COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS	**BOARD NOS.**	**021137-05** **038135-11** **017012-13**
Keith Mercure	Employee	
Colonial Wholesale Beverage Corp.	Employer	
AIM Mutual Ins. Co.	Insurer	
ACE American Insurance Co.	Insurer	
Liberty Mutual Insurance Co.	Insurer	

REVIEWING BOARD DECISION
(Judges Fabricant, Koziol and Calliotte)

The case was heard by Administrative Judge Vendetti.

APPEARANCES
Steven P. Brendemuehl, Esq., for the employee
Linda C. Scarano, Esq., for AIM Mutual Ins. Co. at hearing
Paul M. Moretti, Esq., for AIM Mutual Ins. Co. on appeal
Susan F. Kendall, Esq., for ACE American Insurance Co. at hearing
John J. Canniff, Esq., for ACE American Insurance Co. on appeal
Robert S. Martin, Esq., for ACE American Insurance Co. on appeal
Michael J. Sherry, Esq., for Liberty Mutual Insurance Co. at hearing
Margo Sutton, Esq., for Liberty Mutual Insurance Co. on appeal[1]

FABRICANT, J. This is a multiple insurer case, with three relevant periods of coverage. The first insurer, AIM Mutual Ins. Co. (AIM), was on the risk from the date of the original injury, July 11, 2005, until January 1, 2007, when coverage by the second insurer, Liberty Mutual Insurance Co. (Liberty), began. Liberty remained on the risk until coverage by the third insurer, ACE American Insurance Co. (ACE), began on January 11, 2011.

AIM, the first insurer on the risk, appeals a decision finding it solely responsible for paying the employee temporary total incapacity benefits pursuant to § 34 from May

[1] Though counsel appeared before the reviewing board at oral argument, Liberty Mutual Insurance Co. did not file a brief on appeal.

29, 2013 to February 26, 2014, and for reasonable and necessary medical expenses pursuant to §§ 13 and 30, including surgeries performed on May 29, 2013, December 16, 2013, and February 15, 2014. We find merit in AIM's argument that the judge erred in her application of the successive insurer rule, and therefore vacate the decision and conclude that ACE, the last insurer on the risk, is responsible for all benefits awarded pursuant to §§ 34, 13 and 30, as well as attorney fees, as a matter of law.

At the time of the hearing in this matter, the employee was 48 years old, and had driven trucks for a living since 1993. He began working as a beverage delivery truck driver for the employer, Colonial Wholesale Beverage Corporation, on May 1, 2002. The judge credited the employee's testimony that his work was heavy and physical, often requiring twelve hour workdays delivering between 700 and 1,200 cases and kegs of beer. (Dec. 5.)

On July 11, 2005, the employee "rolled" his left ankle while he was loading a hand truck back into his delivery truck after making a delivery. After reporting the injury and attempting conservative treatment, the employee underwent ankle surgery on November 11, 2005. Following a course of physical therapy, the employee was able to return to light duty work on March 8, 2006, with a return to full duty work by May 2006. However, by May 18, 2006, the ankle symptoms increased and the employee went out of work for another eight weeks, returning once again to full duty work in July 2006. (Dec. 6.)

Following this return to work, the employee's pain increased, and his surgeon performed an additional surgery on October 21, 2008. (Dec. 6.) The employee ultimately returned to light duty work on December 8, 2008, and then to full duty work on April 30, 2009. During this entire time, the employee testified that he was never pain-free, but he continued to work with the help of an ankle brace and ibuprofen. (Tr. II 27, 46; Dec. 6.) He eventually stopped working full duty in November 2012, when his pain symptoms compelled a return to his surgeon who referred him to a foot and ankle specialist. (Dec. 6.) The specialist performed an ankle fusion on May 29, 2013, and on

December 16, 2013 surgically removed a bone spur. A post-operative infection required still more surgery on February 15, 2014, and the employee was finally able to return to full-duty work on March 24, 2014. (Dec. 6.)

The April 23, 2014, examination report and subsequent deposition testimony of the § 11A impartial physician Scott M. Harris, M.D., was adopted by the judge. (Dec. 7.) Dr. Harris described the employee's original July 11, 2005, injury as a "significant left ankle sprain in the presence of previously asymptomatic left ankle osteoarthritis," resulting in "chronic instability and symptomatic osteoarthritis of the left ankle." (Ex. 1; Dec. 7.) He further opined that the ankle instability caused by the injury exacerbated the pre-existing condition to the point where surgery was required, and that, in fact, *all* of the employee's surgeries were causally related to the July 11, 2005, injury. (Ex. 1; Dec. 7.) Dr. Harris specifically testified that the employee's condition continued to deteriorate despite treatment, and that he never fully recovered. (Ex. 1; Dec. 7; Dep. pp. 25, 27, 28, 34-35, and 38.) Finding the employee at maximal medical improvement, Dr. Harris ultimately found the employee capable of doing his current work, but with limitations on walking long distances and climbing ladders. (Ex. 1; Dec. 8; Dep. 28.)

The judge found that the employee suffered a compensable injury on July 11, 2005. As a threshold matter, AIM contests liability for the July 11, 2005 injury, and asserts that it has never accepted liability for it, despite paying the claim, and paying for the resultant surgery.[2] (OA Tr. 6-7; AIM Reply Br. 6-8.) The judge adopted the medical opinion of Dr. Harris, the impartial physician, that the July 11, 2005, injury resulted in significant instability of the ankle, ultimately requiring surgery. (Dec. 10-11; Dep. 7, 10 and 15; Ex. 1.) We thus find ample evidence to support the judge's finding regarding AIM's liability for the July 11, 2005 injury.

[2] Leslie Bowes, an adjuster for AIM, testified that benefits related to the July 11, 2005 injury, including the subsequent surgery on November 10, 2005, were paid without prejudice, and that a January 3, 2006 agreement extended the without prejudice payment period up until the subsequent accepted claim of May 18, 2006. (Tr. III 5-7, 19-22, 25-27.)

The judge then found that the 2005 injury led to periods of temporary total disability and the need for treatment, including dates of injury of January 1, 2007 and January 11, 2011.[3] (Dec. 11.) Crediting the testimony of the employee, as well as the medical evidence and opinions of the § 11A impartial physician, the judge went on to find that "the injuries sustained on 1/1/2007 and 1/11/2011 were a continuation of the injury of 7/11/2005, did not constitute new injuries within the meaning of the Act and are not compensable thereunder as separate claims." (Dec. 11.) As a result, the judge concluded that Liberty and ACE could not be liable for benefits claimed from May 29, 2013 through March 24, 2014, and ordered AIM to pay § 34 benefits for that period. The judge also ordered AIM to pay for medical expenses, including the three surgeries in 2013 and 2014.

On appeal, AIM argues that the judge erred in finding liability against it where the employee's continued heavy work, during the periods when Liberty and ACE were on the risk, resulted in a deterioration of the employee's condition and increased symptomatology. (AIM br. 16, 22-24.) We agree with AIM that the judge's conclusion mischaracterized Dr. Harris's opinions and is a misapplication of the so-called "successive insurer rule."

It is well-settled that only one insurer may be responsible for the payment of compensation benefits for a single period of disability. Fitzpatrick's Case, 331 Mass. 298, 300 (1954). It is not a requirement that a subsequent injury be a significant cause of the incapacity, as long as it is a contributing cause to the "slightest extent." When that pre-requisite is met, the insurer at the time of the most recent injury will be responsible for the entire liability. Pilon's Case, 69 Mass. App. Ct. 167, 169 (2007); Rock's Case, 323 Mass. 424, 429 (1948). See Remillard v. TJX Cos., Inc., 27 Mass. Workers' Comp. Rep. 97, 103 (2013)("causal relationship to the original injury is not severed simply because the employee may have suffered a later injury"). Moreover, there need not be a specific incident for the employee to have suffered an injury. "An injury may develop

[3] We note that no specific accident or incident occurred on either January 1, 2007, or January 11, 2011. These dates represent the first dates of coverage by Liberty and ACE respectively.

gradually from the cumulative effect of stresses and aggravations." Trombetta's Case, 1 Mass. App. Ct. 102, 105 (1973). Here, the judge adopted the impartial physician's opinion regarding the employee's continuing deterioration despite ongoing treatment, as well as his additional work limitations. (Dec. 7.) Dr. Harris specifically testified that the employee's continued work over eight years after the initial injury played a role in his deterioration, and in his need for an ankle fusion in 2013.[4] In addition, the impartial physician specifically testified that the employee's ongoing employment aggravated his condition.[5] (Dep. 26-27.) This testimony falls well within the required "slightest extent"

[4] The colloquy between Dr. Harris and ACE's attorney was as follows:

> A. Okay. I don't feel that the surgery in 2005 made anything inevitable. I think that the injury in 2005 led to instability which caused a significant flare of preexisting arthritis which was asymptomatic. Whether or not he was going to progress to needing a fusion, no one could predict. But despite continued treatment, he continued to deteriorate. And he never reached a point of improvement to the point where he was at baseline before his initial injury. So I don't think the fusion was inevitable.
> Q. But you also stated, I think, Doctor, that you could not differentiate whether or not his walking around for pleasure, walking around for work, was the causative factor in his continued deterioration?
> A. Well, I think that doing his heavy work, despite protecting it with braces and boots, led to increasing symptoms as compared to limited walking or sitting down on a couch and watching TV. So I think that it did play a part over that eight-year period. And would he have come to fusion if he didn't work that type of heavy job? It's still a very real possibility because he was still symptomatic. But it might have taken a longer period of time to come to that point.

(Dep. 34-35.)

[5] Dr. Harris testified:

> Q. [W]ould it be fair to say that his ongoing employment would aggravate his left ankle condition?
> A. Aggravate the condition that occurred in July of 2005?
> Q. Yes.
> A. Yes
> Q. He further testified that pain and swelling became worse when he was on his feet making deliveries, and then it was less on the weekend when he was not working. Would that also be consistent with your opinion that his ongoing employment, as

evidence needed to assign liability to the successive insurers on the risk. The judge's finding that Dr. Harris's opinion supports the imposition of liability on AIM, the first insurer, for the claimed weekly benefits and surgeries, is thus a mischaracterization of the impartial physician's prima facie opinion, a misapplication of the successive insurer rule, and, as a matter of law, requires assignment of liability to the last insurer on the risk. See Wambugu v. Radius Healthcare Ctr. at Millbury, 31 Mass. Workers' Comp. Rep. 49, 58 (2017)(as a matter of law, the adopted medical opinion established successive insurer liability for worsening of the employee's condition). Accordingly, as the awarded benefits are all for periods beginning in 2013, they are fully assignable to ACE, whose coverage of the risk began in 2011. (Dec. 9.)

We therefore vacate that part of the decision ordering AIM to pay all benefits awarded, and instead find ACE, the last insurer on the risk, responsible for all benefits awarded pursuant to §§ 34, 13 and 30, as well as attorney fees. We also order ACE to reimburse AIM for the benefits it paid to or on behalf of the employee, and the fees and expenses it paid to the employee's counsel, pursuant to the hearing decision. Carroll v. State Street Bank & Trust, 19 Mass. Workers' Comp Rep. 306, 311 (2005); G. L. c. 152, § 15A. All other issues addressed in the decision are affirmed.

So ordered.

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Bernard W. Fabricant
Administrative Law Judge

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Catherine W. Koziol
Administrative Law Judge

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described to, (sic) aggravated his condition?
A. Yes.

(Dep. 26-27.)

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Carol Calliotte
Administrative Law Judge

Filed: **May 14, 2018**