COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS

BOARD NO. 057453-96
053237-98
005196-99

Monique J. Taylor	Employee
Morton Hospital and Medical Center, Inc.	Employer
Managed Comp Insurance Company	Insurer
Wausau Business Insurance	Insurer

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

APPEARANCES
John T. Underhill, Esq., for the employee
James W. Stone, Esq., for Managed Comp Insurance Company
Andrew P. Saltis, Esq., for Wausau Business Insurance

MAZE-ROTHSTEIN, J. The employee and both insurers in this successive insurer case appeal from a decision that awarded the employee G.L. c.152, § 34, temporary total incapacity benefits; payment of § 30 medical expenses; attorney's fees; costs; and interest pursuant to § 50. The employee makes two arguments on appeal. First, she contends error in the failure to find that Wausau's untimely § 50 interest payment required the assessment of a § 8(1) penalty. She also argues error in the judge's mere reservation of her rights to bring a future claim for depression after having prevailed on her claim that she suffered from work related depression. We agree. Managed Comp, the first insurer on the risk, argues that Wausau, the second on the risk, is legally responsible for medical care causally related to multiple chemical exposure that continued after it came on the risk. Finding aspects of this argument to have merit as well, we reverse the decision.

We recount the facts pertinent to the appeal. At the time of the hearing, Monique Taylor was a thirty-nine year-old trained radiology technician. (Dec. 6.) Ms. Taylor worked for eight years in the x-ray developing room of the employer hospital, an area

that contained chemicals, which would leak and back up through clogged drains. Frequently, she had to clean up the chemicals with towels and then dispose of them in the laundry. In March of 1994, she began experiencing symptoms, which included chest pains, shortness of breath, pain in the legs and arms, visual problems, headaches, nausea, abdominal swelling, diarrhea, and tingling in her arms and feet. The employer attempted to correct the problem by installing ventilation equipment, clearing the drains and by increased cleaning of the processing equipment, yet the employee's continued severe reactivity required her reassignment to the file room in April 1998. The repetitive filing activities caused pain in both the employee's elbows, the right worse than the left. She eventually sought treatment at the employer's emergency room. This resulted in her transfer to a computer terminal area, where she continued to experience occasional allergic reactions of her throat swelling, heart racing with chest pain, and "appearing in a drunken state," all triggered by copy machine use and by exposure to patients with certain scents. (Dec. 7.)

The employee worked until January 25, 1999, when her treating physician ordered her out of work primarily due to her right elbow pain. (Dec. 7.) In July 1999, she had elbow surgery for a release of the right lateral epicondile. She subsequently declined a second surgery. At the time of hearing, the employee's elbows continued to lock up, cause her pain and she had problems lifting objects. She also felt distressed, which led to frequent episodic crying spells. For this latter condition, Ms. Taylor treated with a social worker and a psychiatrist. (Dec. 7-8.) She unsuccessfully attempted to re-enter the workforce as a clerk at an antique shop because she suffered allergic reactions to cleaning fluids and to customers' perfumes. (Dec. 8.) Similarly, her volunteer work at a high school ended as she succumbed to perfumes in that environment as well. (Dec. 8.)

Both insurers opposed the employee's claims for workers' compensation benefits for the elbow and multiple chemical exposure injuries. At conference, benefits were denied as to the latter claim for weekly benefits but § 34 total incapacity benefits were

ordered for the elbow injuries against Wausau, which timely appealed.[1] By agreement of the parties, two § 11A[2] examinations were conducted, one orthopedic and one by an occupational medicine specialist. (Dec. 8.) On the employee's motion, the fact that the § 11A examining orthopedic's letterhead indicated an affiliation with the employer triggered a ruling of inadequacy.[3] (Dec. 8.) The § 11A occupational health specialist concluded that the employee suffered from "building related illness consisting of transient irritant responses to volatile organic/caus[t]ics to include gl[u]taraldehyde, formaldehyde, acetic acids and others which represent constituents of the x-ray film processing units; idiopathic environmental intolerance; depression; and bilateral epicondylitis." (Dec. 9.) Adopting that opinion, the judge found causality between the employee's work and these conditions totally medically disabled her from x-ray technician work, though she could perform in an environment controlled for exposure to noxious environmental stimuli. (Dec. 9-10.)

As for the elbow injuries, the judge adopted three physicians' opinions that pulling folders for the employer caused the employee severe pain to the right elbow. The judge found that she suffers from persistent bilateral epicondylitis, right worse than left. The elbow condition limited the employee's lifting to no more than 10 to 15 pounds with her right extremity, and required her to avoid repetitive activities with wrist extensions or

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[1] The employee timely appealed the denial as to the chemical exposure injury. The judge joined the cases for the hearing de novo. (Dec. 2.)

[2] General Laws c. 152, § 11A, gives an impartial medical examiner's report the effect of "prima facie evidence [with regard to the medical issues] contained therein," and expressly prohibits the introduction of other medical testimony unless the judge finds that additional medical testimony is required due to the complexity of the medical issues involved or the inadequacy of the report. See O'Brien's Case, 424 Mass. 16 (1996); See also Oliveira v. Srub-a Dub Wash Ctr., 10 Mass. Workers' Comp. Rep. 61 (1996)(no right to more than on § 11A exam). Cf. Pina v. LaChance, 10 Mass. Workers' Comp. Rep. 81 (1996)(but may by agreement of parties).

[3] The employee submitted a number of medical records regarding the orthopedic conditions without objection. The insurers elected not to submit any medical records on this issue. (Dec. 4.)

extreme elbow positioning. (Dec. 10.) Based on these diagnoses and restrictions, the judge found the employee to be unable to perform any of her former work activities. (Dec. 10.)

The parties stipulated that Managed Comp was on the risk through December 31, 1997, and that Wausau provided compensation coverage thereafter. (Dec. 5.) In the decision, the judge concluded that:

> . . . [T]he employee has been totally disabled from employment from the last day that she worked on January 26, 1999 to date and continuing as a result of the combined effects of her two conditions. I find that the primary disabling condition is the bilateral epicondylitis and that that condition began on or about October 13, 1998 while Wausau Insurance Company was on the risk. I find that the employee's exposure at work to chemical agents began in 1994 and that her reaction to these chemicals continued until her reassignment in April, 1998. There is no evidence that the employee's condition resulting from this chemical exposure worsened or changed after December 31, 1997 when Managed Comp went off the risk and I find that the medical treatment for the symptoms from exposure to the chemicals at work are the responsibility of Managed Comp Insurance Company.

(Dec. 10-11.)

We turn first to the arguments raised by Managed Comp. It argues that the § 11A medical opinion is not supportable under the Lanigan/Canavan test. (Managed Comp Brief, 7.) In Canavan's Case, 432 Mass 304 (2000), the Supreme Judicial Court held that an administrative judge abused his discretion by admitting expert medical opinion evidence on the controversial diagnosis of multiple chemical sensitivity (MCS) without a qualifying foundation of scientific reliability under Commonwealth v. Lanigan, 419 Mass. 15 (1994). From the trial level onward, both of those cases dealt with the admissibility of expert medical evidence. Unlike Canavan, supra, and Lanigan, supra, we see no evidence in the record that the scientific reliability issue was raised at hearing. Where the insurer fails to object to the admissibility of the § 11A physician's opinion, or to move to strike it, it has waived any objection to the admissibility of the testimony. Commonwealth v. Haley, 363 Mass. 523, 517 (1973); Santos v. George Knight & Co., 14

Mass. Workers' Comp. Rep. 289 (2000). An objection is timely only if made as soon as the error is apparent. See Commonwealth v. Baptiste, 372 Mass. 700, 706 (1977). " 'Objections, issues or claims—however meritorious—that have not been raised' below, are waived on appeal." Green v. Town of Brookline, 53 Mass. App. Ct. 120, 128 (2001), citing Wynn & Wynn, P.C. v. Mass. Commn. Against Discrimination, 431 Mass. 655, 674 (2000). "This rule applies to arguments that could have been raised, but were not raised, before an administrative agency." Green, supra. See also Dudley v. Yellow Freight Sys., Inc., 15 Mass. Workers' Comp. Rep. 204, 207 (2001)(issues and legal theories not raised below cannot be raised for the first time on appeal). Where there is no timely objection, the § 11A medical evidence retains its full probative value. See Nancy P. v. D'Amato, 401 Mass. 516, 524-525 (1988); P.J. Liacos, Massachusetts Evidence § 3.8, at 78 (7th ed. 1999).

Here, there was no challenge to the admission of the § 11A examiner's report on the basis of scientific foundation. (Dec. 4, 5, 9; Tr. 66.) In fact, it was found to be adequate. Wausau made only a general motion to "open [the record] up all the way," (Tr. 66-67), without any statement of basis. That motion, insufficient under § 11A(2), was denied, but the judge reserved Wausau's right to bring a further motion in that regard. No further motion was presented, and no deposition of the doctor was taken. (Dec. 9.) The occupational medicine § 11A opinion was, therefore, prima facie evidence and could only be rejected if the judge cited sound reasons in the decision for doing so. Shand v. Lenox Hotel, 14 Mass. Workers' Comp. Rep. 152, 155 (2000). Thus, the judge was obliged to adopt the § 11A doctor's opinion that the employee suffered from "idiopathic environmental intolerance" previously known as "multiple chemical sensitivities." (See Statutory Ex. 1, 10.) See G.L. c. 152, § 11A; Dezess v. Ames Dept. Store, 12 Mass. Workers' Comp. Rep. 176 (1998)(where report ruled adequate and not complex, judge legally required to adopt the § 11A prima facie opinion).

Managed Comp next argues that the last insurer on the risk assumes responsibility for care, notwithstanding that symptoms appeared prior to the beginning of that coverage. We endorse this contention and reverse the decision for the reasons that follow.

The Massachusetts policy of nonapportionment in the workers' compensation law known as the "successive insurer rule" is well established.

> Where incapacity results from the combined effect of several distinct personal injuries, received during the successive periods of coverage of different insurers, the result is not an apportionment of responsibility. . . .Where there have been several compensable injuries, received during the successive periods of coverage of different insurers, the subsequent incapacity must be compensated by the one that was the insurer at the time of the most recent injury that bore causal relation to the incapacity.

Evan's Case, 299 Mass. 435, 436-437 (1938); Dembitzski v. Metro Flooring, Inc., 13 Mass. Workers' Comp. Rep. 348, 356 (1999). A work injury is compensable so long as it contributes, "even to the slightest extent," to the employee's resultant incapacity. Rock's Case, 323 Mass. 428, 429 (1948). Moreover, a personal injury can occur as the result of a specific event or events, or may gradually develop from the cumulative effect of work stresses and aggravations. Trombetta's Case, 1 Mass. App. Ct. 102 (1973). This happens in the so-called "exposure cases."

> Where an employee's injury results from a gradual exposure to harmful foreign matter the date of the injury is the date of last exposure to the foreign matter. Steuterman's Case, 323 Mass. 454 (1948). L. Locke, Workmen's Compensation § 177, at 192-194 (2d ed. 1981). Often the date of last exposure coincides with the day when the employee is no longer able to continue his work because of the cumulative effect of such exposure. Id. at 193. . . .

Squillante's Case, 389 Mass. 396 (1983),[4] However, "[w]here the employee was no

[4] General Laws c. 152, § 35C, added by St. 1985, c. 572, § 45, reversed the holding in Squillante's Case, supra, that the rate of compensation to be paid to the employee was that in effect on the last day he was exposed to asbestos, but left untouched the proposition cited supra.

longer exposed to the harmful matter because of a change in technology or job assignment, the last day of exposure is taken as the day of injury." Locke, supra, citing Steuterman's Case, supra; Phillips' Case, 41 Mass. App. Ct. 612, 619 (1996). Thus, both lines of cases, successive insurer and exposure, support the policy of non apportionment by culminating with the last injurious increment of harm.

Here, the judge found that the employee's exposure to chemical agents began in 1994 and her reaction to these chemicals continued until her reassignment in April, 1998. (Dec. 10, 7.) However, he inconsistently found that she sustained a personal injury on or about January 3, 1996 of building-related illness, consisting of all the responses listed above, including idiopathic environmental intolerance.[5] (Dec. 11.) The assignment of a date of injury on January 3, 1996, which was one of the employee's major episodes of symptoms, (Dec. 7), is clear error. Since she was continually exposed to and continued to react to the offending chemicals until April 1998, when Wausau was on the risk, her date of injury would be sometime in April 1998. The fact, as found, that her condition did not worsen after December 31, 1997, when Managed Comp went off the risk, does not relieve Wausau of responsibility for medical expenses, where the judge also found that the employee's exposure and harmful reaction to chemicals at work continued until her transfer in April 1998. Therefore, on the basis of both successive insurer and exposure injury rules, on the facts here as a matter of law, we reverse the finding that Managed Comp is liable for the employee's medical bills after April 1998, and impose § 30 liability on Wausau.

The employee contends that the judge erred in failing to find that Wausau's untimely § 50 interest payment required application of a penalty pursuant to § 8(1). The decision listed § 8 penalties as an issue raised by the employee. (Dec. 2; Tr. 3.) The

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[5] The § 11A physician notes that the term "idiopathic environmental intolerance" has recently supplanted the term "multiple chemical sensitivities" (MCS) to describe a constellation of symptoms such as those affecting the employee. (Statutory Ex. 1, 10.)

judge found that § 50 interest was due on the compensation ordered at conference, but that § 8(5) did not apply to payment of § 50 interest.[6] (Dec. 11, 13.) However, he made no finding with respect to whether § 8(1) penalties were due.

In Favata v. Atlas Oil Co., 12 Mass. Workers' Comp. Rep. 12, 14 (1998), we acknowledged that failure to timely pay interest under a conference order may trigger a penalty under § 8(1)[7] as § 50 interest is "payment[] due the employee" under § 8(1). Here, Wausau does not dispute that payment of interest was due, nor does it argue that timely payment was made. (Wausau Br. 7-9.) Rather, it raises as a defense the employee's failure to comply with the procedural requirements set forth in 452 Code Mass. Regs. § 1.07(2)(b)[8] for claiming a penalty under § 8(1). In Favata, we ruled that the requirements of this regulation had been met by introduction of the claim form and conference order into evidence and by testimony that the interest due had not been received on the weekly benefits paid. Here, the employee introduced neither the claim form nor the conference order into evidence, but she did testify that she had not received interest due on her weekly benefits. (Tr. 35-37.) Wausau's argument that she had failed to meet the requirements of 452 Code Mass. Regs. § 1.07(2)(b) may have had merit had it

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[6] The employee does not appeal the denial of § 8(5) penalties.

[7] General Laws c. 152, §8(1), as amended by St. 1991 c. 398, §§ 23 to 25, reads in pertinent part:

> . . . Any failure of an insurer to make all payments due an employee under the terms of an order. . . within fourteen days of the insurer's receipt of such document, shall result in a penalty. . .

[8] 452 Code Mass. Regs. § 1.07(2)(b) reads:

> Claims for penalty under M.G.L. Ch. 152, Section 8(1), shall be accompanied by a copy of the Order, Decision, Arbitrator's Decision, approved lump sum or other agreement or other relevant document(s) with which it is alleged the insurer has failed to comply, together with an affidavit signed by the claimant or claimant's attorney attesting to the date payment was due, the date, if any, on which payment was made, and the amount of penalty the claimant is owed.

been raised at hearing. However, it was not, and it is therefore waived. See Green, supra; Dudley, supra. Therefore, Wausau is subject to penalties pursuant to § 8(1) as a matter of law.

The employee also argues error in the denial of her claim for medical treatment pursuant to § 30 related to her depression. We agree. In his decision, the judge adopted the § 11A physician's opinion that causally connected all of the employee's medical conditions, including depression, to the work injury. (Dec. 7.) Despite adoption of the § 11A physician's opinion that psychological treatment might greatly accelerate increased function, the judge found there was insufficient evidence on the need for treatment of the depression and reserved the employee's rights to bring a future claim in this regard. (Dec. 13.) The parties litigated the issue of treatment for depression. (Tr. 31-34.) Having found that the employee suffered in part from the sequela condition of depression, and that such condition was causally related to the effects of her employment, it was error to have denied her § 30 claim for treatment. We reverse the denial of medical benefits for the employee's work related depression and conclude that Wausau is liable for those necessary and reasonably related § 30 benefits.

Accordingly, we reverse the decision as to liability and order it against Wausau, order it to pay § 8(1) penalties on the untimely payment of § 50 interest and reverse the reservation as to § 30 benefits for depression and award those benefits as well.

So ordered.

Susan Maze-Rothstein
Administrative Law Judge

William A. McCarthy
Administrative Law Judge

Monique J. Taylor
Board No: 057453-96; 053237-98; 005196-99

Frederick E. Levine
Administrative Law Judge

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