COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 007598-03**

Angel L. Ventura	Employee
Westerman Store Equipment, Inc.	Employer
Travelers Indemnity Ins. Co. of Connecticut	Insurer

REVIEWING BOARD DECISION

(Judges Costigan, McCarthy and Fabricant)

APPEARANCES

Gillian B. Schiller, Esq., for the employee

Donna Gully Brown, Esq., for the insurer

COSTIGAN, J. The employee appeals from an administrative judge's decision adopting the expert opinion of the § 11A impartial medical examiner that the employee was not disabled after September 1, 2003, and awarding him closed periods of total and partial incapacity benefits. The sole argument advanced by the employee on appeal is that the judge erred in denying his motion for additional medical evidence based on the alleged bias of the § 11A impartial physician against both the employee's attorney and his medical expert. The administrative judge concluded:

> I do not find that the impartial medical examiner displayed a bias in his deposition testimony. The fact that he disagreed with the employee's examining physician and recognized the fact that the doctor was the employee's expert did not indicate bias.

(Dec. 3.) We agree, and affirm the judge's decision.

At the time of his injury on March 3, 2003, the employee was working for the employer as a warehouseman under a work release program concluding an incarceration. He sustained three fractured bones in his right ankle when a pallet jack he was pulling struck the back of his right heel. (Dec. 5.) The employee was hospitalized for a week, and underwent surgery, with insertion of hardware, to repair the fractures. He then treated conservatively at the Worcester County House of Corrections infirmary until his release on April 18, 2003. In August 2003, the employee had a screw surgically removed from his ankle, and he began performing odd jobs for minimal pay. The employee moved to

Buffalo, New York in September 2004 and worked part-time. At the time of the hearing in February 2005, he had not undergone medical treatment for his ankle since moving to New York. (Dec. 5.)

In conjunction with his workers' compensation claim, the employee underwent an impartial medical examination by Dr. A. Jerome Philbin on October 13, 2004. The doctor's report was admitted into evidence, (Stat. Ex. 1), and he was deposed on March 16, 2005. The administrative judge adopted portions of Dr. Philbin's opinions to find:

> [T]he employee sustained a displaced left [sic] ankle fracture with disruption of syndesomosis that required an open reduction and internal fixation; that the fracture was causally related to the injury at work on March 3, 2003; that the treatment of surgery and therapy was reasonable and necessary; that the employee was totally disabled from his job as a warehouseman from the date of injury to September 1, 2003 and has no restrictions thereafter.

(Dec. 6.) Based on the odd jobs the employee performed starting on August 8, 2003, the judge assigned a minimal earning capacity as of that date, and awarded maximum § 35 benefits to September 1, 2003 only. (Dec. 6, 8.)

The employee, who claimed ongoing partial incapacity, argues on appeal that the judge erred as a matter of law in denying his motion for additional medical evidence and adopting the impartial medical examiner's opinions, because they were tainted by bias. The allegation of bias focuses on two points: Dr. Philbin's deposition testimony as to why he disagreed with the opinions of Dr. Roland Caron, the employee's medical expert, and a purported conversation between Dr. Philbin and insurer's counsel which took place at his deposition, but off the record. In assessing whether the judge erred in finding no bias, we set forth the doctor's opinions and testimony in some detail.

Certain reports of Dr. Caron had been submitted by the employee for review by the impartial medical examiner. In his October 13, 2004 report, Dr. Philbin wrote:

> The patient sustained a definable injury with subsequent surgery. He has a good recovery with minor loss of function. Severe scarring doesn't appear to bother him. He is capable of returning to his usual occupation, but has not been invited by Westerman's. *I take exception to Dr. Roland Caron's disability assessment of May 12, 2004. I would point out that the patient has been painting and yard cleaning*

> *and is in fact capable of walking activities and walking employment. I do not believe that the possibility of arthritis can be assessed at this point since the patient had an anatomic reduction and is merely one-year post injury.* The patient was reasonably disabled from March 1/03 until September 1/03. I would place no restrictions on his working activity.

(Stat. Ex. 1, p. 2; emphasis added.)

At deposition, employee's counsel questioned the doctor about his disagreement with Dr. Caron:

> Q. . . . Did you offer any opinion on whether Angel Ventura was likely to develop arthritis in the ankle?
>
> A. I said it was too early to assess that and that would be assessed at a later date. The whole purpose of doing an open reduction and internal fixation is to align the joint properly so that will not develop. It may, however, develop.
>
> . . .
>
> Q. Is it uncommon for patients who have had injuries like this to develop arthritis?
>
> A. Many can. Many do. But certainly it's not a universal occurrence.
>
> Q. At what time following the surgery would you expect to be able to assess whether arthritis --
>
> A. That could be anywhere from a year to 20 years.
>
> Q. So is it -- did you express any opinion with regard to Dr. Caron having predicted that he was likely to develop arthritis; do you recall?
>
> A. Yes. I remember reading that and disagreeing totally. *I had noted that the examination had been arranged by the patient's attorney so I questioned how independent the examination might be since Dr. Caron and Mr. Ellis had an ongoing referral network. I, in turn, do not do any attorney examinations or any insurance examinations. I believe that Dr. Caron is an honest man, I think there's a tendency to find in favor on those relationships regarding the assessments. It's been my experience in reviewing letters for years.*

> Q. Would your opinion be the same with regard to exams that are arranged by insurance companies?
>
> A. Can be. *I just felt it was way too early for Dr. Caron to be talking about permanency.*
>
> . . .
>
> Q. We were talking about arthritis. Do you see what [Dr. Caron] says about arthritis?
>
> *A. He says his prognosis is guarded. I did not feel that.* I felt that his next sentence where he says, "It's my opinion that with time he will develop some post-traumatic arthritis in the ankle joint ." *I was taking the opinion that when he said the prognosis is guarded -- which I think the patient's prognosis was good* -- guarded's a very negative term in orthopedics. And therefore I thought that he felt that there would be significant arthritis in the ankle joint, although he didn't say that. He said, "some post-traumatic arthritis in the ankle joint."

(Dep. 34-35; emphasis added.) We discern nothing more in this challenged testimony than the doctor's objective reasons for disagreeing with another medical professional's opinions. Dr. Philbin's is a competent medical opinion and we see no bias reflected in it. See Doherty v. Shaw's Supermarkets, 19 Mass. Workers' Comp. Rep. 334 (2005). That Dr. Philbin approaches the opinions of evaluating, non-treating physicians with a critical eye does not indicate bias against the employee here, or employees in general, [1] particularly given his testimony that he takes the same approach with insurers' medical evaluations. (Dep. 34.) In any event, Dr. Philbin testified he considered Dr. Caron to be an honest man; he simply disagreed with Dr. Caron's assessment of the employee's medical condition. This is not bias.

We turn to the employee's allegation that, after the § 11A deposition was concluded, Dr. Philbin made certain comments off the record which reflected a bias in favor of the insurer. The particulars of this allegation are set forth in a sworn affidavit filed by

[1] In fact, Dr. Philbin testified that he thought the employee was credible: "I liked Mr. Ventura. I thought he was credible. I thought he was sincere." (Dep. 20.) He also testified: "I believe most patients are sincere when they're telling me they're having pain. I'm a compassionate surgeon and I believe them." (Dep. 18.)

employee's counsel three weeks after the deposition, in support of the employee's motion for additional medical evidence. (Employee Ex. 3.) Suffice it to say the statements in the affidavit are no more than rank speculation and conjecture as to a relationship between the doctor and the insurer or insurer's counsel. As did the administrative judge, we accord them no weight. [2]

> Every contention of bias or partiality does not have to be honored by an administrative judge. The administrative judge has a duty to resist challenges to the impartial physician's report which are tenuous, baseless, or frivolous. . . . In general, the question of inadequacy resulting from bias is left to the administrative judge's discretion.

Tallent v. M.B.T.A., 9 Mass. Workers' Comp. Rep. 794, 799 (1995). Unlike the holding in Tallent, we do not conclude, as a matter of law, that the administrative judge erred in denying the employee's motion for inadequacy based on bias. The challenge to the impartial physician's opinions in this case was at least "tenuous," and arguably "baseless" and "frivolous." The judge did not abuse his discretion in rejecting the challenge. As the § 11A physician's opinions amply support the judge's findings as to the nature, extent and duration of the employee's incapacity, we affirm the judge's decision.

So ordered.

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Patricia A. Costigan
Administrative Law Judge

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William A. McCarthy
Administrative Law Judge

[2] We note that during the deposition, employee's counsel never challenged Dr. Philbin's certification on his "Conflict Disclosure Form," appended to his report, (Stat. Ex. 1), that he had no conflicts of interest in this case. Likewise, she did not challenge the doctor's testimony that he did "not do any attorney examinations or insurance examinations." (Dep. 34.) Moreover, although both attorneys and Dr. Philbin were still in the doctor's office when he purportedly made comments off the record which, according to the employee, indicated bias in favor of the insurer, employee's counsel made no effort to reconvene the deposition to memorialize the comments and question the doctor's impartiality on the record.

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Bernard W. Fabricant
Administrative Law Judge

Filed: July 31, 2006