COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS	**BOARD NOS. 000252-03 008393-10**

Alan K. Havill	Employee
Mead Westvaco/Willow Mill	Employer
Mead Westvaco Corp.	Self-insurer
Onyx Specialty Paper, Inc.	Employer
AIM Mutual Insurance Co.	Insurer

REVIEWING BOARD DECISION
(Judges Koziol, Costigan and Horan)

This case was heard by Administrative Judge Murphy.

APPEARANCES
Frank E. Antonucci, Esq., for the employee
John J. Canniff, Esq., for Mead Westvaco Corp.
Kimberly Davis Crear, Esq., for AIM Mutual Insurance Co.

KOZIOL, J. Mead Westvaco Corporation, (Mead), the self-insurer and first insurer in this successive insurer case, appeals from an administrative judge's decision finding it liable to pay the employee ongoing § 34 benefits. Mead contends the judge erred by finding that the employee did not suffer a second injury while AIM Mutual (AIM) was on the risk. We disagree, and affirm the decision.

The employee began working for Mead in 1998, performing work requiring intensive, continuous and repetitive use of his hands, arms and upper body. On January 4, 2003, the employee slipped and fell on ice in the employer's parking lot, sustaining bilateral wrist fractures and ligamentous injuries. (Dec. 5.) Mead accepted his claim and paid compensation pursuant to §§ 34 and 35 for various periods of incapacity from 2003 through 2006, and medical benefits until November 30, 2009, when the company was sold. During that time, the employee

had multiple surgeries on his wrists and hands.[1] He returned to work after each surgery, but the pain in his hands and wrists never entirely went away. (Dec. 5-6.)

By August 2009, the pain in his left dominant wrist began to worsen. His treating physician, Dr. Adamo, prescribed heavy antivibratory gel gloves to help relieve the pressure on his hands, and to allow him to continue his intense, repetitive work. The gloves helped, but did not eliminate, the pain in his hands. (Dec. 6.)

On December 1, 2009, Mead was sold to Onyx Specialty Paper, and AIM became the workers' compensation insurer. (Dec. 4.) On February 26, 2010, while at work loading, unloading and cranking trailers, the employee realized he could not grip with or feel his right hand. When he removed his gel gloves, his hands were purple and swollen. The employee stopped work on that day due to increased heaviness, pain, swelling, burning and numbness in his hands and fingers. He has not worked since. On March 24, 2010, he underwent revised carpal tunnel surgery on his right hand. At the time of hearing, he was awaiting scheduling of left carpal tunnel surgery. (Dec. 6-7.)

The employee filed claims for weekly compensation and medical benefits against both Mead and AIM, from March 5, 2010 and continuing. Following a § 10A conference, the administrative judge ordered AIM to pay ongoing § 34 benefits. Both AIM and the employee appealed to a de novo hearing, at which the December 20, 2010, report and deposition testimony of Dr. Steven Silver, the § 11A physician, were the only medical evidence. (Dec. 2-3.) In her decision, the judge adopted Dr. Silver's opinion:

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[1] The employee had surgery on both scaphoid bones. He returned to work eight weeks later, but within six months experienced bilateral carpal tunnel problems. When cortisone injections were unsuccessful, he had carpal tunnel surgery, first in one hand and then the other. Again, he returned to work, but continued to have pain in both hands; he treated with muscle relaxants and pain medication, and missed work when the pain was too severe. Eventually, he had further surgery to remove the screws in both wrists and bury the nerve in the muscle in the left wrist. However, his pain continued. (Dec. 5-6, 7.)

> According to Dr. Silver, the eight listed diagnoses are all causally related to the initial January 1, 2003 fall at work. He opines that the Employee's continued repetitive use of his wrists at work worsened his symptoms. Dr. Silver differentiates, however, between a worsening of the Employee's symptoms and a worsening of the Employee's underlying condition ([t]he anatomical condition which he attributes to the 2003 fall at work). *According to Dr. Silver, the symptoms were made worse by the repetitive work activity but the underlying condition and need for surgery was not affected by the repetitive work.* He opined the Employee's increased symptomology [sic] was a natural consequence of the original January 1, 2003[2] injury. Moreover, according to him, *absent the repetitive work activity, the Employee would still have experienced increased symptoms with respect to his wrists and carpal tunnel*. In Dr. Silver's opinion, the Employee's disability and treatment is causally related to the 2003 injury and not any subsequent repetitive activity.

(Dec. 7-8; emphases added; footnote added).

Accordingly, the judge found the employee did not sustain "a new injury when he left work on February 26, 2010 as the Employee's underlying physiology was not affected by any work activity subsequent to this 2003 injury and his increased symptomology [sic] is a natural consequence of the 2003 injury." (Dec. 8.) The judge ordered Mead, the insurer on the risk at the time of the January 4, 2003 injury, to pay § 34 benefits beginning on March 5, 2010. (Dec. 10.)

The sole issue raised by Mead in its appeal is the application of the successive insurer rule.[3] Essentially, Mead argues that Dr. Silver's prima facie

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[2] The January 1, 2003, date appears to be a scrivener's error, as the stipulated date of injury is January 4, 2003. (Dec. 4.)

[3] The successive insurer rule provides:

> Where an employee suffers two or more compensable injuries that are causally related to a resulting incapacity, only one insurer is chargeable for the payment of compensation for the same disability. The successive insurer rule provides that the insurer covering the risk at the time of the most recent injury that bears causal relation to the disability claimed must pay the entire compensation. See Fitzpatricks' Case, 331 Mass. 298 (1954); Casey's Case, 348 Mass. 572, 574 (1965); Zerofski's Case, 385 Mass. 590, 592 (1982). The subsequent injury need not be a significant contributing cause to the incapacity. So long as it is to the "slightest extent" a contributing cause, the insurer at the time of the recent injury

opinion that the employee's repetitive activities at work worsened his symptoms, though not his underlying condition, requires a finding that a second injury occurred, either on February 26, 2010 or through the cumulative effects of the employee's work after December 1, 2009. (Self-ins. br. 7-8.) Mead relies on the holding in Long's Case, 337 Mass. 517, 521 (1958) that "a disabling increase in symptoms of some days' duration as a result of the stress and exertion of work *could be found* to be an injury." (Emphasis added.) We find no error in the decision.

Where, as here, the adopted medical opinion indicates that the underlying medical condition has not changed, an increase in symptoms caused by work activities does not mandate a finding of a second injury establishing liability against a successive insurer. Kautz v. Sloan & Walsh, 19 Mass. Workers' Comp. Rep. 54, 61 (2005); Miranda v. Chadwick's of Boston, Ltd., 17 Mass. Workers' Comp. Rep. 644, 651 (2003); Gentile v. Carter Pile Driving, Inc., 17 Mass. Workers' Comp. Rep. 435 (2003); Broughton v. Guardian Indus., 9 Mass. Workers' Comp. Rep. 561, 564 (1995). To the contrary, an award against the first insurer will be upheld, even though the employee's pain has worsened while he continued to work, where the adopted expert opinion indicates the employee's disability is causally related to his original injury. See, e.g., Pilon's Case, supra (finding of liability against first insurer upheld where employee, who sustained carpal tunnel injury and nerve damage to arms and hands due to constant use of vibrating demolition equipment, later experienced recurrent and worsening pain and numbness due to continued use of that equipment, and impartial examiner

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> will be held liable to cover the entire incapacity. See Rock's Case, 323 Mass. 428, 429 (1948). *The determination whether there was a subsequent injury and whether it had causal connection to the ensuring incapacity is essentially a question of fact*. Costa's Case, 333 Mass 286, 288 (1955); see also Zerofski's Case, 385 Mass. at 594, on which expert medical opinion is required. See Casey's Case, supra.

Pilon's Case, 69 Mass. App. Ct. 167, 169 (2007)(emphasis added).

opined that work performed when employee was first injured caused employee's disability); Costa's Case, 333 Mass. 286, 288-289 (1955)(finding of liability against first insurer upheld where adopted medical opinion was that employee's disability was directly attributable to injury with first employer, and employee worked almost continuously thereafter with near constant and progressively worse backaches). Moreover, "[t]he law is well established that the deleterious effects of work subsequent to an industrial injury do not amount to a new industrial injury where the incapacity suffered is 'simply the natural physiological progression of a condition following the initial incident.' " Kautz, supra, at 62, quoting Gentile, supra, at 438, quoting Smith v. South Central Mass. Rehabilitative Resources, Inc., 7 Mass. Workers' Comp. Rep. 84, 86 (1993).

The evidence and findings here fall well within the parameters established by the above cases for upholding an assessment of liability against the first insurer. "The determination of whether there was a subsequent injury and whether it had a connection to the ensuing incapacity is essentially a question of fact, on which expert medical opinion is required." Pilon, supra at 169 (internal citations omitted). Dr. Silver repeatedly opined that, while the employee's symptoms worsened due to his work, he could not say that his condition worsened.[4] (Dep. 30, 31, 35, 49, 41, 44.) In fact, according to Dr. Silver, the employee's symptoms would have worsened even had he not been working. (Dep. 43.) In addition, the

[4] Contrary to Mead's argument, we do not consider Dr. Silver's causation opinion to be internally inconsistent because he opined the employee's symptoms were made worse by work but did not, and would not, opine that the employee's condition, i.e., "his physiology . . . either anatomically or any other way," (Dep. 43), was made worse by the employee's work. (Self-ins. br. 5.) Mead also alleges the judge's finding that, as a result of the February 26, 2010 incident, "the employee's hands were purple and swollen" and were "not working," (Dec. 6), is inconsistent with Dr. Silver's testimony that the employee's symptoms worsened due to his work, but his condition did not change. (Self-ins. br. 11.) Mead confuses the judge's role with that of the medical expert. It was the judge's duty to credit or discredit the employee's testimony as to how his hands felt and appeared on February 10, 2010; it was Dr. Silver's responsibility to opine regarding whether those symptoms indicated a worsening of the employee's condition. There was no inconsistency.

employee had multiple surgeries following his January 4, 2003, fall; and the judge credited his testimony that his pain never entirely went away after that injury. (Dec. 6, 7.) Since both the medical and lay evidence amply support the judge's finding that the employee did not suffer a second injury after AIM came on the risk in December 1, 2009, there was no error in her assessment of liability against the first insurer, Mead.

The decision is affirmed. Pursuant to § 13A(6), Mead is ordered to pay employee's counsel an attorney's fee of $1,517.62.

So ordered.

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Catherine Watson Koziol
Administrative Law Judge

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Patricia A. Costigan
Administrative Law Judge

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Mark D. Horan
Administrative Law Judge

Filed: ***September 6, 2012***