COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 036132-11**

Robert Correia	Employee
Advanced Heating and Hot Water Supply[1]	Employer
Massachusetts Manufacturing S.I.G.	Insurer

REVIEWING BOARD DECISION
(Judges Horan, Harpin and Calliotte)

The case was heard by Administrative Judge Vendetti.

APPEARANCES
Goncalo M. Rego, Esq., for the employee
George D. Kelly, Esq., for the insurer at hearing
Paul M. Moretti, Esq., for the insurer on appeal

HORAN, J. The employee appeals from a decision denying his claim for §§ 13, 30, 34 and 36 benefits.[2] We affirm.

For eleven years prior to his alleged injury, the employee "did brazing, welding and fed tubes of copper or nickel into a machine to fabricate residential hot water heater coils" for the employer. (Dec. 6.) The employee alleged that when he was assigned to coiling, he stood "with knees bent and the pedal depressed for up to a whole day." Id. He denied he spent much of his time brazing or welding. Id. He alleged that on December 7, 2011, he felt pain in his right knee late in his shift, and that he reported his injury to his supervisor, Orlando Ramos. The employee completed his shift, but did not return to work for six days. The judge found that on December 9, 2011, "the employee sought

[1] There is confusion regarding the proper name of the employer in this case. We utilize the name as identified by the parties in their appellate briefs.

[2] The insurer defended the employee's claims, inter alia, on the grounds of liability, causal relationship, and the extent of the employee's disability and incapacity. (Dec. 4.)

medical attention and the medical notes of that visit documented a sore right knee of a couple of weeks' duration." (Dec. 7-8.)

Mr. Ramos's testimony contradicted the employee's. Specifically, Mr. Ramos testified the employee rarely did coiling, and that no injury had been reported on the day of the alleged injury. The judge also heard testimony from the employer's plant supervisor, John Freitas. Mr. Freitas recounted his March 5, 2012 meeting with the employee to discuss the medical restrictions imposed on him by Dr. Pocze, his treating physician. Mr. Freitas testified that neither the employee, nor Dr. Pocze's note, indicated the employee's physical restrictions were work-related. The judge credited the testimony of Ramos and Freitas, and discredited the employee's testimony. (Dec. 7-9.)

Pursuant to § 11A, the employee was examined by Dr. Kevin N. Mabie. His report was entered into evidence, and he was later deposed. (Dec. 5.) On complexity grounds, the judge allowed the parties to submit additional medical evidence; both parties did so. (Dec. 2-3, 5.)

In his report, Dr. Mabie opined that, "within a reasonable degree of medical certainty, [the employee's] repetitive movement at work has exacerbated a previously existing patellofemoral arthrosis." (Stat. Ex. 1). At his deposition, Dr. Mabie opined, "[i]f his work didn't involve repetitive activity and he has patellofemoral arthrosis, then it's most likely unrelated to his work activity." (Dep. 21; see also Dep. 23-24, 30-31.)

In her decision, the judge listed all the medical evidence, but adopted Dr. Mabie's opinion that the employee, 1) suffered from pre-existing bipartite patella and patellofemoral arthrosis, unrelated to work and, 2) that minus constant repetitive bending of his knee at work, the employee's disability "was caused by something other than his work, most likely his pre-existing" condition. (Dec. 11.)

The judge found that *"[if]* the employee's job required him to bend his knee to press a pedal in a constantly repetitious manner then . . . it would

exacerbate [his] pre-existing arthritic condition and cause a work-related disability and need for treatment." (Dec. 11; emphasis added.) But the judge also found:

> I was persuaded by Orlando Ramos's credible testimony and find that the employee did coiling, the part of the job that required bent knee and pressed pedal, for only 10-25% of the day. This percentage of work does not equate with Dr. Mabie's definition of 'repetitive' which is 'more often than not' and is certainly not 'constantly repetitive'; a condition precedent to Dr. Mabie's finding that the employee's work exacerbated his pre-existing condition and caused his symptoms.

(Dec. 11; Mabie Dep. 10-12, 30-31.) Accordingly, the judge concluded the employee did not suffer a compensable injury. (Dec. 11-12.)

The employee raises three issues on appeal. First, he argues the judge erred by failing to list Sergio Cruz as a witness, or otherwise acknowledge his testimony, or the testimony of Dr. Michael Ackland, in her decision. But the judge did reference the deposition testimony of Dr. Ackland, as well as the testimony of Sergio Ravis (Cruz), on page two of her decision. (Dec. 2; March 14, 2013 Tr. 68.) We assume that judges consider all the evidence listed in their decisions. Walsh v. Courier Corp., 29 Mass. Workers' Comp. Rep. 61 (2015)(and cases cited); see Bennett's Case, 72 Mass. App. Ct. 1109 (2008)(Memorandum and Order Pursuant to Rule 1:28), rev. den. 452 Mass. 1107 (2008). There was no error.

Next, the employee argues the judge mischaracterized Dr. Mabie's opinion concerning causal relationship. While the employee is correct that Dr. Mabie never used the phrase "constantly repetitive," the doctor *did* define "repetitive" as meaning "more often than not" and "frequently." (Dep. 30-31.) Because the judge rejected the employee's testimony regarding the time he spent coiling, (which was the only task requiring "repetitive" use of his lower extremity), and credited Mr. Ramos's testimony that the employee spent only 10-25% of his work day performing that task, (which is not "more often than not"), it was reasonable for the judge to construe Dr. Mabie's opinion, in light of her factual determination,

as failing to endorse a causal relationship between the employee's work and the injury claimed.[3] See Brommage's Case, 75 Mass. App. Ct. 825 (2009)(judge need not adopt impartial medical examiner's opinion if factual foundation not found); see also Sponatski's Case, 220 Mass. 526 (1915)(employee has burden of proof on all elements of claim to compensation).

Lastly, the employee argues that the records of his treatment with Dr. Roger Pocze were improperly admitted into evidence over his objection. Specifically, the employee suggests the insurer failed to comply with the requirements of G. L. c. 233, § 79G. We disagree. First, it was appropriate for the insurer to utilize that statute to introduce relevant medical evidence at the hearing. Higgins's Case, 460 Mass. 50, 62 (2011). Second, as the insurer correctly points out, Dr. Pocze's note was the record of Hawthorn Medical Associates, which was properly certified and admitted into evidence under § 79G as insurer's exhibit #4. (Ins. br. 18-20.) There was no error.

We affirm the decision.

So ordered.

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Mark D. Horan
Administrative Law Judge

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William C. Harpin
Administrative Law Judge

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Carol Calliotte
Administrative Law Judge

Filed: **November 16, 2015**

[3] Even if the judge had found the employee's work involved repetitive use of his knee, adoption of Dr. Mabie's opinion would support a finding of a "combination" injury, thereby requiring the employee to prove his case under the "major" cause standard found in the fourth sentence of G. L. c. 152, § 1(7A). The insurer raised § 1(7A) in defense of the claim, but in light of her findings, the judge concluded it did not apply. (Dec. 10-11.)