COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 024149-10**

Stephen A. Dugas	Employee
Coca Cola of Northern New England	Employer
USF&G Insurance Company	Insurer

REVIEWING BOARD DECISION
(Judges Harpin, Levine and Fabricant)

The case was heard by Administrative Judge Benoit.

APPEARANCES
James J. Hykel, Esq., for the employee
Mark A. Teehan, Esq., for the insurer

HARPIN, J. The employee appeals from a decision denying his claim for payment of medical benefits, including a total right hip replacement. We affirm the decision.

Beginning in 2003, the forty-six year old employee worked as a merchandiser/bulk account manager for the employer, which required setting up and stocking displays, shelves and coolers, and moving products by lifting, carrying, pushing and pulling carts with a non-electric hand jack. (Dec. 4.) The employee was a large man, weighing 245 pounds when he began work for the employer. His weight had increased to 280 pounds when he left in 2009. (Dec. 4, 6.)

The employee played football in high school and, later, men's street hockey three nights a week for fifteen years, except during the winter. In 2002, he injured his right knee, requiring arthroscopic surgery in September of that year. (Dec. 4.) He did not play street hockey after that surgery. (Dec. 4.)

The employee claimed that, beginning in April, 2009, he suffered right hip pain related to his work at the employer. (Employee br. 3.) He first sought medical treatment in August, 2009, with Dr. Kelton Burbank. Dr. Burbank

referred the employee to Dr. James Narius, an orthopedic surgeon, who administered a series of epidural steroid shots over the course of a year, with varying periods of symptom relief. (Dec. 4; Employee br., 3.) The employee did not state to either physician that his hip pain was a result of his work for the employer. (Dec. 4.) Dr. Burbank diagnosed the employee's condition as bilateral hip dysplasia, degenerative changes in the left hip, and significant arthritis and osteophytes along the neck of the right hip. (Employee br. 3.) The § 11A impartial physician, Dr. Marshall Katzen, essentially agreed with this diagnosis, finding the employee suffered from bilateral degenerative arthritis of the hips, right greater than the left, stemming from the employee's congenital hip dysplasia. (Dec. 5; Dep. of Dr. Katzen [Dep.] 10.)

The employee's claim for payment of medical treatment under G. L. c 152, §§ 13 and 30, was denied following a conference on April 14, 2011. The employee filed a timely appeal. (Dec. 3.) At the December 5, 2011 hearing the judge accepted the insurer's offer of proof of a combination injury under § 1(7A), allowing that defense to be in issue. (Dec. 3.) Following the taking of lay testimony and the deposition of Dr. Katzen, the judge allowed further medical evidence, as he found Dr. Katzen's deposition testimony contradictory. Both parties submitted additional evidence, including reports of Dr. John M. Siliski from the insurer. (Dec. 2, 3.)

On December 18, 2012, the judge issued a decision denying the claim for payment for medical treatment. He found the employee did not sustain his burden of proof that an industrial accident occurred while working for the employer from 2003 to 2009. (Dec. 7.) The employee appeals, asserting the judge failed to conduct an adequate § 1(7A) analysis, and mischaracterized Dr. Katzen's later opinion by finding that the doctor found no causal connection between the employee's hip pain and his work.

The employee first contends the § 1(7A) analysis was inadequate, as the judge made no findings on whether the employee's "injury" combined with an

"alleged" pre-existing condition. (Employee br. 4.) The judge, indeed, did not conduct a § 1(7A) analysis, for the simple reason that he found "the employee did not sustain an industrial injury." (Dec. 7.) He based this conclusion on his adoption of the opinion of Dr. Katzen that the employee's conditions, hip dysplasia and osteoarthritis, were not caused or worsened by his work, and his adoption of the similar opinion of Dr. Siliski. (Dec. 6.) Dr. Siliski went one step further by stating the employee's hip condition would have been the same no matter what work he did after 2002. (Dec. 6.) Given that an expert medical opinion on causation is a prerequisite to a finding of an industrial accident, Colon-Torres v. Joseph's Pizza, 27 Mass. Workers' Comp. Rep 61, 64 (2013); Stewart's Case, 74 Mass. App. Ct. 919, 939 (2009), the judge's adoption of these medical opinions sounded the death knell for the employee's claim that he sustained a compensable accident at work. Without an industrial accident, there was no need to conduct a § 1(7A) analysis. G. L. c. 152, § 1(7A), fourth clause ("If a compensable injury or disease combines with a pre-existing condition, which resulted from an injury or disease not compensable under this chapter . . . ." [emphasis added] .)

The employee also maintains the judge mischaracterized Dr. Katzen's opinion, when he concluded the doctor felt the employee's job "did not play any role in the development of the underlying disease process . . . the worsening of that condition, or the condition that he exhibited at Dr. Katzen's examination. (Dec. 6.) Instead, the employee argues the doctor, after being informed of the details of the employee's job, changed his opinion and stated the job played an equal role, with his weight, in the development of his osteoarthritis. (Employee br. 8.) This is an incorrect characterization of the doctor's opinions. Dr. Katzen made it clear early on in his deposition that the employee's bilateral hip dysplasia was not causally related to his work from 2002 to 2009. (Dep. 35). Even after being told of the weight (fifty pounds) the employee had to frequently carry, and pushing and pulling a pallet weighing up to 1,950 pounds, the doctor felt the employee's

osteoarthritis was not related to work, but was due to his congenital problems. (Dep. 60-61, 64-66.) It is the doctor's opinions, taken as a whole over the course of his deposition, which are determinative of his final opinion. Keane v. McLean Hosp., 27 Mass. Workers' Comp. Rep. 9, 12 (2013). The doctor repeatedly stated, including at the very end of his deposition, "I don't think this is a work problem. I think this is a congenital problem." (Dep. 76.) There was no error in the judge's adoption of this opinion. The employee's other arguments are without merit.

The decision is affirmed.

So ordered.

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William C. Harpin
Administrative Law Judge

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Frederick E. Levine
Administrative Law Judge

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Bernard F. Fabricant
Administrative Law Judge

Filed: **June 26, 2014**