COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO.:** 046839-91

Manuel J. Nunes, III	Employee
Town of Edgartown	Employer
Mass. Education & Government SIG	Insurer

REVIEWING BOARD DECISION
(Judges Costigan, Horan and Fabricant)

APPEARANCES
Judith B. Gray, Esq., for the employee
John J. Canniff, Esq., for the insurer

COSTIGAN, J. When an impartial physician, appointed under G. L. c. 152, § 11A(2) to examine the employee and render opinions on a medical condition alleged to be work-related, gives two mutually exclusive and contradictory answers to the crucial question of causation, the medical opinion cannot be prima facie under the statute, and a decision adopting one of the doctor's answers over the other must be reversed. Brooks v. Labor Management Servs., 11 Mass. Workers' Comp. Rep. 575 (1997). This is the error cited by the insurer in its appeal of an administrative judge's decision awarding the employee benefits for a recurrence of a 1991 industrial knee injury. We therefore reverse the decision and recommit the case for a de novo hearing.[1]

The employee injured his right knee in the early 1960s while participating in high school sports. He underwent surgery at that time, but experienced no further problems with the knee until he re-injured it at work on September 6, 1991. He underwent surgery in November 1991, and returned to work in late January 1992, but he was never symptom-free thereafter. (Dec. 7.) Between 1996 and 2000, the employee experienced grinding and swelling in his right knee. He was prescribed medication and underwent a series of three injections, which provided temporary pain relief, but he experienced no lasting improvement. His treating physician recommended a total knee replacement. (Id.)

[1] The administrative judge no longer serves on the industrial accident board.

At a § 10A conference in April 2003, the employee claimed § 35 partial incapacity benefits from and after December 27, 2002, when he took an early retirement package offered by the employer; medical benefits for his anticipated total knee replacement; and § 34 total incapacity benefits from and after that surgery. The employee had been allowed to join a claim for a second date of injury, December 27, 2002 (his last day worked), for which the insurer denied liability. In the alternative, the employee raised § 35B as to his 1991 accepted injury.[2] (Dec. 2-3.) The administrative judge denied the employee's claims, and he appealed. (Dec. 2, 12.) At hearing, the insurer raised § 1(7A) in defense of the employee's claims.[3] (Dec. 3.)

Pursuant to G. L. c. 152, § 11A(2), the employee underwent an impartial medical examination by Dr. Gilbert Shapiro on June 24, 2003. In his report, (Ex. 2), the doctor

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[2] General Laws c. 152, § 35B, provides in pertinent part:

> An employee who has been receiving compensation under this chapter and who has returned to work for a period of not less than two months shall, if he is subsequently injured and receives compensation, be paid such compensation at the rate in effect at the time of the subsequent injury whether or not such subsequent injury is determined to be a recurrence of the former injury. . . .

[3] General Laws c. 152, § 1(7A), as amended by St. 1991, c. 398, § 14, 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.

By § 106, the amendment was expressly deemed substantive in nature, and thus applicable only to injuries occurring on and after December 23, 1991. Therefore, as the administrative judge correctly found, (Dec. 11), § 1(7A) did not apply to the employee's September 6, 1991 right knee injury, for which the insurer took the employee "as is" and accepted liability. Crowley's Case, 223 Mass. 288 (1916).

opined that the employee had pre-existing degenerative changes in his right knee which had been aggravated by his 1991 industrial injury, but that the acute episode had long resolved, and the employee's ongoing complaints, for which the total knee replacement was recommended, were due to the pre-existing degenerative changes. (Dec. 8-9; Ex. 2, p. 3.)

At his deposition, however, the doctor offered a different opinion. Employee's counsel posed two lengthy hypothetical questions, both of which asked the doctor to assume the physical requirements of the employee's jobs with the Town and the particulars of his 1991 work injury. (Tr. 24-25.) The first question, however, also asked the doctor to exclude from consideration the employee's pre-existing right knee condition, (Tr. 26-27), and the second, to include it. (Tr. 28.) In response to the first hypothetical, the doctor opined that the employee's 1991 work accident would be "the major causation factor" for the proposed total knee replacement. (Tr. 27.) In response to the second hypothetical, the doctor agreed that, even considering the pre-existing right knee condition, both the 1991 work injury and the employee's continued work efforts up through December 2002 were and remained "significant or important or major contributing factors" in the need for total knee replacement. (Dep. 32-34.)

Near the end of the deposition, there ensued a verbal tennis match among both counsel and the doctor, in which the doctor was repeatedly challenged as to which opinion he held: that set forth in his report, or that articulated earlier in his deposition. (Dep. 48-51.) The doctor, seemingly aiming to please or, perhaps, just aiming for the locker room, simply answered in the affirmative to each question in turn.

The administrative judge recounted the doctor's waffling testimony in some detail, (Dec. 10), but then adopted "the above noted comments and opinions of Dr. Shapiro" to conclude that the recommended right total knee replacement surgery was "appropriate" and was causally related to the employee's 1991 work injury. (Dec. 10, 15.) The judge found that some period of incapacity following surgery was likely, but he denied the employee's claim for § 35 partial incapacity benefits from December 27, 2002 and continuing, finding that the employee left work voluntarily, for reasons unrelated to his knee condition. (Dec. 14-15.)

Even if neither party had filed a § 11A(2) motion for additional medical evidence,[4] the judge's reliance on the exclusive § 11A evidence in this case was contrary to law and cannot stand. In Brooks, supra, we concluded that an impartial medical opinion that is self-contradictory, with no further explanation, cannot attain the prima facie status that § 11A(2) mandates. The reason is simple: which answer is to be accorded prima facie weight, "Yes" or "No?"

The unexplained, internally inconsistent opinion of the §11A physician in the present case cannot be accorded prima facie force under the Cook [v. Farm Service Stores, Inc, 301 Mass. 564 (1938)] reasoning. It should therefore "retain only its inherent persuasive weight as a piece of evidence *to be considered with other evidence*. . . ." Cook, id. at 566 (emphasis added). It logically follows that additional medical evidence is mandated under the circumstances presented by this case. The impartial physician's opinion evidence is inadequate because it is too self-contradictory to "[compel] the conclusion that the evidence is true. . . ." Id. As a practical matter, if the evidence cannot stand alone as prima facie, it cannot be exclusive. § 11A. The doctor's opinion retains status only as ordinary evidence to be weighed with any other medical evidence, within the parameters set by Perangelo's Case, [277 Mass. 59 (1931)].

Brooks, supra at 580. See also Carmichael v. A.T.&T. Technologies, 9 Mass. Workers' Comp. Rep. 791, 793 n.2 (1995)("Should the § 11A examiner fail to offer a satisfactory

[4] Taking judicial notice of documents contained in the board file, see Rizzo v. M.B.T.A., 16 Mass. Workers' Comp. Rep. 160, 161 n.3 (2002), we note that the first § 11A motion, filed by the insurer in March 2004, did not seek the admission of additional medical evidence but rather asked the judge to declare the impartial medical report adequate and the medical issues not complex. At the hearing on May 6, 2004, the judge stated that he had done so sua sponte. (Tr. 6.) Shortly thereafter, the employee noticed his intent to depose the impartial medical examiner for purposes of crossexamination. § 11A(2). The deposition took place on June 16, 2004. (Ex. 2.) By motion filed on June 25, 2004, the employee argued only that Dr. Shapiro's impartial medical report and deposition testimony were silent as to the period of claimed partial disability, from December 27, 2002 at least to the June 24, 2003 impartial examination, and that additional medical evidence should be allowed to address that "gap." The employee's motion bears a handwritten, but unsigned and undated notation, "Denied in hearing decision." Although this is not an issue argued on appeal, we again state that the parties were entitled to a ruling on the employee's motion prior to the filing of the decision on August 25, 2004. See Dunn v. U. S. Art Co., Inc., 18 Mass. Workers' Comp. Rep. 123 (2004).

explanation for a change of opinion, the administrative judge should carefully weigh the adequacy of the § 11A evidence and consider allowing additional medical testimony.")

By the end of his deposition, the impartial physician was testifying at crossends from one question to the next. On redirect examination by the insurer, the doctor stood by his report:

> Q.: Now, Doctor, you took the history from Mr. Nunes, and you reviewed the medical records?
>
> A.: Yes.
>
> Q.: And you offered a statement that the acute episode of September 6th of 1991 had long since resolved, correct?
>
> A.: Yes.
>
> Q.: Do you maintain that opinion today?
>
> A.: Yes.
>
> Q.: And that his ongoing problems were due to the pre-existing degenerative changes that had occurred, correct?
>
> A.: Yes.
>
> Q.: Do you stand by that opinion today, Doctor?
>
> A.: Yes.
>
> Q.: Okay. Now, Doctor, your last sentence of your report indicates that the need for the knee replacement is based upon the pre-existing degenerative changes, correct?
>
> A.: Yes.
>
> Q.: And that it's -- which have been progressive, correct?
>
> A.: Yes.

Q.: And that the need for the total knee replacement is not due to the September 6th, 1991 episode, correct?

A.: Yes.

Q.: You maintain that opinion today, Doctor?

A.: Yes.

(Dep. 44-45.) Although the employee did not have to prove § 1(7A)'s "a major" causation as to the need for the claimed surgery, see footnote 3 supra, the doctor's opinion of *no* causal relationship did not satisfy the employee's lesser burden of proving his work-related injury contributed "to the slightest extent" to the need for surgery. Rock's Case, 323 Mass. 428, 429 (1948); Gonzales v. City of Lynn, 18 Mass. Workers' Comp. Rep. 195, 201 (2004). However, on re-cross examination, the employee volleyed the ball to the doctor:

Q.: Now, you indicated just a moment ago that you stood by your opinion that the [acute] episode [of 9-6-91] had resolved. Would you not agree, Doctor, that based upon the information obtained from this employee as well as the information that we've reviewed today, that the employee, as you've indicated, remains symptomatic by the history he provided to you from 9-6-91 ongoing; is that correct?

A.: That is correct.

Q.: So that in actuality, while the acute episode, if you will, as you described it, the actual injury occurred, that the complaints and symptoms that arose from that injury did not resolve?

A.: Yes, sir [sic].

Q.: And, Doctor, I'm not going to go through the hypothetical questions that I've asked you again, but the opinions that you gave to me based upon the hypothetical questions that I provided to you, those opinions remain the same even in light of the cross-examination and the testimony you've just given?

A.: On the hypotheticals, again, if I am to ignore the past medical history, those opinions remain the same.

> Q.: . . . [T]he first hypothetical question, Doctor, you were instructed to ignore the past medical history, and you indicated that you feel that there would be a causal relationship to the 9-6-91 event. In the second hypothetical, Doctor, if you recall, you were asked to consider the '61 or '65 event, his ongoing work history, et cetera.
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> Do you recall that?
>
> A.: Yes, I do.
>
> Q.: And you gave the testimony as to whether the 9-6-91 injury and his continued work efforts would be and remain a major or significant cause for the need for total knee replacement, and you indicated that it would. Do you still stand by that opinion?
>
> A.: Yes, I would.

(Dep. 45-47.) Thus, the impartial physician obliged the employee with a wholly inconsistent -- and unnecessary -- opinion of § 1(7A) causation. Not to be outdone, the insurer swung its racquet again on third re-direct examination:

> Q.: Doctor, just in conclusion, you continue to maintain the opinions expressed in your report of June 24th of '03?[5]
>
> A.: Yes.

(Dep. 48.) The rally continued on to a total of six re-direct inquiries by the insurer and six re-cross examinations by the employee. (Dep. 48-51.)

We cannot reconcile the two opinions expressed by the doctor. As neither opinion can be prima facie evidence, the judge's adoption of one over the other as such was error. As in Brooks, this is not a case governed by Perangelo's Case, supra. The rule of law there

[5] In his report, the doctor had concluded that the employee's "ongoing problems are due to the pre-existing changes which progress in the normal course of usual activities," and "the need for that knee replacement is based on the pre-existing degenerative changes which have been progressive and not due to the 9/6/91 episode." (Ex. 2.)

announced is that "the opinion of an expert which must be taken as his evidence is his final conclusion at the moment of testifying." Id. at 64. However, Perangelo involved a medical expert changing his opinion based on new evidence. Id. at 63-64. Such is not the case here. There was no one final, substantive opinion rendered by the impartial physician at deposition -- no final match score. Rather, the doctor in turn gave each party the opinion it wanted to hear. All we have is one attorney figuratively walking off the court before the other. Perangelo requires more than that.

Accordingly, we reverse the decision and transfer the case to the senior judge for assignment to a hearing de novo.

So ordered.

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Patricia A. Costigan
Administrative Law Judge

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Mark D. Horan
Administrative Law Judge

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Bernard W. Fabricant
Administrative Law Judge

Filed: October 11, 2005