COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS	**BOARD NO. 056856-95 029875-95 029886-95**
Michael O'Rourke	Employee
Town of West Bridgewater Mass. Interlocal Ins. Assoc. W.C.	Employer Insurer
Green Manor Caterers Wausau Insurance Company	Employer Insurer
Quality Personnel, Inc. a/k/a Quality Temps of Brockton Eastern Casualty Insurance Company	Employer Insurer

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

APPEARANCES
Paul S. Danahy, Esq., for the Employee
Steven O'Connell, Esq., for Mass. Interlocal Ins. Assoc.
Donald M. Culgin, Esq., for Wausau Insurance Co.
Kerry G. Nero, Esq., for Eastern Casualty Insurance Co.

LEVINE, J. Both the employee and Wausau Insurance Co. appeal the decision of an administrative judge which awarded the employee weekly incapacity benefits pursuant to § 34, payment of medical bills pursuant to §§ 13 and 30, and legal fees and expenses. After review, we reverse the decision as to Wausau and recommit the case for further findings on the issue of which of the insurers is liable for the employee's incapacity. We summarily affirm the remainder of the administrative judge's decision.

Michael O'Rourke was, at the time of the hearing, a single, thirty-two year old father of one minor child. (Dec. 4.) He has an eighth grade education and he served in the National Guard for ten years. Mr. O'Rourke's prior jobs included carpentry, framing,

landscaping, cooking and seaward technician. Id. He had suffered prior back problems due to the physical nature of his employment history. (Dec. 5.)

In October 1994, Mr. O'Rourke began employment as a school custodian for the Town of West Bridgewater. His duties included general cleaning functions, which entailed very physical work. Id. He operated buffers and strippers that apply and remove wax from floor surfaces. Id. On July 18, 1995, Mr. O'Rourke was operating a buffer to strip the wax from a classroom floor when the buffer spun out of control and struck him in the low back, shoulders and right hip. (Dec. 6.) Also, the electrical cord somehow wrapped around his feet causing him to fall to the floor. (Dec. 6, 15.) As a result, the employee suffered injuries to his lower back and right hip. (Dec. 6.)

Mr. O'Rourke completed the workday despite pain. Later that evening, he reported to the emergency room of the Good Samaritan Hospital. Id. Four days following the incident, the employee returned to modified work on a four hour per day basis. (Dec. 7.) In September 1995, the employer instructed the employee to resume regular full time work. However, because he was still experiencing a lot of pain in the lower back radiating down the groin and right hip into both legs, the employee could not resume regular work and at that time he stopped working for the town. Id.

Initially, the employee treated with his primary care physician, Dr. Grogan. In October 1995, he was referred to Dr. Carriere, an orthopedic surgeon. Id. Dr. Carriere initially treated the employee with medication. Dr. Carriere's November 1, 1995 office note states that the employee had an epidural steroid injection. (Employee Ex., 2.) On Dr. Carriere's advice the employee sought lighter work with Green Manor Caterers and Quality Personnel, Inc. (Dec. 7.) He apparently worked for King Richard's Faire for ten weeks during the Fall of 1995. Despite his injury, the employee did heavy work for Green Manor as a cook, driver and general laborer. Id. He worked mostly on weekends on an as needed basis. Id. It appears he worked for Green Manor between the weeks ending November 26, 1995 and December 24, 1995. Id. "The more he worked the greater the pain became although there were no other specific incidents of injury." Id. The night of December 16, 1995, was one of those occasions when the pain peaked while

he worked for Green Manor. Complaining of increased pain, Mr. O'Rourke reported to the emergency room of the Good Samaritan Hospital on December 17, 1995. Id. Again on December 18, 1995, the employee visited the same emergency room complaining of exacerbation of back pain as a result of his work for Green Manor. (Dec. 7-8.) He visited the same emergency room on December 24, 1995 complaining of low back pain. (Dec. 8.)

In late December, Mr. O'Rourke stopped working for Green Manor; he then worked about two weeks for Quality Personnel, Inc., a temporary placement company. Id. He worked part time as a laborer at a book bindery. He operated machinery that involved frequent turning and pivoting of his body. The employee did not recall a specific incident, but constant turning to the left caused increased pain, and the employee stopped working for Quality Personnel in mid-January 1996. Id. The employee then began driving a taxicab, but left this job after several days because of the pain caused by the prolonged sitting. Id. The employee also felt increased pain when he shoveled snow during the 1996 winter. Id. Dr. Carriere recommended injections, but they did not help. (Dec. 7.) In January 1996, Dr. Carriere advised Mr. O'Rourke to discontinue work altogether. Id.

Unsatisfied with his medical treatment, the employee came under the care of Dr. Howard Blume, a neurosurgeon. (Dec. 8.) On May 23, 1996, Dr. Blume performed a laminectomy on the employee. Id. The procedure only provided partial relief, and the employee thereafter received therapy and other conservative treatment. Id.

Mass. Interlocal Ins. Assoc. (MIIA), the insurer of the Town of West Bridgewater, opposed the employee's claim for benefits. (Dec.2.) At conference, MIIA filed motions to join the insurers for Green Manor and Quality Personnel. These motions were allowed. Id. After conference, MIIA was ordered to pay weekly workers' compensation benefits to the employee. Id. MIIA filed a timely appeal for a hearing de novo. Liability being at issue, the parties opted out of the § 11A(2) impartial examiner process. See 452 Code Mass. Regs. §§ 1.02 and 1.10(7). The hearing began on July 24, 1997 and was continued over several days. Id. The parties chose not to depose their respective physicians. Id.

The administrative judge generally credited the employee's testimony and adopted the medical evidence presented on his behalf. (Dec. 15, 16.) Based on the evidence submitted, the judge found that the employee experienced a back injury on July 18, 1995 while in the employ of the Town of West Bridgewater. (Dec. 15.) The judge recited that the Good Samaritan Hospital report dated December 18, 1995 indicated that the employee complained of pain in the low back into the right knee with burning sensation in the right buttock. (Dec. 16.) The judge found it significant that prior to this December 18, 1995 report, "there was no reported radiation into the buttocks down to the knee by any of his treating physicians." Id. Based on that observation, she found that on December 16, 1995 the employee suffered an exacerbation of his July 18, 1995 injury. This exacerbation occurred while Mr. O'Rourke worked for Green Manor. (Dec. 16.)[1] Relying on the medical opinion of Dr. Carriere, the judge determined that the employee was totally disabled as of January 16, 1996. Id.

Accordingly, the administrative judge found Wausau, Green Manor's insurer, liable to pay ongoing § 34 benefits from January 16, 1996, medical payments and attorney fees and expenses. The claims against MIIA and Eastern Casualty were dismissed. (Dec. 17.)

In his appeal, the employee contends that the administrative judge erroneously calculated his average weekly wage. Additionally, the employee argues that Wausau is without standing to contest the July 18, 1995 work injury. The employee's appeal is without merit, and we summarily affirm the administrative judge's decision as to the issues the employee raises. Wausau's appeal, on the other hand, has merit.

In Spearman v. Purity Supreme, 13 Mass. Workers' Comp. Rep. 109, 111-112 (1999), we described the factors to be considered in a case such as this.

> Only one insurer is liable for the payment of compensation for a single period of incapacity. L. Locke, Workmen's Compensation § 178 (2d ed. 1981). Where an

[1] The judge reported that the employee complained of increased pain as of January 16, 1996, while working for Quality Personnel, Inc., but the judge stated that "there was no indication that the increased pain caused any additional symptoms indicative of further exacerbation." (Dec. 16.)

> employee is injured at his job and then works at another job and becomes incapacitated, it must be determined which insurer -- the one insuring his first employer or the one insuring his subsequent employer -- bears liability for the ensuing incapacity. Thus, the critical question in all successive insurer cases is whether the employee's subsequent incapacity is "simply the natural physiological progression of a condition following the initial incident [i.e., a recurrence] or the result of a new compensable injury." Smick v. South Central Mass. Rehab. Resources, Inc., 7 Mass. Workers' Comp. Rep. 84, 86 (1993). "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 or necessary to all or a great many occupations." Zerofski's Case, 385 Mass. 590, 594-595 (1982).
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> Where the most recent incident or condition bears a causal relationship, however slight, [footnote omitted] to a subsequent incapacity, it constitutes an aggravation and creates liability for the insurer on the risk at that time. Rock's Case, 323 Mass. 428 (1948); Trombetta's Case, 1 Mass. App. Ct. 102, 104 (1973); Cymerman v. Hiller Co., Inc., 11 Mass. Workers' Comp. Rep. 609, 611 (1997). Thus, when the pain following a work injury has been occasional and well controlled by drugs but later, in association with subsequent work, becomes constant, more severe and not adequately controlled by drugs, a finding of a new injury will be upheld. Trombetta, supra at 104-105; Smick, supra, at 86. See generally L. Locke, Workmen's Compensation, supra and cases cited.
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> Conversely, where the pain or complaints following a work injury have been continuous, subsequent incapacity will usually be deemed a recurrence of the original injury, chargeable to the first insurer, despite subsequent employment predating the incapacity. See Rock's Case, supra at 429-430. That is to say, continued pain, and a subsequent worsening, can support a conclusion that a current incapacity is causally related to the original injury, subjecting the first insurer to liability. Rock's Case, supra. [footnote omitted.]

The administrative judge relied upon the December 18, 1995, emergency room report of the Good Samaritan Hospital to find that an exacerbation had occurred. However, there is no medical opinion in that report stating that the employee suffered an aggravation of his condition while working at the Green Manor. Since an expert medical opinion is necessary on the issue of causal relationship, see Casey's Case, 348 Mass. 572, 574 (1965), the aforesaid emergency room report cannot support the judge's finding of exacerbation, which she relied on to find Wausau liable.

Furthermore, the reason the judge gave for placing significance on the December

18, 1995, emergency room report -- that prior thereto, "there was no reported radiation into the buttocks down to the knee by any of his treating physicians" (Dec. 16) -- is erroneous. First, there was such a report by a treating physician prior to December 18, 1995, and prior to November 26, 1995, when it appears the employee started work for Green Manor. (Dec. 7.) In an October 4, 1995 report, Dr. Carriere states that the employee "has had back, buttock and leg pain." (Employee Ex. 2.) Second, in the report of a September 15, 1995 MRI examination performed on the employee, Dr. Daniel Silverstone gives a clinical history of "LOWER [B]ACK PAIN RADIATING TO BOTH BUTTOCKS AND LEFT LEG." Id. And finally, the judge herself found, earlier in her decision, that the employee left his job with the Town of West Bridgewater in September 1995 "because he was continuing to experience a lot of pain. The pain was in the lower back and radiated down the groin and right hip into both legs." (Dec. 7; see July 25, 1997 Tr. 14.) Hence, the supposed foundation for reliance on the December 18, 1995, emergency room report does not exist. The judge erred in her evaluation of the emergency room report as a basis for holding Wausau liable. See Emde v. Chapman Waterproofing Co., 12 Mass. Workers' Comp. Rep. 238, 241 (1998) (findings are arbitrary if they are not adequately supported by the evidence).

Because of this error, the case must be recommitted to the judge for reconsideration. In reconsidering the case, the judge must be cognizant of the factors relevant to determining which of the insurers is liable. See Spearman, supra. These include the continuity or not of the employee's complaints following the industrial injury. The judge did not make sufficient findings thereon. On that important question, see e.g., July 24, 1997 Tr. 31-33, 47, 70; July 25, 1997 Tr. 4-5, 13-14, 16-17, 19, 29, 64-66. The judge may also reconsider the medical evidence. But even though the question of causation must be addressed by expert medical testimony, Casey's Case, supra,[2] the ultimate determination of which insurer is responsible for the employee's incapacity is "essentially a question of fact and the findings of the board must stand unless a different

[2] See e.g., Employee Ex. #2, which includes the May 14, 1996 report of Dr. Blume and the July 30, 1997 report of Dr. Schanz; Eastern Casualty Ex. #2.

finding is required as matter of law." Costa's Case, 333 Mass. 286, 288 (1955).

In Costa's Case, the employee suffered an industrial injury to his back on December 18, 1947. Although complaining about his condition from time to time, the employee continued to work for the same employer until January 28, 1954 when his back pain became so severe that he left work. The employer was insured by different insurers during that period of time. The court upheld the board's finding that the first insurer, which was on the risk in 1947, was liable for the employee's incapacity beginning in 1954. The court's reasoning is instructive:

> From an examination of the evidence we cannot say that the findings of the board were unwarranted. There was evidence that except for a period of three weeks in April, 1953 the employee worked almost continuously down to January 28, 1954; that during much of this period he had constant backaches which became progressively worse; and that on the day he ceased working his back was "bothering him very badly," and he was obliged to go home. [The employee's treating doctor] testified that in his opinion the employee's disability was directly attributed to the back injury sustained in December, 1947. There was, to be sure, testimony by [that doctor] which tended to qualify this opinion somewhat, and there was medical testimony introduced by [the first insurer] that the employee's condition was not related to the 1947 injury. But the weight and credibility of the evidence were for the board to determine. There was no evidence that the employee sustained a specific injury subsequent to December 18, 1947.

Id. at 288-289. See also Broughton's Case, 9 Mass. Workers' Comp. Rep. 561 (1995); Radke v. Eastern Foundations; 7 Mass. Workers' Comp. Rep. 197, 200-201 (1993). Although the evidence may suggest a certain result, additional findings are necessary before a conclusion can be reached. Cf. Wile v. Sharnet Corp., 9 Mass. Workers' Comp. Rep. 753, 756 (1995).[3, 4]

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[3] If an insurer other than Wausau is found liable, then the average weekly wage, upon which benefits are based, likely will change.

[4] We also agree with Wausau that the judge erred when she purported to credit the testimony of a witness, one Harlow, who in fact never testified. Likely, this was a harmless scrivener's error, see Thompson v. Sturdy Memorial Hosp., 10 Mass. Workers'

Accordingly, we reverse the decision and recommit the case to the administrative judge for new findings consistent with this opinion. We otherwise summarily affirm the judge's decision as to the employee's appeal and as to Wausau's appeal regarding the finding of an industrial injury on July 18, 1995. During the pendency of the new decision, the status quo shall be maintained as to the payment of benefits.

So ordered.

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Frederick E. Levine
Administrative Law Judge

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Susan Maze-Rothstein
Administrative Law Judge

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Martine Carroll
Administrative Law Judge

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Filed: **December 13, 1999**

Comp. Rep. 133, 134 (1996), but the judge will have an opportunity to address this matter on recommittal.