COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTIRAL ACCIDENTS **BOARD NO. 007656-02**

Jean McCarthy	Employee
Peabody Properties	Employer
United States Fire Insurance Co.	Insurer

REVIEWING BOARD DECISION
(Judges Levine, Costigan and Horan)

The case was heard by Administrative Judge Preston.

APPEARANCES
Ronald L. St. Pierre, Esq., for the employee at hearing
Ronald N. Sullivan, Esq., for the employee on appeal
James P. McKenna, Esq., for the insurer at hearing
Byron G. Mousmoules, Esq., for the insurer on appeal

LEVINE, J. After a recommittal for findings on the application of § 1(7A) "combination injury" provisions, see McCarthy v. Peabody Props., 24 Mass. Workers' Comp. Rep. 89 (2010), the case is before us again on the insurer's appeal of the recommittal decision. The insurer argues that the administrative judge erred in finding that the employee's pre-existing osteoarthritis was work-related, and therefore, that the heightened causation standard -- "a major but not necessarily predominant cause" -- did not apply to the employee's January 7, 2002 industrial right knee injury.[1] See Lawson v. M.B.T.A., 15 Mass. Workers' Comp. Rep. 433, 437 (2001)(where pre-existing condition retains connection to earlier compensable injury, condition cannot be characterized as "not compensable under this chapter," thus

[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 such compensable injury or disease remains a major but not necessarily predominant cause of disability or need for treatment.

removing claim from § 1(7A) "combination injury" analysis). Because the medical evidence does not support the judge's § 1(7A) findings, we reverse the decision.

The judge's findings on recommittal causally related the employee's osteoarthritis to a December 12, 2001 right knee injury which occurred at work:

> I conclude that osteoarthritis did not exist in the employee's right knee before December 12, 2001, when the first right knee industrial accident occurs [sic]. The sequelae from the resulting injuries of December 12, 2001 were still ongoing when the second industrial right knee injury occurred January 7, 2002. Only after the March 2002 surgery does the osteoarthritis gain traction and become a factor in the future care and treatment of the Employee's right knee. Thus, Section 1(7A) ceases to be in play as an affirmative defense because the right knee osteoarthritis is a compensable work related condition arising after the right knee injury of December 12, 2001.

(Dec. 3.)

In support of his conclusion, the judge relied on the opinions of Dr. Richard Warnock and Dr. James Karlson. (Dec. 3.) The judge found, based on the June 29, 2006 report of Dr. Warnock, the insurer's expert, that the employee's osteoarthritis "was of little to no significance before December 12, 2001." (Dec. 2.) In further support of the December 12, 2001 date, the judge adopted the causation opinion of Dr. Karlson, expressed in his January 25, 2006 report, that the employee's "current diagnosis is osteoarthritis of the right knee secondary to her initial injury and two subsequent surgeries." (See Dec. 2.)

The judge's findings are flawed. Although Dr. Warnock acknowledged the "minor" December 12, 2001 work injury, (Warnock report, 1), he did not attribute the employee's disabling osteoarthritic changes to that event. Instead, the doctor opined only that "[h]er osteoarthritis is clearly pre-existing. It was documented on x-rays and on the initial MRI, less than a month after the injury and also on subsequent x-rays."[2] Id. at 3. Dr. Warnock's narration of the employee's history

[2] On February 6, 2002, the employee underwent an MRI study, which found, inter alia, "degenerative tear" and "degenerative change."

removes any potential ambiguity in his opinion:

> [After] she slipped at work [on 12/12/01, the employee] did not remain out of work and was showing improvement with her knee discomfort when she tripped over a cord on 1/7/02 striking her right knee again. She saw Dr. Mendez and ultimately had an MRI of the right knee. The films are not available, but the report indicates a torn medial meniscus, narrowing of the patella facets and degenerative changes in the medial compartment.
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> She ultimately had an arthroscopy of the right knee by Dr. Freiberg in March of 2002. His arthroscopic note indicates that he did medial and lateral meniscectomies, and surprisingly he did not note any arthritic changes in the knee at that time, despite the MRI findings.
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> . . .
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> She had a second MRI because of continued pain in July of 2002. The reports indicate severe degenerative changes in the medial compartment and postop changes in the medial meniscus. X-rays done in July of 2002, less than 6 months after the original injury, also indicate significant arthritis of the knee in the medial compartment.

(Id. at 1-2.)

Thus, Dr. Warnock indicated that the osteoarthritis was discovered a month after the subject work injury of January 7, 2002, not after the December 12, 2001 work injury. It cannot be found or inferred from Dr. Warnock's report that the December 12, 2001 injury is the source of the osteorarthritic changes. Rather, Dr. Warnock's opinion is clear: the employee had osteoarthritis in her right knee prior to her January 7, 2002 work injury.[3]

Dr. Karlson, whose opinion the judge also adopted in support of his finding that December 12, 2001 was the cause of the employee's osteoarthritis, did not mention the December 12, 2001 injury anywhere in his narrative reports and treatment notes in evidence. Without a reference to that event, the judge could not reasonably infer that Dr. Karlson causally connected the osteoarthritis to it, rather than

[3] Dr. Warnock effectively repeats this opinion in an August 2, 2006 addendum, which was in evidence. There, he states that the employee suffered a torn medial meniscus causally related to the January 7, 2002 injury and repaired by arthroscopy. "Her symptoms subsequent to that were due to her osteoarthritis, which was clearly pre-existing."

to the subject work injury of January 7, 2002. The judge's assignment of Dr. Karlson's causation opinion to an event absent from the foundation for the doctor's opinion was a mischaracterization of that opinion. See Jaho v. Sunrise Partition Sys., Inc., 23 Mass. Workers' Comp. Rep. 185, 191 (2009)(judge not free to mischaracterize expert medical opinion).

Finally, from the absence of a "routine" reference to osteoarthritis in Dr. Freiberg's March 8, 2002 notes following the employee's meniscus repair, the judge inferred that the condition, if it existed at all, was "grossly insignificant" prior to the January 7, 2002 injury. (Dec. 2.) The inference is unreasonable. The February 6, 2002 MRI report noted "degenerative change," "with osteophytes seen." Under these circumstances, the absence of reference to osteoarthritis in post surgery notes, alone, cannot support a finding that the employee's osteoarthritis was insignificant prior to January 7, 2002. Cf. Forrey v. Dedham Taxi, Inc., 19 Mass. App. Ct. 955 (1985)(disbelief of evidence does not constitute evidence to the contrary).

Because 1) no medical evidence supports the judge's conclusion that the employee's pre-existing osteoarthritis was due to a compensable workplace injury on December 12, 2001, and 2) there is no medical evidence in the record from which it could be found that the January 7, 2002 work injury remained a major cause of the employee's disability, we reverse the decision.[4]

So ordered.

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Frederick E. Levine
Administrative Law Judge

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Patricia A. Costigan
Administrative Law Judge

[4] That the pre-existing osteoarthritis was aggravated by the January 7, 2002 work injury is the law of the case, see McCarthy, supra at 94, triggering the application of the "a major cause" provisions of § 1(7A).

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Mark D. Horan
Administrative Law Judge

Filed: **January 5, 2012**