COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS	**BOARD NOS. 053255-93 055388-95**

Jeffrey Comeau	Employee
Enterprise Electronics, Inc.	Employer
Liberty Mutual Insurance Co.	Insurer
Massachusetts Insurers Insolvency Fund	Insurer

REVIEWING BOARD DECISION
(Judges Costigan, Fabricant and Koziol)

The case was heard by Administrative Judge Bean.

APPEARANCES
Ronald L. St. Pierre, Esq., for the employee
Ronald N. Sullivan, Esq., for the employee on brief
Jean Shea Budrow, Esq., for Liberty Mutual Insurance Co.
Joseph E. Coffey, Esq., for Eastern Casualty Insurance Co. and the Massachusetts Insurers Insolvency Fund at hearing
Paul M. Moretti, Esq., and Mark D. Robins, Esq., for the Massachusetts Insurers Insolvency Fund on appeal

COSTIGAN, J. The employee and the Massachusetts Insurers Insolvency Fund (MIIF) cross-appeal from the administrative judge's decision ordering MIIF to pay workers' compensation benefits for the employee's second work injury in this successive insurer case.[1] That injury occurred on October 2, 1995, when Eastern Casualty Insurance Company (Eastern), which has since been adjudicated insolvent,[2] insured the employer. Liberty Mutual Insurance Company (Liberty) was on the risk for the employee's first work injury on December 21, 1993.[3] MIIF argues that G. L.

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[1] Although the employee filed a timely appeal from the administrative judge's decision, asserting that it was "[a]gainst the facts, law and evidence," his extensive appellate brief concludes by stating the decision should be affirmed. (Employee br. 24). Therefore, we address only MIIF's arguments.

[2] Eastern was declared insolvent effective June 9, 2010. (MIIF br. 3.)

[3] Wausau Insurance Company was the actual insurer on risk for the employee's 1993 injury. Wausau paid benefits and participated in the protracted litigation of its and the employee's

c. 175D, the statutory authority under which it operates, exempts it from liability for any claim against the insolvent entity as a successive workers' compensation insurer. MIIF also contends that the judge committed multiple other errors. We agree that certain errors and omissions in the decision require recommittal, and that the order for MIIF to reimburse Liberty must be reversed as contrary to law. However, we do not agree that MIIF cannot, as a matter of law, be liable for benefits which would, but for Eastern's insolvency, be payable by that successive insurer. To the extent the judge on recommittal may find that MIIF is liable for payment of ongoing benefits as a result of the employee's 1995 injury claims against Eastern, the insolvent successive insurer, MIIF may be ordered to pay such benefits. Pending such findings on recommittal, we vacate the award of benefits against MIIF.

We summarize the pertinent facts found by the judge. The employee owned a microchip business, Enterprise Electronics (Enterprise), of which he and his partner were the only employees. On December 21, 1993, the employee was injured in a motor vehicle accident arising out of and in the course of that employment. He experienced severe back pain, and underwent surgery on January 21, 1994. The surgery was not particularly successful, and the employee returned to only part time work in March 1994. He continued working, albeit in significant back pain which radiated into his leg and foot, and Liberty paid him § 35 partial incapacity benefits. (Dec. 569-570.)

On October 2, 1995, the employee, while still working for Enterprise, climbed onto the wet running board of a truck, reached into the back seat, slipped and fell. MRI testing a few days later showed a new herniated disc at L4-5 that had not been present in prior diagnostic testing. On the advice of his treating orthopedic physician, Dr. David Roth, the employee stopped working on December 25, 1995. The

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complaints and claims at least through July 2008, when it entered into § 19 agreements with the employee and Eastern. (Dec. 567-568; Ex. 10.) Wausau was subsequently acquired by Liberty. (MIIF br. 2, fn.1.) For ease of reference, we herein identify the insurer of the employee's December 21, 1993 injury as Liberty.

employee filed a claim against Eastern, the workers' compensation insurer at that time. After a long procession of subsequent claims, complaints, § 10A conferences and § 19 agreements over the next fourteen years, the present claim for § 34A permanent and total incapacity benefits from and after April 1, 1996, finally went forward in 2010 against both insurers. By conference order filed on April 29, 2010, the judge required Liberty to pay § 34A benefits ongoing from April 1, 2008, and he denied the claim against Eastern. The employee's and Liberty's cross-appeals brought all parties to an evidentiary hearing on December 9, 2010.[4] See Borstel's Case, 307 Mass. 24 (1940)(appeal by one of two successive insurers brought both insurers to hearing). The judge allowed additional medical evidence due to the extraordinary length of time involved in the disputed period of disability. (Dec. 567-568.)

The judge credited the employee's testimony that he had suffered an injury at work on October 2, 1995, and he adopted the employee's medical evidence. Doctor Roth opined that the employee was permanently and totally disabled due to both the 1993 and 1995 work injuries. He diagnosed an acute left L3-4 posterolateral disc extrusion, a small L4-5 disc protrusion, and extensive cervical and lumbar degenerative disc disease. Doctor Michael Mason diagnosed severe foraminal stenosis at L3-4 and L5-S1 bilaterally, and degenerative disc disease in the lumbar spine. He causally related the L3-4 herniation to the 1993 injury, and the L4-5 herniation to the 1995 injury. He opined the employee was permanently and totally disabled. Doctor James Wechsler diagnosed neuropathic pain syndrome affecting the employee's low back and legs, causally related to both work injuries. (Dec. 574-575, 581.) Moreover, the judge credited the employee's complaints of pain and physical restriction. (Dec. 569-572.)

Because Eastern was on the risk for the October 2, 1995, injury, the judge held

[4] Because Eastern had been declared insolvent six months earlier, see footnote 2, supra, MIIF assumed the defense of the employee's 1995 injury claim at hearing.

MIIF liable, as it stood in the shoes of the now insolvent successive insurer. Because MIIF had not paid any compensation on the claim prior to the issuance of his decision, the judge applied the rate enhancement provisions of § 51A[5] to the employee's § 34A permanent and total incapacity benefit. He further ordered MIIF to reimburse to Liberty all payments it had made to the employee pursuant to the April 29, 2010, conference order. (Dec. 581-582.) We address several of the issues argued by MIIF on appeal.

General Laws c. 175D[6] and the "Covered Claim"

The Massachusetts Insurers Insolvency Fund "is obligated [to pay] only . . . 'covered claim[s],' defined as 'unpaid claim[s] . . . which arise[] out of and [are] within the coverage of an insurance policy . . . issued by an insurer, if such insurer becomes an insolvent insurer and . . . the claimant or insured is a resident of the commonwealth.' " Clark Equip. Co. v. Massachusetts Ins. Insolvency Fund, 423 Mass. 166, 167 (1996), quoting G. L. c. 175D, § 1(2)(a). Moreover, "[i]n order to be a covered claim, the claim also must 'not include any amount due any reinsurer, insurer, insurance pool, or underwriting association.' " Ulwick v. Massachusetts Ins. Insolvency Fund, 418 Mass. 486, 488 (1994), quoting G. L. c. 175D, § 1(2). "[T]he Fund is excused from paying claims if the ultimate beneficiary is an insurance company." Ferrari v. Toto, 9 Mass. App. Ct. 483, 486 (1980), *aff'd*, 383 Mass. 36 (1981). Therefore, because the ultimate beneficiary of the judge's order of

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[5] General Laws Chapter 152, §51A, provides:

> In any claim in which no compensation has been paid prior to the final decision on such claim, said final decision shall take into consideration the compensation provided by statute on the date of the decision, rather than the date of injury.

[6] Citing Green v. Town of Brookline, 53 Mass. App. Ct. 120 (2001), both the employee and Liberty argue in their respective briefs that MIIF failed to raise c. 175D as a defense below and, therefore, it has waived its right to challenge the judge's reimbursement order as prohibited under that statute. (Employee br. 20-21; Liberty br. 18, 32-33.) Chapter 175D is the enabling statute under which MIIF operates. Its provisions apply to MIIF as a matter of law, and need not be raised as an affirmative defense. Thus, we address MIIF's arguments which arise under the statute.

reimbursement was an insurance company -- Liberty -- we agree with MIIF that the order was error and reverse so much of the judge's decision as required MIIF to pay back to Liberty the benefits it had paid pursuant to the April 29, 2010, conference order, and whatever recoupment of overpayment Liberty could not obtain from the employee.

We do not agree, however, with MIIF's argument that the claim here is not "covered," because Liberty, not the employee, is purportedly the ultimate beneficiary of the § 34A award it was ordered to pay. Liberty had no contractual or statutory obligations whatsoever relative to the October 2, 1995, date of injury. Liberty simply was not on the risk. Therefore, no "benefit" is conferred upon Liberty by MIIF's payment on that injury. The Supreme Judicial Court addressed the same argument in Massachusetts Ins. Insolvency Fund v. Safety Ins. Co., 439 Mass. 309 (2003):

> The Fund also argues that [the] claim is not a "[c]overed claim" under G. L. c. 175D, § 1(2) . . . because payment by the Fund would benefit another insurer (Safety), relieving it of an obligation. This is not so. Safety is not relieved of an obligation; it had none. An interpretation of G. L. c. 175D that would automatically shift liability from the Fund to the nearest solvent insurer would do violence to the legislatively established scheme. Cf. Dufresne's Case, 51 Mass. App. Ct. 81, 87-88(2001)(workers' compensation insurer not entitled to offset settlement monies that included assets from the Fund); Ferrari v. Toto, [supra at 484-486, *aff'd* 383 Mass. 36, 37-38 (1981)](no liability on Fund because any payment would not go to plaintiffs but to workers' compensation insurer).

Safety, supra at 316.

Under G. L. c. 175D, no payment to a solvent insurer of an "amount due" falls within a "covered claim" payable by MIIF. See Pilon's Case, 69 Mass. App. Ct. 167 (2007). However, MIIF tortures authority to argue that its payment on the Eastern date of injury claim would constitute payment of an "amount due" to Liberty. It cites A. W. Chesterton v. Massachusetts Ins. Insolvency Fund, 445 Mass. 502 (2005), for the proposition. Chesterton involved excess insurance in the context of joint and

several liability. Id. at 505.[7] The court held that the plaintiff/insured could not tap the Insolvency Fund (covering one insolvent excess insurer) in the absence of exhaustion of those jointly and severally liable solvent excess policy limits, where the insured had settled against those insurers for less than the policy limits:

> A company that settles with its solvent excess insurers for less than the policy limits should, in fairness, bear the risk of settling too conservatively. We conclude that where a company fails to exhaust the limits of its solvent excess coverage before turning to the Fund, the Fund will be entitled to a credit, against any liability of the Fund to indemnify or defend, in an amount equal to the full limit of the solvent excess policies.

Id. at 525. Because all of the pertinent players in Chesterton were excess insurers covering stipulated periods of exposure, id. at 506, the court's analysis is not instructive in the successive insurer relationship at issue here. Again, Liberty had no liability for insolvent Eastern's 1995 injury claim.

General Laws c. 175D and the Successive Insurer Rule

MIIF argues that, as a matter of law under G. L. c. 175D, it is exempt from the application of the successive insurer doctrine. This argument is curious in light of the holding in Pilon, supra. In that case, the Appeals Court concluded that MIIF correctly was found liable in a successive insurer case, leaving the question of benefit to the solvent insurer out of the analysis. Id. at 169-170. MIIF claims, however, that Pilon is distinguishable, because there it covered an insolvent *first* insurer, rather than the insolvent *successive* insurer, as in the present case. (MIIF reply br. 23-26; emphases added.) The distinction is not persuasive. It necessarily challenges the doctrine of c. 152 non-apportionment, and seeks to replace it with joint and several liability, taking into account the amounts of contribution from multiple insurers covering

[7] Although MIIF describes the case as involving "various insurers [which] covered different time periods of an insured's coverage for asbestos exposure, and one of those insurers was insolvent," (MIIF reply br. 28), those "different time periods" of coverage had nothing to do with the analysis. It was "multiple layers of excess indemnity policies," id. at 504, that were at issue.

successive work injuries. The Supreme Judicial Court addressed a similar argument in Sliski's Case, 424 Mass. 126 (1997):

> The Massachusetts policy of nonapportionment is long and well established. Known as the "successive insurer rule," this policy dictates that
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> > "Where incapacity results from the combined effect of several distinct personal injuries, received during the successive periods of coverage of different insurers, the result is not an apportionment of responsibility . . . Where [this occurs], the subsequent incapacity must be compensated by the one which was the insurer at the time of the most recent injury that bore causal relation to the incapacity."
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> Evans's Case, 299 Mass. 435, 436-437 (1938). Subsequent cases have not deviated from this position and it is now "settled that in a series of injuries contributing to an existing condition of disability the insurer covering the risk at the time of the last injury is responsible for all disability payments." Carrier v. Shelby Mut. Ins. Co., 370 Mass. 674, 675 (1976).

Sliski's Case, supra at 131.

MIIF also and again seeks shelter under the "ultimate beneficiary" umbrella, contending that the decision's "order that the Insolvency Fund pay benefits going forward will benefit [Liberty] by having the Insolvency Fund pay instead of [Liberty]." (MIIF reply br. 27.) We reject MIIF's argument that it is not an "insurer" under c. 175D for purposes of the successive insurer rule. The successive insurer rule merely dictates non-apportionment among multiple insurers covering multiple injuries contributing to one incapacity. It is the injured employee, the actual third party beneficiary of the primary insurance contract, who benefits from the successive insurer rule. The rule streamlines the process for the employee, eliminating delay in receipt of his weekly benefits and eliminating the need for him to seek approvals for medical treatment from more than one insurer. It also serves to eliminate ongoing disputes as to which of the insurers is responsible to pay for any proposed treatment and in what proportion. In effect, the rule helps to accomplish the primary goal of our workers' compensation system: ensuring prompt payment of benefits in as simple and as summary a manner as possible. MIIF's proposed outcome would only result in added delay, ongoing disputes among the parties, and increased litigation costs.

MIIF also misstates case law in urging its result. It argues that the successive insurer rule "does not absolve the first insurer of liability," (MIIF br. 35), which amounts to a truism in the scheme of non-apportionment. Citing Stoltz's Case, 325 Mass. 692 (1950), MIIF then states: "Any one of successive insurers paying compensation can bring a contribution claim against the other insurers." (MIIF br. 35.) Stoltz does not stand for anything close to that proposition, as it was not a successive insurer case. Stoltz addressed the distinct issue of a municipality, which had in place multiple policies of workers' compensation insurance under G. L. c. 152, § 69, "each purporting to cover a different department of the city." Id. at 693. The court concluded that the city's acceptance of the act under § 69 meant that "it then assumed the position of any other employer subject to the act; i.e., if it insured at all, it was required to insure the whole of its obligations to the extent of its acceptance of the act." Id. at 695. This meant that "as matter of law any one of the multiple policies of workmen's [sic] compensation covering laborers, workmen and mechanics of the city at the time of the employee's injury and constituting duplicate or manifold coverage might be selected and held liable to pay compensation on the instant claim." Id. at 696. It was in this context only that the court then held "that where insurers of an industrial accident are concurrently liable there is a right of contribution among them." Id.

Asserting that Liberty, the first insurer, bears some responsibility for the employee's resulting disability, MIIF would have it continue to be responsible for all payments, because anything else would provide the prohibited "benefit" to Liberty.[8] Obviously, such an argument is barred by application of the successive insurer rule. Moreover, it would have the practical effect of leaving the employee without compensation for the worsened condition resulting from the second injury because, as a matter of law, the first insurer, Liberty, simply could not be held liable for any injury that occurred at a time when it was not insuring the employer.

[8] MIIF claims that Liberty Mutual's only recourse would be a contribution claim against the Eastern Casualty bankruptcy estate.

MIIF further asserts that c. 175D "contains its own rules on apportionment between the Insolvency Fund and solvent insurers," (MIIF br. 37), and that "absent a provision of the Workers' Compensation Act defining the Insolvency Fund as an insurer for the purposes of such act, provisions in the Workers' Compensation Act applicable to insurers do not apply to the Insolvency Fund." (MIIF br. 36.) We note that MIIF advances no argument as to whether it is an insurer for purposes of entitlement to second-injury fund reimbursement under G. L. c. 152, § 37, or cost-of-living adjustment reimbursement under § 34B.

In any event, MIIF's reliance on superior court decisions addressing third party claims for PIP benefits under G. L. c. 90, § 34M, with the attendant entitlement to attorney's fees and costs, is misplaced, as those cases are inapposite. (MIIF br. 36; reply br. 25-26.) Nothing in the successive insurer rule approximates the statutory assessments of damages and penalties involved in those cases. If the successive insurer rule involves the application of a strictly "statutory" cause of action -- not one based, as it is, on the contract of insurance between the employer and the insurer, with the employee as a third party beneficiary -- then MIIF would have no place in covering *any* insolvent workers' compensation insurers, a patently wrong result. This is not how the Appeals Court treated MIIF in Pilon, supra. MIIF's argument that its coverage applies to insolvent first insurers, but not to insolvent successive insurers, is arbitrary and nonsensical.

Finally, we comment on MIIF's overwrought, policy-based assertion of its supremacy in all manners of statutory construction. It is the same argument that missed its mark before the Supreme Judicial Court just two years ago. In Wheatley v. Massachusetts Ins. Insolvency Fund, 456 Mass. 594 (2010), MIIF contended that a legislative amendment to c. 93A, which explicitly included the Fund as a "person" subject to that statute's unfair settlement and business practices penalties, did no such thing. The court responded:

> Finally, citing various provisions of G. L. c. 175D, the insolvency fund argues that the Legislature has "taken great pain" to limit the insolvency fund's

> obligations in order to preserve the insolvency fund's "limited financial resources" and "limit the burden on the public," which will bear the "ultimate financial responsibility" for any G. L. c. 93A awards. . . . The insolvency fund argues that interpreting the 1996 amendment as subjecting it to G. L. c. 93A consumer actions, as we do, would mean necessarily that there is "no limit" on the insolvency fund's liability, a result discordant with the Legislature's efforts to limit the insolvency fund's obligations. We conclude today only that the insolvency fund is subject to G. L. c. 93A consumer actions. We do not consider and do not decide whether any of the statutory limitations on the insolvency fund's obligations to pay claims set forth in c. 175D and elsewhere apply as well to any damages that may be awarded against the IF under c. 93A.

Wheatley, supra at 609-610.

In this case, MIIF advances the same arguments about "limitations," "limited resources," and "burden on the public," at pages 35 to 39 of its brief, and more extensively in its reply brief. The arguments are no more availing here than in Wheatley. We conclude only that regardless of whether other insurers are involved, MIIF must cover unpaid claims against insolvent workers' compensation insurers, such as Eastern, a duty clearly imposed by the Legislature and affirmed in the courts through several decades.

Reimbursement To a Solvent Insurer

The employee acknowledged, (Dec. 568; Ex. 10), and the judge found, (Dec. 583), that in addition to the benefits Liberty was ordered to pay in the April 29, 2010, conference order, Liberty had also overpaid the employee the sum of $34,830 during the period when the employee was back to work, receiving § 35 partial incapacity benefits.[9] The judge found that Liberty was entitled to recoup that amount from the employee. (Id.) So far, so good. The judge, however, further determined:

> Liberty Mutual Insurance Company may subtract the money they [sic] owe the employee as a result of penalties assessed in this decision [under §§ 7, 8(5) and 14(1)], from the recoupment order. If the employee continues to owe money to Liberty Mutual Insurance Company after subtracting the money they

[9] The employee testified, (Tr. I, 92-94), and his W-2 forms for 1994, (Ex. 4), and 1995, (Ex. 5), confirmed, that his annual earnings were $272,775 and $471,140 respectively, far in excess of his pre-injury average weekly wage, rendering him not entitled to the partial incapacity benefits Liberty paid him and giving rise to the overpayment.

> [sic] owe to the employee, *then the Guarantee* [sic] *Fund* [MIIF] *shall reimburse Liberty Mutual Insurance Company the money owed from the back compensation benefits owed by the Guarantee* [sic] *Fund to the employee.*

(Dec. 583; emphasis added.) Moreover, in his April 29, 2010, § 10A conference order, the judge had ordered Liberty to pay the employee's claims. In his 2011 hearing decision, the judge found that MIIF, on behalf of Eastern, the insolvent successive insurer, was liable for those payments. Therefore, he directed MIIF to reimburse Liberty for the payments it had made.[10]

The provisions of G. L. c. 152, § 11D(4), would otherwise govern this situation:

> Where an order of recoupment against an employee has not been fulfilled, and weekly benefits are owed to an employee under this chapter by an insurer other than that to which recoupment has been ordered, such insurer shall reduce by thirty percent said weekly benefits payable to the employee, and shall pay such thirty percent excess directly to the insurer to whom recoupment has been ordered, until full recovery has been made.

MIIF argues, however, that to the extent the judge required that it directly reimburse Liberty, his orders ran afoul of the holding in Pilon, supra, and cannot stand. We agree. The application of Pilon is appropriate, because reimbursement to Liberty for payments it made under the conference order, and any reimbursement of its overpayment not obtained from the employee, would be to that solvent insurer's benefit, and therefore prohibited by the enabling statute. Id. at 172-173.

> The question, however, is not whether [Liberty] has a right of reimbursement against [Eastern, the employer's insurer in 2002], which it undoubtedly would were [Eastern] still solvent, but whether the Insolvency Fund must make good on that reimbursement. We agree with the Insolvency Fund that the order to reimburse [Liberty] is an error of law as it expressly contravenes G. L. c. 175D, § 1(2). Whatever force [Liberty's] arguments may have as a matter of policy, the Legislature has decided otherwise and imposed a prohibition that neither the Department of Industrial Accidents nor this court may ignore.

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[10] The judge excluded from his reimbursement order the statutory penalties he assessed against Liberty. (Dec. 582.)

Pilon, supra at 172.[11] See also Dufresne's Case, 51 Mass. App. Ct. 81, 87-88 (2001)(no Hunter offset in favor of solvent insurer coming from assets of MIIF).

There is one other reason why MIIF is not liable to pay benefits -- to either the employee or Liberty -- for the period from April 1, 2008 (the start date of the § 34A conference award) to March 14, 2011 (the filing date of the judge's decision). The employee's claim for that period was not an "unpaid claim," because he received payment of those benefits from Liberty under the conference order. See G. L. c. 152, § 1(2); Ferrari v. Toto, supra at 486. The employee has no further entitlement to such benefits and no right to double recovery. See Pilon, supra at 173 n.9.

We therefore reverse the judge's order of reimbursement by MIIF to Liberty. Liberty is not entitled to reimbursement of any amount, directly or indirectly, from MIIF. Likewise, because MIIF is not liable to pay benefits for the same period paid by Liberty pursuant to the conference order, Liberty is not entitled to seek reimbursement of those benefits from the employee under § 11D(3), although it may recoup its overpayment from him. See footnote 9, supra.

Applicability of § 51A

MIIF argues that the judge erred by applying the rate enhancement provision of § 51A[12] in his award of benefits. We disagree. Because MIIF had not paid any amounts on the employee's claim against it for the insolvent Eastern Casualty's 1995 date of injury, § 51A applied to change the rate of compensation to that in effect on the date of the decision. In MacDougall's Case, 80 Mass. App. Ct. 950 (2011), the

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[11] The court noted that "the statutory proscription against payments for the benefit of an insurer likewise prohibits the Insolvency Fund from reimbursing [Liberty] by passing that payment through the employee. Where [the employee] is the conduit of payment, the ultimate beneficiary is still an insurer in contravention of the statute." [Citations omitted.] Pilon, supra at 173.

[12] General Laws c. 152, § 51A, provides:

> In any claim in which no compensation has been paid prior to the decision on such claim, said final decision shall take into consideration the compensation provided by statute on the date of the decision, rather than the date of the injury.

court endorsed a broad approach to § 51A, reversing the reviewing board's denial of its application where the insurer had paid § 35 partial incapacity benefits during the pendency of a § 34A claim. No cases have been found addressing the present case's combination of the successive insurer doctrine and § 51A. MIIF cites Conte v. P.A.N. Constr. Co., 51 Mass. App. Ct. 398 (2001), in which § 51A was found inapplicable. However, Conte is distinguishable, as there, the same insurer had paid weekly benefits under the same claim for the same date of injury, albeit under New Jersey law, prior to being ordered to pay such benefits under § 34. Such is not the case here. Inasmuch as MIIF contested the separate claim against it, which asserted a different date of injury than the employee's claim against Liberty, and made no payments on that claim prior to the filing of the hearing decision, it may not escape application of § 51A by virtue of Liberty's payments under the conference order.

We therefore conclude that the judge properly applied § 51A to the employee's award of weekly incapacity benefits, as the statute refers to "any claim in which no compensation has been paid," not to any unpaid incapacity. In successive insurer cases, one incapacity is the subject of multiple claims against two or more different insurers. Because MIIF paid nothing on the claim against it prior to the issuance of the decision, § 51A's rate enhancement provision will apply, should the judge on recommittal find MIIF liable to pay weekly incapacity benefits.

General Laws c. 152, § 1(7A)

MIIF correctly argues that the judge did not make findings on the applicability of its affirmative defense under § 1(7A)[13] relative to combination injuries. This is yet another reason why recommittal is necessary.

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[13] 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.

We remind the judge that he must first determine whether MIIF has met its burden of production:

> An insurer that wishes to rely on the heightened causation standard of the statute must first meet a burden of production. The insurer must raise evidence that (1) the prior injury is noncompensable, and (2) the present claimed injury or condition is a resultant condition arising from a combination of the present injury and a pre-existing condition resulting from the prior noncompensable injury. "The insurer must raise § 1(7A) as a defense and produce evidence to trigger its application. . . . An essential element of proof in establishing this threshold requirement is a showing by the insurer that there is a 'combination' of the industrial injury with the pre-existing condition." Johnson v. Center for Human Dev., 20 Mass. Workers' Comp. Rep. 351, 353 (2006). If the insurer fails to meet this burden of production, "the heightened causation standard of § 1(7A) does not apply. . . ." Id. at 354.

MacDonald's Case, 73 Mass. App. Ct. 657, 659-660 (2009). If the judge determines that MIIF meets its burden of production under the statute, then the employee has the burden of proof as to the inapplicability of the statute:

> It is the employee's burden to prove the compensable nature of the pre-existing condition in order to invalidate a § 1(7A) defense. [Citation omitted.] If the pre-existing condition is not compensable, the judge must then address the effect of its combination with the subject work injury. [Citation omitted.] If the employee has not defeated § 1(7A) by successfully attacking either of these first two elements of the statute, the judge must then make findings on the last element: whether the work injury remains a major but not necessarily predominant cause of the resultant disability or need for treatment.

Vieira v. D'Agostino Assocs., 19 Mass. Workers' Comp. Rep. 50, 53 (2005). The judge on recommittal must make detailed findings of fact addressing each element of the requisite § 1(7A) analysis.

Statute of Limitations, Late Notice, Late Claim and Laches

MIIF duly raised these defenses. (Ex. 24.) It correctly argues that the judge failed to make findings addressing these issues. While the employee asserts MIIF was not prejudiced from whatever delay in notice or claim may have occurred, (Employee br. 16), this is an argument for the judge to consider in the first instance. Therefore, recommittal is appropriate.

The Medical Evidence

MIIF contends the judge misinterpreted the medical evidence and erroneously found that there was no diagnostic study performed before the employee's second work injury of October 2, 1995, which indicated a disc herniation at L4-5. (Dec. 581.) We agree. The December 24, 1993, MRI does reflect "a small central herniation at the "L4" disc. (Ex. 13-18, 20-21.) This diagnostic finding is repeated in Dr. Roth's office note a few days after that MRI. (Ex. 9.) The judge adopted Dr. Roth's opinion to award benefits paid by MIIF. (Dec. 574.) But for those references, the employee's medical records prior to October 1995 do not confirm the existence of a disc herniation at L4-5. It is therefore appropriate for the judge to reconsider the medical evidence and clarify his findings as to the employee's lumbar diagnoses prior to the occurrence of the 1995 work injury.

Finally, MIIF questions whether the adopted medical evidence was based on an accurate history of the employee's alleged fall from a truck at work on October 2, 1995. Although he noted the absence of a history of this injury in the contemporaneous medical records of Dr. Roth, a treating physician, and Dr. Howard Taylor, a § 45 examiner, the judge credited the employee and found the work injury occurred as the employee testified. (Dec. 570; Tr. I, 42, 82-83, 85-86, 126, 129.) That the employee's accounts of the incident varied somewhat in the histories given to certain doctors was a matter for the judge to reconcile, based on credibility findings. He did so. There is no error.

Conclusion

Accordingly, we reverse and vacate the judge's order that MIIF reimburse Liberty the benefits it paid pursuant to the § 10A conference order, and that it reimburse Liberty whatever amount of its overpayment it is unable to recoup from the employee directly. We also vacate the award of benefits against MIIF. We recommit the case for further findings on MIIF's affirmative defenses of § 1(7A), statute of limitations, late notice, late claim and laches.

So ordered.

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Patricia A. Costigan
Administrative Law Judge

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Bernard W. Fabricant
Administrative Law Judge

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Catherine Watson Koziol
Administrative Law Judge

Filed: **August 28, 2012**