**COMMONWEALTH OF MASSACHUSETTS**

**DEPARTMENT OF INDUSTRIAL ACCIDENTS** **BOARD NO. 014204-96**

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| Alba Vinas | Employee |
| City of Lawrence School Dept. | Employer |
| City of Lawrence | Self-insurer |

**REVIEWING BOARD DECISION**
(Judges Wilson, McCarthy and Smith)

**APPEARANCES**
Paul M. Moretti, Esq., for the employee on brief
Michael A. Torrisi, Esq., for the employee at hearing and on brief
John J. Morrissey, Esq., for the self-insurer on brief
Frederick M. Fairburn, Esq., for the self-insurer at hearing

**WILSON, J.** Alba Vinas appeals from a decision in which an administrative judge awarded her a short, closed period of weekly benefits under G.L.c. 152, § 34, but denied her claim for continuing benefits. The employee argues that the judge made numerous erroneous and harmful rulings, which demonstrate his bias against her. We do not see any indication of bias. We do agree, however, that the decision is flawed in two respects, and reverse the judge's rulings that deny the cost for a translator and establish the cut-off date for § 34 weekly benefits.

The employee injured her left ankle on February 26, 1996, while working as a Spanish and mathematics teacher's aide. (Dec. 4-5.) She continued to work for the next two weeks, but her ankle and foot got worse. On March 22, 1996, she saw an orthopedic surgeon, who recommended that she stay out of work for two weeks and prescribed anti-inflammatory medication. (Dec. 5.) After five weeks of physical therapy, the employee failed to improve. She saw another doctor on July 30, 1996, who placed her foot in a fixed cast for three weeks, after which she underwent another regimen of physical therapy for four months. On September 11, 1997, the employee saw a podiatrist, who

ordered a nerve conduction study, after which he made a diagnosis of "questionable tarsal tunnel syndrome" on February 3, 1998. As of the time of the hearing on February 8, 1998, the employee claimed that she could not work as a teacher due to the pain in her foot. (Dec. 6.)

By the day of the hearing, the self-insurer had agreed that Ms. Vinas suffered an industrial injury on February 26, 1996. (Dec. 2.) The employee had undergone an impartial medical examination on February 11, 1997. The impartial physician formed a diagnosis of "contusion of the ankle, initially" followed by a period of traumatic tendonitis of the posterior tibial tendon. (Dec.6.) The doctor opined that he would anticipate a four to six week recovery for such a condition, and that the prolonged course of the employee's treatment seemed out of proportion to and inconsistent with rehabilitation of that type of injury. The doctor reported an essentially negative examination, and opined that the employee could return to full work status. (Statutory Exhibit 1, 2; Dec. 6-7.)

The judge allowed additional medical evidence to be introduced by the parties to address the period of claimed incapacity that preceded the impartial medical examination – from March 18, 1996 until February 11, 1997. (Dec. 7-8.) The judge adopted the opinion of the impartial physician that the employee was not physically disabled from her usual occupation as of the February 11, 1997 examination. (Dec. 12.) With one exception, the judge was not persuaded by any of the employee's additional medical evidence provided by her treating physicians. That exception was a May 12, 1996 note of Dr. Thomas Hoerner, in which he stated that the employee was unable to attend school from March 26 through April 10, 1996. (Employee Exhibit 2; Self-insurer Exhibit 4; Dec. 9.) The judge relied on this opinion to support his termination of benefits as of April 10, 1996. (Dec. 12.) The judge also adopted the opinion of Dr. William Donahue, the insurer's examiner, who opined that the employee was capable of returning to work and needed no more medical treatment, as of his October 7, 1996 examination. (Dec. 9.)

In his decision, the judge discredited the employee's testimony, found that she exaggerated her complaints and awarded her § 34 weekly benefits only until April 10,

1996. The judge further concluded that, even if he were to credit the podiatrist's questionable diagnosis of mild tarsal tunnel syndrome, that condition would not be incapacitating, as the employee had the capacity to earn in excess of her average weekly wage at a sedentary job. (Dec. 11-13.) The judge awarded § 30 medical benefits through September 1997. (Dec. 12-13.)

On appeal the employee first challenges the judge's refusal to award the costs of her interpreter at the hearing. The judge considered that the employee's use of a interpreter at the hearing was unnecessary, as the employee "understood all of the questions posed in English" and "there were no areas of this Hearing that were beyond her full comprehension in the English language." (Emphasis supplied). (Dec. 8.) The decision is silent as to how the judge was able to make this conclusory and all-inclusive determination. Significantly, the judge neither questioned the use of the interpreter during the hearing nor gave the parties an opportunity to be heard on the issue. Moreover, the self-insurer's silence at hearing indicates that it accepted the use of a interpreter and the attendant risk of an award of the reasonable cost of the interpreter's services. As the denial of such cost is arbitriary and capricious under these circumstances, we reverse the ruling and conclude that the self-insurer is liable for payment of reasonable costs for the interpreter.

The employee next argues that the judge was biased, as evidenced by his rulings on both the interpreter cost and objections made during the impartial physician's deposition. Some of those disputed evidentiary rulings, however, were correct. [1] We

[1] We reject the employee's assertion of reversible error regarding the sustained objection at page fifteen of the deposition. We find it harmless error, as the information sought came in through further questions. There is no error in the sustaining of the self-insurer's objection to an overbroad hypothetical without a basis in the record. (Dep. 28.) We see no error in the judge's overruling an objection at page thirty-four of the deposition, as the judge had specifically allowed the videotape, (Insurer Exhibit 7), to be shown to the impartial physician. (Tr. 79-80.) We reject as well the employee's contention that the judge erroneously ruled on objections that were not supported with reasons, as the department regulation states merely that "no administrative judge shall be required to rule on any objection or motion unless such reasons or statements have been made." 452 Code Mass. Regs. § 1. 12 (6) (emphasis added). We do so notwithstanding the judge's declaration that he ruled only on objections "stated with particularity . . . [.]" (Dec. 3.)

agree with the employee's contentions of error in the judge's sustaining of the self-insurer's objections, which were either withdrawn, (Dep. 13; Dec. 3), or based on the self-insurer's erroneous recollections of the record evidence. (Dep. 24; Employee Exhibit 5.) As for the employee's objection to a question that was then withdrawn and consequently not answered, the error made when the judge overruled the objection is obviously harmless. (Dep. 36-37; Dec. 3.) Although these errors could be viewed as indicative of inattention or an imperfect knowledge of the rules of evidence, they do not smack of bias. "None of the specific rulings cited by the [employee] discloses a lack of impartiality on the judge's part." Demoulas v. Demoulas Super Markets, Inc., 424 Mass. 501, 525 (1997). We reverse the rulings on the pages cited, but conclude that, in the context of this case, there is no need to recommit the case for the judge to consider the answers given, as they are not material to the outcome.

The employee also challenges the judge's termination of weekly benefits as of April 10, 1996 based upon Dr. Hoerner's May 12, 1996 note. (Employee Exhibit 2; Self-insurer Exhibit 4.) We agree with the employee that the judge was without authority to terminate benefits as of that date, as the self-insurer had disputed entitlement to benefits only after May 18, 1996. (Self-insurer Exhibit 1; Tr. 5.) The employee's further argument that the May 12, 1996 note was inconsistent with an earlier April 12, 1996 office note of Dr. Hoerner has no merit, as the doctor in the April 12, 1996 note stated the inability to work in the past tense, rather than the present tense as asserted by the employee. (Employee Exhibit 2.) Accordingly, we reverse the administrative judge's termination of weekly benefits as of April 10, 1996, and conclude that the self-insurer is liable for weekly benefits through May 18, 1996.

As a final matter, the employee asserts that the judge should revisit the question of the extent of the employee's medical disability and make specific findings regarding the nerve conduction test reported in Dr. Hurchik's office notes on January 5, 1998, (Employee Exhibit 5), as the impartial physician opined that the employee would have some medical restrictions on excessive walking and standing in the event the reported objective findings of mild, increased latency of the left nerves were indeed present.

(Dep. 26-30.) The judge, however, reviewed and specifically cited that part of the deposition and found that the impartial examiner "was shown the subsequent reports of Dr. Hurchik and he appeared skeptical of the test results quoted therein and the validity of the diagnosis of 'very mild involvement of the tibial nerve which would be consistent with a mild tarsal tunnel syndrome.' " (Dec. 8, quoting Dep. 29.) Our review of the deposition confirms the judge's assessment of the impartial examiner's reluctance to rely on the assumptions in Dr. Hurchik's office notes, absent information on who conducted and interpreted the test, their qualifications, and when and where the test was conducted. (Dep. 26-29.) Moreover, the impartial examiner's response to a hypothetical question on the tarsal tunnel syndrome issue was properly disregarded, as essential facts stated in the hypothetical were not in the evidentiary record. (Dep. 28-29.) We see no error in the judge's assessment of the impartial examiner's opinion on the reported nerve conduction test. Nor do we find an abuse of discretion in the judge's denial of the employee's motion for additional evidence on the basis of complexity and inadequacy. (Dec. 7, 8.)

The decision is reversed insofar as the administrative judge denied the employee reasonable costs of the translator and denied weekly benefits for a period not in dispute. The decision is otherwise affirmed.

So ordered.

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Sara Holmes Wilson
Administrative Law Judge

Filed: May 23, 2000

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William A. McCarthy
Administrative Law Judge

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Suzanne E.K. Smith
Administrative Law Judge