COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS	**BOARD NO. 035380-10 037043-12**
Kenneth Linton	Employee
G.P.C. International/Chartpak, Inc.	Employer
Ins. Co. of the State of Pennsylvania	Insurer
Federal Insurance Co.	Insurer

REVIEWING BOARD DECISION
(Judges Koziol, Fabricant and Calliotte)

The case was heard by Administrative Judge Rose.

APPEARANCES
Michael P. Cardaropoli, Esq., for the employee
Joseph F. Culgin, Esq., for insurer, Ins. Co. of the State of PA., at hearing
Thomas G. Bradley, Esq., for the insurer, Ins. Co. of the State of PA., on appeal
Joseph R. Conte, Esq., for the insurer, Federal Ins. Co., at hearing
Christopher L. Maclachlan, Esq., for the insurer, Federal Ins. Co., on appeal

KOZIOL, J. Federal Insurance Company (Federal), the second insurer in this two-insurer case, appeals from a decision ordering it to pay the employee §§ 13 and 30 medical benefits for a repetitive injury to his right shoulder. (Dec. 5.) Federal argues the judge erred by transforming the employee's claim, without notice, from one alleging an injury caused by a single event in 2012, into a claim of repetitive and ongoing aggravation of the employee's underlying shoulder condition. Federal also argues the judge erred by finding it liable for the employee's injury under the successive insurer rule. See Trombetta's Case, 1 Mass. App. Ct. 102, 104 (1973)(Successive insurer rule provides "that where there is a series of compensable injuries, the insurer covering the risk at the time of the most recent injury bearing a causal relation to the disability must pay the entire compensation"). We affirm the judge's decision.

The employee, a single, fifty-four year old man, is a long-term employee of the employer. (Dec. 3.) On April 9, 1996, the employee began working for the employer as a paper processor/machine operator in its California plant. (Dec. 3.) In the early 2000's he transferred to the employer's Leeds, Massachusetts plant, where he has continued to perform the same job duties. (Dec. 3.)

The employee's work is fast-paced, repetitive and heavy, requiring frequent lifting of seventy-five to one hundred and twenty-three pounds. (Dec. 3.) "In 2003/2004," the employee "first began having pain and problems with his right arm," which required him to seek treatment "with a Dr. Fallon at the Hampshire Orthopedics." (Dec. 3.) The employee continued to work full duty while he received approximately fifteen sessions of physical therapy, which were paid for by his health insurance. (Dec. 3.)

In 2010, the employee "went back to the doctor when his shoulder 'messed up' after a particularly difficult and repetitive work day."[1] (Dec. 4.) At that time, the employee's condition prevented him from working for approximately two months. He received weekly workers' compensation benefits from the Insurance Company of the State of Pennsylvania (first insurer), during this absence from work. The first insurer also paid for his medical expenses, including an additional course of physical therapy and the purchase of "a TENS unit which the employee continues to use." (Dec. 4.) Thereafter, the employee returned to full-duty work.

While working, "[o]n or about September 11, 2012," a seventy-five pound box "fell on the employee's right shoulder and knocked him to the ground." (Dec. 4.) The judge found the employee "began active medical treatment again for more intense pain than he had experienced previously," and that the employee "felt his shoulder was worse after that incident." (Dec. 4.) After the September 11, 2012 injury, Federal paid for the employee to receive approximately four weeks of physical therapy. (Tr. 23.)

[1] The date of injury listed in the board file is August 23, 2010. Rizzo v. M.B.T.A., 16 Mass. Workers' Comp. Rep. 160, 161 n.3 (2002)(judicial notice taken of board file).

The employee testified that in 2013, he began to receive cortisone shots in his right shoulder which helped to reduce his pain. (Tr. 24, 59.) In August of 2014, he filed the present claim against both insurers seeking payment of medical benefits, specifically listing "injections" as the requested treatment. Rizzo, supra. The employee's claims were the subject of a § 10A conference before a different judge,[2] who ordered Federal to pay for the treatment. Federal appealed, and the employee was examined, pursuant to § 11A(2), by orthopedic surgeon Dr. Kuhrt Wieneke, Jr. In his report, Dr. Wieneke opined, "[t]he single reported work injury, of September 11, 2012, appears, in my opinion, not to have impacted his underlying diagnoses or contributed specifically, in any way, to his impairment."[3] (Ex. 5.) The employee was the sole lay witness at hearing. Following the hearing, the first insurer took Dr. Wieneke's deposition.

The judge found that after the September 11, 2012 injury, the employee "began active medical treatment again for more intense pain than he had experienced previously. He credibly felt his shoulder was worse after the incident on September 11, 2012." (Dec. 4.) The judge also found that since the September 11, 2012, injury, the employee "has had several flare-ups of his shoulder pain" and is "always agitating it" at work. (Dec. 4.) He further found the employee "continues to work with pain in

---

[2] The board file indicates the employee's Form 110 claims against both insurers also listed "surgery" as a requested medical expense and § 34 benefits "from date of surgery to date and continuing." Rizzo, supra. By the time of the § 10A conference, the conference Form 140 shows that the employee sought only payment of §§ 13 and 30 medical benefits "for injections." Id.

[3] Dr. Wieneke opined:

> [the employee's] right shoulder pain complaints date definitely from 2010, and probably as far back as 2002. There was one work aggravation which occurred in September 2012, which is documented. There are no other specific reported injuries at work, either before or since. The episode of September 11, 2012 appears not to have, in any way, changed the underlying course of his right shoulder pain, with the above diagnoses.

(Ex. 5.)

his right major shoulder," and credited the employee's testimony that "his continued work aggravates his shoulder condition on a daily basis." (Dec. 4.) He adopted the opinions of Dr. Wieneke that the employee's "AC arthropathy, right shoulder; degenerative instrasubstance supra spinatus tear, right shoulder; and, documented bicipital tendonitis; right shoulder," are "causally related to his continued heavy lifting at work as a major but not necessarily predominant cause for his need for treatment." (Dec. 4.) He also adopted Dr. Wieneke's opinion that the "employee's shoulder condition is a 'continuum' over a long period of time while working, and that any aggravation from the September 11, 2012 specific incident has passed (Deposition Dr. Wieneke, pp. 11, 13, 15)." (Dec. 4.) Lastly, the judge adopted Dr. Wieneke's opinion that "[i]njections up to three times a years [sic] into the affected shoulder if [sic] effective and reasonable treatment, related to his nineteen years working for Chartpak (Id. p. 20)." (Dec. 4.)

Under the heading "Legal Analysis," the judge made the following findings and rulings:

> I find that the employee has suffered a 'continuum' injury to his right major shoulder arising out of and in the course of his employment for Chartpak Inc. I find credible the employee's subjective complaints that he continues to work full duty at an extremely physically demanding position and that he daily aggravates his condition. I have adopted the opinions of the 11A examiner as set forth above.
>
> Federal Insurance Co. indicates they remain the insurer for the employer, and under these unique circumstances the employee is suffering a major but not necessarily predominant aggravation every day he continues to work, making it impossible to clearly identify a specific date of accident. For housekeeping/record keeping purposes only, acknowledging it would be logistically impractical to require the employee to constantly file a new claim every day, the order for medical treatment is filed under DIA number 037043-12. The order for prospective medical treatment is confined to the continuing coverage by Federal Insurance Co., and in the future should that change, the employee will have to re-file.

(Dec. 5.)

Federal's appeal argues the judge erred at the hearing by inquiring into the scope of the insurers' coverage without notifying the parties he intended to use the information to convert the claim, sua sponte, to one alleging a continuing injury claim under the successive insurer rule. It also argues that because it was unaware the judge was considering application of the successive insurer rule, it was deprived of an opportunity to put forth evidence on this issue. Both allegations are belied by the record.

First, the record shows that questioning by counsel for the employee and the first insurer elicited testimony from the employee implicating the application of the successive insurer rule. The employee testified that, in regard to his injury of August 23, 2010, no specific incident happened; rather, his right "shoulder messed up" "from working repetitiously and from lifting, from working very hard, and I just had to go get it checked out." (Tr. 16, 28-29.) In light of this testimony; Dr. Wieneke's report limiting the scope of the impact of the September 2012 incident; and, the employee's additional testimony regarding his ongoing problems and his continued work performing the same job tasks, the judge was well within his statutory authority to inquire as to the parties' insurance coverage.[4] G. L. c. 152, § 11 ("At the hearing the member shall make such inquires and investigations as he deems necessary. . . ."); See Holden v. Town of Wilmington, 25 Mass. Workers' Comp. Rep. 165 (2011)(proper parties to proceeding must be given notice and opportunity to be heard).

[4] After hearing testimony elicited on cross-examination by counsel for the first insurer regarding the employee's daily aggravation of his shoulder condition, the judge asked:

> The Judge: Oh, before we go on, what's the coverage period for both of you folks?
> Mr. Culgin: My coverage period, your Honor, is from 12/31/09 through 12/31/10.
> The Judge: And for Attorney Conte?
> Mr. Conte: 12/31/11 to the present.
> The Judge: To the present. All right. Thank you. Go Ahead.
> Mr. Conte: Thank you, your Honor.

(Tr. 31-33.)

More importantly, counsel for Federal never objected to the judge's inquiry nor did he question, in any way, why the judge was inquiring about coverage. In fact, after that inquiry, Federal's counsel asked the employee:

> Q: Now since you had that incident on September 11, 2012, have you had additional flare ups with your shoulder?
> A: Yes.
> Q: And how often does that happen on a weekly basis?
> A: Quite frequently. Quite frequently because I'm not able to get no therapy, no nothing. I'm on my own.
> Q: Okay. And would it be fair to say that the therapy essentially controls the pain and allows you to work?
> A: Along with the shots, yeah. But if I don't get it, I just do the best I can with it you know.

(Tr. 54-55.) The judge then asked further questions about the employee's pain, and again, Federal failed to object.

> The Judge: And is it the same type of pain you've had since 2002-2003 except the intensity?
> The Witness: Yes, absolutely, yes.
> The Judge: All right. And since this latest accident September 11, 2012, has your pain returned to what we would call your base level or is it still worse?
> The Witness: It's flared up.
> The Judge: What do you mean by that?
> The Witness: It's worse.
> The Judge: It's worse temporarily or permanently?
> The Witness: I just know that when I get the shots it helps it. Without no shots it just is more, it enhances it. Am I making sense?
> The Judge: Right. But without the shots, would you say your pain is better, worse, or the same since 2010?
> The Witness: Worse.
> The Judge: In what way?
> The Witness: Because, your Honor, I have no way to stop my pain at all, none. And when I work I'm always agitating it, but when I get shots I get relief in that.

(Tr. 58-60.) Finally, at the close of the lay testimony, the first insurer's counsel asked the judge the following question about amending its hearing memorandum, again, without objection by Federal:

> Mr. Culgin: And your Honor, I didn't specifically list successive insurer, if your Honor thinks I need to specifically state it, I'd like to add it.
> The Judge: I don't think you need to either quite frankly that's the law.
> Mr. Culgin: Okay.

(Tr. 63.)

At his deposition, Dr. Wieneke answered additional questions posed by opposing counsel, again without objection, implicating an ongoing or continuous injury appropriate for application of the successive insurer rule. (Dep. 10-11, 19-20.) The issue was clearly tried by consent, and the judge committed no error.

We also see no error in the judge's application of the successive insurer rule to require Federal to pay for the employee's treatment in this case. "[T]he determination of whether an employee has suffered an aggravation of a prior injury or a recurrence of symptoms is essentially a question of fact, and the judge's findings, including all rational inferences permitted by the evidence, must stand unless a different finding is required as a matter of law." Miranda v. Chadwick's of Boston, Ltd., 17 Mass. Workers' Comp. Rep. 644, 648 (2003), citing Costa's Case, 333 Mass. 286, 288 (1955). The judge's findings are supported by the medical evidence and do not require reversal. Accordingly, we affirm the judge's decision. Federal shall pay the employee's counsel a fee pursuant to G. L. c. 152, § 13A(6), in the amount of $1,613.55.

So ordered.

_____
Catherine Watson Koziol
Administrative Law Judge

_____
Bernard W. Fabricant
Administrative Law Judge

_____
Carol Calliotte
Administrative Law Judge

Filed: **November 7, 2016**