

**COMMONWEALTH OF MASSACHUSETTS**

**DEPARTMENT OF  
INDUSTRIAL ACCIDENTS**

**BOARD NO. : 030176-97**

Christopher Candito  
Browning-Ferris Industries  
Insurance Co. State of PA

Employee  
Employer  
Insurer

**REVIEWING BOARD DECISION**

(Judges Levine, McCarthy and Maze-Rothstein)

**APPEARANCES**

William T. Salisbury, Esq., for the employee at hearing  
Mary B. Klegman, Esq., for the employee on appeal  
Michael A. Fager, Esq., for the insurer

**LEVINE, J.** The employee appeals from a decision in which an administrative judge denied and dismissed his claim for workers' compensation benefits stemming from his infection with the Hepatitis C virus. The employee alleged that he was exposed to the Hepatitis C virus while working for the employer waste disposal company; he alleges that he was pelted with untreated sewage in an incident occurring at the MWRA Headworks Ward Street treatment facility. Because the judge made crucial findings of fact that were not supported by the record evidence, we reverse the decision and recommit the case for further proceedings.

At the time of the hearing, the employee had worked as a driver for the employer for approximately eighteen years. It is undisputed that on August 8, 1997, the employee was exposed to waste material. The employee was cleaning out a room into which waste material is emptied from a chute, when someone mistakenly released the material into the room, apparently thinking that the room was clear. Before the employee could get out of the way, the waste material shot onto him. (Dec. 3-4.) The judge credited the employee's account of the events and found that the waste material covered the

employee, including his head and face, eyes and ears.<sup>1</sup> The material contained solid waste, such as condoms, sanitary napkins, dead animals and fecal matter. The employee slipped and fell as he ran to leave the room, ramming his left shoulder into a wall. (Dec. 4.) The employee returned his truck to the employer's Brighton facility, and went home after reporting the incident to his superiors. (Dec. 4.)

At home, the employee took several showers, and discovered small abrasions on the back of his neck and head. He reported to the Jordan Hospital, where he underwent blood work and treatment for his shoulder. The employee started treating with Dr. Sliwowski at the Braintree Rehabilitation Hospital. The doctor advised the employee that he was at risk for Hepatitis A, cholera, HIV, parasites and other diseases. The employee received a Hepatitis A shot, and was advised to closely observe his personal hygiene practices. In February 1998, the employee tested positive for Hepatitis C. The employee was then treated by a liver disease specialist, Dr. Eric Cohen, with Interferon and Ribavirin therapies. (Dec. 4.)

Following the August 1997 incident, the employee missed six weeks of work due to his shoulder injury. The insurer accepted liability and paid compensation for this injury. But the insurer did not accept the employee's claim for compensation benefits based on his Hepatitis C infection. The judge denied the employee's claim at conference, and the employee appealed to a full evidentiary hearing. The employee underwent an impartial medical examination pursuant to § 11A(2) on March 8, 1999. (Dec. 2.) The impartial physician was unable to say that the employee's exposure to the sewage at work was the cause of his Hepatitis C infection. (Dec. 8.) The doctor did speculate that there might be a risk of exposure from untreated medical waste in the sewage sludge, if the employee had a break in the skin. (Dec. 8; Dep. 37-38.) The judge discounted this speculation on the basis that the sewage at the MWRA facility was treated. (Dec. 10.)

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<sup>1</sup> The insurer disputed the extent of the exposure. The employer's safety manager, who apparently saw the employee soon after the incident, did not corroborate that the employee was covered with sewage. (Dec. 4.) But the MWRA Ward Street station chief observed that the employee had "screening all over him." (Dec. 4.)

The judge allowed the parties to introduce their own medical evidence on the basis of medical complexity. (Dec. 2.) The employee introduced the expert opinions of his treating physicians, Drs. Sliwowski and Cohen. Both doctors causally related the employee's Hepatitis C to the exposure to sewage on August 8, 1997 at the MWRA Ward Street facility. (Dec. 8-9.) The insurer's expert physician, Dr. Robert H. Resnick, opined that it was unlikely the employee's Hepatitis C infection would have been caused by his exposure to sewage, where there was no break in the skin or mucous membrane. (Dec. 9-10; Insurer Ex. 3, pp. 2-3.)

The judge adopted the medical opinions of the impartial physician and of Dr. Resnick, and concluded that the employee had not proved a causal connection between the exposure to sewage and his infection with Hepatitis C. The judge found that the employee had received drug treatment for his drug problem and that he was not forthcoming in his testimony at hearing as to the extent of his cocaine use. (Dec. 5, 10.) The employee's less-than-forthright description of his history of cocaine use was a factor in the judge's assessment of his claim: "It was apparent in this case that Mr. Candito exposed himself to more than the risk factors that were associated with his employment." (Dec. 10-11.) The judge adopted the opinion of the impartial physician that one could not determine the cause of Hepatitis C in most patients because they tend to deny risk behaviors, such as drug use. (Dec. 10.) The judge denied and dismissed the claim. (Dec. 11.)

The employee on appeal contends that the judge made crucial findings of fact without evidentiary support, and that the decision therefore must be reversed and the case recommitted. We agree.

Findings of fact must be adequately supported by the evidence and reasonable inferences that can be drawn therefrom. Judkins' Case, 315 Mass. 226, 228 (1943). Crucial findings that lack evidentiary support are arbitrary and capricious, necessitating reversal of the decision and recommitment of the case. Moretti v. Moretti Constr. Co., 10 Mass. Workers' Comp. Rep. 98, 99 (1996); Cibene v. Brentwood Realty Trust, 8 Mass. Workers' Comp. Rep. 172, 173 (1994).

In the present case, the judge found that “[t]here was no indication that the waste at the MWRA was untreated. In fact, the testimony was to the contrary.” (Dec. 10.) The finding is simply not supported by the evidence in the record. In fact, the finding directly contradicts the testimony of the MWRA station chief at the Ward Street facility that the sewage emptying into the Ward Street facility – to which the employee was exposed – was “raw sewerage.” (Sept. 20, 1999 Tr. 28.) The finding is crucial because it goes to the fundamental issue in the case: What risk did the exposure to the sewage pose to the employee? If the sewage was untreated, and contained waste that could have carried blood-born viruses with it, there was risk of Hepatitis C, so long as the employee’s account of abrasions on his head and neck was credited.

And the judge did credit the employee’s account of the incident, including finding that the employee discovered small abrasions on his neck and scalp after the incident. (Dec. 4, 10.) The opinion of the insurer’s expert physician, Dr. Resnick, was based on a history that the employee “did not however indicate that there was any puncture of skin or mucous membranes as a consequence of this unfortunate occurrence.” (Insurer Ex. 3, p. 2.) Given this critical factual discrepancy, the judge’s adoption of Dr. Resnick’s opinion is erroneous, because the doctor’s opinion on the absence of causal relationship was specifically based “on the apparent resistance [sic] of a normal skin and mucus membranes to the transmissibility of this agent”; i.e., the Hepatitis C virus. *Id.* See Patterson v. Liberty Mut. Ins. Co., 48 Mass. App. Ct. 586, 598 (2000)(reliance on expert opinion not grounded in evidence reversible error). In light of these two errors, we must reverse the decision and recommit the case for further proceedings.

Moreover, the judge found that the employee had received drug treatment for cocaine abuse. (Dec. 5.) This finding likewise has no support in the evidence. The employee never answered the only question at hearing regarding this subject. (July 26, 1999 Tr. 60-62.) Since the extent of the employee’s prior drug use was a major component in the insurer’s defense of the claim and the judge’s analysis of causal relationship, (Dec. 10), this error is not harmless. See Fantasia v. Northeast Mfg. Co., Inc., 14 Mass. Workers’ Comp. Rep. 200, 205 (2000)(judge’s mischaracterization of

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photograph in evidence not harmless error, where it impacted the analysis of central issue in exposure case, industrial hygiene).

Finally, the judge's conclusion both that she "credit[ed] the testimony of Mr. Candito regarding the events that occurred on August 8, 1997" and that she credited "the testimony of all other lay witnesses," (Dec. 10), is contradictory. At least one of the insurer's witnesses, whose testimony included a description of the employee's appearance soon after the incident, contradicted the employee's testimony as to how much sewage he was actually exposed to. (Dec. 4.) See note 1, supra. It is unclear what the judge believed given these internally inconsistent findings. See Carney v. M.B.T.A., 9 Mass. Workers' Comp. Rep. 492, 494 (1995)(where there are conflicts in evidence requiring credibility assessments, fact finding is required to choose between them).

We reverse the decision. Because the administrative judge who heard the case no longer serves in the department, we transfer the case to the senior judge for reassignment and recommitment to a different judge for a hearing de novo

So ordered.

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Frederick E. Levine  
Administrative Law Judge

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William A. McCarthy  
Administrative Law Judge

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Susan Maze-Rothstein  
Administrative Law Judge

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