COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 020766-04**

Dennis Ladue	Employee
C & S Wholesale Foods	Employer
Fidelity & Guaranty Insurance Co.	Insurer

REVIEWING BOARD DECISION
(Judges Costigan, Carroll and Fabricant)

APPEARANCES
Michael J. Chernick, Esq., for the employee
James D. Chadwell, Esq., for the insurer

COSTIGAN, J. The insurer appeals from a decision in which the administrative judge found that the employee had sustained a repetitive stress injury to his right hip while working in a warehouse, and awarded § 35 partial incapacity benefits. The insurer contends the judge's conclusions with respect to the issues of notice and of causal relationship, at least as to the second period of incapacity claimed, are unsupported by sufficient subsidiary findings of fact. We agree, and recommit the case for further findings.

The employee, aged thirty-seven at the time of the hearing, worked as a selector in the C & S Wholesale Foods (C & S) warehouse. His job involved standing on and driving a motorized pallet jack throughout an extensive warehouse; he would jump off the vehicle to select cases to be loaded onto trucks for delivery, and then jump back on. On a daily basis, the employee moved approximately 200 cases per hour, sometimes in multiples, which entailed jumping approximately ten inches off the pallet jack onto a concrete floor up to 150 times per hour. (Dec. 4.) In early 2002, the employee began to experience pain in his right hip, which would come and go depending on his workload. (Dec. 5.)

In August 2002 the employee filed a claim for short-term disability benefits, in which he reported feeling a sharp pain in his right groin when he

picked up a child.[1] He underwent hernia surgery in September 2002 and returned to work the following month, with a full duty release from his treating physician. (Dec. 5; Tr. 30.) In late 2002, the employee experienced a return of his right hip pain. After further periods of disability and a second hernia surgery, in April 2004 the employee started looking for another job which would not require the same sort of activities that he felt were causing the pain. He obtained a selector's job at Big Y's warehouse, which had a slower work pace than that of the employer.[2] (Dec. 4-5.) The employee's pain dissipated after leaving C & S on May 31, 2004, but returned in May 2005 when his hours at the new warehouse were increased. (Dec. 5-6.)

In the summer of 2004, the employee, citing a January 15, 2004 date of injury, filed a workers' compensation claim against C & S's insurer for incapacity, medical and § 36 (permanent loss of bodily function) benefits from and after from June 1, 2004. (Dec. 2.) Contrary to the judge's finding, (Dec. 7), the employee did not file a claim against Big Y's insurer.[3] On March 14, 2005, the employee underwent a § 11A impartial medical examination by Dr. Kuhrt Wieneke, Jr.[4]

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[1] The employee acknowledged that this pain was not work-related. (Tr. 59-60.)

[2] The judge found that prior to being hired by Big Y, the employee underwent a pre-employment physical examination and was cleared for selector's work without restrictions. The judge also found that the pace of the employee's selector's job at Big Y was "substantially slower," involving "an average of 50 to 100 stops per hour versus the 150+ at C & S Wholesale Warehouse." (Dec. 5.)

[3] The employee testified that on February 12, 2005, he developed right lower quadrant pain at the site of his previous hernias, while lifting boxes of bananas at his then employer, Big Y. He said he completed an accident report and that Big Y paid for his medical treatment, but he was given light duty and lost no time from work. (Tr. 53-54, 86-87.) The employee further testified that around Memorial Day in 2005, after about a year of being pain-free, and some six weeks after he was evaluated by the § 11A impartial physician, he experienced the return of right hip pain and decided to resign from his job at Big Y. (Tr. 92- 94.)

[4] The impartial medical report was deemed adequate, (Dec. 2), and no additional medical evidence was sought or admitted.

The doctor opined that the employee suffered from arthritis of the right hip which, although pre-existing, had been aggravated by the repetitive jumping off of the pallet jack onto the concrete floor. The doctor opined that the employee's work activity was a major cause of his medical disability, and that he was restricted from the causative warehouse activities. (Dec. 6.) Based on that sole expert medical opinion in evidence, the judge found:

> The doctor[']s clinical examination was relatively "normal," and I adopt the doctor[']s only specific restriction that the employee not jump off equipment or jump from heights to concrete floors at any time in a repetitive fashion at the pace he worked at C & S. . . . I also adopt the doctor's opinion that repeatedly jumping off a pallet at work, as well as handling relatively heavy materials on a repetitive basis at the C & S pace, aggravated an underlying and preexisting condition, i.e., early arthritis in his right hip. *I also adopt the doctor*[']*s opinion that his work activities at C & S are a major and even a predominate* [sic] *cause of his disability*. . . . I also adopt Dr. Wieneke's findings of no permanent loss of function.

(Dec. 6; emphasis added.)[5] Therefore, the judge ordered C & S's insurer to pay

[5] The judge's use of the present tense misstates the doctor's cited testimony:

> Q: Do you have an opinion as to whether or not the jumping on and off the forklift *was* a predominant cause of his disability?
> A: I would say it *was.*

(Dep. 10; emphasis added.) We note the doctor's opinion, elicited much later in his deposition:

> A: . . . I would say he aggravated an underlying condition when he was working at C & S, and that he got better when he stopped that job. And he further aggravated an underlying condition when his right hip became painful, when he was working at Big Y. The real question in my mind is did either of these episodes substantially alter the underlying natural course of [his] hip arthritis? The answer is: There isn't any evidence that that has occurred. At least in my way of thinking.
> Q: Certainly at the Big Y job?
> A: Either one. I don't think that that occurred.

(Dep. 41.)

§ 35 partial incapacity benefits from June 1, 2004 to May 31, 2005, based on the employee's actual wages with Big Y. The judge also determined that after the employee started working at Big Y, he suffered a further, closed period of disability from May 31, 2005 until July 20, 2005, but as there was no claim against that second insurer, benefits were not awarded.[6] The judge did order C & S's insurer to pay ongoing § 35 partial incapacity benefits from and after July 20, 2005. Finding that "the employee is an intelligent, reliable employee who has the present ability to perform entry-level management employment," the judge assigned a $600 weekly earning capacity. (Dec. 7-8.)

Addressing the insurer's affirmative defense of late notice, the judge found that, "[d]ue to the repetitive nature of the industrial injury . . . the notice in this case to the employee [sic] was sufficient." (Dec. 6.) We agree with the insurer that this sole finding, tested against the pertinent statutory provisions governing notice,[7] is legally insufficient, requiring that we recommit the case for further findings.

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[6] The judge found:

> The employee suffered return of his hip pain after heavy working at Big Y on or about May 31, 2005. As they are not a party [to] this claim, I do not make any findings whether he has a compensable injury under Chapter 152 for a new injury, however the alleged incident does break the chain of causation for the period of time from May 31, 2005 to the employee's testimony on July 20, 2005. At hearing the employee testified that since leaving the Big Y job his hip pain had dissipated. Regrettably, the employee did not testify when exactly that occurred, and there is no motion to introduce additional medical evidence on that point, and I refrain from acting sua sponte.

(Dec. 7.)

[7] General Laws c. 152, § 41, provides, in pertinent part:

> No proceedings for compensation payable under this chapter shall be maintained unless a notice thereof shall have been given to the insurer or insured as soon as practicable after the happening thereof. . . .

There is no dispute that prior to the filing of his workers' compensation claim, the employee did not give the employer written notice of the time, place and cause of his injury, as required by §§ 41 and 42. The judge's finding that "the notice" was sufficient because the nature of the employee's injury was "repetitive," is inscrutable but, more importantly, it is is not dispositive of the notice issue.[8] We do not think the judge could permissibly infer employer knowledge of the causal connection between the employee's work activity and his alleged injury from either the repetitive nature of the work or the cumulative nature of the injury. If the inference is to be drawn as the judge has stated it, he needs to explain in greater detail how the evidence supports that conclusion.

General Laws c. 152, § 42, provides, in pertinent part:

> The said notice shall be in writing, and shall state in ordinary language the time, place and cause of the injury, and shall be signed by the person injured. . . .

General Laws c. 152, § 44, provides:

> Such notice shall not be held invalid or insufficient by reason of any inaccuracy in stating the time, place or cause of the injury unless it is shown that it was the intention to mislead and that the insurer was in fact misled thereby. Want of notice shall not bar proceedings, if it be shown that the insurer, insured or agent had knowledge of the injury, or if it is found that the insurer was not prejudiced by such want of notice.

[8] "When late notice is asserted by the insurer, the burden of proof rests with the employee to show either that the employer or insurer had knowledge of the injury, or that the insurer was not prejudiced by lack of timely notice." Day v. Lumbermen's Mut. Cas. Co., 4 Mass. Workers' Comp. Rep. 313, 317-318 (1990), citing Clifford's Case, 337 Mass. 129 (1958), and Berthiaume's Case, 328 Mass. 186 (1951). "Knowledge of the injury" is used "in the statute in its ordinary sense as meaning actual knowledge, but not absolute certainty." Dugas v. Bristol Cnty. Sheriff's Dept., 17 Mass. Workers' Comp. Rep. 349, 354 (2003), quoting Walkden's Case, 237 Mass. 115, 117 (1921). "Knowledge of the injury" has been interpreted to mean the employer or insurer knew or had reason to know the injury was causally related to the employment. Kangas's Case, 282 Mass. 155 (1933). In the absence of such knowledge, only a showing that the insurer was not prejudiced by his failure to give notice will permit the employee to recover benefits. Tassone' s Case, 330 Mass. 545, 549 (1953); Kangas's Case, supra at 157-158. See also, Hamel v. Kidde Fenwal, Inc., 21 Mass. Workers' Comp. Rep. ___ (2007).

Surmise and conjecture do not suffice. See Russell's Case, 334 Mass. 680, 683 (1956). There is certainly ample testimony from the employee,[9] and from the employer's representative, (Tr. 103-116), relevant to the issue of notice. We therefore recommit the case for the judge to consider this evidence and make such additional subsidiary findings as will allow us to "determine with reasonable certainty whether correct rules of law have been applied to facts that could be properly found." Couch v. Gill-Montague Reg. School Distr., 20 Mass. Workers' Comp. Rep. 237, 238 (2006), quoting Praetz v. Factory Mut. Eng'g & Research, 7 Mass. Workers' Comp. Rep. 45, 47 (1993).

On recommittal, the judge should also revisit his findings with regard to the temporary break in causal connection between the employee's original claimed injury at C & S and his alleged incapacity from May 31, 2005 until July 20, 2005. The judge concluded the increase in the employee's right hip pain during that period was due to his increased work schedule at the Big Y warehouse in May

[9] The employee testified he did not report his right hip/groin pain to anyone in authority at C & S, nor did he seek medical treatment. He continued to work for eight months. (Tr. 31-32.) In June 2003, the employee filed a second claim for short-term disability benefits, and was out from work on STD from June to November 2003. (Tr. 34-39.) He acknowledged he was aware that if he believed he had sustained a work-related injury or condition, he was supposed to report the injury to his employer, but he testified he "was discouraged" by his employer from filing a workers' compensation claim. (Tr. 63, 73.) He testified that in November 2003, he was again released by his physician to return to full duty work with no restrictions, but his right hip pain returned within a month. The employee further testified that in January 2004 he told his supervisor he had experienced a sharp pain in his right hip while bowling. (Tr. 64-65.) He stopped working again, underwent another hernia surgery in March 2004, and again collected STD benefits. (Tr. 40-42.) After applying for a new job with Big Y in April 2004, the employee returned to work at C & S in May 2004, and then resigned in early June 2004, without ever having filed any report of accident or injury involving his right hip. (Tr. 73, 78). The employee testified he told his supervisor he experienced right hip pain at work, (Tr. 33-34, 60-61, 77-78), but at no time prior to his resignation did he ever report to anyone at C & S that the pain was work-related. (Tr. 48, 60-61, 77-78.) The employee acknowledged that the workers' compensation claim he filed in the summer of 2004 was the first notice he gave to C & S that he was alleging a work-related injury. (Tr. 78.)

2005, which culminated in his leaving that job at the end of that month. The employee's pain had dissipated by the time of the hearing on July 20, 2005. (Dec. 7.) While a temporary exacerbation of the employee's pain due to the work performed at Big Y is a possibility, see Broughton v. Guardian Indus., 9 Mass. Workers' Comp. Rep. 561, 564 (1995), we do not discern medical support for that proposition in the judge's findings. (See footnote 6, supra.) It is axiomatic that findings on causal relationship must be supported by expert medical opinion. Josi's Case, 324 Mass. 415, 418 (1949). Further findings as to the medical foundation, if any, for the judge's conclusions on causal relationship and continuing partial disability are necessary. See Guilbeault v. Teledyne Rodney Metals, 15 Mass. Workers' Comp. Rep. 23, 27 (2001)(medical evidence on causation required in successive insurer cases).

Accordingly, we recommit the case for further findings of fact consistent with this opinion.

So ordered.

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Patricia A. Costigan
Administrative Law Judge

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Martine Carroll
Administrative Law Judge

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Bernard W. Fabricant
Administrative Law Judge

Filed: **November 13, 2007**