COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NOS. 040730-02 027983-08**

Gary Bolduc	Employee
New England Coffee Co.	Employer
Liberty Mutual Insurance Co.	Insurer
Travelers Insurance Co.	Insurer

REVIEWING BOARD DECISION
(Judges Costigan, Horan and Levine)

The case was heard by Administrative Judge Taub.

APPEARANCES
Alicia M. DelSignore, Esq., for the employee
Jean Shea Budrow, Esq., for Liberty Mutual Insurance Co.
Richard Bock, Esq., for Travelers Insurance Co. at hearing
Thomas B. Daniels, Esq., for Travelers Insurance Co. on appeal

COSTIGAN, J. Liberty Mutual Insurance Company (Liberty) appeals from a decision ordering it to pay the employee benefits for a purported 2008 recurrence of a 2002 work injury. The rationale for the administrative judge's award was that when the employee left work in June 2008, due to a marked increase in his back and left leg pain, Liberty commenced payment and voluntarily paid beyond the 180-day "without prejudice" period under G. L. c. 152, §§ 7 and 8.[1] The insurer on the risk in 2008 was

[1] General Laws c. 152, § 7, provides, in pertinent part:

> (1) Within fourteen days of an insurer's receipt of an employer's first report of injury, or an initial written claim for weekly benefits on a form prescribed by the department, whichever is received first, the insurer shall either commence payment of weekly benefits under this chapter or shall notify the division of administration, the employer, and, by certified mail, the employee, of its refusal of commence payment of weekly benefits.

General Laws c. 152, § 8, provides, in pertinent part:

> (1) An insurer which makes timely payments pursuant to subsection one of section seven, may make such payments for a period of one hundred eighty calendar days from the commencement of disability without affecting its right to contest any issue arising under this chapter.

Travelers Insurance Company (Travelers). The judge found as a fact that the employee suffered a new work-related injury in 2008 for which Travelers would have been liable, but for Liberty's voluntary payment of benefits based on a recurrence of incapacity. Liberty argues that under the successive insurer rule, the judge erred by failing to hold Travelers liable for payment of compensation for what he found to be a new injury.

This case presents a pure question of law: whether the judge, having found that the employee suffered a second compensable back injury in 2008, when a successive insurer was on the risk, could properly hold the first insurer liable under the liability-triggering provisions of §§ 7 and 8. We answer no to that question, and reverse the decision. The relevant facts are as follow.

The employee suffered a back injury at work on November 12, 2002, when Liberty insured the employer. Liberty paid § 34 total incapacity benefits and § 30 medical benefits from November 13, 2002, to December 17, 2002, and from February 12, 2003, to May 7, 2003, when the employee returned to work. (Dec. 3, 5.) Pursuant to §§ 7 and 8, see footnote 1, supra, those payments were made and terminated within the so-called without prejudice period.[2] (Dec. 8-9.)

Between May 2003 and May 2008, the employee continued to work, albeit in chronic back pain; he took Percocet and underwent multiple epidural steroid injections throughout that period. (Dec. 5-6.) In January 2008, Travelers became the

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> Any one hundred eighty day payment without prejudice period herein provided may be extended to a period not to exceed one year by agreement of the parties provided that:
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> (a) the agreement sets out the last day of such extension; and
> (b) a conciliator, administrative judge, or administrative law judge approves such agreement as not detrimental to the employee's case.

[2] By statute, unless the parties agree to an extension and a conciliator approves same, see footnote 1, supra, the maximum period for payments without prejudice is *one hundred eighty calendar days* from the commencement of disability. Here, that period would have expired on or about May 12, 2003.

employer's workers' compensation carrier. (Liberty br. 2.) On May 27, 2008, the employee experienced markedly increased pain in his back and down his left leg while lifting and moving a large conference table at work. He sought treatment and attempted to continue working over the next few days. On June 5, 2008, the employee left work, not to return. (Dec. 6.)

After what the judge viewed as a thorough investigation, (Dec. 9-10), Liberty determined that the employee's disability and medical treatment commencing in late May, 2008, was a recurrence of the 2002 work injury. Liberty paid the employee § 34 benefits at the weekly rate of $589.09, based on his 2002 average weekly wage of $981.81.[3] On September 25, 2008, the employee filed a claim against Liberty, seeking authorization for surgery and asserting that he should be paid benefits based on his 2008 average weekly wage. In exchange for Liberty's acceptance of his average weekly wage claim and payment at the higher rate of benefits, see G. L. c. 152, § 35B,[4] the employee withdrew that claim. (Dec. 3.)

On October 17, 2008, the employee filed another claim against Liberty for payment of the proposed back surgery. At the same time, he filed an alternative claim against Travelers for weekly incapacity and medical benefits, alleging he had sustained a new injury on or about May 27, 2008. Liberty continued to pay § 34 benefits. The claims came on for a § 10A conference on December 28, 2008. The judge ordered payment against Liberty, and denied the claims against Travelers. (Id.)

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[3] By DIA Form 107, "Insurer's Notification of Acceptance, Resumption or Termination or Modification of Weekly Compensation," filed on June 27, 2008, Liberty gave notice that it had resumed payment of weekly § 34 benefits effective June 6, 2008. Liberty identified its payments as a "Resumption of Payment of a Case within the Payment Without Prejudice Period," which characterization was incorrect as the 180-calendar day without prejudice period had run some five years earlier, on or about May 12, 2003. See footnote 2, supra.

[4] General Laws c. 152, § 35B, provides, in pertinent part:

> An employee who has been receiving compensation under this chapter and who has returned to work for a period of not less than two months shall, if he is subsequently injured and receives compensation, be paid such compensation at the rate in effect at the time of the subsequent injury whether or not such subsequent injury is determined to be a recurrence of the former injury. . . .

The employee appealed the denial of payment in Travelers' favor, and Liberty appealed the order of payment against it.[5]

After the hearing, at which the employee's motion to join a claim for § 34A permanent and total incapacity benefits against both insurers was allowed, the judge found that the table-lifting incident on May 27, 2008, was a new work injury. (Dec. 11.) Citing the successive insurer rule, the judge continued:

> That would point to Travelers being the responsible insurer. But, here Liberty Mutual voluntarily commenced payment for the disability and treatment as a recurrence of the 2002 injury and voluntarily continued payment for more than 180 days without interruption effective from June 6, 2008 through the December 23, 2008 conference.

(Dec. 12.) Based on this finding, the judge concluded:

> By its own actions, Liberty Mutual accepted liability for the current circumstances of [the employee] as a recurrence of the November 12, 2002 industrial injury. It cannot now either undo or disown its actions. Liberty Mutual was obligated to timely raise its argument and defense that a new injury had occurred either prior to making any payment on the new claim or, in the least, prior to 180 days having run from the effective date of its payments. It did neither.

(Dec. 14.)

The judge erred in finding, "that by paying benefits as it did, Liberty Mutual has accepted liability for the case as a recurrence of disability and need for treatment attributable to the November 2002 injury." (Dec. 12.) In the first place, Liberty did not deny liability for the employee's 2002 injury. Notwithstanding Liberty's characterization of its resumption of benefits in June 2008 as without prejudice, see footnote 3, supra, the judge's decision reflects that Liberty contested "liability for any 2008 injury, asserting that Travelers, not Liberty, ought to be found the responsible carrier in keeping with section 15A." (Dec. 4.) Travelers countered "that Liberty Mutual had accepted liability for the disability that began May 29, 2008 and could not seek to have Travelers made responsible." (Id.) The judge accepted Travelers's argument. We do not.

[5] The judge's decision states incorrectly that both insurers appealed. (Dec. 3.)

As a matter of law, a recurrence is not a new industrial injury. As to Liberty, "liability for the *case*," (Dec. 12, emphasis added), does not speak to the procedures governing the establishment of initial liability. From this error, the decision becomes mired in a faulty analysis regarding the benefit-commencement provisions of §§ 7 and 8 and the establishment of initial liability. These statutory provisions governing payments without prejudice have no place in the analysis of this claim against Liberty for further incapacity occurring *six years* after the 2002 industrial injury.

The judge had only two choices under the successive insurer doctrine. See Long's Case, 337 Mass. 517, 521 (1958)("The insurer covering the risk at the time of the most recent injury bearing a causal relation to the disability is held responsible, even if the last injury was even to the slightest extent a contributing cause of the subsequent disability"). Either the onset of disability in 2008 was a recurrence of the Liberty 2002 work injury, payable based on the employee's 2008 average weekly wage under § 35B, or it was a new injury for which Travelers bore the risk, subject to its affirmative defense under § 1(7A).[6]

The judge found as a fact that "a second industrial injury did occur on or about May 27, 2008." (Dec. 11.) He adopted expert medical opinions that the employee's ensuing disability and need for treatment were, at least, the result of the two industrial injuries, the first in 2002 and the second in 2008. (Dec. 11-12.) Thus, Liberty's acceptance of the 2002 injury as compensable rendered Traveler's § 1(7A) defense inapplicable, as the requisite pre-existing condition did not "result[ ] from an injury or disease not compensable under this chapter." G. L. 152, § 1(7A).

Having found that the employee sustained a new, compensable work injury in 2008, the judge should have denied and dismissed the claims against Liberty and

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[6] General Laws c. 152, § 1(7A), provides, in pertinent part:

> If a compensable injury or disease combines with a pre-existing condition, which resulted from an injury or disease not compensable under this chapter, to cause or prolong disability or a need for treatment, the resultant condition shall be compensable only to the extent such compensable injury or disease remains a major but not necessarily predominant cause of disability or need for treatment.

ordered Travelers to pay the claimed benefits. Instead, the judge posited a third option: "[E]ven if a new 2008 injury did occur, has Liberty Mutual accepted responsibility and liability for the incapacity and treatment that began in May 2008 by its having paid benefits without interruption for the time it did prior to being ordered to do so." (Dec. 11.) Answering that question in the affirmative, the judge committed legal error.

The judge properly determined that Liberty's payment on the 2008 claim was not within the scope of §§ 7 and 8(1)'s "without prejudice" provisions. Liberty utilized that statutory scheme in 2002 for making payments without prejudice within the 180-day period following the injury. (Dec. 9.) There is nothing in the statute which authorizes a second 180-day "without prejudice" period, applicable to a recurrence of that industrial injury some six years later.

> [W]here an insurer assumes liability for compensation on a resulting period of disability and voluntarily pays benefits beyond the "without prejudice" period provided in G. L. c. 152, § 15A, that insurer may bear the burden of proving the claim against the alleged proper insurer.

Baker's Case, 55 Mass. App. Ct. 628, 632 n.6 (2002), citing Lincoln v. Fairside Trucking, 8 Mass. Workers' Comp. Rep. 218 (1994).

Once it reinstated payments in 2008 for the 2002 injury, Liberty had no right to unilaterally terminate those payments without the judge's order allowing same. See G. L. c. 152, § 8(2). Certainly, Liberty could have been more diligent in its defense of the employee's claim against it, in that it waited some five months to interpose the meritorious defense of a new injury covered by a successive insurer. (Dec. 3.) Nevertheless, contrary to the judge's view, Liberty lost no defenses. See Pezzulo v. City of Salem, 66 Mass. App. Ct. 1103 (2006)(Memorandum and Order Pursuant to Rule 1:28)(self-insurer did not violate § 8[2] by unilaterally discontinuing total incapacity benefit payments, nor did it accept the employee's § 34A claim, even though it had continued to pay benefits at the total incapacity rate unabated for nine years after exhaustion of the § 34 statutory maximum). See also, Dennen v. Addison

Gilbert Hospital, 5 Mass. Workers' Comp. Rep. 289 (1991)(violation of § 7 did not conclusively establish insurer liability).

Travelers cites Lincoln, supra, as support for the judge's conclusion. Lincoln actually supports Liberty's argument. In Lincoln, an insurer, National Union Fire Insurance Company (National Union), mistakenly paid beyond the without prejudice period, on an injury which it did not cover. The actual insurer on the risk (Commercial Union) opposed an order which directed it to reimburse National Union. Operating under the equitable considerations governing "controversies between insurers as to which is liable to pay a claim" within the scope of G. L. c. 152, § 15A,[7] described in Utica Mut. Ins. Co. v. Liberty Mut. Ins. Co., 19 Mass. App. Ct. 262, 265 (1985),[8] the reviewing board concluded that National Union was not barred from its

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[7] General Laws c. 152, § 15A, provides:

> If one or more claims are filed for an injury and two or more insurers, any one of which may be held to be liable to pay compensation therefor, agree that the injured employee would be entitled to receive such compensation but for the existence of a controversy as to which of said insurers is liable to pay the same, such one of said insurers as they may mutually agree upon or as may be selected by a single member of the board shall pay to the injured employee the compensation aforesaid, pending a final decision of the board as to the matter in controversy, and such decision shall require that the amount of compensation so paid shall be deducted from the award if made against another insurer and be paid by said other insurer to the insurer agreed upon or selected by the single member aforesaid. If, however, said insurers cannot agree that such employee would be entitled to compensation irrespective of the existence of such controversy, then a hearing to determine the question of liability and the payment of compensation shall be held forthwith by the division, such hearing to take precedence over other pending matters.

[8] In Utica Mutual, as in Lincoln and the present case, there was no agreement between the insurers as to the compensation to be paid the employee "but for the existence of a controversy as to which of said insurers is liable to pay the same." G. L. c. 152, § 15A. Regardless, the court advanced an equitable model of practice using the § 15A procedure for resolution of such cases. Utica Mutual, supra at 267. Indeed, that section mandates that such matters be resolved on an expedited basis when the insurers do not agree on the underlying entitlement to compensation. Here, the lack of insurer agreement, which the judge placed as a determinative factor in his rejection of the section's invocation by Liberty, (Dec. 13-14), was substantively meaningless. The 2008 onset of disability was either a recurrence or a new injury, necessitating payment by one or the other insurer. In other words, it was a classic § 15A-type controversy, and should have been treated as such under Utica Mutual, supra.

claim for reimbursement and substitution of liability by its payment beyond sixty days.[9] Lincoln, supra at 225. The reviewing board addressed Commercial Union's argument for the establishment of National Union's liability as a matter of waiver or estoppel:

> Commercial Union asserts that, even if National Union establishes a compensable injury [payable by Commercial] and entitlement to the full [reimbursement] of benefits which it has paid, equitable principles of waiver and estoppel bar relief under c. 152, § 15A. We disagree. Waiver consists of the voluntary or intentional relinquishment of a known right. Merrimack Mutual Fire Ins. Co. v. Nonaka, 414 Mass. 187, 189 (1993). It cannot be used to create or enlarge coverage under an insurance contract. Id. at 191. Here National Union had no contract of insurance covering Fair[side] Trucking. . . . [Likewise, e]stoppel will not bar National Union's claim for substitution because Commercial Union did not rely to its detriment on anything that National Union did or did not do.

Lincoln, supra at 225.[10] The same principles apply to the present case, in which Liberty simply did not insure the employer in 2008. Moreover, Travelers was not prejudiced in any way by Liberty's voluntary payment of benefits prior to the conference on the employee's claims seven months later.

We reverse the decision as contrary to law. Travelers covered the 2008 new injury. Liberty's payment of benefits "cannot be used to create or enlarge coverage under [its] insurance contract" with the employer. Id. Accordingly, we authorize Liberty to cease payment of benefits pursuant to the hearing decision. We order Travelers to reimburse Liberty all such benefits it has paid, and to commence payment of weekly incapacity and medical benefits, effective immediately, for the employee's May 27, 2008 injury.

So ordered.

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[9] At the time, the without prejudice period was only sixty days. See G. L. c. 152, § 8, as amended by St. 1985, c. 572, § 21.

[10] "[T]he reasoning of the reviewing board in Lincoln" was cited with approval by the Appeals Court in Baker's Case, supra.

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Patricia A. Costigan
Administrative Law Judge

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Mark D. Horan
Administrative Law Judge

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Frederick E. Levine
Administrative Law Judge

Filed: **September 6, 2012**