**COMMONWEALTH OF MASSACHUSETTS**

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| **DEPARTMENT OF INDUSTRIAL ACCIDENTS** | **BOARD NOS. 008484-03; 034338-09; 000761-10** |
| Steven Lupa | Employee |
| United Parcel Service | Employer |
| United Parcel Service | Self-Insurer |

**REVIEWING BOARD DECISION**
(Judges Fabricant, Horan and Harpin)

The case was heard by Administrative Judge Hernandez.

**APPEARANCES**
Rickie T. Weiner, Esq., for the employee at hearing
James N. Ellis, Esq., for the employee on appeal
Charles E. Berg, Esq., for the employee on appeal
Joseph J. Durant, Esq., for the self-insurer at hearing
John J. Canniff, Esq., for the self-insurer on appeal

**FABRICANT, J.** The employee appeals from a decision denying and dismissing his claims for §§ 34 or 35 incapacity benefits, as well as §§ 13 and 30 medical benefits, specifically bilateral knee replacements.[1] The employee contends the judge mischaracterized the impartial examiner's opinion supporting his claim regarding causal relationship and the need for medical treatment. While we agree the judge mischaracterized portions of the impartial examiner's opinion, for reasons discussed below, we affirm the decision.

[1] During oral argument before the reviewing board, the parties narrowed the issues in dispute to just the employee's claim for §§ 13 and 30 benefits. Accordingly, we do not address the substance of the original claim for §§ 34 and 35 benefits. (Oral Argument Tr. 11-12, 20.) We hasten to add the judge did not, as the employee suggests, deny his right to treat generally for his injuries. Respecting the employee's medical treatment rights, at hearing the insurer only denied "entitlement to medical benefits as to the bilateral knee replacement. . . ." (Dec. 3.) The judge denied "the Employee's claim for Section 13 and 30 benefits specifically to his need for treatment for bilateral total knee replacement." (Dec. 16.)

Over the course of thirty-five years working for United Parcel Service, the employee incurred several injuries which were accepted by the employer. (Dec. 3.) On February 9, 1982 he injured his right knee; on March 21, 2003 he again injured his right knee, suffering a torn medial meniscus; and, in August of 2009, he was diagnosed with deep venous thrombosis with multiple pulmonary emboli. The employee formally retired on December 31, 2009. (Dec. 4-5.)

The employee's original claim for benefits pursuant to §§ 34, 35, 13 and 30, was denied following the § 10A conference on May 6, 2010. The employee filed an appeal of that order. (Dec. 2.)

An impartial medical examination was conducted by Dr. Charles Kenney on August 28, 2010, pursuant to G. L. c. 152 § 11A, and his report and deposition testimony were admitted into evidence. (Dec. 6; Ex. 1.) The judge ruled that the impartial report was adequate, and denied the insurer's motion to open the record due to complexity, although the submission of additional "gap" medical records was allowed. (Tr. 56-57.)

The judge adopted Dr. Kenney's opinion that the work-related incidents of 1982, 2003 and 2009, combined with the pre-existing progressive degenerative osteoarthritis of both knees, to cause the employee's complaints, disability and need for treatment. (Dec. 6, 11-12.) Because of this opinion, the judge found the self-insurer met its burden of production regarding G. L. c. 152 § 1(7A).[2] (Dec. 12.) However, the judge also adopted Dr. Kenney's testimony that he could not state to a reasonable degree of medical certainty whether the employee's arthritic changes resulted from the injury in 1982, or whether it occurred naturally and progressively. (Dec. 13.) Based upon this adopted testimony, the judge concluded that the bilateral knee replacement surgery cannot, within

[2] General Laws c. 152, § 1(7A), states 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.

a reasonable degree of medical certainty, be found to be caused by the industrial accidents. (Dec. 14.)

The employee argues the judge erred by misinterpreting Dr. Kenney's opinion. We agree, but this does not mean the judge's conclusion must be reversed. Once the judge found that the self-insurer appropriately raised § 1(7A) as an affirmative defense, the burden of proof shifted to the employee to prove the work injury remained a major but not necessarily predominant cause of his need for the bilateral knee replacement. The adopted report and testimony of Dr. Kenney provide the employee with the requisite "a major cause" opinion:

> "It is my opinion, based upon a reasonable degree of medical certainty, that a causal connection exists between the work-related incidents of 1982, 2003, and 8/17/2009 and the aforementioned diagnoses.[3] It is my opinion, based upon a reasonable degree of medical certainty, that the work incidents of 1982, 2003 and 8/17/2009 combine with the preexisting conditions, preexisting progressive degenerative osteoarthritis of both knees, to cause the complaints, disability and need for treatment. *It is my opinion, based upon a reasonable degree of medical certainty, that the work-related injury is a major cause of the Employee's complaints, disability and need for treatment*."

(Ex. 1; Emphasis added.)

Thus, although Dr. Kenney could not establish whether the employee's osteoarthritis was the result of the industrial injury, or merely a natural progression, he nonetheless opined that the work-related injury was *a major* cause of the employee's complaints, disability and need for treatment.

Since the judge ruled that the § 11(A) report was adequate to provide an opinion as to causal relationship pursuant to § 1(7A), and other medical reports that were

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[3] Dr. Kenny's referenced diagnoses states thus:

> "It is my opinion, based upon a reasonable degree of medical certainty that the diagnoses are: Bruise of right knee in 1982; sprain of right knee with tear of medial meniscus in 2003; deep venous thrombosis with multiple pulmonary emboli; preexisting progressive degenerative osteoarthrosis of both knees."

(Ex. 1.)

admitted for the "gap" period could be used to address only disability, (Tr. 57), Villiard v. Rogers Insulation Specialist, 27 Mass. Workers' Comp. Rep. 1, 5 (2013), the only adopted medical evidence supports a finding of causation. LaGrasso v. Olympic Deliv. Serv., 18 Mass. Workers' Comp. Rep. 48, 58 (2004)(judge not free to mischaracterize expert medical opinion).

However, the impartial physician's findings do not end with the "a major" cause opinion. The same report goes on to conclude:

> "It is my opinion, based upon a reasonable degree of medical certainty, that a medical end result has been reached."

(Ex. 1, p. 7.) Opining a "medical end result" does not answer the question whether the requested surgery was warranted. Earlier in the same report, Dr. Kenney noted:

> "Knee replacements were recommended. However, since he had recently undergone pulmonary embolism, it was thought best to wait."

(Ex. 1, p. 6.) Where there is no specific opinion evidence regarding the reasonableness and adequacy of the knee replacement surgery, whether the impartial physician intended to include it as part of the employee's "need for treatment" cannot be determined. Because the impartial physician was under no statutory obligation to opine on the employee's need for surgery, the employee bears the burden of proving this element of his case. It was thus the responsibility of the employee's counsel to submit sufficient hypothetical questions, or to question the doctor directly at deposition, concerning whether the proposed surgery was reasonable, adequate, and causally related. Eastwood v. Willowood of Williamstown, 26 Mass. Workers' Comp. Rep. 291, 297 (2012). As this insufficient opinion is the only evidence before the judge addressing this issue, the employee's claim must fail. Sponatski's Case, 220 Mass. 526, 527-528 (1915)(burden of proving essential elements of claim rests with the employee).

Finally, the employee has also challenged the senior judge's authority to hear this case and render a decision. Rather than cite any conclusive Massachusetts case law, the employee instead relies upon the argument that the independence and impartiality of the

reviewing board would be called into question each time it reviewed a decision issued by the senior judge, as he is vested with the supervision and administrative control of all the judges at this department. (Employee br. 30.) As the senior judge[4] is not precluded by statute from issuing a decision following his appointment, this argument is without merit. See G. L. c. 23E, § 6.

Accordingly, we affirm the decision denying the claim for medical benefits pursuant to G. L. c. 152, §§ 13 and 30. [5]

So ordered.

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Bernard W. Fabricant
Administrative Law Judge

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Mark D. Horan
Administrative Law Judge

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William C. Harpin
Administrative Law Judge

Filed: **February 12, 2016**

[4] We take judicial notice that the senior judge was reappointed as an administrative judge whose term does not expire until 12/29/2017.

[5] See McDonald v. Brand Energy Services, Inc., 29 Mass. Workers' Comp. Rep. ___ (Jan. 5, 2015); Panu v. Chrysler Motors Corp., 28 Mass. Workers' Comp Rep. 91 (2014); McCambly v. M.B.T.A., 21 Mass. Workers' Comp. Rep. 57, 61 (2007)(reviewing board will affirm decision with right result, even if judge gave wrong reason).