COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS	**Board Nos.:** 046702-04 038851-05, 046278-05 010094-06, 018421-06
Donna Oliver	**Employee**
Bristol Elder Services	**Employer**
Alea North America Insurance Co.	**Insurer**
Ace American Insurance Co.	**Insurer**
Alea North America Insurance Co.	**Insurer**
Arch Insurance Co.	**Insurer**
American Home Assurance Co.	**Insurer**

REVIEWING BOARD DECISION

(Judges Fabricant, Horan and Koziol)

The case was heard by Administrative Judge Sullivan.

APPEARANCES

Goncalo M. Rego, Esq., for the employee
Joseph M. Spinale, Esq., for Alea North America Insurance
Robert A. Reardon, Esq., for Ace American Insurance at hearing
Jennifer Hylemon, Esq., and Laurie K. Stewart, Esq. for
Ace American Insurance on appeal
Sheila S. Cunningham, Esq., for Alea North America Insurance
Paul R. Ingraham, Esq., for Arch Insurance
Lori J. Harling, Esq., for American Home Assurance

FABRICANT, J. American Home Assurance (American), the last insurer in this successive insurer case, appeals from an administrative judge's decision holding it liable for the employee's bilateral carpal tunnel injury. Because we agree there is no evidence the employee's condition or symptoms worsened during the time American was on the risk, we reverse the decision, vacate the award of benefits against American, and recommit the case to the judge for further findings and additional evidence, if necessary.

Donna Oliver, formerly a stone setter for a jewelry company for thirty-one years, began working for the employer twenty hours a week as a driver and kitchen helper in August 2001. As a result of an automobile accident in the course of her employment on October 23, 2001, the employee was out of work for a couple of months with pain primarily in her left shoulder, left elbow and neck. In November 2001, while still recuperating from the car accident, she began to experience a slight tingling and numbness in both hands. (Dec. 7, 8.) Following her return to work in December 2001, the symptoms and pain in her hands increased. She associated this with repetitive job activities. (Dec. 8.) She began dropping things and, by late 2004, her pain and other symptoms peaked so that she needed assistance from co-workers. (Dec. 8.)

The employee initially treated with Dr. Gary Alves, a chiropractor, for the injuries resulting from the automobile accident. (Ex. 11a.) One week after that accident, she began treating with Dr. Sergey Wortman, a physiatrist to whom Dr. Alves referred her, for pain in her left shoulder, elbow and wrist. In February 2002, Dr. Wortman performed a nerve conduction study and EMG on her right wrist. (Dec. 7, 8-9, 11.) He, in turn, referred the employee to Dr. Edward Akelman, an orthopedic surgeon specializing in the treatment of hands and upper extremities. Dr. Akelman examined her twice in 2005, ultimately diagnosing her on November 16, 2005, with bilateral carpal tunnel syndrome, causally related to her work with the employer. He suggested new EMG and nerve conduction velocity tests, which, if positive, could indicate the need for bilateral surgeries. (Ex. 11c.) To date, the employee has neither undergone surgery, nor received any treatment, including physical therapy or medication, since seeing Dr. Akelman. (Dec. 9, 11-12.) Until the hearing, the employee had not lost time from work due to the bilateral carpal tunnel condition, although she did continue to have constant burning, aching, throbbing and numbness in both wrists, a loss of feeling in her fingertips, and the inability to hold small items such as pens, forks and knives. (Dec. 10, 14.)

The employee ultimately filed claims against five insurers for §§ 13 and 30 medical benefits, for anticipated bilateral carpal tunnel surgery, and ongoing § 34 weekly total incapacity benefits following the surgery.[1] (Dec. 2.) Doctor Robert

[1] Dates of coverage for each insurer are as follow:

Leffert conducted an impartial examination pursuant to § 11A, but was unable to offer a definitive diagnosis or opinion on causation. (Dec. 10-11.) The judge allowed the employee's motion to submit additional medical evidence due to the complexity of the medical issues. (Dec. 2, 5.) The employee submitted medical records from Drs. Alves, Wortman and Akelman. Three of the insurers submitted medical records from Dr. Alice Hunter, Dr. John Fattore and Dr. Wortman. (Dec. 5.)

Adopting the opinions of Dr. Akelman, Dr. Hunter and Dr. Fattore as to diagnosis, the judge found that the employee suffered from bilateral carpal tunnel syndrome. With respect to causation, the judge adopted Dr. Akelman's November 16, 2005 opinion that the employee's carpal tunnel syndrome in both arms was "directly and causally related to her work for [the employer]." [2] (Dec. 12.) The judge further found that § 1(7A)'s heightened causation standard was not applicable because "none of the insurers adduced any evidence of a bilateral condition of the upper

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Arch Insurance: July 10, 2000 - June 30, 2004
Ace American Insurance: October 30, 2001 - July 9, 2003
Alea North America Insurance Co.: July 1, 2004 - June 30, 2005
Alea North America Insurance Co.: July 1, 2005 - April 6, 2006
American Home Assurance: April 7, 2006 - July 1, 2006

(Dec. 8.) The decision indicates the periods for Ace American and Arch Insurance are probable, subject to confirmation. Id. The hearing transcript indicates Ace American's coverage ended July 1, 2003, and Arch Insurance's coverage began July 1, 2000. (Tr. 18-19.) However, neither insurer raises the issue of the dates of coverage on appeal.

[2] The judge acknowledged that Dr. Akelman's earlier opinions on causation were inconsistent with his final opinion, but permissibly adopted his latest opinion. (Dec. 11-12.) See Perangelo's Case, 277 Mass. 59, 64 (1931)(expert's opinion which must be taken as evidence is his final opinion). The judge specifically rejected the causation opinions of Dr. Hunter and Dr. Fattore because neither physician had a complete work history, and Dr. Hunter had no prior medical records relative to the employee's care. (Dec. 12-13.)

extremities that pre-existed the onset of symptoms alleged by Ms. Oliver." (Dec. 16.)

Based on Dr. Hunter's opinion, the judge authorized bilateral carpal tunnel surgeries followed by four weeks of § 34 total incapacity benefits after each surgery.[3] (Dec. 11-13, 15-17.)

As to the issue of which of the five insurers was liable to pay benefits under the successive insurer rule, the judge made the following findings:

> I find Ms. Oliver sustained an original workplace injury due to repetitive use of her hands while employed by Bristol Elder Services and that her condition first became symptomatic in October 2001. *I find also that her condition worsened as she continued her work in essentially the same job. Although her pain peaked as early as late 2004, her total condition worsened every year*. Finally, I find that American Home Assurance, the carrier last at risk, is liable for the workplace injury to Ms. Oliver.

(Dec. 15; emphasis added.) American argues the judge misapplied the successive insurer rule because there is no evidence the employee suffered any aggravation or worsening of her condition or symptoms after it came on the risk in April 2006. We agree.

The successive insurer rule applies to claims for medical benefits, such as surgery, as well as to claims for weekly incapacity benefits. Miranda, supra at 648. Under this familiar rule, the insurer on the risk when an employee's work activities are "even to the slightest extent a contributing cause of the subsequent disability," is liable for the employee's ensuing incapacity. Rock's Case, 323 Mass. 428, 429

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[3] Although we have held that an award of a specific period of weekly incapacity benefits is speculative where surgery has not been performed, Miranda v. Chadwick's of Boston, Ltd., 17 Mass. Workers' Comp. Rep. 644, 648 n.3 (2003), and cases cited, American has not challenged the prospective award of four weeks of total incapacity benefits following each surgery. Therefore, we do not address this issue. See Buckley v. Stahl USA, 20 Mass. Workers' Comp. Rep. 151, 152 n.1 (2006).

(1948). Of course, as here, an injury "may develop gradually from the cumulative effect of stresses and aggravations." Trombetta's Case, 1 Mass. App. Ct. 102, 105 (1973); Cole v. Roger Kent & Co., Inc., 24 Mass. Workers' Comp. Rep. 7 (2010).

The issue of the contribution, or the causal relationship, of multiple injuries to a period of incapacity, or need for surgery, requires expert medical evidence. Miranda, supra at 649; Spearman v. Purity Supreme, 13 Mass. Workers' Comp. Rep. 109, 112 (1999). If the adopted medical and lay evidence can be read to support a finding of liability against the insurer designated by the judge, we will uphold that finding. See Kautz v. Sloane & Walsh, 19 Mass. Workers' Comp. Rep. 54, 62 (2005). Here, however, the adopted medical and lay evidence fails to support the judge's finding of liability against American, the last insurer. The judge found the employee's "condition worsened as she continued her work in essentially the same job," and that "her total condition worsened every year."[4] (Dec. 4.) However, there was no medical evidence the employee's condition worsened or was aggravated as a result of her work activities from April 7, 2006 through July 1, 2006, when American was on the risk. Doctor Akelman's causation opinion, on which the judge relied, was given on November 16, 2005, five months before American assumed responsibility for paying compensation claims against the employer. Doctor Akelman's opinion was based on his examination of the employee, the February 2002 EMG and nerve conduction velocity tests, and his understanding of the employee's job duties. He offered no opinion regarding when her need for surgery due to her work activities arose, or that he expected her condition to worsen. [5] (Ex. 11c.)

Of course, even in the face of an expert opinion that the employee's medical condition has remained the same, "a disabling increase in symptoms of some days' duration as a result of the stress and exertion of work" may be considered an injury which supports a finding of liability against a later insurer. Long's Case, 337 Mass.

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[4] We note that although the judge found the employee continued to work in "essentially the same job," (Dec. 4), he described changes in her job duties beginning in 2005. (Dec. 6-7.)

[5] Even had he so opined, his opinion may have been speculative.

517, 521 (1958); Gosselin v. Springfield Wire Co., 21 Mass. Workers' Comp. Rep. 317, 318 (2007). However, Dr. Akelman's opinion does not reflect that the employee's symptoms continued to worsen due to her work activities after April 6, 2006, nor did the judge so find. Not even the employee's testimony would support a finding that her symptoms increased after American assumed liability. Rather, the employee testified, and the judge found, that her pain had peaked in 2004 or 2005. (Dec. 14, 15; Tr. 80.) At no point did she recant her testimony as to when her pain was at its worst; [6] rather, she affirmed that her pain had remained basically the same since peaking in 2005. (Tr. 48, 69-70, 81.)

Thus, the judge's assignment of liability to the last insurer on the risk cannot stand. We reverse the decision insofar as it holds American Home Assurance liable for the employee's medical and projected incapacity benefits for a bilateral carpal tunnel injury, and we vacate the award of such benefits. We recommit the case for the judge to determine liability among the successive insurers. In so doing, he must make specific findings, supported by the evidence, regarding when the employee's symptoms and/or condition were last aggravated by her work, causing a need for surgery. He may take additional evidence as needed.

So ordered

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Bernard W. Fabricant
Administrative Law Judge

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Mark D. Horan
Administrative Law Judge

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[6] The judge cited the following testimony by the employee before making his findings: "It's really hard to say when it peaked. I can honestly say as time went on, it got worse . . . as every year went on, it got to the point where like I said I started dropping more things. The pain got more severe." (Dec. 8; Tr. 61.) However, the judge asked the employee to clarify this testimony, and she confirmed her earlier testimony that her pain peaked in late 2004 or early 2005. (Tr. 62-64; see also Tr. 55-56.)

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Catherine Watson Koziol
Administrative Law Judge

Filed: **December 15, 2010**