COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NOS. 013131-98 056539-98**

Joann M. Azulay	Employee
Saints Memorial Medical Center	Employer
Saint Memorial Health Systems	Self-insurer
Emerson Hospital	Employer
Mass Healthcare S.I.G.	Insurer

REVIEWING BOARD DECISION
(Judges Wilson, McCarthy and Maze-Rothstein)

APPEARANCES
Alan S. Pierce, Esq., for the employee
Herbert C. Dike, Esq., for Saint Memorial Health Systems
James W. Stone, Esq., for Mass Healthcare S.I.G.

WILSON, J. The employee and the second insurer, Mass Healthcare S.I.G.(Mass Healthcare), appeal from a decision of an administrative judge in a successive insurer case. Both parties assert that the judge erred by finding that an industrial injury – an outbreak of dermatitis caused by frequent hand washing – occurred while the employee worked as a nurse for the employer that was covered by the second insurer. The employee also challenges the judge's assignment of an earning capacity. We summarily affirm the decision with respect to the judge's award of partial incapacity benefits based on the assigned earning capacity. We affirm the decision as to the successive insurer issue for the reasons that follow.

In January 1997, Ms. Azulay, while working as a registered nurse for Saints Memorial Medical Center (Saints Memorial), began to develop cracking and bleeding on her right third finger due to exposure to latex and frequent handwashing with disinfectant soap. The symptoms then developed on all of her fingers. (Dec. 5.) The employee treated with various doctors for her diagnosed allergic contact dermatitis, irritant contact dermatitis and dyshidrotic dermatitis. (Dec. 5-7.) She left work for several periods of

time, was paid temporary total incapacity benefits, and terminated her employment with Saints Memorial in July 1998. (Dec. 5.)

The employee commenced work as a nurse at Emerson Hospital (Emerson) in October 1998, at which time her hands were clear of the industrial dermatitis. She began working thirty-two hours per week, but soon developed the dermatitis again, noticing cracking and bleeding all over her fingers. She continued to work and was prescribed antibiotic medication. She reduced her hours in January 1999, and once again in August of that year. At the time of hearing the employee felt that she could work up to twelve hours per week, without further inciting the dermatitis. (Dec. 5-6.)

The employee claimed partial incapacity benefits, ongoing from March 1, 1999, against Saints Memorial, which then joined Emerson in the proceeding. (Dec. 2, 4.)

The employee underwent an impartial medical examination pursuant to § 11A(2) on March 1, 2000. The impartial physician opined that the employee suffered from allergic contact dermatitis as an exacerbant to dyshidrotic dermatitis. Additionally, the doctor opined that the employee's condition likely began as an irritant contact dermatitis to hand cleansing and latex gloves and that the employee must avoid latex gloves. The doctor opined that, although the multiple hand washing required in the nursing profession would limit her from performing full time duty, she could work part-time shifts without incident. Finally, the doctor opined that frequent hand washing caused the employee's further outbreak of dermatitis while she was working for Emerson. (Dec. 6-7.)

The judge concluded that the employee sustained a second industrial injury as a result of the frequent hand washing while working for the second insured, Emerson, which separate irritant triggered her underlying industrial dermatitis. (Dec. 11.) The judge awarded the employee partial incapacity benefits with a weekly earning capacity of $475.00, reflecting her ability to work part-time as a registered nurse, or full time as a non-care nurse. (Dec. 11.)

In their appeals to the reviewing board, the employee and second insurer, Mass Healthcare, contend that the judge erred by finding that an industrial injury occurred at Emerson. Mass Healthcare argues that there is no contribution to the employee's

condition arising from the subsequent employment because her skin breakdown from hand washing was due to latex exposure with the first employee and, thus, a recurrence. (Mass Healthcare brief, 4-5.) We disagree. "It was open to the [judge] on the evidence to find that what happened [at Emerson] was a contributing cause of the employee's ensuing disability." Long's Case, 337 Mass. 517, 520 (1958). It has long been settled that where there are successive insurers, "chargeability for the whole compensation rests upon the one covering the risk at the time of the most recent injury that bears a causal relationship to the disability." Tassone's Case, 330 Mass. 545, 547 (1953). It certainly is true that the impartial physician considered the employee's condition to be established as of her leaving the employ of Saints Memorial, (Dep. 13-14), and that he stated the employee's multiple hand washing at Emerson "would provoke a continuation of the same response." (Dep. 21.) Nonetheless, the doctor also considered that hand washing was a "separate irritant," id., and the evidence was that the employee no longer had dermatological symptoms prior to her commencement of employment with Emerson. (Dec. 5; April 21, 2000 Tr. 25.) It certainly could be found as a fact that the frequency of the hand washing required in the nursing profession is not common and necessary to a great many occupations, thereby removing any objection under Zerofski's Case, 385 Mass. 590 (1982), concerning the compensable nature of a hand washing injury. Under these circumstances, the judge rightly could have found that the employee's increase in symptoms was the result of the separate contribution of the frequent hand washing at Emerson. "[I]t was within the fact finder's prerogative to weigh the reported symptoms as well as the medical opinion, and that a disabling increase in symptoms [as a result of her work at Emerson] . . . could be found to be an injury." Long's Case, supra at 521. It is axiomatic that an aggravation – even to the slightest extent – of a pre-existing compensable condition is a personal injury under the Act. See Arbogast v. McCord-Winn, Inc., 5 Mass. Workers' Comp. Rep 189, 194 (1991); Rock's Case, 323 Mass. 428, 429 (1948); Tassone's Case, supra at 547 (medical opinion that recurrence of dermatitis, caused by earlier employment and then cleared up, "had its immediate cause in what [the employee] came in contact with" at the second employer sufficient to support imposition

of liability on second insurer). Contrast G.L. c. 152, § 1(7A)(where industrial injury combines with a pre-existing, non-compensable injury or disease, "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").

The decision is affirmed.

So ordered.

Sara Holmes Wilson
Administrative Law Judge

Filed: **October 31, 2001**

William A. McCarthy
Administrative Law Judge

Susan Maze-Rothstein
Administrative Law Judge