COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 024634-95**

Diana Stasinos	Employee
Cherry, Webb & Touraine	Employer
Fireman's Fund Insurance Co.	Insurer

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

APPEARANCES
Kevin T. Daly, Esq., for the employee
Gerard A. Butler, Esq., for the insurer

COSTIGAN, J. The employee appeals from an administrative judge's decision on recommittal which again denied her claim for G. L. c. 152, § 34A, permanent and total incapacity benefits.[1] She argues that the judge's reliance on the expert medical evidence, particularly the deposition testimony of the § 11A impartial examiner, was improper, because he made subsidiary findings of fact which contradicted the impartial doctor's assessment of the employee's medical condition. We agree with the employee that this was error, but not, as she contends, error requiring reversal. Instead, we again recommit this case to the administrative judge.

The insurer had accepted liability for the employee's June 21, 1995 low back injury, sustained when she moved a twelve-foot ladder while working as a clerk in the employer's clothing store. (Dec. I, 52; Dec. II, 378-379.) The insurer paid § 34 temporary total incapacity benefits for intermittent periods of lost time until the statutory

[1] We refer to the judge's first § 34A decision, filed on October 24, 2001, as "Dec. I" and the recommittal decision now on appeal, filed on May 31, 2002, as "Dec. II."

maximum was exhausted on October 3, 2000.[2] (Dec. I, 52; Dec. II, 379-380.) The employee's § 34A claim was the subject of a prior hearing and decision, (Dec. I), by the same administrative judge, who denied and dismissed the claim based on the § 11A report of Dr. Raymond Igou, who served as the impartial examiner in both hearings. On appeal by the employee, the reviewing board recommitted the case to the judge to consider the transcript of Dr. Igou's deposition, which the judge had not received prior to filing his decision. (Dec. II, 378-379.) See Stasinos v. Cherry, Webb & Touraine, 16 Mass. Workers' Comp. Rep. 123 (2002). The judge did review the doctor's deposition testimony, but it did not change his mind. He again denied and dismissed the employee's § 34A claim, (Dec. II, 384), and she again appeals.

The employee was forty-nine years old at the time of the § 34A hearing, married with two adult children living with her. She is a high school graduate and holds an associate's degree from a community college. From the age of ten until she was twenty-three, she worked in her parents' small variety store. In 1988, after her children were older, she returned to work managing a small variety store; her duties included working at the register and ordering products. In 1994, she began working for the employer, waiting on customers, ringing up sales, rehanging clothing and keeping the store clean. (Dec. I, 52; Dec. II, 379.)

The administrative judge made the following subsidiary findings of fact relative to the employee's medical condition. The employee has suffered from low back pain since the time of her injury. (Id.) She remained out of work due to her injury until 1997, but attempts to return to work in 1997 and in 1998 were unsuccessful, due to her back injury. (Id.) On April 24, 1998, the employee suffered a fractured coccyx during a physical

[2] In September 1999, a different administrative judge filed a hearing decision which denied the insurer's complaint for modification or discontinuance of weekly benefits, but also denied, as premature, the employee's claim for § 34A permanent and total incapacity benefits. The Appeals Court has since held that exhaustion of § 34 temporary total incapacity benefits is not a prerequisite to a § 34A claim. Slater's Case, 55 Mass. App. Ct. 326 (2002).

therapy session. (Dec. I, 52; Dec. II, 379-380.)[3] The judge also found:

> Since being injured, the employee has gotten several facet joint injections. These injections brought her temporary relief from her pain, for up to a month or so. However, the pain always returned. In March and April, 2001 she went to Greece for three and a half weeks to soak in a mineral spring. The spring provided pain relief while she was there but the pain returned when she returned home.
>
> Today the employee continues to suffer from pain radiating from her coccyx down both of her legs, more on her right than left. She also suffers from tingling and numbness. She cannot bend or twist and can pick up only light things that are positioned at table height. She takes pain medication. She also uses a hydroculator which delivers moist heat to the painful area and ice packs for her pain. She takes two hot showers a day and lies down when needed. She wears a back brace when she goes out. She has a shoe horn that is more than a foot long to put on her shoes, and a pole with a mechanism to grasp things on one end of it so that she can pick something up off the floor. She has a pillow to sit on . . . She cannot do laundry or vacuum. She can only cook on the stovetop and can dust and fold laundry. She continues to treat with Dr. DeMichele who has prescribed aquatic therapy. This therapy has not been approved by the insurer. She has good days and bad days. She stated that the day she saw the impartial doctor was a good day.

(Dec. I, 52-53; Dec. II, 380.) With the exception of the last sentence, these statements are not merely recitations of testimony, which are always insufficient. Jenney v. Waltham-Weston Hosp. & Medical Ctr., 15 Mass. Workers' Comp. Rep. 54, 58 (2001). Although obviously derived from the employee's testimony, they are factual findings as to the employee's pain and physical limitations, based on the judge's assessment of her credibility. It is well-established that such credibility findings are binding on the reviewing board, Lettich's Case, 403 Mass. 389 (1988), unless they are not based in record evidence or reasonable inferences drawn therefrom, or not pertinent to the claim, and thus arbitrary and capricious. Correia v. UNICCO Service Co., 16 Mass. Workers'

[3] There was a factual dispute between the parties as to the origin of the fractured coccyx. The judge's finding that the employee suffered the fracture while undergoing treatment for her industrial injury was dispositive of the causal relationship issue. "The sequelae of causally related medical treatment is [sic] compensable under the Act." Wall v. LePages, Inc., 11 Mass. Workers' Comp. Rep. 359, 362 (1997), citing Burns's Case, 218 Mass. 8, 10-11 (1914) (death from blood poisoning resulting from bedsore was compensable where protracted hospital stay was due to industrial injury).

Comp. Rep. ___ (October 8, 2002); Frey v. Mulligan, Inc., 16 Mass. Workers' Comp. Rep. 364, 366-367 (2002); Pittsley v. Kingston Propane, 16 Mass. Workers' Comp. Rep. 349, 351 (2002); Yates v. ASCAP, 11 Mass. Workers' Comp. Rep. 447, 454-455 (1997). Therefore, it is axiomatic that findings of fact based on credibility assessments are binding on the administrative judge who makes them. Here, we agree with the employee that the judge erred in adopting the § 11A examiner's opinion, which discounted those very factual findings.

The administrative judge discussed, at length, Dr. Igou's 2001 report and deposition testimony about his findings on examination of the employee in 2001, compared to his 1999 evaluation. (Dec. II, 380-383.) The judge noted that, unlike the doctor's 1999 findings, in 2001 the employee demonstrated "no significant clinical findings, no observed muscle spasm, no documented neurological impairment, no documented alteration in structural integrity, no fractures or other abnormalities." (Dec. I, 54; Dec. II, 381; Exh. 3 - Igou February 8, 2001 report 4.) Although the doctor had opined in 1999 that the employee was permanently and totally disabled, he found "great improvement in [the employee's] physical findings" in 2001, although not much improvement in her subjective complaints. (Dec. II, 381; Igou October 16, 2001 Dep. 9-10.) "The employee's 'complaints remained the same, [but] the findings were all different.' " (Dec. II, 381; Igou October 16, 2001 Dep. 32.)

That the impartial physician changed his opinion as to medical disability is not, as the employee argues, grounds for reversal of the judge's decision. More troubling are the judge's citations to those parts of Dr. Igou's opinion which stray impermissibly into the province of credibility. Paraphrasing Dr. Igou's testimony, the judge found that the employee "no longer had sacroiliitis and had no pain in the cocci which allowed her to sit without difficulty. In 1999 she could not sit due to her cocci pain." (Dec. II, 381.) The doctor was questioned closely about his statement in this regard:

> Q. Is it fair to say at least subjectively, the same conditions existed for her as in the first examination?
> A. Well, she didn't have the sacroiliacitis [sic] and she didn't have the pain in the cocci any longer. They had healed up.

Q. Did she tell you she didn't have pain in the cocci area at the second exam?
A. Well, she sat fine. For the first exam she couldn't. She had difficulty with maneuvers that the butt muscles pull onto the cocci, which makes straight leg raising difficult because you're stretching onto the fractured cocci at the same time. So that that [sic] muddies up a good deal of that exam.
Q. Did she tell you that she had to use cushions for sitting; correct, Doctor? If I could direct your attention to page two, three-quarters of the way down, paragraph beginning, "Pain in the lower lumbar"?
A. Yes, I see it.
Q. And she did tell you then that she does have to use cushions for sitting in order to relieve pressure on the coccyx?
A. That's what she said, yes.
Q. So at least at that time you were aware that time frame she was still having pain in the coccyx?
A. *I knew that she was claiming to have pain, yes.*
Q. And that's the same pain she claimed to have regarding the coccyx at the first exam? Yes, Doctor?
A. The complaints remained about the same; the findings were all different.

(Igou October 16, 2001 Dep. 31-32, emphasis added.) The judge found that the doctor "believes that the employee was not suffering from coccyx pain at the time of the 2001 examination that was causally related to the 1995-work injury.[4] He stated that it is 'highly unlikely that such pain would exist. (I)n 35 years of (medical) practice, (he) has never seen it.' " (Dec. II, 381-382, citing to Igou October 16, 2001 Dep. 35-36.) The judge further noted Dr. Igou's testimony that the employee's L5-S1 disc protrusion, which was causally related to the 1995 injury and from which originated her chronic degenerative disc disease at that level, (Igou October 16, 2001 Dep. 37), was a correct diagnosis in 1999 but no longer accurate in 2001, because the employee no longer

[4] It is apparent from his deposition testimony that Dr. Igou did not think the employee's fractured coccyx was causally related to her 1995 industrial injury because he "was never able to correlate lifting a ladder with a coccyx fracture. That's usually from a direct fall. So I did not really feel that the cocci nor the sacral-ileitis [sic] really were anything to do with her back strain." (Igou October 16, 2001 Dep. 34.) When questioned by employee's counsel, however, he recalled that the employee had told him she injured her coccyx in a physical therapy session. (Id. at 35.) See footnote 3, supra.

showed any signs of nerve root irritation. (Dec. II, 382, citing to Igou October 16, 2001 Dep. 38-41.) "Unlike in 1999, in 2001 her subjective complaints were not consistent with his objective findings. Deposition, page 41, lines 2, 16 and 24. He concluded that the employee 'changed her story.' Deposition, page 41, line 18." (Dec. II, 382.)

The impartial medical examiner could properly opine that the employee's subjective complaints were not supported by his objective physical findings, but when Dr. Igou concluded that the employee "changed her story," he improperly infringed on the judge's exclusive authority to assess the employee's credibility. The doctor may have believed that the employee was embellishing her complaints, but the judge did not. He found that "[t]oday the employee continues to suffer from pain radiating from her coccyx down both of her legs, more on the right than left. She also suffers from tingling and numbness. . . . She has a soft pillow to sit on." (Dec. I, 53; Dec. II, 380.) Likewise, the doctor's skepticism[5] about the need for the same physical restrictions he imposed on the employee in 1999, when he deemed her permanently and totally disabled, and in 2001, when he found her not medically disabled from gainful employment -- no lifting in excess of ten pounds and no repeated bending, twisting and turning -- is of no consequence. The judge credited the employee's testimony and found:

> [S]he cannot bend or twist and can pick up only light things that are positioned at table height . . . She has a shoe horn that is more than a foot long to put on her shoes, and a pole with a mechanism to grasp things on one end of it so that she can pick something up off the floor. . . .

(Id.)

Despite all of his subsidiary findings of fact as to the employee's continuing pain and physical restrictions, the administrative judge concluded that,

> the employee is no longer entitled to wage replacement benefits pursuant to §§ 34, 35 and 34A. In making this determination I rely on the persuasive opinions of the impartial medical examiner. He found that the employee is no longer disabled due to the industrial injury and is able to perform some work. . . . He was quite clear

[5] Dr. Igou testified that, in his opinion, "anyone who has had a bad back that lasts as long as [the employee's] did, should have limitations put on them for their own safety. Whether they truly require it or not is another story, but I don't think they should." (Igou October 16, 2001 Dep. 37.)

> and convincing in his statements that he believes the employee is no longer disabled.

(Dec. II, 383.) The judge then contradicted his own subsidiary findings of fact to deny further weekly incapacity benefits:

> I can accept that the employee continues to experience *some discomfort*. However, this discomfort does not prevent her from earning at least her previous average weekly wage of $170.66. The employee is only 49 years old and has an associate's degree. If she could find a minimum wage job for just 26 hours a week, she would make more than her small pre-injury average weekly wage. With her education and experience, she likely could earn far more than minimum wage, dropping the hours necessary to earn $170.66 down below 20. Therefore, even if I were to reject the impartial doctor's opinions and adopt the employee's testimony to the point that would establish an ongoing disability limiting her to just light or sedentary work, she would not be entitled to any ongoing wage replacement compensation.

(Dec. II, 384.)

Although the judge performed the requisite analysis of the employee's vocational factors, see Scheffler's Case, 419 Mass. 251 (1994), and Frennier's Case, 318 Mass. 635 (1945), he did so against the backdrop of a medical opinion which contradicted his own assessment of the employee's credibility. In effect, Dr. Igou accepted the employee's subjective complaints of pain and physical restriction in 1999 but disbelieved them in 2001, based on his opinion that her objective physical examination had improved and that she had "changed her story." (Igou October 16, 2001 Dep. 41.) The judge could not properly credit the employee's subjective complaints and adopt the § 11A opinion which discredited them. "[T]he history upon which the medical expert relies is crucial to his opinion." Saccone v. Department of Pub. Health, 13 Mass. Workers' Comp. Rep. 280, 282 (1999), citing Patient v. Harrington & Richardson, 9 Mass. Workers' Comp. Rep. 78, 80 (1992). To that extent, his decision is arbitrary and capricious and calls for recommittal.

Lastly, we address the issue of what medical evidence will be before the judge on this second recommittal. According to both of the judge's decisions, the only medical evidence before him was Dr. Igou's February 8, 2001 report and his October 16, 2001

deposition, both marked as Exhibit 3. (Dec. I, 51; Dec. II, 378.) In her brief, however, the employee contends that following the § 11A deposition, a "motion hearing" was held on October 31, 2001, as a result of which the parties were allowed to submit additional medical evidence. (Employee Br. 1.) We find no written § 11A motion in the board file and no written allowance of any such motion, as required by the provisions of 452 Code Mass. Regs. § 1.12(5)(a). However, it is apparent from the transcript of the July 17, 2001 hearing, that the judge had agreed to entertain a § 11A motion after the deposition of the impartial medical examiner[6] and, according to the reviewing board, Stasinos, supra at 124, because of difficulties in scheduling the deposition, the date set for the § 11A motion hearing was rescheduled from September 20, 2001 to October 31, 2001. Prior to the § 11A motion hearing, however, the administrative judge filed his first decision on October 24, 2001. The reviewing board specified that the case was being recommitted for the § 11A motion hearing and a decision anew. Id. at 124.[7] As the decision on recommittal is silent on this issue and as we are recommitting this case once again, the administrative judge should first determine and identify what, if any, medical evidence has been admitted in addition to the § 11A report and deposition testimony. He must then weigh that medical evidence in light of this opinion, reconciling it with his

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[6] The Judge: There is going to be a deposition of the impartial doctor?
Mr. Daly: Yes, your Honor.
The Judge: And then an 11A motion?
Mr. Daly: Yes, your Honor.
The Judge: Aside from setting a date to return for that, is there anything else we need to do today?
Mr. Butler: No, your Honor.
The Judge: All right. We will go off the record.

(Tr. 46.)

[7] The reviewing board's decision seems to indicate that the October 31, 2001 § 11A motion hearing did not take place. The employee states it was held. (Employee Br. 1.) The board file contains a letter dated November 14, 2001 from employee counsel to the administrative judge identifying and offering the employee's additional medical evidence. We cannot determine whether the administrative judge authorized and/or accepted this additional medical evidence. It is not mentioned in his decision on recommittal.

credibility findings and subsidiary findings of fact, and file a decision anew on the employee's claim.

So ordered.

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Patricia A. Costigan
Administrative Law Judge

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Martine Carroll
Administrative Law Judge

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Susan Maze-Rothstein
Administrative Law Judge

Filed: May 19, 2003