

COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS

BOARD NO. 048360-96

Joaquim Henriques
Bernardino's Bakery, Inc.
Arbella Indemnity Insurance Co.

Employee
Employer
Insurer

REVIEWING BOARD DECISION (Judges Smith, McCarthy and Wilson)

APPEARANCES
Steven D. Rose, Esq., for the Employee
Michael T. Hassett, Esq., for the Insurer

SMITH, J. The employee appeals from a decision on the insurer's discontinuance complaint, which terminated benefits as of the date of the § 11A impartial medical examination. Because we are uncertain whether the judge applied the correct law to facts which could properly be found, we find it appropriate to recommit the case for further findings of fact. G.L. c. 152, § 11C.

Joaquim Henriques is a married, forty-nine year old father of one child. (Dec. 3.) In 1978, he immigrated to the United States from Portugal. He was educated to a fourth grade level in Portugal, prior to his arrival in the United States, and cannot speak or write the English language. Once in the United States, he was employed as a factory worker. In 1979, he commenced employment with Bernardino's Bakery as a baker. (Dec. 3.)

On or about October 24, 1996, in the course of his employment, Henriques injured himself while attempting to detach several baking trays. The trays were stuck together and Henriques struck his right hand against the pans in an effort to disengage them from one another. Consequently, he developed pain in his right hand in the radial

subthenar area. The insurer accepted liability for the October 1996 injury, which was diagnosed as carpal tunnel syndrome. (Dec. 3.)

Henriques contends that he attempted a return to work, but that he developed right shoulder pain as a result of pushing a heavy cart. Although Henriques did not report any shoulder injury to his employer, he pursued medical treatment for his shoulder condition. (Dec. 3-4.) The judge found Henriques' testimony concerning his right shoulder injury unpersuasive. (Dec. 4.)

Henriques has been out of work since December 12, 1996. (Dec. 3.) On March 11, 1997, he underwent right carpal tunnel release surgery. The surgery was unsuccessful. Henriques continues to complain of pain in his hand, elbow, shoulder and neck. (Dec. 3.)

The insurer filed the pending discontinuance complaint on January 26, 1998. After conference, the judge denied the discontinuance complaint. The insurer then appealed to a hearing de novo. (Dec. 1.)

Pursuant to § 11A, Henriques was examined on June 22, 1998 by Dr. Armand Aliotta. (Dec. 2, 5.) The impartial physician opined that Henriques had sustained a work-related injury to his right wrist, which exacerbated an underlying carpal tunnel syndrome. It was the § 11A examiner's opinion that Henriques would have been disabled for about six weeks following the incident. He then determined that this injury interplayed with the employee's right shoulder which, due to repetitive use, was also injured. He further opined that this shoulder injury was probably work related and that because of the compounding factors, Henriques was not able to return to work. (Dec. 5.) On a final note, the § 11A examiner opined that Henriques would have been able to return to work if the injury had been limited to his right hand. Id.

The administrative judge adopted that part of the impartial medical examiner's opinion, which concluded that Henriques sustained a work-related injury to his right wrist. However, the judge did not adopt the impartial physician's opinion that the right shoulder problems were work-related. Relying on the history of x-ray and MRI results contained in the impartial medical examiner's report, (Statutory Board # 1, 2), the judge

reasoned that none of the tests or reports established causation and he so found. (Dec. 5.)

The judge rejected the impartial medical examiner's opinion that there was a causal connection between the right shoulder condition of degenerative joint disease because it was based on history by the employee that the judge found to be flawed and unpersuasive. (Dec. 4, 5.) Accordingly, the judge concluded that the Henriques' incapacity ended on the date of the impartial medical examination. (Dec. 6.) The employee appeals.

Henriques raises two issues: that the judge (1) misperceived the impartial examiner's opinion; and (2) failed to give prima facie weight to the impartial examiner's medical opinion as it related to the employee's right shoulder injury. The second issue raised by Henriques has merit and our address of that issue is dispositive of this case.

The only medical evidence admitted in this case was that of the § 11A physician. (Dec. 2, 5.) The doctor opined that the employee's right shoulder injury was work-related. The judge rejected that opinion as having been based on an improper foundation, to wit: the unpersuasive testimony of the employee. This reason would be valid if the only evidence of the employee's work were his unpersuasive testimony. However, here the record contained other evidence about the nature of the employee's work, namely, the testimony of the owner of the business. (Tr. 45-51.) The judge did not make findings on this evidence, which could provide a proper foundation for the impartial medical examiner's causation opinion. We are unable to understand why the judge rejected the impartial medical examiner's causation opinion on the right shoulder in light of the owner's testimony.

Moreover, we are not assured that the judge acted within the scope of his authority in rendering his decision on this issue. The judge used test results, which were not independently in evidence¹ but merely recited in the impartial examiner's report, to overcome the impartial opinion. In so doing, he may have impermissibly substituted his

¹ The judge found that "none of the tests or reports established causation." (Dec. 4.) Without the reports themselves in evidence, it is difficult to ascertain the record support for this finding.

own lay opinion for that of the doctor. A judge may not rely upon his own knowledge of medical matters in order to form his judgement, unless the cause or nature of the injury is so obvious that it is within the common knowledge and everyday experience of the general population. Lorden's Case, 48 Mass. App. Ct. 274, 280 (1999). The employee's right shoulder condition does not fall into that category.

For these reasons, we conclude that it is appropriate to recommit the case for further findings of fact on the issue of the employee's right shoulder injury.²

So ordered.

Suzanne E. K. Smith
Administrative Law Judge

William A. McCarthy
Administrative Law Judge

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Sara Holmes Wilson
Administrative Law Judge

² The employee also asserts inadequacy in the incapacity analysis. Because the judge's decision turned on causal relationship, we need not address that issue. Should the judge on recommitment find causation, he should describe the employee's work-related medical limitations, education, training, age and experience, and determine the amount that the employee has been capable of earning. See Scheffler's Case, 419 Mass. 251, 256 (1994). At each change in medical condition during the disputed period, the judge should repeat the incapacity analysis. Rogers v. Universal Products, Inc., 12 Mass. Workers' Comp. Rep. 198, 202 (1998).