COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS	**BOARD NOS.**	**029985-07** **003410-14** **003411-14**
Mary Wambugu	Employee	
Radius Healthcare Ctr. at Millbury Atlantic Charter Ins. Co.	Employer Insurer	
Christopher House AIM Mutual Ins. Co.	Employer Insurer	
Senior Comfort Service National Union Fire Ins.	Employer Insurer	

REVIEWING BOARD DECISION
(Judges Koziol, Harpin and Calliotte)

The case was heard by Administrative Judge Benoit.

APPEARANCES
John A. Smillie, Esq., for the employee
Anne G. Clark, Esq., for Atlantic Charter Ins. Co.
Robert J. Riccio, Esq., for AIM Mutual Ins. Co. at hearing
Holly B. Anderson, Esq., for AIM Mutual Ins. Co. on appeal
Joseph F. Culgin, Esq., for National Union Fire Ins.[1]

KOZIOL, J. In this multiple insurer case, the first insurer on the risk, Atlantic Charter Insurance Company (Atlantic Charter), and the employee cross-appeal from a decision that found Atlantic Charter responsible to pay for the employee's medical treatment to her right shoulder as a result of a work-related injury of October 10, 2007. (Dec. 17.) Both Atlantic Charter and the employee argue the judge erred in failing to find AIM Mutual Insurance Company (AIM), the insurer for the employee's subsequent employer, Christopher House, responsible for paying compensation relating to her right shoulder. AIM disagrees and asserts it is no longer part of this litigation because no

[1] National Union Fire Insurance did not file a brief on appeal.

appeal to the reviewing board was filed specifically against it. We reverse and recommit the matter for further findings of fact.

The employee is a right-hand dominant, certified nursing assistant (CNA). It is undisputed that on October 10, 2007, while working as a CNA at Radius Healthcare Center at Millbury, she fell down a flight of stairs, injuring her left shoulder and right knee. (Dec. 6.) As a result of that injury, Atlantic Charter paid her weekly total incapacity benefits pursuant to § 34. (Dec. 6.) In February of 2008, while the employee was receiving treatment for her left shoulder injury from orthopedic surgeon, Dr. Gary Peters, she complained of pain in her right shoulder and reported she also injured her right shoulder when she fell at work. (Dec. 12.) On March 6, 2008, Atlantic Charter stopped paying the employee weekly incapacity benefits and medical benefits. (Dec. 7.) Thereafter, she was unemployed until she secured a job as a CNA at Christopher House, where she worked from May 24, 2008 through January 10, 2011. She then left work in order to have left shoulder surgery. (Dec. 8.) While she was employed at Christopher House, the employee also performed some private duty work through Senior Comfort Service, "which consisted of being with an elderly gentleman who was quite independent and required very little of her." (Dec. 7, n.1.) The assignment through Senior Comfort Service ended before January of 2011, and the only other assignment she had lasted one day because she told the employer "the job was beyond her capabilities." Id.

The employee had surgery on her left shoulder on January 13, 2011, but she "did not receive much benefit from the surgery which took place some 39-months after her October 10, 2007, industrial injury." (Dec. 8.) In March of 2011, the employee filed a claim against Atlantic Charter, seeking payment of medical benefits; partial incapacity benefits from May of 2008 until January of 2011; and, following her surgery, total incapacity benefits. Rizzo v. M.B.T.A., 16 Mass. Workers' Comp. Rep. 160, 161, n.3 (2002)(judicial notice taken of board file). The judge's July 13, 2011, § 10A conference order denied the claim. Id. The employee appealed and on September 24, 2011, she was examined, pursuant to § 11A(2), by orthopedic surgeon Dr. Charles Kenny. (Dec. 8.)

On February 9, 2012, the judge allowed the employee's motion to join for hearing, claims for permanent and total incapacity benefits under § 34A, and medical treatment for her right shoulder. However, no hearing was held. Rizzo, supra. Instead, on December 17, 2012, the judge approved a lump sum settlement agreement between the employee and Atlantic Charter. (Dec. 5.) The settlement agreement states that the case settled with liability established for the injury of October 10, 2007, and the following accepted diagnoses: "left shoulder subscapularis tendon tear with retraction; supraspinatus tendon and biceps tendon tear; recovered sprain/strain right shoulder."[2] (Dec. 2; Ex. 9.)

In September of 2013, the employee filed the current claim against Atlantic Charter, seeking payment of medical benefits for treatment of her left and right shoulders. (Dec. 2.) Rizzo, supra. Later, on February 21, 2014, the employee filed separate claims against AIM, the insurer for Christopher House, and National Union Fire Insurance Company (National Union Fire), the insurer for Senior Comfort Service, seeking §§ 13 and 30 medical benefits for medical treatment related to her right shoulder, and § 34A benefits from the date of her left shoulder surgery, January 13, 2011, and continuing. (Dec. 2-3.) Rizzo, supra. The claim against Atlantic Charter proceeded to conference in February of 2014, and the judge's March 5, 2014, order required Atlantic Charter to pay, at board rates, for treatment of the employee's left shoulder, but denied the employee's claim for treatment of her right shoulder. (Dec. 5.) On July 28, 2014, a conference was held on the AIM and National Union Fire claims; by § 10A orders dated August 1, 2014, the judge denied both claims. (Dec. 5.) The employee timely appealed all three orders. The matters were then joined, and the employee was examined a second time, by the § 11A, impartial medical examiner, Dr. Charles Kenny, who issued a report on November 15, 2014. (Ex. 8.)

[2] The lump sum narrative states: "[l]iability is being accepted for a recovered sprain/strain of her right shoulder that the insurer alleges occurred due to overuse, rather than direct trauma. The employee will file claims against subsequent employers for the further aggravation to her right shoulder." Rizzo, supra.

At the hearing, the judge allowed the parties to submit additional medical evidence, because he determined that the issues were medically complex and that Dr. Kenny's report was inadequate. (Dec. 5.) The parties took Dr. Kenny's deposition and, with the exception of National Union Fire, they submitted additional medical evidence. (Dec. 5; Exs.14-16.)

Although the judge's decision recites portions of the records of the other medical providers who treated and examined the employee, the judge expressly accepted and adopted only certain statements of fact and opinions of Dr. Kenny. (Dec. 6-14.) The judge concluded that the employee did not sustain an injury, or an aggravation of an industrial injury, while employed by Christopher House or by Senior Comfort Services, and he denied those claims. (Dec. 16.) He also concluded that the "right shoulder sprain/strain, as that term is used in the lump sum settlement agreement [between the employee and Atlantic Charter] to describe resolved injuries, does not include an impingement syndrome in that shoulder." (Dec. 17.) He further concluded the employee had proven that "the industrial injury of October 10, 2007, through her need to overuse her right upper extremity because of the continued weakness of her left upper extremity, is the cause of the impingement syndrome and other medical conditions that she has experienced in her right shoulder." (Dec. 17.) He ordered Atlantic Charter to pay for the employee's medical treatment for her left and right shoulder conditions. (Dec. 17.)

On appeal, both the employee and Atlantic Charter argue the judge committed several errors by failing to assign responsibility for payment of the right shoulder medical treatment to the successive insurer, AIM. In response to these arguments, AIM raises a threshold issue: it asserts that the judge's decision must be upheld because no appeal was filed challenging the denial of the employee's claim against AIM. AIM argues that the employee filed three separate appeals from the conference orders denying her claims; however, the appeals from the hearing decision by the employee and Atlantic Charter bear only the board number assigned to the Atlantic Charter claim. (AIM br. 9) AIM argues that without a direct appeal of the denial of the employee's claim against it, the

reviewing board lacks any authority to review the judge's decision denying the employee's claim against AIM. (AIM br. 9-10.) We disagree.

The matters were not joined for the conference proceedings. The Atlantic Charter proceeding was conducted separately from, and months before, the proceeding against AIM, thereby necessitating individual appeals. At the hearing stage, all of the employee's claims were joined as claims against successive insurers. The case was tried as one proceeding and a single decision issued. "Where there are several successive insurers, the one chargeable with the whole compensation is the one covering the risk at the time of the most recent injury that bears a causal relation to the disability." Sylvia's Case, 313 Mass. 313, 314 (1943). Under those circumstances, the longstanding rule has been that an appeal by one is an appeal against all. Id., citing, Borstel's Case, 307 Mass. 24, 27 (1940)(In a successive insurer scenario, "[t]he claim for review by the earlier insurer brought both insurers before the reviewing board"). AIM points to nothing unusual in this case that would cause us to deviate from applying that rule, and we decline to do so.

Both the employee and Atlantic Charter argue the judge erred by failing to apply the successive insurer rule. They assert the judge's decision is internally inconsistent and that he erred by ignoring adopted medical evidence and the employee's lay testimony, and by substituting his own causation opinions for those of Dr. Kenny. We agree that so much of the order against Atlantic Charter as requires it to pay for treatment to the employee's right shoulder must be reversed, and the matter recommitted for further findings of fact.[3]

[3] The claim against Atlantic Charter was for payment of medical treatment to the employee's left and right shoulders. (Dec. 2.) Atlantic Charter did not appeal from the March 5, 2014, conference order requiring it to pay for medical treatment to the employee's left shoulder, and denying the portion of the claim that sought payment for medical treatment to the employee's right shoulder. Insofar as the hearing decision requires Atlantic Charter to pay for medical treatment to the employee's left shoulder, we affirm that order, which is unchallenged on appeal. Moreover, by failing to appeal from the conference order, Atlantic Charter cannot obtain a better result at hearing than it did at the conference. McGahee v. Milton Bradley, 25 Mass. Workers'

The only medical opinions adopted by the judge are those of Dr. Kenny. (Dec. 8-14.) While the judge adopted many of Dr. Kenny's statements and opinions, (Dec. 8-9, 11-14), we focus only on those which are most relevant to our discussion.

From the September 24, 2011, report of his first examination of the employee, the judge adopted the following statements of Dr. Kenny:

- The employee reported to Dr. Kenny that while she worked as a CNA at Christopher House he [sic] was able to perform her work without using her left arm.

- She has full range of motion in the right shoulder, although she does have some pain with internal and external rotation and I palpated a click in the anterior subacromial area on impingement testing.

- The work incident of 10/10/2007 is the proximate and logical cause of the employee's complaints, and no other cause can be identified through review of the history or physical examination.

(Dec. 8-9.) The judge adopted Dr. Kenny's diagnoses of a left shoulder "subscapularis tendon tear with retraction, now atrophied; supraspinatus tendon and biceps tendon tears;" and "failed surgical repair," along with a right shoulder "impingement syndrome" that are causally related to the October 10, 2007, work-related accident. (Dec. 8-9.) He also adopted Dr. Kenny's opinion that the employee was "permanently totally disabled from her occupation." (Dec. 9.)

From Dr. Kenny's November 15, 2014, report, the judge adopted the doctor's diagnoses concerning the employee's left and right shoulders. These diagnoses were the same as those appearing in his September 24, 2011, report except for the added diagnosis of rotator cuff tear of the right shoulder. (Dec. 11.) The judge also adopted Dr. Kenny's opinion that "a causal relationship exists between the work related incident of 10/10/2007 and the aforementioned diagnoses." (Dec. 11.) He further adopted Dr. Kenny's opinion that:

Comp. Rep. 329, 330 (2011); Vallieres v. Charles Smith Steel, Inc., 23 Mass. Workers' Comp. Rep. 415, 418-419 (2009)(failure to appeal from conference order deemed acceptance of order).

> A major cause of the employee's right shoulder condition is the inability to use the left shoulder for activities of daily living and for work activities after the incident of 10/10/2007, except for those activities at the Senior Comfort Services. Surgery and other therapeutic and diagnostic procedures to treat the left and right shoulder pathology were and would be reasonable, necessary, and causally related to the work-related incident of 10/10/2007.

(Dec. 11; emphasis in original.)

The judge also adopted Dr. Kenny's opinions given during his March 2, 2015, deposition. Specifically, the judge adopted Dr. Kenny's opinions that although the employee had not worked in the interim, her right shoulder condition worsened between his September 24, 2011, and November 15, 2014, examinations and that "having to rely solely on her right arm while recovering from her left shoulder surgery could have caused [the employee's] right shoulder to get worse." (Dec. 12.) The judge also adopted the doctor's opinions that:

- In September of 2011, after knowing about the employee's having worked for a subsequent employer as a CNA, Dr. Kenny had opined that the October 10, 2007 work injury was the only cause of Ms. Wambugu's left and right shoulder diagnoses.

- The employee's injury to her right shoulder is a consequence of the October 10, 2007 industrial injury to her left shoulder.

- Dr. Kenny affirmed, within a reasonable degree of medical certainty, that he believed that the cause of her right shoulder trouble was related to overuse of, rather than to a specific injury to, her right shoulder.

- In February 2008 – approximately three months before she started working for Christopher House on May 24, 2008 – the employee had told Dr. Peters that she had injured her right shoulder at the time of her October, 2007 fall.

- Impingement syndrome is a diagnosis by a physical examination in the absence of diagnostic studies. In other words, it is the 1st stage in the deterioration of the rotator cuff of the shoulder. Since Dr. Kenny had no diagnostic studies to refer to in 2011, he diagnosed impingement syndrome.

- Following the September 2011 § 11A examination by Dr. Kenny, x-rays of the right shoulder on November 3, 2011 revealed degenerative changes of the glenohumeral joint. Dr. Kenny assumes that these occurred as [sic] result [sic] the injury of October 10, 2007, that these were degenerative changes that were subsequent to an **abnormal use pattern in her right shoulder**, and that she never had any symptoms or any need for treatment before the industrial injury of October 10, 2007.

- The degenerative changes resulted [sic] were from abnormal use, which was a consequence of the October 10, 2007 industrial injury.

- **Degenerative changes from abnormal use will develop pretty quickly after the abnormal use pattern, depending on the kind of abnormal use. For example, pushing and pulling patients and doing things like that abnormally with her one arm, I would say within 3 months or so the changes would be apparent.**

- At the time of the September 2011 examination, the employee had been using her right arm primarily for everything, both at work and out of work.

(Dec. 12-13; emphasis supplied.)

Foreshadowing his ultimate conclusion, the judge then expressed his disapproval of the successive insurer rule: "the standard to be used in situations of successive insurers is intrinsically unfair: all that is required is that an industrial accident contributed to *a slight degree* to the injured workers' disability or need for treatment in order for the second insurer to bear the full brunt of an award." (Dec. 14; emphasis original.) The judge credited the employee's testimony that she never injured her right shoulder at Christopher House, as well as her testimony that "her shoulder felt worse as time went on during the period that she worked at Christopher House."[4] (Dec. 15.) The judge correctly observed:

[4] The employee described lifting patients at Christopher House (Tr. 41-49) and testified that her right shoulder worsened while she worked there and that lifting got progressively more difficult there as time went on. (Tr. 63, 64-65, 92, 104, 106.)

> The employee is a layperson, and thus can only testify of changes in her symptoms. The actual diagnosis of her condition lies within the bailiwick of medical professionals. It is altogether possible that a person can have a worsening of symptoms without a worsening of the medical condition. *Carroll* v. *State Street Bank & Trust*, 19 Mass. Workers' Comp. Rep. 306 (2005).

(Dec. 15; emphasis in original.) The judge then performed the following analysis:

> Unfortunately, the employee did not have the opportunity to undergo diagnostic testing of her right shoulder at any time before she left work for good in January of 2011. Dr. Kenny explained that the dearth of objective diagnostic testing is the reason that in his initial § 11A report in September 2011 he could only definitively diagnose an impingement syndrome. He clearly testified that to be more definitive in his diagnoses at that time, he would need to rely upon objective diagnostic testing, and none existed until later. By the time he re-examined her in November 2014, she had undergone an MRI of the right shoulder. While Dr. Kenny testified that the employee's condition worsened during the 38-month gap between his September 2011 examination and his November 2014 examination, it is imperative to note that the employee did not work at all during this 38-month period.
>
> In other words, the employee's right shoulder problems developed before she ever began work at Christopher House, felt worse during the 32-month period that she worked at Christopher House, and continued to worsen during the four years subsequent to her last day of work at Christopher House.
>
> I infer from this evidence that the worsening of the employee's right shoulder condition during this period was the natural progression of her continuously deficient left shoulder and the concomitant overuse of her right upper extremity necessarily resulting therefrom.
>
> I find that the employee did not sustain an injury at Christopher House.
>
> I find that the employee's injury to her left shoulder, which was not resolved by the surgery of January 2011, was the cause of her having to overuse her right upper extremity throughout the day, (a) before her employment with Christopher House, (b) during the years that she worked at Christopher House prior to the January 2011 surgery, and (c) ever since, though she hasn't been employed anywhere, up to and including the close of the record.

(Dec. 15-16; emphasis in original.)

We agree with Atlantic Charter and the employee that the decision is internally inconsistent and that the judge mischaracterized Dr. Kenny's opinions, because the medical evidence supported, rather than rejected, a medical worsening of the employee's condition as a result of her work at Christopher House. The judge found that "while she worked as a CNA at Christopher House [s]he was able to perform her work without using her left arm." (Dec. 8-9.) The judge expressly adopted Dr. Kenny's opinion that the employee's work activities as a CNA using only her right arm to perform her duties were "an abnormal use pattern" that would cause the degenerative changes in the employee's right glenohumeral joint to appear within three months.[5] (Dec. 13.) The judge acknowledged the employee performed that work for thirty-two months, and credited the employee's testimony that her shoulder "felt worse as time went on during the period that she worked at Christopher House." (Dec. 15.) Dr. Kenny consistently referred to those work activities as requiring the employee to use her right arm in a manner that was "pathological" or "an abnormal use pattern," and he consistently opined that the employee's impingement syndrome worsened as a result of the her work at Christopher House. (Dep. 27-29, 37-42, 50-52.)

Despite acknowledging that it is a medical question whether an activity actually causes a worsening of a condition, (Dec. 15), the judge drew his own inference that the employee's right shoulder condition was nothing more than a natural progression of her left shoulder injury, and concluded that she did not sustain an injury at Christopher House. (Dec. 16.) In doing so, he not only mischaracterized Dr. Kenny's opinion, but also impermissibly substituted his own opinions for Dr. Kenny's medical opinion.

> Whether the employee sustained a personal injury by reason of the work done by [her] after [her] return to work on [May 24, 2007], and whether if [she] did there was a causal connection between the injury and the ensuing incapacity were not

[5] He explained that his first report was not inconsistent with his second report because his first report addressed whether the original injury was a major cause of the employee's impingement syndrome and at that time he was not asked whether the employee's work at Christopher House worsened that condition. (Dep. 23-27, 51-52.)

> matters that could be determined by the board from its own knowledge; these were matters calling for expert medical testimony.

Casey's Case, 348 Mass. 572, 574 (1965); Pilon's Case, 69 Mass. App. Ct. 167, 169 (2007). As the judge pointed out, a worsening to the "slightest extent" is sufficient to attach liability in a successive insurer case. Rock's Case, 323 Mass. 428, 429 (1948). The judge cannot adopt portions of a physician's medical opinion, then substitute his own opinion for that of the doctor, because he disagrees with the legal effect those opinions may have. We therefore find, as a matter of law, that the adopted portions of Dr. Kenny's opinions established that the employee suffered an injury to her right shoulder as a result of her work at Christopher House.

We observe that AIM raised a number of other defenses to this claim,[6] and the judge's decision contains no findings of fact or rulings of law concerning those defenses. Accordingly, we reverse so much of the decision as found that Atlantic Charter is responsible for payment of the employee's medical treatment for her right shoulder on the ground that there was no injury at Christopher House, and recommit the case for further findings of fact and rulings of law addressing AIM's other defenses and the remainder of the employee's claim.[7]

So ordered.

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Catherine Watson Koziol
Administrative Law Judge

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William C. Harpin
Administrative Law Judge

[6] AIM raised the following additional defenses: "proper notice; proper claim; laches; Section 1(1) AWW; double recovery; Section 48." AIM also contested the employee's disability and the extent thereof. (Dec. 2; Ex. 4; Tr. 6-8.)

[7] In addition to seeking medical benefits for treatment of her right shoulder, the employee sought permanent and total incapacity benefits from January 13, 2011 and continuing. (Dec. 2.)

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Carol Calliotte
Administrative Law Judge

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