COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 034727-95**

Michael Hannon	Employee
Energy Insulation Conservation, Inc.	Employer
New Hampshire, C/O AIGCS	Insurer

REVIEWING BOARD DECISION
(Judges McCarthy, Wilson and Smith)

APPEARANCES
Michael R. Castano, Esq., for the employee at hearing
Justin F.X. Kennedy, Esq., for the employee on brief
Donald E. Wallace, Esq., for the insurer

MCCARTHY, J. Michael J. Hannon appeals a decision in which an administrative judge awarded him a closed period of temporary total incapacity benefits. The judge ended weekly benefits on November 14, 1995, the date Mr. Hannon was involved in a non-work-related motor vehicle accident. Because we find the judge's reasoning in terminating the employee's benefits on that date ambiguous, we recommit the case for clarification.

The employee injured his upper back while working on August 14, 1995. (Dec. 5.) Not able to return to work, Hannon began chiropractic treatment. (Dec. 6.) The insurer paid weekly temporary total benefits without prejudice from that date until December 18, 1995. By the time the hearing took place, the insurer had accepted liability for the August 14, 1995 injury. (Dec. 4.) Mr. Hannon was involved in a non-work-related motor vehicle accident on November 14, 1995, in which he sustained new and severe injuries which caused a worsening of his medical condition. (Dec. 4, 6, 9.)

The employee filed a claim for further weekly incapacity benefits, which was denied following a § 10A conference. Hannon appealed to a full evidentiary hearing. (Dec. 2.) After a medical examination of the employee pursuant to § 11A(2), the judge found the medical issues complex and opened the record for additional medical evidence.

(Dec. 2-3.) The employee introduced the depositions of his chiropractor, Dr. Deborah Ann Mager, and his neurologist, Dr. Roger L. Kinnard. The insurer offered the deposition of Dr. Edwin T. Wyman. (Dec. 1, 6, 16.)

The judge discredited the employee's testimony that his work-related medical condition had not improved by November 14, 1995, the date of the motor vehicle accident. Instead the judge adopted the testimony of Dr. Kinnard, who noted the employee's history of improvement in his work-related medical condition as of his first examination on October 26, 1995. (Dec. 11-12.) The judge also did not credit the employee's testimony that he could not recall if he sustained head, neck, back injuries and a pinched nerve as a result of that motor vehicle accident. (Dec. 8-9.) Adopting the testimony of Dr. Mager, the judge found that the employee complained of new and seriously aggravated symptoms the day after the motor vehicle accident. (Dec. 9.)

The judge adopted the opinions of Drs. Kinnard and Wyman, as well as the impartial physician, that the employee had sustained a cervical soft tissue strain as a result of his industrial accident. (Dec. 20.) As to the specifics of the employee's medical progress, the judge relied heavily on the opinions of Dr. Kinnard, who, on October 26, 1995, diagnosed neck sprain and opined that the employee would have a hard time driving, would need to be able to change positions during the day, and could not stand up all day. (Dec. 12.) Dr. Kinnard next examined the employee on November 14, 1995, just before the occurrence of the motor vehicle accident. At that time, Dr. Kinnard opined that the employee continued to have some spasm and limited motion in his neck, but also considered that the employee's cervical examination was normal. (Dec. 13.) When Dr. Kinnard saw the employee on December 13, 1995, his opinion was that the injuries stemming from the November 14, 1995 motor vehicle accident were significant. Noting the employee's first complaints of radiating arm pain and new lower back pain, Dr. Kinnard stated that the employee demonstrated increased spasm in his upper back to the right, and clear, objective findings in his lower back for the first time. (Dec. 13-14.) The doctor diagnosed the new injuries as cervical radiculopathy and a lumbar sprain, both causally related to the motor vehicle accident. (Dec. 14.) Dr. Kinnard also diagnosed

reflex sympathetic dystrophy, which he specifically had ruled out in his examinations prior to the motor vehicle accident. (Dec. 12, 14.) The judge adopted Dr. Kinnard's opinions throughout the decision. (Dec. 11-16, 20.)

The judge also relied on the opinions of the insurer's expert, Dr. Wyman. Dr. Wyman opined that the employee was restricted from lifting, climbing, working with his arms elevated or his head extended for a few weeks, as of his October 4, 1995 examination. On November 7, 1995, the employee submitted to reexamination by Dr. Wyman. At that time, Dr. Wyman specifically noted the absence of spasm in the neck, as well as normal reflexes in the extremities. The doctor opined that the employee's complaints of pain through his neck to his shoulder blade had been caused by a soft tissue strain. He ruled out reflex sympathetic dystrophy. The employee's November 7, 1995 examination, according to Dr. Wyman, was normal. (Dec. 16.) The doctor opined that the employee was no longer restricted from returning to his usual work. (Dec. 20; Wyman Dep. 18.) The judge adopted the opinions of Dr. Wyman, with the provision that she found Dr. Kinnard's opinion that the employee still had some neck discomfort as of November 14, 1995 more persuasive. (Dec. 13, 17.)

Based on these subsidiary findings of fact, the judge concluded, pertinent to the dispositive issue on appeal:

> Based on the medical opinions adopted above, I find that the motor vehicle accident on November 11 (sic), 1995 aggravated and worsened the employee's condition and caused new and more serious symptoms to appear causing the employee's subsequent disability and need for medical treatment. I adopt the more persuasive opinion of Dr. Kinnard over that of Dr. Mager and find that the employee's condition has not reverted to its status prior to the auto accident. I find that this accident was not in the course of the normal and usual events of living, and that it caused harm to the employee. I find that the cause of the employee's disability and need for treatment subsequent to November 11 (sic), 1995 was the motor vehicle accident, and that this accident acted as an intervening cause, breaking the chain of causation and relieving the insurer of liability.
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> I adopt the medical opinions of Dr. Byrne [the impartial physician], Dr. Kinnard and Dr. Wyman and find that the employee sustained a cervical soft tissue strain

> as a result of his industrial accident. I find, adopting the opinion of Dr. Wyman that the employee was restricted from performing his work as an insulator as a result of his work injury between August 14, 1995 and November 7, 1995. I adopt the more credible and convincing opinions of Dr. Kinnard and find that the employee sustained new and severe injuries, and aggravated his previous injuries, as a result of his auto accident on November 14, 1995, and that his disability after that date is causally related to the non-work accident.

(Dec. 19-20.) The judge ordered that the insurer pay § 34 benefits from August 14, 1995 until November 14, 1995, and that it pay § 30 benefits for the diagnosed condition up until November 14, 1995. (Dec. 21.).

The employee argues, among other things, that the judge misapplied the intervening cause theory to bar compensation in his claim. We agree that the decision is unclear on that point, and that recommittal is therefore appropriate.

The law on intervening or supervening non-work-related accidents and their effect on the liability of the workers' compensation insurer for incapacity that continues after such an accident is explained in Roderick's Case, 342 Mass. 330 (1961). The analysis of the court and the facts of that case make it particularly apposite to the present decision. In Roderick, the reviewing board had concluded that the employee was partially incapacitated until the day on which he happened to apply for unemployment compensation, September 28, 1958, on which date it terminated benefits. Id. at 333. Relevant to the present case, the reviewing board had also determined "that any partial incapacity the employee had following this date was due to a nonindustrial accident which he had sometime around October, 1958, 'when an automobile knocked him to the ground and that his back was worse than before he was hit with the car.'" Id. at 334.

The court remanded the case for clarification. Id. at 334. The court explained the ambiguity that warranted recommittal:

> The board's further finding that any partial incapacity the employee had after September 28, 1958, was due to the nonindustrial accident which he had in October 'when an automobile knocked him to the ground and that his back was worse than before he was hit with the car' falls short of a finding that his former partial disability ended at that time. The 'supervening of a noncompensable injury

> . . . does not excuse the insurer from paying the compensation which would otherwise be payable for a compensable injury.' Whitehead's Case, 312 Mass. 611, 613.

Roderick, supra at 334 (emphasis added). Concluding that "both insurer and employee are entitled to unambiguous findings as to the continuance or discontinuance of incapacity" the court recommitted the case because the subsequent automobile accident "had no effect on the continuing existence of partial incapacity." Id.

Citing Roderick's Case, we recently restated its rule of law:

> In a situation such as the present one, the insurer is responsible for the employee's incapacity as it was just prior to the non-work-related rear end collision. The insurer here is not responsible for the additional incapacity caused by the rear end collision, but it is responsible for whatever incapacity the employee had just prior thereto. Thus, for example, if the employee was partially incapacitated just prior to the rear end collision, and the rear end collision caused the employee to be totally incapacitated, the workers' compensation insurer remains responsible for the employee's partial incapacity, but it is not responsible for the employee's total incapacity.

Squires v. Beloit Corp., 12 Mass. Workers' Comp. Rep. 295, 297-298 (1998).

The present decision exhibits that same type of ambiguity that troubled the Roderick court. Adopting the opinion of Dr. Wyman, the judge concluded that the employee's work-related cervical soft tissue strain restricted him from returning to work only until November 7, 1995, one week before the motor vehicle accident. (Dec. 20.) However, the judge awarded § 34 benefits until the date of the motor vehicle accident, November 14, 1995. (Dec. 21.) In support of that award, the judge explicitly found, based on the adopted opinion of Dr. Kinnard, that the motor vehicle accident was "an intervening cause, breaking the chain of causation and relieving the insurer of liability." (Dec. 19.) However, Dr. Kinnard opined that the employee still had some neck strain symptoms and restrictions related to the work injury when the November 14, 1995 motor vehicle accident occurred. (Dec. 15-16.)

We are not convinced that the judge correctly applied the law under Roderick's Case, supra. Dr. Kinnard opined that the employee had some measure of work-related

symptomatology and restrictions continuing until the motor vehicle accident, namely limitations on driving, standing and the necessity to change positions as needed. (Dec. 12; Kinnard Dep. 47-49.) If there still existed some measure of incapacity related to the industrial injury on November 14, 1995, that part of the employee's incapacity would remain compensable, notwithstanding the non-work related motor vehicle accident. See discussion in Kashian v. Wang Laboratories, 11 Mass. Workers' Comp. Rep. 72, 73-76 (1997). However, an analysis of what Dr. Kinnard's restrictions as of November 14, 1995 meant in terms of the employee's vocational incapacity is lacking. We think that the judge should revisit the question of the extent of the employee's incapacity at the time of the motor vehicle accident. If some work-related incapacity existed, the employee will remain entitled to workers' compensation benefits related solely to that work-related incapacity, but not for the increased incapacity caused by the motor vehicle accident.

Accordingly, we recommit the case for such findings of fact as are needed to clarify the judge's decision.

So ordered.

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William A. McCarthy
Administrative Law Judge

Filed: October 8, 1999

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Sara Holmes Wilson
Administrative Law Judge

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Suzanne E.K. Smith
Administrative Law Judge