**COMMONWEALTH OF MASSACHUSETTS**

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| **DEPARTMENT OF INDUSTRIAL ACCIDENTS** | **BOARD NOS. 24726-96 33579-96** |
| Robert Duggan | Employee |
| Liberty Transportation | Employer |
| General Accidents Insurance Co. | Insurer |

**REVIEWING BOARD DECISION**
(Judges Smith, McCarthy and Wilson)

**APPEARANCES**
Paul S. Danahy, Esq., for the employee
Thomas P. O'Reilly, Esq., for the insurer at hearing
Paul M. Moretti, Esq., for the insurer on appeal

**SMITH, J.** The insurer appeals from a decision that awarded benefits for two closed periods of temporary total incapacity and ongoing partial incapacity. Because there is no competent evidence in the record that a work injury remains a cause of the employee's ongoing complaints of pain, we reverse the decision and recommit the case for further findings.

Robert Duggan, a truck driver, had a left patella that did not track properly. (Dec. 9.) Nevertheless, he worked without left knee problems until 1996. In November 1995, he began having problems with his back due to a broken seat in his truck. The seat was eventually repaired, and his back got better. (Dec. 4.) In July 1996, Duggan was once again assigned to a truck with a broken seat. On July 4, 1996, he left work because of pain in his right shoulder, his knees, neck and back. Duggan stayed out of work for about one week. Upon returning to work, on July 23, 1996, Duggan drove a different truck on a route from Boston to Connecticut. The truck had problems with its fuel tank, which caused it to lose power. Duggan had to shift continuously for at least one to two hours in order to keep the truck going. The shifting involved repetitive use of his left foot. His left knee became painful. Duggan reported the problem with the truck to his supervisor in

Connecticut. He notified his superiors in Boston of his physical ailments upon returning on July 25, 1996. Duggan left work at that time, and has not returned. (Dec. 5.)

The judge made these additional findings: Prior to July 4 1996 and July 25 1996, Duggan had no medical problems with his neck, back, shoulders or knees. (Dec. 6; but compare the judge's finding of back problems in November 1995, Dec. 4.) Duggan was aware that the employer was closing its Massachusetts facility and moving to Connecticut around mid-August 1996, which meant that he might well be out of a job with the company. Although the company had mentioned a job offer in Connecticut, a formal offer had not been made to Duggan prior to his last day of work. (Dec. 6.)

Duggan treated with various doctors, and underwent arthroscopic surgery on his left knee in February 1997. He attempted work hardening, but stopped because of increased pain in the back, shoulder and neck. (Dec. 6.) He continued to experience pain in varying gradations. As of the hearing date, Duggan had been out of work for seventeen months. (Dec. 5.) He had not looked for work. He was experiencing good and bad days. On good days, he performed household chores such as vacuuming, cleaning and grocery shopping, and was able to do non-strenuous yard work. He helped care for his seventeen month old twins. (Dec. 7.)

Duggan filed claims for compensation benefits for injuries occurring on July 4, 1996 and July 17, 1996, alleging problems with his shoulder, lower back, left leg and knees. (Dec. 2, 5.) After conference, the judge awarded a closed period of total compensation from July 4, 1996 to July 12, 1996 for the July 4, 1996 injury and ongoing total compensation from July 19, 1996 for the July 17, 1996 injury. The insurer appealed to a hearing de novo. (Dec. 2.)

Duggan underwent a § 11A medical examination on April 8, 1997. The judge found that the history Duggan provided the doctor was consistent with his testimony at hearing, with some minor discrepancies that are not at issue in this appeal. (Dec. 7.) The impartial physician diagnosed 1) cervical and lumbar back sprain, resolved, 2) prepatellar bursa right knee, 3) chondromalacia left knee, and 4) status post arthroscopic surgery and lateral retinacula release of left knee. In his report, the impartial physician

noted that Dr. Richard Greenberg had opined that all of the employee's conditions had resolved with no symptoms as of his October 22, 1996 examination and that Duggan was capable of returning to work. (Dec. 8; Report 3.) As to causal relationship, the § 11A physician could not find sufficient convincing evidence that the employee's medical problems were attributable to his job of driving a truck. The doctor's opinion was that the employee's patellofemoral arthritis, along with the chondromalacia of the patella could develop for a variety of reasons other than the repetitive trauma at work that Duggan alleged as the cause. The doctor further opined that the snapping scapular or scapulothoracic bursitis, along with the employee's cervical and lumbar pain, was not linked with any clearly identifiable work trauma. (Dec. 8; Report 4.) The doctor then testified at his deposition that the employee's experience of forcible shifting repetitively for an hour or two reasonably would be considered a major contributing cause of his initial left knee symptoms. However, the doctor made clear that such activity would not have caused prolonged and continuing trouble with the employee's left knee and that the employee's February 1997 surgery was not work-related. (Dec. 9; Dep. 17-19, 26.) The impartial doctor concluded his deposition with the opinion that Duggan was not suffering from any residuals of his work injuries, and that he could return to work as a truck driver. (Dec. 9-10; Dep. 25-27.) The judge adopted the impartial physician's opinions. (Dec. 10.)

The judge found that Duggan was a credible witness, and adopted his testimony that he did not have any symptoms prior to his alleged work injuries. (Dec. 10-11.) The judge inferred that Duggan had asymptomatic pre-existing conditions, which became symptomatic due to his work injuries.[1] The judge used the finding of no pain pre-injury

[1] Although not addressed by either party, the judge's inference raises the issue of whether § 1(7A) provides the appropriate standard of causation with which to assess this employee's injuries -- namely, the "major but not necessarily predominant" standard applicable to work injuries that combine with pre-existing non-work-related health conditions. See McArthur v. Grossman's Inc., 11 Mass. Workers' Comp. Rep. 651, 653-654 (1997). Of course, if there is no "preexisting condition, which resulted from an injury or disease not compensable under this chapter," see G.L. c. 152, § 1(7A), as amended by St. 1991, c. 398, § 14, then the standards of medical and legal causation discussed in Zerofski's Case, 385 Mass. 590 (1982) apply.

and continuing pain post-injury to overcome the impartial physician's opinion of no causation.

The judge found that the employee was temporarily totally incapacitated from July 4 1996 to July 12 1996 and from July 26 1996 to April 8 1997, the date of the impartial medical examination. Relying on the employee's subjective complaints regarding his physical impairment, together with his age, background and education, the judge concluded that Duggan continued to be partially incapacitated by the effects of his work injuries. (Dec. 11.) The judge ordered § 34 total compensation from July 4 1996 to July 12 1996 and from July 26 1996 to April 8 1997 and ongoing § 35 partial compensation from April 9 1997, based upon an earning capacity of $210. (Dec. 11-12.) The insurer appeals to the reviewing board.

The insurer argues that the judge erred by finding the employee's medical conditions causally related to his industrial injuries. We agree that the judge's causation analysis is flawed. An employee has the burden of proving all elements of his claim, including the causal connection between work activities on the dates of any alleged injuries and his disabling medical problems. Sponatski's Case, 220 Mass. 526, 527-528 (1915). Where, as here, the causal relationship between an employee's work and medical condition is a matter beyond common knowledge and experience of ordinary laymen, proof of causation must rest upon expert medical testimony. Sevigny's Case, 337 Mass. 747, 749 (1958).

The judge recognized this dilemma[2] and tried to fill the hole in the causation case by inferring that the employee had some *asymptomatic* preexisting condition that became symptomatic as a result of work activities and for which the employee underwent

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[2] The judge noted that Dr. McConville's opinion and the employee's testimony were inconsistent with regard to causal relationship as well as impairment. (Dec. 10.) Although she explicitly adopted the § 11A(2) report and deposition testimony of the impartial physician "regarding diagnosis, causal relationship and level of impairment," (Dec. 10.), she in essence overcame it by accepting the employee's conflicting testimony regarding his pain and restrictions, and by making her own lay causation decision. (Dec. 11.)

left knee surgery in January 1997. (Dec. 11.) However, such *post hoc, ergo propter hoc*[3] reasoning is fallacious and legally erroneous. "In complex matters a mere temporal correlation does not establish medical causation. Where the basic fact, i.e. causal relationship, requires expert opinion evidence, without it there is nothing from which to draw an inference." Allie v. Quincy Hospital, 12 Mass. Workers' Comp. Rep. 167, 169 (1998). The timing of the onset of a medical disease is not a matter that a judge may determine from her own knowledge; it is a matter calling for a competent medical opinion. Ralph's Case, 331 Mass. 86, 90 (1954). The fact that an employee suffers a deterioration of health after a work injury will not, standing alone, support a finding of causation. King's Case, 352 Mass. 488, 489-490 (1967). The impartial physician's no causation opinion is entitled to prima facie weight. G.L. c. 152, § 11A(2). The judge cannot rely solely upon continuation of the employee's pain, a fact known to the impartial physician, to overcome the impartial medical opinion of no causation. See Allie, supra, at 171 (where the judge's inference is based on the same record as that provided to the impartial physician, no inference contrary to his opinion can be drawn).

Dr. McConville opined that the employee could have suffered symptoms in his left knee from the constant clutching and shifting on July 23, 1996. (Dec. 9; Dep. 17-18.) However, he clearly stated that such damage or insult to the knee would not result in any prolonged, continued trouble with the knee. (Dec. 9; Dep. 19.) The doctor did not find any evidence of ongoing patellofemoral arthritis or chondromalacia patellar of such a degree that would prevent Duggan from returning to truck driving. (Dec. 9.) The doctor could find no organic basis for Duggan's pain on prolonged standing, kneeling, bending, squatting and lifting more than twenty-five pounds. The doctor opined that Duggan was not suffering from any residuals of the work injury and was capable of performing his pre-injury job. (Dec. 9-10; Dep. 23-25, 27; Rep. 4.) The record contains no properly grounded expert medical opinion causally relating the employee's continuing complaints to a work injury. Such positive medical testimony on the specific issue of causal relation

[3] Meaning, "after this, therefore because of this."

is necessary to justify the continuing compensation award. See Look's Case, 345 Mass. 112, 115-116 (1962). Without it, the award cannot stand.

The insurer also challenges the finding of total incapacity. As the case is being recommitted, we find it appropriate to request further findings of fact on that issue as well. Duggan's claims place in dispute the nature and extent of his incapacity, as well as its causal connection to work, from July 25, 1996 to the present and continuing. The judge therefore should determine what causally related medical problems Duggan had on July 25, 1996, and whether such problems prevented the performance of all remunerative labor. Then, addressing the claimed incapacity chronologically, at the point when the judge is no longer persuaded that Duggan remained totally medically disabled as a result of the work injuries,[4] she should determine the economic effect of any remaining, causally related medical restrictions. Dawson v. New England Patriots, 9 Mass. Workers' Comp. Rep. 675, 677 (1995). At each change in medical condition thereafter, the incapacity analysis should be repeated. Rogers v. Universal Products, Inc., 12 Mass. Workers' Comp. Rep. 198, 202 (1998).

As the finding of continuing causation is arbitrary and capricious, we reverse it. Because the record could conceivably support an award of some compensation for some of the claimed conditions, for some period of time, we recommit the case for a determination of the nature, extent and duration of the causally related incapacity, if any. In her discretion, the judge may take such additional evidence, including additional medical evidence,[5] as she deems necessary to render a just decision.

So ordered.

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[4] See n. 1, supra. If § 1(7A) applies, the judge must make findings regarding the extent of the continuing causal connection.

[5] Under §§ 11 and 11A(2), the judge has the authority to open the case up for additional medical testimony, see Wilkinson v. City of Peabody, 11 Mass. Workers' Comp. Rep. 263, 265 (1997) or to request an addendum to the impartial report to answer questions aimed at the § 1(7A) definition of personal injury, the extent of causally related medical disability prior to the date of the impartial examination, and when causation ceased. See Ciufo v. Labor Management Servs., 11 Mass. Worker's Comp. 494, 499 (1977).

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Suzanne E.K. Smith
Administrative Law Judge

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William A. McCarthy
Administrative Law Judge

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Sara Holmes Wilson
Administrative Law Judge

Filed: November 19, 1999