

**COMMONWEALTH OF MASSACHUSETTS**

**DEPARTMENT OF  
INDUSTRIAL ACCIDENTS**

**BOARD NO. 034501-03**

Janet Monterosso  
Gentiva Health Care  
Hartford Insurance Company

Employee  
Employer  
Insurer

**REVIEWING BOARD DECISION**  
(Judges Horan, McCarthy and Fabricant<sup>1</sup>)

**APPEARANCES**  
Cynthia A. Spinola, Esq., for the employee  
Brian R. Sullivan, Esq., for the insurer

**HORAN, J.** The employee appeals from an administrative judge's decision awarding her a closed period of weekly § 34 benefits. We affirm the decision.

Janet Monterosso, seventy years old at the time of hearing, worked part-time for the employer as a home health aide. On July 18, 2003, she tripped and fell at work, injuring her left knee. From July to December 2003, she worked light duty for a few hours a week, and received partial incapacity benefits on a without prejudice basis from Hartford (hereinafter "the insurer"). When the light duty job ended and the insurer terminated her benefits, the employee filed § 34 claims against the insurer and against Travelers, the insurer of her employer in 1987.<sup>2</sup>

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<sup>1</sup> Judge Carroll, originally assigned to this panel, did not take part in the deliberations involved in this decision due to her elevation to the position of Senior Judge.

<sup>2</sup> Ms. Monterosso had fractured her left hip at work in 1987, necessitating a total hip replacement in 1990. As a result of the surgery, her left leg was slightly shorter than her right leg, and she needed a lift in her left shoe to minimize her limp. (Dec. 3, 4; Stat. Ex. 1, p. 3; Tr. 7-8.)

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A § 10A conference resulted in an order of § 34 benefits against the insurer. Both parties appealed.<sup>3</sup> (Dec. 2.)

On November 5, 2004, Dr. Steven Silver examined the employee pursuant to § 11A. Dr. Silver opined the employee had sustained a contusion of her left knee<sup>4</sup> on July 18, 2003, which produced no disability at the time of his examination. He also opined the employee had a valgus deformity of her left knee resulting in a “mild partial disability.” However, Dr. Silver did not believe the valgus condition, or the employee’s physical limitations, were causally related to her 2003 injury at work. Dr. Silver did not identify the cause of the valgus deformity in his report; he was not deposed. (Stat. Ex. 1; Dec. 3-4.)

On November 26, 2004, after the impartial examination, the employee fell and broke her right hip while attempting to flip a mattress at home. She had right hip replacement surgery in December of 2004. (Dec. 2-3; Tr. 35, 67.)

The hearing on cross appeals from the conference order was held on May 23, 2005. The employee testified she had trouble walking, standing, and sitting due to stiffness in her left knee. She had left knee replacement surgery on June 27, 2005. The judge allowed the parties to submit additional medical evidence due to the complexity of the medical issues. Two of the employee’s treating physicians, Dr. Bote and Dr. Bouillon, causally related the employee’s left knee injury, and the need for left knee replacement surgery, to the July 2003 work injury. They opined that, in July 2003, the employee most likely suffered a fracture of the lateral tibial plateau, requiring left knee replacement surgery. (Dec. 2-3.)

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<sup>3</sup> We have taken judicial notice of the documents in the board file to fill in some of the details omitted by the judge. *Rizzo v. M.B.T.A.*, 16 Mass. Workers’ Comp. Rep. 160, 161 n.3 (2002). After the hearing, but before the judge issued his decision, the employee lump sum settled her case with Travelers, leaving only the claim against Hartford *sub judice*. (Dec. 2.)

<sup>4</sup> Dr. Silver stated at one point in his report the employee sustained a contusion to her *right* knee. (Stat. Ex. 1, p. 3.) However, this appears to be a scrivener’s error, as the other references to the work injury indicate it was to her left knee.

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In his decision, the judge acknowledged the difficulty of getting a “handle” on both the extent of the employee’s disability during the period leading up to her knee replacement surgery, and the causal relationship of that disability to the work injury. (Dec. 4.) All doctors agreed the valgus deformity of the employee’s left knee was causing her ongoing knee symptomatology. However, where the treating physicians linked the development of the valgus deformity to the July 2003 fall, Dr. Silver opined the valgus deformity was *not* caused by her fall at work. The judge expressly rejected the opinions of Dr. Bote and Dr. Bouillon, and adopted Dr. Silver’s opinion that the employee had suffered only a contusion of her left knee at work in 2003, and that, as of November 5, 2004, she had recovered. (Dec. 4-5.) He further adopted Dr. Silver’s opinion that after November 2004, any problems she had with her knee were caused by her valgus deformity, which was unrelated to her 2003 fall at work. (Dec. 3.) The judge concluded:

I simply am not persuaded that Ms. Monterosso suffered anything more than *a temporary aggravation of her underlying left knee problem* in her fall of July 2003. This seems to have returned to baseline by the summer of 2004 as suggested by her own physician’s notes and most significantly as confirmed by Dr. Silver in November of 2004. It only becomes a problem again after the non-work related fall of November 26, 2004, sustained while Ms. Monterosso was flipping a mattress, a fall severe enough to require the replacement of her right hip.

(Dec. 5.)(Emphasis added.) Consistent with Dr. Silver’s opinion, the judge ordered the insurer to pay the employee weekly § 34 temporary total incapacity and medical benefits from December 3, 2003 to November 5, 2004. (Dec. 6.)

On appeal, the employee raises several issues; we address one, and otherwise summarily affirm the decision.<sup>5</sup> The employee maintains the judge’s

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<sup>5</sup> We note that two of the employee’s arguments are moot. At oral argument, the parties reached a § 19 agreement addressing the issue of the employee’s average weekly wage. Her argument that the judge failed to conduct a Frennier analysis is mooted by our affirmance of the judge’s finding that any work-related disability had ceased by the time of the §11A examination.

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finding that she had “a temporary aggravation of an underlying left knee problem” is arbitrary and capricious. We agree the evidence does not support this finding. Dr. Silver, whose opinion the judge adopted, diagnosed no prior knee problems, and stated the employee reported no left knee problems prior to July 18, 2003. (Stat. Ex. 1.) Moreover, the medical evidence contains no reference to any left knee problems prior to the employee’s 2003 fall at work.

However, in spite of his misunderstanding of the employee’s left knee condition prior to July 18, 2003, the judge was free to adopt Dr. Silver’s opinion that on that day, the employee sustained only a contusion to her knee, and that her condition had resolved by the time of his impartial examination.<sup>6</sup> It is up to the judge to weigh the evidence and determine its probative value. Robinson v. Contributory Ret. App. Bd., 20 Mass. App. Ct. 634, 639 (1984); Tran v. Constitution Seafoods, 17 Mass. Workers’ Comp. Rep. 312, 320 (2003). He is free “to accept the medical testimony of one expert and to discount that of another.” Thompson v. Berkshire County Assoc. for Retarded Citizens, 20 Mass. Workers’ Comp. Rep. 247, 251 (2006), quoting Fitzgibbons’s Case, 374 Mass. 633, 636 (1978). We conclude the judge’s decision, grounded in Dr. Silver’s opinions – which were *not* based upon a history of a pre-existing left knee condition prior to July 18, 2003 – is not arbitrary, capricious or contrary to law. G. L. c. 152, § 11C.

Accordingly, we affirm the decision.

So ordered.

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Mark D. Horan  
Administrative Law Judge

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<sup>6</sup> The judge noted the employee’s treating physician, Dr. Bote, stated that by July, 2004, the employee had minimal left knee pain, and that she acknowledged in November, 2004, she was “feeling great.” The judge also observed the employee had not alleged that the cause of her fall at home was related to a “giving away” of her left knee. (Dec. 3- 4.)

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William A. McCarthy  
Administrative Law Judge

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Bernard W. Fabricant  
Administrative Law Judge

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