COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS	**BOARD NOS. 027454-11 027003-11**
Jair Ortiz Vasquez	Employee
Sheraton Springfield[1]	Employer
AIM Mutual Insurance Company	Insurer
SPHS Mercy Medical Center	Employer
ACE American Insurance Company	Insurer

REVIEWING BOARD DECISION
(Judges Horan, Fabricant and Calliotte)

The case was heard by Administrative Judge Poulter.

APPEARANCES
Earlon L. Seeley, III, Esq., for the employee
Douglas F. Boyd, Esq., for AIM Mutual Ins. Co. at hearing
Edwin Barrett, Esq., for AIM Mutual Ins. Co. on appeal
Jennifer A. Hylemon, Esq., for ACE American Ins. Co. at hearing
John F. Burke, Jr., for ACE American Ins. Co. on appeal

HORAN, J. AIM Mutual Insurance Company (AIM), the first insurer in this two insurer case, appeals from a decision awarding the employee §§ 13, 30 and 34 benefits for a left knee injury. We affirm the decision.

The parties stipulated the employee suffered two reported incidents involving his left knee. (Dec. 3.) The first one occurred on September 7, 2011. At that time, the employee was employed by the Sheraton Springfield (Sheraton), insured by AIM. Working as a houseman, "he fell through a gap between the loading dock and [a] truck," twisted his left leg, and felt pain in his left knee. (Dec. 4.) His knee was treated and he returned to work five days later for the

[1] The employer's corporate name is Falcon Hotel Corporation. (Dec. 4, n.2.)

Sheraton, and for his concurrent employer, SPHS Mercy Medical Center (Mercy), insured by ACE American Insurance Company (ACE).[2] Id.

On September 28, 2011, the employee worked at Sheraton, and then went to his housekeeping job at Mercy. The judge credited the employee's testimony that: 1) on September 28, 2011, while pushing a rolling trash cart at Mercy, he lost control of his left leg and fell forward and; 2) in the weeks preceding that incident, he had lost control of his left leg.[3] (Dec. 5; Tr. 48-49, 67, 73-75.)

On October 23, 2012, the employee was examined by Dr. Steven Silver, the impartial medical examiner. (Dec. 1, 3, 6; see Stat. Ex. 1.) Dr. Silver was later deposed. The judge adopted Dr. Silver's opinions. He causally related the employee's disability to his September 7, 2011 injury. (Dec. 7.) Regarding the September 28, 2011 incident at Mercy, Dr. Silver was asked to assume that the employee's left leg "simply gave out on him." (Dep. 45.) When asked if he would consider such an occurrence to be consistent with his diagnosis of a meniscal tear, caused by the September 7, 2011 fall, Dr. Silver replied, "[t]hat is correct." (Dep. 45-46.) The doctor also testified the employee's need for left knee treatment was "irrespective of whether he would have had another injury at Mercy or not." (Dep. 49.) Finally, when asked whether the employee's "disability would have continued even in the absence of that knee giving out at Mercy on September 28, 2011," Dr. Silver replied, "[i]n all probability, yes."[4] (Dep. 49-50.)

The judge found that, "Dr. Silver has clearly opined that Mr. Ortiz Vasquez's symptoms increased but he could not determine that [the employee's] pathology had increased as a result of the second incident on September 28,

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[2] The employee worked as a housekeeper for Mercy. (Dec. 4.)

[3] The employee testified that when his left knee gave out at Mercy, he hit his chest against the cart. He did not testify that he hit his knee. (Tr. 48-50.)

[4] The judge also adopted the opinion of Dr. Charles Kenny, who opined the employee's September 28, 2011 incident did not contribute to his current symptoms, disability or need for treatment. (Dec. 6; Ex. 8.)

2011." (Dec. 9.) Applying the rule of Rock's Case, 323 Mass. 428, 429 (1948), and its progeny, the judge ordered AIM to pay the employee's benefits. (Dec. 8-9.)

On appeal, AIM argues the judge failed to make sufficient findings of fact and erred as a matter of law by not concluding that the employee sustained a compensable injury at Mercy on September 28, 2011. We disagree. The judge credited the employee's testimony, and adopted competent medical evidence to support her findings that: 1) the employee's knee gave out on September 28, 2011 *as a result of* the injury he had sustained three weeks prior, and; 2) the September 28, 2011 incident, while painful, was not causative of further injury, or the employee's disability. That the employee's knee gave out at Mercy, without more, does not constitute a compensable personal injury.[5] See, e.g., Ritchie's Case, 351 Mass. 495 (1966). On the facts found, the decision to order the first insurer to pay compensation was proper. See Costa's Case, 333 Mass. 286, 288-289 (1955); Rock, supra; Carroll's Case, 68 Mass. App. Ct. 1119 (2007) (Memorandum and Order Pursuant to Rule 1:28); Griffin v. Pal Painting Co., 30 Mass. Workers' Comp. Rep. ___ (January 25, 2016); Havill v. Mead Westvaco/Willowmill, 26 Mass. Workers' Comp. Rep. 255 (2012)(and cases cited).

The decision is affirmed. Pursuant to G. L. c. 152, § 13A(6), AIM shall pay a $1,618.19 attorney's fee to employee's counsel.

So ordered.

Mark D. Horan
Administrative Law Judge

[5] The employee did not, as AIM contends, fall "'heavily" onto his left knee striking it on the trash cart." (AIM br. 7.) The record indicates otherwise. (Tr. 48-50.)

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Bernard W. Fabricant
Administrative Law Judge

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Carol Calliotte
Administrative Law Judge

Filed: **May 27, 2016**