COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS	**BOARD NO. 030784-95 044198-95**
Harry T. Spearman	Employee
Purity Supreme	Employer
Purity Supreme	Self-Insurer
Burger King	Employer
Eastern Casualty	Insurer

REVIEWING BOARD DECISION
(Judges Levine, Carroll & Maze-Rothstein)

APPEARANCES
Michael Lynn, Esq., for the employee
Monique Chiacchia, Esq., for the self-insurer at hearing
Joyce E. Davis, Esq., for the self-insurer on brief
John A. Smillie, Esq., for the insurer, Eastern Casualty

LEVINE, J. The self-insurer appeals the decision of an administrative judge ordering the self-insurer, rather than the successive insurer, to pay benefits to the employee. The self-insurer argues that the judge failed to properly apply the successive insurer rule and that the judge's finding that the employee did not incur a new injury in his subsequent employment is inconsistent with his finding that the employee's subsequent work activities worsened his condition. We disagree with the self-insurer and affirm the decision.

Harry Spearman was thirty-five years old at the time of the hearing. His formal education ended after the eighth grade. (Dec. 4.) He has not earned a GED certificate. He began working for the self-insurer, Purity Supreme, in April 1995 as an overnight stocker of shelves. Id. His previous work experience was in low or semi-skilled food preparation and dishwashing positions. Id. On July 19, 1995, while pulling a pallet of food products up a ramp with a pallet jack, he felt a strain in his back accompanied by pain. Id. He went to the hospital where he was given pain medication. Thereafter he

treated with a chiropractor. Id.

The employee remained out of work until approximately September 14, 1995, when he commenced part-time work for Burger King. His duties at Burger King included lifting boxes of food weighing up to fifty pounds and, on occasion, moving trash bags and wiping tables. (Dec. 5.) He also took inventory, which required him to occasionally bend down or reach up. Both bending and reaching bothered him. He advanced to full-time employment as a supervisor. Id. Although he suffered no specific incident or injury and did not miss work due to his back condition, his work activities at Burger King bothered his back to the point where his condition worsened. Everything would aggravate his back and he was always in pain during this period of time. He was on his feet forty hours per week. Id. However, the range of his level of pain remained unchanged from the time of his Purity Supreme injury to the time of hearing. Id.[1] He stopped working at Burger King on March 22, 1996 because his back condition had worsened. Id.

On June 5, 1996 the employee underwent back surgery. After the surgery his pain increased and he developed left foot numbness and left leg weakness. He took Vicodin for his pain, and an MRI revealed the presence of fragments. A second surgery was performed on March 7, 1997. Post-operatively, his pain remained the same; Percocet was prescribed. (Dec. 5-6.)

Presently, the employee is able to stand for ten to fifteen minutes, sit for twenty minutes and walk up to one half mile; he sometimes walks with a limp. Bending causes a ripping sensation in his back and sleeping is fitful. (Dec. 6.)

The employee received § 34 total temporary weekly incapacity benefits from July 20, 1995 to September 25, 1995 from the self-insurer. Thereafter, the employee filed a claim for benefits which both insurers opposed. Following a § 10A conference, the self-insurer was ordered to pay continuing § 34 benefits from March 18, 1996. The claim

[1] On a scale of one to ten, with ten representing the worst pain, the employee's pain ranged from a five to a nine. The pain included radiation into the left leg and numbness in the left foot. (Dec.5.)

against Eastern Casualty was denied. The self-insurer appealed to a hearing de novo. (Dec. 2.) Pursuant to § 11A the employee was examined by Dr. Michael Freed who diagnosed a lumbar strain/sprain with a disk bulge. An MRI taken after the June 1996 surgery showed a prominent central herniation at L5-S1. In his report Dr. Freed opined that the diagnosed condition was causally related to the July 19, 1995 injury. (Dec. 6.) The administrative judge adopted the opinions of Dr. Freed and found that "[the employee's] condition, though worsened in degree by his work duty at Burger King, represents a continuum of the same injury and varying pain to date." Id.

In his general findings the administrative judge stated, "I find that, though his back condition worsened while at Burger King, it does not represent a new injury." (Dec. 8.) The judge ordered the self-insurer to pay § 34 benefits from July 19, 1995 to September 13, 1995 and from March 22, 1996 to date and continuing. (Dec. 9.)

Only one insurer is liable for the payment of compensation for a single period of incapacity. L. Locke, Workmen's Compensation § 178 (2d ed. 1981). Where an employee is injured at his job and then works at another job and becomes incapacitated, it must be determined which insurer -- the one insuring his first employer or the one insuring his subsequent employer -- bears liability for the ensuing incapacity. Thus, the critical question in all successive insurer cases is whether the employee's subsequent incapacity is "simply the natural physiological progression of a condition following the initial incident [i.e., a recurrence] or the result a new compensable injury." Smick v. South Central Mass. Rehab. Resources, Inc., 7 Mass. Workers' Comp. Rep. 84, 86 (1993). "To be compensable, the harm must arise either from a specific incident or series of incidents at work or from an identifiable condition that is not common or necessary to all or a great many occupations." Zerofski's Case, 385 Mass. 590, 594-595 (1982).

Where the most recent incident or condition bears a causal relationship, however slight,[2] to a subsequent incapacity, it constitutes an aggravation and creates liability for the insurer on the risk at that time. Rock's Case, 323 Mass. 428 (1948); Trombetta's

[2] Contrast this with the situation where the first injury, and cause of the pre-existing condition, was not work related. In such a case the later incapacity is compensable only to the extent that

Case, 1 Mass. App. Ct. 102, 104 (1973); Cymerman v. Hiller Co., Inc., 11 Mass. Workers' Comp. Rep. 609, 611 (1997). Thus, when the pain following a work injury has been occasional and well controlled by drugs but later, in association with subsequent work, becomes constant, more severe and not adequately controlled by drugs, a finding of a new injury will be upheld. Trombetta, supra at 104-105; Smick, supra at 86. See generally L. Locke, Workmen's Compensation, supra and cases cited.

Conversely, where the pain or complaints following a work injury have been continuous, subsequent incapacity will usually be deemed a recurrence of the original injury, chargeable to the first insurer, despite subsequent employment predating the incapacity. See Rock's Case, supra, at 429-430. That is to say, continued pain, and a subsequent worsening, can support a conclusion that a current incapacity is causally related to the original injury, subjecting the first insurer to liability. Rock's Case, supra.[3]

The issue of the contribution of multiple injuries to a period of incapacity requires expert medical opinion evidence. LeBlanc v. MacNeill Eng'g, 9 Mass. Workers' Comp. Rep. 572, 573 (1995); Medeiros v. San Toro Mfg., 7 Mass. Workers' Comp. Rep. 66, 68 (1993). Here, the only medical opinion was the report of the § 11A examiner who opined that the employee's current incapacity was causally related to his original injury. (Dec. 6.) The adequacy of his opinion was not challenged; neither the insurers nor the employee sought to cross-examine the § 11A physician by way of deposition. (Dec. 3.) Of course, medical causation may not be the same as legal causation. Bearse v. Anchor Motor Freight, 8 Mass. Workers' Comp. Rep. 17, 19 (1994). The issue becomes a

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the subsequent incapacitating work injury remains a major but not necessarily predominant cause of disability. M.G.L. c. 152, § 1(7A). See Robles v. Riverside Mgmt., Inc., 10 Mass. Workers' Comp. Rep. 191, 195-197 (1996), for further discussion.

[3] In Rock's Case, the employee, while working for the subsequent employer, hurt his back lifting a barrel and was disabled from work for nearly a year. The injury was to the same region of the back as originally injured. Despite the specific incident, the court held that the board was not required to find that the incident "was even to the slightest extent a contributing cause of the subsequent disability." Id. at 429. The court noted that the employee had not recovered from the original injury and that he had been continually complaining ever since the original injury. Id. at 430.

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. Broughton v. Guardian Indus., 9 Mass. Workers' Comp. Rep. 561, 563 (1995). The judge's findings that the employee's range of pain remained the same from the injury of July 19, 1995 to the day of hearing, (Dec. 5); and that the employee's condition, though worsened in degree by his work at Burger King, represents a continuum of the same injury and varying pain to date, (Dec. 6.), support the judge's general finding that the worsening of his condition at Burger King does not represent a new injury. (Dec. 8.) Cymerman, supra at 611 ("recurrences are generally evidenced by a continuity of complaints involving a particular condition from the date of a first incident even though there is a later employment and incapacity").[4] These findings, combined with the expert opinion, warrant the judge's conclusion that the employee's current incapacity is legally causally related to the injury of July 19, 1995 and not to the subsequent employment. Rock's Case, supra at 429-430. Broughton, supra, at 564 (the judge "concluded that the employee's exertions in the decade of employment after his original injury . . . had a deleterious effect on his weakened knee, but did not amount to a 'personal injury.' ").

The decision of the administrative judge is affirmed. Pursuant to § 13A(6) and in light of the effort expended by the employee's attorney, the self-insurer is ordered to pay the employee's attorney a fee of $500.00, plus necessary expenses.

So ordered.

[4] As we previously reported, at one point in his decision, the judge found that the employee's work activities at Burger King "bothered his back to the point where his condition worsened. Everything would aggravate his back and he was always in pain during this time." (Dec. 5.) But later in the same paragraph of his decision, the judge clarified that there had been a continuity of complaints beginning with the original injury: the range of pain was the same beginning with the original injury and to the present time. Id. Moreover, "[u]se of the term 'aggravation' does not automatically delineate that a later insurer is liable for incapacity." Broughton, supra at 564. See also Cymerman, supra at 611-612 (fact that employee's condition worsened after the original industrial injury and while in subsequent employment does not by itself indicate a lack of legal causation to the original injury).

Frederick E. Levine
Administrative Law Judge

Martine Carroll
Administrative Law Judge

Susan Maze-Rothstein
Administrative Law Judge

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