COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 010950-99**

Jose Valdes	Employee
Tewksbury Hospital	Employer
Commonwealth of Massachusetts	Self-insurer

REVIEWING BOARD DECISION
(Judges Maze-Rothstein, McCarthy and Wilson)

APPEARANCES
Kenneth J. Butterworth, Esq., for the employee
Marian C. Grimes, Esq., for the self-insurer

MAZE-ROTHSTEIN, J. The self-insurer appeals an awarded closed period of G. L. c. 152, § 34, temporary total incapacity benefits, § 30 medical benefits and § 13A counsel fees. The self-insurer contends that the medical evidence fails to establish causation and the extent of any medical disability arising from the workplace injury. We agree and reverse the decision.

Jose Valdes, the employee, is a married, forty-seven year old, who attained a tenth grade education. In 1992, he commenced employment with the Tewksbury Hospital as a maintenance/housekeeping person with a subsequent promotion to the position of working supervisor within the same department. (Dec. 3.)

On February 28, 1999, while operating a floor-buffing machine, Mr. Valdes experienced pain in his neck and a sensation of "pins and needles" radiating down his right arm into his fingers. The incident was reported to the head nurse on duty and he remained out of work until October 12, 1999. Mr. Valdes received compensation benefits on a "pay without prejudice" basis up through August 21,

1999.[1] The self-insurer discontinued benefits thereafter. (Dec. 4.) In response, the employee filed a claim for benefits. On February 14, 2000, the matter went to a § 10A conference where the employee prevailed on medical benefits only. Mr. Valdes appealed to a hearing de novo.

As the compensation sought was for a prior closed duration of time, the parties opted out of the § 11A[2] medical process. The employee submitted a medical report. The doctor's report noted the employee's chronic pain affecting multiple parts of his body, without neurological deficit, likely due to a deconditioning syndrome. But on the key issues of causation to work and extent of medical disability the report was silent. (Dec. 6; Employee's Ex. 3.)

Additionally, the employee proffered a return to work note signed by another doctor. (Dec. 1, 6.) The note, dated October 6, 1999, released the employee to return to work on October 10, 1999 without restrictions. (Dec. 6; Employee's Ex. 2.) The self-insurer submitted a copy of a 1997 § 48 lump sum agreement the parties entered into without an acknowledgement of liability. (Dec.

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[1] General Laws c. 152, § 8(1), as amended by St. 1991, c. 398 §§ 23 to 25, states in pertinent part:

> An insurer which makes timely payments . . . may make such payments for a period of one hundred eighty calendar days from the commencement of disability without affecting its right to contest any issue arising under this chapter. An insurer may terminate or modify payments at any time within such one hundred eighty day period without penalty . . . if it gives the employee and the division of administration at least seven days written notice of its intent to stop or modify payments and contest any claim filed.

[2] Whenever medical issues are in dispute, G.L. c. 152, § 11A(2), as amended by St. 1991, c. 398 § 30, requires that an impartial medical expert be appointed to examine the employee and that no other medical evidence is allowed by right to any party. An exception is carved out in 452 Code Mass. Regs. § 1.10(5), whereby the parties may opt out of the impartial medical framework:

> No impartial physician shall be required in disputed matters concerning death and matters where the dispute over entitlement to weekly benefits concerns specific period(s) of prior disability.

6.) The agreement listed several injury dates falling within the 1997 calendar year involving injuries to the employee's neck, shoulder, right wrist, hand and forearm. (Dec. 6; Insurer's Ex. 1.)

Based on the evidence before him, the administrative judge determined that the employee had sustained a work-related injury on February 28, 1999. He also found that the employee's medical evidence made no mention of the extent of medical disability. (Dec. 7.) Nonetheless, the judge awarded § 34 benefits from February 28, 1999 to August 26, 1999. He also ordered the self-insurer to pay § 30 medical expenses and § 13A counsel fees.

On appeal, the self-insurer maintains that neither of the medical documents submitted by the employee constitutes sufficient evidence to support the employee's claim. (Self-insurer's brief, 1.) The employee responds that where there is no § 11A examination, judges should be accorded wide discretion. We agree with the self-insurer.

At the foundation of our workers' compensation system is the fundamental principle that an employee has the burden of proving every element of his claim. Ginley's Case, 244 Mass. 346, 347-348 (1923); Hughes v. D&D Elec. Contrs., Inc., 11 Mass. Workers' Comp. Rep. 314, 316 (1997). To warrant compensation, beyond proof of the occurrence itself, a claimant must prove two additional basic elements: causation and the extent of medical disability. See L. Locke, Workmen's Compensation § 502 (2d ed. 1981.) These requirements, regardless of whether or not the parties are acting within § 11A, do not change. Here, the employee has simply failed to meet his burden of proof.

It is well established that most questions of causation and medical disability are matters beyond lay knowledge and require expert medical opinion. See Josi's Case, 324 Mass. 415 (1949); Koonce v. Bay State Bus Corp., 14 Mass. Workers' Comp. Rep. 238 (2000); contra Lovely's Case, 336 Mass. 512 (1937)(no medical expertise necessary where causation is obvious). The employee's medical history included a number of complicating injuries and conditions noted in the 1997 lump

sum agreement predating the 1999 subject injury, which may have had bearing on causation and the extent of present medical disability. See G. L. c. 152, § 1(7A); Robles v. Riverside Mgmt., Inc., 10 Mass. Workers' Comp. Rep. 191 (1996)(for discussion of the interplay of a work injury and pre-existing unrelated injuries or conditions); White v. Town of Lanesboro, 13 Mass. Workers' Comp. Rep. 343 (1999)(for discussion of interplay between multiple work injuries interspersed with unrelated injuries or conditions). Yet the employee's medical evidence says nothing about either pivotal issue. Additionally, the release to return to work medical note entirely lacks any history, diagnosis, findings upon examination, or mention of whether an actual physical examination even occurred. (Employee's Ex. 2 and 3.) Consequently, there is no medical opinion in the evidentiary record to establish causal relationship or the extent of medical disability. Despite these patent evidentiary deficiencies, the employee neglected to take the appropriate remedial steps to meet his burden of proof, leaving no foundation for the judge to reach the questions of causal relationship, incapacity and its duration.

In his brief, the employee states that the "[r]eviewing [b]oard is not bound by strict legal precedent or legal technicalities, but is governed by practice in equity, and equity is consonant with liberal construction to be given the Workers' Compensation Act." (Employee's brief, 3, citing Lavoie v. Zayre Corp., 13 Mass. Workers' Comp. Rep. 76 (1999).) Notwithstanding the beneficent design of the Act, equity never supplants clearly articulated, well settled law, and neither the judge nor the reviewing board can make the employee's case for him. Opting out of the § 11A provisions does not relieve the claimant of the burden to prove his claim. See Ginley's Case, supra. The findings on medical disability and causal relationship are not supported by the requisite expert medical opinion. Accordingly, the decision is reversed.

So ordered.

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Susan Maze-Rothstein
Administrative Law Judge

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William A. McCarthy
Administrative Law Judge

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Sara Holmes Wilson
Administrative Law Judge

Filed: May 21, 2002