COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 019094-96**

Timothy Spangler	Employee
Mello Construction	Employer
Great American Insurance	Insurer

REVIEWING BOARD DECISION
(Judges McCarthy, Wilson and Smith)

APPEARANCES
John P. LeGrand, Esq., for the employee
Peter P. Harney, Esq., for the insurer

MCCARTHY, J. The employee, Timothy Spangler, had worked in the construction trades his entire adult life as a carpenter, roofer, sider and mason. At the time of the hearing, he was 37 years old and had three dependent children. On September 4, 1991, he injured his back while working for Care Free Homes, Inc. He had surgery, followed by rehabilitation and physical therapy, and returned to work as a carpenter for a different employer in 1992. (Dec. 3.) On February 12, 1993, he settled his claim for this back injury by way of a lump sum agreement. This agreement was made and approved under the provisions of § 48 prior to the establishment of liability by acceptance or by decision, so the lump sum agreement redeemed the insurer's obligation for the payment of future medical expenses and vocational rehabilitation benefits as well as weekly benefits. (Dec. 7.)

Mr. Spangler continued to work full-time, without incident, medical attention or medications until 1996. (Dec. 4.) In late March of 1996, he began working for Mello Construction. On May 21, 1996, the employee was setting up staging using a hydraulic pump when the pump slipped. He "felt an immediate 'pop' in his back and immediate pain radiating down through his buttocks into his leg." (Dec. 4-5.) He reported the incident to his supervisor, and the following day went to see Dr. Schmidek, the

neurosurgeon who had performed his 1991 back surgery. Dr. Schmidek was of the opinion that the employee had suffered a recurrence of his prior disc herniation, and recommended immediate surgery. On June 26, 1996, the employee underwent a repair of a massive L5-S1 disc herniation. Due to complications, he later required further surgery. (Dec. 5.)

The employee filed a claim for compensation benefits which Mello Construction's insurer denied. Following a conference on October 16, 1996, an administrative judge awarded § 34 weekly temporary total incapacity benefits. The insurer appealed the conference order, and the case came on for a hearing *de novo* on July 16, 1997. At the hearing, the report of the impartial medical examiner, Dr. Ronald Birkenfeld, was entered into evidence. (Dec. 2.) Dr. Birkenfeld concluded that the employee was totally medically disabled and had not reached an end result. (Dec. 8.) He causally related the employee's ongoing disability to the 1991 incident, stating, "The patient had an excellent result with resolution of his pain and he returned to work, after convalescence, symptom free until May 21, 1996, at which time, while at work, he had an acute flare-up of his back and right leg pain. An MRI was done on 5/22/96 revealing a very large recurrent disc rupture at L5-S1 on the right." (Imp. Rep. 1.) Neither party sought to depose the impartial examiner or to submit additional medical evidence. (Dec. 10.)

In his hearing decision, the administrative judge found the employee's current incapacity to be causally related to the 1996 incident at work, rather than to the original 1991 incident. Acknowledging that the impartial examiner had causally related the disability to the 1991 incident, he wrote, "In the absence of a deposition of the impartial examiner which may have served to resolve and [sic] question as to causal relationship, I consider the event of May 21, 1996 to constitute an 'aggravation' of an underlying condition." (Dec. 9.) He continued, "I find that the employee worked, pain free, from sometime in 1992 to May 21, 1996, and thus the substantial worsening of the pain, after an incident, and while in the employ of Mello Construction, constitutes an 'aggravation' and, in fact, a compensable second injury." (Dec. 9-10.) In all other respects except causal relationship, the judge adopted the opinion of the impartial examiner. (Dec. 10.)

He awarded the employee weekly § 34 temporary total incapacity benefits from May 21, 1996 to date and continuing. (Dec. 11.)

The insurer on appeal says that the decision should be reversed because there is no medical opinion which supports the judge's finding that the employee's incapacity is causally related to the May 21, 1996 incident. The insurer argues that the administrative judge erroneously inserted his own opinion rather than adopting the uncontradicted prima facie opinion of the § 11A impartial physician. And this case, says the insurer, is one where the question of casual relationship is "beyond the common knowledge of the hearing judge so proof of causal relationship would depend upon expert medical testimony." Josi's Case, 324 Mass. 415, 417-418 (1949). (Insurer brief 4, 5.) The insurer's argument has merit. We reverse the decision and recommit the case for further proceedings consistent with this opinion.

The insurer does not dispute the judge's finding that the employee is temporarily and totally incapacitated. The core question is whether this incapacity is related to the September 4, 1991 incident, which has been closed by lump sum settlement, or whether it is related to the May 21, 1996 incident. The fact pattern here is akin to a "successive insurer" case. The successive insurer rule states that where several distinct personal injuries are received during successive periods of coverage of different insurers, the resulting incapacity is compensated by the "one that was the insurer at the time of the most recent injury that bore causal relation to the incapacity." Evans's Case, 299 Mass. 435, 436-437 (1938). "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." Zerofski's Case, 385 Mass. 590, 594-595 (1982). Because the 1991 injury was work-related, the employee is taken "as is," and the subsequent injury is compensable so long as it contributes "even to the slightest extent" to the employee's resulting incapacity. Rock's Case, 323 Mass. 428, 429 (1948). See Robles v. Riverside Mgmt., Inc., 10 Mass. Workers' Comp. Rep. 191, 195 (1996).

The ingredients which produced the reversible error here came together in the following manner. The § 11A physician examined the employee on December 16, 1996. His report, which constitutes the only medical evidence in this case, includes this history.

> Patient is a 37 year old construction worker with a chief complaint of low back and occasional mild right leg and buttock radiation, which he dates originally to a work related incident which took place when he was lifting on the job in September, 1991. He developed acute back and right leg pain at that time. An MRI was done on 10/28/91, which revealed a large disc herniation at L5-S1 on the right. This was operated on and removed by Dr. Henry Schmidek on 11/04/91.
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> The patient had an excellent result with resolution of his pain and he returned to work, after convalescence, symptom free until May 21, 1996, at which time, while at work, he had acute flare-up of his back and right leg pain. [emphasis added]. An MRI was done on 5/22/96, revealing a very large recurrent disc rupture at L5-S1 on the right.

(Imp. Rep. 1.)

Based on this history, his review of all pertinent medical records and his examination, the § 11A examiner concluded that the recurrent disc rupture was causally connected to the injury of September 1991. The doctor goes on in his report to state that, "The reason for this causal relationship is that the patient had abrupt onset of symptoms referable to the ruptured disc at L5- S1 right related to his work incident in September, 1991 and had no significant preexisting history of similar disorder." (Id. at 2.) Neither party moved to submit additional medical information or requested to depose the impartial examiner.

After the impartial medical report of examination was filed with the judge and provided to the parties, the claim proceeded to hearing. Following the hearing, the judge filed his decision. Adopting the employee's testimony the judge found that, "[o]n May 21, 1996, the employee was in the process of setting up staging using a hydraulic pump. The pump slipped during the procedure and the employee felt an immediate 'pop' in his back and immediate pain radiating down through his buttocks into his leg." (Dec. 4-5).

The hearing judge now had to confront the dicey problem of causal relationship. The judge had made a finding of a new incident on May 21, 1996. This incident triggered a return of back and right leg pain and took the employee out of the work force once again. The judge believed and found the employee's incapacity was causally related to this new incident.

It is evident that the judge recognized that the impartial opinion was of dubious value because it was grounded on a history critically different from the history found by the judge. In his decision the judge attempted to paper over the problem with the following finding:

> In the absence of a deposition of the impartial examiner which may have served to resolve and [sic] question as to causal relationship, I consider the event of May 21, 1996 to constitute an 'aggravation' of an underlying condition.

(Dec. 9.)

The judge's finding on causal relationship cannot stand. As we said above, where a medical issue is beyond the reach of a lay person's general knowledge, expert medical testimony is needed to establish a causal connection between incapacity and an industrial injury. Josi's Case, supra. The outcome in our case is governed by what we said in Wilkinson's Case, 11 Mass. Workers' Comp. Rep. 263 (1997). Because it is dispositive of the issue before us, what we said there is worth repeating.

> 'Certainly a decision by the administrative judge to foreclose further medical testimony where such testimony is necessary to present fairly the medical issues would represent grounds either for reversal or recommittal.' O'Brien's Case, 424 Mass. 16, 22-23 (1996). Neither party filed a motion to present additional medical evidence. However, faced with a claim he believed to be meritorious and with an inadequate impartial report, the judge should have exercised his authority to **sua sponte** require additional medical evidence. See § 11A(2). Such approach, in the circumstances of this case, would have provided each party with a fair opportunity 'to make out its position on the disputed issue.' O'Brien, supra. Because the judge instead attempted to plug the evidentiary hole with his own causation opinion, the decision cannot stand.

Id. at 264-265.

We reverse the decision and return the file to the senior judge for assignment for further proceedings consistent with this opinion. During the pendency of these further proceedings, payment of benefits shall continue pursuant to the terms of the conference order.

So ordered

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William A. McCarthy
Administrative Law Judge

Filed: June 28, 1999

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Sara Holmes Wilson
Administrative Law Judge

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Suzanne E.K. Smith
Administrative Law Judge