presenting. In other words you want me to assume that his first time ever injuring the shoulder was in October of 2009 and he never had any problems with his shoulder prior to that?
> Q. That is correct. I am asking you to assume that.
> A. So his first injury then was in October of 2009?
> Q. Yes.
> A. So your question was what?
> Q. How would that change your causal relationship to – how would that change your causal relationship finding?
> A. It wouldn't. I mean he still had a pre-existing injury of his shoulder dislocating.
> Q. And you would relate that back to the October incident?
> A. I would. If it was a work-related incident.

(Dep. 33-34.)

disability.[4] Here, however, there was sufficient evidence for the judge to find, as she did, that the prior condition was also the result of a work injury. Therefore, the employee does not have to address the heightened §1 (7A) "a major" cause standard. See MacDonald's Case, 73 Mass. App. Ct. 657 (2009)(where predicate elements of § 1(7A) defense unmet, "as is" causation standard applies).

The decision of the administrative judge is affirmed. Pursuant to G. L. c. 152, § 13A(6), the insurer is ordered to pay the employee an attorney's fee in the amount of $1,574.87.

So ordered.

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Bernard W. Fabricant
Administrative Law Judge

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Mark D. Horan
Administrative Law Judge

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William C. Harpin
Administrative Law Judge

Filed: **May 22, 2014**

[4] 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.