COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **Board No.:** 026685-99

Edward Menard	Employee
Allied Automotive Group	Employer
Reliance Insurance Co.	Insurer

REVIEWING BOARD DECISION

(Judges McCarthy, Costigan and Horan)

APPEARANCES

Brian C. Cloherty, Esq., for the employee at hearing
Karen S. Hambleton, Esq., for the employee on brief
Cori J. Alcock, Esq., for the insurer at hearing
David M. O'Connor, Esq., and Barbara L. Horan, Esq., for the insurer on brief

McCARTHY, J. The insurer appeals from an administrative judge's decision awarding § 34A permanent and total incapacity benefits. First, the insurer alleges that the judge improperly excluded probative videotape evidence of the employee, and that on recommittal, it should be allowed to show the videotape to the impartial physician. The insurer also contends that in finding that the employee was incapable of remunerative work, the judge erred by referencing a criminal conviction for driving under the influence of alcohol, and that the judge made several other errors in evidentiary rulings. For the reasons that follow, we recommit the case for further findings.

Edward Menard, thirty-four years old at the time of the hearing and a high school graduate, was injured while doing automobile transport work. The job required the employee to load automobiles onto car carriers, tie them down using ratchet chains and unload them at dealerships. His work history in chief involved heavy physical labor, including the use of heavy equipment, construction, landscaping, and heavy equipment transport. (Dec. 4.)

On July 15, 1999, while unloading a delivery of nine vehicles, the employee experienced a severe pinch in his back while releasing a tie-down. He continued to work for a period of time until the pain became too severe. Initially, he received conservative treatment

including nerve blocks and steroid injections. Later, he underwent two surgeries including a posterior spinal fusion. (Dec. 5.)

The employee was paid § 34 benefits until expiration and then claimed permanent and total incapacity benefits under § 34A. Following a conference on the § 34A claim, the insurer was ordered to pay § 35 benefits. The employee appealed and his claim went to a full evidentiary hearing under § 11. (Dec. 2.)

Dr. Ronald N. Paasch examined the employee pursuant to § 11A. At hearing, the judge adopted the § 11A examiner's opinion that the employee's activity level would be limited to what he could tolerate, and that further surgery may be required. (Dec. 6.; Imp. Dep. 20.)[1] The § 11A examiner restricted the employee to lifting 5-10 pounds occasionally, with no bending, lifting, twisting, pushing or pulling. (Dec. 6.)

The judge credited the testimony of the employee that his symptoms have been unchanged since his second surgery, that the numerous narcotic pain medications make him drowsy and affect his memory, and that he rarely is able to stand fully erect. (Dec. 5) The judge also credited the employee's testimony that he is unable to bend over to play with his three minor children, that at times the children fear him because of his pain and that on an average day, on a 10-scale for pain he rates a 5, and on a bad day he rates an 11. "Even the employee's dogs avoid him in the morning." (Dec. 5-6.)

The judge discounted the testimony of Faith Johnson, the insurer's vocational expert, who had prepared a labor market survey and employability evaluation. The expert identified job openings in driving, dispatching, assembly and security as suitable for the employee. However, the judge noted that on cross-examination the expert conceded she did not discuss the employee's conviction for operating a motor vehicle under the influence of alcohol with the employers she surveyed. (Dec. 7.)

[1] The judge also credited the opinion of Dr. Harold Wilkinson, the employee's treating physician and surgeon, who performed the two spinal surgeries. Dr. Wilkinson opined that as of July 29, 2002, the employee was permanently and totally disabled from gainful employment as a result of his injury. (Dec. 5, Employee Ex. 5.) This additional medical evidence was permitted for the so-called "gap" period prior to the § 11A examination.

At hearing, insurer's counsel moved to introduce into evidence a videotape of the employee for impeachment purposes. (Tr. 82.) Employee's counsel objected on the ground of authentication. He argued that given the employee's concession that the tape was of him and he testified as to the content, use of the tape for any other reason required the insurer to lay a proper foundation for its admittance into evidence, to ensure that the tape had not been edited. (Tr. 83.) The judge sustained the objection and excluded the videotape.

Crediting the employee's testimony as to his pain and activity level in conjunction with the medical evidence proffered, the judge found that the employee's disability and incapacity to earn wages is permanent and total, and he awarded § 34A benefits from July 16, 2002 and continuing, medical benefits pursuant to § 30 and interest, attorneys fees and costs. (Dec. 9-10.)

On appeal, the insurer first argues that the judge erred in refusing to admit probative videotape evidence of the employee. We agree.

The judge sustained the employee's objection to the admission of the videotape, on the basis of authentication. (Tr. I, 86.) However, the employee's admission that he was indeed the person depicted in the videotape took that objection off the table. Videotapes are admissible in evidence, "if they are relevant, they provide a fair representation of that which they purport to depict, and they are not otherwise barred by an exclusionary rule." Commonwealth v. Mahoney, 400 Mass. 524, 527 (1987). See Commonwealth v. Lavelley, 410 Mass. 641, 645 (1991)("videotapes are 'on balance, a reliable evidentiary resource,' [and] consequently . . . should be admissible as evidence if they are relevant . . . [and] provide a fair representation of that which they purport to depict"); Commonwealth v. Cates, 57 Mass. App. Ct. 759, 762-763 (2003)(same). Given that the employee admitted the videotape was, in fact, a fair representation of him, the judge should have admitted it into evidence.[2]

To the extent that the employee argued that the videotape was inadmissible due to reasons having to do with the doctrine of completeness, the argument does not attack the admissibility of the insurer's evidence. See Commonwealth v. Watson, 377 Mass. 814,

[2] The insurer's argument that the impartial physician ought to view the videotape may be addressed on recommittal. See Crandell v. ELAD General Contractor, 16 Mass. Workers' Comp. Rep. 51, 56-57 (2002).

827 (1979)("whenever the statements, declarations or admissions of a party are made subjects of proof, all that was said by him at the same time and upon the same subject is admissible in his favor, and the whole should be taken and considered together"). On recommittal, if there is additional videotape footage over and above that offered by the insurer, the judge may decide whether the employee should be allowed to introduce it. It should also be open to the employee to call the videographer for cross-examination regarding the video footage.

Next, the insurer argues that the judge, in ruling that the employee was incapable of remunerative work, impermissibly referenced a criminal conviction for driving under the influence. An erroneous admission or exclusion of evidence need not be a fatal error. Indrisano's Case, 307 Mass. 520, 523 (1940). However, where it goes to pivotal factual findings and where there is a substantial risk of injustice, the error is not harmless. Id. The judge found that the insurer's vocational expert conceded she did not discuss with prospective employers restrictions in the employee's activities, or his medications and their side effects. He also found that the vocational expert did not disclose the employee would need to change positions frequently, had not worked for the past four years and had a conviction for operating a motor vehicle under the influence of an intoxicating substance. (Dec. 7.) Further diminishing the probative value of the expert's opinion was the testimony of the employee's wife that she had contacted a number of the prospective employers, only to find that some of the jobs were no longer available, some required physical activity beyond the § 11A examiner's restrictions and some required drug testing. (Dec. 8.) The judge characterized the expert's multiple omissions as significant, in light of her own testimony that a clean driving record would be required by some of the prospective employers. (Dec. 8.)

Given that the judge clearly considered the vocational expert's testimony in its entirety and then assigned it no probative weight, we hold that the employee's criminal record was not key to the judge's incapacity determination and any error in its admission was de minimis. Compare Guzman v. Town and Country Fine Jewelry, 12 Mass. Workers' Comp. Rep. 50, 53 (1998)(substantive fact based on inadmissible hearsay went beyond a credibility finding and was not harmless error).

We recommit the case for the admission of the insurer's videotape. The judge will conduct further proceedings and make the findings of fact that are necessary to address that evidence. We summarily affirm the decision with regard to the insurer's other

arguments on appeal. As the employee prevailed in a majority of the issues raised on appeal, employee's counsel is awarded a fee of $1,312.21 pursuant to § 13A(6).

So ordered.

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William A. McCarthy
Administrative Law Judge

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Patricia A. Costigan
Administrative Law Judge

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Mark D. Horan
Administrative Law Judge

Filed: September 13, 2005