COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **Board Nos.:** 033214-96, 019269-01, 022174-01

Elizabeth Carroll	Employee
State Street Bank & Trust	Employer
Liberty Mutual Ins. Co.	Insurer
Travelers Ins. Co.	Insurer

REVIEWING BOARD DECISION

(Judges Horan, McCarthy & Fabricant)

APPEARANCES

William R. Neelon, Esq., for the employee at hearing and on appeal
Mary B. Klegman, Esq., for the employee on appeal
Jean Shea Budrow, Esq., for Liberty Mutual
Mark J. Kelly, Esq., for Travelers

HORAN, J. Travelers, the second insurer in this successive insurer case, appeals from a decision in which an administrative judge ordered it to pay the employee benefits for a new injury to her hands on February 23, 2001.[1] The employee initially suffered a work-related overuse injury to her hands on March 1, 1996; Liberty Mutual accepted liability for that injury and paid benefits. We agree with Travelers that the judge's finding of a new industrial injury lacked medical evidentiary support.

The employee suffered from thoracic outlet syndrome related to her extensive use of a computer keyboard at work. Her initial injury in 1996 incapacitated her until she returned to modified work in the summer of 1997. Her wrist and hand pain returned with any keyboard use; she rarely worked a 40-hour week. The employee continued to work with "manageable symptoms for the next few years." (Dec. 157-158, 166.)

In 1999, the employee was required to perform more keyboard work, and her symptoms increased. She had difficulty with daily life activities, but continued to work through 1999 and 2000. The employee testified that as of January 1, 2001, her workload increased

[1] We summarly affirm the decision with respect to the employee's issues on appeal.

following a corporate reorganization, and her symptoms increased commensurately. Travelers provided workers' compensation coverage for the employer as of January 1, 2001. (Dec. 155.) The employee's pain caused her to stop working for good on February 23, 2001. (Dec. 159.) The employee filed a claim for benefits against Liberty Mutual; it successfully joined Travelers. (Dec. 156.)

The employee underwent a §11A examination on March 20, 2002 with Dr. Christopher Rynne. (Dec. 156-157.) The judge thereafter allowed the employee's motion to submit additional medical evidence. (Dec. 162-163.)

In ruling against Travelers, the judge found the employee's " *condition* worsened during the period of January 1, 2001 to February 23, 2001." (Dec. 165; emphasis added.) He relied on the employee's testimony regarding her symptoms, "and the persuasive medical opinions of Doctors Rynne, Perlmutter, Leffert and Lee." (Dec. 166.) Neither Drs. Leffert nor Lee expressed opinions supportive of a specific causal link between the employee's work in 2001 and her subsequent disability. Id. Accordingly, our attention is directed to the causation opinions of Dr. Rynne and Dr. Perlmutter. We examine whether their opinions support the judge's finding that the employee's condition worsened during the time Travelers provided coverage.

Dr. Rynne opined the employee developed upper extremity symptoms as a result of the increased repetitive activities required of her job in 1995. The doctor offered no explanation why the employee's symptoms persisted when she stopped working. (Dec. 161-162; Rynne Dep. 70-71, 75.) Dr. Rynne specifically noted the employee never recovered from her initial onset of wrist and hand symptoms dating back to 1995-1996, and that they had persisted ever since. (Rynne Dep. 19.) The doctor also noted it was logical that an increase in the causative work activity would cause an increase in *symptoms*. (Dec. 162; Rynne Dep. 70.) However, Dr. Rynne never opined the employee's work in 2001 caused her *condition* to worsen. At his deposition, Dr. Rynne rejected the employee's contention that her work in 2001 had caused such a worsening:

> The fact that her symptoms persisted despite complete rest back, I believe in 1997, for approximately one year, and in 2001 for 13 months,[2] despite the cessation of

[2] The doctor's reference to thirteen months refers to the time between the employee's departure from work in February, 2001, and his examination of her in March, 2002.

> all the activities that she blamed these symptoms on, her symptoms persisted without improvement, *that in my opinion would be inconsistent* with that, I guess with the, *with her stated causality*.

(Rynne Dep. 45-46; emphasis added.)

Dr. Perlmutter opined the employee's thoracic outlet syndrome would cause her symptoms to wax and wane throughout her lifetime. (Dec. 163-164; Perlmutter Dep. 30, 34.) Dr. Perlmutter specifically addressed the causation issue at his deposition:

> Q.: Do you have an opinion as to a reasonable degree of medical certainty, Doctor as of March 19, 2001[the date of his examination], whether or not the worsening of thoracic outlet syndrome was related to her work situation?
>
> A.: Well, I think her causation dates back to the mid-1990's . . . . The causation, in my opinion, was based on her initial symptoms back in the mid-1990's with the use of her arms as a systems analyst. I would qualify that by saying that, yes, increased use of her arms did cause her increased symptoms when she did that historically.

So, in fact, those specific situations that you mentioned as she testified to, may have caused worsening of her symptoms. I do not have documentation of that so it's difficult for me to say that . . . .

(Perlmutter Dep. 37-38.)

> Q.: Is it fair to say, Doctor, or do you have an opinion as to a reasonable degree of medical certainty whether or not her employment in 2001 worsened her condition to the point she could no longer use her upper extremities for these tasks?
>
> A.: I don't believe necessarily the employment tasks in 2001 caused her present inability to work. I think her present inability to work related, again to her thoracic outlet syndrome which developed from use of her arms in the mid-1990's.
>
> Q.: But the work in 2001 worsened her condition, Doctor?
>
> A.: Based on her testimony, yes.

(Perlmutter Dep. 39.)

Had the deposition ended on page thirty-nine, the doctor's answers could have reasonably been interpreted to implicate either insurer. Was Dr. Perlmutter saying that, *based* on the employee's testimony, *he* would agree that her work in 2001 worsened her medical condition? Or, was he simply holding to his opinion that her work in the mid-1990's remained causative, while simply acknowledging the *employee's belief* that her condition had worsened as a result of her 2001 work efforts? The judge accepted the former interpretation, noting that both doctors Rynne and Perlmutter "took note of the increase in the employee's symptoms in January and February, 2001." (Dec. 166.)

However, Dr. Perlmutter's testimony following this exchange makes it clear that he was disagreeing with the employee's lay opinion on causality. The doctor further testified as follows:

> Q.: So, it is your opinion that continuous pain from '96 to 2001, continuous complaints from '96 to 2001, and continuous treatment from'96 to 2001 and *a subsequent worsening perceived by the employee in 2001* would be more of a continuation of that long-standing condition rather than a new injury?
>
> A.: Yes, I would agree with that.

(Perlmutter Dep. 47-48; emphasis added.)

> Q.: Now, again, just to clarify this matter: What is your opinion to a reasonable degree of medical certainty as to the causal relationship between Miss Carroll's employment as a senior systems analyst and the diagnosis of thoracic outlet syndrome and any associated disability?
>
> A.: I believe her thoracic outlet syndrome is causally related to her employment tasks which began in the mid-1990s and related to her work as a senior systems analyst.
>
> Q.: Just for clarification purpose: What's the basis for that opinion?
>
> A.: I base that opinion on her subjective complaints and her objective findings during physical examination.

(Perlmutter Dep. 49.)

> Q.: And you already stated that it's your opinion that any *perceived worsening by the employee in 2001* was a natural progression of the condition that began in '95 and '96 when she was keying up to 70 hours a week; is that correct?
>
> A.: Correct.

(Perlmutter Dep. 57-58; emphasis added.)

We acknowledge the general rule that "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." Miranda v. Chadwick's of Boston, Ltd., 17 Mass. Workers' Comp. Rep. 644, 648 (2003), citing Costa's Case, 333 Mass. 286, 288 (1955). On this record, resolution of the successive insurer issue required expert medical testimony. Casey's Case, 348 Mass. 572, 574 (1965); see Crowley's Case, 287 Mass. 367, 375-376 (1934). Therefore, the judge could not properly find the successor insurer liable solely by crediting the employee's lay testimony. Certainly, the doctors could have utilized that testimony as a foundation for their opinions; however, they did not. Accordingly, the judge was not at liberty to adopt Dr. Permutter's answer on page thirty-eight of his deposition transcript as his final statement on the subject of causation, and ignore the balance of his testimony on the issue. "The opinion of an expert which must be taken as his evidence is his final conclusion at the moment of his testifying." Buck's Case, 342 Mass. 766, 770 (1961); Perangelo's Case, 277 Mass. 59, 64 (1931).

Neither of the settled medical opinions of Drs. Rynne and Perlumtter provides support for an award of benefits against Travelers. Rarely does a record require reversal of a finding against a second insurer as a matter of law; however, this is such a case. Casey's Case, supra; Audette's Case, 5 Mass. App. Ct. 867 (1977); Smick v. South Central Mass. Rehabilitative Resources, Inc., 7 Mass. Workers' Comp. Rep. 84, 88-89 (1993).

Because there was no medical evidence to support an award against Travelers, the judge's decision was arbitrary and capricious. G. L. c. 152, § 11C. The evidence adopted requires the entry of a decision against the first insurer. We reverse the decision and order Liberty

Mutual to pay the benefits awarded.[3] Liberty Mutual is also ordered to make reimbursement to Travelers of the benefits paid to or on behalf of the employee, and the attorney's fees and expenses it paid to employee's counsel, pursuant to the judge's hearing decision. Thibeault v. Sure Management Oil & Chem., 18 Mass. Workers' Comp. Rep. 130, 137 (2004); Smick, supra; see G. L. c. 152, § 15A.

So ordered.

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Mark D. Horan
Administrative Law Judge

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William A. McCarthy
Administrative Law Judge

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Bernard W. Fabricant
Administrative Law Judge

Filed: October 26, 2005

[3] We need not recommit the case as G. L. c. 152, § 35B was raised, and on this record, applies as a matter of law.