

COMMONWEALTH OF MASSACHUSETTS

**DEPARTMENT OF
INDUSTRIAL ACCIDENTS**

BOARD NO. 017977-00

James M. Fedier
Balise Motor Sales Co.
AIM Mutual Insurance Co.

Employee
Employer
Insurer

REVIEWING BOARD DECISION

(Judges Carroll, Horan and Fabricant)

APPEARANCES

William T. Walsh, Jr., Esq., for the employee
Kimberly Davis Crear, Esq., for the insurer

CARROLL, J. The employee appeals from a decision in which the administrative judge denied and dismissed his claim for medical benefits to pay for surgery on a bilateral knee condition known as retropatellar chondritis. Because the judge erred by applying the § 1(7A) “a major” causation standard, we reverse the decision in part.

James Fedier suffered a torn cartilage to his left knee at work on April 3, 2000. Despite two surgical repairs, the employee continued to have pain in his left knee and started to develop pain in his right knee. The insurer resisted Mr. Fedier’s claim for further surgery to the left knee and for surgery to the right knee. The employee underwent an impartial medical examination by Dr. Allan Bullock. Dr. Bullock opined that the employee suffered from retropatellar chondritis in both knees and that the proposed osteotomy of the bone would be a reasonable and necessary treatment. As to causal relationship, the doctor offered that the work injury to the left knee and subsequent surgeries to that knee were contributing causes of the retropatellar chondritis in that injured knee. (Dec. 2-3.) The doctor was of the opinion that the work injury to the left knee was *not* a cause of the retropatellar chondritis of the *right* knee. (Dec. 3; Dep. 10-11.)

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In the absence of any articulation by the insurer at hearing¹ that it was raising § 1(7A)² in defense of the employee's claim for medical benefits, the judge nevertheless concluded:

The impartial physician clearly opines that the development of the retropatellar chondritis in the right knee is not work related. While he cannot rule out the work injury as a contributing factor to its development in the left knee, he also cannot state whether it is a major or minor cause. Given that the employee developed the condition in both knees approximately the same time period, I am not persuaded that the work injury was indeed a major cause of the present need for surgery to the left knee.

(Dec. 3.) The judge denied and dismissed the employee's claim for surgery to both knees. (Dec. 4.)

The judge was in error to apply the heightened causation standard of "a major" cause to the employee's claim. The record does not support that the insurer put the provision into play by raising it at hearing. We have long set out the requirement that an insurer raise the provision for it to apply. See Saulnier v. New England Window and Door, 17 Mass. Workers' Comp. Rep. 453, 459-460 (2003), and cases cited. This omission by the insurer is sufficient to establish that § 1(7A) did not apply to the claim. The decision is therefore contrary to law.

¹ Testimony at hearing was submitted by the affidavit of James M. Fedier; no issue statement was submitted by the insurer. (Dec. 1, 2; Ins. br. 5, n.1.) No stenographic record was made. Section 1(7A) was not listed as an issue in dispute on the Temporary Conference Memorandum for the claim for surgery, which claim was denied at conference on March 9, 2005. We take judicial notice of the documents in the board file. Rizzo v. M.B.T.A., 16 Mass. Workers' Comp. Rep. 160, 161 n.3 (2002).

² General Laws c. 152, § 1(7A), provides, in relevant 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.

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We conclude the employee has established that his left knee chondritis is causally related to his work injury to that knee, as a matter of simple contributing causation. The uncontradicted opinion of the impartial medical examiner constitutes prima facie evidence of simple causal relationship and must be adopted. Leppo v. Rusco Steel Co., 17 Mass. Workers' Comp. Rep. 499, 502 (2003) (under the terms of M.G. L. c. 152, § 11A, the impartial opinion has prima facie impact). Pursuant to §§ 13 and 30, the insurer is ordered to authorize and pay for the proposed surgery to the left knee.

As the impartial physician's opinion at his deposition is clear, that he could *not* causally relate the right knee chondritis to the left knee work injury,³ we affirm the decision as to that component of the employee's claim.

Pursuant to § 13A(6), employee's counsel is awarded a fee of \$1,407.15.

So ordered.

Martine Carroll
Administrative Law Judge

Mark D. Horan
Administrative Law Judge

Filed: **April 18, 2007**

Bernard W. Fabricant
Administrative Law Judge

³ Indeed, the doctor opined that the extra work required of the right knee, due to the left knee injury and surgery, actually would have the result of strengthening the right knee and making the chondritis less likely. (Dep. 10.)