COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 006435-95**

Paul W. Gomes	Employee
Bristol County House of Correction	Employer
County of Bristol	Self-Insurer

REVIEWING BOARD DECISION
(Judges Maze-Rothstein, Levine and Carroll)

APPEARANCES
Deborah G. Kohl, Esq., for the employee
Robert M. Novack, Esq., for the self-insurer

MAZE-ROTHSTEIN, J. The self-insurer appeals from a decision finding it liable for a second period of incapacity following the employee's injury as he stepped out of his vehicle while not at work. The self-insurer argues that there was no medical opinion establishing causal relationship between the employee's initial industrial injury and his second period of medical disability. We agree, and therefore reverse the decision.

Paul Gomes had been a correctional officer for 25 years at the Bristol County House of Correction when, on February 3, 1995, he injured his right knee in an attempt to cut down and carry away an inmate who was trying to hang himself. (Dec. 3.) In April of 1995, he had right knee surgery, involving loss of some of the meniscus.[1] Id. He returned to full duty on June 12, 1995.[2] (Dec. 2.) The self-insurer accepted liability for

[1] The decision indicates that the surgery was in August of 1995. (Dec. 3.) This appears to be an error, however, as the parties agree that the surgery was on April 10, 1995. (Employee Brief 1; Self-insurer Brief 3.) This date is supported by the § 11A examiner in his report (Joint Ex. 1) and deposition testimony. (Dep. 6.) The employee testified that the surgery was between February and June 1995, though he could not recall specifically when. (Tr. 12.)

[2] Although the decision indicates at one point that the parties stipulated that the employee returned to work on June 12, 1995, (Dec. 2), it indicates at another point that he returned to work on April 10, 1995 (Dec. 3), which was actually the date of his first surgery. The employee's

this injury. Id. Following his surgery and return to work, the employee felt a lot better and he therefore stopped treating. (Dec. 4.) However, he continued to feel "twitching and buckling" in his knee, though it did not cause him to fall down. Id. He also experienced intermittent "aching," for which he used over-the-counter medication. Id. Although he never went to the doctor after his return to work, he could not perform all of his normal activities. Id.

On June 15, 1997, approximately two years after his return to work, the employee pulled up to his house, got out of his truck and experienced right knee pain. He limped into his house. (Dec. 3, 5; Tr. 14.) He sought treatment a few days later, and underwent a second right knee surgery in August 1997. (Dec. 3, 4, 6.)

Mr. Gomes filed a claim for § 34 temporary total incapacity benefits from June 15, 1997 to November 7, 1997, (Employee Ex. 1), which was denied at conference. (Dec. 2.) A hearing de novo was held on April 8, 1998. The only medical evidence consisted of the report and deposition testimony of the G. L. c. 152, § 11A[3] medical examiner, Dr. VonErtfelda. (Dec. 1, 5.) The doctor opined that the 1995 injury resulted in a medial meniscus tear, which was partially removed in surgery. (Joint Ex. 1; Dep. 6, 9-10.) The 1997 incident resulted in another tear of the medial meniscus, but in a different location, (Joint Ex. 1; Dep. 27); it also caused an anterior cruciate ligament tear, which had been intact at the time of the work injury. (Joint Ex. 1, 2; Dep. 22.) The § 11A physician stated that he could not say with any degree of medical certainty that there was a relationship between the employee's work injury of 1995 and his post-June 1997 medical disability. (Joint Ex. 1, 2; Dep. 14-16, 17-18, 31-32.) Instead, he attributed the

---

testimony at hearing supports the conclusion that he returned to work in June of 1995, (Tr. 20-21), and both parties agree that he returned to work at that time. (Employee Brief 1; Self-insurer Brief 3.)

[3] General Laws c. 152, § 11A, gives an impartial medical examiner's report the effect of "prima facie evidence with regard to the medical issues contained therein," and expressly prohibits the introduction of other material medical evidence to meet it unless the judge finds the additional medical testimony is required due to the complexity of the medical issues involved or the inadequacy of the report. O'Brien's Case, 424 Mass.16 (1996).

employee's present symptoms to degenerative changes in the knee, which had been present at the time of the first injury. (Joint Ex. 1, 2; Dep. 7, 17, 18.)

The judge credited the employee's testimony and found that he had not fully recovered from his initial knee injury by June of 1997. (Dec. 5-6, 7, 9-10.) Without discussing the findings of the § 11A doctor at any length, she rejected as inconsistent with the evidence that part of his opinion which was based on an assumption that the employee had no problems with his knee after he returned to work in June 1995. (Dec. 7.) She found that, because the employee had had ongoing symptoms since 1995 and because he had acted non-negligently in stepping out of his truck on June 15, 1997, the causal chain was unbroken between the initial industrial injury and the employee's incapacity after June 1997. (Dec. 6, 7.) In so finding, she particularly relied on the doctor's testimony that part of the employee's meniscus had been excised in his original surgery, leaving his knee physically different from what it was prior to the industrial accident, and that "the meniscus is an important organ within the body and it is necessary in the knee." (Dec. 5, 8, 9; Dep. 16.)

The self-insurer appeals, alleging, *inter alia*, that the judge erred in rejecting the causation opinion of the § 11A doctor and substituting her own opinion, unsupported by any other medical evidence. The employee responds that, under the holding of Mutcherson v. Bechtel, 11 Mass. Workers' Comp. Rep. 369 (1997), the judge was correct in holding that the causal chain is not broken where the employee acts non-negligently and reinjures himself. The employee maintains that even though the § 11A physician was unable to state with any degree of medical certainty whether the first injury contributed to the second injury, in light of the doctor's testimony that the first injury may have predisposed the employee to further injury, the medical conclusion is clear that the two injuries are linked. We agree with the self-insurer that the judge improperly substituted her own opinion for that of the § 11A physician, without adequate support in the medical evidence; we therefore reverse the decision.

The § 11A doctor is charged with providing an opinion on medical issues, including causation. G.L. c. 152, § 11A(2); Scheffler's Case, 419 Mass. 251, 257 (1994). As to those issues, the physician's report constitutes prima facie evidence. G.L. c. 152, § 11A(2); Scheffler's Case, supra at 258. Prima facie evidence requires a finding that the evidence is true, if there is no competent contradictory evidence. Id. A judge may reject a § 11A medical opinion if there is a rational basis in the record. Simas v. Modern Continental Obayashi, 12 Mass. Workers' Comp. Rep. 104, 109 (1998); Paolini v. Interstate Uniform, 11 Mass. Workers' Comp. Rep. 322, 324 (1997). However, she cannot substitute her own lay opinion on causal relationship for that of the § 11A physician where the doctor had the same facts before him as did the judge, when he rendered his final opinion on causal relationship. Shand v. Lenox Hotel, 12 Mass. Workers' Comp. Rep. 365, 368 (1998).

Here, the judge rejected part of the § 11A examiner's "opinion which relies on an assumption that the Employee was problem free as it is inconsistent with all the facts in evidence." (Dec. 7.) However, the doctor's opinion was not based on that assumption. Although in relating the employee's history, the doctor's report did so indicate, (Joint Ex. 1), at his deposition, when asked to assume that the employee had experienced precisely the symptoms found by the judge after his return to work (i.e., buckling and twitching from time to time causing him some problems, though not enough trouble to go to the doctor [Dep. 17]), the doctor maintained his position that there was no causal relationship between the industrial injury and the employee's medical disability after June 1997.[4]

[4] In response to questioning by the employee's attorney, the impartial physician's testimony regarding causal relationship was as follows:

> Q: . . . Now assume further that he testified that, from time to time, he would feel some buckling or some twitching in the knee but without enough pain to require him to go back to the doctor during the time between his return to work in 1995 and the time of this incident in June of 1997. . . . And assume, again, that the second time that he has the surgery, the same degenerative changes are found, except this time we have a tear in the medial meniscus again and there is the ACL ligament tear – everything that, basically,

you've noted. Can you say with any degree of medical certainty, again, that there is any relationship or no relationship between the first and second surgeries? . . .

A: I can't – I can't honestly say that there is any relationship. I mean, the only thing I could say, if I were to stretch it, would be to say that he had a tear of the medial meniscus in 1995. This required an excision. The meniscus is an important organ within the body and it is necessary in the knee. And so perhaps, as a result of that loss of some meniscus, he perhaps was predisposed to another injury a little easier than someone else. That's about as far as I can –as much as I can say.

Q: Now, would the incident in June of 1997 when he was getting out of the truck, would that be a reoccurrence, in your medical opinion, or an aggravation?

A: It seemed to me like another injury, from the history.

Q: And why would you say it was another injury?

A: Well, he told me that he was doing fine and—because I questioned him carefully about that. And he said he had, quote, "No trouble with his knee until the episode of June 15, 1997." So I have to assume it's a new injury.

Q: Now assume that his testimony was that in between '95 and '97 he had some twitching, some buckling from time to time but, again, without enough that he would require to go back to the doctor but enough to know that it was something that, from time to time, he would have a problem with. Would you still feel that was a completely new incident?

A: I have to assume it's a new incident. I mean, he had degenerative arthritis. I mean, that could account for some of his symptomatology between the two. But I don't know what else I can say. If someone tells me that he has, quote, "no trouble" and then he has a re-injury and then has to have surgery, I have to assume it's another injury.

Q: Okay. And what you're relying on is the fact that he said to you that he was having no trouble.

A: Yes. And then he related an injury.

Q: If there was trouble in between '95 and '97 with regard to the knee, would that change your opinion?

A: Not really, because he has degenerative changes in the knee and many of these symptoms that you are describing are consistent with that type of problem.

(Dep. 14-18);

This is not a situation such as that in Bedugnis v. Paul McGuire Chevrolet, 9 Mass. Workers' Comp. Rep. 801 (1995), where we held that an ambiguous medical opinion on causal relationship can be strengthened not only by other expert testimony but also by lay evidence. Here, even though the doctor was given a history as found by the judge in a hypothetical his final opinion remained the same: he could not say with any degree of medical certainty that the industrial injury related causally to the current medical disability. (Dep. 31-32). See Perangelo's Case, 277 Mass. 59, 64 (1931)(where new evidence is presented, the expert opinion which must be taken as evidence is his final conclusion at the moment of testifying). See also, Brooks v. Labor Mgmt. Serv., 11 Mass. Workers' Comp. Rep. 575, 579 (1997)(final expert opinion must be based on a sound foundation supported by the facts). This last opinion, is not dislodged by the physician's earlier speculation that, in losing some of the meniscus, the employee was "perhaps predisposed to another injury a little easier than someone else" (Dep. 16), or that he would "guess that there would be more predisposition to a problem, to an injury than

---

In response to questioning by the insurer's attorney, the impartial examiner answered thus:

> Q: Okay. Is it also your opinion, to a reasonable degree of medical certainty, that there is no relationship between the 2/3/95 injury and the 6/15/97 injury?
>
> A: Yes, other than what I had stated before about the fact that, as a result of the 1995 injury, he no longer had a normal meniscus. The meniscus was torn. So he was left with an abnormal situation. In other words, he didn't have a complete meniscus. So I would guess that there would be more predisposition to a problem, to an injury than someone who had a normal meniscus. I think that's true of any type, any time a meniscus is torn and excised.
>
> Q: But you can't say, to a reasonable degree to medical certainty –
>
> A: No.
>
> Q: --that that 2/3/95 injury had any effect on this 6/15 –
>
> A: I can't say with any degree of certainty.
>
> (Dep. 31-32.)(Emphasis added).

someone who had a normal meniscus." Id.; Brooks, supra 579 (earlier conflicting opinion may diminish weight of later opinion). Compare Bedugnis, supra (where the physician consistently felt there was "quite possibly" a causal connection).

The employee's reliance on Mutcherson v. Bechtel, 11 Mass Workers' Comp. Rep. 369 (1997), is misplaced. He argues Mutcherson requires a finding that the second period of disability is causally related to the workplace injury unless the self-insurer shows that the employee's actions prior to the second period of disability involved gross negligence or misconduct. (Employee Brief 2.) This puts the cart before the horse. In Mutcherson, we held that an uncontroverted medical opinion causally relating an employee's second period of medical disability to his work injury could not be rejected unless the aggravating non-work activity had been more than negligently performed. Id. at 372. We did not hold that a judge could find causal relationship where there is no medical opinion that it existed. Where, as in Mutcherson, supra, a medical opinion does establish a causal relationship between the work injury and a later period of medical disability following an incident outside of work, then and only then must the employee's actions be examined for gross negligence or misconduct. If he was acting reasonably or only with simple negligence, then the causal chain remains intact. If he was involved in gross negligence or misconduct, then the causal chain breaks. But, first and foremost, there must be a medical opinion establishing causal relationship before the employee's behaviors are reviewed. See Kashian v. Wang Laboratories, 11 Mass. Workers' Comp. Rep. 72, 74-75 and n.2 (1997). Cf. Gulczynski v. Granada Hosp. Group, 7 Mass. Workers' Comp. Rep. 151, 152-153 (1993) (where the issue of causation was not a medical one, and therefore, the only question was whether the causal chain was broken by misconduct or gross negligence.) The medical opinion here was one of no causation.

For the above reasons, we reverse the decision of the administrative judge.

So ordered.

Susan Maze-Rothstein
Administrative Law Judge

Martine Carroll
Administrative Law Judge

Frederick E. Levine
Administrative Law Judge

Filed: May 6, 1999