COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NOS.:** 042041-02
048116-03

Employee: Michael Barbetta
Employer: Port Morris Tile & Marble Corp.
Insurer: Zurich North American Insurance Co.
Insurer: St. Paul Fire & Marine Insurance Co.

REVIEWING BOARD DECISION
(Judges Costigan, McCarthy and Horan)

APPEARANCES
M. Blair Bigelow, Esq., for the employee
John J. Barrett III, Esq., for Zurich at hearing
Ralph DiMeo, Esq., for Zurich on appeal
Sara J. VanDeCarr, Esq., for St. Paul at hearing
John F. Toomey, Esq., and Emily Lanza Dwyer, Esq., for St. Paul on appeal

COSTIGAN, J. Zurich North American Insurance Company (Zurich), the first insurer in this successive insurer case, appeals from the administrative judge's decision finding it liable to pay the employee § 34A permanent and total incapacity benefits. Zurich argues that St. Paul Fire and Marine Insurance Company (St. Paul), the second insurer, should have been found liable. Because the judge's findings of fact are insufficient for appellate review of the successive insurer issue, [1] we recommit the case for further findings.

The employee injured his lower back at work on September 25, 2002. He immediately sought medical treatment and remained out of work for eleven days. Zurich paid

[1] We summarily affirm the decision as to Zurich's second argument on appeal, challenging the judge's vocational analysis.

compensation benefits on a without-prejudice basis, pursuant to §§ 7 and 8(1) of the act. When the employee returned to work, his employer provided lighter duty, but he continued to have symptoms of numbness and tingling. The employee was laid off in early 2003, and subsequently returned to work for the same employer at a different job site on March 16, 2003. St. Paul insured that job site, named "#1 Lincoln Street Project," in Boston. (Dec. 6.) The employee worked at that location until March 26, 2003. He described the work as "stone work," that is, working with marble and granite, including on scaffolding, and testified it was harder than working with tile. During that ten-day period, the employee's symptoms, including numbness in his right leg and tightening up of his lower back, worsened each day. On March 26, 2003, the employee could not feel his right leg. He left work and has not returned to work since. The employee underwent lumbar spinal fusion surgery in November 2004. (Dec. 5-6, 16.)

Zurich paid benefits for the employee's incapacity commencing on March 27, 2003. On May 16, 2003, it filed a complaint for modification or discontinuance of weekly compensation, which was denied at conference by a different administrative judge. Zurich appealed and later successfully moved to join St. Paul, the second insurer, as a party to the proceeding. The employee thereafter joined his claim for § 34A benefits. (Dec. 6.)

The employee underwent § 11A impartial medical examinations by Dr. Richard G. Selbst, first on November 7, 2003, and again on June 10, 2005, seven months after his lumbar fusion surgery. (Dec. 2-3, 8.) Dr. Selbst opined at his deposition that the employee's work activities during his return to work from March 16 to March 26, 2003 probably contributed to his disability by aggravating his pre-existing work-related impairment. Dr. Selbst diagnosed the employee's pain as a L-5 radiculopathy in the right leg, with foot drop, that had worsened from the first examination to the second. (Dec. 9-10.)

Although he allowed additional medical evidence on the grounds of medical omplexity and the inadequacy of the impartial physician's reports, (Dec. 11) [2], the judge adopted, in

[2] The judge's decision reflects that the records of the employee's primary care physician, Dr. Michael Yoon, and his surgeon, Dr. David H. Kim, were offered into evidence, not by the employee but by Zurich, in contravention of 452 Code Mass. Regs. § 1.11(6)("[A] party may offer as evidence medical reports prepared by physicians *engaged by said party*. . . .") (Emphasis added.) (Dec. 2, 11.) See DiReeno v. M.B.T.A., 5 Mass. Workers'

part, the medical opinion of Dr. Selbst to find that the employee was totally incapacitated. He then addressed causal relationship:

> "I find that the employee's disability and incapacity are causally related to his work related injury of September 25, 2002 [the initial injury]. I further find that the employee did not sustain a new injury while working at the Lincoln St. site. I find further that the increase in symptoms experienced by the employee at the Lincoln St. site were [sic] a temporary exacerbation of his underlying condition and did not constitute an aggravation."

(Dec. 19.) After considering the employee's vocational factors, see Scheffler's Case, 419 Mass. 251 (994), the judge ordered the first insurer, Zurich, to pay the employee § 34A benefits. (Dec. 20.) Zurich's appeal challenges the judge's causal relationship finding. It points to the opinion of Dr. Selbst that the employee's return to work aggravated his prior work-related back impairment. Zurich seeks reversal of the decision and assignment of liability against the second insurer, as a matter of law.

It is well-established that liability rests with the insurer covering the risk at the time of the most recent injury that bears a causal relationship to the disability. Casey's Case, 348 Mass. 572, 574 (1965); Evans's Case, 299 Mass. 435, 437 (1938). A second injury is compensable if it is a contributing cause, even to the slightest extent, of the employee's incapacity. Rock's Case, 323 Mass. 428 (1948). Where symptomatology has subsided or is occasional, a worsening that occurs with a return to work is more likely to be found a compensable new injury. Trombetta's Case, 1 Mass. App. Ct. 102, 104 (1973). However, complaints of continual pain after an injury militate toward the conclusion that a current incapacity relates to the original injury. Rock's Case, supra at 429-430; Thibeault v. Sure Mgt. Oil & Chem., 18 Mass. Workers' Comp. Rep. 130, 133 (2004), citing Burke v. Burns & Roe Enterprises, 15 Mass. Workers' Comp. Rep. 332 (2001). An employee may suffer a recurrence of incapacity which does not rise to the level of being a new industrial injury. Gentile v. Carter Pile Driving Inc., 17 Mass. Workers' Comp. Rep. 435 (2003).

Comp. Rep. 42 (1991). However, we infer the employee assented to the insurer's submission of his treating physicians' records as they otherwise would have been his additional medical evidence.

Finally, because causal relationship is a matter beyond the common experience of the ordinary layman, expert medical testimony is required. Casey's Case, supra at 574-575.

As we see it, the error afflicting the hearing decision on review is the judge's failure to make any findings of fact regarding the causal relationship opinions in evidence. The decision consists only of recitation of the medical opinions without specific adoption of one or more. Mere recitation of doctors' opinions is not equivalent to findings thereon. Bemis v. Raytheon Corp., 15 Mass. Workers' Comp. Rep. 408, 412 (2001), citing Messersmith's Case, 340 Mass. 117 (1959). We agree with Zurich that Dr. Selbst's opinion, if adopted, certainly would support a finding the employee sustained a new compensable injury during his ten-day return to work, when St. Paul was on the risk. On the other hand, the report of the employee's treating orthopedic surgeon, Dr. David H. Kim, was part of the admitted additional medical evidence, and it took a different tack. Although he noted that the employee continued to perform heavy work, despite his symptoms, Dr. Kim articulated a causal relationship opinion that pointed only to the initial September 25, 2002 work injury. That opinion was rendered on April 1, 2003, just days after the employee left work for good. In this instance, as well, the judge simply narrated the doctor's report, without making findings adopting or rejecting any part of it.

Given the absence of findings reflecting what medical evidence the judge adopted, we are unable "to determine with reasonable certainty whether correct rules of law have been applied to facts that could properly be found." Praetz v. Factory Mut. Eng'g Research, 7 Mass. Workers' Comp. Rep. 45, 47 (1993). Because the medical evidence of record could support a decision imposing liability for payment of § 34A benefits on either insurer, we are obliged to recommit the case for a specific finding on the issue of causal relationship. On recommittal, the administrative judge should also consider the employee's argument, (Employee br. 1, 5), that under McLeod's Case, 389 Mass. 431 (1983), the application of § 51A [3] to increase the rate of § 34A benefits awarded was mandatory, notwithstanding that the employee neither raised § 51A at hearing nor appealed the judge's decision.

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[3] General Laws c. 152, § 51A, provides:

> In any claim in which no compensation has been paid prior to the final decision on such claim, said final decision shall take into consideration the compensation provided by statute on the date of the decision, rather than the date of injury.

Accordingly, the case is recommitted for further findings of fact consistent with this opinion.

So ordered.

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Patricia A. Costigan
Administrative Law Judge

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William A. McCarthy
Administrative Law Judge

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Mark D. Horan
Administrative Law Judge

Filed: **August 11, 2008**