COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO.:** 029591-04

Anthony Orlofski	**Employee**
Town of Wales	**Employer**
MIIA Workers' Compensation SIG	**Insurer**

REVIEWING BOARD DECISION

(Judges Costigan, McCarthy and Fabricant)

The case was heard by Administrative Judge Chivers.

APPEARANCES

Rickie T. Weiner, Esq., for the employee at hearing and oral argument
James N. Ellis, Esq., for the employee on brief
Kimberly Davis Crear, Esq., for the insurer

COSTIGAN, J. The parties cross-appeal from a decision in which the administrative judge awarded the employee § 35 partial incapacity benefits for an accepted 2004 low back injury, but denied his emotional distress claim.[1] The employee argues the judge erred in denying his claim based on the "bona fide personnel action" exception in § 1(7A). He also contends the judge acted arbitrarily, capriciously and in violation of his due process rights by excluding, as irrelevant, certain testimony about his encounter with the insurer's evaluating psychiatrist. The insurer argues the award of ongoing § 35 benefits is wholly unsupported by the only expert medical opinion in evidence addressing the employee's physical complaints -- that of the § 11A impartial medical examiner.[2]

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[1] The judge characterized that aspect of the employee's claim as involving "a discrete set of events leading to an emotional disability, including both initial liability and continuing disability." (Dec. 2.)

[2] Based on the emotional distress claim, which had been joined and denied at the § 10A conference, (Dec. 1), upon motion of the employee, the judge deemed the

For the reasons that follow, we affirm the judge's decision in part, reverse it in part, and vacate his award of benefits.

The employee, sixty-three years old at the time of hearing, had been employed as a custodian for Wales Elementary School since 1998. On September 13, 2004, he injured his back when he lost consciousness and fell while stripping floors at work. He underwent a MRI and a course of injections. The insurer paid incapacity benefits for a three-month period without prejudice, see G. L. c. 152, §§ 7 and 8, and upon termination of payments, the employee filed a claim for further benefits. (Dec. 2.) While he was out from work, the employee was terminated from his job for reasons other than the work injury. (Dec. 3.)

The employee's claim pertaining to his physical injuries was the subject of a § 10A conference on March 7, 2005, at which he was allowed to join an emotional distress claim. The judge awarded § 35 partial incapacity benefits of $137.56 per week, based on a pre-injury average weekly wage of $529.27 and a $300 assigned earning capacity, and § 30 medical benefits, for the employee's physical injuries. His emotional distress claim was denied, and both parties appealed. (Dec. 2; Employee br. 1; Ins. br. 1-2.)

On June 1, 2005, pursuant to § 11A, the employee was evaluated for his physical complaints by Dr. Steven Silver, an orthopedic surgeon. In his report, Dr. Silver diagnosed a chronic lumbar strain, causally related to the employee's work injury, pre-existing spinal stenosis, and pre-existing facet joint arthropathy "at best"

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medical issues complex and allowed the parties to submit their respective expert psychiatric testimony. (Tr. I, 4, 79.) The employee offered the December 29, 2004 and January 24, 2006 reports of Dr. Zamir Nestelbaum. (Employee Ex. 2.) The insurer offered the March 1, 2005, May 18, 2005 and May 30, 2005 reports of Dr. Walter A. Borden. (Ins. Ex. 2.) The employee deposed Dr. Borden on May 24, 2006 and Dr. Nestelbaum on June 21, 2006.

temporarily aggravated by the employee's work.[3] (Stat. Ex. 1, p. 3.) The doctor further opined:

> It is my opinion the patient has a mild to moderate causally related disability related [sic] to his injury at work. I feel that he can stand for eight hours, sit for eight hours and lift no more than approximately 30-40 pounds, and can carry the same amount.
>
> It is my opinion the patient has reached an end result with respect to his lumbar strain, but has a spinal stenosis which may require further treatment. It should be noted that the spinal stenosis is unrelated to his injury at work.

(Id.) Although neither party at hearing[4] indicated an intent to depose Dr. Silver for the purpose of cross-examination, (Tr. I, 79-80; Tr. II, 71-72), he was, in fact, deposed on June 29, 2006.

As to the employee's physical injuries, the judge found:

> Dr. Steven Silver, the impartial examiner for Mr. Orlofski's physical complaints, opines that Mr. Orlofski has a chronic lumbar strain causally related to his injury at work. (Stat. Ex. #1, p. 3; Dep. p. 18, lines 6-10). However, he also has a pre-existing spinal stenosis that was only temporarily aggravated by this work. (Dep. p. 17, lines 11-23; p. 14, line 21 to p. 15, line 11; p. 27, lines 15-19). But, he opines that Mr. Orlofski is restricted to standing or sitting no more than eight hours, and lifting or carrying no more

[3] The doctor later testified that he defined "temporary aggravation" as "not longer than about three or four months." (Silver Dep. 11.)

[4] The hearing took place on February 8, 2006 and March 24, 2006. References to the verbatim transcript of the first day of testimony are designated, "Tr. I," and to the second day, "Tr. II."

> than 30 to 40 pounds. (Stat. Ex. 1, p. 3). He should also avoid shoveling and moving furniture. (Dep. p. 20, lines 3-16).[5]

(Dec. 3-4.) The judge's selective citation to the doctor's causal relationship opinion on page eighteen of the deposition transcript impermissibly ignored the contradictory opinion the doctor later offered. When questioned by employee's counsel, the doctor first testified that the chronic lumbar strain was causally related to the industrial injury and that, at the time of his examination, it was a major cause of the employee's orthopedic problems. (Dep. 14-15.) Upon questioning by insurer's counsel, however, the doctor offered a diametrically opposite opinion:

> Q.: The only diagnosis that you would causally relate to this industrial accident is the chronic lumbar strain; is that correct?
>
> A.: Exactly.
>
> . . .
>
> Q.: At the time of your examination, that strain had resolved; is that fair to say?
>
> A.: That's correct.

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[5] Dr. Silver never testified that the employee's spinal stenosis was aggravated by the work injury. In fact, he testified it was the employee's facet joint arthropathy (arthritis) that was temporarily aggravated by the work injury: "No one is saying that someone has pain as a result of spinal stenosis. They can have spinal stenosis being caused by degenerative arthritis, and they could have a temporary aggravation of the degenerative arthritis, but not the spinal stenosis." (Silver Dep. 11.) Lastly, Dr. Silver clearly opined that the restrictions against shoveling and moving furniture were based on the employee's predilection to back injury due to his spinal stenosis and facet joint arthropathy in the lumbar spine, not due to the chronic lumbar strain. (Silver Dep. 20-24.) A judge is not free to mischaracterize expert medical opinion. LaGrasso v. Olympic Deliv. Serv., 18 Mass. Workers' Comp. Rep. 48, 58 (2004).

Q.: And the limitations, if I'm reading your report correctly, are related to the stenosis and the arthritis, not the strain, right?

A.: Exactly.

Q.: The disability, if any, is related to the non-working [sic] related diagnoses of spinal stenosis and arthritis?

A.: Exactly.

Q.: And the strain, the only causally related diagnosis, wasn't playing any part in Mr. Orolofski's disability at the time of your exam?

A.: Exactly.

(Silver Dep. 26-27.) Finally, upon further questioning by employee's counsel, Dr. Silver changed his opinion yet again:

Q.: At the time you saw [the employee], you had an opinion that at that time he was suffering from a chronic lumbar strain causally related to his injuries at work; is that correct?

A.: That is correct.

Q.: You also said he had facet joint arthropathy that was temporarily aggravated by his work; is that correct?

A. That is correct. For a period of time following his injury, not at the time I saw him.

Q.: At that time he had symptoms of a chronic lumbar strain, which you said were a major but not predominant cause of his current complaints, is that correct?

A.: That is correct.

Q.: Thank you.

(Whereupon the deposition concluded. . . .)

(Silver Dep. 27-28.)

The insurer argues that because Dr. Silver's was the only expert medical opinion in evidence, and "Dr. Silver was **unequivocally** of the opinion that the work related low back strain had resolved at the time of his examination, there could be no other result other [sic] than finding that the employee was no longer entitled to workers' compensation benefits of any kind." (Ins. br. 11; emphasis added.) We disagree. The above-quoted excerpts of Dr. Silver's testimony reflect nothing but equivocation. Indeed, this deposition, although of shorter duration, is reminiscent of the "verbal tennis match" that transpired at the § 11A deposition in Nunes v. Town of Edgartown, 19 Mass. Workers' Comp. Rep. 279 (2005), with the doctor giving irreconcilable answers in turn, depending on which party asked the question. Here, as in Nunes, the impartial medical evidence was self-contradictory and, without further explanation, could not properly attain the prima facie status that § 11A(2) mandates.

The unexplained, internally inconsistent opinion of the § 11A physician in the present case cannot be accorded prima facie force under the Cook [v. Farm Service Stores, Inc., 301 Mass. 564 (1938)] reasoning. It should therefore "retain only its inherent persuasive weight as a piece of evidence *to be considered with other evidence*. . . ." Cook, id. at 566 (emphasis added). It logically follows that additional medical evidence is mandated under the circumstances presented by this case. The impartial physician's opinion evidence is inadequate because it is too self-contradictory to "[compel] the conclusion that the evidence is true. . . ." Id. As a practical matter, if the evidence cannot stand alone as prima facie, it cannot be exclusive. § 11A. The doctor's opinion retains status only as ordinary evidence to be weighed with any other medical evidence, within the parameters set by Perangelo's Case, [277 Mass. 59 (1931)].

Nunes, supra at 282-283, quoting Brooks v. Labor Mgt. Srvcs., 11 Mass. Workers' Comp. Rep. 575, 580 (1997).

As with Brooks, supra, and Nunes, supra, this is not a case governed by Perangelo's Case, supra("the opinion of an expert which must be taken as his evidence is his final conclusion at the moment of testifying"). In Perangelo, the medical expert changed his opinion based on new evidence. Such is not the case here. We cannot reconcile the two opinions expressed by the impartial physician.

As neither opinion can be prima facie evidence, the judge's adoption of one over the other was error.

Although § 11A(2) provides that "the administrative judge may, on his own initiative or upon a motion by a party, authorize the submission of additional medical testimony" based on the inadequacy of the impartial medical report or the complexity of the medical issues, it is "not incumbent upon the administrative judge to order it sua sponte." Viveiros's Case, 53 Mass. App. Ct. 296, 300 (2001). It is axiomatic that the employee bore the burden of proving all elements of his claim. Sponatski's Case, 220 Mass. 526, 527-528 (1915); Patterson v. Liberty Mut. Ins. Co., 48 Mass. App. Ct. 58, 592 (2000). Here, as in Viveiros, the employee did not move for the submission of additional medical evidence as to his physical injury. In the absence of such a motion, the administrative judge's failure to act on his own did not result in reversible error.[6] Viveiros, supra. Rather, we have a simple failure of proof by the employee. Therefore, the judge's award of partial

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[6] In Brooks, supra at 579, the reviewing board wrote:

> In Carmichael [v. A.T. & T. Technologies, 9 Mass. Workers' Comp. Rep. 791 (1995)] we noted: "Should the § 11A examiner fail to offer a satisfactory explanation for a change of opinion, the administrative judge should carefully weigh the adequacy of the § 11A evidence and consider allowing additional medical testimony." Id. at 793, n.2. We think that this is a case in which the judge *must allow* additional medical evidence, due to the unexplained change in the assessment of causal relationship. . . .

(Emphasis added.) Because neither Brooks nor Carmichael involved a party's motion for the allowance of additional medical evidence, the board's view that the judge was required to allow such evidence was later disavowed by the Appeals Court in Viveiros, supra. Compare Lorden's Case, 48 Mass. App. Ct. 274, 280 (1999)(error for judge to reject impartial medical examiner's report and deny both parties' motions to submit additional medical evidence). In Nunes, supra at 282 n.4, following the impartial physician's deposition, the employee did move for the allowance of additional medical evidence, albeit only for the so-called "gap" period prior to the § 11A examination.

incapacity and medical benefits for the employee's physical complaints cannot stand, as his finding of ongoing causally related incapacity is unsupported by the requisite expert medical opinion. Accordingly, we reverse that finding and vacate the award of benefits for the employee's physical injury.

As to the employee's emotional distress claim, the judge found:

> Mr. Orlofski's first medical treatment for emotional issues was in November of 2004 (two months after the physical injury) when he attempted suicide by carbon monoxide. He points to many factors that he says led up to this, including a dispute over pay and time compensation, stress at work due to extra working hours, alleged sexual harassment at work, and the accusations surrounding his firing in the fall of 2004, as well as the termination itself - which Mr. Orlofski candidly says "blew me out of the water."
>
> Nancy Orlofski testifies [sic] that her husband was very upset about the comp time issues, and become [sic] more and more stressed out.

(Dec. 3.) The judge concluded:

> A large part of Mr. Orlofski's claim is based on his emotional difficulties. I do not find facts that would support Mr. Orlofski's claim on these issues. Specifically, I do not find support for Mr. Orlofski's claim for sexual harassment, as I credit the testimony of Mr. Zinkus [the school principal] regarding this episode. As to the other events, including the comp time issue, the extra work hours, and the termination, I find these to be bona fide personnel actions and therefore do not find them to be a basis for an emotional disability claim.

(Dec. 4.)

Where there are conflicts in the evidence requiring credibility assessments, it is up to the trier of fact to resolve the issues. Larti v. Kennedy Die Castings, Inc., 19 Mass. Workers' Comp. Rep. 362, 369 (2005); Carney v. M.B.T.A., 9 Mass. Workers' Comp. Rep. 492, 494 (1995). Here the judge resolved conflicts between the employee's testimony and that of Mr. Zinkus against the employee. As the judge's credibility findings are not arbitrary or capricious, we will not disturb them. See Lettich's Case, 402 Mass. 389, 394 (1998); Mulkern v. Massachusetts Tpke.

Authy., 20 Mass. Workers' Comp. Rep. 187, 199 (2006). Based on the testimony he credited, we see no error in the judge's view that, except for the employee's post-termination evaluations by the insurer's psychiatric expert, the events the employee incriminated in his emotional distress claim were bona fide personnel actions which, by statute, could not give rise to a compensable personal injury.[7]

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[7] General Laws c. 152, § 1(7A), provides in pertinent part:

> No mental or emotional disability arising principally out of a bona fide, personnel action including a transfer, promotion, demotion or termination except such action which is the intentional infliction of emotional harm shall be deemed to be a personal injury within the meaning of this chapter.

Citing to Dube's (dependent's) Case, 70 Mass. App. Ct. 121 (2007), which involved a physical injury found to have caused such unsoundness of mind as to render the employee's death by suicide compensable under the provisions of G. L. c. 152, § 26A, the employee argues the judge erred in using § 1(7A)'s bona fide personnel action exception to bar his psychological injury claim, because his emotional distress was a sequella of his 2004 physical injury. (Employee br. 12-13.) The problem is the employee did not advance that theory below. To the contrary, in his opening statement at the February 8, 2006 hearing, employee's counsel explained to the judge:

> We're here today on an appeal issued by you. [Sic.] There is a physical issue and back injury as a result of a slip and fall that occurred. There is also a serious psychiatric issue, based on treatment and allegations by Mr. Zinkus toward Mr. Orlofski, and Mr. Orlofski has had extensive psychiatric evaluations. There have been complaints of harassment, and I think it's going to reveal how Mr. Zinkus treated Mr. Orlofski and lead him to a condition of anxiety, depression and suicidal thoughts, which we're claiming all arise out of the course [sic] of his employment with the Town of Wales.

(Tr. I, 7-8.) Moreover, in his appellate brief, employee's counsel wrote:

> Shortly after the injury, the Employee began to exhibit signs of serious emotional distress. (Dec. at 3). *The genesis of his emotional issue was when*

Lastly, the employee argues the judge violated his due process rights by denying him "the opportunity to present all of the relevant facts that would allow for a finding for psychological injuries." (Employee br. 9.) Specifically, the employee contends he was not allowed to testify about "an event that occurred as a result of his visit with the Insurer's Independent Medical Examiner."[8] (Employee br. 10.)

Contrary to the employee's argument, the transcript of the hearing reflects the employee testified in some detail about his February 22, 2005 and May 18, 2005 evaluations with Dr. Borden and what later transpired. (Tr. I, 51-60.) It is true the judge sustained several of the insurer's objections to employee's counsel's line of questioning, but the judge's rulings were proper, given that the employee had been terminated from his job several months prior to Dr. Borden's statutorily authorized

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> *the Employee was informed that he was not entitled to the "comp time" that he thought he had earned.* (Trans. I at 21-22.)

(Employee br. 4; emphasis added.) Given the employee's own characterization of his psychological claim, we see no error in the judge's view of that claim as involving "a discrete set of events leading to an emotional disability, including both initial liability and continuing disability." (Dec. 2.) As the employee did not advance the argument below that his physical injury contributed to his emotional distress, we deem that argument waived. Green v. Town of Brookline, 53 Mass. App. Ct. 120, 128 (2001). Even if the employee had so claimed, the absence of an expert medical opinion causally relating his ongoing physical complaints to the work injury would defeat such a claim.

[8] The insurer's evaluating psychiatrist, Dr. Walter A. Borden, testified that based on his May 18, 2005 second evaluation of the employee, he was of the opinion the employee was then "imminently dangerous to himself," i.e., suicidal. He also testified that based on information he had received from the workers' compensation insurer, he believed the employee was then "imminently homicidal," i.e., a danger to principal Zinkus, and that he so informed Mr. Zinkus. The employee, who was the subject of a restraining order previously obtained by Mr. Zinkus, was subsequently arrested. (Borden Dep. 34-40.)

evaluations. G. L. c. 152, § 45. See Larocque's (dependents') Case, 31 Mass. App. Ct. 657 (1991)(employee's fatal myocardial infarction at home, two weeks after discharge from employment, did not arise in the course of his employment, even though caused by emotional stress of telephone call with former employer). In any event, the employee's entire account of his dealings with Dr. Borden and his subsequent arrest, see footnote 8, supra, is contained in Dr. Nestelbaum's January 24, 2006 report, and was addressed at length at the doctor's deposition. (Employee Ex. 2.) The judge simply did not credit the employee's version of these events.

Accordingly, we affirm the administrative judge's denial and dismissal of the employee's emotional distress claim. We reverse so much of the judge's decision as found ongoing causally related physical incapacity, and we vacate his award of benefits. The insurer may seek recoupment of the overpayment resulting from this decision as provided in § 11D(3).[9]

So ordered.

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Patricia A. Costigan
Administrative Law Judge

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William A. McCarthy
Administrative Law Judge

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Bernard W. Fabricant
Administrative Law Judge

Filed: **May 6, 2009**

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[9] General Laws c. 152, § 11D(3), provides in pertinent part:

> Where overpayments have been made that cannot be recovered [by unilateral reduction of weekly benefits], recoupment may be ordered pursuant to the filing of a complaint pursuant to section ten or by bringing an action against the employee in superior court.