COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 036858-10**

Carlos Araujo	Employee
United Walls Systems, LLC	Employer
AIM Mutual Insurance Company	Insurer

REVIEWING BOARD DECISION
(Judges Horan, Fabricant and Harpin)

The case was heard by Administrative Judge Benoit.

APPEARANCES
Teresa Brooks Benoit, Esq., for the employee at hearing
James N. Ellis, Esq., for the employee on appeal
Robert J. Riccio, Esq., for the insurer at hearing and on appeal
Peter P. Harney, Esq., for the insurer on appeal

HORAN, J. The employee appeals from a decision awarding him a closed period of § 35 benefits,[1] arguing the judge erred by relying, in part, on video evidence[2] of the employee's activities to conclude he was no longer disabled, and therefore no longer entitled to partial incapacity benefits. We agree, and reverse the decision insofar as it terminates the employee's § 35 benefits as of December 10, 2012.

The employee, age fifty-eight at hearing, was educated through the sixth grade in Uruguay. He speaks limited English and testified with the assistance of a Spanish interpreter. His work history consisted of heavy labor. On his injury date, he worked

[1] The insurer was also ordered to pay medical benefits, interest, and an enhanced attorney's fee. (Dec. 8.)

[2] The videotape evidence consisted of two digital video discs (DVDs), along with their accompanying investigator's reports. (Dec. 3; Exs. 8-11.) The judge noted he reviewed this evidence, but specifically relied upon video of the employee's activities as depicted on December 10, 2012, to terminate the employee's entitlement to § 35 benefits as of that date. (Dec. 6-7.)

as a construction laborer for the insured; his average weekly wage was $896.67. (Dec. 4, 6; Tr. 15.)

The employee testified that on November 17, 2010, he was attempting to lift a manhole cover with a co-worker. (Tr. 22-23.) While lifting, the employee felt the onset of low back and right leg pain. (Tr. 23-24.) The judge did not describe the history of the employee's injury in detail, but did find the employee "sustained an industrial injury . . . on November 17, 2010." (Dec. 8.)

The employee was examined by Dr. Marc Linson pursuant to § 11A.[3] In his May 16, 2012 report, Dr. Linson opined the employee:

> injured his back in the course of his employment November 2010 and that this injury aggravated pre-existing lumbar degeneration and borderline stenosis at the L4-5 level. Prior to this injury it was not causing him symptoms. He appears to be, according to his testimony, in severe and ongoing pain a year and a half later. He would be considered at a medical end result.
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> . . .
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> I find him . . . permanently partially disabled with the injury of November 2010 being a major causal factor. He is able to participate in sedentary to light work with no standing, sitting or walking for more than 45 minutes without a chance to change position, infrequent bending and no lifting over 15 pounds. *With these restrictions he is capable of full-time work but is not able ever to resume his former heavy job doing paving work. . . .*

(Ex. 1; emphasis added.)

Video evidence of the employee's activities was admitted at the May 22, 2013 hearing. See footnote 2, supra. At his July 30, 2013 deposition, Dr. Linson was not shown that evidence, and was not asked to comment on the employee's activities as depicted therein. The doctor maintained that while he had not seen the employee since May, 2012, his "condition was not expected to have changed appreciably in the future and that he had a certain permanent partial disability." (Dec. 7.) Dr. Linson also testified, consistent with the opinions expressed in his report:

[3] Although the judge permitted both parties to admit additional medical evidence for the period following Dr. Linson's examination, neither party did. (Dec. 3.)

> [I]t's not that [the employee is] unable to work. It's just that he's unable to do certain jobs in his work, which was a heavy job.
>
> . . .
>
> He can do sedentary to light work with no standing, sitting, or walking for more than 45 minutes without a chance to change position and frequent bending and no lifting over 15 pounds.

(Dep. 10, 43.) Dr. Linson later explained his opinions were "based on my assessment *to some degree* of [the employee's] credibility, which I found to be satisfactory." (Dep. 23; emphasis added.) When asked if he was able to detect tenderness or spasm in the employee's back, Dr. Linson replied, "I was." (Dep. 31.) When asked to explain why an examination of the employee prior to May, 2012, failed to document back tenderness or spasm, Dr. Linson explained it was "possible that this man had a good day that day. . . and that was a day where he was accurately observed to have no problem associated with his back. . . ." (Dep. 32.)

At the conclusion of his deposition, Dr. Linson made it clear he had,

> in a very strong way, pegged [the employee's] physical and medical condition as being unchanging from the time of my impartial [examination] on. So I'm committed to that statement.
>
> *I also do think that within some variation, he is likely to be as he was then, indefinitely*.

(Dep. 45; emphasis added.)

The judge adopted Dr. Linson's opinions respecting causal relationship, diagnoses, and the nature and extent of the employee's disability subsequent to November 17, 2010.[4] (Dec. 5-6.) We are compelled to infer that the judge also credited the employee's history of injury, because if he had not, there would be no

[4] While the judge specifically adopted, inter alia, Dr. Linson's opinion that the employee, on June 29, 2011, reported improvement in his back condition, such improvement was prior to Dr. Linson's examination. The fact that Dr. Linson agreed the employee had previously reported some resolution of symptoms did not preclude the doctor from forming opinions, following his examination on May 16, 2012, that the employee's medical restrictions were causally related to his work injury, and likely permanent.

basis for awarding the employee partial incapacity benefits based on a full-time, minimum wage earning capacity.[5] (Dec. 7-8.)

The judge noted Dr. Linson's opinions "were based to some degree on the doctor's assessment of [the employee's] credibility. . . ." (Dec. 7.) The judge then concluded that, "[b]ased on my assessment of the Employee's credibility . . . including my observation of him during the Hearing and . . . the surveillance video, I find that the Employee was no longer disabled as of December 10, 2012." Id. Accordingly, the judge ordered the insurer to pay the employee weekly partial incapacity benefits from November 18, 2010 to December 10, 2012. (Dec. 8.)

On appeal, the employee argues that once the judge adopted Dr. Linson's opinions to award weekly partial incapacity compensation, the judge erred by discontinuing those benefits based primarily on the video evidence of the employee's activities of December 10, 2012.[6] (See Exs. 10-11.) We agree.

This case is analogous to Jaho v. Sunrise Partition Sys., Inc., 23 Mass. Workers' Comp. Rep. 185 (2009). In Jaho, the judge awarded the employee § 34A benefits for a closed period, "and then assigned him an earning capacity, based on inferences the judge drew from viewing [the employee] on surveillance videotapes."

[5] The employee does not object to the $320 earning capacity assigned.

[6] We acknowledge the judge also relied upon his observations of the employee at the hearing. (Dec. 7.) However, none of the judge's observations respecting the employee's appearance at hearing may permit the conclusion, without more, that Dr. Linson's medical opinions would have changed if he had been apprised of those observations. We also note that, as described by the judge, the employee's behavior at hearing was not contrary to the medical restrictions imposed by Dr. Linson. (Ex. 1; Dep. 43.) The same can be said concerning the video of the employee's activities on December 10, 2012. (Ex. 11.) That video is less than thirteen minutes long, and purports to capture the employee's activities over approximately fifty-two minutes that day. The employee is seen driving women to a store; he remains outside, where he stands and occasionally walks. He drives the women back to a residence with their purchases. He then makes one trip from the vehicle while carrying several small white shopping bags into the residence. There is no reliable way of knowing how much weight he is carrying, and there was no testimony concerning this issue. The judge did not avail himself of the option of forwarding the video evidence to Dr. Linson to inquire if the actions of the employee, as depicted therein, would have altered the doctor's opinions. See General Laws c. 152, § 11.

Id. Mr. Jaho was observed standing for an extended period of time at a soccer match, and carrying a cooler. Id. at 188. The judge concluded "that the employee's physical condition was by the time that the videos were taken substantially better than it had been when [the impartial medical examiner] examined him. . . ." Id. at 188-189. The judge then assigned the employee an earning capacity, and he appealed. We held, "it was error for the judge to substitute his conclusory assessment of the employee's videotaped activities" in place of evidence demonstrating the requisite improvement in the employee's medical condition or his vocational capacity. Id. at 190, and cases cited. Accordingly, we reinstated the employee's § 34A benefits. Id. at 192.

In this case, the judge erred in a similar fashion. He assumed that because Dr. Linson testified his opinions were, in part, based on his assessment of the employee's credibility at the time of his examination, the doctor would have changed his opinions if he had observed the employee's behavior on the videotape, or at hearing. Such an assumption is, on the record before us, arbitrary. As noted, the insurer did not ask Dr. Linson to view the video evidence. Nor did the insurer ask the doctor questions based on the employee's activities. The judge had the option of asking the doctor to view, and to comment on, the employee's activities, but chose not to do so. See footnote 6, supra. Because Dr. Linson steadfastly maintained the employee's industrial accident caused a permanent partial disability, the judge was not free, on this record, to reject that opinion once he adopted it. Compare Brommage's Case, 75 Mass. App. Ct. 825, 828 (2009)(judge need not adopt opinions of impartial medical examiner where judge rejects factual foundation of those opinions).

That part of the decision terminating the employee's entitlement to partial incapacity compensation as of December 10, 2012, is reversed. We order the insurer to pay the employee § 35 benefits at the weekly rate of $364 from November 18, 2010 to date and continuing.

Because only the employee appealed the hearing decision, and has prevailed, an attorney's fee may be due under G. L. c. 152, § 13A(7). Accordingly, employee's

counsel is directed to submit to the undersigned, for review, a duly executed fee agreement between the employee and counsel. No attorney's fee shall be due and collected from the employee unless and until the fee agreement, and the amount of the fee requested, is approved by this board.

So ordered.

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Mark D. Horan
Administrative Law Judge

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Bernard W. Fabricant
Administrative Law Judge

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William C. Harpin
Administrative Law Judge

Filed: **November 25, 2014**