COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO.:** 002284-07

Paul S. Dickie	Employee
Kesseli and Morse, Inc.	Employer
AIM Mutual Insurance Co.	Insurer

REVIEWING BOARD DECISION

(Judges Koziol, Costigan and Fabricant)
This case was heard by Administrative Judge Rose.

APPEARANCES

Joseph F. Agnelli, Jr., Esq., for the employee
Robert J. Riccio, Esq., for the insurer at hearing and on brief
Holly B. Anderson, Esq., for the insurer on brief

KOZIOL, J. The insurer appeals from an administrative judge's decision awarding the employee various periods of incapacity benefits under §§ 34 and 35 as a result of a repetitive stress injury to his left knee. The insurer argues the judge erred in finding that the employee gave notice of his injury to the insurer or insured "as soon as practicable" as required by M. G. L. c. 152, § 41,[1] and that the claim should be denied and dismissed due to lack of notice.[2] Finding no error, we affirm the decision.

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[1] General Laws c. 152, § 41, states, in pertinent 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.

[2] The insurer argues that the employee also failed to meet his burden of proving the insurer or the employer had knowledge of the injury and the insurer was not prejudiced by his failure to give notice. (Ins. br. 15-20.) Because the judge found the insurer gave notice of his injury "as soon as

In 1984, the employee, Paul Dickie, began working for the employer as a flooring installer. Approximately seventy-five percent of his job involved installing carpeting, a task that resulted in his knees being twisted at least fifty times per day as his toes or foot dragged against the rug as he moved. (Dec. 5.) The job also required him to rest on his left knee, and "hop" repeatedly on that knee as he changed position. (Dec. 5.) In addition to the installation work, the employee was required to lift and carry carpeting and flooring weighing between fifty and one hundred pounds. (Dec. 4-5.)

In 2000, the employee began to notice pain and a "loose and sloppy" feeling in his left knee at night after work. (Dec. 6.) The employee continued working for the employer until December 3, 2004, when he was laid off. (Dec. 6.) In January 2005, he consulted with Dr. Jeffrey Metzmaker, an orthopedic surgeon, because of pain and swelling in his left knee. Dr. Metzmaker noted the employee had a congenital varus knee and degenerative arthritis of the left knee and ultimately diagnosed the condition as varus mal-alignment and osteoarthritis of the left knee. (Dec. 7-8.) On June 8, 2005, Dr. Metzmaker performed the first surgery on the employee's left knee, consisting of a left proximal tibial osteotomy and iliac crest bone graft. Post-surgery, the employee developed complications, including chronic osteomyelitis and non-union of the left tibia following high tibial osteotomy. (Dec. 9.) Thereafter, the employee sought treatment from several other physicians, had additional hospitalizations, and underwent a number of orthopedic and plastic surgeries to address these complications.[3]

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practicable," he committed no error in failing to make any findings of fact on the issues of knowledge and prejudice. Those factors come into play only when the judge finds that timely notice was not given. General Laws c. 152, § 44, provides:

> Want of notice shall not bar proceedings, if it be shown that the insurer, insured or agent had knowledge of the injury, *or* if it is found that the insurer was not prejudiced by such want of notice.

(Emphasis supplied).

[3] The course of the employee's medical treatment is described in detail in the judge's decision. (Dec. 9-12.) Therein, the judge recounts the circumstances surrounding four additional surgeries on the employee's left knee, performed on October 31, 2005, December 12, 2005, January 17, 2006, and January 22, 2008, as well as the extensive treatment the employee received for

The employee filed a claim for compensation on February 8, 2007.[4] Prior to that date, he had not filed a report of injury or otherwise notified his employer that he injured his knee at work.[5] (Tr. 85.) The claim proceeded to conference and on May 9, 2007, an order issued denying the employee's claim, which the employee timely appealed. (Dec. 2.)

At the hearing, the judge found the report of the § 11A impartial medical examiner, orthopedic surgeon, Dr. John R. Corsetti, inadequate with respect to the issue of disability, and the parties submitted additional medical evidence. (Dec. 2.) The judge adopted Dr. Corsetti's diagnoses of left knee medial compartment osteoarthritis with varus alignment, and status post high tibial osteotomy complicated by infected nonunion. He also adopted Dr. Corsetti's opinion that the employee has a history of degenerative arthritis of the left knee, and that the employee's work duties over twenty-two years "likely led to acceleration of the degenerative condition and that his work is a major but not predominant cause of his condition."[6] (Dec. 13-14.) The judge specifically adopted the disability opinion of Dr. George Whitelaw, who evaluated the employee on January 25, 2007, that the employee was disabled from his career as a carpenter-floor installer. (Dec. 14.) In addition, the judge adopted the May 2008, opinion of the insurer's examiner, Dr. Richard Anderson, that the employee had a work capacity "with the avoidance of

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infection. (Dec. 9-12.) Following the employee's last surgery on January 22, 2008, Dr. Carl Talmo, his then treating orthopedist, recommended a left total knee replacement. (Dec. 12.)

[4] We take judicial notice of documents in the board file. See Rizzo v. M.B.T.A., 16 Mass. Workers' Comp. Rep. 160, 161 n.3 (2002).

[5] The employee did not report a work injury. He testified that before he was laid off, he told his foreman, Mark Eldridge, he was having problems with his knee. (Tr. 25-26.) After he saw Dr. Metzmaker in January 2005, he told Mr. Eldridge the doctor recommended a total knee replacement. (Tr. 37.) George Kustigian, the employer's CEO and treasurer, testified that there was a memo from Mr. Eldridge in the employee's personnel file indicating the employee had called looking for work after being laid off, and that he had arthritis in his knee. (Tr. 118.)

[6] The judge also adopted Dr. Talmo's "stronger and confirming opinion . . . that the employee's work activities are 'the major, if not the only, precipitating cause of his osteoarthritis,' " and found these opinions satisfied the "a major cause" requirement of § 1(7A), (Dec. 14), a defense raised by the insurer. (Dec. 2).

prolonged standing or walking (15 minutes), no repetitive bending or squatting, and a lifting restriction of 25 pounds." (Dec. 14.)

In regard to the issue of notice, the judge made the following findings:

> The time frame required by statute is that of "as soon as practicable." Where the employee's condition is not patently the result of a work injury, he/she is not required to give notice "until, acting reasonably in search of the cause of his disability, he learns that he has sustained an injury that probably arose out of and in the course of his employment." [Nason, Koziol and Wall, Workers' Compensation, 29 M.P.S. (2003) § 15.3, p. 455, quoting Wheaton's Case, 310 Mass. 504, 506 (1942).] The employee's claim is based on repetitive trauma and not on a frank accident. The repetitive nature of the injury is not patently obvious to an injured worker such that an immediate notice to the employer or insured would be expected or required.
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> Although the employee knew he had arthritis in his knee, he was unaware of what causes arthritis. [Tr. 38.] I further find that it is reasonable for one outside the medical field to be unaware of the potential causes of arthritis. I find that the employee was not made aware of any potential connection to his job until he consulted his present counsel. Once he was made aware of a possible work connection, he made reasonable and timely efforts to search for the cause of his disability. Consequently, I find that notice was given "as soon as practicable" and was therefore timely.

(Dec. 15-16.)

The judge then awarded the employee § 34 benefits for the numerous periods he was hospitalized, ongoing § 35 benefits beginning on June 26, 2005, and § 34 benefits commencing prospectively on the date of the proposed left knee replacement surgery. (Dec. 17-18.)

The insurer asserts, without a single citation to the record, that the evidence conflicted with the judge's finding that the notice was given "as soon as practicable," and that the employee had not acted reasonably in search of the cause of his disability. (Ins. br. 12-15.) Specifically, the insurer takes issue with the judge's findings crediting the employee's testimony that he knew he had arthritis but did not know what caused it, and that the employee was not made aware of any potential connection to his job until he consulted present counsel. (Dec. 15.) To the extent that these findings are based upon credibility determinations, we will not disturb them. See Lettich's Case, 403 Mass. 389, 394 (1988)(reviewing board may not review credibility determinations). In

addition, "the judge's findings, including all rational inferences permitted by the evidence, must stand unless a different finding is required as a matter of law." Spearman v. Purity Supreme, 13 Mass. Workers' Comp. Rep. 109, 112-113 (1999). "A decision is not arbitrary or capricious unless there is no ground which 'reasonable men might deem proper' to support it." Burnette v. Command Marketing Corp., 13 Mass. Workers' Comp. Rep. 56, 60 (1999), quoting from, T.D.J. Development Corp. v. Conservation Commn. of North Andover, 36 Mass. App. Ct. 124, 128 (1994).

Contrary to the insurer's brief, the employee did not testify that as early as January 25, 2005, he "believed" that his arthritis was caused by his work. (Ins. br. 13.) Instead, when asked, "Did you know what was causing [the arthritis] at that point in time?," the employee replied in the present tense: "I believe it was from my job." (Tr. 38.) To the extent this answer was confusing in the context of the questioning as a whole, it was immediately clarified.[7] (Tr. 37-38.)

The judge also found that prior to consulting his present counsel, the employee had not been made aware of a potential causal connection between work and his arthritis.[8] (Dec. 15.) The

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[7] The following exchange then took place:

> The Judge: When was that?
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> Q. At that point [January of 2005] when you talked to him [his foreman], did you know what had caused it at that point in time?
>
> A. Did I know?
>
> Q. Yes.
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> A. I believed it was arthritis.
>
> Q. But you didn't know what caused the arthritis?
>
> A. No.

(Tr. 38.)

[8] The undisputed testimony was that the employee first consulted with his present counsel in late 2006. (Tr. 65-66.)

employee testified, and the insurer does not dispute, that Dr. Whitelaw, who evaluated the employee and authored a report on January 25, 2007, was the first doctor who told him his knee condition was caused, in part, by his work. (Tr. 66; Ins. br. 8, 21, 22.) Notice to the insurer and employer was then given through the claim filed on February 8, 2007.[9] (Tr. 67, 116; Ins. br. 10.)

The filing of a notice "as soon as practicable" after the occurrence of an injury requires an employee to furnish such notice within a reasonable time after he has knowledge of the particulars that the notice should contain. He could not be expected to give a notice of the cause of the injury, the nature of which might be entirely due to disease, until, acting reasonably in search of the cause of his disability, he learns that he has sustained an injury that probably arose out of and in the course of his employment.

Wheaton's Case, supra.

The insurer argues, however, that the employee should have been aware of the cause of his injury because his knee hurt after working and he had to ice it. (Ins. br. 14; Dec. 6, 16.) Under the circumstances, we do not consider these findings to require, as a matter of law, a conclusion contrary to that drawn by the judge. The judge properly found it was reasonable for a layperson to be unaware of the causes of arthritis. Causation is a uniquely medical question, except in certain circumstances. See, e.g., Lovely's Case, 336 Mass. 512, 516 (1957)

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[9] At hearing, (Tr. 86), and again in the conclusion of its brief on appeal, (Ins. br. 22), the insurer appears to suggest, without citation to any legal authority, that the claim form filed by employee's counsel on behalf of the employee does not satisfy the requirements of § 42 because it is not signed by the employee. General Laws, c. 152, § 42 provides:

> The said notice shall be in writing, and shall state in ordinary language the time, place and cause of the injury, and shall be signed by the person injured, or, in the case of his death, by his legal representative, or by a person to whom payments may be due under this chapter, or by a person in behalf of any one of them. Any form of written communication signed by a person who may give the notice as above provided, containing the information that the person has been so injured, giving the time, place and cause of the injury, shall be considered a sufficient notice.

Here, the employee's attorney signed the claim form on the employee's behalf, and was clearly a person authorized to give notice under § 42.

(layperson may be able to reasonably relate incapacity to specific injury or incident as matter of common knowledge and experience). Particularly where there is a pre-existing condition, such as the employee's arthritis, it is beyond the common knowledge and experience of a layperson to determine causation. See, e.g., Josi's Case, 324 Mass. 415, 417-418 (1949)(whether accident caused disability or aggravated pre-existing arthritic condition was beyond common knowledge and experience of ordinary layman and required expert medical testimony).

Also rational was the judge's finding that the repetitive nature of the employee's injury made its cause less obvious. Where there is no specific incident causing injury, but a repetitive trauma superimposed on a pre-existing condition, the difficulty in determining causation may be even more problematic. Moreover, because the employee's credited testimony was that he did not know what caused his arthritis, he could not have been expected to tell his doctors that work caused his knee condition. The employee also had serious complications following his June 2005 surgery, requiring treatment by numerous physicians, and multiple hospitalizations and surgeries to treat his infection and the nonunion of his tibia. Against this backdrop, we find no error in the judge's finding the employee "made reasonable and timely efforts to search for the cause of his disability," and thus gave notice his knee condition was work related "as soon as practicable." (Dec. 16.) See Whitlock's Case, 361 Mass. 878 (1972)(circumstances, including continuous hospitalization, partial paralysis, and treatment for depression, warranted finding that notice seventeen months after injury was given "as soon as practicable"). Based on the evidence presented in this case, the judge's findings and conclusions regarding the timeliness of the notice were rational.[10] Accordingly, we affirm the decision, as there was no reason for the judge to conduct any further analysis in this case. See footnote 2, supra; Whitlock's Case, supra (where board's findings that notice had been given as soon as practicable was supported by the evidence, unnecessary to consider insurer's further argument that delay was prejudicial to it).

Pursuant to G. L. c. 152, § 13A(6), the insurer is ordered to pay employee's counsel a fee of $1,495.34.

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[10] We are not suggesting that employees who allege repetitive injury are excused from giving notice until they receive a physician's opinion on causation. We hold only that, under the circumstances here, it was not arbitrary and capricious for the judge to credit the employee's testimony he did not know his arthritis was likely caused by his job, and to find that notice was timely when given within a month after receiving Dr. Whitelaw's opinion on the issue.

So ordered.

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Catherine Watson Koziol
Administrative Law Judge

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Patricia A. Costigan
Administrative Law Judge

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Bernard W. Fabricant
Administrative Law Judge

Filed: ***September 10, 2009***