COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS	**BOARD NO. 050421-00**
Wayne Houghton	Employee
Maaco Auto Paint, Inc.	Employer
Utica Mutual	Insurer

REVIEWING BOARD DECISION

(Judges Carroll, McCarthy and Maze-Rothstein)

APPEARANCES

Eugene J. Burkart, Esq., for the employee
Shawn F.X. Mullen Esq., for the insurer

CARROLL, J. The employee appeals from a decision in which an administrative judge denied and dismissed his claim for workers' compensation benefits, based on the judge's conclusion that the employee had not suffered the cumulative industrial back injury as claimed. The employee was not incapacitated by his back injury until his condition was worsened by a non-work-related lifting incident at home. Because the decision is contrary to law, we reverse. See G. L. c. 152, § 11C.

The employee, thirty years old at hearing, worked in autobody repair, and commenced employment with the employer in 1995. He worked full time, repairing between three and ten cars per week. The job required the employee to be on his feet for most of the day, to lift objects weighing between five and 100 pounds, and to use various power tools, such as sanders, impact guns and an air chisel. Some of the tools were large and heavy. (Dec. 4.)

The employee began noticing pain in his lower back in early 2000, while he was using a particular power sander for more than twenty minutes at a time. By the fall of that year, he would experience the pain every time he used that tool, with the pain lasting up to two hours. He then started to feel pain while performing other jobs, as well. Pain radiated down his right leg on a couple of occasions, and he felt pain while working on Monday and Tuesday, November 20 and 21, 2000. The employee did not report his

symptoms to the employer or seek medical treatment. The shop closed early on Wednesday, November 22, the day before Thanksgiving. (Dec. 5.)

On Thanksgiving Day, the employee lifted his baby, who was in her car seat, from the floor and felt severe pain in his lower back. The employee began having shooting pains in his right leg, was unable to stand up straight, and needed assistance walking. He stayed in bed the next day, and went to see his primary care physician, Dr. Christopher Jacobus. The employee related the history of lifting his baby to Dr. Jacobus, and also told him that he engaged in repetitive bending and straining of his back at work. He was unable to return to work, and treated conservatively, with the result that his right leg pain disappeared after about three months. (Dec. 6-7.)

The employee filed a claim for workers' compensation benefits, which the insurer resisted. (Dec. 2.) The administrative judge denied the claim at the § 10A conference, and the employee appealed. (Dec. 1.) The employee underwent an impartial medical examination, pursuant to G. L. c. 152, § 11A, with Dr. Denis Byrne on July 31, 2001. Dr Byrne concluded that the employee suffered from a herniated lumbar disc, and that the employee was partially disabled on a permanent basis. Dr. Byrne recommended that the employee avoid repetitive bending and twisting, and that he avoid using power tools such as the sander that had caused him pain in the past. Dr. Byrne opined that the employee's work activities, such as using the sander and working in awkward positions contributed significantly to his back condition, and that they were the predominant cause for the deterioration of the employee's lumbar disc. This deterioration then precipitated the acute episode of disc herniation that the employee experienced when he lifted his baby on Thanksgiving Day. (Dec. 9-10.)

The judge allowed the parties to introduce their own medical evidence for the "gap" period between the alleged industrial injury of November 22, 2000 (the last day of work) and the July 31, 2001 impartial medical examination. (Dec. 1.) The employee introduced the deposition of his treating physician, Dr. Jacobus. Dr. Jacobus opined that the employee's work activities increased his risk for developing the lesion that manifested on Thanksgiving Day, after the employee lifted his child. Dr. Jacobus stated:

"My opinion is that [the employee's working conditions] created a situation in which he was able to injure his back more easily and to become disabled." (Dec. 10-11; Jacobus Dep. 22-23.) Dr. Jacobus testified that the employee was totally disabled from November 24, 2000 until April 19, 2001, when the doctor wrote the employee a letter advising that he should avoid repetitive bending or twisting at the waist, repetitive squatting or kneeling, working from unprotected heights, occasional lifting of objects weighing more than 20 pounds or frequent lifting of objects weighing less than 20 pounds. (Dec. 11.)

The judge properly analyzed the claim using the approach set out in Twomey v. Greater Lawrence Visiting Nurses Ass'n, 5 Mass. Workers' Comp. Rep. 156 (1991). In that case, we concluded that where a non-work-related activity triggers the emergence of a prior work-related medical impairment, the ensuing incapacity is the responsibility of the worker's compensation insurer so long as the non-work-related activity was normal, reasonable and not negligent. Id. at 158. (Dec. 11.) The judge found that the activity of lifting the baby was reasonable and normal, and not negligently performed. The judge adopted the opinions of the Drs. Byrne and Jacobus, and then stated that the issue before him was "whether the employee suffered a work injury at any time prior to the incident that occurred on Thanksgiving Day." (Dec. 12.)

The judge cited as apposite authority Bemis v. Raytheon Corp., 15 Mass. Workers' Comp. Rep. 408, 412 (2001), a case in which the employee's non-disabling carpal tunnel syndrome (alleged to be work related) was aggravated to the point of incapacity by her subsequent pregnancy. (Dec. 12-13.) The judge then distinguished Bemis:

> First, unlike Bemis, the employee here had never sought treatment for his back complaints before the precipitating non-work related incident occurred. Second, in the Bemis case the employee had reported her symptoms to her supervisors on numerous occasions, and the employer had taken steps to accommodate her limitations. None of that occurred here. Third, in Bemis two doctors had opined that the employee's condition arose in 1994, and one of those doctors causally related the condition to her work. In the present case, while the doctors agree that the employee's back probably was weakened by repetitive trauma at work, their opinions do not, in my view, warrant a finding that an injury (even loosely defined) occurred prior to November 23, 2000. Therefore since no work injury

> preceded the non-work related Thanksgiving Day incident, I conclude that the non-work incident caused the employee's disabling condition.

(Dec. 13-14.) The judge therefore denied and dismissed the employee's claim. (Dec. 15.) Feeling that the case was close, the judge made additional findings on the extent of incapacity in the event that the his view of the case was not upheld. The judge concluded that the employee was totally incapacitated from November 24, 2000 until April 19, 2001, and assigned the employee a $300.00 weekly earning capacity thereafter. (Dec. 14.)

The employee argues that the judge's denial of his claim, based on the grounds that he did not suffer a work-related injury, was contrary to the undisputed medical evidence. We agree. We reverse the decision, and award benefits in accordance with the judge's incapacity findings. The judge's findings compel the conclusion that the employee suffered an industrial accident under the Act, and his reasons for distinguishing Bemis, supra, were inconsequential and, thus, erroneous.

There is no question that the employee established a cumulative work injury under the second prong of Zerofski's Case, 385 Mass. 590 (1982), by way of the adopted impartial and treating doctors' opinions on the contribution of his various work activities to his compromised back. (Dec. 9-11.) The judge's findings clearly acknowledged this, (Dec. 11-12), but he then focused on the subsequent non-work-related lifting event and misapplied the law in concluding that it was the sole legal cause of the employee's incapacity. (Dec. 12-14.)

In Bemis, we concluded that compensability for an employee's allegedly work-related carpal tunnel syndrome, aggravated by her pregnancy, was not barred by that non-work-related subsequent condition. Id. at 412-413. Bemis governs the present case. First, the crucial similarity between Bemis and the instant case is that both involve work-related medical conditions that were not disabling at any time prior to the non-work-related trigger events. The law is clear on this point:

> It must be borne in mind that the employee need not show that she was incapacitated . . . in order for her to establish a personal injury under the act and to be entitled to weekly benefits [at a later time]. Steutermann's Case, 323 Mass.

> 454, 457 (1948)("An injury may be found to have been sustained at a time before incapacity to work resulted"); Jordan v. Hilltop Steak House, 6 Mass. Workers' Comp. Rep. 25, 26 (1992). Furthermore, where the "a major" cause standard in § 1(7A) is not implicated, cf. Fairfield v. Communities United, 14 Mass. Workers' Comp. Rep. 79, 81-82 (2000)(no medical evidence employee's morbid obesity is a "disease"), any contribution of the work to the injury will suffice. Zerofski's Case, 385 Mass. 590, 592-593, 594-595 (1982)(but harm must arise from a "condition that is not common or necessary to all or a great many occupations").

Bemis, supra at 412.

The judge distinguished Bemis on the following grounds. (Dec. 13-14.) First, the judge noted that, unlike the employee in Bemis, the employee here did not seek treatment prior to the non-work-related trigger event. The distinction is insubstantial. While it is true that the employee in Bemis was treating for her carpal tunnel syndrome prior to her pregnancy, id. at 409, that fact in no way entered into the reasons for recommitting the case for further findings on whether an industrial injury had occurred. Id. at 411-413. Outside the realm of credibility, whether an employee seeks medical treatment is not pertinent to the legal question of the causal connection between work and disability. There is nothing in the judge's findings of fact to indicate that he discredited the employee's account of experiencing pain while performing certain duties at work. (Dec. 5.) Second, the judge noted the employee did not report his pain to the employer. If, as here, a judge does not discredit an employee's testimony regarding the onset of pain at work, then whether the employee reports the occurrence of pain contemporaneously to his employer does not determine whether an industrial injury occurred. And, the decision before us simply cannot be read to indicate the judge's rejection of the employee's account of his onset of pain at work throughout 2000.[1] Finally, the judge missed the mark in drawing a distinction between the medical evidence proffered in the two cases. He stated that, in Bemis, two doctors had opined that the employee's condition arose prior to her pregnancy, while in the present case "the doctors agree that the employee's

[1] We note, as well, the judge's considerate findings on the extent of incapacity in the alternative, "[a]cknowledging that this is a close case on the facts and on the law." (Dec. 14.) If there was any doubt as to the judge's crediting of the employee's account of his work-related pain, the inclusion of these incapacity findings puts that to rest.

back probably was weakened by repetitive trauma at work." (Dec. 13.) The finding amounts to a distinction without a difference, as the weakening of the back by years of repetitive trauma constitutes the "arising" of the employee's condition. The opinions of Dr. Byrne, the impartial physician, and Dr. Jacobus, the treating doctor (both of which the judge adopted, (Dec. 12)), were that the work-related weakening was the cause for the deterioration of his lumbar disc, which in turn precipitated (Dr. Byrne) or increased the risk of (Dr. Jacobus) the Thanksgiving Day disc herniation. (Dec. 10.) Certainly a deterioration of this magnitude qualifies, as a matter of law, as "whatever lesion or change in any part of the system [that] produces harm or pain or a lessened facility of the natural use of any bodily activity or capability." Burns's Case, 218 Mass. 8, 12 (1914). Thus, the judge's findings require a result opposite from the one he reached. There was a cumulative industrial injury to the employee's back in this case, as a matter of law.

Next, we must examine the import of the employee's subsequent non-work-related Thanksgiving Day incident, lifting his baby. The judge found it to be reasonable, normal, and not negligent activity. (Dec. 12.) As such, "the insurer liable for the original work injury may be responsible to pay the second period of disability if the second disability is the natural and proximate result of the original injury." (Dec. 11, citing Twomey, supra.) This portion of the judge's analysis is correct. However, the resulting incapacity picture can only be handled one way, which is not the way the judge handled it.

As discussed above, here there was an industrial injury, albeit one which had not yet become disabling at the time of the non-work event. As in Bemis, the insurer must bear the responsibility for the payment of all benefits for the employee's incapacity, to the extent that the medical disability subsequent to the non-work-related incident was causally connected to the work injury. Id. at 413-414. See Kashian v. Wang Labs., 11 Mass. Workers' Comp. Rep. 72, 74-75 (1997), aff'd Appeals Court No. 97-J-135 (1997)(citing Larson's treatise, board reasoned that exclusive issue in intervening cause cases is medical issue of causal connection between the work injury and the subsequent medical complications); Morgan v. Seaboard Prods., 14 Mass. Workers' Comp. Rep. 280, 283 (2000), aff'd Appeals Court No. 00-J-720 (2003)(applying Kashian supervening non-

work-related incident analysis in context of medical benefits).[2] The adopted medical evidence in the present case unequivocally supports the continuing causal connection between the work contribution and the employee's subsequent incapacity. Therefore, the insurer is liable for all benefits due, notwithstanding that the trigger event was non-work-related. See Roderick's Case, 342 Mass. 330, 334 (1961)("The supervening of a noncompensable injury . . . does not excuse the insurer from paying the compensation which would otherwise be payable for a compensable injury."); Blackwell v. Bostitch, 591 A.2d 384, 386 (R.I. 1991) (worsening of non-disabling industrial injury to point of total incapacity, due to at-home lifting incident, held fully compensable as work injury was substantial cause of incapacity); Brackett v. A.C. Lawrence Leather Co., 559 A.2d 776, 778 (Me. 1989) ("The work-related back injury remained a cause in [the

---

[2] It is well worth returning to the learned treatise quoted in Kashian:

> [O]nce the work-connected character of any injury, such as a back injury, has been established, the subsequent progression of that condition remains compensable so long as the worsening is not shown to have been produced by an independent nonindustrial cause . . . . [For example, a] claimant has suffered a compensable accident in 1966, injuring claimant's back. Several years later, this condition was triggered by a sneeze into a disc herniation, for which claimant required surgery. [The judge's] finding that the sneezing episode was the independent cause of claimant's disability, and the resultant denial of compensation, were held to be error, and benefits were awarded on appeal. This result is clearly correct. The presence of the sneezing incident should not obscure the true nature of the case, which is nothing more than that of a further medical complication flowing from a compensable injury. If the herniation had occurred while claimant was asleep in bed, its characterization as a mere sequel to the compensable injury would have seemed obvious. The case should be no different if the triggering event is some nonemployment exertion like raising a window or hanging up a suit, so long as it is clear that the real operative factor is the progression of the compensable injury, associated with an exertion that in itself would not be unreasonable in the circumstances. A different question is presented, of course, when the triggering activity is itself rash in the light of the claimant's knowledge of his or her condition.
>
> The issue in all of these cases is *exclusively* the medical issue of causal connection between the primary injury and the subsequent medical complications. By the same token, denials of compensation in this category have invariably been the result of a conclusion that the requisite medical causal connection did not exist.

Id. at 74, quoting 1A. Larson, The Law of Workmen's Compensation, § 13.11(a)(1996) (emphasis added)(footnotes omitted).

employee's] total incapacity, and the total incapacity is thus fully compensable . . . ."); Town of Hudson v. Wynott, 128 N.H. 478, 484-486, 522 A.2d 974, 977-978 (1986)(lifting non-work-related bucket of bait triggered surgery for back already compromised by lump-summed work injury; court held that medical evidence established treatment was "a direct and natural result" of work injury, and therefore supported award of medical benefits).

The decision is reversed, and benefits awarded consistent with the judge's findings on page 14 of his decision. We award an attorney's fee for the hearing under § 13 A(5) in the amount of $4,499.70.

So ordered.

____
Martine Carroll
Administrative Law Judge

____
William A. McCarthy
Administrative Law Judge

Filed: **December 19, 2003**

____
Susan Maze-Rothstein
Administrative Law Judge