COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 010997-18**

Anthony M. Iannacone, Jr.	Employee
New England Lead Burning Company, Inc.	Employer
Zurich American Insurance	Insurer

REVIEWING BOARD DECISION
(Judges Calliotte, Fabricant and Long)

This case was heard by Administrative Judge O'Neill.

APPEARANCES
John M. Vlassakis, Esq., for the employee at hearing
Anthony M. Iannacone, Jr., pro se on appeal
Roger J. Doucette, Esq., for the insurer

CALLIOTTE, J. The employee appeals from a decision ordering the insurer to pay him a closed period of Section 34 benefits for a back injury, as well as §§ 13 and 30 benefits for treatment for his back for the same closed period. The employee argues that the judge erred in admitting a surveillance video at hearing, while failing to show it at the hearing itself, and by allowing the impartial examiner to view the video at deposition. In addition, the employee maintains the judge erred by finding the employee's closed head injury, post-concussive syndrome, cervical strain, lumbar strain and left leg pain were resolved by the first video surveillance date. For the following reasons, we affirm the decision.

The employee, who was forty-nine years of age at the time of hearing, has a high school degree and a work history in carpentry with some supervisory duties. On April 24, 2018, he was hired as a construction superintendent for the employer. In that position, he was a working supervisor, meaning he performed carpentry and other physical jobs in addition to supervising subcontractors. (Dec. 5.) On May 3, 2018, the employee alleges he injured his back lifting a generator into and out of a truck with the help of another employee. He further alleges that, later that day, he tripped and fell into a

trench, striking his head. (Dec. 6.) Still later that same day, his supervisor, Brian Bechet, called the employee to a meeting, at which he fired him. (Dec. 6-7.) The following day, May 4, 2018, the employee went to the hospital, complaining of shooting pain from the middle of his low back down his left leg. He later had an MRI and an EMG, and physical therapy was recommended. (Dec. 7.) He has not returned to work.

The insurer denied the employee's claim for compensation.[1] Following a § 10A conference, the judge ordered §§ 13 and 30 medical benefits, including six weeks of physical therapy. Both parties appealed to a hearing. (Dec. 3.)

At the hearing, the employee claimed §§ 34, 13 and 30 benefits from May 4, 2018, and continuing. The insurer challenged liability, disability and extent of incapacity, and causal relationship, as well as proper notice, proper claim, and average weekly wage. The employee, his supervisor Brian Bechet, and another employee of the company, Scott Steiger, testified. The insurer offered into evidence, without objection, a surveillance video disc of the employee taken on July 12, 2018, August 13, 2018, September 6, 2018, and October 17, 2018.[2] (Dec. 9-10; Tr. 6-7; Exh. 12A and 12B.) The judge did not view the video disc during the hearing but stated she would view it on her own time. (Tr. 6.)

Dr. Scott Harris, an orthopedist, performed an impartial examination on March 19, 2019, and his report and deposition testimony were admitted as evidence. Additional medical evidence was also admitted due to the complexity of the medical issues. Excerpts from the video disc were shown to Dr. Harris at his deposition.

In her decision, the judge credited the employee's testimony that reported a back injury to his supervisor and that he, in fact, injured his back at work on May 3, 2018, but did not credit his testimony that he reported a head injury to his supervisor or that he fell

[1] Rizzo v. M.B.T.A., 16 Mass. Workers' Comp. Rep. 160, 161 n.3 (2002)(permissible to take judicial notice of board file).

[2] At hearing, the judge stated that there was a surveillance disc from July of 2018 and one from September of 2018. She then clarified with the insurer counsel that there was only one disc with both dates, which would be designated as Exhibit 12A and 12B. (Tr. 6-7.) In her decision, the judge stated that the videos showed surveillance done on July 12, 2018, August 13, 2018, September 6, 2018, and October 17, 2018. (Dec. 9-10.)

and struck his head. (Dec. 6-7.) With respect to the employee's credibility, she further found,

> Regarding the employee's testimony, there were several inconsistences. He testified he couldn't get on the impartial doctor's examining table without help, yet he could step in and out of his pickup truck without a problem. He testified he has been in excruciating pain since the date of the accident and yet had difficulty explaining his activities that were caught on video by the investigator in the summer of 2018. For example, he claimed he was resting his back at the beach and that he was only bending down for a half a second to pick up sea glass and debris. This is not consistent with the video evidence. He testified on direct exam he never had prior back pain and then on cross examination stated that "I'm sure somewhere along the line in my construction career I had back pain," but he doesn't remember treating for it. However, in reviewing the prior workers' compensation case of the Employee, Board #1442810, the Employee testified under oath to pretty severe back pain that he was experiencing in 2012, and to a prior work injury also involving his back some years earlier. So, he had two significant back injuries that he could not recall.[3]

(Dec. 8.)

The judge made further specific findings based on her review of the surveillance videos:

> Surveillance was conducted that showed the Employee to be active with no sign of any impairment. Surveillance taken, the afternoon on July 12, 2018, showed the Employee reading in an Adirondack chair on the beach and then carrying a bucket while wading through shallow water and gathering something from the sand. It did not look like he was picking up sea glass or debris as he testified to. He easily and repeatedly bent at the waist and used both hands to dig in the sand for minutes at a time. He also searched under large rocks with both hands while bending and then squatted in the water still digging in the sand all while wading up and down the beach. This took place over a few hours. There were subsequent videos from August 13, 2018, September 6, 2018, and October 17, 2018 that showed him walking normally and getting in and out of the car without a problem.

(Dec. 9-10.)

[3] The judge had informed the parties that she would be taking judicial notice of the employee's prior board files. (Tr. 4.)

The judge adopted Dr. Harris's diagnoses of cervical strain, resolved, and lumbar strain and left leg pain. Because she did not credit the employee's testimony that he fell and struck his head, she disregarded Dr. Harris's opinion that the employee had a closed head injury and post-concussive syndrome which had resolved. (Dec. 10.) She did adopt Dr. Harris's opinion the lumbar strain was directly causally related to his industrial injury, and that most lumbar strains resolve after a month or two. (Dec. 10.) In addition, she adopted Dr. Harris's opinion, some of which was influenced by the surveillance videos,

> that the Employee demonstrated symptom magnification and that it was impossible to determine his true abilities given the degree of symptom magnification and the absence of significant objective findings. Dr. Harris noted after watching the surveillance video that the Employee's actions on film combined with complaints he was making to doctors around the same time show significant inconsistencies, which is the same thing he found on his exam in March of 2019. The video strengthened his belief that the Employee was exaggerating his symptoms and that the Employee did not appear to have any difficulty moving his back or walking around as of July 2018. *He opined that someone with a lumbar strain would not be able to do what the Employee was observed doing on video.*

(Dec. 10-11; emphasis added.) The judge also adopted the opinion of Dr. Christian Dee, a treating physician, who opined on May 21, 2018, that the employee was totally disabled from any work, as he suspected he "pulled his lumbar nerves from the injury." Dr. Dee prescribed medication and referred him to physical therapy. "He expected the employee to gradually improve over four to six weeks." (Dec. 11.)

The judge found the employee totally incapacitated from May 3, 2018, until July 11, 2018, based on the above portions of the adopted medical opinions of Dr. Harris and Dr. Dee, and the employee's own testimony. However, she further found,

> On July 12, 2018 surveillance video demonstrated the Employee's ability to bend, sit, walk and move in a manner inconsistent with a lumbar strain. I find that he had completely recovered by this date. I also find that the Employee exaggerated his symptoms to the examining doctors and therefore made it impossible to ascertain his true incapacity. However, his actions captured on video suggest that he did not have any incapacity as of July 12, 2018.

> Additionally, this date would be approximately eight and a half weeks after the injury which is consistent with Dr. Dee's opinion that he expected the Employee's condition to improve over the four to six weeks after the injury. Furthermore, Dr. Harris opined that most lumbar strains resolve after a month or two. That opinion was confirmed when the doctor was presented with surveillance evidence where the employee was found to be demonstrating physical activity that is inconsistent with his claimed limitations.

(Dec. 12.) The judge ordered §§ 13 and 30 medical benefits for treatment for the employee's back for the same period, May 3, 2018, until July 11, 2018.[4] (Dec. 13., 14.)

On January 7, 2019, the employee appealed the hearing decision,[5] without the assistance of counsel. His attorney then filed a motion to withdraw as counsel, which was heard by a member of the reviewing board on February 27, 2020. The employee neither opposed the motion nor desired the opportunity to find successor counsel, so the motion was allowed, and the employee proceeded pro se. A post-transcript conference was held that same day with the pro se employee and insurer counsel, after which both parties filed briefs.

On appeal, the employee first argues that the surveillance videos should not have been admitted into evidence because they were not authenticated by the person or persons who took them. "Videotapes are admissible as evidence ' "if they are relevant, they provide a fair representation of that which they purport to depict, and they are not otherwise barred by an exclusionary rule." ' . . . These requirements apply where a videotape is offered to impeach a witnesses' credibility." Brouder v. Whittier Rehabilitation Hospital, 25 Mass. Workers' Comp. Rep. 177, 179-180 (2011)(additional

[4] The judge also addressed the other issues raised by the insurer, finding the employee provided proper notice and claim, and that his average weekly wage was $1,730.77 per week. Noting that the insurer had raised employee status in its closing argument, the judge also found that the fact that the employee lied on his application, (stating he had a college degree when he did not), did not disqualify him from receiving workers' compensation benefits, and that he was an employee under the statute. (Dec. 13-14.)

[5] The board file reveals that the insurer also appealed the hearing decision on January 13, 2019, but withdrew the appeal on January 15, 2019. Rizzo, supra.

citations omitted). "The requirement of authentication calls for the trial judge to make a threshold determination that 'there is evidence sufficient, if believed, to convince the jury by a preponderance of the evidence that the item in question is what the proponent claims it to be.' " Commonwealth v. Connolly, 91 Mass. App. Ct. 580, 586 (2017), quoting from Commonwealth v. Purdy, 459 Mass. 442 447 92011). See Mass. G. Evid. § 901. However, as with other evidence, where there is no objection to the admission of a surveillance video, the issue of its admissibility is not preserved for appeal. See Commonwealth v. Chin, 97 Mass. App. Ct. 188 (2020)(where video footage was properly admitted without objection, and the defendant does not seriously argue otherwise, there was no error). See also, Green v. Town of Brookline, 53 Mass. App. Ct. 120, 128 (2001), quoting Wynn & Wynn, P.C. v. Massachusetts Commn. Against Discrimination, 431 Mass. 655, 674 (2000)(" 'Objections, issues, or claims – however meritorious – that have not been raised' below, are waived on appeal"); Kenney v. Pembroke Hospital, 32 Mass. Workers' Comp. Rep. 27 (2018)(objections to admissibility of evidence not raised below are waived); Santos v. George Knight & Company, 14 Mass. Workers' Comp. Rep. 289, 292 (2000)(same).

At the hearing, the judge read into the record the exhibits that had been marked, including the surveillance video, stating, "There is no objection to the surveillance disc being admitted." (Tr. 6.) Insurer counsel agreed. Id. Employee counsel's only comments were to clarify the exhibit number, (Tr. 7) and then to affirm that the issues, defenses, stipulations, and exhibits had been properly stated by the judge. (Tr. 10.) At no time did he object to the admission of the surveillance video. Moreover, employee 's counsel confirmed in the § 11A deposition that there had been no objection to the admission of the CD's of the surveillance, and that "the employee testified to them." (Dep. 25.) Thus, any objection as to the admissibility of the surveillance video was waived. Green, supra.

Moreover, the employee indicated familiarity with the surveillance, and testified regarding the particular activities in the summer of 2018 on which the judge made

findings, essentially authenticating the video himself. His attorney asked him the following:

> Q: You['re] familiar with surveillance that the insurer had of you last summer, summer of 2018?
> A: Yes.
> Q: Do you remember what you were depicted doing?
> A: That day I was sitting on the beach.
> Q; And what were you doing as you were sitting?
> A: Resting. Resting my back.
> Q: Do you recall any instances where you would be out of—not just sitting and resting but doing anything?
> A: Yes. At nighttime we have a lot of people that go out there fishing late night. And sometimes they break bottles on the beach. And sometimes they leave their trash down there. To try to get some exercise I would go down there and pick up sea glass or debris that's on the beach behind my father's house.

(Tr. 63-64.) See Menard v. Allied Automotive Group, 19 Mass. Workers' Comp. Rep. 249 (2005)(videotape admissible for impeachment purposes after employee authenticated it by testimony he was depicted on tape). The judge did not err in admitting the surveillance video, or in using it to impeach the employee's credibility.

The employee also argues that the judge's decision not to view the video at hearing caused a violation of his due process rights to cross-examine and challenge the contents of the video. When admitting the video disc, the judge stated, "But I will watch them on my own time. And we're not going to take up the Court's time of watching 30 minutes of surveillance documents." (Dec. 6.) Again, there was no objection to the video not being shown at the hearing itself, nor was there any request for the judge to view it at the hearing. Absent any such objection, it was permissible for the judge to view the video surveillance disc outside the courtroom. And, as discussed above, the employee agreed he was familiar with the surveillance and testified regarding what it showed him doing on July 12, 2018.

Next, the employee contends that it was error for Dr. Harris to view the video surveillance disc following objection by his attorney on the ground that the videos were "not the copies presented to [the judge]." (Employee br. 2.) Again, we find no error.

While employee's counsel did initially object to the showing of the video to Dr. Harris, he ultimately acquiesced to the impartial examiner viewing it. The colloquy between employee and insurer counsel was as follows:

> Q: . . . One thing I don't think you ever saw as part of this case was some surveillance that was taken in 2018 that was entered into evidence at the hearing. We can either stay on the record, or we can go off the record. There's no audio to the surveillance, but I'm going to play portions of it for you now, Doctor.
>
> Mr. Doucette: I'll leave it up to my brother. Do you want to stay on the record?
>
> Mr. Vlassakis: We can stay on the record. I'll object to showing the doctor the videos because I'm not quite sure that you authenticate them as being the same, but the judge can deal with that.
>
> Mr. Doucette: Okay. I will represent under Rule of Civil Procedure 11,--that's Rule 11, as well as Massachusetts Professional Rules of Ethics that I'm about to show the doctor the two videos that were introduced into evidence at the hearing before Judge O'Neill in August.
>
> . . . .
>
> Mr. Doucette: And, again, the objection is that you're not sure that I'm playing the doctor the videos that were entered into evidence?
>
> Mr. Vlassakis: It's not that. *I know that we had – you had CD's of the images, which went in and there was no objection to those*.
>
> Mr. Doucette: Sure.
>
> Mr. Vlassakis: Plaintiff – *the employee testified about them*.
>
> Mr. Doucette: Right.
>
> Mr. Vlassakis: What you're showing from your laptop, presumably you're saying is the same thing, and *I'm not doubting the veracity of it,* it's just that from an authentication standpoint, the best evidence of them would be the actual images, and you might have been able to make a request of the judge to have an authentic duplicate, but –
>
> Mr. Doucette: So one thing is, though, you've had the discs since last December. You had the opportunity to watch the videos that I'm about to show the doctor, and you can opine on the record if you think the videos that I'm about to show the doctor were not the videos that were introduced into evidence.
>
> Mr. Vlassakis: Sure.
>
> Mr. Doucette: All right. For that reason, I request that we all see the video.
>
> Mr. Vlassakis: *Whatever's easiest. If the doctor wants to sit and look at them, that's fine.*

(Dep. 24-26; emphases added.) There was no further objection to Dr. Harris viewing the video and testifying regarding his opinion as to its depiction of the employee. Thus, no

issue was preserved for appeal. Green, supra. See also Commonwealth v. Connolly, 91 Mass. App. Ct. 580, 585 n.5(2017)("the best evidence rule does not apply to videotapes, at least in the sense that 'a properly authenticated copy' of a videotape 'would be admissible if otherwise relevant' "), citing Commonwealth v. Leneski, 66 Mass. App. Ct. 291, 294 (2006), and Mass. G. Evid. § 1001(a)(" '[V]ideotapes . . . are not writings or records' "). [6]

Next, the employee challenges the judge's findings with respect to his disability and incapacity. First, we find no merit to the argument that the judge erred by disregarding Dr. Harris's opinion causally relating a closed head injury, and post-concussive syndrome, resolved, to an alleged fall at work on May 3, 2018. (Dec. 10; Ex. 1A.) The judge is the sole arbiter of credibility, Lettich's Case, 403 Mass. 389, 394-395 (1988), and she did not believe the employee's testimony that he tripped and fell in a ditch, striking his head. (Dec. 6.) Thus, insofar as Dr. Harris's opinion was based on a history the judge did not credit, it may not be adopted. See Brommage's Case, 75 Mass. App. Ct. 825 (2009)(§ 11A opinion entitled to no weight if judge discredits its assumed factual foundation); Tucker v. Stanley &: Sons, Inc., 24 Mass. Workers' Comp. Rep. 239 (2010)(same). There was no error.

The employee also complains that the judge erred by finding the employee was no longer incapacitated by his lumbar strain and left leg pain, because she cited no medical evidence to support her conclusion that the employee's injuries had resolved as of July 12, 2018. We disagree.

It is "perfectly permissible to place . . . videotapes alongside medical records, oral history, medical tests and results of examination as the medical expert work[s] toward

[6] The employee's complaint that he was denied the opportunity to be present at Dr. Harris's deposition is without merit, as he was represented by counsel at that time, and his attorney was present and questioned Dr. Harris. There is also no merit to his contention that Dr. Harris's opinion, insofar as it was based on the videos should have been disallowed and stricken from the record. As discussed, infra, there was no objection to the admission of the videos, nor was there a motion to strike the impartial opinion. Therefore, those arguments have been waived.

reaching an opinion on causal relationship and medical disability." Peroulakis v. Stop & Shop, 12 Mass. Workers' Comp. Rep. 93, 96 (1998). However, a judge may not rely on video evidence to counter the opinion of a medical expert on the issue of extent of disability." Jaho v. Sunrise Partition Systems, Inc., 23 Mass. Workers' Comp. Rep. 185, 190 (2009).[7]

Here, Dr. Harris opined in his report and deposition that an MRI and EMG of the employee's back were essentially normal, and that the mild bulging at L4-5 was not significant enough to impinge on the nerve roots. (Ex. 1(a), Exh. 1(b), Dep. 9-10.) Although Dr. Harris stated in his report, "I do not feel that this employee is employable at this point," he explained that was "because it is impossible to determine what his true abilities are given the degree of symptom magnification and the absence of significant objective findings." (Ex. 1A). At his deposition, even before being shown the video, he further clarified that he could not really tell what the employee's limitations were:

> A: When someone is magnifying symptoms, as I think is the case here, it's really difficult to know whether he has any symptoms, mild symptoms that are real because of the overlay of the magnified complaints. So it just muddies the water . . . you really don't know. But I think I know that this man is magnifying his complaints significantly.
>
> Q: And because of that, you're not sure what the real limitations are, so you can't opine as to work capacity?
>
> A: Correct.

(Dep. 24-25.)

After being shown the surveillance from July 12, 2018, Dr. Harris opined, "*what I observed on the video appeared normal,*" (Dep. 30), and "was different than what I found on exam." (Tr. 31.) He observed that at times the employee was "squatting and using

[7] See also Wicklow v. Fresenius Medical Care Holdings, Inc., 31 Mass. Workers' Comp. Rep. 167 (2017)(where video was not viewed by doctor, judge erred in substituting her own disability opinion based on activities in video, for opinion expressed in medical evidence; Araujo v. United Walls Systems, LLC, 28 Mass. Worker's Comp. Rep. 229, 233 (2017)(judge erred in assuming impartial physician would have changed his disability opinion had he viewed surveillance video). In Jaho, Wicklow, and Araujo, the adopted medical experts did not view the surveillance video, and the judge in each case improperly used the surveillance video to make findings contrary to those of the adopted medical expert.

two hands to dig and both his hands submerged almost to elbow" and that he "flexed at least 90 degrees at the waist. *Somebody with lumbar strain should not be able to do that.* (Dep. 32.) Further, Dr. Harris stated, "When you see a patient who is complaining of severe pain, requiring physical therapy, but yet at the same time is able to walk without a limp, not have problems squatting, bending, or moving about, and digging in water, it's inconsistent with his complaints to his primary care, to his emergency room doctor, and to this therapist in 2018." (Dep. 46.) Thus, although Dr. Harris could not determine the extent of the employee's incapacity because of the degree of symptom magnification he exhibited, the §11A physician made it abundantly clear that the employee's activities on the video appeared normal, and were inconsistent with his complaints to his own doctors and therapists, as well as to Dr. Harris himself. (Dec. 10-11.) This opinion provides ample medical evidence on which the judge could rely.

After hearing testimony and viewing the video surveillance evidence herself, the judge, whose job is to assess credibility, permissibly concluded that, based on the inconsistencies and symptom magnification found by Dr. Harris, and her own observations of the employee's activities on the video, which were consistent with those of Dr. Harris, that the employee was not incapacitated for work as of July 12, 2018. She did not counter the opinion of the § 11A physician but made findings in accord with it. Cf. Jaho, supra. Just as the judge, as the arbiter of credibility, hears testimony from the employee and other witnesses which the impartial examiner does not hear, and bases her conclusions on that testimony, so may she view a video (even one not seen by the § 11A physician) and draw reasonable inferences based on its content. Laflash v. Mount Wachusett Dairy, 18 Mass. Workers' Comp Rep. 254, 263 (2004). That is what the judge here did. See Marcoux v. Lawrence General Hospital, 32 Mass. Workers' Comp. Rep. 61 (2018)(judge permissibly accepted video as evidence of employee's limited mobility, as stated by the impartial physician, who viewed the video, and found that the video did not contradict the adopted gap medical evidence). There was no error.

The employee also argues that the judge erred by adopting Dr. Dee's May 21, 2018, opinion that he expected the employee to improve over four to six weeks. The employee maintains this opinion was speculative, particularly in light of Dr. Dee's opinion of August 5, 2019, which the judge did not adopt, that the employee could not return to work. See Bernardo v. Hallsmith Sysco, 12 Mass. Workers' Comp. Rep. 397, 405 (1998)(judge may adopt all, part or none of a medical opinion as long as he does not mischaracterize it or fail to consider the whole record). While Dr. Dee's earlier opinion regarding his expectation that the employee would improve over a certain period of time could be seen as speculative, the judge adopted Dr. Harris's consistent opinion that lumbar strains generally heal within four to six weeks. Thus, Dr. Dee's opinion was essentially "cumulative of the judge's numerous other proper findings," Saia v. Grow Associates, Inc., 31 Mass. Workers' Comp. Rep. 45, 47 (2017), and any error was harmless. More importantly, the judge adopted Dr. Harris's opinion that the employee's actions on the video, taken approximately a year before Dr. Dee's second opinion was given, demonstrated significant inconsistencies with complaints he was making to doctors around the time of the video, and that, as of two months after the industrial accident, the employee appeared normal, and, in effect, would not be able to perform the activities shown on the video if he had a lumbar strain. (Dec. 10-11.) Essentially the judge did not credit the employee's testimony regarding his pain or limitations, which he reported to Dr. Dee in August 2019, based on her adoption of Dr. Harris's opinion and her own observations. There was no error.

The decision is affirmed.

So ordered.

Carol Calliotte
Administrative Law Judge

Bernard W. Fabricant
Administrative Law Judge

Martin J. Long
Administrative Law Judge

Filed: ***MAY 24, 2021***