COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS	**BOARD NO. 056404-95**
Lenette Shaw	Employee
Nashoba Networks, Inc.	Employer
Travelers Ins. Co.	Insurer

REVIEWING BOARD DECISION
(Judges McCarthy, Wilson and Smith)

APPEARANCES
Richard C. Hyman, Esq., for the employee
Michael F. Ashe, Esq., for the insurer

MCCARTHY, J. At the time of the administrative judge's decision, Lenette Shaw, the employee, was a thirty-five year old single parent with one child. In addition to a high school GED, she has a certificate in computer repair and attended Northeastern University for two years. (Dec. 4; Tr. 11.) Ms. Shaw worked at various temporary jobs, from 1982-1988. From 1988 through 1994, she was employed as a technician repairing PC boards and testing systems. In 1995, she started employment at Nashoba Networks, Inc. (Nashoba) as a senior manufacturing technician group leader. Her responsibilities included assigning work and conducting quality control tests. (Dec. 4.)

As early as 1990, while employed with Proteon Company, Ms. Shaw experienced pain in both feet. (Dec. 4.) Her left ankle pain became more severe as time went on and in April 1994, she had left ankle surgery. (Dec. 5.) Ms. Shaw's condition improved following the surgical procedure, but she was not symptom free. (Dec. 5.)

Several months into her employment with Nashoba, the employee was moved to a warehouse with a damp concrete floor. (Dec. 5.) Her job responsibilities required her to be on her feet for almost the entire work day. (Dec. 5.) The employee testified that her requests to reorganize her workstation, so that she could do her work while in a seated

position, were refused by Nashoba. (Tr. 30-31, 42-43.) Ms. Shaw also testified that her feet became more painful thereafter. (Tr. 28-29; Dec. 5.)

Due to continuing pain, the employee consulted with a different physician. She wore an air boot on her left foot for three months. In April 1996, she had further surgery on her left lower extremity. She never returned to work with Nashoba. In July 1996, she resumed employment elsewhere. (Dec. 5.) Ms. Shaw wears orthotics in both shoes and continues to experience minimal symptoms in her feet. (Tr. 46, 50-52; Dec. 5.) At the time of the hearing, the employee was not actively treating. She feels the need for more treatment but cannot afford it. (Dec. 5; Tr. 47, 53; Dec. 6.)

On December 19, 1996, Ms. Shaw's claim for benefits was conferenced before an administrative judge. The claim was denied and the employee filed a timely appeal for a hearing *de novo*. (Tr. 3.) On April 23, 1997, the employee was examined by Dr. Earl F. Hoerner as provided by § 11A. (Dec. 3.) Both the medical report and the deposition testimony of the impartial physician were admitted into evidence at the hearing. (Dec. 2, 3.)

Doctor Hoerner's diagnosis was left foot sequellae of left tarsal tunnel syndrome with chronic pain; right tarsal tunnel syndrome and plantar fasciitis; and pre-existing bilateral tibial torsion, with biomechanical dysfunction of the lower extremities, below the knee and involving the ankle and foot. (Rep. 6; Dec. 6-7.) Doctor Horner opined that prolonged standing and walking on the cement floor at work had aggravated the employee's underlying condition. (Dep. 19; Dec. 7.) The impartial physician concluded that the employee's pre-existing condition and her workplace activities contributed equally as causes of her medical disability. (Rep. 7; Dep. 27; Dec. 7.)

Following the full evidentiary hearing, the administrative judge filed his decision. Critical to the denial of the employee's claim is the judge's conclusion that, "the employee's work activities were normal everyday activities – movements that all of us make each day." (Dec. 7.) This conclusion is supported by the uncontradicted testimony of the employee. In the course of his legal analysis the judge properly drew on the

principles set out in Zerofski's Case, 385 Mass. 590 (1982).[1] We have the case on appeal by the employee.

In her brief, the employee argues that her facts are distinguishable from those in Zerofski. Shaw contends that while standing and walking may be an identifiable condition common and necessary to all or a great many occupations, walking all day on a hard cement floor is not. (Employee brief 4.) This contention is not persuasive. Zerofski was also injured as a result of prolonged walking and standing on concrete floors.[2]

The employee correctly points out that the reviewing board has observed that all walking and standing cases do not necessarily fall on the side of wear and tear and "[t]here may well be a case where the facts and circumstances attending the walking or standing might warrant a finding of compensability." Nussberger v. Lechmere, Inc., 10 Mass. Workers' Comp. Rep. 454, 457 (1996). While such a factual circumstance is conceivable, the facts found in the case at hand are supported by the evidence and fall squarely on the side of wear and tear. Because the distinction between "wear and tear" and "compensable injury" is a recurring and difficult one it, is worthwhile to quote at length the important principles laid out in Zerofski's Case:

> Our workers' compensation act affords employees broad protection against work-related injury. Recovery does not depend on the fault of the employer or upon the foreseeability of harm. [citations omitted]. Instead, it is based on "a unique theory of distribution of the human loss directly arising out of commercial and industrial enterprises." [citation omitted].
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> The act provides that employees may collect workers' compensation for "personal injur[ies] arising out of and in the course of . . . employment."

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[1] The facts in Zerofski are analogous to the facts in the case at hand. In 1964, Zerofski suffered a broken toe when a pallet fell on his foot. The claim was accepted. He returned to work in 1966. There was no new incident or incidents. In his new job, Zerofski was called upon to do prolonged standing and walking on concrete floors. This prolonged standing and walking aggravated his pre-existing condition to the point of total medical disability. The Zerofski court determined that although the employee sustained a personal injury causally related to prolonged walking and standing, the injury was not compensable by the second insurer because it fell on the side of "wear and tear." The court went on to affirm the Superior Court order of payment by the first insurer.

[2] Although there is no adjective describing the Zerofski concrete, the use of "hard" as a modifier of concrete seems superfluous.

G.L. c. 152, § 26. This phrase covers a wide range of injuries. Injury "arises out of" employment if it is attributable to the "nature, conditions, obligations or incidents of the employment; in other words, [to] employment looked at in any of its aspects." Caswell's Case, 305 Mass. 500, 502 (1940). Unlike many workers' compensation statutes, our act does not require that injury occur "by accident," so that gradually developed injuries are compensable as well as those caused by sudden incidents.

. . .

The line between compensable injury and mere "wear and tear" is a delicate one, as a comparison of the results reached in past decisions reveals. Nevertheless, the distinction is necessary to preserve the basic character of the act. The "purpose [of the act] is to treat the cost of personal injuries incidental to . . . employment as a part of the cost of business." Madden's Case, 222 Mass. 487, 494-495 (1916). "It is not a scheme for health insurance." Maggelet's Case, 228 Mass. 57, 61 (1917). To be compensable, injury must arise "out of" as well as "in the course of" employment, and "[a] disease of the mind or body which arises in the course of employment, with nothing more, is not within the act." Id. Much of the responsibility for separating injuries that are sufficiently work-related from those that are not rests with the Industrial Accident Board, which must determine as a matter of fact whether a causal connection exists between employment and injury. McManus's Case, 328 Mass. 171, 173 (1951). Brzozowski's Case, 328 Mass. 113, 115-116 (1951). The distinction between compensable and noncompensable injuries, however, involves more than the factual problem of causation. In some cases work may be a contributing cause of injury, but only to the extent that a great many activities pursued in its place would have contributed. When this is so, causation in fact is an inadequate test.

Drawing from the nature of the purposes of the act as we have described them, and from the pattern of our decisions over the years, we arrive at the following restatement of the range of harm covered by the act. To be compensable, the harm must arise either from a specific incident or series of incidents at work, or from an identifiable condition that is not common and necessary to all or a great many occupations. The injury need not be unique to the trade, and need not, of course, result from the fault of the employer. But it must, in the sense we have described, be identified with the employment.

Zerofski's complaint against the employer falls on the side of "wear and tear." Undoubtedly, the initial injury to his toe in 1964 was a contributing cause of his disability, and a compensable personal injury within the meaning of the act. The aggravation of the injury over the next ten years of work, however, did not amount to a personal injury. There is

> nothing to distinguish these ten years of work from other occupations that Zerofski might have pursued. Prolonged standing and walking are simply too common among necessary human activities to constitute identifiable conditions of employment.

Zerofski's Case, supra at 592, 594-596 (footnotes omitted; emphasis added).

The hearing judge correctly applied existing law to the facts which he found. We therefore affirm his decision.

So ordered.

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William A. McCarthy
Administrative Law Judge

Filed: June 24, 1999

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Suzanne E. K. Smith
Administrative Law Judge

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Sara Holmes Wilson
Administrative Law Judge