COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 054851-00**

Carminda Pinhancos	Employee
St. Luke's Hospital	Employer
Southcoast Health System	Insurer

REVIEWING BOARD DECISION
(Judges Costigan, Maze-Rothstein and Wilson)

APPEARANCES
Goncalo M. Rego, Esq., for the employee
Stephen P. Rowley, Esq., for the insurer

COSTIGAN, J. The employee appeals from a decision in which an administrative judge found that her allegation of a work injury was not credible and denied and dismissed her claim for workers' compensation benefits. Because the judge relied heavily on an unauthenticated hospital record, improperly admitted into evidence, in making his credibility assessments, we vacate the decision and recommit the case.

The employee, age fifty-three at the time of the hearing and educated to the fourth grade in her native Portugal, worked for the employer hospital as a housekeeper, cleaning patient rooms and transporting cleaning supplies and trash bags on a four-wheel cart. Her work was moderately heavy, requiring repetitive activities and the use of both upper extremities. (Dec. 4-5.)

The employee, who speaks Portuguese and has a limited ability to speak and understand English, was nevertheless able to communicate with her supervisor in English about issues related to work. (Dec. 4, 5, 10.) According to the employee's testimony, which the administrative judge recited at length but did not use to make factual findings, (Dec. 5-7), she injured her right arm while lifting dirty linens at work at approximately noon on July 25, 2000. She had not been in any discomfort when she reported to work that day. She continued working, with pain in her right shoulder

and across her shoulders, for a couple of hours, but by 2:00 p.m. she was unable to move her arm. The employee went on to testify that at 3:00 p.m., she telephoned her supervisor, told him that she injured herself pulling a bag, was unable to continue working, and that she needed to go to the emergency room. The employee then sought out her daughter-in-law, who worked as a registered nurse at the hospital. She wanted her daughter-in-law to interpret for her in the emergency room. When the daughter-in-law said she could not then leave work but would meet her in the emergency room when she finished her shift, the employee presented to the emergency room nurses' station alone and reported she injured herself. She was asked questions, filled out paperwork,[1] was seen by a doctor, was discharged and went home. (Dec. 5-6.)

The employee further testified that on the following day, she called her employer to advise that she would not be in to work due to a shoulder problem.[2] She remained out of work for two weeks, and upon returning, experienced pain while performing her work with difficulty. As of September 25, 2000, the employee could no longer work. She underwent an operation in November of that year, and was in physical therapy for three months thereafter. At the time of the hearing, the employee

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[1] This statement mischaracterizes the employee's uncontradicted testimony that when she presented to the emergency room, she had to answer some questions but that personnel at the nurses' station filled out the paperwork. (Tr. 22.) Having found that the employee speaks Portuguese and has a limited ability to speak and understand English, (Dec. 4), and having noted there was no evidence whether emergency room personnel spoke or understood Portuguese, (Dec. 6, n.1), the judge nevertheless found that "the St. Luke's Hospital emergency room record of July 25, 2000 is a fair representation of the history *as provided by the Employee*." (Dec. 13; emphasis added.) Even if the hospital record were properly in evidence, which it was not, we do not think the judge could reasonably infer that the record accurately reflected what the employee said to the emergency room personnel. See Truong v. Chesterton, 15 Mass. Workers' Comp. Rep. 247, 249-251 (2001)(judge's inference that surgery had been considered before employee's alleged work injury not supported by the evidence and, thus, not reasonable.)

[2] The employee testified that she did not remember with whom she spoke when she called in on July 26, 2000, although she acknowledged she was supposed to either speak with her supervisor or leave a message on his answering machine. (Dec. 6; Tr. 23.)

continued to treat with her primary care physician and take pain medication. (Dec. 6-7.)

The insurer denied the employee's claim for workers' compensation benefits, as did the administrative judge at the § 10A conference. (Dec. 2.) Pursuant to the employee's appeal, she underwent a § 11A impartial medical examination by Dr. Gilbert Shapiro on November 14, 2001. He diagnosed the employee as having degenerative cervical disc disease at multiple levels with possible radiculitis, a right shoulder rotator cuff tear with impingement syndrome, status postoperative care, and diabetes mellitus. The doctor opined that the industrial accident had aggravated the employee's pre-existing degenerative changes in her cervical spine and right shoulder, and that she was partially disabled due to restricted ability to use her right upper extremity. (Dec. 7.) His opinions were based on the history provided by the employee. (Dec. 8, citing Dep. 6.) The judge ruled that the impartial report was adequate.[3] (Dec. 3.)

The insurer deposed the impartial doctor, and asked him questions about the emergency room record from the alleged date of injury, July 25, 2000. (Dec. 8.) That record had been provided to the doctor in the materials sent to him prior to the examination, (Dep. 6-7), but had not been offered into evidence at the June 3, 2002 hearing. By written motion dated June 26, 2002, a copy of which is appended to the employee's brief, the insurer notified the judge that "it intended to have Dr. Shapiro comment on the St. Luke's Hospital Emergency Room Record dated July 25, 2000 at his deposition," and asked that it be "included as a medical exhibit as if were [sic] introduced at the hearing on June 3, 2002."[4] On July 2, 2002, the judge made his

[3] The judge noted that Dr. Shapiro did not render a determination on the employee's disability for the "gap period" prior to his examination. However, because the parties "agreed that any change in disability, if any, shall apply as to the date of the impartial examination," no additional medical evidence was required. (Dec. 3.)

[4] The motion is also contained in the Board file, which we have reviewed as we are permitted to do. See Rizzo v. M.B.T.A., 16 Mass. Workers' Comp. Rep. 160, 161 n.3 (2002).

written ruling on the motion: "The insurer may *present* the noted record to Dr. Shapiro *for comment*." (Employee Brief, Exhibit 1; emphasis added.)

The emergency room record was first marked as Exhibit 2 to the § 11A deposition for identification purposes only. (Dep. 7.) The impartial physician acknowledged that the record contained no history of a specific lifting or throwing incident at work, such as the employee had given to the doctor, but rather reflected that the employee's complaint of right shoulder pain had been present for several months, that it had worsened over the past five days, and that there had been no trauma. Although he agreed that the respective histories were inconsistent, (Dep. 9), Dr. Shapiro testified that he based his causal relationship opinion - - that the industrial accident aggravated the employee's underlying, pre-existing problems - - on the employee's history, and not the emergency room record. (Dep. 11.) The judge credited the doctor's diagnoses and disability opinions but not his causal relationship opinion, due to the discrepancy in the two histories and the judge's disbelief of the employee's history of a work injury. (Dec. 8.)

The judge made the following findings pertinent to the issue on appeal:

> The Employee has several hurdles to overcome in proving each element of her claim. The threshold issue is whether on July 25, 2000, she sustained an industrial injury during and while in the course of her employment. *The report of St. Luke's Hospital dated July 25, 2000, and submitted by the Insurer during the deposition of Dr. Shapiro*, notes the Employee being assisted by her daughter in law. This report is inconsistent with the Employee's testimony.[5] The record notes the Employee had been having shoulder pain for several months and it has over the past five days become somewhat worse. The Employee testified that she was fine when she reported to work on July 25, and suggested by her testimony that she had no problems with her shoulder.

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[5] There is no such inconsistency. The employee and her daughter-in-law both testified, (Tr. 21, 39-40), and the judge found, (Dec. 9), that the daughter-in-law did not accompany the employee to the emergency room. Thus, the daughter-in-law was not present when the employee spoke with personnel at the nurses' station. When the daughter-in-law met the employee in the emergency room, the employee was "waiting for the doctor to return." (Id.) The daughter-in-law did not know what the employee had told the doctor, who did not speak Portuguese, before she arrived, and the doctor did not ask the daughter-in-law any questions. (Id.)

> Additionally, *I find the report to be an accurate account of the history provided to the emergency room personnel on July 25, 2000.*
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> Dr. Shapiro's report was based upon the history provided to him by the Employee. The history is inconsistent with that of the St. Luke's Hospital emergency room record. The Employee did not notify the Employer that she sustained a work related injury either by way of her supervisor Mark Russo, she did not inform her daughter in law that she sustained a work related injury on the day in question, nor does the record of St. Luke's Hospital's emergency room reflect an industrial injury. The Employee's actions subsequent to July 25, 2000 are not consistent with one who has sustained a work related injury, including seeking weekly benefits when or if she was entitled.
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> . . .
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> *I find the St. Lukes's Hospital emergency room record of July 25, 2000 is a fair representation of the story as provided by the Employee. I further find that this record is the type contemplated by M.G.L. c. 233, § 79.* The record which includes a history of "shoulder pain for several months," there "was no trauma," she "has been taking Celebrex for this with moderate relief," and "over the last five days the pain is somewhat worse," is relevant as to the Employee's medical condition, treatment and history regarding her right shoulder. However, this report is inconsistent with the Employee's testimony. Such facts relevant to medical history or treatment are admissible without the need of corroboration of the Employee, whose testimony I do not credit. *I find the emergency report as written is a fair representation of the history as provided by the Employee.* I find the Employee was aware of the procedure to report a work related injury, and she failed to do so.
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> Based upon the above I find the Employee did not satisfy her burden of proof that it was more likely than not that she sustained an industrial injury, during and while in the course of her employment with the Employer.

(Dec. 11-13; emphases added.) The administrative judge denied and dismissed the employee's claim. (Dec. 14.)

The employee contends that the judge's denial of her claim was arbitrary and capricious, because he improperly allowed into evidence as Exhibit No. 5, (Dec. 1), the employer's emergency room record, and then made findings of fact based on that record. We agree.

The scope of a judge's authority to admit evidence is governed by 452 Code Mass. Regs. § 1.11(5), which provides in pertinent part: "[u]nless otherwise provided

by M.G.L. c. 152 or 452 C.M.R. 1.00, the admissibility of evidence . . . shall be determined under the rules of evidence applied in the courts of the Commowealth." See Haley's Case, 356 Mass. 678, 681-682 (1970). The admission of hospital records in workers' compensation proceedings is governed by G. L. c. 152, § 20, which in relevant part provides:

> Copies of hospital records kept in accordance with section seventy of chapter one hundred and eleven, *certified by the persons in custody thereof to be true and complete,* shall be admissible in evidence in proceedings before the division or any member thereof.

(Emphasis added.) At the deposition of the impartial physician, the employee objected, on the basis of hearsay, to the insurer's offer of the St. Luke's Hospital emergency room record into evidence.[6] (Dep. 13-14.) The judge erred when he overruled the objection, (Dec. 3), and it matters not that he expressly limited the admission of the record "for history." (Dec. 1.)

Insofar as the copy of the emergency room record that the insurer offered at the § 11A deposition was not certified, as required by § 20, the employee's objection should have been sustained, as "[t]he requirement for authentication by certification is absolute under [that statute]." Guzman v. Town and Country Fine Jewelry, 12 Mass. Workers' Comp. Rep. 50, 54 (1998). The employee's objection on the basis of hearsay was sufficient to preserve the issue of the lack of proper certification under § 20. See id. at 53-54; Patterson v. Lib. Mut. Ins. Co., 48 Mass. App. Ct. 586, 595 (2000). Moreover, as to the judge's finding that the hospital record "is the type contemplated by M.G.L. c. 233, section 79," (Dec. 13), certification is required by

[6] Neither in its motion, see footnote 4, supra, nor at the § 11A deposition, did the insurer cite the statutory authority for its offer of the emergency room record.

that statute as well.[7]

The judge's erroneous admission of the emergency room record was not harmless. Compare Indrisano's Case, 307 Mass. 520, 523 (1940) (a decree in a workmen's [sic] compensation case will not be reversed for error in the admission or exclusion of evidence, unless substantial justice requires reversal). Here, the admission "injuriously affected substantial rights" of the employee. Moseley v. New England Fellowship for Rehab. Alternatives, 13 Mass. Workers' Comp. Rep. 316, 324 (1999). Generally, a judge's credibility findings are final and immune from appellate review, see Nee v. Boston Medical Ctr., 16 Mass. Workers' Comp. Rep. 265, 266 n.1 (2002), citing Lettich's Case, 403 Mass. 389, 394 (1988), and the judge did make certain credibility assessments which, on their face, would withstand our scrutiny. It is apparent from his decision, however, that the springboard for all of the judge's credibility findings is the discrepancy between the history the employee gave to the impartial medical examiner, to which she also testified at hearing, and that contained in the improperly admitted hospital record. "Like other findings, findings on credibility must be based on the evidence of record. If they are not, they are arbitrary and capricious." Melendez v. City of Lawrence, 16 Mass. Workers' Comp. Rep. 370,

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[7] Section 79 of G. L. c. 233 provides in pertinent part:

> Records kept by hospitals . . . under section seventy of chapter one hundred and eleven shall be admissible . . . as evidence in the courts of the commonwealth so far as such records relate to the treatment and medical history of such cases and *the court may, in its discretion, admit copies of such records, if certified by the persons in custody thereof to be true and complete*; but nothing therein contained shall be admissible as evidence which has reference to the question of liability.

(Emphasis added.) Unlike that statute, G. L. c. 152, § 20, does not restrict the use of such records as evidence on the "question of liability." Therefore, the judge could have used the emergency room record to resolve the liability question in this case - - whether the employee injured her shoulder at work on July 25, 2000 - - only if the record were admissible under § 20. Lacking certification, it was not.

374 (2002), citing Pittsley v. Kingston Propane, Inc., 16 Mass. Workers' Comp. Rep. 349, 351 (2002); Yates v. ASCAP, 11 Mass. Workers' Comp. Rep. 447, 454-455 (1997), and Truong, supra at 249.

Compounding his error, the judge specifically adopted the contents of the inadmissible record to make a pivotal finding of fact: "I find the emergency report as written is a fair representation of the history as provided by the employee." (Dec. 13.) "As the hospital record at issue was not properly authenticated by certification from a record custodian, the judge's credibility finding, as well as [his] substantive finding on [the genesis of the employee's injury] must fail because they are not based on competent evidence." Guzman, supra at 54.

Accordingly, we vacate the decision, and recommit this case for further proceedings. Because the administrative judge who heard and decided the employee's claim no longer serves with the department, we transfer the board file to the senior judge for reassignment to another administrative judge for hearing de novo.

So ordered.

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Patricia A. Costigan
Administrative Law Judge

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Susan Maze-Rothstein
Administrative Law Judge

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Sara Holmes Wilson
Administrative Law Judge

Filed: **September 4, 2003**