COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 052146-98**

Vivian Maynard	Employee
Burger King Corp.	Employer
Eastern Casualty Insurance Co.	Insurer
Star Insurance Co.	Insurer

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

APPEARANCES
Ronald D. Malloy, Esq., for the employee
John J. Davey, Esq., for Eastern Casualty Insurance Co.
Austin T. Powell, Esq., for Star Insurance Co.
Joyce E. Davis, Esq., for Star Insurance Co. on brief

MCCARTHY, J. Vivian Maynard, who was fifty-two years of age at the time of the hearing, received a high school education in her native Barbados. She also had secretarial school training but never worked in that capacity. Upon coming to the United States in 1971, she worked as a nurse's aide for various employers until 1990 when she suffered a work related back injury. Several years later she returned to work at the Essex Nursing Home and stayed there until it closed in 1995. Fearful that she would again hurt her back if she returned to work as a nurse's aide, she secured part-time employment in February 1997 with Burger King Corporation. Prior to her employment with Burger King, Ms. Maynard had never experienced any skin problems. (Dec. 4.)

At Burger King Ms. Maynard cooked hamburgers, made salads, washed dishes and cleaned the kitchen. Id. Several months into her employment Ms. Maynard's hands began to itch. She nevertheless continued to work but her skin condition deteriorated and eventually spread to her legs, back, face, ears and neck. (Dec. 5.) By November 1997 she had developed a serious rash on her hands and arms and was sent by Burger King's

manager to see Dr. Howard Goldberg. Doctor Goldberg noted that the "patient presented with a problem of highly pruridic eruption on the hands and arms which have been present since February but has gotten worse in recent weeks. Of note is that the patient started working at Burger King in February and the problem began after that. The patient works as a cook but has to wash her hands frequently and particularly uses a sanitizing solution on her hands which tends to cause considerable irritation." (Dec. 5.) Doctor Goldberg diagnosed adult atopic dermatitis aggravated by exposure to irritants at work. In late February 1998, Dr. Goldberg advised Ms. Maynard to stop work and look for employment where she was not exposed to wet materials. (Dec. 6.) Doctor Goldberg's advice to the contrary, Ms. Maynard continued to work until November 13, 1998. (Dec. 7.)

The employee filed claim against Star Insurance Company ("Star") who provided workers' compensation insurance for Burger King from August 1, 1997 through November of 1998. On the motion of Star, the administrative judge joined a second insurer, Eastern Casualty Insurance Company ("Eastern"). Eastern provided workers' compensation insurance from February 1997 through July 31, 1997. The judge's conference order directed Star to pay weekly incapacity benefits from November 13, 1998 based on the stipulated average weekly wage of $182.11 together with reasonable and related medical benefits under § 30 of the Act. The judge denied the claim against Eastern.

Following an appeal by Star, the case returned to the same administrative judge for a full evidentiary hearing de novo. Doctor Stefanos Kales conducted an impartial examination pursuant to § 11A of the Act. The hearing judge sua sponte opened the hearing for additional medical evidence for the period prior to the November 18, 1999 exam by the impartial physician. The reports of Ms. Maynard's treating physician, Dr. Howard S. Goldberg, were accepted into evidence and marked as Employee Exhibit No. 2. Neither insurer entered additional medical evidence.

Ultimately, the judge determined that the employee's dermatitis condition was totally incapacitating and causally related to her employment with Burger King. Turning

to the question of which insurer was responsible for payment of benefits, the judge found that the employee's "symptoms progressed as Ms. Maynard continued with her employment." (Dec. 10.) The judge went on to note that there was "no doubt that Ms. Maynard's symptoms began when Eastern Casualty Insurance Company was on the risk. It is also clear that her condition became more serious during the succeeding sixteen months, when Star Insurance Company was on the risk, until finally in November, 1998 she was unable to continue working." (Dec. 10.) The judge denied the claim against Eastern and ordered Star to pay c. 152 benefits. Star appeals.

Star argues that the decision is contrary to law, because the adopted medical opinion of the § 11A physician – that the employee's dermatitis was caused by frequent hand washing and using cleaning solutions at work – was legally defective due to the doctor's lack of knowledge as to the specific chemicals used by the employee. (Dep. 7, 15, 19, 33.) The insurer cites Patterson v. Liberty Mut., 48 Mass. App. Ct. 586 (2000), as authority for its argument. The employee in Patterson alleged that she had contracted asthma due to airborne substances at the workplace. Id. at 587. But for latex, she could not identify any substances which might have produced her asthma. The court reasoned:

> [The impartial physician] several times admitted that he could not identify and did not know what asthma-inducing allergen or toxin Patterson might have come in contact with at the hospital, other than latex. Even as to latex – which he did think "within a reasonable degree of medical certainty . . .was . . . more likely than not a problem" – he acknowledged that Patterson herself had testified that exposure to latex had produced a skin rash but not respiratory problems; that he had no actual evidence Patterson in fact had an allergy to latex which could produce a respiratory response . . . ; and that he had no information regarding the levels of latex in the hospital operating rooms . . . .
>
> Patterson, on whom the burden lay, proffered no testimony, expert or lay, and no admissible exhibits regarding air quality or the presence of any potentially asthma-inducing agents in any part of the hospital . . . .
>
> None of those sources [on which the impartial physician relied], however, provided an iota of expert or admissible evidence regarding the actual, as opposed to the hypothesized, presence of latex or any other asthma-causing substances in the hospital operating room or other hospital areas in which Patterson had worked. As such, it was merely an unsubstantiated opinion based on assumed facts not

> established by the admissible evidence and thus the product of surmise and conjecture as to the existence of any causal connection . . . .
>
> The judge thus rested his causation decision on an [impartial] report that was not only expressed in terms of mere possibility but was also unsupported by admissible evidence in the record or any other basis. As such, the [impartial] report was not entitled to any evidential weight . . . .

Id. at 594-597 (emphasis in original).

The medical evidence in the present case is altogether different from that which was deemed incompetent in Patterson. Here, it is undisputed that the employee used cleaning solutions at the workplace. (Dec. 4-5; Star's Brief, 3.) The impartial physician rendered his opinion, based on a reasonable degree of medical certainty, that the employee's dermatitis was causally connected to frequent hand washing and the use of cleaning solutions at work.

> [T]he patient had had no prior history of skin disease prior to her work at Burger King. Her job involved frequent hand washing and use of a cleaning and sanitizing solution. According to the medical records, she developed that skin condition after having frequent contact with those solutions. And the skin findings were most dramatic in a glove-like distribution where she would have had the most contact.
>
> . . .
>
> [B]ased on her history, based on her treating physician's report, based on the other IME from a board-certified dermatologist, this seemed to be the most likely scenario.

(Dep. 7-8.) The doctor's opinion is not based on the "hypothesized [] presence of . . . [dermatitis]-causing substances." Patterson, supra. It is based on the employee's actual use of cleaning solutions, and actual frequent hand washing. Therefore, Patterson does not apply here.

Moreover, the doctor's lack of knowledge regarding the specific chemicals in the products used by the employee at work is simply irrelevant to the issue of causal relationship under the circumstances of this case, on both factual and legal grounds. First, the doctor testified that the precise chemical makeup of the cleaning solutions was

only important in order to diagnose the type of industrially-induced dermatitis, not whether that dermatitis was causally related: "As I've testified already, I have not been provided with the exact chemical components of the solutions and soaps that she used, nor has she undergone patch testing, which is a way of identifying substances which produce a contact allergic dermatitis. *So, I cannot tell you whether it's an allergic dermatitis with an irritant component or purely irritant dermatitis.*" (Dep. 34, emphasis added.) The insurer takes the doctor's testimony out of context in pressing its argument.

Second, case law both in the workers' compensation and the tort context establishes that there is no necessity to prove the exact ingredients of – or even the nature of the contact with – a causative substance in order to prove a causally related dermatitis. In Rodrigues' Case, 296 Mass. 192 (1936), the court affirmed an administrative judge's finding of an industrially-based dermatitis caused by an inferred contact with "some chemical irritant." "The employee had the burden of proving such a causal relation but he was not required to exclude all other possible sources of his injury, [citations omitted], *or to show its precise cause*, Bean's Case, 227 Mass. 558, 560, Belanger's Case, 274 Mass. 371, 374, MacDonald's Case, 277 Mass. 418, 421." Rodrigues, supra at 195 (Emphasis added). "[T]aking into consideration the testimony in its aspects most favorable to the employee there was a basis for a reasonable man drawing a rational inference that some chemical irritant did come in contact with the employee while he was engaged in the duties of his last employment." Id. at 196. Likewise in tort, the court has not required that plaintiffs prove the specific irritating ingredient when alleging dermatitis causally related to defendants' products. In Flynn v. Bedell Co. of Massachusetts, 242 Mass. 450 (1922), the court upheld a verdict for the plaintiff for dermatological injuries "alleged to be due to poisonous or noxious substances, transmitted from the dyed fur collar on a coat purchased by her from the defendant in December 1917." Id at 452. The court concluded:

> It could be found that the plaintiff's skin was not delicate or sensitive, and that she had never had skin trouble before; that her neck and face were blackened on each of the days she wore the fur; and that a rash appeared on the day after the "crocking" occurred. And there was testimony by two physicians to the effect that

> this fur caused the trouble of which the plaintiff complained. Finally, it could not be ruled that such examination as she made of the garment ought to have revealed the "defect" of noxious substance in the dye.

Id. at 454. In Kurriss v. Conrad & Co., 312 Mass. 670 (1942), the court noted that "[t]he record discloses no direct evidence that the dress in question contained any poisonous dye, or anything else that would injure the skin . . . ." Id. at 674. However, the court continued:

> [T]here was evidence of a pink discoloration on the plaintiff's body where the dress had come in contact with it. When the plaintiff washed, there was the same shade pink on the wash cloth that appeared in the dress. It could have been found that the plaintiff had never before had any skin ailments, and that, apart from the dermatitis, her physical examination was negative. There was evidence that the dress in question was the cause of her 'contact' dermatitis. . . . We think the inference was warranted that the dress in question was the cause of the plaintiff's dermatitis.

Id. The court therefore overturned the directed verdict for the defendant. Id. at 683. In Graham v. Jordan Marsh Co., 319 Mass. 690 (1946), the court analyzed the plaintiff's prima facie case of products liability, in reversing a directed verdict for the defendant:

> The plaintiff's physician testified that her condition was an 'allergic dermatitis, some sensitivity to something that she came in contact with.' He testified that her condition was not due to diabetes for which he had been treating her. He did not testify that the application of the cream was the cause of the injury to the plaintiff's face. The defendant contends that the plaintiff has failed to prove that her injuries were due to the cream; that if she did, then it has not been shown that the cream was harmful to a normal person; and that whatever harm that resulted was due to the peculiar susceptibility of the plaintiff's skin. The plaintiff could testify to the sensations that she experienced after she applied the cream to her face and the change in the color of her face. She testified without objection that her face had been burned by the cream. [Citations omitted.] In any event, whatever may be the proper medical term for the plaintiff's injury, it is clear that the jury could find that it was caused by the application of the cream.

Id. at 692-693. Venerable as these cases are, none of them have been overruled or limited by subsequent jurisprudence or legislative action.

Bearing in mind that "the workers' compensation statute was enacted as a 'humanitarian measure' in response to strong public sentiment that the remedies afforded

by action of tort at common law did not provide adequate protection to workers who were the victims of industrial accidents," CNA Ins. Co. v. Sliski, 433 Mass. 491, 493 (2001), we discern no error in the judge's award of compensation benefits for the employee's industrially-induced dermatitis, and affirm the decision accordingly.

So ordered.

_____
William A. McCarthy
Administrative Law Judge

Filed: **November 21, 2001**

_____
Sara Holmes Wilson
Administrative Law Judge

_____
Susan Maze-Rothstein
Administrative Law Judge