COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS

BOARD NOS.: 14284-02, 14288-02 14300-02, 14305-02, 14309-02, 14311-02, 4313-02, 14315-02, 14318-02, 14322-02, 14323-02, 14330-02

Robert T. Ford	**Employee**
O'Connor Constructors, Inc.	**Employer**
HVAC Compensation Corp. SIG	**Self-insurer**
Workers' Compensation Trust Fund	**Insurer**
Guaranty Fund[1]	**Insurer**

REVIEWING BOARD DECISION

(Judges McCarthy, Horan and Koziol)
The case was heard by Administrative Judge McDonald.

APPEARANCES

Chester L. Tennyson, Jr., Esq., for the employee
Edward M. Moriarty, Jr., Esq., for the self-insurer at hearing and on brief
Neal H. Sahagian, Esq., for the Guaranty Fund at hearing
Karen S. Fabiszewski, Esq., for the Trust Fund at hearing

McCARTHY, J. The self-insurer appeals from an administrative judge's decision finding it liable for the employee's incapacity resulting from his cumulative exposure to various types of ash and metals during the course of his employment as a boilermaker. As we affirm the decision, we address three of the numerous issues raised by the self-insurer: 1) late notice; 2) double recovery; and 3) causal relationship. We summarily affirm the decision as to all other issues raised by the self-insurer.

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[1] The employee withdrew his claim against the Guaranty Fund with the submission of his closing argument at hearing. (Dec. 1, n.1.)

From 1970 until 1998, Robert Ford, who was fifty-eight years old at hearing, worked for multiple employers through the Boilermakers Union Local 29, installing and repairing industrial boilers in power plants and paper mills. (Dec. 2, 6.) The work was heavy and the atmosphere was dirty, smoky and dusty, exposing him to boiler fossil fuel ash, bottom ash, fly ash, dust and soot, containing metals such as vanadium, nickel, iron, zinc, chromium and arsenic. Though the type of ash varied depending on the type of fuel used in the plant (coal, oil, gas, or trash), the atmosphere was consistent. (Dec. 7.)

The employee wore safety goggles and respirators, but they were not one-hundred percent effective; he could taste sulfur and fumes, and at times would cough up black sputum. He first experienced the onset of wheezing in the 1980s, and from 1993 on his breathing became progressively worse. (Dec. 7.) He began treating with Dr. David Christiani in 1996. On June 3, 1998, while working for the employer at Mystic Station in Everett, he left work due to difficulty breathing. Although he has not worked since then, his condition has worsened. (Dec. 8.)

Four years later, on June 2, 2002, the employee filed claims against a number of insurers, alleging he suffered a disabling respiratory condition in the course of his employment as a boilermaker. Following a conference order denying all claims, the employee withdrew some claims, and settled approximately eighty others, for a total of $87,400. (Dec. 2, 5.)

His multiple claims against the self-insurer,[2] the Guaranty Fund and the Workers' Compensation Trust Fund proceeded to hearing, with the employee withdrawing his claim against the Guaranty Fund in his closing argument. (Dec. 1, n.1.) The impartial physician who examined the employee on June 6, 2004, subsequently died, rendering his report inadmissible. See Padilla v. North Coast Seafood, 19 Mass. Workers' Comp. Rep. 98 (2005). The judge denied the self-insurer's motion for another impartial examination, and instead allowed the parties to submit

[2] The employee's claims against the self-insurer encompass twelve different periods between 1993 and 2002, during which he worked for the employer at various locations. (Tr. 5.)

additional medical evidence. The employee submitted medical records of his treating physician, Dr. Christiani. The self-insurer submitted medical reports prepared by Dr. Barry Levine and Dr. Jerome Siegel. All three physicians were deposed. (Dec. 4.)

In his decision, the judge adopted the unanimous medical opinions that the employee was totally disabled from his work as a boilermaker. (Dec. 16.) He adopted the opinions of both Dr. Christiani and Dr. Siegel that the employee has chronic obstructive pulmonary disease (COPD), predominately caused by cigarette smoking. Based on Dr. Christiani's opinion, he further found that the employee's work as a boilermaker for twenty-eight years likely caused him to develop occupational asthma, and that, notwithstanding his history of smoking-related COPD, those occupational exposures were, and remain, a major cause of the employee's COPD and secondary disability. (Dec. 13-14, 18.) The judge explicitly rejected Dr. Siegel's opinion to the extent it conflicted with the adopted medical opinions. (Dec. 14.)

Because the nature of the employee's injury was cumulative, the judge found the self-insurer, which covered the risk at the time of the employee's last exposure on June 3, 1998 was responsible for the payment of compensation. (Dec. 14, 18-19.) The judge also found that, although the self-insurer did not have actual notice of the employee's claimed injury for four years after his last exposure, it was not prejudiced by such late notice. (Dec. 15-16.) In addition, the judge found no merit to the self-insurer's claim that the $87,400 in prior lump sum settlement payments should be used to offset the weekly incapacity benefits awarded at hearing to prevent a double recovery, since there was no evidence the lump sum agreements represented the commutation of future weekly incapacity benefits. (Dec. 16-17.)

Finding the employee incapable of returning to work as a boilermaker, and possessed of a limited education, with no other work experience or transferable skills[3], the judge awarded him § 34 total incapacity benefits from June 4, 1998 to

[3] The employee attended school through the ninth grade and later obtained a G.E.D. His only work experience, other than as a boilermaker, was in the military. (Dec. 6, 20.)

June 3, 2001, and § 34A permanent and total incapacity benefits thereafter. Because there was no latency period between the date of injury and the date on which the employee became eligible for weekly incapacity benefits, the judge held the provisions of § 35C did not apply, and dismissed the claim against the Trust Fund.[4] (Dec. 20-21, 22.)

On appeal, the self-insurer first argues the judge erred as a matter of law in holding it was not prejudiced by the employee's failure to notify it, or the employer, of his alleged injury until four years after he left work, particularly since the employee's condition deteriorated during that time. The self-insurer argues that it was deprived of the opportunity to conduct its own medical examination to determine disability and causation, and thereby suffered prejudice. We disagree.

Where the employee fails to give timely notice of an injury and the employer does not have knowledge of such injury,[5] the employee must prove the insurer was not

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[4] General Laws Chapter 152, § 35C, provides, in relevant part:

> When there is a difference of five years or more between the date of injury and the initial date on which the injured worker or his survivor first became eligible for benefits under section thirty-one, thirty-four, thirty-four A or section thirty-five, the applicable benefits shall be those in effect on the first date of eligibility for benefits.

[5] The employee does not dispute that, by failing to notify the employer until four years after he left work, he did not give notice of his alleged work-related injury "as soon as practicable," as required by G. L. c. 152, § 41. Nor does the employee maintain that his late notice is excused, pursuant to G. L. c. 152, § 44, because the insurer or employer had knowledge of the injury. See Hamel v. Kidde Fenwal, Inc., 21 Mass. Workers' Comp. Rep. 127, 130-131 (2007), and cases cited ("knowledge of the injury" means "actual knowledge, but not absolute certainty"). Rather, he maintains his claim is not barred because the insurer was not prejudiced by his failure to give timely notice of his injury. See § 44 ("Want of notice shall not bar proceedings, . . . if it is found that the insurer was not prejudiced by such want of notice").

prejudiced by late notice in order to maintain his claim. Kangas's Case, 282 Mass. 155, 158 (1933). He can sustain this burden by introducing evidence from which a reasonable inference can be drawn that the insurer suffered no prejudice. Zabec's Case, 302 Mass. 465, 469 (1939). Whether the employee has met his burden is generally a question of fact. Kangas's Case, supra. "The usual forms of prejudice are the inability of the insurer to procure evidence at a time remote from the injury, and the failure of the employee to be treated medically promptly after the injury." Tassone's Case, 330 Mass. 545, 548 (1953).

The self-insurer argues that prejudice resulted from its inability to obtain its own medical opinion regarding the extent of the employee's disability at the time he left work and for years afterward. Because the employee's condition worsened after the employee stopped working, the self-insurer contends the situation here is analogous to that in Hamel supra where the employee had surgery prior to giving notice of his injury. However, Hamel involved a single injury to the employee's knee, which required investigation to determine whether it occurred in the course of employment, rather than a cumulative exposure to substances inherent in the employee's work environment. See Tassone's Case, supra. There is a legal distinction between injuries due to cumulative exposure and those resulting from a single injury or a repetitive injury. In Tassone's Case, where over three years elapsed between the date of last exposure and notice to the employer, the court stated:

> [The] insurer knew, or could easily ascertain, the danger [inherent in the employee's work environment]. The very employment of the employee exposed her to that danger. The case did not call for the investigation of an isolated incident to determine whether the injury occurred out of and in the course of the employment. . . . By inference, it could have been found that the insurer was not prejudiced.

Id. at 548-549.

Similarly, here the judge reasonably inferred the self-insurer knew that boilermakers, through their repetitive work burning, welding, grinding, and cutting

metal components using oxyacetylene torches, were exposed to ash and fumes which affect pulmonary functioning. (Dec. 6.) Not only did the self-insurer provide its employees with safety goggles and respirators, but it had also allowed research studies to be conducted on its own premises, including the facility where the employee last worked.[6] (Dec. 15-16.) These findings do not, as the self-insurer maintains, erroneously impute actual knowledge of the injury to the employer, but instead support the judge's finding of no prejudice due to known and obvious hazards of employment. Cf. Fredyma v. AT&T Network Systems, 11 Mass. Workers' Comp. Rep. 420, 426 (1997)(judge's findings insufficient to support conclusion of no prejudice where there was no evidence the kind of occupational exposure and injury alleged were common to the industry).

Also supporting his conclusion that the self-insurer was not prejudiced by late notice is the judge's finding that the employee provided the self-insurer with records of his contemporaneous medical treatment, including respiratory function tests performed during his employment and shortly after he was forced to leave work. The self-insurer submitted these records to Dr. Siegel and Dr. Levine, who both rendered opinions within two to three months. (Dec. 9.) We note the self-insurer did not request that Dr. Levine actually examine the employee until 2007. (Dec. 16.)

The judge concluded:

> [N]otwithstanding the employee's failure to give the employer/self-insurer actual notice of his claimed injury, the self-insurer reasonably had knowledge of ongoing workplace exposures and of the employee's contemporaneous medical treatment records that documented his respiratory function over a period of time, and these treatment records were sufficient

[6] These studies were conducted by the employee's treating physician, Dr. Christiani. Dr. Siegel, one of the self-insurer's reviewing physicians, considered Dr. Christiani's work "groundbreaking." (Dec. 10.) He also testified as to a probable link between the employee's continuous exposure to irritants at work and his respiratory condition. (Dec. 11, 15; Siegel Dep. 33.)

> for its medical expert to render a medical opinion on causality and disability. Therefore, the self-insurer has not been prejudiced by late notice.

(Dec. 16.) There was no indication that, had the insurer been promptly notified, the employee could have received treatment which would have minimized his disability. See Gustafson's Case, 303 Mass. 397 (1939)(no prejudice where employee's occupational disease, caused by working conditions "open and obvious to employer," progressed between date of last exposure and date notice given). In addition, neither Dr. Levine nor Dr. Siegel expressed an inability to offer opinions as to the nature and extent of the employee's disability during the period between June 3, 1998 and June 2, 2002.[7] Because the judge's findings are well-reasoned and detailed, we affirm the decision on this issue.

Next, the self-insurer maintains the employee received an unlawful "double recovery" because the judge refused to credit the lump sum payments the employee

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[7] We note that Dr. Siegel and Dr. Levine appear to have different opinions with respect to the extent of the employee's disability during the period from June 1998 to June 2002 (Siegel Dep. 16 ([unable to work as boilermaker]; Levine Dep. 24[full work capacity].) Without specifically addressing the discrepancy in medical opinions for the first few years of disability claimed, the judge simply adopted the opinions of all three physicians that the employee was disabled from returning to work as a boilermaker. (Dec. 9, 11, 13, 14, 16, 19.) He did say he adopted none of Dr. Levine's opinions, except that the employee could not return to work as a boilermaker, a finding which could be read as a rejection of his opinion the employee had a full work capacity in 1998. (Dec. 9; Levine Dep. 23.) While, arguably, the judge's decision should have been more explicit in its adoption of medical evidence to support disability throughout the claimed periods, the self-insurer has not raised this issue. The issue it has raised -- alleged prejudice due to lack of timely notice -- is separate from the issue of whether the judge made adequate findings regarding what medical evidence he adopted. Because the latter issue was neither raised nor argued, we consider it waived. Cotter v. Hawkeye Constr. Co., 22 Mass. Workers' Comp. Rep. 149, 150 n.1 (2008), citing Green v. Town of Brookline, 53 Mass. App. Ct. 120 (2001).

received from multiple other insurers against the compensation awarded in the hearing decision. The employee counters that there was no evidence presented from which the judge could have found that the lump sum settlements compensated the employee for the same losses for which compensation was awarded in the hearing decision, and thus no offset is required. We agree with the employee.

The parties stipulated that: "The employee has received $87,400. through settlement of approximately eighty claims filed against various insurers." (Dec. 5.) The agreements themselves were not entered into evidence, nor was there any testimony regarding their contents. "Because of the uncertainty as to what the settlement amount[s] actually represent[], it is impossible to say on this record that [they] duplicate[] the recovery under the [hearing decision's] award." Kszepka's Case, 843, 848-849 (1990). As in Kszepka, "[t]he amount of money agreed on [in the settlements] may have been influenced by many factors, including issues of liability, the extent of future medical benefits, the possibility that [the insurers] might escape [their] full obligation as the result of a supervening injury or death, the attitude of the board, and the eagerness or reluctance of the employee to settle." Id. at 848. The judge properly declined to assume, without more, that those agreements redeemed liability for the same periods of disability awarded at hearing.[8]

[8] In spite of the absence of evidence with respect to the lump sum agreements, the judge found:

> The release and settlement agreements do not simply represent the commutation of future weekly incapacity benefits to which the employee was entitled. The agreements release the insurers "from all claims, damages, actions or causes of action for bodily injury, consequential damages, and medical expenses resulting from the claimed date of injury." . . . Not one of these agreements is for incapacity. They therefore cannot be deemed to be "recovery" for any benefits the employee has received as a result of this hearing decision."

The self-insurer maintains, however, that only if we hold that the compensation awarded at hearing was for a "separate and distinct injury" under § 48(4) and (5), from those for which the employee was compensated in his eighty or so lump sum settlement agreements, can he avoid an offset. The self-insurer contends the employee did not suffer a "separate and distinct injury," but the same injury, albeit cumulative, to the same body part for the same onset of disability the lump sum agreements compensated him, and therefore, § 48 does not apply to allow full recovery from both the lump sum agreements and the hearing decision. (Self-ins br. 16.) We disagree. The judge properly did not reach this argument because the self-insurer presented no evidence as to whether these agreements contemplated separate and distinct injuries from that claimed at hearing; what amounts the employee actually received after attorneys' fees and costs were deducted; or even whether the lump sum agreements were intended to compensate the employee for periods of disability which overlapped with those for which the hearing decision compensated him.[9] Simply put, there was no evidence adduced from which the judge could have found a double recovery. Kszepka, supra. Under these

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(Dec. 17.) These findings, which track the language in Kszepka's Case, supra at 848, do not appear to be based on any evidence before the judge, but the error is harmless since the basis for our holding of no double recovery is not the evidence before the judge, but the lack of evidence.

The judge also found that all the settlement agreements were without liability. (Dec. 17.) There was no testimony or other evidence supporting this finding, but given the number of settlements and the dispute as to liability at hearing, there is no reason to doubt it.

[9] Other cases in which evidence was presented regarding the disability periods being compensated are inapposite. Cf., e.g., Mizrahi's Case, 320 Mass. 733 (1947)(employee not entitled to weekly compensation for same period of total incapacity for which he had already received weekly compensation based on a different injury).

circumstances, the judge did not err in declining to offset the compensation awarded at hearing by the amounts received in the lump sum agreements.

Third, the self-insurer argues that Dr. Christiani's opinion, adopted by the judge, does not support a finding of causal relationship between the employee's work for the employer and his disabling respiratory condition, because there was no evidence to support a finding the employee was exposed to injurious irritants when he last worked for the employer from June 1 to June 3, 1998. We disagree.

It is well-settled that only one of several successive insurers can be held liable for the same disability. Evans's Case, 299 Mass. 435, 436-437 (1938). The self-insurer acknowledges that, for purposes of determining a date of injury in an exposure case, and thus identifying the responsible insurer, we must look to the day of the last exposure bearing a causal relationship to incapacity. Tassone's Case, supra at 547. Often, the date of last exposure corresponds with the day the employee is no longer able to continue working due to the cumulative effect of such exposure. Squillante's Case, 389 Mass. 396, 397 (1983), citing L. Locke, Workmen's Compensation § 177, at 192-194 (2d ed. 1981); see De Filippo's Case, 284 Mass. 531, 533-534 (1933). The employee need only show that work at his last employer contributed, "even to the slightest extent," to his resultant disability for liability to attach to that insurer for the whole compensation. Rock's Case, 323 Mass. 428, 429 (1948).

Here, the judge credited the testimony of Dr. Christiani, who conducted published research on workplace exposures and long-term and acute respiratory responses in boilermakers. Notably, some of this research was done at the employer's Mystic Station site where the employee last worked. (Dec. 12, 15.) Dr. Christiani explained that cutting and welding inside the boilers generate intense metal fumes which can cause acute and chronic inflammation in the airways and airway damage. (Dep. 15-17.) He opined the employee's cumulative work exposure from 1970 through June 3, 1998 was a major cause of his disability. (Dep. 29, 36, 86.) He maintained this opinion on causation, even in light of the "minimal exposure" the employee had while working for the employer at the Mystic Station. (Dep. at 41-42.) Describing the work of a boilermaker as "very dirty," (Dep. at 45), Dr. Christiani stated:

> The type of work that takes place at these plants are [sic] pretty standard. The only thing that's different is the type of fuel they use to generate steam that turns the turbine. Otherwise the nature of the work is pretty similar. It may have legal implications. If you told me those are the only times he worked for [the employer], obviously you all have to work that out. But in terms of the cumulative exposures it doesn't change my opinion.

(Dep. at 42.) Crediting also the employee's testimony as to the "dirty, smoky and dusty" atmosphere in which he constantly worked, (Dec. 6), the judge found that "[the atmosphere] was likely consistent from job to job, varying in the nature of the ash depending upon the fuel used in the boiler." (Dec. 7.) The judge credited the employee's testimony that he left work on June 3, 1998 because of difficulty breathing.[10] (Dec. 8; Tr. 36-37.)

"[T]he judge's findings, including all rational inferences permitted by the evidence, must stand unless a different finding is required as a matter of law." Spearman v. Purity Supreme, 13 Mass. Workers' Comp. Rep. 109, 112-113 (1999). Given the unrebutted lay and medical testimony regarding the consistency of respiratory irritants in the atmosphere in which the employee worked, regardless of the particular plant to which he was assigned, the inference that he continued to be exposed to those irritants up through his last day of employment is entirely reasonable. Dr. Christiani's testimony that it was the "accumulative [sic] effect of all the exposure" through June 3, 1998, which was a major cause of his disability, is sufficient to support the judge's finding the employee thereby suffered a personal injury on the last date of his employment. (Dep. 41-42.) See Taylor v. Morton Hosp. & Med. Ctr., Inc., 16 Mass. Workers' Comp. Rep. 30, 36 (2002)(as employee continually exposed to and continued to react to offending chemicals

[10] The employee testified his duties as a boilermaker did not change between 1980 and 1998. Boilermakers "weld, burn, grind, break, punch tubes." (Tr. 22.) On the last two days he worked he was "doing boilermaker work," taking out a piece of tubing, replacing it and welding it back in. (Tr. 35-36.) There is nothing in his description of his work on those days from which the judge could have inferred he was not exposed to the same irritants as on all other workdays.

until April 1998, liability attaches to insurer on risk at that time). Thus, we affirm the judge's finding of liability against the self-insurer.

Accordingly, we affirm the decision. Pursuant to § 13A(6), the self-insurer shall pay employee's counsel a fee in the amount of $1,495.34.

So ordered.

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William A. McCarthy
Administrative Law Judge

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Mark D. Horan
Administrative Law Judge

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Catherine Watson Koziol
Administrative Law Judge

Filed: ***April 8, 2009***