COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS	**BOARD NO. 054379-96**
Melodi Johnson Kane	Employee
Mediplex Rehab of Holyoke	Employer
Sentry Insurance Companies	Insurer

REVIEWING BOARD DECISION
(Judges Wilson, McCarthy and Smith)

APPEARANCES
Alan M. Katz, Esq., for the employee
Richard J. Florino, Jr., Esq., for the insurer

WILSON, J. The insurer appeals from a decision of an administrative judge that denied the insurer's complaint to discontinue or modify the employee's G. L. c. 152, § 34 weekly incapacity benefits. Because the judge relied on medical testimony that was both internally inconsistent and inadequate, we recommit the case.

Melodi Johnson Kane was thirty-one years old at the time of the hearing in this matter. A high school graduate, she worked as a certified nursing assistant, helping to lift, restrain and assist with daily living activities patients on a psychiatric ward. (Employee Exhibit 1; Dec. 2.)

On December 13, 1996, the employee injured her left knee during an attempt to stabilize a patient who was falling in the shower. As her kneecap was protruding, she pushed it back into place. She felt immediate pain, swelling and numbness in the knee, but continued to work. Her difficulties increased, however, as she re-injured her left knee when a wheelchair rammed her leg on December 21, 1996. She was placed on light duty work and later returned to regular duty work, before stopping work altogether on March 2, 1997. She has not returned to work. (Dec.2.)

The employee underwent left knee arthroscopic surgery on May 2, 1997, after which she undertook a course of physical therapy. (Dec. 2.) At the time of the hearing

she complained of constant knee pain. The judge found that she is able to perform household activities, albeit with increased pain, but she cannot run or ride a bicycle, and her leg tires and hurts upon stair climbing. Additional surgery has been recommended. (Dec. 3.)

Subsequent to payment of weekly incapacity benefits, the insurer filed a complaint to modify or discontinue those benefits. The complaint was denied at a § 10A conference and the insurer appealed to a hearing de novo. (Dec. 2.) Pursuant to § 11A, the employee was examined by Dr. Gordon Rich. The employee's Motion to Submit Additional Medical Testimony due to complexity of the issues and inadequacy of the § 11A report was denied. (Employee Motion dated August 13, 1998.) Dr. Rich's report and deposition testimony thus comprise the sole medical evidence.

The administrative judge's decision denying the insurer's complaint brought the case to us on the insurer's appeal. (Dec. 5.) The insurer asserts that the administrative judge erred in not addressing causal relationship, which was raised as an issue at hearing. (Dec. 1.) Section 11B of the Act requires that a decision of an administrative judge "set forth the issues in controversy, the decision on each and a brief statement of the grounds for each decision." The judge made no finding on causal relationship.[1]

The insurer also contends that the employee failed to meet her burden of proving medical causation.[2] Where the question of causal relationship exceeds the common knowledge of the hearing judge, proof of causal relationship requires expert medical testimony. Josi's Case, 324 Mass. 415, 417-418 (1949). Certainly, there may be

[1] Although the judge pointed out that the impartial examiner found no reason to dispute the employee's history of pain commencing with the trauma brought about by her injuries at work, (Dec. 3; Dep. 33, 62), this observation does not rise to the level of a finding on causal relationship. Nor is the remark of the impartial examiner an opinion that there is a causal relationship. See infra.

[2] The judge appears to have constructively found causal relationship when he denied the insurer's complaint to modify or discontinue the weekly benefits being paid to the employee.

circumstances "where the cause or nature of the injury is so obvious that it is within the common knowledge and everyday experience of the general population." Lorden's Case, 48 Mass. App. Ct. 274, 280 (1999), citing Lovely's Case, 336, 512, 515 (1957). That is not the case here. The sole medical evidence admitted was the report and deposition of the § 11A examiner, Dr. Rich, who offered a diagnosis of chondromalacia of the patella, hardly a household term. (Statutory Exh.1, 2.) But nowhere in his report does he set out any statement of causal relationship. Counsel for the insurer exposed this omission in his examination of Dr. Rich at deposition.

> Q: Now, chondromalacia of patella, within a reasonable degree of medical certainty and in considering your medical opinion, was that causally related to the injury of 1996 and 1997?
>
> A. I'm not sure.

(Dep. 25.)

Section 11A(2) of the Act requires that the impartial medical examiner's report contain a determination of "whether or not within a reasonable degree of medical certainty any such disability has as its major predominant contributing cause a personal injury." Absent a medical opinion of causal relationship to a reasonable degree of medical certainty in either the report or in the deposition, the § 11A report is inadequate and the judge's dismissal of the insurer's complaint without allowing additional medical evidence is error. See O'Brien's Case, 424 Mass. 16, 22-23 (1996); Patterson's Case, 48 Mass. App. Ct. __, slip op. at 10 (February 18, 2000).

The insurer argues as well that the § 11A report is further flawed on the issue of extent of medical disability. In his report on the physical examination, Dr. Rich stated, "I am more impressed with how good her knee looks rather than how bad it looks on physical examination today. I do not know why she is incapacitated with these complaints. I personally cannot see any objective reason why she cannot return to work doing her regular job as a certified nursing assistant, possibly using a brace." (Statutory Exh. 1, 2.) When deposed, Dr. Rich was asked his opinion *as of the date of his*

examination as to the employee's capability to return to her prior job. He stated "Well, I thought she could be rehabilitated with a physical therapy program and then I didn't see any reason why she couldn't go back to work." (Dep. 12.) Later in the deposition, the employee's attorney sought to clarify whether the impartial examiner's opinion was that the employee could return to work immediately using a brace, or only after rehabilitation in a physical therapy program. Dr. Rich would merely quote from his report, stating that his quoted opinion that she could return to work with a brace was "as of then[,]" meaning the date of exam, and then further quoted from his report, stating that the quadriceps muscle could be rehabilitated with a physical therapy program. (Dep. 55-56.) Another attempt to sort out the time line for a return to work was rebuffed by the impartial examiner, who would only respond, "I'll stick with what I dictated here. I think it's pretty clear, I don't see why we have to beat it to death." (Dep. 56-57.) To the contrary, the sole conclusion that emerges from this muddled testimony is that Dr. Rich's statements on the issue of physical disability as of the date of his examination are contradictory, rendering his opinion internally inconsistent and inadequate as a basis for a finding of continuing total incapacity.[3] On recommittal, the judge may either pose specific questions to the § 11A examiner on the issue of extent and duration of medical disability as of the examination date, or he may allow additional medical evidence on the issue of extent and duration of physical disability.

The case is recommitted to the administrative judge for further proceedings and findings on causal relationship and extent of incapacity, in accordance with this decision.

So ordered.

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[3] The employee counters that the judge's finding on extent of incapacity is adequate because it does not rest solely on Dr. Rich's medical opinion. Rather, she argues, the judge credited her complaints of pain, which the judge properly could consider in reaching his decision. This argument is flawed. Findings of incapacity may be based on an employee's testimony and the judge's observation of the employee *in conjunction with the medical opinion*. Gerci v. Visiting Nurse Assoc., 12 Mass. Workers' Comp. Rep. 462, 465 (1998). Here, due to the internal inconsistency, there was only an inadequate medical opinion on duration of medical disability with which to combine the lay testimony.

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Sara Holmes Wilson
Administrative Law Judge

Filed:

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William A. McCarthy
Administrative Law Judge

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Suzanne E.K. Smith
Administrative Law Judge