COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS	**BOARD NOS. 052712-97 055630-99**
David Larivee	Employee
Brake King	Employer
Eastern Casualty	Insurer
T. I. G. Insurance	Insurer

REVIEWING BOARD DECISION
(Judges Carroll, Wilson and Levine)

APPEARANCES
Charles Casartello, Esq., for the employee
Thomas Dillon, Esq., and Kerry G. Nero, Esq., for Eastern Casualty
Donald Culgin, Esq., for T.I.G. Insurance

CARROLL, J. Eastern Casualty, the first insurer in a successive insurer case, appeals from a decision in which the administrative judge concluded that it was liable for the employee's present and continuing incapacity. We affirm the decision, as there was evidence to support that conclusion, and we cannot say that the judge erred as a matter of law.

The employee experienced a work injury on October 10, 1997, which was diagnosed as a herniated disc. He treated conservatively, but continued to have pain in his low back, as well as his left buttock, thigh and foot. In February 1998, he was told to stay out of work, while a discectomy and fusion at the L5-S1 level was contemplated. Dr. Neumann performed surgery on March 17, 1998, but explored the L3-4 level instead of the L5-S1. The employee experienced no relief from pain after the surgery, and also began to experience a burning numbness in his left thigh and shin area, and developed a limp. (Dec. 4-5.)

The employee was released and returned to part-time restricted work in July 1998. The employee continued to receive incapacity benefits from Eastern Casualty, which were terminated on December 23, 1998. The employee did not return to full-time work

until April 1, 1999. His pain, however, was unremitting, and he was referred to a neurosurgeon, Dr. Comey. On September 3, 1999, before he was able to see Dr. Comey, the employee experienced an increase in his pain when he twisted and pulled his back at work. In addition, he felt burning pain in both buttocks. The recommendation of Dr. Comey in November 1999 was that the employee undergo an L5-S1 decompression and fusion. The employee continued to work full-time light duty until January 2000, when Dr. Comey recommended that the employee get off his feet. (Dec. 5-6.)

The employee underwent the recommended surgery on March 7, 2000. The surgery was unsuccessful, and the employee underwent another surgery with some improvement. (Dec. 6.) The employee's present symptomatology is unremitting pain. (Dec. 7.)

The employee was examined by Dr. Robert Cantu under the provisions of § 11A. Dr. Cantu causally related the employee's herniated disc, surgeries and partial disability to the October 10, 1997 industrial accident. Dr. Cantu also opined that the September 3, 1999 incident aggravated the employee's condition, but that it did not change the underlying neurological condition. He noted that surgery had already been recommended prior to that event, and that the employee ended up being no more disabled after the September 3, 1999 incident than he was before it. (Dec. 7-8.)

The administrative judge found, based on the opinion of Dr. Cantu, that the employee's disability and need for medical treatment were causally related to the 1997 work injury. (Dec. 8-9.) While the judge's finding of legal causation to the 1997 work injury was surely not compelled, it was not without evidentiary foundation and, hence, not arbitrary and capricious. See Wax's Case, 357 Mass. 599, 600-602 (1970). The judge's conclusion was also supported by his finding that the employee's pain was continuous from 1997 onward and that surgery was contemplated as a result of the 1997 work injury. (Dec. 5-6, 8.) See Rock's Case, 323 Mass. 428, 429-430 (1948). Although Dr. Cantu – and the judge – refer to the September 3, 1999 incident as an aggravation, nothing rides on the choice of that word over "recurrence" or "exacerbation," as a matter of law. See Broughton v. Guardian Indus., 9 Mass. Workers' Comp. Rep. 561, 564

(1995); Bearse v. Anchor Motor Freight, 8 Mass. Workers' Comp. Rep. 17, 19 (1994). As we have stated:

> . . . [M]edical causation may not be the same as legal causation. Bearse [supra at 19]. The issue becomes 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. Broughton [supra at 563].

Spearman v. Purity Supreme, 13 Mass. Workers' Comp. Rep. 109, 112-113 (1999). Where the judge considered the September 3, 1999 incident and adopted the impartial physician's opinion that the employee was not any more disabled after that incident than before it, (Dec. 8), we see no error in attributing liability to the first insurer on the risk.

The decision is affirmed. Pursuant to § 13A(6) the insurer is ordered to pay employee's counsel a fee of $400.00.[1]

So ordered.

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Martine Carroll
Administrative Law Judge

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Sara Holmes Wilson
Administrative Law Judge

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Frederick E. Levine
Administrative Law Judge

Filed: **December 11, 2002**
MC/jdm

[1] The employee did not file a brief