COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS

BOARD NOS. 047349-05 032079-08

Jose Moran	Employee
Signature Breads Inc.	Employer
Liberty Mutual Insurance Co.	Insurer
Acadia Insurance Co.	Insurer

REVIEWING BOARD DECISION
(Judges Koziol, Fabricant and Levine)

The case was heard by Administrative Judge Tirrell.

APPEARANCES
Paul F. Murphy, Esq., for the employee
Gerald T. MacCurtain, Esq., for Liberty Mutual Insurance Co.
Ellen Harrington Sullivan, Esq., for Acadia Insurance Co.

KOZIOL, J. The employee appeals from the judge's decision denying his claims against both insurers for § 35 partial incapacity and § 30 medical benefits. The employee argues the judge committed various factual and legal errors in denying his claims, despite finding the employee has occupational asthma causally related to his exposure to flour dust at the employer's bakery. He also argues the judge erred in denying his post-hearing motion to take judicial notice of the employer's insurance coverage for the year 1996. We affirm the judge's order denying and dismissing the employee's claims, but do so on different legal grounds.

The employee began working for the employer in 1996, first as a sanitation worker and then as an utility technician, operating and cleaning machines, mixing ingredients, loading ovens and cleaning, mopping, and disposing of flour and oil. (Dec. 4-5.) "About 1998 or 1999 [the employee] began seeking medical help for a breathing problem" and in 2001, his treating pulmonologist, Dr. Jonathan Strongin, diagnosed him as having occupational asthma associated with flour exposure. (Dec. 5; Employee Ex. 6.) The employee "has been prescribed an antihistamine, fexofenadine, Adv[a]ir, an inhaler for bronchospasms, and an albuterol inhaler, a

bronchodilator."[1] (Dec. 5.) Since April 28, 2005,[2] the employee also receives "bi-weekly injections of Xolair" on every other Friday in Dr. Strongin's office. (Dec. 5.) Immediately after the injections, the employee requires up to twenty minutes of medical observation and he is prohibited from performing heavy lifting for the remainder of the day. (Dec. 5, 6.)

The employee filed a claim against Liberty Mutual Insurance Company (Liberty), alleging a date of injury of April 28, 2005, and seeking payment of § 30 medical benefits for medications and out-of-pocket expenses associated with his treatment, and § 35 partial incapacity benefits for his absence from work every other Friday.[3] The employee's claim against Liberty was denied at conference and he appealed. The employee underwent a § 11A impartial medical examination by Dr. Philip H. Thielhelm on August 30, 2007. (Dec. 2, 4.)

Liberty insured the employer from April 28, 2005 through September 15, 2007. (Dec. 3.) On July 1, 2008, the judge allowed Liberty's motion to join Valley Forge Insurance Company (CNA), see Rizzo v. M.B.T.A., 16 Mass. Workers' Comp. Rep. 160, 161 n.3 (2002)(judicial notice taken of contents of board file), which insured the employer from September 16, 2007 through September 15, 2008. (Dec. 3.) On October 27, 2008, the judge allowed CNA's motion to join Acadia Insurance Company (Acadia), see Rizzo, supra, which insured the employer from September 16, 2008 through the date of the hearing, April 27, 2009. (Dec. 3.) Prior to hearing, the

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[1] The employee testified he has been taking medications for his breathing difficulties since the year 2000. (Tr. 84.)

[2] The judge's decision states the injections began on April 20, 2004 and on April 28, 2004. (Dec. 5.) The parties agree however, that the injections began on April 28, 2005. (Employee br. 3; Liberty br. 5; Acadia br. 3. See also, Tr. 24.)

[3] Since March of 2009, the employee has been able to work his regular schedule at his regular rate of pay because the employer provides him with lighter work on the day he receives the injections. (Dec. 5, 6.)

employee and CNA entered into a lump sum settlement agreement, approved by the judge on a without liability basis on April 3, 2009. (Dec. 3.)

The claims against Liberty and Acadia proceeded to hearing, where both insurers continued to contest liability for the alleged industrial injury. The employee proceeded on the theory his work exposed him to flour dust causing his occupational asthma. He alleged his cumulative daily exposure to flour caused daily aggravation of his condition, requiring application of the successive insurer rule.

Following Dr. Theilhelm's deposition, the judge, sua sponte, found the medical issues complex and opened the record for admission of additional medical evidence. In his decision, the judge credited the employee's testimony that his condition was better than it was in the year 2000, and that he recalled telling the impartial medical examiner that his breathing problems have steadily improved since his injections began. (Dec. 5-6.)

The judge adopted the following opinions of Dr. Thielhelm:

> I adopt his diagnosis of adult-onset bronchial asthma, also known as occupational asthma, and that it was causally related to exposure to flour dust in the workplace. I also adopt his opinion that the Xolair injections need to be administered in a controlled setting because of the risk they might cause an acute asthma attack. Dr. Thielhelm testified, and I find, that [the employee] continued to suffer from occupational asthma at the time of his impartial medical examination in 2007. He testified that [the employee's] condition appeared to have stablilized and improved prior to the examination. . . . I adopt Dr. Thielhelm's opinion that at the time of his impartial examination [the employee] had a mild asthmatic condition which was intermittent and controllable with medication.

(Dec. 6-7.) The judge also made the following findings adopting the opinions of Acadia's examining physician, Dr. Reid Boswell:

> "[The employee's] exposure to wheat flour in the workplace and subsequent sensitization between 1996 and 1998 is the major cause of his current complaints. His condition has not worsened or improved since he was originally diagnosed, it is just that he has better treatment to control his symptoms now versus when he was first diagnosed." (Acadia Insurance Company's Exhibit 1) I therefore find that [the employee's] asthma developed years before either Liberty Mutual or Acadia Insurance Company were on the

> risk. As Dr. Boswell opined, I find [the employee's] underlying condition has remained unchanged since he first developed occupational asthma but that his symptoms have improved with medication. I find that neither Liberty Mutual nor Acadia Insurance Company is responsibility [sic] the payment of § 35 benefit for partial disability or for the treatment of [the employee's] asthmatic condition.

(Dec. 7.) The judge denied and dismissed both claims. (Dec. 9.) On January 13, 2010, the judge denied the employee's motion for reconsideration.[4]

On appeal, the employee alleges there is no evidence to support the judge's findings that he 1) sought medical treatment for breathing problems in 1998 or 1999; 2) was exposed to flour dust, or had an onset of his condition, in 1996, 1998 or 1999; and, 3) began receiving Xolair injections on April 28, 2004. (Employee br. 3.) The employee testified he began working at the bakery on July 28, 1996. (Tr. 10.) The employee's testimony provided the basis for the judge's findings that he sought medical treatment for breathing problems in 1998 or 1999, and he had an onset of his condition in 1998 or 1999.[5] Insofar as the judge incorrectly stated the employee

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[4] The employee argued reconsideration was required to address three "unresolved facts and issues." First, the employee asserted:

> The employee had no incapacity that could support a claim for benefits prior to 2005. The case law talks of incapacity not exposure. Therefore the relevance of who insured the employer in 1996 is unclear based on the case law in question. However, the employee would request the single member [sic] take judicial notice of the additional coverage sheet showing Liberty was on the risk in June of 1996, when the employee started work. (See Exhibit 1 attached.)

(Employee's Motion to Reconsider.) Second, he argued compensation was warranted because his claim sought compensation beginning in 2005 and neither insurer had raised any defense contradicting the date of loss. Lastly, the employee asserted the successive insurer rule applied, because Dr. Boswell noted that he "complained of increased shortness of breath and wheezing at work and home" when his Xolair injections had been stopped due to insurance problems. Id. See Rizzo, supra.

[5] When questioned by his own counsel, the employee testified:

> Q: Now, at some point when you started work at Signature Breads, did you seek medical attention for a breathing problem?
> A: Yes.

began to receive Xolair injections in 2004, see footnote 1, supra, the error is harmless because the adopted medical opinions failed to support a finding that the employee incurred any injury on the date he began to receive those injections. Specifically, the judge adopted Dr. Boswell's opinion that the employee's condition had not worsened or improved since the date he had been diagnosed as having occupational asthma, which was sometime in 2001. (Acadia Ex. 1; Dec. 5.)

This brings us to the employee's claim that the judge erred as a matter of law in failing to apply the successive insurer rule in this case. We disagree. The employee correctly states the general rule in cumulative exposure cases is that the date of injury is the first day of disability, Letteney's Case, 429 Mass. 280 (1999); Defelippo's Case, 284 Mass. 531, 533-534, 535 (1993), and that the insurer on the risk at the time of the last *injurious* exposure to harmful foreign matter bears responsibility for payment of the employee's claim. Pilon's Case, 69 Mass. App. Ct. 167, 169 (2007). However, the employee fails to acknowledge that it was a medical question whether his disability was caused by a cumulative exposure, and whether, once he developed occupational asthma, his continued exposure to flour resulted in

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> Q: Can you tell us approximately when that was.
> A: It started at around 1998 or 1999.

(Tr. 12-13.) When questioned by Liberty's counsel, the employee testified:

> Q: Okay. Can you tell me, sir, when did you first start to notice symptoms at work as a result of the flour you were exposed to?
> A: Until 1989 or '88, around that time.
> Q: '88 or '98?
> A: '98 and '99.

(Tr. 41.) When questioned by Acadia's counsel, the employee's testimony was consistent:

> Q: Mr. Moran, just very briefly, you began experiencing the symptoms; the coughing, shortness of breathe [sic], around 1998, 1999; is that right?
> A: Yes.

(Tr. 62.)

further injury. Pilon, supra, at 169("The determination of whether there was a subsequent injury and whether it had a connection to the ensuing incapacity is essentially a question of fact, on which expert medical opinion is required")(citations omitted.)

The employee's receipt of a new treatment for his condition in 2005, which resulted in his missing work one day every other week, did not require a finding that he sustained further injury at work on that date. Indeed, Dr. Boswell's adopted opinion did not support the employee's theory that continued exposure to flour dust resulted in his sustaining any further harm or injury.[6] (Dec. 5.) The facts do not support application of the successive insurer rule in this case.

Lastly, the employee argues the judge erred in denying his post-hearing request to take judicial notice of the employer's insurance coverage during 1996. We disagree and decline the employee's request to recommitt the matter for the purpose of reopening the record to take evidence of the employer's insurance coverage in 1996. (Employee br. 4.) The request first was made in response to certain findings and a ruling made in the judge's decision. Specifically, the judge found:

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[6] Dr. Thielhelm's opinions also did not support the employee's theory of the case. Dr. Thielhem described the employee's disease process as, "a substance in the environment that sensitizes the patient," (Dep. 6), but in the employee's case, he could not determine whether the nature of the exposure was cumulative. (Dep. 8.) When asked if once a patient is sensitized, the condition is then permanent, Dr. Thielhelm opined, "depends on the material but many times yes." (Dep. 6.) While he did not have enough information to tell if the employee's condition was permanent, he opined the employee was "doing quite well when I saw him," in 2007. (Id.) Dr. Thielhelm also opined that "once sensitized you can react adversely to non-allergic situations." (Dep. 8.) Dr. Thielhelm testified that Xolair is designed to reduce allergic reactions, (Dep. 58, 68), and if it does that successfully, the lung function will improve. (Dep. 68.) He also denied that there was a relationship between the need for the Xolair and the level of exposure to the irritant, stating the need for the Xolair was determined by the person's allergic status. (Dep. 54.) Dr. Thielhem testified that there is a possibility that if the employee "walked away from his job" the level of medications he requires would diminish, but emphasized that was only a possibility. (Dep. 62, 65.) Moreover, Dr. Thielhelm testified that based on the employee's medical records, which included testing of the employee in 2005 and 2006, and the employee's history, he had "no reason to believe his condition worsened between 2005 and 2006." (Dep. 38, 39, 41.)

> Neither insurer was on the risk between 1996 and 1998 and therefore neither is liable for paying workers compensation benefits in this case.
>
> I find the employee has failed to prove, more probably than not, that either insurer was on the risk when he suffered his last exposure to an allergen in the workplace which contribute to his incapacity once every two weeks or his need for ongoing medical treatment.

(Dec. 7-8.) He then ruled that the employee failed to prove "more probably than not, that either Liberty Mutual Insurance Company or Acadia Insurance Company provided workers' compensation coverage for his employer at a time when he was last exposed to an allergen in the workplace which contributed to his incapacity and need for medical treatment." (Dec. 8.) The only claims properly before the judge for adjudication bore dates of injury of April 28, 2005 and September 15, 2008. Consequently, the judge erred in finding neither insurer was on the risk between 1996 and 1998. He further erred in ruling the claims had to be denied because the employee failed to prove the insurers provided coverage on the actual date of injury. See Vibert v. Raytheon Co., 23 Mass. Workers' Comp. Rep. 209 (2009)(judge must refrain from making findings on issues that are not properly before him at hearing). Thus, we vacate the judge's findings and ruling pertaining to the employee's alleged failure to prove coverage, by either insurer, for any period prior to April 28, 2005. (Dec. 3.) Because, as a matter of law, the employee failed to prove a compensable injury occurred on either of the dates claimed, April 28, 2005 or September 15, 2008, we affirm the denial and dismissal of the employee's claims.

So ordered.

Catherine Watson Koziol
Administrative Law Judge

Bernard W. Fabricant
Administrative Law Judge

Jose Moran
Board Nos. 047349-05 & 032079-08

Frederick E. Levine
Administrative Law Judge

Filed: