COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 079228-87**

Michael O'Connor	Employee
Eastern Airlines	Employer
North River Insurance Co.	Insurer

REVIEWING BOARD DECISION
(Judges McCarthy, Maze-Rothstein and Levine)

APPEARANCES
Justin F.X. Kennedy, Esq., for the employee
Susan F. Kendall, Esq., for the insurer

MCCARTHY, J. Michael O'Connor, the employee, worked as a flight attendant for Eastern Airlines. The claim on appeal to the reviewing board is for payment of certain medical expenses. The claim was denied at conference and again after a full evidentiary hearing under § 11 of the Act. The employee, on appeal, argues that the administrative judge failed to make adequate subsidiary findings in support of his conclusion. We agree and recommit to the hearing judge for further findings.

The essential background facts are these. On July 1, 1985 Mr. O'Connor sustained injuries to his neck and back when he slipped and fell in the course of his employment. He received medical treatment and was out of work for several closed periods. Travelers Insurance Company ("Travelers") accepted the case and paid benefits during the time the employee was out of work. Mr. O'Connor returned to work again on February 21, 1986 and worked until September 7, 1987. As far as we can determine, O'Connor never returned to work after that date. There was no specific incident which occurred on September 7, 1987. By that date, North River Insurance Company ("North River") was providing workers' compensation insurance for Eastern Airlines. O'Connor filed claim in the alternative against Travelers alleging a recurrence of incapacity stemming from the July 1, 1985 industrial injury or a new injury flowing from the physically demanding work of a flight attendant aboard various aircraft. In a hearing

decision filed November 10, 1988, a different administrative judge found that the employee's condition had deteriorated during the period September 21, 1986 to September 7, 1987 as a result of the physical stresses of his employment. The judge thus determined that there was a new industrial injury on the last day of work, September 7, 1987, and directed North River to pay weekly incapacity benefits under § 35 of the Act from that date and continuing.[1] On August 17, 1990, the employee settled his claim against North River by a lump sum settlement in the amount of $18,000.00. The claim was settled with liability established and without redeeming liability for payment of subsequent medical benefits or vocational rehabilitation benefits.

After the lump sum settlement, Mr. O'Connor underwent back surgery in 1991, 1992 and again in 1994. (Dec. 4.) Doctor Neumann performed these three surgeries. During this period O'Connor also received treatment from an osteopathic physician, Dr. Lowney. Id. North River reimbursed Mr. O'Connor for osteopathic treatment with Dr. Lowney. (Dec. 11.) Presumably, the insurer also paid for the surgical services rendered by Dr. Neumann though there is no explicit finding to that effect. Starting in 1993 and continuing into 1996, the employee received osteopathic treatment from Dr. Besler. (Dec. 4, 5.) In 1996 Mr. O'Connor moved to Nevada where he began treating with two new osteopaths, Dr. Kessler and Dr. Lapcevic. (Dec. 5.)

In 1997, the employee received medical treatment at the Poudre Valley Hospital at Fort Collins, Colorado. Although the decision does not say so in so many words, it appears that it is the cost of this treatment together with the bills from Dr. Lapcevic for treatment during 1997 and 1998 which is the subject of this claim.[2]

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[1] Much of the background information contained in this paragraph was developed by a review of board file 059266-85. That file contains, among other things, the decision of the hearing judge filed on November 10, 1988. There is no indication that the claim against Travelers was ever settled by lump sum agreement.

[2] The hearing judge notes only that, "[T]he claim to be adjudicated is for the payment of certain medical treatment provided prior to July 8, 1998 in the monetary amount of approximately $6,000.00." (Dec. 11.)

A guideline for the preparation of hearing decisions is found in § 11B of the Act which provides in pertinent part that: "[d]ecisions . . . shall set forth the issues in controversy, the decision on each and a brief statement of the grounds for each such decision." The decision being reviewed identifies the issue in dispute and concludes with a denial of the claim. It lacks "a brief statement of the grounds for . . . such decision." The judge devotes much of his decision to summarizing the various medical opinions. He notes that the § 11A examiner, Dr. James V. Bono, an orthopedic surgeon, made a diagnosis of "failed back syndrome." There is no discussion of causal relationship in the summary of Dr. Bono's views. (Dec. 5.) The judge then reviews the opinions of the attending osteopathic physician, Dr. James S. Lapcevic. (Dec. 5-8). In a report dated June 12, 1998 Dr. Lapcevic indicates that he is " . . . unaware, since the original injury of 1985, that this patient has had any complicating injuries that would form a subsequent intervening event or incident to break the chain of causation from the original inception of injury suffered in his original 1985 incident." (Dec. 5.)[3] In a later report dated October 4, 2000, Dr. Lapcevic states that the employee is "suffering low back problems apparently initiated by an injury of September 7, 1987 while he was employed as a flight attendant for Eastern Airlines." (Dec. 7.) Later in that same report, Dr. Lapcevic causally relates the complaints of pain and the symptomatology "to his original injury." (Dec. 8.) The hearing judge then summarizes medical records from the Poudre Valley Hospital. The record for September 3, 1997 includes a history that the employee had been refurbishing a car and thus had been doing a lot of crawling and bending. That record also notes a history of chronic back pain with an original injury in 1987. (Dec. 9.) Finally, the judge paraphrases reports of Dr. Panos Panagakos who examined Mr. O'Connor on behalf of the insurer. It is Dr. Panagakos's view that the employee's complaints and difficulties are not attributable to the July 1, 1985 incident but rather are related to activities such as "the apparent refurbishing of automobiles." (Dec. 10.)

[3] It would seem that in the absence of a lump sum settlement of the claim against Travelers, it was and is open to the employee to make claim for these medical expenses against Travelers.

Not surprisingly, the expert medical testimony in this case cuts both ways. On recommittal, the hearing judge should earmark the medical testimony he chooses to adopt as the grounds of his ultimate conclusion. We return this file to the hearing judge for further findings. The judge may take further testimony if he thinks it is warranted.

So ordered.

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William A. McCarthy
Administrative Law Judge

Filed: **January 31, 2002**

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Susan Maze-Rothstein
Administrative Law Judge

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Frederick E. Levine
Administrative Law Judge