COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 57220-90**

Daniel Morgan	Employee
Seaboard Products	Employer
Liberty Mutual	Insurer

REVIEWING BOARD DECISION
(Judges McCarthy, Wilson and Smith[1])

APPEARANCES
James J. O'Malley, III, Esq., for the employee
Dennis M. Maher, Esq., for the insurer

MCCARTHY, J. The employee, Daniel Morgan, appeals from a decision in which an administrative judge denied his claim for § 30 medical benefits for treatment alleged to be causally related to his accepted 1990 industrial accident. Mr. Morgan suffered a non-work-related slip and fall further injuring his back a month before he had surgery in September 1997. The judge denied § 30 medical benefits based on the occurrence of the non-work-related accident. Because we agree with Mr. Morgan that the judge misapplied the law governing independent intervening causes, and that the medical evidence indisputably indicates a causal connection between the 1990 industrial accident and the 1997 surgery, we reverse the decision and award the medical benefits claimed.

Mr. Morgan fell on a loading dock at work on September 24, 1990, and sustained injuries to his lower back. (Dec. 1.) The insurer accepted liability for the injury, paying § 34 incapacity benefits and medical benefits that included a hemi-laminectomy in 1991 for the removal of an extruded disc at L5-S1. (Dec. 2-3.) After a recovery of about one year, Mr. Morgan returned to normal activity, excluding strenuous bending and lifting.

[1] Judge Smith no longer serves as a member of the reviewing board.

(Dec. 3.) On February 5, 1992, the parties entered into a lump sum settlement of the case, which left open Mr. Morgan's entitlement to §30 medical benefits as a matter of law. (Dec. 2.) See § 48.

Mr. Morgan successfully reentered the work force in a lighter duty position as a systems analyst. He still had occasional back pain, which he treated with rest and a heating pad. Then, on August 5, 1997, he slipped and fell in a puddle of oily water at a car lot while shopping for an automobile. He had an immediate onset of severe back pain and left leg pain. (Dec. 2.) The next month Mr. Morgan underwent another operation on his lower back, a laminectomy at L4-5 with a facetectomy and foraminotomy and disc excision, as well as another hemi-laminectomy at L5-S1, with facetectomy and foraminotomy and decompression of the S1 nerve root on the left. (Dec. 3.) He filed a claim for § 30 medical benefits in which he alleged that the surgery was the result of a recurrence of his 1990 back injury. (Dec. 2.) The judge denied Mr. Morgan's claim at conference, and the matter went to a full evidentiary hearing.

Prior to that hearing, Dr. James S. Hewson, an orthopedic surgeon, performed an impartial medical examination under the provisions of § 11A(2). Dr. Hewson diagnosed Mr. Morgan as having lumbar disc protrusions at L4-5 and L5-S1, with evidence of spinal stenosis and degenerative changes at L3-4. Dr. Hewson opined that these diagnoses were causally related to the employee's 1990 industrial injury, and that the 1990 event was a substantial contributing factor to the medical condition that necessitated the 1997 surgery. (Dec. 3-4; Statutory Ex. 1.) At his deposition, Dr. Hewson opined that the 1997 slip and fall was also a significant aggravating event in necessitating the surgery that followed. He stated that he could not say for sure whether Mr. Morgan would have ever needed another surgery were it not for the 1997 slip and fall in the car lot. (Dec. 4.)

The judge found that the employee's slip and fall while shopping for a car was not normal activity of everyday life, and that that distinct injurious event significantly changed his medical condition for the worse, resulting in the 1997 surgery. (Dec. 5.) With regard to the medical evidence, the judge found as follows:

> Dr. Hewson, though maintaining the condition Mr. Morgan was left in following his 1990 industrial injury was significant, nonetheless allowed on cross-examination that the 1997 fall was definitely an aggravating event in Mr. Morgan's needing surgery, agreed that the employee's condition changed as a result of the fall at the car dealership, and could not say for sure whether or not Mr. Morgan would have ever needed another back surgery were it not for the fall at Baron Chevrolet.

(Dec. 5.) As a result, the judge concluded that "[t]he record here simply does not support the claim that the 1990 industrial injury was the cause of the employee's need for surgery in 1997. I do not find the evidence here sufficiently convincing to support a finding that the need for the 1997 surgery was causally related to the 1990 industrial injury." (Dec. 6.)

Mr. Morgan's appeal challenges the judge's interpretation of the medical evidence and his reasoning in finding the 1997 slip and fall an intervening event breaking the chain of causation between the 1990 industrial accident and the 1997 surgery. First, we agree with the employee that the slip and fall while shopping was not an abnormal or unreasonable activity on his part, such that it would cut the chain of causation as a matter of law. See Davis' Case, 304 Mass. 530, 534 (1939). As we observed, courtesy of Arthur Larson, in another subsequent non-work-related slip and fall case:

> [O]nce the work-connected character of any injury, such as a back injury, has been established, the subsequent progression of that condition remains compensable so long as the worsening is not shown to have been produced by an independent nonindustrial cause . . . . [For example a] claimant had suffered a compensable accident in 1966, injuring claimant's back. Several years later, this condition was triggered by a sneeze into a disc herniation, for which claimant required surgery. . . . The presence of the sneezing incident should not obscure the true nature of the case, which is nothing more than that of a further medical complication flowing from a compensable injury. If the herniation had occurred while the claimant was asleep in bed, its characterization as a mere sequel to the compensable injury would have seemed obvious. The case should be no different if the triggering event is some nonemployment exertion like raising a window or hanging up a suit, so long as it is clear that the real operative factor is the progression of the compensable injury, associated with an exertion that in itself would not be unreasonable under the circumstances. A different question is presented, of course, when the triggering activity is itself rash in the light of the claimant's knowledge of his or her condition.

> *The issue in all of these cases is exclusively the medical issue of causal connection between the primary injury and the subsequent medical complications. By the same token, denials of compensation in this category have invariably been the result of a conclusion that the requisite medical causal connection did not exist.*

Kashian v. Wang Laboratories, 11 Mass. Workers' Comp. Rep. 72, 74 (1997), *aff'd* Single Justice of the Appeals Court, 97-J-135 (1997), quoting 1 A. Larson, *The Law of Workmen's Compensation*, § 13.11(a) (1996)[§ 10.02 in 2000 edition](emphasis added).

The only pertinent issue then, is whether the judge's conclusion – that the requisite medical causal connection did not exist – was supported by the evidence. We agree with the employee that it is not. The employee had the burden of proving, through expert medical evidence, that his surgery was causally related to his 1990 industrial accident. Camuso v. Westinghouse Elec. Co., 11 Mass. Workers' Comp. Rep. 479, 482 (1997); Galloway's Case, 354 Mass. 427, 431 (1968). As a matter of law, the exclusive prima facie medical evidence introduced pursuant to § 11A(2) supported the employee's claim that his 1997 surgery was causally connected to the 1990 industrial injury.

Mr. Morgan is correct in his contention that Dr. Hewson never changed his opinion that the 1990 injury was a substantial contributing cause of the condition necessitating surgery in 1997. (Dec. 4; Statutory Ex. 1.) The fact that the triggering event was the 1997 non-industrial slip and fall is not decisive. As with most every aggravation injury, there is no way of knowing how the employee's medical condition might have developed, were it not for the aggravation. In positively establishing causal relationship, the doctor need not negate every conceivable hypothetical scenario. See Rodrigues' Case, 296 Mass. 192, 195 (1936)("The employee had the burden of proving such a causal relation but he was not required to exclude all other possible sources of his injury."). Finally, the fact that the surgery in the present case was a distinct new treatment for the employee's worsened medical condition in no way prevents the compensation insurer from being held liable. Town of Hudson v. Wynott, 128 N.H. 478, 522 A.2d 974, 977-978 (1986)(lifting bucket of bait triggered surgery for back already compromised by lump-summed work injury; court held that medical evidence established treatment was "a

direct and natural result" of work injury, and therefore supported award of medical benefits). [2]

Because the medical evidence unequivocally supports the award of § 30 medical benefits for the 1997 surgery by causally connecting it to the 1990 work injury, we reverse the decision and award the claimed benefits.

So ordered.

William A. McCarthy
Administrative Law Judge

Filed:

Sara Holmes Wilson
Administrative Law Judge

[2] No Massachusetts court cases address the issue presented in this appeal: how to determine the compensability of medical treatment after a non-work-related aggravation of a work injury. Cf. Roderick's Case, 342 Mass. 330 (1961)(board's discontinuance of partial incapacity benefits, based partly on subsequent non-work-related injury, held erroneous; recommitted for clarification on present incapacity, since "supervening of a noncompensable injury . . . does not excuse the insurer from paying the compensation which would otherwise be payable for a compensable injury"). We recently cited Roderick in recommitting a case for the judge to make findings on whether a compensation insurer should continue to pay partial incapacity benefits not exceeding those paid before a non-work-related motor vehicle accident worsened the employee's work injury to the point to total incapacity. The judge erroneously had concluded that the later accident relieved the compensation insurer from making any further indemnity payments. Hannon v. Energy Insulation, 13 Mass. Workers' Comp. Rep. 304, 307-308 (1999).

Apportioning the incapacity attributable to the industrial injury and the motor vehicle accident will rarely be easy, but it can be done. In the case before us, we see no workable rationale for dividing medical bills. Based on our conclusion in the present case, we might give Hannon a hard look when presented with an appeal calling for its application. See Brackett v. A.C. Lawrence Leather Co., 559 A.2d 776, 778 (Me. 1989) (addressing work injury aggravated by non-work-related motor vehicle accident, court held "The work related back injury remained a cause in [the employee's] total incapacity, and the total incapacity is thus fully compensable . . . ."); Blackwell v. Bostitch, 591 A.2d 384, 386 (R.I. 1991)(worsening of non-disabling industrial injury to point of total incapacity, due to at-home lifting incident, held fully compensable as work injury was substantial cause of incapacity).