COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NOS. 002449-00 030854-05**

Cynthia Gosselin	Employee
Springfield Wire Co.	Employer
AIM Mutual Insurance Co.	Insurer
Pacific Indemnity Insurance Co.	Insurer

REVIEWING BOARD DECISION
(Judges Horan, Costigan and Fabricant)

APPEARANCES
Katherine Lamondia Wrinkle, Esq., for the employee
Ronald C. Kidd, Esq., for AIM Mutual Ins. Co.
William C. Harpin, Esq., for Pacific Indemnity Ins. Co.

HORAN, J. Pacific Indemnity Insurance Company, (Pacific), the latter of two insurers, appeals from a decision awarding the employee § 35 benefits. Primarily, Pacific contends the judge's findings are unsupported by the evidence. We disagree, and affirm.

On January 18, 2000, the employee injured her back at work; as a result, she experienced back and left leg pain. She underwent disc surgery at L5-S1 in May 2001, and a second back surgery in October 2004. Although she felt better following her surgeries, she continued to experience symptoms. In May 2005, she returned to work on a light duty, part-time basis. (Tr. 26.) On July 5, 2005, while bending and moving files, the employee felt a significant increase in her back and leg pain. The employee continued to work with increased pain until she was laid off in August 2005. (Dec. 4, 6.)

The administrative judge found the July 5, 2005 incident constituted a new work injury for which Pacific, the insurer then on the risk, was liable. The judge ordered Pacific to pay the employee partial incapacity benefits based on an earning capacity of $360.00 per week. (Dec. 6-7.)

On appeal, Pacific contends the opinion of Dr. Alan Bullock,[1] the § 11A impartial physician, fails to support the judge's finding that the employee, based on an increase in her symptoms, suffered a new injury at work in July 2005. See Long's Case, 337 Mass. 517 (1958)(increase in symptoms may be found to constitute a new injury in successive insurer cases, notwithstanding opinion that medical condition remained the same). Ordinarily, "[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). We cannot say the judge's finding of a new injury, based on his view of the lay and medical evidence, is arbitrary, capricious, or contrary to law. G. L. c. 152, § 11C.

Pacific also argues it cannot be liable for the employee's partial incapacity because, until she was laid off for non-medical reasons in August 2005, the employee simply continued to work at the same level of incapacity as before the July 2005 incident. This argument misses the mark. The issue *sub judice* was whether the July work event contributed to the employee's ensuing level of partial incapacity. Because a fair reading of the doctor's testimony indicates the July 2005 incident contributed, even to the slightest degree, to the employee's disability, the successive insurer rule places liability squarely on Pacific. See Rock's Case, 323 Mass. 428, 429 (1948). The doctor testified:

> I think the cause of her present disability was some pre-existing disease that was aggravated with some lifting and twisting at work, followed by two operations on her back, one being more minor, one being fairly major, followed by another twisting injury that aggravated her previous surgery. So, again, I think there are many reasons for her current symptoms.

[1] Dr. Bullock provided the only medical opinion in this case.

(Dep. 35-36.) The closest the doctor comes to denying that the July 2005 incident had *any* effect on the employee's disability is in his response to questions disregarding the employee's credited testimony of increased pain, and a worsening of her medical condition after said incident. (Tr. 55-56; Dec. 6.) Those questions focus only on the undisputed lay-off for non-medical reasons. (Dep. 62-63.) Only in that context does the doctor provide an opinion excluding the July 2005 incident from the causal mix. Id. Particularly in light of his other factual findings crediting the employee's testimony, the judge was not obligated to adopt that piece of deposition testimony over the bulk of the doctor's testimony implicating the July 2005 event. (Dep. 57-60.) Even if Pacific's view of the lay testimony is taken, we note that at the end of his testimony, Dr. Bullock implicates, to some degree, the July 2005 incident:

> If indeed she injured herself [in July 2005] but did not complain of her back at all further and we documented that and then she was called in by her boss and the boss says "we are doing away with your job . . . you're fired" and that back did not enter into it, then that injury *didn't do much.* So it's going to depend upon what facts we're going on.

(Dep. 66; emphasis added.)

The decision is affirmed.[2] Pacific shall pay employee's counsel a fee under § 13A(6) in the amount of $1,458.01.

So ordered.

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Mark D. Horan
Administrative Law Judge

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Patricia A. Costigan
Administrative Law Judge

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Bernard W. Fabricant
Administrative Law Judge

Filed: December 21, 2007

[2] We summarily affirm the decision as to all other matters argued by Pacific on appeal.