

COMMONWEALTH OF MASSACHUSETTS

**DEPARTMENT OF
INDUSTRIAL ACCIDENTS**

BOARD NO. 014223-02

Frank Kinsley, Jr.
Kinsley Trucking, Inc.
Granite State Insurance Co.

Employee
Employer
Insurer

REVIEWING BOARD DECISION
(Judges Fabricant, Costigan and Horan)

APPEARANCES

Kathleen M. Fitzgerald-Losito, Esq., for the employee
Diane Cole Laine, Esq., for the insurer

FABRICANT, J. The employee appeals from a decision in which the administrative judge awarded a closed period of § 35 partial incapacity benefits, and § 30 medical benefits, for injuries to his back, neck and right knee suffered in a work-related motor vehicle accident. The employee argues that the judge failed to address his claimed disability from the knee injury which did not occur until two years after the original injury. For the reasons that follow, we affirm the decision.

On May 6, 2002, the truck the employee was operating was struck by another vehicle, and collided with a dwelling as a result. The employee received treatment for his neck, back and right knee injuries, and was out of work for two months. He returned to work on July 7, 2002, but reported further symptoms in his knee beginning in the spring of 2004, resulting from stepping in and out of his truck. (Dec. 4-5.)

The judge concluded that the employee's present incapacity was due to a combination of his back, neck and knee impairments, but specifically found that the back and neck symptoms had not worsened due to the employee's truck driving activities after he returned to work. However, the judge did find a worsening of the employee's knee impairment beginning in the spring of 2004 resulting from his resumption of work activities. (Dec. 5-6.)

This case presents a departure from the accepted approach to the litigation of successive insurer claims. The employee returned to work after the two month period of incapacity claimed and awarded. The insurer accepted liability for the employee's claimed back and neck injuries, and challenged only the extent of his disability for that two month period. While the insurer also accepted liability for the employee's right knee injury stemming from the 2002 work-related motor vehicle accident, it contested continuing causal

relationship after May 1, 2003, based on the aggravating effects of the employee's truck driving, until he left work on July 1, 2004.¹ (Dec. 2, 6.) As of that date, Granite State Insurance Company, was no longer on the risk, and thus, as the judge properly found, any liability must be ascribed to the successor insurer, based on the subsequent aggravation injury. However, no successor insurer was joined as a party to this claim. Therefore, the judge appropriately awarded only a closed period of incapacity benefits for the initial two months of lost time in 2002, together with \$ 30 medical benefits for the employee's back and neck injuries. (Dec. 8.) Because no claim against the successor insurer is presently before us, we cannot consider further the employee's request for relief.

The employee also argues the judge failed to address the presently disabling effects of his back and neck injuries, for which the insurer accepted liability. We agree the judge did not address this issue in detail, but simply recounted the medical evidence of continuing symptoms. However, the judge explicitly found the employee's truck driving activities following his return to work did not contribute to, or otherwise aggravate, those symptoms, thereby eliminating the successive insurer issue for those body parts. (Dec. 4-5.) That finding, coupled with the judge's finding that the employee's knee (the responsibility of the absent successor insurer) is a cause of his leaving work and continuing incapacity, makes any detailed analysis of the extent of incapacity attributable to the back and neck unnecessary. "The successive insurer rule addresses the responsibility of insurers for an incapacity; any number of industrial injuries can contribute to that, and it stands to reason that they may involve any number of body parts." Laverde v. Hobart Sales & Serv., 18 Mass. Workers' Comp. Rep. 214, 218 n.4 (2004). The non-apportionment theory behind the successive insurer rule applies equally to the scenario of concurrent incapacities stemming from distinctly different injured body parts. The only question is which insurer bears the responsibility for the most recent injury causing any measure of incapacity. See Evans's Case, 299 Mass. 435, 436-437 (1938). Here, as the administrative judge correctly found, that is the successor insurer on the risk during the period from July 2002 until July 1, 2004, when the employee's resumed work activities and aggravated his right knee condition.

The decision is affirmed.

So ordered.

Bernard W. Fabricant

¹ Although not clear in the decision, the employee underwent arthroscopic surgery on his knee on May 1, 2003, and the insurer contested its liability for any knee-related benefits after that date. (Dec. 2, 8.)

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Administrative Law Judge

Patricia A. Costigan
Administrative Law Judge

Mark D. Horan
Administrative Law Judge

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