

COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS

BOARD NOS. 022298-03
022301-03
022308-03
023728-03

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| Jonathan F. White | Employee |
| Uncle Fred's Gun Repair | Employer |
| Legion Insurance Co./Massachusetts Insolvency Fund | Insurer |
| Shelby Insurance Co. | Insurer |
| St. Paul Fire & Marine Insurance Co. | Insurer |
| Liberty Mutual Insurance Co. | Insurer |

REVIEWING BOARD DECISION

(Judges Costigan, Horan and Fabricant)

APPEARANCES

Ronald L. St. Pierre, Esq., for the employee at hearing and on brief
Laura Caron, Esq., for the employee on appeal
Douglas F. Boyd, Esq., for Legion Ins. Co./Mass. Insolvency Fund
David C. Williams, Esq., for Shelby Ins. Co.
Thomas B. Daniels, Esq., for St. Paul Fire & Marine Ins. Co.
Patricia M. Vachereau, Esq., for Liberty Mutual Ins. Co. at hearing
Thomas E. Fleischer, Esq., for Liberty Mutual Ins. Co. on appeal

COSTIGAN, J. The employee appeals from a decision in which the administrative judge found in his favor that he had suffered an industrial injury -- lead poisoning -- while working as a gunsmith, but that he had not proved any causally related incapacity. We affirm the decision, summarizing the relevant procedural history of the employee's claims and the judge's subsidiary and general findings of fact.

The employee began working for his stepfather as an apprentice at Uncle Fred's Gun Repair in 1982. Although there were various interruptions in his employment at the gun shop, he ultimately achieved the title of master gunsmith and became manager of the business. As a gunsmith, the employee repaired guns in a small, unventilated back room

of the shop. The employee stopped working at the gun shop on July 12, 2000. (Dec. 3, 6-7, 10.)

In November 2000, the employee filed a claim for workers' compensation benefits against Legion Insurance Company, alleging a July 7, 1998 date of injury. That claim was denied following a § 10A conference and the employee appealed. He underwent what was to be the first of two § 11A impartial medical examinations by Dr. Jerome Siegel on November 7, 2001.¹ In his report of that date, (Stat. Ex. 2), Dr. Siegel diagnosed the employee as having multiple symptoms including headaches, dizziness, memory loss, fatigue, excessive sleep, generalized aches, and depression. Specifically noting inconclusive lab results and poor documentation of lead levels at the gun shop, Dr. Siegel opined there was insufficient information to establish a causal relationship between the employee's job and his symptoms. (Dec. 8; Stat. Ex. 2.) Although he noted the employee was then out of work, Dr. Siegel imposed no physical restrictions on the employee and offered no opinion as to disability. (*Id.*) The employee then withdrew his appeal of the conference denial of his claim.

In June 2003, the employee filed new claims against Legion and three other insurers of the employer gun shop, alleging dates of injury/exposure in 1980 and 1982 (Shelby), 1986 (St. Paul), 1986 and 1996 (Liberty Mutual) and July 12, 2000 (Legion). (Employee br. 2-3; Dec. 10.) None of the claims was accepted, and a different administrative judge denied them after a § 10A conference. The employee appealed all four denials. (Dec. 2-5.)

The employee underwent his second impartial medical examination by Dr. Siegel on May 25, 2004. The judge wrote:

On that occasion the doctor had the benefit of the consultation report from the Commonwealth of Massachusetts, Division of Occupational Safety (Employee's exhibit #5). Dr. Siegel added to his previous diagnosis, "possible lead toxicity." On causation, the doctor opined that the new evidence supports possible lead toxicity, but, he still could not causally related [sic] exposure of lead at work with the employee's multiple symptoms and any ongoing impairment or disability. He

¹ The judge's reference to the original impartial medical examination as occurring on *July* 7, 2001, (Dec. 8), appears to be a scrivener's error.

concluded that the employee had reached a medical end result as of the evaluation with Dr. Hu.²

(Dec. 8-9.) The judge found it probable that the employee had sustained significant clinical lead poisoning as a result of his workplace exposure, and thus had suffered a personal injury within the meaning of Chapter 152. (Dec. 9-10.) As to causally related incapacity and medical treatment, the judge concluded:

The employee suffers from a myriad of subjective complaints and symptoms. Despite the opinion of Dr. Elson to the contrary, I am persuaded and adopt the opinion of Dr. Siegel, who after a very thorough and extensive evaluation on two occasions, reviewed the entire medical documentation provided, and concluded that he could not establish a causal relationship between the lead exposure at work and the employee's multiple symptoms and any ongoing impairment or disability. Therefore, I cannot find any incapacity causally related to the personal injury of lead poisoning. I adopt the conclusion of Dr. Hu that the medical treatment associated with the lead poisoning was reasonable and necessary up until his evaluation of July 16, 2002. I find that the lead exposure continued until the employee left Uncle Fred's Gun Shop, and pursuant to the successive insurer rule, the liability for medical treatment for lead poisoning lies with the last carrier, Legion Insurance.

(Dec.10)

The employee argues that the decision is internally inconsistent, because the judge adopted the medical opinions of both Dr. Hu and Dr. Siegel. Because the employee's

² Because the judge deemed the medical issues complex, the parties were allowed to submit additional medical evidence. (Dec. 9.) Included in the employee's submission was the July 16, 2002 evaluation of Dr. Howard Hu, (Employee Ex. 4), who opined that the employee probably suffered from significant lead poisoning as a result of his exposures at work. Dr. Hu considered the lead poisoning therapies which the employee had undergone in order to rid his body of the toxin to be appropriate treatment. However, he recommended the treatments be discontinued. Dr. Hu also recommended the employee change his profession to limit lead exposure, but did not give an opinion on disability in general. (Dec. 9.)

interpretation of the judge's findings based on those doctors' reports is flawed, we disagree.

The employee argues the judge could not properly find he had sustained a a personal injury, for which he was entitled to compensation in the form of medical treatment under § 30, without also finding entitlement to weekly incapacity benefits. This argument ignores longstanding case law that an injury may occur without any resulting incapacity. Crowley's Case, 287 Mass. 367 (1934); see also Steuterman's Case, 323 Mass. 454 (1948); cf. Ames v. Town of Plymouth, 19 Mass. Workers' Comp. Rep. 150 (2006)(in absence of proof of "lesion or change in any part of the system produc[ing] harm or pain or a lessened facility of the natural use of any bodily activity or capability," Burns's Case, 218 Mass. 8, 12 (1914), exposure to asbestos not a personal injury under c. 152).

The judge's award of medical benefits was expressly based on Dr. Hu's adopted opinion that the employee's treatment had been reasonable, necessary and causally related to his exposure to lead in the workplace, at least until July 16, 2002, but the employee fails to acknowledge that Dr. Hu offered no opinion as to disability. Dr. Siegel, on the other hand, did address disability, but not in the employee's favor. The doctor opined that he could not causally relate the employee's "possible" work-related lead toxicity with the employee's multiple symptoms and any ongoing impairment or disability the employee claimed he was suffering.³ (Dec. 8-9.) We see no error.

Given our disposition of the first issue presented by the employee's appeal, we need not address his second challenge, involving the calculation of his average weekly wage. The decision is affirmed.

So ordered.

³ We acknowledge that in his 2001 report, Dr. Siegel opined he could not determine causal relationship, in part because of a lack of documentation establishing lead exposure at work. When Dr. Siegel examined the employee in 2004, however, he had the benefit of a report of the Massachusetts Division of Occupational Safety (Employee Ex. 5) which, in his view, supported *possible* lead toxicity from the workplace. Although Dr. Hu's diagnosis of *probable* lead toxicity carried the employee's burden of proof as to diagnosis, cf. Silbovitz's Case, 343 Mass. 372, 374 (1961), the judge properly found that "Dr. Hu did not provide any opinion as to what symptoms or disability, if any, would be attributed to the probable lead poisoning." (Dec. 9.) The judge correctly concluded that no weekly incapacity benefits were due the employee. (Dec. 10-11.)

Patricia A. Costigan
Administrative Law Judge

Mark D. Horan
Administrative Law Judge

Bernard W. Fabricant
Administrative Law Judge

Filed: May 6, 2008