COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS	**BOARD NO. 019844-12**
Steven Golub	Employee
M.B.T.A.	Employer
M.B.T.A.	Self-insurer

REVIEWING BOARD DECISION
(Judges Koziol, Horan, and Fabricant)

The case was heard by Administrative Judge Bean.

APPEARANCES
Alan S. Pierce, Esq., for the employee
Paul A. Brien, Esq., for the insurer

KOZIOL, J. The self-insurer appeals from a decision ordering it to pay the employee § 34 benefits from July 14, 2012, through July 14, 2013, and medical treatment, pursuant to §§ 13 and 30, for a left knee injury. The self-insurer argues the judge erred by failing to address its defenses, and in conducting his incapacity analysis. Because the judge failed to make any findings addressing the self-insurer's § 1(7A) defense, we vacate the award and recommit the matter for further findings of fact.

In 2011, the employee began working part-time as a bus driver for the self-insured employer. On February 1, 2012, for reasons unrelated to this workers' compensation case, the employer transferred the employee to the position of Customer Service Agent (CSA), where he worked part-time on a split shift at several Blue Line stops. (Dec. 649-650.) As a CSA, the employee oversaw the entire station, checked vending machines, monitored safety, and tried to meet every train as it entered the station. (Dec. 650.) He customarily worked three shifts per week at the State Street station, where "he had to climb the stairs

continually to meet trains as they arrived on either side of the tracks." (Dec. 650, 652.) The employee began to feel sharp pain in his left lower leg on March 12, 2012, and soon thereafter developed knee pain,[1] which he attributed to his frequent stair climbing. (Dec. 650-651.)

Although the employee sought medical treatment for his left leg, he did not report an injury. On July 9, 2012, he received a cortisone injection in the left knee and on July 14, 2012, he left work. (Dec. 651.) On September 12, 2012, the employee underwent knee surgery performed by Dr. Zarins. (Dec. 651.) He was released to return to work as a bus driver in February of 2013, but the employer did not allow him to return to that position until July 14, 2013. (Dec. 651, 652.)

The self-insurer denied liability for the employee's injury, raising defenses of, "Zerofski's [C]ase as to the issue of an aggravation of the left lower extremity as a result of prolonged standing and walking," and § 1(7A).[2] (Self-ins. br. 4.) The judge made the following findings regarding the medical opinions of the employee's treating surgeon, Dr. Zarins, and the self-insurer's examining physician, Dr. John Sliski.

> In [Dr. Zarins's] first report, dated July 26, 2012 he recorded a history that is consistent with the one related above and found the employee to be totally disabled. He noted that the etiology of the knee condition was 'undetermined'. Two months later, on September 20, 2012 he stated that the injury was 'probably' related to the employee's repetitive work activities. He is more emphatic in his December 27, 2012 report dropping

[1] The decision does not indicate which knee the employee injured. The notes of the employee's treating surgeon, Dr. Bertram Zarins, indicate the employee injured his left knee. (Ex. 7.)

[2] General Laws c. 152, § 1(7A), provides, in pertinent part:

> If a compensable injury or disease combines with a pre-existing condition, which resulted from an injury or disease not compensable under this chapter, to cause or prolong disability or a need for treatment, the resultant condition shall be compensable only to the extent such compensable injury or disease remains a major but not necessarily predominant cause of disability or need for treatment.

> the word 'probably' and expressly attributing the employee's knee pain to the repetitive walking and climbing at work. The doctor performed surgery on the employee on September 12, 2012 and provided an out of work note for 'probably two months' on October 26, 2012.
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> The employee was examined on May 23, 2013 by Dr. John Sliski at the request of the self-insurer. His report of the same date and an addendum dated August 23, have been entered into evidence as exhibit 10. In his report he recorded a history that is consistent with the one related above except that he reported the onset of knee pain in February 2012, the same month as reported in the Massachusetts General Hospital record (exhibit 6) and a month earlier than Dr. Zarins in his report and the employee in his testimony reported. He offered the opinion that the employee could return to driving a bus and that the knee pain and resulting surgery are related [sic] pre-existing degenerative arthritis and not to any work activities.

(Dec. 651-652.) The judge found "the employee sustained a work-related injury and was totally disabled from July 14, 2012 through July 14, 2013. In making these findings I rely on the credible testimony of the employee and the persuasive medical opinions of Dr. Zarins." (Dec. 652.)

The self-insurer argues the judge's decision failed to address its defense based on the "wear and tear" doctrine discussed in Zerofski's Case, 385 Mass. 590, 596 (1982)([p]rolonged standing and walking are simply too common among necessary human activities to constitute identifiable conditions of employment"). The self-insurer also argues the judge failed to address its § 1(7A) defense. In addition, the self-insurer contends the evidence did not support the judge's findings pertaining to the employee's incapacity.

Focusing on Dr. Zarins's December 27, 2012 report, the self-insurer asserts there is no way to know what Dr. Zarins meant when he stated "repetitive activities" caused the employee's knee pain, because the report contains no description of the employee's work activities consistent with the employee's testimony. (Self-ins. br. 5.) The self-insurer's argument is not supported by the record. First, the self-insurer ignores the employee's extensive testimony about

the stair climbing he performed on the job, which the judge credited. (Dec. 652; Tr. 31-34, 43-47.) Second, the self-insurer's argument focuses on selected portions of the judge's decision and Dr. Zarins's treatment notes, extracting them out of context and viewing them in isolation. The judge paraphrased Dr. Zarins's opinion, recorded in his office note of September 20, 2012, when he found the doctor opined that the employee's "injury was 'probably' related to the employee's repetitive work activities." (Dec. 651.) Dr. Zarins's office note states that the injury was "probably related to excessive force going up and down stairs, which causes a high load on the patellofemoral joint." (Ex. 7.) Thus, consistent with the employee's testimony, the doctor identified stair climbing as one of the "repetitive work activities" noted by the judge.

The self-insurer also argues there was no evidentiary support for the judge's finding that the employee sustained a left knee injury as a result of "repetitive walking and climbing at work." (Dec. 651.) Specifically, the self-insurer contends the judge erred in finding that Dr. Zarins "expressly attribute[ed] the employee's knee pain to repetitive walking," (Dec. 651), because Dr. Zarins's December 27, 2012 report identified "climbing," not "walking" as its cause. (Ex. 7; Self-ins. br. 4.) The self-insurer further maintains that there was no evidence of "climbing" in this case. Consequently, the self-insurer argues reversal is required because the judge referred to walking as a cause of the employee's left knee pain, (Dec. 651), "an aggravation caused merely be [sic] walking at work is a defense consistent with Zerofski." (Self-ins. br. 5.)

The judge erred in finding Dr. Zarins's December 27, 2012 report "expressly" mentioned "walking" as a "repetitive activit[y]" causing the employee's knee pain. (Dec. 651.) However, the error is harmless under the circumstances because Dr. Zarins's report expressly identifies "climbing" as a cause. (Ex. 7.) The judge's discussion of Dr. Zarins's opinions shows he reviewed the doctor's notes, and his evolving opinions regarding the etiology of the employee's knee pain, in the context of his entire treatment of the employee.

(Dec. 651.) By viewing Dr. Zarins's notes in their totality, the judge reasonably and permissibly inferred that the doctor's December 27, 2012 statement that "climbing" caused the employee's knee pain, was a reference to the "stair" climbing the doctor discussed in his September 20, 2012 report. (Ex. 7.) Thus, the judge did not err in concluding, based on the employee's testimony and Dr. Zarins's opinions, that the employee suffered a compensable injury caused by repetitive stair climbing. Sawyer's Case, 315 Mass. 75, 76 (1943)("[t]he essential facts need not be proved by direct evidence but may be established by reasonable inferences from the facts shown to extist").

However, the judge failed to address the self-insurer's duly raised § 1(7A) defense. The employee acknowledges Dr. Zarins opined that the work injury was "superimposed over a pre-existing degenerative process," (Ex. 7, Employee br. 2), which is sufficient to meet the self-insurer's burden of production under § 1(7A). See Castillo v. Cavicchio Greenhouses, Inc., 66 Mass. App. Ct. 218, 219 (2006). The judge made no findings of fact identifying the precise diagnosis or nature of the employee's left knee injury, which is the place where his analysis of the self-insurer's § 1(7A) defense should start. Stecchi v. Tewksbury State Hosp., 23 Mass. Workers' Comp. Rep. 347 (2009). On recommittal, once the judge identifies the diagnosis that is causally related to the employee's work activities, he must make findings and analyze the medical evidence with respect to the self-insurer's § 1(7A) defense. See Soucy v. Beacon Hospice, Inc., 25 Mass. Workers' Comp. Rep. 311, 313 (2011), and cases cited therein.

Although the judge may not reach the issue of the extent of the employee's incapacity on recommittal, we see no error in his current incapacity analysis. The insurer's argument to the contrary is based on a version of the facts that differs from those found by the judge, which are supported by the record. (Dec. 651, 652.) We also note that the judge's findings regarding the employer's failure to accommodate the employee's medical release, permitting him to return to his bus driving duties, is consistent with the evidence and law. See Scheffler's Case, 419

Mass. 251, 256 (1994). Accordingly, we vacate the decision and recommit the case to the judge for further findings of fact consistent with this decision.

So ordered.

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Catherine Watson Koziol
Administrative Law Judge

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Mark D. Horan
Administrative Law Judge

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Bernard W. Fabricant
Administrative Law Judge

Filed: ***July 1, 2015***