COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS	**BOARD NOS. 030742-98 030680-77**
Mark Guilbeault	Employee
Teledyne Rodney Metals	Employer
CNA Insurance Co.	Insurer
Argonaut Insurance Co.	Insurer

REVIEWING BOARD DECISION
(Judges McCarthy, Wilson & Smith[1])

APPEARANCES
Anne M. D'Errico, Esq., for the employee at hearing
Paul E. Kelleher, Esq., for the employee on brief
Alexander P. Borre, Esq., for the insurer CNA
Pamela G. Smith, Esq., for the insurer Argonaut

MCCARTHY, J. Mark Guilbeault is presently forty-five years old. A high school graduate, he has been employed by Teledyne since 1974. In 1977, while employed as a maintenance worker, he suffered a serious crush injury to his right foot when motors weighing six to seven hundred pounds fell on his foot. Argonaut Insurance Company, the insurer on the risk at that time, accepted liability, paying weekly incapacity and medical benefits. (Dec. 3-5.)

Guilbeault underwent two surgeries and, after a period of recovery, returned to his regular work full-time. Thereafter, he was promoted to assistant foreman. In 1986 he became a working foreman. (Dec. 5-6.)

Guilbeault's foot pain worsened over the years causing him to undergo additional surgery in April 1998. He again returned to work after a recovery period. In January 1999 he underwent a fourth surgery. CNA provided workers' compensation insurance for Teledyne at the time of Mr. Guilbeault's 1998 and 1999 surgeries. At the time of the hearing he had returned to a light duty job. (Dec. 4.)

[1] Judge Smith no longer serves as a member of the reviewing board.

Guilbeault filed claims in the alternative for §§ 13, 30 and 34 benefits against Argonaut and CNA, but waived his § 34 claim at conference. Following the § 10A conference, CNA was ordered to pay § 30 benefits and the claim against Argonaut was denied. Both CNA and the employee appealed the conference order giving rise to a full evidentiary hearing. The judge framed the issue as follows:

> . . . there is no question that the employee suffered an industrial injury in 1977 when Argonaut was on the risk. The issue for determination is whether his current incapacity is caused by "wear and tear" or by a specific incident or series of incidents at work or from an identifiable condition not common and necessary to all or a great many occupations, which would place the liability squarely on the shoulders of CNA.

(Dec. 5, citations omitted.) The hearing judge determined that CNA, which insured the employer in 1998, bore the responsibility. (Dec. 9.) CNA has appealed, raising three arguments. First, it argues that there was no medical evidence to support the award of benefits against CNA. Next, it contends that the employee suffered a recurrence rather than a new injury while CNA was on the risk. Lastly, it maintains that the judge erred in not allowing CNA's motion to submit the medical report of Dr. Armstrong.[2]

We note at the outset that neither insurer raised liability as a defense. (CNA exhibit 1; Argonaut exhibit 1.) As neither insurer raised liability as a defense, the issue for resolution is which insurer is responsible for the claimed benefits. See G.L. c. 152, § 15A.

We address CNA's second argument first. The administrative judge correctly stated the successive insurer rule as follows:

> [U]nder the successive insurer rule if the employee's disability is caused by an aggravation of a prior work related injury, or by a new injury, then the successive insurer, i.e., the insurer on the risk at the time of the aggravation, bears the liability for the entire injury. If, however, it is determined that the incapacity is due to a recurrence of symptoms, i.e., not a new injury, then the former insurer bears the burden. See Rock's Case, 323 Mass. 428 (1948) and Smick v. South Central Mass. Rehab. Resources, Inc., 7 Mass. Workers' Comp. Rep. 84 (1993).

[2] We see no merit to this last argument as Dr. Armstrong was engaged by Argonaut not CNA. See 452 Code Mass. Regs. § 1.11(6) and Pavao v. Chase Collections, 13 Mass. Workers' Comp. Rep. 39, 40-41 (1999).

(Dec. 4-5.)[3]

It matters not how modest the second injury for if the new injury was "even to the slightest extent a contributing cause of the subsequent disability," the successive insurer is liable. Rock's Case, supra, at 439. While both Rock's Case and Smick's Case deal with weekly incapacity claims, we see no reason why a claim 'for medical benefits only' should be governed by a different rule.

The judge then properly applied the test set out in Zerofski's Case, 385 Mass. 590, 594-595 (1982), wherein the Court held that "[t]o 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 or necessary to all or a great many occupations." For a detailed discussion of the analysis used by the Court, see Freeman v. Sears Auto Sales, 14 Mass. Workers' Comp. Rep. (Dec 4, 2000).

CNA's first argument - - that there is no medical evidence to support the award of benefits against CNA - - has merit. The administrative judge made the following findings on the way to finding a new injury. In his last job as a working foreman, Guilbeault spent approximately eighty percent of his time walking on cement, wooden and metal floors. In addition to his supervisory duties, he performed plumbing jobs, changed motors, fixed machinery parts, climbed ladders, climbed onto roofs, lifted and carried objects weighing between fifty and one-hundred-fifty pounds and walked on uneven surfaces such as pipes and berms. "[T]he employee credibly testified and I find that, although his pain was always present after his initial injury, that it got 'worse and worse as the years went by' until 1998 when it became intolerable." (Dec. 5-7.)

These findings support a finding of a new compensable injury under the second prong of the Zerofski test, but an award of § 30 medical benefits requires a supporting medical opinion. But there is none here. Doctor Richard Jaslow, Guilbeault's treating

[3] The present case is factually distinguishable from Twomey v. Greater Lawrence Visiting Nurses Assoc., 5 Mass. Workers' Comp. Rep. 156 (1991), and Morgan v. Seaboard Products, 14 Mass. Workers' Comp. Rep. (issued October 6, 2000). In those cases the subsequent injury was not work-related.

physician, offered the only medical evidence on the critical question of causation. He stated, in a letter dated March 20, 1998, that Guilbeault's recent surgery was causally related to his 1977 injury. (Dec. 7.) But the administrative judge did not adopt Dr. Jaslow's causal relationship opinion. "An administrative judge is free to accept all, part, or none of an expert medical expert's testimony with regard to causality so long as he makes sufficient findings." Hannon v. Gillette Co., 7 Mass. Workers' Comp. Rep. 287, 291 (1993). And even if there is medical causal relationship to the 1977 injury, that does not preclude medical and legal causal relationship to the recent period of employment. See Spearman v. Purity Supreme, 13 Mass. Workers' Rep. 109, 112 (1999) (medical causation may not be the same as legal causation). However, this case is not so medically simple that causal relationship can be established without medical evidence. Josi's Case, 324 Mass. 415, 418 (1949). Indeed, the issue of causation in successive insurer cases requires expert testimony. Spearman, supra.

We recommit the case to the administrative judge to make further findings on the issue of causal relationship. These findings must be based on expert medical testimony.

So ordered.

William A. McCarthy
Administrative Law Judge

Sara Holmes Wilson
Administrative Law Judge

Filed: January 30, 2001