COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS	**BOARD NO. 05504-95**
Arthur Belleville	Employee
Sonora Steel	Employer
National Union Fire Insurance	Insurer

REVIEWING BOARD DECISION
(Judges McCarthy, Wilson and Smith)

APPEARANCES
George N. Keches, Esq., for the employee at hearing
Karen S. Hambleton, Esq., for the employee on brief
Charles C. Donoghue, Esq., for the insurer

MCCARTHY, J. When this fifty-seven year old ironworker reported an industrial injury to his left arm and shoulder on February 7, 1995, his employer's insurer voluntarily commenced payment of § 34 temporary total weekly incapacity benefits. Subsequently, the insurer filed a complaint to discontinue or modify those benefits. The complaint was denied at a § 10A conference and the insurer appealed to a full evidentiary hearing. While waiting for the hearing date, Belleville filed a motion to have his claim for further weekly benefits[1] joined at hearing. The motion was allowed at the February 9, 1998 hearing. (Dec. 2, 4.)

The insurer also presented a motion at the hearing. It sought permission to immediately terminate the payment of benefits claiming that a material misrepresentation by the employee was relied upon by the insurer in accepting the claim. In conjunction with its allegation, the insurer also requested the imposition of § 14(2) penalties. The motion to terminate weekly benefits was denied, but the misrepresentation allegation was added as an issue at the hearing. (Dec. 2.)

[1] Because the statutory expiration of his § 34 benefits was approaching, Belleville sought § 34A or, alternately, § 35 benefits. (Dec. 2.)

After considering the testimony of four lay witnesses as well as three deposition witnesses and thirteen exhibits, the administrative judge issued his decision. The judge found that Belleville had sustained an industrial injury arising out of and in the course of his employment on February 7, 1995. He awarded ongoing weekly incapacity benefits and denied and dismissed the insurer's § 14 claim. (Dec. 10,14.) The insurer appeals, arguing that the administrative judge's ruling on its § 14(2) complaint is arbitrary, capricious and against the weight of the evidence.

Section 14(2) of the Act states, in pertinent part:

> If it is determined that in any proceeding within the division of dispute resolution, a party, . . . concealed or knowingly failed to disclose that which is required by law to be revealed, knowingly used perjured testimony or false evidence, knowingly made a false statement of fact or law, participated in the creation or presentation of evidence which he knows to be false, or otherwise engaged in conduct that such party knew to be illegal or fraudulent, . . . the part shall be assessed, in addition to the whole costs of such proceedings and attorneys' fees, a penalty payable to the aggrieved insurer or employee, in an amount not less than the average weekly wage in the commonwealth multiplied by six.

The insurer submitted numerous documents and medical records in support of its § 14(2) allegation. Included in that evidence were the following: the February 28, 1982 Jordan Hospital Emergency Department record of Mr. Belleville's treatment for a work related left shoulder and upper arm injury which was thought to be a partial tear of the biceps tendon (Insurer Exhibit 5, Dec. 2, 6); the January 3 and 5, 1995 Jordan Hospital Emergency Department records of treatment for a possible left rotator cuff tear sustained while playing hockey (Insurer Exhibit 2, Dec. 2, 7); and the February 22, 1995 transcript of an interview with a representative of the insurer in which Belleville denied ever having any left shoulder problems or any sports injuries to his left shoulder. (Insurer Exhibit 1, Dec. 2, 5.)

After consideration of this evidence, as well as Belleville's live testimony, the administrative judge made the following subsidiary findings on the § 14 issue:

> I do not find the employee to have made any misrepresentations with the intent to fraudulently advance his workers' compensation claim. I do

> not find his failure to have told of his February 1982 and January 1995 left upper extremity injuries to have been done with any ill intent. I do not find any action or omission by the employee that would serve to bar his receipt of compensation. Nor do I find any action or omission of the employee that would invalidate or warrant the undoing of the insurer's acceptance of liability for the employee's February 7, 1995 injury.
>
> Having thoroughly reviewed and considered the testimony of Mr. Belleville, having sized up his person and his demeanor while he testified, and having considered the other testimony and evidence, I am satisfied that Mr. Belleville simply did not sense the relevance of those earlier incidents. Mr. Belleville's rough and tumble manner leads me to find credible his explanation that he viewed the questions regarding previous injuries as asking about injuries that had permanent or lasting effects. Here we have a man who described his having had many minor, short-lived injuries that he never allowed to interrupt his life or work now having an injury that he described as being like nothing he had ever experienced before.
>
> The 1982 injury that was suspected to be a biceps tear was years before, required no treatment beyond the initial visit, and did not cause lost time. Mr. Belleville has done strenuous work over the intervening years since then. Nothing was in the record to indicate that there had ever been any similar problem or any interference with the employee's capacity to work due to the left biceps until the February 1995 injury. Nor was there anything to indicate that there was any deformity, telltale of a biceps tear, until after February 1995.
>
> The January 1995 incident also subsided quickly. I credit Mr. Belleville's testimony that there were no symptoms from this incident and was no need for any limitations on his work activity during his work for both Converse in January and Sonora in February. Again, I am satisfied that Belleville saw the January 1995 incident as a minor insignificant occurrence and a done deal well before the February 1995 injury at Sonora.

(Dec. 11-12.)

Reduced to its essentials, the insurer's argument attacks the administrative judge's credibility findings as arbitrary and capricious and therefore erroneous as a matter of law. The interpretation of the evidence introduced at hearing ultimately depended upon the employee's credibility. Based on his impressions set out above, the hearing judge believed that Belleville testified honestly. Credibility findings belong exclusively to the administrative judge, and the reviewing board has no power to intrude upon or otherwise disturb such findings. Ighodaro v. All-Care Nurse Ass'n., 12 Mass. Workers' Comp.

Rep. 415, 417 (1998). We therefore affirm the decision of the hearing judge. As we do so, one portion of the insurer's argument warrants comment.

The hearing judge ascribes the errors and omissions in his recitation of the history of prior injuries and medical treatment to Belleville's view that they were all insignificant and thus unworthy of mention. Directing us to an outpatient record of treatment in January 1995 at the Jordan Hospital for a non-work related injury, the insurer argues that this record clearly leads to the conclusion that Belleville attempted to get the doctor to relate this hockey injury to an earlier work injury. (Insurer Brief 15.) This record, says the insurer, ". . . clearly serves to support the insurer's contention that the employee was fraudulent in his numerous misrepresentations, setting forth the mind set of the employee, ..." (Insurer Brief 15.) According to the insurer, the employee told Dr. Broome, the doctor in attendance at Jordan hospital, that he "Shot hockey puck lefty. You saw me ten years ago, want to relate it to workers' comp injury ten years ago . . . ." (Insurer Brief 15.) As the judge did not make specific findings about this hospital record, it would be appropriate to recommit for further findings if the insurer had correctly reported the evidence. But it hasn't!

Neither the January 5, 1995 emergency department intake note nor Dr. Broome's testimony at deposition support the insurer's position. The emergency department note states "You saw me 10 yrs ago – wants to *attend Dr. S. Oliver*. Relate it to wc injury 10 yrs ago." (Insurer Exhibit 2; emphasis added.) At deposition, when asked by the insurer's attorney to read his handwritten note, Dr. Broome replied "He wants to *attend Doctor Oliver*. Doctor Oliver is an orthopedic surgeon. He relates it to a workman's comp injury of ten years ago. . . ." (Dep. 9-10; emphasis added.)

The insertion of the words "attend Dr. S. Oliver," absent from the insurer's "quote," puts the evidence in a different light, one much less favorable to the insurer's position.[2] Telling Dr. Broome that he wished to come under Dr. Oliver's care is not suggestive of fraud nor is it inconsistent with the judge's characterization of Belleville.

[2] It is a cause for concern that the insurer would misread both the exhibit and Dr. Broome's deposition on this point.

Nor does Belleville's stated thought that his then current problem relates to a prior injury necessarily lead to a finding of fraud.[3] Rather, both statements can be read to be consistent with a "rough and tumble manner."

The administrative judge did not err and his decision is affirmed.

So ordered.

William A. McCarthy
Administrative Law Judge

Sara Holmes Wilson
Administrative Law Judge

Filed: **August 16, 2000**

Suzanne E.K. Smith
Administrative Law Judge

[3] The judge adopted the medical opinion of Dr. McGuirk. Doctor McGuirk opined that there was no causal connection between the employee's January 1995 condition and the injury caused by work on February 7, 1995. (McGuirk Dep. 27—29); see also McGuirk Dep. 24-25 (no causal connection between 1982 injury and February 7, 1995 work injury).