COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NOs. 025276-00 042178-00**

Augustin Miranda	Employee
Chadwick's of Boston Ltd.	Employer
Liberty Mutual Insurance Company	Insurer

REVIEWING BOARD DECISION
(Judges Maze-Rothstein, McCarthy and Carroll)

APPEARANCES
Michael J. Reno, Esq., for the employee
Jean Shea Budrow, Esq., for the insurer

MAZE-ROTHSTEIN, J. Liberty Mutual Insurance Company (Liberty) appeals from an administrative judge's decision ordering that it pay reasonable and necessary medical expenses, including recommended shoulder surgery, as well as an unspecified period of § 34 weekly incapacity benefits following the surgery. It argues that the administrative judge erred by denying its motion to join a concurrent employer and then by not finding that employer liable for the employee's incapacity. The insurer contends that neither the judge's subsidiary findings nor the impartial physician's prima facie opinion supports the judge's assessment of liability against it. We disagree and affirm the judge's decision for the following reasons.

Augustin Miranda, fifty years old at the time of hearing, is a native of Puerto Rico who emigrated to the United States in 1972. He has a GED and an associate's degree in diesel mechanics. He began working for Chadwick's of Boston, Ltd. (Chadwick's) in 1994 as a clothes processor, and was eventually promoted to the position of forklift driver, a job requiring frequent overhead activity and heavy lifting. In 1996, he began lighter part-time, concurrent employment at Athena International Foods, (Athena), a convenience store. (Dec. 2-3.)

On June 12, 2000, the employee injured his right shoulder while working for the employer. He was eventually diagnosed with tendinitis and referred to physical therapy, through which he improved enough to return to full-time light duty work. The insurer paid the employee weekly § 34 benefits without prejudice during the period he was out of work until August 19, 2000. On October 23, 2000, the employee re-injured his right shoulder while driving a forklift for Chadwick's. An MRI revealed tendonosis of the rotator cuff, but no tear. (Dec. 2-3.)

When the employee failed to respond to steroid injections, subacromial decompression surgery was recommended. The insurer denied the request for surgery, and the employee received no further treatment. Though he was unable to return to work for Chadwick's, he continued to work part-time at his concurrent employment.[1] At the time of hearing, his symptoms included constant right shoulder pain which increase if he raises his arm over his shoulder or picks up heavy objects. He occasionally does limited overhead activities or lifting at his concurrent employment, but is not required to perform those activities all day long, as he was when he worked for the Chadwick's. He is able to slice meat at the Athena deli counter but does not consider this to be heavy overhead lifting. (Dec. 4.)

Since the employee was earning enough through his work at Athena to preclude entitlement to weekly benefits,[2] (Dec. 6), he filed a claim for medical benefits, including the recommended shoulder surgery, against Chadwick's insurer, Liberty. He also sought § 34 benefits during his recuperation period following the surgery. The judge denied his claim at conference, and the employee appealed to a hearing de novo. (Dec. 2.)

Prior to hearing, Dr. Richard E. Greenberg examined the employee pursuant to

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[1] The employee testified that he attempted to return to part-time light duty work for the employer on December 3, 2000, but was fired on December 7, 2000. (February 14, 2002 Tr. 22-24.)

[2] The employee testified that he began working forty to fifty hours a week at his concurrent employment around October 2001. (February 14, 2002 Tr. 31-32.)

§ 11A. (Dec. 4.) Neither party moved to submit additional medical evidence, and the judge found Dr. Greenberg's report adequate and the medical issues not complex. (Dec. 5.) Following two days of hearing, the insurer took Dr. Greenberg's deposition. (Dec. 2, 4-5.) After the deposition, the insurer filed a motion to join Athena and its insurer, which the judge denied following oral argument. (See Dec. 2; and Insurer's Amended Motion to Join Additional Party, dated May 10, 2002.)

In her decision, the judge found that Dr. Greenberg causally related the employee's chronic tendonosis and tendinitis of his right major shoulder to his June 12, 2000 injury at Chadwick's, which he opined was aggravated by the October 23, 2000 forklift injury, again at Chadwick's. Dr. Greenberg further opined that the employee was partially disabled, and should not perform stressful or overhead activities with his right shoulder. He recommended subacromial decompression surgery and two or three months of physical therapy thereafter, without which he believed the likelihood of further improvement was "quite guarded." (Dec. 4.) Turning to the impartial physician's deposition testimony, the judge concluded:

> During Dr. Greenberg's deposition, the insurer was unable to elicit any testimony that the specific June 12, 2000 injury at work for the employer was not the cause of the employee's need for surgery, although some of the duties currently performed by the employee for the convenience store as depicted on the videotape could be contributing to his current discomfort. The medical records upon which Dr. Greenberg relied advised surgery long before the employee sought relief at the DIA and worked full time at Athena. Dr. Greenberg believed that the insurer's refusal to provide that treatment could have a negative impact on the employee's full recovery. The accidents at work for the employer were the cause of the employee's inability to work, not the functions he performed at Athena International after he was injured in two specific wrenching incidents at the employer.

(Dec. 5.)

Accordingly, the judge assessed liability against Liberty. She found the employee entitled to reasonable and necessary medical care, including the recommended shoulder surgery. The judge also found that the employee would be disabled for some unspecified

period of time after the surgery, and that the insurer was liable for weekly § 34 temporary total incapacity benefits during his subsequent recuperation period.[3] If the parties are unable to stipulate to the employee's average weekly wage at his concurrent employment, as they had indicated they would, the judge noted that they could submit the issue to her when the employee becomes entitled to weekly benefits. (Dec. 5-6.)

The insurer appeals, making three related arguments. First, Liberty argues that the judge's subsidiary findings that the employee's work at Athena International Foods contributed to his injury require a finding that the insurer of the concurrent employer is liable. Second, the insurer argues that the judge failed to adopt the prima facie causal relationship opinion of the impartial examiner, which, it contends, changed during his deposition when he received information on the employee's duties at his concurrent employment. Third, the insurer argues that the judge erred in denying its motion to join the successive insurers of the concurrent employer. We disagree.

The successive insurer rule applies to claims for medical benefits, such as surgery, as well as to weekly incapacity claims. Guilbeault v. Teledyne Rodney Metals, 15 Mass. Workers' Comp. Rep. 23, 26 (2001). It provides that if the employee's disability (or need for surgery) is caused by an aggravation of a prior work-related injury, or by a new injury, the insurer on the risk at the time of the aggravation or new injury bears liability for the entire incapacity and treatment. If the disability is due to a recurrence of symptoms, then the former insurer bears the burden. Id. at 25-26. The determination of whether an employee has suffered an aggravation of a prior injury or a recurrence of symptoms is essentially a question of fact, and the judge's findings, including all rational inferences permitted by the evidence, must stand unless a different finding is required as a matter of law. Costa's Case, 333 Mass. 286, 288 (1955); Spearman v. Purity Supreme, 13 Mass.

[3] See Marchand v. Waste Mgmt. of Mass., Inc., 14 Mass. Workers' Comp. Rep. 332 (2000), and O'Neill v. BJ's Wholesale Club, 17 Mass. Workers' Comp. Rep. 42 (2003)(award of specific period of weekly incapacity benefits is inevitably speculative where surgery has not been performed; once surgery is performed, period of incapacity can be established by agreement, or failing that, through the filing of a further claim).

Workers' Comp. Rep. 109, 113 (1999). An award against the first insurer will be sustained where the employee has suffered consistent symptoms after the first injury, even in the face of a worsening of symptoms at a second employment. See Spearman, supra at 113(where employee's range of pain remained unchanged from the time of his first injury to the hearing, award against first insurer upheld, even though employee's work for second employer caused his back condition to worsen in degree); Rock's Case, 323 Mass. 428 (1948)(award against first insurer upheld where evidence was that employee had not recovered from his first injury, that lifting at second employer was not an independent intervening cause of incapacity, and that he would not have sustained any incapacity had he not been suffering from the effects of the first injury). Of course, expert medical opinion is required to support a judge's findings. Spearman, supra at 112. But even where the medical expert's opinion could be interpreted in more than one way, a judge's finding that the first insurer is liable may be upheld. Costa's Case, supra at 289 (though doctor whose opinion judge adopted qualified somewhat his opinion causally relating the employee's disability to the injury suffered at the employee's first employer, judge's award against the first insurer was upheld where evidence was that employee worked continuously after originally injury with constant backaches that became progressively worse until he stopped working six years later); Escalante v. Reidy Heating and Cooling, 17 Mass. Workers' Comp. Rep. 231, 233-234 (2003)("While the impartial physician's opinion could support [a finding] that the work performed at the latter employment constituted an aggravation of the employee's medical impairment . . . , the medical testimony also could be read to support the judge's conclusion that such contribution was merely a temporary exacerbation of the employee's symptoms and did not worsen the underlying medical condition.")

The insurer argues that the judge's subsidiary findings--specifically her finding that the employee's work with Athena contributed to his injury--fail to support her conclusion that liability remains with the first insurer on the risk. (Ins. Brief, 12.) We

disagree. The judge actually found that the work the employee did at the convenience store "*could* be contributing to his current *discomfort*," (Dec. 5, emphasis added), not to his *injury*. This finding implies not a new injury or aggravation, but a recurrence or increase in symptoms. In such a case, we will sustain a judge's award against the first insurer. Costa's Case, supra; Rock's Case, supra; Spearman, supra. In addition, the judge's other findings support her conclusion that liability remains with the first insurer on the risk. The judge found that the employee had two specific injuries while working for the employer, with immediate treatment. (Dec. 3.) After viewing the videotape of his work at Athena (April 1, 2002 Tr. 4) and hearing testimony of the investigator as to his observations of what the employee did there, (Id. 5-54), she found that the employee's overhead and lifting activities at his concurrent employer are limited, rather than constant, as they were at the employer's. He nevertheless has constant right shoulder pain which increases if he raises his arm over shoulder level or picks up heavy objects. (Dec. 4.) Examining the impartial doctor's deposition testimony, she found no testimony refuting his original opinion causally relating the necessity for surgery to his original June 12, 2000 injury. In fact, she noted that the medical records on which Dr. Greenberg relied advised surgery before the employee worked full-time at Athena or filed a compensation claim.[4] (Dec. 5.) Because these subsidiary findings indicate that the employee suffered a recurrence or increase of his symptoms rather than a change in his underlying condition, they support the judge's assessment of liability against the insurer for the employer. See Gentile v. Carter Pile Driving, Inc., 17 Mass. Workers' Comp. Rep. ___ (September 16, 2003)(appearance of symptoms while performing subsequent job does not indicate a new injury or aggravation as a matter of law).

[4] The insurer's complaint that the judge adopted medical records not in evidence when she found that, "the medical records upon which Dr. Greenberg relied advised surgery long before the employee sought relief at the DIA and worked full time at Athena, (Dec. 5), is unfounded. The judge was merely stating the basis for Dr. Greenberg's opinion, as Dr. Greenberg had testified in his deposition. (Dep. 38-39.) Compare Akoumianakis v. Stadium Auto Body, Inc., 17 Mass. Workers' Comp. Rep. ___ (August 21, 2003)(judge erred by adopting medical opinion not in evidence, over impartial opinion, which was entitled to prima facie weight).

Next, Liberty argues that the medical evidence does not support the judge's finding of liability against it. The insurer maintains that the judge improperly relied on the impartial doctor's opinion as expressed in his report, despite the fact that, at his deposition, he changed his opinion on causal relationship when presented with details of the employee's work for his concurrent employer. We do not agree that the impartial physician changed his opinion causally relating the employee's need for surgery to his two injuries at the Chadwick's. See Perangelo's Case, 277 Mass. 59, 64 (1931)("[t]he opinion of an expert which must be taken as his evidence is his final conclusion at the moment of testifying").

In his report, the impartial physician clearly related the employee's incapacity to his injuries at work.[5] At his deposition, Dr. Greenberg's opinion was more equivocal, but we cannot say that his testimony does not support the judge's conclusion. See Costa's Case, supra at 289. The insurer argues that the impartial doctor changed his opinion when presented with a videotape of the employee's actual duties at his concurrent employment, which showed the employee using a meat slicer at the deli counter, using a metal rod to push a gate up, carrying and unloading boxes, shoveling snow, and performing other similar activities. (Dep. 17-28). Dr. Greenberg testified that the employee had not told him of any of these activities, (Dep. 33), but he assumed that the employee put things on shelves, ran a deli counter and did the usual things that store

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[5] Dr. Greenberg wrote on September 15, 2001:

> There is, within a reasonable degree of medical certainty, a causal connection between the medical condition found on my examination and the history of injury provided to me in that he never had any prior symptomatology in his shoulder until his June injury when his arms was hyper-extended when the plastic on a pallet gave way when he was pulling it. Subsequent to that time, he has had persistent symptomatology of varying intensity aggravated by his subsequent injury at work on the forklift in October. The reason for the causal relationship is, therefore, a temporal one. The injuries that he sustained at work are certainly consistent in terms of mechanism of injury to account for his tendinitis.

(Statutory Exh. 1.)

owners did. (Dep. 7.) The insurer then repeatedly asked variations on the question of whether the employee's activities at Athena (as demonstrated in the video) were the cause of his tendinitis or tendonosis. The impartial doctor's consistent response was that they could contribute to his *symptoms* (Dep. 22, 26) or "will aggravate[6] the *symptoms* of tendinitis and tendonosis." (Dep. 22.) However, he never repudiated his original opinion as to the underlying cause of the need for the employee's surgery.[7] Where there is no testimony that the underlying medical condition has changed, the fact that subsequent work causes an increase in symptoms does not mandate a finding of liability against a second insurer.[8] Broughton v. Guardian Indus., 9 Mass. Workers' Comp. Rep. 561, 564 (1994); Escalante, supra at ___.

Finally, the insurer argues that the judge erred by denying its post § 11A deposition motion to join the insurers of the employee's concurrent employer. While the better practice would be to join successive insurers of a concurrent employer in a case such as this one, whether the judge erred in failing to do so depends in large measure on whether the evidence and the judge's findings support her decision to assess liability against the

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[6] The use of the term "aggravation" does not automatically mean that a later insurer is liable. Spearman, supra at 113 n. 4, citing Broughton, supra at 564.

[7] Dr. Greenberg opined that the employee's tendinitis could have started with his October 23, 2000 injury at the employer's. (Dep. 25.) If taken alone, this opinion could be considered speculative. However, when the medical and lay testimony are viewed as a whole, we think the judge's causal relationship finding is warranted. See Bedugnis v. Paul McGuire Chevrolet, 9 Mass. Workers' Comp. Rep. 801, 803 (1995).

[8] The insurer makes much of a colloquy in the deposition in which the impartial doctor was asked whether the employee's ongoing symptomatology was related to his continuing use of his right arm and shoulder at the deli, to which Dr. Greenberg responded: "In the absence of the formal [sic] work he did before, I would say it is quite likely within a reasonable degree of medical certainty." (Dep. 34.) The insurer would have us read this as a statement, to a reasonable degree of medical certainty, that the employee's need for surgery is due to his work at his concurrent employer. However, putting aside the various interpretations of the phrase, "In the absence of the formal [sic] work he did before," the impartial doctor's opinion addresses only the continuation of the employee's symptoms, not the cause of his underlying condition. Again, such an opinion does not mandate a finding of liability against a subsequent insurer. See Gentile, supra at ___; Spearman, supra at 113.

first insurer. See Escalante v. Reidy Heating and Cooling, 17 Mass. Workers' Comp. Rep. 231, 233-234 and n. 4 (2003). Since we have found that they do, there was no error in denying the insurer's motion to join the insurers of Athena International Foods. Id.

The decision of the administrative judge is affirmed. Pursuant to § 13A(6), we award the employee's attorney a fee in the amount of $1,276.27.

So ordered.

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Susan Maze-Rothstein
Administrative Law Judge

Filed: **December 31, 2003**

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William A. McCarthy
Administrative Law Judge

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Martine Carroll
Administrative Law Judge