COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 008193-94**

John Powers	Employee
Brockton District Court, Trial Court	Employer
Commonwealth of Massachusetts	Self-Insurer

REVIEWING BOARD DECISION
(Judges McCarthy,Wilson and Smith[1])

APPEARANCES
Paul C. Kelly, Esq., for the employee at hearing
John J. Canniff, Esq., for the employee on brief
Timothy M. Linnehan, Esq., for the self-insurer

MCCARTHY, J. The employee, John Powers, is fifty-nine years of age and a resident of Avon, Massachusetts. He has worked as a court officer with the Massachusetts Trial Court Department since 1974. On February 14, 1994, while preparing prisoners for transportation, a prisoner resisted and a struggle ensued. During the scuffle, the employee fell against a cell door striking his face, arms and both knees against the steel bars. Two days later, Mr. Powers began treatment for a fractured right patella with Dr. Richard Paul. At first, his leg was placed in a brace which went from the right hip down to the ankle. In October 1994, surgery was performed to remove the right patella. There was a further surgery in March 1995, and finally in April 1997 a total left knee replacement was performed. (Dec. 3.)

Mr. Powers never returned to work after the February 14, 1994 injury. The self-insurer accepted the case and paid temporary total incapacity benefits under § 34 until the maximum was reached.

[1] Judge Smith no longer serves as a member of the reviewing board.

The employee then filed a claim for permanent and total incapacity benefits under § 34A of the Act from March 10, 1997 and continuing, together with the payment of reasonable medical expenses under § 30. The self-insurer raised issues of extent of incapacity and causal relationship. It also denied that the employee's left knee condition was causally related to the accepted industrial injury and raised the application of § 1(7A) on the question of causal relationship.

After a conference under the provisions of § 10A, the administrative judge directed payments of partial incapacity benefits under § 35. This order was appealed by the employee. Following a full evidentiary hearing, the administrative judge filed a decision awarding § 34A benefits. The judge explicitly found that the February 14, 1994 industrial injury served to aggravate a pre-existing left knee condition and that, " . . . it was probably inevitable that the left knee would have required total knee replacement with or without the fall." (Dec. 8.) The hearing judge concluded, " . . . that Self-Insurer is liable for the left knee including the expenses incurred for the medical treatment of the left knee." (Dec. 8.) The self-insurer appeals.

The self-insurer raises a number of issues on appeal. First, it argues that the judge failed to apply the § 1(7A) standard of compensability for pre-existing medical conditions.[2] The pertinent part of § 1(7A) states:

> 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 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.

[2] Mr. Powers tore cartilage in his left knee while a college student. Over the next twenty years he had at least three major medical procedures as a result of the left knee injury sustained while in college. (Dec. 3.) This college injury of course was not a compensable injury under c. 152. The right knee, which also presented a preexisting condition, continues to cause significant pain. (Dec. 3-5.)

The hearing judge erred when she found that § 1(7A) did not apply in this case. The judge cited Batson v. Beth Israel Hosp., 9 Mass. Workers' Comp. Rep. 267, 270 (1995), and Smick v. South Central Mass. Rehabilitative Resources, Inc., 7 Mass. Workers' Comp. Rep. 84, 87 (1993), for the proposition that if, "a judge finds that an employee's work aggravated an underlying condition, then the employee sustained an industrial injury. Further, an aggravation of a pre-existing condition to the point of incapacity is a compensable injury." (Dec. 7.) Both of the cited cases involve injuries sustained prior to December 23, 1991. However, § 1(7A) as most recently amended by § 14 of St. 1991, c. 398 was expressly made substantive by § 106 of the same c. 398. It therefore applies to injuries occurring on or after December 23, 1991, including the present injury which occurred on February 14, 1994. The decision then must be reversed and the case returned to the hearing judge for application of the correct § 1(7A) causal relationship standard.

Next, the insurer argues that the judge erred when she ordered the self-insurer to pay interest under § 50. Russo's Case, 46 Mass. App. Ct. 923 (1999). The Appeals Court in Russo found that c. 152 does not authorize the award of interest against the Commonwealth either by its express terms or by necessary implication. The employee in its brief concedes that the award of interest is error.[3]

One other argument made by the self-insurer bears comment. The self-insurer contends that the hearing judge erred by shifting the employee's burden of proving each element of his claim when she made the following general finding:

> But for the testimony of Dr. O'Shea, I was not persuaded that there were not substantial and meaningful work activities which the Employee could engage in on at least a part-time basis. However, there was no vocational testimony proffered by the Self-Insurer as to what such jobs would be.

[3] The reviewing board filed its decision in Russo finding the Commonwealth liable to pay § 50 interest on February 11, 1997. The administrative judge followed the reviewing board when she awarded interest in her decision filed March 31, 1999. The Massachusetts Appeals Court decision reversing the reviewing board was not filed until thirteen days later.

(Dec. 7.) The self-insurer is not required to present rebuttal testimony. It is well-established that the employee has the burden of proving each and every element of his claim. O'Reilly's Case, 265 Mass. 456, 458 (1929). See also Phillip's Case, 41 Mass. App. Ct. 612, 618 (1996).

The decision of the administrative judge is reversed. We return the case to the hearing judge for application of the proper causal relationship standard and for a new decision. In light of the passage of time, the judge at her discretion may require the presentation of further lay or medical testimony.

So ordered.

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William A. McCarthy
Administrative Law Judge

Filed: **February 8, 2001**

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Sara Holmes Wilson
Administrative Law Judge