**COMMONWEALTH OF MASSACHUSETTS**

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| **DEPARTMENT OF INDUSTRIAL ACCIDENTS** | **BOARD NO. 052719-97 055056-98** |
| Roy Thompson | Employee |
| Town of Barnstable | Employer |
| Town of Barnstable | Self-insurer |

**REVIEWING BOARD DECISION**
(Judges McCarthy, Carroll and Levine)

**APPEARANCES**
Richard N. Curtin, Esq., for the employee at hearing
Paul M. Moretti, Esq., for the employee on brief
Kathleen A. Moore-Kocet, Esq., for the self-insurer at hearing and on brief
Albert R. Mason, Esq., for the self-insurer on brief

**MCCARTHY, J.** The self-insurer appeals an administrative judge's decision that awarded the employee G. L. c. 152, § 34, temporary total incapacity benefits; G. L. c. 152, § 35, partial incapacity benefits; payment of § 30 medical expenses; attorneys fees, costs; and interest pursuant to § 50. On appeal the self-insurer claims that the judge erred in not applying the "normal wear and tear doctrine." See Zerofski's Case, 385 Mass. 590 (1982). We disagree and affirm the decision. G. L. c. 152, § 11C.

Roy Thompson, age fifty-eight at hearing, is married and the father of three adult children. (Dec. 4.) Diagnosed as a diabetic in the 1970's, he managed to keep the disease under control through medication, weight loss and professional training in how to care for himself. Id. The employee also has a history of back and knee problems, underwent a triple by-pass in 1987 and around 1990 developed circulatory or vascular problems. Id.

The employee started with the employer as a custodian in 1968 and became the head custodian at the West Barnstable Elementary School in 1972. He worked from 7:00 a.m. to 3:00 p.m. keeping the school clean, buffing floors, washing windows, emptying trash, receiving, lifting and distributing supplies, and setting up equipment. (Dec. 4.) Jim Rooney, an assistant to the employee, worked the evening shift during the school year, arriving at 2:00 p.m., and worked the day shift along with the employee during the summer months. (Dec. 4.)

During the 1996 December vacation week, the employee was scheduled to be off from work. At the request of the principal, Thompson interrupted his vacation for a day or so to assist Mr. Rooney in taking an inventory of school supplies. (Dec. 4.)

While taking the inventory, Thompson reached into a closet to pick up a large box of paper and instantly felt pain in his right low back. The incident was corroborated by Mr. Rooney who testified that he observed Thompson attempting to walk off the pain. (Dec. 4.) After finishing the inventory, the employee resumed vacation. When he returned to work, the employee's back pain had eased and he was able to perform his job duties. However, as time went on, his back pain increased. In response to the pain Mr. Thompson altered his gait. (Dec. 4-5.)

The employee sought treatment for his back with Dr. Edward Fink, an orthopedic surgeon with whom he had previously treated. Dr. Fink prescribed muscle relaxants and physical therapy. (Dec. 5.) Mr. Thompson kept on working and continued to adjust the way he walked in order to ease the pain. The employee noticed his back condition was getting worse and also found that a small blister had developed on his right great toe. Id. The school nurse, Ms. Carol Manfredi, saw Thompson as a courtesy and advised him to see a podiatrist. In October 1997, the employee saw Dr. Eugene Hill, a podiatrist. Dr. Hill prescribed antibiotics and dressing changes. Id. Despite these treatments, the employee

stopped working on October 25, 1997 and his right great toe was surgically removed. Id.

On September 19, 1998, Mr. Thompson returned to work in a full duty capacity wearing specially made shoes. However, he now limped not only because his back hurt but also because of the missing toe. Now, for the first time, the pain began to radiate into his buttocks and leg. Id. Eventually, the employee began to experience problems with his left foot and leg. In November, 1998, Mr. Thompson noticed a blister on his left great toe. Id. Antibiotics were administered, but despite this treatment the toe problem worsened and he had to leave work in February of 1999 for left great toe amputation. Id. Eventually, during a two-month hospital stay, all of the employee's toes were removed. Complications continued and by June 1999 his left foot and leg were amputated to the knee. He has not returned to work since February 3, 1999 and was retired at the time of hearing. (Dec. 6.)

The employee filed two separate claims for benefits, one for the December 26, 1996 back injury and a second for the February 3, 1999 left foot injury. (Dec. 2.) Both were opposed by the self-insurer. Following a conference on the back claim, an administrative judge filed an order directing payment of weekly § 34 benefits. Id. A later conference on the left foot injury resulted in a denial of benefits. Cross appeals were taken and the two claims were consolidated for hearing. Id.

Dr. James S. Broome, a board certified orthopedic surgeon, examined the employee pursuant to § 11A(2) on two occasions and due to complexity, the parties were allowed to introduce additional medical evidence. (Dec. 6.)[1]

The judge adopted the employee's medical experts Doctors O'Donnell and Feeney and found that the employee sustained an injury to his back during the

[1] In the first report the §11A physician provided a number of diagnoses including that of an amputated right toe; the judge did not find persuasive his opinion that there was no causal relationship between the employee's work, i.e., an injury to his back in December 1996, and the amputation of the great right toe. (Dec. 6.) The judge did find persuasive and credible the §11A physician's concession that, although the employee had a longstanding history of diabetes and had been working on his feet with the employer for many years, he had not developed either plantar, medial or dorsal blisters in his feet until after the incident at work in December 1996. Id.

week of December 26, 1996, which arose out of and in the course of his employment and that this injury set into motion a chain of events that combined with the employee's pre-existing diabetic condition and resulted in the amputation of the employee's right great toe, left foot and left leg. (Dec. 10.) Furthermore, the judge found that the employee's back injury and resultant pain led to an altered gait which resulted in a blister of the employee's right great toe that in turn resulted in an amputation of that toe. (Dec. 11.)

The judge specifically found that there was one identifiable incident, the injury to the employee's back, and that it remained a major cause of the employee's ongoing disability and need for treatment. (Dec. 11.) That one incident, on or about December 26, 1996, resulted in three distinct medical problems. The back injury with radiation to the lower extremities triggered the altered gait which in turn, led ultimately to the amputation of the right great toe and the amputation of the left foot and leg. Id.

The self-insurer presents only one argument on appeal. It argues that the administrative judge erred by not applying the "normal wear and tear doctrine," as articulated in Zerofski's Case, 385 Mass. 590 (1982). There was no error. It is well-established that the Act provides compensation to employees for "personal injur[ies] arising out of and in the course of . . . employment." Zerofski's Case, 385 Mass. 590, 592 (1982). "There are, however, certain limits on compensable injury, which have taken shape in a line of decisions denying recovery for '[b]odily wear and tear resulting from a long period of hard work.'" Id. at 593; Spalla's Case, 320 Mass. 416, 418 (1946). "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." Id. at 594-595 (emphasis added). The Zerofski court noted that "[o]ur decisions place injuries attributable to specific events at work within the business risks covered by the act, 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 administrative judge specifically found that all of the harm resulted from the lifting incident at work on or about December 26, 1996 and that the lifting incident remained a major cause of ongoing incapacity and the need for medical treatment. (Dec. at 11). Therefore, any inquiry as to whether there was an identifiable condition that was not common and necessary to all or a great many occupations or whether the employment exposed the employee to an unnatural risk greater than that experienced by the general public was not necessary.[2]

Accordingly, we affirm the decision of the hearing judge. Pursuant to § 13(A)(6), employee's counsel is awarded a fee of $1,285.63.

So ordered.

William A. McCarthy
Administrative Law Judge

Martine Carroll
Administrative Law Judge

Frederick E. Levine
Administrative Law Judge

Filed: August 6, 2002

[2] We note that prior to the back injury, the employee walked for years with his diabetic condition without difficulty or infection. Indeed, the blister was not in the normal weight bearing area of the foot. See O'Donnell dep. at 12. Setting aside the finding of a specific incident at work, the flaw in the self-insurer's argument is it overlooks that the blisters did not occur from mere walking as it argues. Instead, the blisters occurred from an altered gait that was necessitated to alleviate the radiating pain that the back injury produced.