COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 029539-12**

Maria Aguiar	Employee
Life Care Center	Employer
Old Republic Insurance	Insurer

REVIEWING BOARD DECISION
(Judges Calliotte, Fabricant and Koziol)

The case was heard by Administrative Judge McManus.

APPEARANCES
Seth J. Elin, Esq., for the employee
David G. Shay, Esq., for the insurer

CALLIOTTE, J. The insurer appeals from a decision finding liability for an injury to the employee's right knee, and awarding a closed period of § 34 temporary total incapacity benefits, ongoing § 35 partial incapacity benefits, and §§ 13 and 30 medical benefits for a right total knee replacement. The insurer argues that the judge failed to address its late claim defense, and that the employee did not prove her falls at work arose out of her employment. We affirm the decision.

The employee, age sixty-one at the time of hearing, was born and educated through the fourth grade in the Azores. (Dec. 4.) She speaks, reads and understands some " 'functional' English." Id. She began working for the employer in August of 2000, first as a housekeeper and later as a certified nursing assistant (CNA). She described her CNA job as very physical, requiring her to bathe, dress, feed and move patients, as well as make beds. (Dec. 5.) While performing these duties, she testified she experienced pain in her knees, particularly her right knee. She also testified that, while bringing a tray to a patient sometime in 2011, she fell, landing on her right knee. (Dec. 5; Tr. 70) She first stated that she "fell in the bed," (Tr. 70), but, upon further questioning, testified that she fell directly to the floor, without hitting anything. (Tr. 72-73.) In

addition, she testified without elaboration that, prior to the 2011 fall, she "fell a few times." (Tr. 15; Dec. 6, 17.)

On March 30, 2012, the employee stopped working. (Dec. 5.) A few days later, on April 2, 2012, Dr. Barry Saperia performed a total right knee replacement. (Dec. 6; Ex. 9.) Due to continuing complaints, the employee underwent a closed manipulation of the right knee on July 11, 2012. (Dec. 6, 8.) In April 2012, shortly after leaving work, the employee applied for short-term disability benefits. (Dec. 5.) Eight months later, in November 2012, she filed a claim for workers' compensation benefits. (Dec. 17.) Following a § 10A conference, the judge ordered the insurer to pay ongoing § 34 benefits from March 31, 2012, but did not order payment of past medical treatment. (Dec. 2.)

On May 15, 2013,[1] Dr. Kevin Mabie conducted an impartial examination pursuant to § 11A; he was later deposed. The judge found the impartial report adequate, but allowed the parties to submit additional medical evidence on grounds of medical complexity. (Dec. 3, 8.) Regarding Dr. Mabie's findings, the judge wrote:

> Dr. Mabie noted that the Employee reported initially experiencing pain in her right knee after twelve years of employment with this Employer, and without any specific trauma. However, she reported that she suffered a number of falls over the years, and following the most recent fall, was taken to Morton Hospital by her boss. After progressing pain, she was seen by Dr. Saperia and subsequently underwent a total knee replacement.

(Dec. 8.) Dr. Mabie assumed that "the multiple falls exacerbated or prompted the progression of her pain." (Dec. 9.) He opined that the employee's "work history and the physical requirements" of her job, which included "vigorous and repetitive use of her right knee," exacerbated pre-existing osteoarthritic changes in that knee, "necessitating the total right knee replacement." Id. The judge found Dr. Mabie agreed with the employee's treating surgeon, Dr. Saperia, that " 'a major' cause of the Employee's disability was the repetitive work she was performing for the Employer." Id.

[1] The judge initially stated that the impartial examination was on May 20, 2013, (Dec. 3), but that was actually the date of the report. (Statutory Ex. A.) The examination was held on May 15, 2013, as the judge correctly stated later in her decision. (Dec. 8.)

Dr. Saperia's opinion was based on a history reported on December 1, 2011, "of having pain in her right knee for the past three months or so, but no report of any specific injury," and of having worked as a CNA for twelve years. (Dec. 10.) Dr. Saperia diagnosed the employee with "advanced degenerative joint disease of the right knee and scheduled a total right knee arthroplasty." Id. On September 11, 2012, he opined that her arthritis and need for a total knee replacement are "the direct and proximate result of the rigors involved at her workplace." Id.; see Employee Ex. 9. On May 9, 2014, he opined that the employee's "March 30, 2012" injury[2] was "a major cause" of her disability. (Dec. 11; Employee Ex. 9.)

Adopting the opinions of both Dr. Mabie and Dr. Saperia, the judge found that, while the insurer had properly raised § 1(7A), producing evidence of a pre-existing condition (osteoarthritis) which combined with the work injury to cause or prolong disability or need for treatment, the employee had satisfied her burden of proving that a major cause of her disability and need for total knee replacement was her "repetitive work," as noted by those doctors. (Dec. 14-15.)

Turning to the insurer's defense of late notice and late claim, the judge again found the employee credibly testified she "sustained several falls while working with this Employer, the most recent being in November of 2011, before leaving her employment in March of 2012." (Dec. 17.) The judge credited the employee's testimony that she informed her supervisor of the 2011 fall and was taken to the hospital by that supervisor. Further, the judge credited the employee's testimony that "she complained repeatedly to her supervisor of her knee pain incurred while performing the work activities which she described as heavy and strenuous." Id. The judge found these complaints of pain caused

[2] As noted above, March 30, 2012 was the employee's last day of work, which, in the absence of other evidence establishing a more clear-cut date, may be considered the date of injury in repetitive injury cases. See Trombetta's Case, 1 Mass. App. Ct. 102, 105 (1973)(finding was warranted that employee reached end of capacity for work on day he was laid off, due to cumulative effect of stresses and aggravations at work); Nason, Koziol and Wall, Workers' Compensation, § 9.11 (3rd ed. 2003)(for repetitive injury claim, date of injury may be date employee forced to give up work).

by work, although not in writing, constituted notice to the employer, as required by G. L. c. 152, §§ 41 and 42. Furthermore, the judge found that the filing of the employee's claim eight months after leaving her employment provided adequate and timely notice of the injury. Even if, arguendo, the employee failed to provide timely notice, the judge found the insurer was not prejudiced because it was not hampered in its ability to investigate the claim or procure evidence, and, in fact, presented witnesses who had worked with the employee and employment records. Neither was the insurer prejudiced due to the lack of prompt medical treatment, since the employee had surgery immediately upon leaving work. Finally, even the insurer's examiner, Dr. John McConville, indicated the employee's knee surgery was due to the chronic repetitive demands placed on the employee's right knee in the performance of her work. (Dec. 17-18.)

The judge concluded the employee sustained "an injury to her right knee arising out of and while in the course of her employment . . . as a result of the strenuous physical work she performed and the falls she sustained while so employed." (Dec. 19.) She adopted the employee's testimony "as to the physical requirements and activities she performed through her years of employment with this Employer as well as the occurrence of her knee pain." (Dec. 7.) However, the judge did not find the employee's pain rose to the level the employee described.[3] Id. Instead, adopting the opinions of Dr. Saperia, in part, and Dr. Mabie, she found the employee was totally disabled until the date of Dr. Mabie's impartial examination, May 15, 2013, and partially disabled and able to perform full-time sedentary work thereafter. (Dec. 10, 13, 19.) She awarded §§ 34 and 35 benefits in accordance with those findings, as well as "§§ 13 and 30 medical benefits for medical, hospital, physical therapy and pharmaceutical services, to include the right knee replacement surgery." (Dec. 20.)

We first address the insurer's argument that the employee has not sustained her burden of proving the falls she suffered at work arose out of her employment. The

[3] At hearing, the employee testified that she continues to suffer from pain and swelling in her right knee, and has limitations in standing, walking, sitting, lifting and driving which totally incapacitate her from her prior work. (Dec. 6.)

insurer maintains that the 2011 fall, which occurred when the employee fell directly to the floor without striking anything, was "idiopathic," and thus not compensable as a matter of law. Further, the insurer contends that the employee's cursory testimony about the other falls fails to establish the cause and time of occurrence; thus, she has failed to prove they arose "out of" her employment. See G. L. c. 152, § 26. Moreover, the insurer suggests, the employee had non-work-related diagnoses of dizziness and vertigo which were the likely cause of her falls. The insurer concludes that the judge erred by relying on Dr. Mabie's causal relationship opinion, which had as its foundation a history of these falls. It requests that the case be recommitted for further findings on whether the employee has introduced any medical evidence supporting a finding of causal relationship based on the adopted testimony of the employee's repetitive work duties. (Insurer br. 20-23.)

The insurer is correct that the judge did not make any findings regarding the nature of either the 2011 fall or the other falls which occurred at unspecified times before that. With respect to the falls prior to 2011, there is no evidence from which the judge could have made such findings, since the employee merely testified that she "fell a few times." With respect to the 2011 fall, the judge did not resolve the inconsistency in the employee's testimony that she fell "in the bed" and later that she fell directly to the floor, or make findings regarding whether this fall was idiopathic or unexplained, and, if idiopathic, whether the employee's fall was nonetheless compensable. [4]

Were the falls a necessary component of Dr. Mabie's causal relationship opinion, we would agree with the self-insurer that the case should be recommitted for findings of fact on the nature and cause of at least the 2011 fall. However, here, recommittal is not necessary because, even absent consideration of the falls, the medical evidence supports a finding that the employee's strenuous and repetitive work over the years was a major cause of her disability and need for a total right knee replacement. Dr. Mabie testified clearly that her repetitive work activities as a CNA were a major cause of her disability:

[4] See Nason, Koziol and Wall, supra, § 10.10 (discussing and distinguishing idiopathic and unexplained falls).

> Q: You specifically identify in your impartial report that the primary factor that you think aggravated her condition was her rigorous repetitive work activities as a CNA?
>
> A. Yes.
>
> Q. In fact, Doctor, it would be your opinion that while there can be potential multiple major causes of the acceleration of osteoarthritis, based on your report you made clear that the repetitive rigorous—I'm sorry, the repetitive vigorous work activities is [sic] at least one of potential multiple major causes?
>
> A. Yes.
>
> . . . .
>
> Q. In fact, Doctor, Dr. Saperia and you agree that a, not the, a major cause of her disability is the repetitive work activities as a CNA?
>
> A. Yes.

(Dep. 45-46.) See Lesoine v. Corcoran Management Co., Inc. 22 Mass. Workers' Comp. Rep. 153, 159 (2008)(while only one cause can be "the" major cause of an employee's disability, multiple causes may qualify as "a" major cause); Alves v. Warerite Distributors, 20 Mass. Workers' Comp. Rep. 203, 205 (2006)(medical opinion that work injury was one of several major causes of employee's ongoing back symptoms satisfies employee's burden under § 1[7A]). The judge made repeated findings adopting Dr. Mabie's opinion that the "employee's vigorous and repetitive use of her right knee over the years in her employment exacerbated her previously existing osteoarthritis in the right knee," (Dec. 9), and "necessitated the total right knee replacement." (Dec. 10.) Although Dr. Mabie assumed that the falls "exacerbated or prompted the progression of her pain," (Dec. 9), he never opined the alleged falls were a necessary component of his "a major cause" opinion.

Moreover, the judge found that Dr. Mabie "agreed with Dr. Saperia that 'a major' cause of the Employee's disability was the repetitive work she was performing for the Employer." (Dec. 9.) Dr. Saperia did not report a history of falls, and, in fact, wrote in

his December 1, 2011, report that the employee "denies any injuries but states that she has been experiencing discomfort for the past three months or so." (Ex. 9; Dec. 10.)

Accordingly, the fact that the judge considered the employee's alleged falls as causative of her right knee injury, (Dec. 19), without making findings on whether those falls were compensable, is harmless error. See Golub v. M.B.T.A., 29 Mass. Workers' Comp. Rep. ___ (July 1, 2015)(where judge found repetitive walking and climbing caused employee's disability, but medical evidence supported only climbing as causative, error in also attributing injury to walking was harmless). The medical evidence the judge adopted adequately supports the conclusion that the employee's repetitive work was *one* of the major causes of her incapacity and need for right total knee replacement, and that is sufficient to support the judge's award. See Alves, supra; Lesoine, supra.

The insurer also argues that the judge failed to make findings regarding its defense of late claim, and that the employee failed to file her claim within four years of becoming aware of the causal relationship between her disability and her employment, as required by § 41.[5] The insurer argues that, because the judge credited the employee's testimony that, over the years, she repeatedly complained to her supervisor of her knee pain incurred while performing her work activities, (see Dec. 17), the four-year statute of limitations began to run as of the first of those complaints, which were made between 2000 and 2011. (Insurer br. 9.)

We agree that the judge did not specifically address the insurer's defense of late claim. However, again, the error is harmless because, as a matter of law, the employee's filing of her claim in November 2012, approximately eight months after she left work on March 30, 2012, due to her right knee problems, satisfied the four-year limitations period.

[5] General Laws c. 152, § 41, provides, in relevant part:

> No proceedings for compensation payable under this chapter shall be maintained unless a notice thereof shall have been given to the insurer or insured as soon as practicable after the happening thereof, *and unless any claim for compensation due with respect to such injury is filed within four years from the date the employee first became aware of the causal relationship between his disability and his employment.*

(Emphasis added.)

The insurer concedes that the judge's finding that the employee provided adequate notice is based on credibility determinations and is thus not reviewable. (Insurer br. 12.) Nonetheless, much of the insurer's argument confuses "late claim" with "late notice," as it refers to the employee's obligation to file a claim within four years of her knowledge that she suffered an "injury." However, the statute of limitations "begins to run not on the date of *injury*, but rather from 'the date the employee first be[comes] aware of the causal relationship between his *disability* and his employment.' " Sullivan's Case, 76 Mass. App. Ct. 26, 31 (2009), quoting G. L. c. 152, § 41 (emphasis added). Because disability is not the same as inability to work, an employee may be disabled, due to a physical or mental impairment, when she seeks medical treatment for a work injury, without being incapacitated from work; thus the statute of limitations may begin to run at the time of treatment. Id.; Orekoya v. Bank of New England Corp., 14 Mass. Workers' Comp. Rep. 29, 32-33 (2000).[6] Here, however, the medical evidence the insurer relies on to establish the employee treated for her right knee is a March 27, 2007, Morton Hospital record of treatment following a fall at work, which the insurer admits did *not* include reference to, or treatment of, her knee. (Insurer br. 18.) The first evidence of treatment to the employee's right knee is Dr. Saperia's note of December 1, 2011. There is no evidence of "disability" or "medical impairment" due to the employee's right knee injury before that treatment. Thus, whether December 1, 2011 or March 30, 2012, the date the employee left work, is considered the date of injury, the employee's claim was filed within the four-year statute of limitations. Accordingly, any error in failing to address the insurer's defense of late claim was harmless.

Accordingly, we affirm the decision. Because the employee failed to file an appellate brief, we award her attorney a 50% reduced fee of $809.10, pursuant to G. L. c. 152, § 13A(6). See Griffin v. Pal Painting Co., 30 Mass. Workers' Comp. Rep. ___ (January 25, 2016), and cases cited.

[6] In Sullivan, the court rejected the suggestion that our decision in Orekoya, supra, set forth a per se rule that any visit to a doctor after a work-related injury starts the period of the statute of limitations. Sullivan, supra at 32 n.12.

So ordered.

Carol Calliotte
Administrative Law Judge

Bernard W. Fabricant
Administrative Law Judge

Filed: **June 10, 2016**

Catherine Watson Koziol
Administrative Law Judge