COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 067845-86**

Donald A. Yates	Employee
ASCAP	Employer
Commerce and Industry	Insurer

REVIEWING BOARD DECISION
(Judges Wilson, McCarthy and Smith)

APPEARANCES
Frederick T. Golder, Esq., for the employee
Edward M. Moriarty, Jr., Esq., for the insurer

WILSON, J. The employee appeals from a decision in which an administrative judge denied and dismissed his claim for various closed periods of incapacity benefits related to an industrial injury of a psychological nature. The claim has been the subject of six prior hearing and reviewing board decisions. In the most recent of these, Yates v. ASCAP, 11 Mass. Workers' Comp. Rep. 447 (1997) ("Yates III"), the reviewing board reversed an administrative judge's denial of the employee's claim on the grounds of no liability, determining that liability was established as a matter of law. Id. at 454-456. The reviewing board therefore recommitted the case to the administrative judge for further findings on the narrow issue of the extent of the employee's incapacity. We reverse the latest decision in part, and recommit the case a fourth time, as the administrative judge who decided the case de novo on recommittal based his decision largely on his discrediting of the employee's testimony, without actually having heard it.

There is no reason for a further exposition of the facts of this claim for emotional injuries arising from a 1980 industrial injury. See Yates III, supra; Yates v. ASCAP, 6 Mass. Workers' Comp. Rep. 97 (1992); Yates v. ASCAP, 9 Mass. Workers' Comp. Rep. 550 (1995). Germane to the appeal at hand are the following procedural matters: Upon receiving the case recommitted in Yates III, the administrative judge recused himself

from hearing the employee's claim on the basis of bias. (Dec. 472.) The case was reassigned to the present administrative judge. The judge reported in his decision that the parties agreed to a hearing on the extent of incapacity issue based only on the six prior hearing and reviewing board decisions. (Dec. 472.)[1] With that stipulation, another recommittal was, as a practical matter, nearly a foregone conclusion. Extent of incapacity to work is a question of fact, Barry's Case, 235 Mass. 408, 410 (1920), to be determined "within the particular requirements governing a workers' compensation dispute." Scheffler's Case, 419 Mass. 251, 258 (1994). When the judge made numerous specific findings discrediting the employee's printed testimony, and then rejected the employee's uncontroverted medical evidence based on that disbelief, (Dec. 486-490), the end result was an arbitrary and capricious decision.

This case is governed by Antoine v. Pyrotector, 7 Mass Workers' Comp. Rep. 337 (1993). In that case as well, a different judge was assigned a case in which a § 11B hearing had already taken place, and the parties stipulated to the new judge's deciding the case without taking further testimony. Id. at 339. The stipulation notwithstanding, the reviewing board reversed all credibility findings:

> A preliminary matter in this case pertains to the parties having stipulated to a decision based on the record as it existed before the administrative judge who heard the case. The reviewing board will not disturb a judge's findings not erroneous as a matter of law where they are directly based on "live" testimony of a witness appearing before the judge. Lettich's Case, 403 Mass. 389, 394 (1988). In this case, however, the judge who filed the decision did not hear live testimony. He nevertheless ruled on credibility in several instances and made findings contrary to the employee's direct testimony . . . .
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> Under the circumstances, it is arbitrary, capricious and contrary to law for a judge to make findings based on the credibility or demeanor of witnesses whom the judge did not have an opportunity to observe. See DiCenso v. Winchester Concrete & Carpentry, 7 Mass. Worker's Comp. Rep. 237 (1993). On remand, all credibility findings are stricken as the judge did not hear live testimony. To the extent that lay testimony is essential to the resolution of issues in dispute, the judge must actually hear the employee's testimony before making any credibility rulings.

[1] The parties assert in their briefs that the case was to be decided on the existing record evidence.

Id. See also Salem v. Massachusetts Commission Against Discrimination, 404 Mass. 170, 174-176 (1989); Neff v. Commissioner of DIA, 421 Mass. 70, 83 (1995)(O'Connor, J., dissenting)("[I]ssues of witness credibility and veracity often are critical to the decision making process. Goldberg [v. Kelly, 397 U.S. 254, 269 (1970)] noted that in such circumstances 'written submissions are a wholly unsatisfactory basis for decision.' ") As the judge in the present case rejected the employee's medical evidence (the only medical evidence in the case) based in part on his discrediting the employee's history on which it was based, (Dec. 486-490), his determination of the extent of incapacity cannot stand. As we instructed in recommitting Antoine, "[i]f any rulings based on credibility are essential to the adjudication of the case, the judge must conduct a de novo hearing on the relevant issue." Id. at 342.

We are therefore compelled to reverse the judge's findings and conclusion on the extent of the employee's incapacity.[2] We recommit the case for a proper de novo hearing insofar as credibility findings are essential to that issue. We otherwise summarily affirm the decision.

So ordered.

Sara Holmes Wilson
Administrative Law Judge

Filed:

William A. McCarthy
Administrative Law Judge

[2] We decline to reconsider our rejection of the employee's reply brief, which was untimely filed.

Smith, J. dissenting in part and concurring in part. Three different administrative judges have now found the employee incredible, rejected the medical opinions relying on the employee's discredited history, and denied the claim. I disagree that the case should be recommitted again for another de novo proceeding. For the reasons previously stated in my dissent in Yates III, 11 Mass. Workers' Comp. at 456 et seq., the denial of compensation should be affirmed.

The judge correctly concluded that employee's counsel filed a frivolous claim for an enhanced legal fee to be paid by the insurer. The alleged injury here predated November 1, 1986. Therefore any fees for services provided this claimant "shall be of an amount agreed upon between the employee and the attorney." G.L. c. 152, § 13A(9). Counsel is not entitled to any fee at all from the insurer. See Miller v. Metropolitan District Comm'n, 11 Mass. Workers' Comp. Rep. 355, 358 (1997) (reversing fee award for injury prior to November 1, 1986). The fee claim is "without any basis in the law," (Dec. 497), and therefore lacks "reasonable grounds." G.L. c. 152, § 14(1).

Suzanne E.K. Smith
Administrative Law Judge

Filed: April 1, 1999