COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS	**BOARD NO. 051575-99**
Robert P. Flaminio, Jr.	Employee
Central Motors, Inc.	Employer
Seaco Insurance Co.	Insurer

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

APPEARANCES
Michael J. Farley, Esq., for the employee
Robert J. Doonan, Esq., for the insurer

MCCARTHY, J. Robert P. Flaminio, Jr., is forty-three years old, married with one child and a resident of Cranston, Rhode Island. He has a tenth grade education and served in the United States Army from 1977 to 1981. (Dec. 2-3.) Mr. Flaminio was self-employed for six years in automobile sales. He then worked seven years as a maintenance company supervisor, four years in furniture sales and five years as an automobile salesman for two different employers. (Dec. 3.) In 1998, he started working for Central Motors, Inc. of Norwood as an automobile salesman. His duties included meeting customers and selling cars to them, demonstrating vehicles, changing license plates and moving vehicles. He typically worked sixty-five to seventy hours per week and was paid monthly by a draw against commissions. In addition to his other duties, the employee was required to attend an hour-long general sales meeting each week. Id.

On June 21, 1999, at the conclusion of the sales meeting, Flaminio rose from his chair and in the process, " . . . felt an immediate grabbing sensation in his mid-lower back near his hips." Id. He went outside and smoked a cigarette, spoke with some fellow employees, and then returned to his desk to make telephone calls. He told his sales

manager that he was having increased back discomfort. Mr. Flaminio then drove to Norwood Hospital where he was treated and released. Id. Thereafter, the employee made several attempts to return to work and in August 1999, he actually resumed his normal work schedule. He continued working until mid October 1999 when he left the job for good.

Mr. Flaminio came under the care of Dr. Mark Braun, who in turn referred him to Dr. Curt Doberstein. In October 1999, Dr. Doberstein operated on the employee's back. (Dec. 5.) The insurer denied the employee's claim for benefits and, after a § 10A conference, an administrative judge denied the claim. The employee's appeal brought the case to a full evidentiary hearing de novo. (Dec. 1.)

On September 22, 2000, the employee was examined by Dr. Vernon H. Mark, the § 11A impartial medical examiner. (Dec. 5.) Doctor Mark diagnosed a bulging intervertebral disc at L4-5 and opined that disc pathology may have preceded the industrial accident. Notwithstanding, the examiner opined that the incident exacerbated an asymptomatic condition, which became painful as a result. In Doctor Mark's view, Mr. Flaminio was partially, medically disabled because of his back pain and numbness in his right leg. (Dec. 5.) The § 11A medical expert also noted that the employee was not at a medical end result and that additional testing, treatment at a pain management clinic and psychiatric evaluations would be beneficial. (Dec. 5.) The administrative judge adopted the medical opinions of the § 11A examiner, the sole source of medical evidence in this case. (Dec. 6.)

Working towards his general findings and conclusions, the judge was confronted with conflicting evidence on a critical evidentiary point. Mr. Flaminio testified that he did not simply rise from the chair in which he was sitting. He testified that " . . . he actually lifted the front of the chair in order to move it back." (Dec. 6.) There was documentary evidence wherein the employee described the incident as "just getting out of chair" and "arose from chair, hurt back." (Dec. 6.) After a careful analysis of the evidence, (Dec. 6-8), the judge found as a fact that the injury occurred when Mr. Flaminio "just got out of a chair." (Dec. 8.)

The judge then turned to the core issue in the case, namely, did Mr. Flaminio suffer an industrial injury arising out of and in the course of his employment? Adverting to Zerofski's Case, 385 Mass. 590 (1982), the judge pointed out that for an injury to be compensable, it must arise either from a specific incident or series of incidents at work, or from an identifiable condition that is not common and necessary to all or a great many occupations. After finding that the employee did not lift his chair as he rose to a standing position at the end of the sales meeting, the judge also found there was no question but that the employee sustained an injury as he '" just got out of a chair.'" (Dec. 8.) The judge then concluded as follows:

> Applying those facts to Zerofski, I must find that the employee has failed to meet his burden that simply getting out of a chair is not a condition common and necessary to a great many occupations. His claim, therefore, must be denied and dismissed.

(Dec. 8.) The employee, on appeal, argues that the hearing judge incorrectly applied the principles set out in Zerofski. We agree and reverse the judge's decision. The Zerofski court distinguished compensable from non-compensable injuries in the following paragraph:

> Drawing from the nature of the purposes of the act as we have described them, and from the pattern of our decisions over the years, we arrive at the following restatement of the range of harm covered by the act. 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 and necessary to all or a great many occupations. The injury need not be unique to the trade, and need not, of course, result from the fault of the employer. But it must, in the sense we have described, be identified with the employment.

Id. at 594-595.

The court also took care to point out that specific events occurring at work are compensable even when employment does not expose employees to an unusual risk greater than that experienced by the general public. Id. at 595 n. 2. The Zerofski test is sequential in nature.

> The first prong of Zerofski addresses 'a specific incident or series of incidents at work' . . . Should the judge find that the first prong of Zerofski is not satisfied, he must then address the second prong which offers another means of arriving at a compensable mechanism of injury arising from 'an identifiable condition that is not common and necessary to all or a great many occupations.'

Jobst v. Grybko, 16 Mass. Workers' Comp. Rep. 125, 129-130 (2002). If Mr. Flaminio injured himself arising from a chair after concluding a meeting at work, then the harm clearly arose from that specific incident and no further inquiry as to the commonplace nature of the activity is required.[1]

The fact pattern confronting the judge in the case before us is very much like the facts in McManus's Case, 328 Mass. 171 (1951). McManus suffered a low back strain as he stooped over to pick up a vacuum cleaner hose which he was using in the course of his employment as a porter. Arguing that the reviewing board erred when it found the incident compensable, the self-insurer pointed out that the employee

> was not lifting anything as he was bending over to pick up the hose and consequently no stress could have been put upon his back, and also that, if he did experience a strain as he was reaching for the hose, the strain was due to one of the most common movements of the body, which almost invariably is not accompanied by any harmful effects and therefore could not result in a compensable injury.

Id. at 172. The McManus court held otherwise, however.

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[1] The hearing judge may have been misled by dicta in Cardinal v. E.R. Jones Co., 5 Mass. Workers' Comp. Rep. 209 (1991). Although the case turned on whether two specific incidents actually occurred, the decision also contained the following language:

> Even if the judge had believed the employee's account of the washroom incident, which he did not, the mere act of turning to reach for a paper towel is simply " too common among necessary human activities to constitute an identifiable condition of employment." Zerofski's Case, 385 Mass. 590, 595-595 (1982). Because the employee's back was already compromised, an otherwise prosaic physical movement induced a manifestation of symptoms which, though occurring in the course of his employment, did not arise out of his employment and thus did not constitute a compensable personal injury.

We now disavow this dicta.

In affirming the reviewing board it wrote that,

> A back injury causally connected with employment is a compensable injury under the act, . . . and it need not necessarily result from unusual force or exertion although, of course, it would be more difficult to prove the causal relation of the injury to the employment where the stress upon the back was neither unusual nor heavy . . . It has been held that a strain caused merely by stooping down or bending over in the course of his employment entitles the employee to compensation for the resulting incapacity.

Id. at 173. (citations omitted). Here, the judge has made a clear finding of a specific incident but went on to find that "the employee has failed to meet his burden of proof that the aforesaid injury arose out of and in the course of his employment with Central Motors, Inc." (Dec. 9.) Because he has misapplied the Zerofski rule, we reverse his denial and dismissal of the employee's claim and recommit the case to the hearing judge for findings on the other issues raised, namely causal relationship and extent of incapacity.

So ordered.

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William A. McCarthy
Administrative Law Judge

Filed: **February 19, 2003**

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Patricia A. Costigan
Administrative Law Judge

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Susan Maze-Rothstein
Administrative Law Judge