COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 036112-13**

Percida Maldonado	Employee
CPF Incorporated	Employer
AIM Mutual Insurance Co.	Insurer

REVIEWING BOARD DECISION
(Judges Fabricant, Koziol and Long)

The case was heard by Administrative Judge Maher

APPEARANCES
Paul L. Durkee, Esq., for the employee
Peter P. Harney, Esq., for the insurer at hearing
Holly B. Anderson, Esq. for the insurer on appeal

FABRICANT, J. On appeal from a decision awarding the employee weekly benefits pursuant to § 34, and medical benefits under § 30, the insurer seeks reversal on the grounds that the employee's theory of recovery runs afoul of the holding in Zerofski's Case, 385 Mass. 590 (1982). It argues the injury developed from a wear and tear type repetitive activity, rather than from a specific incident or series of harmful incidents at work arising from an identifiable condition not common and necessary to all or a great many occupations, and that the evidence does not support the judge's findings of fact on that issue. We affirm the decision.

At the time of hearing, the employee was a fifty-seven year old college graduate who was born in Puerto Rico. She worked for the employer on two machines that put labels on Pepsi products at a bottling factory. (Dec. 5.) The two machines were large and fed bottles upright on conveyor-like tracks, into an area where glue and labels were applied automatically. Because the bottles would often fall over, the employee would have to quickly straighten them up while monitoring the level of glue and making sure the labels were being affixed properly. There was always something she had to check or fix, requiring her to walk or stand during her shifts which ran ten to twelve hours per day.

In order to prepare the machines for the bottle run, the employee had to change the rolls of labeling drums. She estimated the weight of the drums at twenty to thirty pounds each. All of her work required the employee to be on her feet during her shift and to move from machine to machine constantly. (Dec. 6.)

On June 2, 2009, the employee was injured when she slipped off a bar she had stepped upon in order to reach and change out parts. (Tr. 21-22, Dec. 6.) At that time she fell and hit her left leg and had pain in her left shin. She was treated at Nashoba Valley Hospital and was out of work for a week. (Dec. 6.)

The employee had right foot pain, but her left shin and leg pain was also very bad. During her last year of employment, she felt she was getting too slow to do her job and began taking days off due to the pain. She sought treatment from her podiatrist who referred her to a surgeon. On August 30, 2013, a right Achilles tendon lengthening and right triple arthrodesis surgery was performed. The employee has not worked since then. (Dec. 6.)

The employee's claim for §§ 34, 13 and 30 benefits was conferenced on August 13, 2014, and an award of those benefits was issued. Both parties filed timely appeals and the matter was heard at a hearing *de novo* on December 16, 2015. (Dec. 3.)

Dr. Steven A. Silver conducted a § 11A impartial medical examination on December 8, 2014. (Dec. 3.) The judge allowed a motion for additional medical evidence advanced by the employee on the basis of both inadequacy and complexity. (Dec. 8.)[1] After reviewing all of the additional medical evidence submitted, the judge adopted parts of the opinions of Drs. Neil J. Feldman, Justin Dorfman, Jennifer Weyler, Mercedes Martinez, Mark O. Cutler and the §11A examiner. (Dec. 8.)

We summarize the adopted medical evidence as follows:

Dr. Justin Feldman opines that the employee's duties are of a heavy labor-

[1] The § 11A inadequacy finding was based on the examiner's failure to address causation and his request for additional information. Furthermore, due to the complexity of the medical issues involved, which now included a psychiatric component as well as a possible complex regional pain syndrome diagnosis, and, a § 1(7A) diagnosis, the judge found the need to review additional medical evidence. (Dec. 4.)

intensive, repetitive nature and that her "work after the initial injury in 2009 was ultimately responsible for the surgical procedures that she required in 2013 and the subsequent total disability." (Employee Exhibit 13, #1, Dec. 8.)

Dr. Justin Dorfman stated that the employee's repetitive work activities leading to her pain disorder were the "predominant contributing cause with respect to her diagnosed health conditions and temporary total disability from August 30, 2013 to present and continuing." (Employee Exhibit 13, #2, Dec. 9.)

Dr. Jennifer Weyler opines that the long hours of standing and walking on hard surfaces at work was "a major contributing cause of [the employee's] arthritis, the need for surgery and the resulting surgery." (Employee Exhibit 13, #7, Dec. 10.)

Dr. Mark O. Cutler indicates that the employee's "repetitive work activities leading to her pain disorder are the predominant contributing cause with respect to her psychiatric disorders." (Employee Exhibit 13, #3, Dec. 11.)

The insurer appeals the hearing decision ordering payment to the employee of § 34 temporary total incapacity benefits from August 30, 2013, to date and continuing, and §§ 13 and 30 payment of reasonable and adequate medical expenses, including outpatient psychiatric treatment.

The insurer first argues that the judge erred as a matter of law in his finding that the employee sustained a personal injury arising out of and in the course of her employment, as a consequence of repetitive climbing. (Ins. br. 22.) The insurer posits that the reports of Drs. Weyler, Dorfman, Feldman and Cutler show either that the "repetitive activity" identified as causative was prolonged standing and walking, or that the physicians' understanding of the nature of the employee's work activity conflicts with the employee's testimony adopted as credible by the judge. (Ins. br. 18-19.) We disagree.

Because the distinction between "wear and tear" and "compensable injury" is a recurring and difficult one, it is worthwhile to explore the important principles laid out in Zerofski's Case, supra:

Unlike many other workers' compensation statutes, G.L. c. 152 does not require

that a personal injury occur by accident. Zerofski's Case, 385 Mass. 590, 593 (1982). Gradually developed injuries are compensable as well as those caused by sudden incidents. Id; see also Trombetta's Case, 1 Mass. App. Ct. 102 (1973)(a compensable injury may develop gradually from the cumulative effect of stresses and aggravations). There are, however, limits on cumulative repetitive-type compensable injuries. Recovery will be denied where the disability is as a result of bodily "wear and tear." Zerofski's Case, supra.

In Zerofski, the court held that prolonged standing and walking on concrete floors over a ten-year period, which aggravated an employee's pre-existing foot condition, was not a compensable personal injury within the meaning of the Act. The court recognized that the employee's prolonged standing and walking at work contributed to his condition only to the extent that a great many similar activities would have. In acknowledging that the line between compensable injury and mere "wear and tear" is a delicate one, the court arrived at the following restatement of the range of harm covered by the act: "To be compensable, the harm must arise either from a specific incident or series of incidents at work, or from an identifiable condition that is not common and necessary to all or a great many occupations." Id. at 594-595. Applying this standard, the court held that prolonged standing and walking are simply too common and necessary among human activities to constitute identifiable conditions of employment.

In its brief, the insurer argues that the employee's theory of recovery is a work injury from repetitive standing and walking, rather than from "harm arising… from an identifiable condition… not common and necessary to all or a great many occupations." (Ins. br. 16, quoting Zerofski's Case, supra at 594-595.) Thus, it is the result of non-compensable wear and tear. Zerofski's Case, supra, citing Aetna Life & Cas. Ins. Co., v. Commonwealth, 50 Mass. App. Ct. 373, 377 (2000).

While it is true the employee testified that her job required prolonged standing and walking on concrete floors, the judge found at least one repetitive element of her job that was not common and necessary to all or a great many occupations: her changing of parts on the machine, which required her to step up on the frame bar on the conveyors. The

judge found that the employee sustained a personal injury arising out of and in the course of her employment while performing a repetitive, climbing activity. (Dec. 12.) Relying in part on the credible consistent testimony of the employee, he wrote:

> "Because she was constantly on her feet for long shifts and walking between the two machines as well as the activity setting up and adjusting the product as well as climbing up she experienced worsening pain especially in the right foot and had difficulty standing and walking trying to do her job."

(Dec. 6.)

The employee's testimony on direct examination supported the judge's findings on the nature of her work activities. When queried about her initial 2009 injury, the employee explained a process in which she would regularly "step up on a bar" in order to reach and interchange a malfunctioning part of the bottle labeling machine. (Tr. 24.)[2] In addition to the employee's testimony relative to her repetitive stepping/climbing on the conveyor machine to replace parts, she also testified that the machine moved "really fast," and that there was a need to replace drums weighing 20-30 pounds containing labels that would be mechanically affixed to bottles. (Dec. 6, Tr. 21-23.) The insurer concedes that testimony on the employee's duty to change out machine parts as well as with the additional duty of "cleaning the machines of glue involved stepping into the machine through a door." (Ins. br. 21.)

Under G.L. c. 152, § 11C, findings that are dispositive of the case, based on the credibility of witnesses who have given live testimony, are not subject to our review. Krell v. State Street Restaurant Corp., 5 Mass. Workers' Comp. Rep. 105, 108 (1991), citing Lettich's Case, 403 Mass. 389 (1988). The judge found the employee's testimony consistent and credible in proving a compensable personal injury arising out of her employment while performing the activity of changing out the parts to the machine. (Dec. 12.) We see no reason to disturb those findings.

[2] The employee testified that when she returned to work one week after the June 2, 2009 injury, there was no light duty work so, she continued with the same duties. (Tr. 23, 27-28.)

There is also medical evidence supporting the employee's contention that her disabling foot problems developed as a result of cumulative stresses and strains due to the unique conditions of her employment. Dr. Mark O. Cutler examined the employee on February 8, 2016 at the behest of her attorney. His history reports that the employee was on her feet approximately ten hours a day while working on a machine for the employer. As for the June 2, 2009 injury, he notes that the employee fell approximately three feet suffering a left lower extremity contusion and striking her right foot. Upon returning, "the patient would climb and lift in the course of her work." (Employee Exhibit 13, #3.)

We further note the employee's testimony on direct:

> Q: Let me stop you there, Percida. These machines were big enough that you could actually get inside them?
>
> A: Yeah, I do. You put the door up, and then you ***climb*** in there and you bend to clean.
>
> Q: How frequently were you doing that?
>
> A: Well, depends. Some days more frequently because nobody could get why the machine was doing something, whether its glue or [sic]. Sometime it was the kind of thing, problems.
>
> Q: Okay.
>
> A: It depends how they're running that day. Some days not too bad; and some days were bad.

(Tr. 19; emphasis added.)

It is apparent that the judge's findings support that the employee was engaging in activities not common to many occupations, i.e., climbing into the machine and stepping on the frame of machines to change parts. In accordance with the test set forth in Zerofski, along with the medical and testimonial evidence adopted and found credible by the judge, we see no reason to disturb his findings as a matter of law.

The insurer also argues that the hearing decision was arbitrary, capricious and based on crucial and material findings of fact not supported by the evidence. The insurer

takes issue with the judge's finding that the employee had to climb on the machine to "adjust product," arguing that it has no basis in the evidence. Although there was no evidence that climbing was involved in the adjusting of product, nothing in the record supports the insurer's position that the judge "likely had an incorrect impression of the requisites of the employee's work …." (Ins. br. 21-22.)

It is well settled that it is within the judge's discretion to establish essential facts not proven by direct evidence but established by reasonable inferences from the facts shown to exist. A judge's findings, including all rational inferences permitted by the evidence, will be upheld unless a different finding is required as a matter of law. Howze v. M.B.T.A., 25 Mass. Workers' Comp. Rep. 159 (2011), citing Sawyer's Case, 315 Mass., 75, 76 (1943). Compare, Pilon's Case, 69 Mass.App.Ct.167, 169 (2007) (weight to be given duly admitted evidence is for the judge alone to determine). "Factual findings will not be reversed unless wholly lacking in evidentiary support or otherwise tainted by errors of law." Phillips v. Armstrong World Industries, 5 Mass. Workers' Comp. Rep. 383, 384 (1991).

Given that the evidence indicates two other identifiable repetitive conditions not common to many occupations, we read the judge's finding as to climbing to reposition the bottles as harmless. LaPlant v. Maguire, 325 Mass. 96, 98 (1949), and Bendett v. Bendett, 315 Mass. 59, 65-66 (1943) (illustrating harmless error where the evidence is cumulative).[3] The judge's decision regarding causal relationship is warranted by the evidence and untainted by errors of law. We therefore decline to overturn it. See Pacheco v. Plymouth Rubber, 5 Mass. Workers' Comp. Rep. 385, 388 (1991); Woolfall's Case, 13 Mass. App. Ct. 1070 (1982).

The additional repetitive duties occurring simultaneously and reasonably inferred by the judge, are outside the Zerofski "wear and tear" doctrine as they constitute identifiable conditions not common to all or a great many occupations. Therefore, the

[3] We note the judge's separating his description of "adjusting the product" and "climbing up" with the preposition "as well as." (Dec. 6.) Contrary to the insurer's contention, this indicates the judge found that the employee's adjusting of product and climbing are two distinct actions, not one job duty.

resulting incapacity is compensable under the Act. The hearing judge correctly applied existing law to the facts he found. We affirm his decision.

Because the employee has prevailed on the issues raised in the insurer's appeal, pursuant to G. L. c. 152, § 13A(6), the insurer shall pay the employee's attorney a fee in the amount of $1,680.52.

So ordered

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Bernard W. Fabricant
Administrative Law Judge

_____
Catherine Watson Koziol
Administrative Law Judge

_____
Martin J. Long
Administrative Law Judge

Filed: November 7, 2018