COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS	**BOARD NOS. 032652-01 030270-10 030269-10 030501-09**

Kim Benson	Employee
United Parcel Service	Employer
Helmsman Management Services, Inc. c/o Liberty Mutual Ins. Co.	Self-insurer

REVIEWING BOARD DECISION
(Judges Fabricant, Koziol and Levine)

The case was heard by Administrative Judge Bean.

APPEARANCES
Brian C. Cloherty, Esq., for the employee at hearing and on appeal
Jennifer N. Seich, Esq., for the employee on appeal
Joseph J. Durant, Esq., for the self-insurer at hearing
John J. Canniff, Esq., for the self-insurer on appeal

FABRICANT, J. The self-insurer appeals from a decision in which the administrative judge awarded the employee § 30 medical benefits for a total knee replacement, and § 34 total incapacity benefits for the resulting period of recuperation. Raising the defense of § 1(7A) "a major" causation applicable to combination injuries,[1] the self-insurer argues that the need for surgery was not caused by the employee's work activities, and that the judge misinterpreted the medical evidence in finding that it was. We affirm.

[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.

The employee suffered a non-work related injury to his knee in 1975, resulting in several surgeries for torn menisci and anterior cruciate ligaments. The employee then sustained work-related knee injuries in 2000 and 2001, resulting in some lost time, work accommodations and conservative treatment. (Dec. 701-702.) The employee further claims work-related knee injuries on October 21, 2009 and November 25, 2009, and total knee replacement surgery on January 5, 2010. (Dec. 703-704.) It is the knee replacement surgery and closed periods of total incapacity that are at issue here. (Dec. 699.)

The judge allowed additional medical evidence based on the inadequacy of the impartial medical report of Dr. Conforti. (Dec. 700.) Dr. Conforti was first informed of the employee's 1975 non-work-related knee injury at his deposition. Despite this additional information, the doctor maintained that the incidents at work in 2000 and 2001 were still major causes of the full blossoming of the arthritic condition, leading eventually to the 2010 knee replacement. (Dec. 705, 707; Dep. 45.) The judge adopted Dr. Conforti's opinion and awarded the claimed benefits. (Dec. 707-708.)

The self-insurer argues that the judge "cherry-picked" the one opinion Dr. Conforti expressed in his deposition supporting the employee's claim pursuant to § 1(7A). The self-insurer also maintains that this case should be governed by the rule of law set out in Perangelo's Case, 277 Mass. 59 (1931), which mandates that the last opinion expressed by the expert physician must prevail over any prior stated opinions. We disagree.

The thrust of the self-insurer's argument is that, at his deposition, Dr. Conforti reversed his clearly stated opinion that the employee's work with the employer in 2000-2001 was a major cause of the 2010 knee replacement surgery.[2]

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[2] Dr. Conforti testified:

Q. Would you agree with me that Mr. Benson's work played a significant role in the symptoms that he was complaining of following these injuries of 2000 to his left knee?

During that time the employee suffered three incidents which aggravated his previously impaired knee, and the judge credited the employee's testimony to that effect. (Dec. 707.) The insurer cited Dr. Conforti's deposition testimony:

> Q: So if the employee is incorrect in that assumption [that he ruptured his ACL in 2001] would you then consider changing your opinion as to whether the 2000 and 2001 injuries were the major but not necessarily predominant cause of the employee's need for a total knee replacement?
> A: The answer to that is yes.

(Dep. 60.)

There is no inconsistency. Merely stating that he would *consider* changing his opinion does not mean that that doctor has, in fact, so changed his opinion. The self-insurer's reliance on Orlofski v. Town of Wales, 23 Mass. Workers' Comp. Rep. 175 (2009), is misplaced. In that case, the impartial physician did unquestionably change his causal relationship opinion over the course of the deposition without giving a reason. Id. at 179-180. Here, Dr. Conforti's opinion on causal relationship did not change despite any ambiguity as to the exact nature of the 2000 and 2001 injuries.[3] Once the doctor took into account the problems the employee experienced with his knee in 1975, he changed his opinion that the torn ACL stemmed directly from the 2000-2001 incidents, but still opined: "He had some incidents that happened then at work [in 2000 and 2001], and I think he aggravated his knee." (Dep. 46.) In other words, a foundation which included a torn ACL directly related to those 2000-2001 incidents was not necessary for the medical opinion to stand. The 2000-2001 incidents occurred, (Dec. 701-702), and

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> A. It's my opinion that his activities and his work, and the incidents outlined in 2000 and 2001 were the major, but not necessarily predominant cause, of his ongoing knee symptoms and his need for treatment and total knee replacement.

(Dep. 45.)

[3] The self-insurer's argument that Dr. Conforti's opinion was not competent, because he did not know exactly *what* had happened to the employee in those 2000-2001 incidents is not sufficiently developed. We address the underlying premise, in any event.

liability for that "a major" aggravation of the employee's pre-existing knee injury therefore followed.[4] (Dep. 57-58.)

Accordingly, the decision is affirmed. The self-insurer shall pay counsel for the employee an attorney's fee under § 13A(6) in the amount of $1,517.62. .

So ordered.

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Bernard W. Fabricant
Administrative Law Judge

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Catherine Watson Koziol
Administrative Law Judge

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Frederick E. Levine
Administrative Law Judge

Filed: **May 15, 2012**

[4] Dr. Conforti testified:

Q. Without knowing what happened to him in 2000 and 2001, how can you state to a reasonable degree of medical certainty that whatever it was that happened is a major or [sic] not necessarily predominant cause of his disability and need for total knee replacement in the context of knowing that he had seven prior other surgeries between 1975 and 1989 and a chronic ACL tear that's noted as old as of 2001?

. . .

A. It's still my opinion it's major but not necessarily the predominant cause of his need for treatment.

(Dep. 57-58.)