COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 004664-94**

Paul A. Rizzo	Employee
M.B.T.A.	Employer
M.B.T.A.	Self-insurer

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

APPEARANCES
Jerome E. Falbo, Esq., for the employee
Christopher J. Connolly, Esq., for the self-insurer on appeal
Gerald P. Noone, Esq., for the self-insurer at hearing

WILSON, J. The employee appeals from a decision in which an administrative judge denied his claim for compensation benefits for a 1998 recurrence of a 1994 work-related lumbar spine injury. We agree with the employee that the judge erred by failing to list in evidence or make findings indicating his consideration of a 2000 report of a neurosurgeon, Dr. Shapur A. Ameri. We also are not convinced that the judge properly rejected the causal relationship opinion of a neurologist, Dr. David Hollander, given the requirements of an intervening cause analysis not performed by the judge. We therefore recommit the case for further findings. The decision is summarily affirmed as to the employee's remaining issues.[1]

The employee injured his low back and right index finger when he slipped and fell at work on February 3, 1994. The employee treated conservatively for his back, and returned to full duty work eight months later, after surgery on his finger. (Dec. 7.) The judge found that the employee did not seek treatment for his back from 1994 until the

[1] The employee asserts error with regard to the judge's denial of the employee's claim for § 35 benefits due to his finger, and the judge's denial of § 14(1) penalties against the self-insurer.

alleged recurrence in 1998, due largely to the lack of medical evidence in the record indicating such treatment.[2] (Dec. 8-9.)

The employee experienced an onset of back pain at home on July 26, 1998, which event is the subject of the present claim. (Dec. 8.) The judge found that this injury was caused by an accident in a swimming pool, when the employee's granddaughter jumped on the employee's back. This finding was based on the testimony of an employer witness, Ellen Wong Halloran, that the employee had told her of the incident. (Dec. 15.) An MRI taken soon after the onset of pain revealed that the employee had a posterolateral disc herniation at L5-S1 as well as spinal stenosis of the L4-5 level, secondary to diffuse disc bulging. On August 6, 1998, Dr. Ameri performed an L5-S1discectomy, and an L4-5, L5-S1 laminectomy. (Dec. 9.)

As to the expert medical evidence on causal relationship, the judge rejected the opinion of the neurologist, Dr. Hollander, who treated the employee in 1994. Dr. Hollander stated in a June 9, 1999 report that the employee's low back symptomatology in 1998 was causally related to his February 1994 industrial injury. The judge rejected this opinion on the basis that Dr. Hollander did not have a history from the employee that included the swimming pool accident in July 1998. (Dec. 9-10.) The judge adopted, instead, the opinion of Dr. Mark Weiner, the self-insurer's expert physician. Dr. Weiner opined that the employee's 1998 disc herniation was not causally related to the 1994 industrial injury. (Dec. 11.) On these bases, as well as his overall disbelief of the employee's testimony regarding how his pain developed in 1998, the judge denied the employee's claim. (Dec. 18-19.)

However, the judge apparently neglected to list as an exhibit, or discuss in his subsidiary findings, an April 4, 2000 report of Dr. Ameri.[3] The employee asserts that the

[2] The judge allowed the parties to introduce additional medical evidence due to the inadequacy of the impartial medical report. (Dec. 4.)

[3] Our inspection of the board file reveals that the April 4, 2000 report is in the file, together with the cover fax form and the judge's grant of an extension of time, but was not marked as an exhibit. We take judicial notice of these documents.

report was faxed to the judge within the extension of time that the judge allowed. In this report, Dr. Ameri sets out his causal relationship opinion: "I believe Mr. Rizzo's lumbar ruptured disc was causally related to his low-back injury of his accident of February, 1994, gradually became worse, and he's required decompression." (Exhibit D to Employee's Brief.) Because we cannot tell whether the judge considered the April, 2000 report of Dr. Ameri, we must recommit the case.[4] See Praetz v. Factory Mutual Engineering & Research, 7 Mass. Workers' Comp. Rep. 45, 47 (1993).

Moreover, we think that the judge put undue and premature emphasis on the swimming pool incident in his rejection of Dr. Hollander's causal relationship opinion. The first task in an intervening incident case is to focus solely on making a determination on causal relationship. The employee need only prove that the 1994 work injury bears some continuing causal relation to the employee's incapacity. We recently stated in Bemis v. Raytheon, 15 Mass. Workers' Comp. Rep. ___ (December 10, 2001), a case involving a subsequent pregnancy alleged by the self-insurer as the cause of that employee's carpal tunnel syndrome:

> Should the judge find that the employee suffered an industrial injury in 1994 and that its effects continue in any way, the employee's subsequent pregnancy cannot break the causal chain between work and the employee's subsequent disability and incapacity that accompanied the pregnancy. This is because the pregnancy is subject to well-established legal principles:
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> > The circumstances in which a subsequent non-work-related incident, causing a recurrence or aggravation of a work-related injury, can break the chain of causal relation between an employee's incapacity and an industrial accident are fairly well defined. These cases should not be lumped into the successive insurer rule . . . . The non-work-related aggravating incident causing a further period of incapacity, is governed by a different rule:
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> > [I]f the [non-work-related] activity is a normal and reasonable one and not performed negligently, the insurer who paid compensation during the first period of disability may be responsible to pay the second disability if the fact finder is satisfied that the second disability period is the natural and proximate result of the original injury.

[4] The report is not cumulative evidence, as there is conflicting medical evidence in the record. See Round v. King Size Co., 13 Mass. Workers' Comp. Rep. 98, 99 (1999).

> Twomey v. Greater Lawrence Visiting Nurses Assoc., 5 Mass. Workers' Comp. Rep. 156, 158 (1991). In Twomey, we affirmed the judge's conclusion that an incident which occurred while the employee was leaning forward playing cards at home caused an aggravation of a work-related injury. The judge further concluded, and we agreed, that the causal relation continued between the card-playing incident, i.e. the intervening event did not break the causal chain.

Bemis, supra. Likewise, if there is any causal connection between the 1994 industrial injury in the present case, and the employee's 1998 onset of low back symptomatology, the swimming pool accident would enter the analysis only if it were *not* the result of reasonable and normal activity. See Kashian v. Wang Laboratories, 11 Mass. Workers' Comp. Rep. 72, 74, 75 n.2 (1997)(reasoning that exclusive issue of intervening cause cases is medical issue of causal connection between the work injury and the subsequent medical complications; where there is continuing causal relationship, the reasonableness of a subsequent non-work activity will be scrutinized). Conversely, if there is no causal relationship between the 1998 onset of symptomatology and the 1994 injury, there is no reason for the judge to inquire whether the swimming pool event was reasonable and normal and not performed negligently, as there is no causal connection to be severed. Kasian at 75 n.2.

Accordingly, we recommit the case for the judge to assess the causal relationship opinions of Drs. Ameri and Hollander, by applying the correct principles of law. If the judge on recommittal credits either doctor's opinion that causal relationship between the 1994 injury and the 1998 incapacity continued, the judge will then need to determine whether the employee's swimming pool incident was the result of reasonable and normal activity on the part of the employee, such that it would not be an intervening cause cutting off liability for the industrial injury as a matter of law.

So ordered.

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Sara Holmes Wilson
Administrative Law Judge

Filed: April 19, 2002

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Susan Maze-Rothstein
Administrative Law Judge

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Martine Carroll
Administrative Law Judge