COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS	**BOARD NOS. 034765-99 055913-00**
Robert Gentile	Employee
Carter Pile Driving, Inc.	Employer
National Union Fire Insurance	Insurer
G. Donaldson Construction	Employer
Fairfield Insurance	Insurer

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

APPEARANCES
Christopher N. Hug, Esq., for the employee
Craig A. Russo, Esq., for National Union Fire Insurance
Michael Kiernan, Esq., for Fairfield Insurance

MCCARTHY, J. National Union Fire Insurance ("National Union"), the first insurer in this successive insurer case, appeals from a decision awarding the employee continuing partial incapacity benefits for an accepted industrial injury of August 5, 1999. National Union contends that the employee's post-injury work for different employers in 2000 contributed to his impairment, constituting an aggravation and a personal injury within the Act, as a matter of law. We disagree and affirm the decision.

Robert Gentile, age fifty-five at the time of the hearing, worked as a union pile driver with Carter Pile Driving, Inc. (Carter) for all of his adult life. On August 5, 1999, Mr. Gentile was struck on the left hand by the boom of a crane and thrown backward about six feet, landing on the ground. He suffered a broken left arm and shattered elbow. He underwent surgery on August 30, 1999, consisting of the excision of the radial head and replacement with a silastic implant. (Dec. 4-5.)

Mr. Gentile returned to work as a "walking steward" with a new employer, J. Cashman Company, on January 17, 2000. He left that job when the project he was

working on ended on May 19, 2000. After working briefly in another light duty job for another employer in May 2000, the employee commenced work with G. Donaldson Company (Donaldson) as a pile driver and steward. His duties were lighter than his pile driving duties with Carter. While the employee no longer operated jackhammers or pneumatic hammers, and estimated that he did only about 20% of a normal pile driver's duties, his left arm and wrist symptoms nevertheless worsened to the point that he asked to be laid off on October 19, 2000. Mr. Gentile collected unemployment benefits from that time until May 20, 2001. He went back to work in the summer of 2001 performing "odd jobs" for Wilkinson Septic Service. (Dec. 5-6.)

The employee filed a claim against Carter's insurer, National Union, for compensation benefits commencing on October 20, 2000, and continuing. After a conference order for payment of partial incapacity benefits, which both parties appealed, a claim against Fairfield Insurance, insurer of Donaldson, was joined for the hearing. (Dec. 1.) National Union disputed incapacity and causal relationship based on the employee's employment activities at Donaldson, while Fairfield Insurance disputed liability, i.e., the occurrence of an industrial injury at Donaldson. (Dec. 2.)

The employee underwent an impartial medical examination by Dr. Victor A. Conforti, an orthopedic surgeon. Doctor Conforti opined that the employee was status-post excision of the radial head with silastic implant and a probable secondary synovitis. In addition, the employee had a probable injury or tear of the triangular fibrocartilaginous complex of the left wrist. Doctor Conforti opined that the employee had suffered a 30% permanent loss of function of his left upper extremity, resulting in the employee's being restricted from any continuous use of his left wrist or elbow, or any lifting or continuous positioning involving his left arm. The doctor causally related these restrictions to Mr. Gentile's August 5, 1999 industrial injury. (Dec. 7-8.)

When asked at deposition about Mr. Gentile's work activities at Donaldson during which he experienced increased pain and swelling, Dr. Conforti did not change his opinion regarding causal relation. Given the nature of the original 1999 injury, the doctor

felt that the employee's continuing problems over several years would have been expected. While the work activities at Donaldson aggravated the employee's symptoms, Dr. Conforti considered that they did not aggravate or change his underlying problem, his disability or his permanent loss of function. Doctor Conforti's § 11A report and testimony constituted the only medical evidence in the case. (Dec. 8-9.)

The judge adopted the prima facie § 11A medical evidence of Dr. Conforti, and concluded that the employee was partially medically disabled from employment beginning on October 20, 2000. The judge found that the employee's partial incapacity was as a result of his August 5, 1999 injury while working for Carter, and that his work activities at Donaldson did not result in a personal injury under c. 152. The judge assigned an earning capacity of $300.00 per week, and awarded continuing § 35 benefits in accordance with the stipulated average weekly wage of $958.33. (Dec. 2, 9-10.) The judge dismissed the employee's claim against Fairfield Insurance. (Dec. 11.)

National Union argues that the employee's work activities as a light duty pile driver and steward at Donaldson constituted a personal injury as a matter of law. National Union places much stock in Dr. Conforti's use of the word, "aggravation," and the fact that the employee went back to work. First, the doctor's reference to "aggravation" is not dispositive of the legal analysis under the successive insurer rule. Thompson v. Tambrands, Inc., 9 Mass. Workers' Comp. Rep. 282 (1995). See also Larivee v. Brake King, 16 Mass. Workers' Comp. Rep. 457, 458 (2002) (". . . nothing rides on the choice of that word over 'recurrence' or 'exacerbation' as a matter of law"). Here the medical evidence was uncontroverted that the employee suffered from a recurrence/aggravation of his symptoms rather than a change in his underlying condition. (Emphasis added.) If all that were necessary to show a new industrial injury were the appearance of symptoms while performing the subsequent job, there would have been no need for the legislature to enact § 35B. That section equalizes the rates of compensation available for subsequent work-related recurrences and injuries, and was originally

intended to maintain an employee's benefits as against the erosion of inflation.[1] See Don Francisco's Case, 14 Mass. App. Ct. 456, 462 (1982)("§ 35B is a legislative remedy for the disparity which would otherwise exist between wages lost and compensation received in those situations where an employee returns to work but, because of a prior compensable injury, his ability to perform his duties changes while his compensation benefits remain the same"); Puleri v. Sheaffer Eaton, 10 Mass. Workers' Comp. Rep. 31, 35-40 (1996)(average weekly wage is "rate" within meaning of § 35B). But see Taylor's Case, 44 Mass. App. Ct. 495, 499-501(1998)(interpreting § 35B, when applicable, to lower rates of compensation under the benefit-reducing amendments of 1991).

An employee may suffer a recurrence of incapacity which does not rise to the level of being a new industrial injury under c. 152. See Broughton v. Guardian Indus., 9 Mass. Workers' Comp. Rep. 561, 563-564 (1995). The law is well established that the deleterious effects of work subsequent to an industrial injury do not amount to a new industrial injury where the incapacity suffered is "simply the natural physiological progression of a condition following the initial incident." Smick v. South Central Mass. Rehabilitative Resources, Inc., 7 Mass. Workers' Comp. Rep. 84, 86-88 (1993). Here, Dr. Conforti's opinion makes it clear that Mr. Gentile's aggravated symptoms experienced while working for Donaldson were of the Smick variety, rather than a new "lesion," as a c. 152 personal injury was described in Burns' Case, 218 Mass. 8, 12 (1914). See Costa's Case, 333 Mass. 286, 289 (1955)(upholding administrative judge's adoption of medical opinion causally connecting disability to original injury even in the

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[1] General Laws c. 152, § 35B, provides:

> An employee who has been receiving compensation under this chapter and who has returned to work for a period of not less than two months shall, if he is subsequently injured and receives compensation, be paid such compensation at the rate in effect at the time of the subsequent injury *whether or not such subsequent injury is determined to be a recurrence of the former injury;* provided, that if compensation for the old injury was paid in a lump sum, he shall not receive compensation unless the subsequent claim is determined to be a new injury.

(Emphasis added.)

face of equivocation as to second employment's contribution). Finally, it is of some consequence that the employee in the present case suffered symptoms on a consistent basis throughout the disputed post-1999 injury period of disability. (Tr. 25.) See Rock's Case, 323 Mass. 428, 429-430 (1948)(continual complaints of pain since original injury supported award against insurer on risk at that time).

The decision is affirmed. National Union is directed to pay a fee in the amount of $1,273.54 to the employee's attorney as provided by § 13A(6).

So ordered.

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William A. McCarthy
Administrative Law Judge

Filed: ***September 16, 2003***

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Martine Carroll
Administrative Law Judge

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Susan Maze-Rothstein
Administrative Law Judge