COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS	**BOARD NO. 024916-98**
Steven E. Lombardo	Employee
Titan Roofing Co.	Employer
Zurich American Ins. Co.	Insurer

REVIEWING BOARD DECISION
(Judges Koziol, Fabricant and Calliotte)

The case was heard by Administrative Judge Bean.

APPEARANCES
Brendan G. Carney, Esq., for the employee
Henry E. Bratcher III, Esq., for the insurer at hearing
Joseph M. Spinale, Esq., for the insurer at hearing and on appeal

KOZIOL, J. The insurer appeals from a decision awarding the employee § 34 total incapacity benefits from October 31, 2012 to July 31, 2015, and § 34A permanent and total incapacity benefits from August 1, 2015, and continuing. The insurer raises three issues on appeal. It claims the judge committed reversible error by: 1) denying its request to join subsequent insurers pursuant to 452 Code Mass. Regs. § 1.20; 2) mischaracterizing the medical evidence, resulting in an erroneous award of § 34A benefits; and, 3) failing to apply § 35C, McDonough's Case, 440 Mass. 603 (2003), or § 35E to this case. We affirm the judge's decision.

The employee, a sixty-three year old high school graduate, worked as a union sheet-metal worker from 1970 through 2012. (Dec. 87.) Throughout his career, the employee installed duct work and metal roofing, but from 1992 onward, he mainly installed metal roofing. The work was heavy and required "constant climbing up and down ladders and staging and working on pitched roofs." (Dec. 87.) The employee carried up to sixty pounds of aluminum sheets to the roof and his job required "much kneeling." (Dec. 87.) The employee's first left knee injury occurred in New Hampshire

in 1981, when he was working out of a New Hampshire union hall for a New Hampshire employer. The employee had arthroscopic surgery and was paid New Hampshire workers' compensation benefits for approximately two months while he was out of work due to the injury. (Dec. 87.) He returned to work without incident, working several years with no knee problems until the mid-1990s, when he experienced minor swelling in his left knee. (Dec. 88.)

"In early April of 1998, [the employee] had some locking in his [left] knee." (Dec. 87.) "[W]hile working on a roof, he felt a pop and felt excruciating pain," and could not finish his day's work. (Dec. 88.) As a result of the work-related injury of April 13, 1998, the employee underwent a second arthroscopic surgery and was out of work for three to four months. The employee then returned to full duty work and received no medical treatment for his left knee until December 18, 2008. At that time, he was diagnosed with arthritis in his left knee. Id.

The employee continued to work "but climbing and kneeling were painful," and "the pain was the same whether he was climbing ladders at work or climbing stairs at home." (Dec. 88.) Between 2008 and early 2009, the employee received a total of three cortisone shots to his left knee. The cortisone shots "did not help much," but he sought no further treatment until "nearly three years later" in December of 2011. Id. The judge found, "[the employee] worked those three years with constant knee pain that was not as severe as the pain he had in December 2008." Id. He sought medical treatment for his knee again on December 8, 2011, as his pain had increased. Prescribed viscosupplementation shots were discontinued after it became apparent that the employee was allergic to them. The employee continued to work until he was laid off from work on October 31, 2012. He did not seek further employment because he knew he was having left total knee replacement surgery on December 31, 2012. Id.

With these background facts in mind, we address the claim's procedural history which provides the foundation for the thrust of the insurer's appellate arguments. On March 6, 2014, the employee filed the present claim against the insurer based on the

April 13, 1998, date of injury. Rizzo v. M.B.T.A., 16 Mass. Workers' Comp. Rep. 160, 161, n.3 (2002)(judicial notice taken of board file). The insurer maintained that the employee's medical records between 2008 and 2012, supported the joinder of subsequent insurers. (Motion Tr. 11/10/15, 3.) The employee filed two additional claims against subsequent insurers alleging dates of injury of December 18, 2008, (the date the employee first sought treatment for his knee following his return to work after the April 13, 1998, injury) and October 31, 2012, (the employee's last day of work before undergoing his total knee replacement surgery). Rizzo, supra; (Motion Tr. 11/10/15, 3.) All three claims were the subject of a conciliation held on May 30, 2014.[1] The claim against the insurer (Zurich), based on the injury of April 13, 1998, was sent forward to the division of dispute resolution. However, the conciliator administratively withdrew the claims alleging injuries on December 18, 2008 and October 31, 2012, because there was insufficient medical evidence to support those claims.[2] (Motion Tr. 11/10/15, 3-4; Employee br. 3.)

The matter was originally scheduled for a § 10A conference on September 16, 2014. Rizzo, supra. However, the parties agreed to reschedule the matter to October 10, 2014. "Zurich requested a status conference for the purpose of joining additional parties," (Dec. 85), seeking joinder of the same parties and dates of injury that were dismissed by the conciliator. (Motion Tr. 11/10/2015, 4.) After hearing the motion in September of 2014, (Dec. 87), the judge "directed that the October 10, 2014, conference proceed with just Zurich defending" because he found that "Zurich did not have sufficient evidence of coverage or medical documentation of a subsequent injury or

[1] On the record, the parties stated the conciliation was held on May 3, 2014, (Motion Tr. 11/10/15, 3); however this is not supported by the board file which indicates it occurred on May 30, 2014. Rizzo, supra. We use the date appearing in the board file.

[2] Because those claims bear different board numbers, they appear on the Zurich claim's conciliation cover sheet contained in the board file, but otherwise they are not part of the board file. Rizzo, supra.

aggravation." (Dec. 85.) The judge's § 10A conference order required Zurich to pay the employee § 34 benefits. The insurer appealed.[3] (Dec. 85.)

On December 23, 2014, the employee was examined by a § 11A impartial medical examiner, orthopedic surgeon Dr. Mark P. Gilligan. (Dec. 89.) Dr. Gilligan diagnosed the employee as having "left knee medial meniscal tear status post left knee arthroscopy" and "left knee osteoarthritis exacerbated by [the] work injury [of] April 3, 1998."[4] (Ex. 3.) He further opined the April 13, 1998, injury "is a major, but not necessarily predominant cause of [the employee's] current symptoms." (Ex. 3, 2.)

Meanwhile, following the § 10A conference, the judge "allowed Zurich time to establish subsequent periods of coverage by other insurers and to obtain medical documentation of subsequent injuries or aggravations and invited Zurich to renew its motions to join." (Dec. 85.) The judge summarized the procedural history:

> Over the course of the next several months there were numerous "status conferences" as Zurich sought to revive its joinder motions. Headway was made concerning the issues of coverage, but none was made on documenting later injuries and/or aggravations.
>
> On September 22, 2015 I heard the joinder motions on the record with several insurance companies represented. Zurich was able to establish which insurers covered the employee's several employers in the years 1998-2012. However, except for some indications the employee received medical treatment for his knee, there *was no medical documentation of a further injury or aggravation to the employee's knee, that is or was causally related to his employment*. I denied the motion. See Exhibit 5. I set October 30, 2015 as the date for the hearing with the admonition that there would be no further continuances.

[3] At the conference, the insurer submitted a September 15, 2014, record review by Dr. Robert J. Nicoletta, M.D. who simply opined there was no causal relationship between the employee's need for a total knee replacement and his industrial accident in 1998. Rizzo, supra; (Employee br. 6.)

[4] Dr. Gilligan's report stated the date of injury was "April 3, 1998" but he testified that he believed his use of that date was "just a clerical error." (Dep. 30.) The judge later found that although the doctor used an "April 3, 1998," date of injury, he was actually referring to the stipulated claimed injury date of "April 13, 1998." (Dec. 90.)

> Only at that point, did Zurich commission a medical examination of the employee, retaining Dr. Robert Pennell. The parties submitted a joint motion for a continuance just days before the scheduled hearing. The Pennell examination was scheduled for the date of the scheduled day of hearing (October 30, 2015). The employee, who lives in Florida, was flying up to Boston to attend the hearing. Zurich offered to voluntarily pay the employee § 35 partial disability compensation at the maximum rate and pay for his plane ticket, if he agreed to join Zurich in the continuance request and attend the § 45 examination. The employee's § 34 benefits had exhausted on or about July 31, 2015 and the employee had been paid nothing in August, September or October as Zurich continued to attempt to join additional parties. The employee agreed as the alternative could have been to go another several months with no weekly compensation benefits. With reluctance, I gave the parties their requested 60 day continuance. The hearing was set for December 30, 2015.
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> With Dr. Pennell's report in hand, Zurich asked that I reconsider my ruling of September 22, 2015, itself a reconsideration of my ruling of September 2014. I denied the reconsideration motion as untimely on November 10, 2015 and again on December 14, 2015. The hearing was held on December 30, 2015 and the record was scheduled to be closed on January 29, 2016. However, the insurer then requested time in which to depose the impartial doctor. The record closing was postponed to March 11, 2016. On March 10, 2016 the insurer tried yet again to join additional parties, this time citing the just completed deposition. I denied the motion again as untimely, now 18 months after the issue was first raised. The record closed on March 11, 2016.

(Dec. 85-87 [emphasis supplied]; Motion Trs. 11/10/15 and 12/14/15.)

The report and deposition of Dr. Gilligan provided the only medical evidence admitted at the hearing, and no motions to submit additional medical evidence were filed. (Dec. 85; Ex. 3.) The judge found the employee "credible in his description of his accidents and his many years of knee problems, in particular, his assertion that he never sustained any new injuries or aggravations at work after 1998." (Dec. 91.) The judge found Dr. Gilligan causally related the employee's diagnoses of "left knee medical meniscal tear, status post left knee arthroplasty and left knee osteoarthritis exacerbated by the work injury of April [1]3, 1998," to the April 13, 1998 injury. (Dec. 90.) He also

found the employee's "osteoarthritis continued to worsen over time." (Dec. 90.) The judge found:

> [Dr. Gilligan] stated that the roofing activity since 1998 aggravated [the employee's] osteoarthritis (pages 16, 20, 22, 23, and 25) but that nothing that he found out at the deposition has changed his opinion on the issue of causation. (page 22) I accept that last statement as controlling, noting that the employee credibly testified that he had suffered no injuries of aggravations after 1998 and that his pain increased with all activity, whether at work or at home. His last injury was the "pop" he felt in 1998.

(Dec. 91.) Dr. Gilligan found the employee to be permanently disabled from his work as a union sheet-metal worker. (Dec. 90.) Relying on "the credible testimony of the employee, and the vocational expert, Carole Falcone, and the persuasive medical opinions of Dr. Gilligan," the judge found the employee is entitled to both § 34 total incapacity benefits from October 31, 2012, to the date of exhaustion of those benefits, July 31, 2015, and § 34A permanent and total incapacity benefits from August 1, 2015, and continuing. (Dec. 91-92.)

On appeal, Zurich argues the judge erred in denying its motions to join insurers for alleged dates of injury subsequent to April 13, 1998. The insurer cites 452 Code Mass. Regs. § 1.20(1),[5] arguing the rule must be liberally applied to permit joinder of parties. It also argues the judge erred by denying the motion at the November 10, 2015, status conference when "all parties were present" and that there would have been "no further delays if the Motion were allowed."[6] (Ins. br. 5-6.) Zurich further argues the judge erred

[5] 452 Code Mass. Regs. § 1.20(1) states:

> An administrative judge before whom a proceeding is pending may join, or any party to such proceeding may request the administrative judge to join as a party, on written notice and a right to be heard, an insurer, employer, or other person who may be liable for payment of compensation to the claimant.

[6] Zurich's brief alludes to the fact that, despite its motion to compel production of documents regarding the employee's medical treatment, the employee failed to provide the requested documents. (Ins. br. 2, 3.) However, the requested records appear to concern the 1981 injury. (Motion Tr. 11/10/15, 9, 11,13).

by denying its last motion to join, filed after the impartial medical examiner's deposition. We disagree

"It is well settled that an administrative judge has broad discretion in setting procedure for matters assigned to his docket." Weinkunat, Jr. v. Springfield Muffler Co., 17 Mass. Workers' Comp. Rep. 252, 256 (2003). It also is undisputed that, "[t]he issue of contribution of multiple injuries to a period of incapacity requires expert medical evidence." Spearman v. Purity Supreme, 13 Mass. Workers' Comp. Rep. 109, 112 (1999). As of May 2014, Zurich knew the employee's attempt to join additional parties was not fruitful because he lacked medical evidence suggesting a causal relationship between his subsequent work and his disability and need for treatment. 452 Code Mass. Regs. § 1.07(2)(f)(claim must be accompanied by medical documentation relating incapacity to industrial injury). Although Zurich knew that some medical evidence of a work-related aggravation of the knee was required, it sought to invoke the successive insurer rule as a defense, filed motions to join subsequent alleged dates of injury, and proceeded to the § 10A conference with no medical opinion supporting its motions or the defense.[7] Indeed, by September 22, 2015, almost one year after the § 10A conference, nine months after Dr. Gilligan's December 23, 2014, § 11A examination and report, four months and multiple continuances from the hearing date of May 18, 2015,[8] and following motion hearings on August 6, 2015, and September 10, 2015, Zurich still had not produced any medical evidence supporting its motion.[9] At that point, the insurers whom

[7] Zurich's Form 104 Notification of Denial of the employee's claim, was filed on June 20, 2014, nearly two months after the employee filed his claim and almost one month after the employee's unsuccessful attempt to join successive insurers, yet it failed to raise the successive insurer rule as one of the grounds for denying the employee's claim, despite providing eight other "grounds" for the denial. Rizzo, supra.

[8] The employee's § 34 benefits were due to expire on July 31, 2015. (Dec. 86.) The original hearing date, May 8, 2015, was rescheduled to May 18, 2015, in light of the employee's motion to join a claim for § 34A benefits which was allowed. (Motion Tr. 11/10/15, 4.)

[9] Both the employee and the insurer reference opinions offered by Dr. Robert R. Pennell, who, according to the employee, provided a record review of the employee's case in September 2015 and opined the employee's knee problem was related to his earlier injury in New Hampshire in

Zurich sought to join, (Ex. 5), objected to being joined on the ground there was no medical evidence supporting joinder, and the judge agreed. (Motion Tr. 11/10/15, 24.)

The judge provided a detailed chronicle of the procedural events, explaining his reasons for denying not only Zurich's earlier motion to join successive insurers but also its November 10, 2015, second request for reconsideration of that ruling. (Motion Tr. 11/10/15, 23-27.) The judge did not abuse his discretion nor did he act arbitrarily or capriciously by refusing to revisit the issue again. In addition, Zurich's assertion that no further delay would be incurred if the judge had allowed the motion on November 10, 2015, (Ins. br. 6), fails to consider that the three insurers it sought to join to the proceedings, "shall be allowed a reasonable period of time to prepare a defense . . . [that] shall not exceed 45 calendar days from the date of joinder." 452 Code Mass. Regs. § 1.20(3). Thus, the hearing could not have been conducted until January of 2016 at the earliest, because each insurer would have had the right to have the employee examined by an independent medical examiner prior to the hearing, something Zurich did not seek to do until over one year after the § 10A conference, and five months after the original hearing date. See G.L. c. 152, § 45 (entitling insurer to require employee to submit to medical examination by a physician of the insurer's choice every six months).

In light of the procedural history of this case, we also see no error in the judge's denial of the motion to join, filed after the lay testimony and after the deposition of Dr. Gilligan. The judge gave Zurich ample opportunity to develop its successive insurer defense, which the judge found Zurich failed to do in a timely manner, (Dec. 87), and he did not abuse his discretion by denying the insurer's motions to join at any stage in this dispute.

1981, not the 1998 injury. (Employee br. 4-5.) According to the employee, after the judge denied Zurich's motion on September 22, 2015, the insurer produced an addendum to Dr. Pennell's report dated September 28, 2015, wherein he indicated there was a work-related aggravation subsequent to April 13, 1998. (Employee br. 8; Motion Tr. 11/10/15, 24.) Dr. Pennell examined the employee on the date set by the judge for hearing, October 30, 2015. (Dec. 86.) According to Zurich, Dr. Pennell opined the employee could return to work on a full duty basis. (Ins. br. 4.) Dr. Pennell's reports are not part of the hearing record, as neither party sought to submit them as an offer of proof.

Invoking the successive insurer rule, Zurich next argues the judge mischaracterized Dr. Gilligan's medical opinion, by finding the employee's incapacity and need for the total knee replacement is causally related to the 1998 injury. Zurich points to Dr. Gilligan's testimony that the employee's left knee valgus deformity is a phenomenon that develops over time and that "going up and down ladders," accelerated development of the deformity, thereby supporting use of the successive insurer rule. (Dep. Tr. 23.) We disagree.

The judge acted within his discretion where he found the requisite causal relationship existed between the April 13, 1998, injury and the employee's incapacity and need for the total knee replacement, based, in part, on finding the employee credible. See Wilson's Case, 89 Mass. App. Ct. 398, 401 (2016)(no requirement that causal relationship be shown only by expert testimony). Dr. Gilligan's testimony "that nothing that he found out at the deposition has changed his opinion on the issue of causation," was accepted as controlling by the judge. (Dec. 91.) Dr. Gilligan's report was unequivocal, providing the causal relationship opinion needed for the employee to succeed in his claim based on the April 13, 1998, injury. (Dec. 90; Ex. 3.) The judge also found "the employee credibly testified that he suffered no injuries of aggravations after 1998 and that his pain increased with all activity, whether at work or at home." (Dec. 91.) This finding had ample support in the evidence. (Tr. 29, 30-31, 37.) Moreover,

> [c]ausal relationship to the original injury is not severed simply because the employee may have suffered a later injury. In fact, the successive insurer rule contemplates that an employee may suffer 'two or more compensable injuries that are causally related to a resulting incapacity.' Pilon's Case, 69 Mass. App. Ct. 167, 169 (2007). However, again, where there is no successive insurer and no issue of another date of injury, the successive insurer rule does not come into play to shift liability.

Remillard v. TJX Cos., 27 Mass. Workers' Comp. Rep. 97, 103 (2013). "Because there is no successive insurer to whom liability may be shifted, the employee remains entitled

to benefits to the extent his incapacity is causally related to his [1998] industrial injury." Kendrick v. Grus Constr. Personnel, 30 Mass. Workers' Comp. Rep. ___ (2016).

Lastly, Zurich's arguments regarding §§ 35C[10] and 35E[11] are wholly without merit. Section 35C operates, "where there is a difference of five years or more between the date of injury and *the initial date* on which the injured worker or his survivor first became eligible for benefits." G. L. c. 152, § 35C (emphasis supplied). Here, the employee initially received weekly benefits from Zurich immediately following his injury of April 13, 1998, and Zurich also paid for the employee's arthroscopic surgery in 1998. The fact the employee's § 34 benefits exhausted during the course of this litigation and the employee's entitlement to § 34A benefits began on August 1, 2015, does not reset the clock for consideration of § 35C, as of August 1, 2015. 452 Code Mass. Regs. § 3.02(2) ("Payment of benefits under M.G.L. c. 152, §§31, 34, 34A, or 35 within five years of the date of injury shall preclude applicability of M.G.L. c. 152, § 35C").

As a prerequisite to the application of § 35E, the employee must be "at least sixty-five years of age." The employee was only sixty-three years old at the time of the hearing. (Dec. 87.) Moreover, § 35E only applies to individuals receiving §§ 34 or 35 benefits. Here, the employee is receiving § 34A benefits. G. L. c. 152, § 35E. Neither §§ 35E nor 35C applies under the circumstances. Accordingly, we affirm the judge's

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[10] General Laws, c. 152, § 35C states, in relevant part:

> When there is a difference of five years or more between the date of injury and the initial date on which the injured worker or his survivor first became eligible for benefits under section thirty-one, thirty-four, thirty-four A, or section thirty-five, the applicable benefits shall be those in effect on the first date of eligibility for benefits.

[11] General Laws, c. 152, § 35E states, in relevant part:

> Any employee who is at least sixty-five years of age and has been out of the labor force for a period of at least two years and is eligible for old age benefits pursuant to the federal social security act or eligible for benefits from a public or private pension which is paid in part or entirely by an employer shall not be entitled to benefits under sections thirty-four or thirty-five unless such employee can establish that but for the injury, he or she would have remained active in the labor market.

decision. The insurer shall pay the employee's counsel a fee pursuant to G. L. c. 152, § 13A(6), in the amount of $1,613.55.

So ordered.

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Catherine Watson Koziol
Administrative Law Judge

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Bernard W. Fabricant
Administrative Law Judge

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Carol Calliotte
Administrative Law Judge

Filed: **March 23, 2017**