

COMMONWEALTH OF MASSACHUSETTS

**DEPARTMENT OF
INDUSTRIAL ACCIDENTS**

BOARD NO. 022283-07

Maria Soares
Springfield Wire, Inc.
Hartford Insurance Co.

Employee
Employer
Insurer

REVIEWING BOARD DECISION
(Judges Costigan, Horan and Fabricant)

The case was heard by Administrative Judge Chivers.

APPEARANCES

Douglas F. Boyd, Esq., for the employee
Anthony D. DaDalt, Esq., for the insurer

COSTIGAN, J. The insurer appeals from the administrative judge's decision awarding the employee ongoing § 34 total incapacity benefits for an accepted injury to her right dominant hand. The insurer argues the judge erred by denying its motion for additional medical evidence due to the inadequacy of the § 11A impartial medical report. We affirm the decision

The employee was a manual assembly line worker for Springfield Wire for almost thirty years before her industrial injury of August 3, 2007. The impartial medical examiner, Dr. Charles Kenny, diagnosed the employee with pre-existing osteoarthritis, which combined with the effects of her work injury, a right hand ligament sprain, and caused an aggravation of her osteoarthritic joints. The employee's resulting limitations are substantial, and given her medical condition and limited vocational factors, the judge concluded she was totally incapacitated. (Dec. 2-3.)

The insurer argues the judge erred by denying its post-§ 11A deposition motion for additional medical evidence. It contends the impartial medical examiner's diagnosis changed from his report -- a ligament sprain -- to his deposition testimony -- a joint injury. The insurer posits that nothing in the medical records reviewed by the

doctor even raised the specter of the joint injury diagnosis to which the doctor opined, for the first time, at his deposition. The insurer contends it had the right to meet the purportedly new diagnosis with its own medical evidence. The insurer appears to be arguing that its right to due process was violated, such as we have found in a judge's unannounced adoption of gap medical evidence to support present disability findings. See Gulino v. General Elec., 15 Mass. Workers' Comp. Rep. 278, 281 (2001), and other cases in which a party was improperly foreclosed from addressing opposing medical evidence; Mayo v. Save on Wall Co., 19 Mass. Workers' Comp. Rep. 1, 4 (2005)(allowance and adoption of additional medical evidence without notification to parties violated their right to due process).

In this case, however, we do not agree that the deposition testimony of the impartial medical examiner is so different from the opinions expressed in his medical report, as to require recommitment for the introduction of additional medical evidence. In his report, Dr. Kenny offered two diagnoses: sprain, right hand, and osteoarthritis, right hand. He opined that the employee's work injury, a right hand ligament sprain, combined with her pre-existing osteoarthritis, "to cause the complaints, disability, and need for treatment." (Stat. Ex. 1, 6-7.) The insurer would be hard pressed to challenge this aspect of the doctor's opinion, as it had raised the provisions of § 1(7A)¹ in defense of the employee's claim, and Dr. Kenny's combination² opinion carried the insurer's burden of production under that statute.³ See Fairfield v.

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.

² "Combination" is defined as, inter alia: "The state of being combined. Something resulting from combining two or more things." The American Heritage Dictionary, Second College Edition (1985).

³ Indeed, it was the insurer who elicited the opinion from Dr. Kenny:

Q.: Your diagnosis was a sprain, correct?

A.: Correct.

Q.: And by definition, a sprain is an injury to a ligament?

A.: Well, a sprain is an injury to a noncontrollable collagenous structure. So a ligament is the most likely part of that. Yes, I would agree with that. It can be confused with what's called a strain, which is an injury of a muscle.

...

Q.: In this case, more likely than not, the sprain that you diagnosed was to a ligament?

A.: Yes. It was one of the supporting structures in the hand, and I didn't identify what that was.

Q.: Most likely a ligament, as you sit here today?

A.: Yes. I think probably the wrist or the palmar aspect of the hand or further out in the hand.

...

Q.: When there is swelling of a ligament at a joint, that would impact, would it not, or act upon or aggravate any arthritis at that joint, would it not?

A.: Yes, I think it would.

Q.: You had said that the injury combined, and I don't want to misquote you, but you said that the injury, the sprain, combined with the preexisting osteoarthritis, correct? You said that?

A.: Correct.

Q.: That's your opinion today too?

A.: That is my opinion, yes.

Q.: So the combination, physiologically, was the combination of the swelling of the ligament impacting upon the arthritis? Would that be the combination?

A.: No. I think that if we have a joint that's osteoarthritic, degenerative osteoarthritic, and we assume that this joint is weakened, and if the supporting ligamentous structure of that joint is injured, by direct inference the joint itself has been injured. Because the stresses that tear a ligament are going to be absorbed also by the joint, but it's not visible.

Q.: So the acute tear – I just want to make sure I understand what you are saying, this acute sprain of a ligament, in this case perhaps a tear of a ligament, would immediately affect the surrounding joint or the adjacent joint?

A.: I would say, yes, it would. And in addition, I think even more importantly the stress that caused the tear also simultaneously stressed the joint. And a joint that's been, you know, weakened, because of osteoarthritis, is most likely to suffer a problem as a result of that than one that isn't.

Q.: To make sure I understand you, so the injury to a ligament would have an impact upon the joint, and the same stress that caused the sprain to this ligament will also cause an injury, if you will, to the joint itself. So there are two factors?

A.: Yes, exactly.

...

Communities United, 14 Mass. Workers' Comp. Rep. 79 (2000). The doctor further opined in his report that the ligament sprain was, at the time of his examination, a major cause of the employee's resulting disability. This aspect of the impartial medical opinion carried the employee's burden of proving causally related disability. See MacDonald's Case, 73 Mass. App. Ct. 657 (2009); Vieira v. D'Agostino Assocs., 19 Mass. Workers' Comp. Rep. 50 (2005).

In his deposition testimony, Dr. Kenny opined more specifically that the work injury was an acute sprain of the ligaments of the right hand, which also caused some damage to the employee's already osteoarthritic joints, and that both of those diagnoses were part of the same injury. See footnote 3, supra. When cross-examined regarding the purported change in his opinion as to the nature of the injury, i.e., he had not mentioned injury to the joints in his report, the doctor explained:

I thought by saying [in the report] it combined with the osteoarthritis, the osteoarthritic process is a process of repeated injury and repeated wearing and deterioration of the joint. This was one aspect of that process that seemed to me to be a very precisely defined aspect of the process, but the whole idea is the joint is being subjected to damage over a period of time.

...

What I presumed occurred during this [work] incident was that the injuring force broke some of the [cartilage] cage containing the molecules and damaged some of the cells, perhaps killing them or impairing their ability to produce this substance [collagen]. After that, the ability of the cartilage to contain these molecules is impaired and remains impaired and is the basis for her disability.

(Dep. 25, 28.) We think the doctor's deposition testimony did not essentially change his opinion but rather clarified the work injury's aggravation of the employee's

Q.: To a reasonable degree of medical certainty you feel [the work injury] was a sprain to the ligament?

A.: That was the acute injury, yes, and some damage to the osteoarthritic joint.

Q.: Are you sure, to a reasonable degree of medical certainty, that there was a separate injury to the joint?

A.: It was the same injury.

(Dep. 6-20; emphasis added.)

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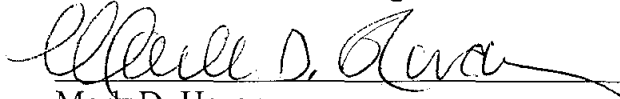
underlying osteoarthritic condition, which aggravation, the doctor concluded, remained a major cause of her disability. (Dep. 58-59.) Therefore, the judge's denial of the insurer's motion for additional medical evidence was not arbitrary, capricious or contrary to law. Accordingly, we affirm his decision.

Because employee's counsel failed to file a response brief, we direct the insurer to pay him a reduced attorney's fee of \$750, pursuant to G. L. c. 152, § 13A(6).

So ordered.



Patricia A. Costigan
Administrative Law Judge



Mark D. Horan
Administrative Law Judge



Bernard W. Fabricant
Administrative Law Judge

Filed:

