COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS	**Board Nos.:** 043953-06 009268-08
Francisco Sanchez	**Employee**
Cataldo Ambulance Service	**Employer**
Commerce & Industry Insurance Co.	**Insurer**
North River Insurance Co.	**Insurer**

REVIEWING BOARD DECISION

(Judges Fabricant, Horan and Koziol)
The case was heard by Administrative Judge Bean.

APPEARANCES

Armond C. Colombo, Jr., Esq., for the employee
Michael T. Henry, Esq., for Commerce & Industry
Brendan T. Malvey, Esq., for North River at hearing and on appeal
David M. O'Connor, Esq., for North River on appeal

FABRICANT, J. North River Insurance Company (North River), the second insurer in this successive insurer case, appeals from the administrative judge's decision ordering it to pay the employee incapacity and medical benefits for a 2008 industrial injury. For the reasons that follow, we affirm the decision.

The employee alleged three work injuries to his lower back occurring in 1998, 2006 and 2008. The two most recent injuries are the subject of the present case. In 2006, the employee was working as a paramedic when he experienced an immediate onset of pain and tightness in his back while carrying a woman down a flight of stairs.[1] The employee was out of work for a year before he was cleared to return to full duty in July 2007. Nonetheless, the employee experienced persistent pain, which he treated with medication. (Dec. 26.)

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[1] The parties stipulated that the employee suffered an industrial injury on June 23, 2006. Liability as to an alleged incident on February 9, 2008 was among the issues presented. (Dec. 23, 26.)

The employee again injured his back at work on February 9, 2008, when he responded to a report of an injurious fight. He experienced a spike in back pain as he pursued a fleeing suspect. (Dec. 26-27.) When the employee claimed benefits from the first insurer, Commerce & Industry Insurance Company, (Commerce) it moved to join the subsequent insurer, North River. A conference order was issued against Commerce, and it appealed to an evidentiary hearing.[2] [2] (Dec. 24-25.)

In his hearing decision, the judge adopted the opinion of the impartial physician causally relating the employee's current disability to all three of his industrial injuries. Because North River was the insurer on the risk at that time, the judge ordered it to pay the employee's incapacity and medical benefits. (Dec. 30-31.)

North River argues the decision is arbitrary and capricious, because the judge never explicitly found that the 2008 incident constituted an aggravation, rather than a recurrence, of the 2006 injury. We disagree. By finding that the 2008 incident was a compensable industrial injury, the judge necessarily imparted the status of "aggravation" to the medical worsening which occurred. (Dec. 29.) See, e.g., Guilbealt v. Teledyne Rodney Metals, 15 Mass. Workers' Comp. Rep. 23, 25-26 (2001).

North River next argues that the medical evidence does not support the judge's finding of a 2008 industrial injury. We disagree. The deposition testimony of the impartial physician established that the employee's disability was related to the 1998, 2006, and 2008 incidents. (Dep. 28-29.) Although the doctor did not identify the mechanics of the event in 2008, the employee's credible testimony did. (Dec. 26-27.) Taken together, there is no doubt the impartial physician's opinion on causal relationship included the 2008 work injury:

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[2] In the procedural history section of the decision, the judge erroneously stated that the conference order issued against North River. (Dec. 24-25.) While North River argues that the mistake warrants reversal, we disagree. The hearing is a de novo proceeding. The judge's assignment of liability at conference is immaterial to the outcome of the hearing. We summarily affirm the decision as to this argument on appeal.

> "[A]ll three of these events did lead to his subsequent problems, which is continuous pain and mild weakness and sensory deficit. . . ."

(Dep. 29.) As the judge specifically adopted that opinion,[3] there was no error.

Finally, North River argues the evidence did not support an award against it as a matter of law, because the employee had been experiencing continuous pain for which he had been treating since the 2006 work injury. Again, we disagree. This argument overlooks the employee's credible account of the 2008 injury, which occurred with the specific stressful activity of running in pursuit of a suspect. As such, the gradual accumulation cases cited by North River, see, e.g., Costa's Case, 333 Mass. 286, 288 (1955), are inapposite.

Accordingly, the decision is affirmed. Pursuant to § 13A(6), North River shall pay employee's counsel an attorney's fee of $1,488.30

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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Catherine Watson Koziol
Administrative Law Judge

Filed: **December 20, 2010**

[3] The judge's ruling that the impartial physician's opinion on causal relationship was inadequate, (Dec. 28), did not render that opinion incompetent. The opinion remained as record evidence equal in weight to the additional medical evidence, which the judge could adopt or reject as he saw fit. See Coggin v. Massachusetts Parole Bd., 42 Mass. App. Ct. 584, 589 (1997), citing Anderson's Case, 373 Mass. 813, 817 (1977); Cook v. Farm Service Stores, 301 Mass. 564, 566-567 (1938).