COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS	**BOARD NO. 043583-88**
Eloise White	Employee
M.B.T.A.	Employer
M.B.T.A.	Self-Insurer

REVIEWING BOARD DECISION
(Judges McCarthy, Wilson and Smith[1])

APPEARANCES
James K. Brownell, Esq., for the employee at hearing
James N. Ellis, Esq., for the employee on brief
Mark A. Teehan, Esq., for the self-insurer

MCCARTHY, J. At the time of the administrative judge's decision, Eloise White, the employee, was a single, fifty-seven year old mother of three sons. Ms. White completed her high school education in Alabama and later moved to Massachusetts. In 1983, she started work as a bus driver with the Massachusetts Bay Transportation Authority (MBTA). (Dec. 6.)

On July 7, 1988, Ms. White was assaulted by several passengers while operating a bus in the course of her employment. She was thrown to the floor of the bus, struck in the face and kicked in the right knee. She was taken by ambulance to Carney Hospital. As a result of the incident, the employee underwent three surgeries to her right knee.[2] In addition to medical treatment for her physical injuries, the employee also treated for

[1] Judge Smith no longer serves as a member to the reviewing board.

[2] An arthroscopy was performed on February 6, 1989, for osteochondral fracture to the patella. On April 10, 1991, the employee had an osteotomy and patellofemoral realignment. Finally, on September 8, 1992, the employee had the osteotomy hardware removed.

depression and post-traumatic stress disorder. (Dec. 6.) Doctor Padriac Burns, the employee's treating physician, prescribed Prozac and psychotherapy. (Dec. 7.)

Initially, the self-insurer accepted the employee's claim and paid workers' compensation benefits pursuant to § 34. The employee's compensation benefits were supplemented by the employer with "assault pay." On December 27, 1989, the self-insurer filed a complaint to discontinue benefits and, following a § 10A conference, the employee was assigned an earning capacity. Both parties appealed the conference order and later entered into a stipulation restoring § 34 benefits. On March 17, 1993, the self-insurer again filed a complaint to discontinue benefits. One week later, the self-insurer withdrew its request.[3] (Dec. 7.) On July 12, 1993,[4] the employee filed a claim for § 34A benefits. On October 20, 1993, that claim was withdrawn and two days later the employee again filed a claim for § 34A benefits in addition to specific benefits under § 36. Following a conference, an order issued directing payment of § 35 weekly benefits of $265.33 based on an assigned weekly earning capacity of $ 200.00 from July 8, 1993 and continuing. (Dec. 2, 7.) The parties reached agreement on the employee's claim for § 36 benefits thus taking it out of the dispute. The order was silent regarding the claim for § 34A benefits. (Dec. 8.) Both parties appealed the conference order which brought the case to an evidentiary hearing under § 11. (Dec. 2, 8.)

On June 10, 1994, the employee was examined by Dr. John S. Ritter as required by § 11A. (Dec. 8.) The § 11A physician opined that the employee had a medical disability related to her subjective complaints regarding her right knee and that these subjective complaints were causally related to the July 7, 1988 work-related incident. (Dec. 8-9.) Further, the § 11A examiner opined that the employee should avoid activities requiring lifting, kneeling, squatting or performing repeated stair climbing. In response

[3] The self-insurer withdrew its complaint as the employee's § 34 benefits were projected to be exhausted as of July 7, 1993. (Dec. 2, 7.)

[4] The administrative judge erroneously listed the date as July 12, 1997, rather than the actual 1993 date. (Dec. 8.)

to a hypothetical, the § 11A examiner opined that the employee could perform the duties of a collector for the MBTA.

At deposition, the § 11A examiner testified that he could not find any objective findings on examination to substantiate the employee's subjective complaints. (Dep. 17; Dec. 10.) He further stated that the physical restrictions he imposed were based on the employee's subjective complaints. (Dep. 18; Dec. 10.) Despite Ms. White's physical limitations, the § 11A physician stated that she could kneel on occasion, go up and down a flight of stairs once an hour, walk on uneven ground and bend without restriction. (Dep. 23-25; Dec. 10.) Further, the § 11A examiner stated that the employee could use a foot pedal to operate a gate at MBTA collection stations and that there was no need to keep the employee's leg upright or elevated. (Dep. 30, 33; Dec. 10.) The employee's motion to declare the § 11A report inadequate was allowed, and the parties were permitted to offer additional medical evidence.[5]

Medical reports of Dr. William A. Mitchell, the employee's treating physician, were submitted on behalf of the employee and the self-insurer offered the report of Dr. George B. McManama, Jr. (Dec. 1-2.) Doctor Mitchell opined that the employee was totally disabled due to a combination of progressive degenerative arthritis and reflex sympathetic dystrophy. Doctor McManama opined that the employee had no specific orthopedic restrictions. Doctor McManama further opined that the employee had significant emotional overlay which had negatively affected her symptoms and that the employee appeared to have some reflex sympathetic dystrophy in her right lower extremity, in addition to her psychiatric disorder. (Dec. 13.)

[5] The original evidentiary record was closed on December 14, 1994. However, the administrative judge first assigned to the case failed to issue a decision in a timely fashion. On September 22, 1997, a re-hearing was conducted and additional lay testimony was presented. The parties were permitted to submit additional medical evidence to cover the period after the impartial examination, which was conducted in November 1994. Counsel were denied permission to depose their respective medical experts and the record was closed. A decision on the matter had not been rendered prior to the expiration of the administrative judge's term. The matter was then reassigned to the current administrative judge for a hearing de novo.

The administrative judge adopted the medical opinion of the § 11A medical examiner in total. (Dec. 11.) He specifically rejected the medical opinion of Dr. Mitchell as "he based his opinion of total disability on a combination of 'progressive degenerative arthritis' (a non-work-related condition) and 'reflex sympathetic dystrophy' (a diagnosis which has been ruled out by the Impartial Physician whose opinion I have adopted)." (Dec. 12-13.) Additionally, the judge adopted that portion of Dr. McManama's medical opinion which found that the employee was without specific orthopedic restrictions. (Dec. 13.)

Adopting the § 11A examiner's medical opinion in its entirety, the administrative judge determined that the employee could perform the job duties associated with the MBTA's offer of a toll collector's position. As this position would not result in a diminution of the employee's weekly earnings, the judge determined that the employee was not entitled to weekly incapacity benefits. The judge also noted that the employee remained entitled to reasonable and necessary medical treatment related to her accepted industrial accident and denied the employee's claim for compensation benefits pursuant to §§ 34A or 35. (Dec. 16-17.) The employee appeals.

One issue raised by the employee is dispositive of this appeal. At the outset of the proceeding on March 2, 1999, the parties entered into a stipulation which was signed by counsel and by the administrative judge. (Dec. 2.) That stipulation reads as follows:

> Stipulation of Parties
>
> The parties to the above-captioned matter hereby stipulate that a Decision will be made based upon Evidence on Record with the DIA. This is inclusive of medical records and reports, witness testimony and all DIA filings. No determination will be made on the psychological issue as of this date. This will render a determination of benefits from 7-8-93 to date of Decision. The parties agree the Judge will take Judicial notice of all DIA forms. *The parties agree that further lay testimony is required at this time*.

(Joint Ex. 1)(emphasis added.) Notwithstanding the clear language of the last sentence of the stipulation the judge erroneously notes in the procedural history section of his decision that "the parties drafted a voluntary stipulation [Joint Ex. # 1] that would allow

the administrative judge to issue a decision based solely on the previously submitted record, without the need for lay testimony at this time." The judge then reviewed the transcript of the prior proceeding and based his decision on that record. Hence, we recommit the case to the administrative judge for further testimony in accordance with the parties' stipulation. (Dec. 3.)

One other issue raised by the employee bears comment. After reviewing the testimony of the employee, the judge indicated that since he did not have the benefit of hearing her testimony in person, he would take her testimony at "face value." (Dec. 13.) He qualified this face value acceptance, however, by noting that "in those areas dealing with physical capability and potential restrictions, I give more weight to the expert medical opinion of the physicians whose reports are in evidence, rather than the employee's self assessment of her medical condition, since she obviously does not have the appropriate medical credentials." (Dec. 13.) We do not think that an employee needs any particular medical training to competently testify about her/his physical restrictions.[6] Whether such testimony is worthy of credit is, of course, for determination by the hearing judge. And if the judge is to resolve the conflict between the employee's testimony as to her physical complaints and the opinions of the medical experts, he must actually see and hear Ms. White testify. It is always error for the judge to decide whether any witness is worthy of belief (which is to say, credible) without "live" testimony. Yates v. ASCAP, 13 Mass. Workers' Comp. Rep. 95, 96-97 (1999); Dicenso v. Winchester Concrete & Carpentry, 7 Mass Workers' Comp Rep. 237, 241 (1993). Nevertheless, we take note that the judge may not have intended to make credibility calls, in the sense of "worthy of belief," as he used language such as "give her testimony little or no weight," "give more weight," or "highly persuasive" to explain his conclusions on the testimony of several witnesses. But because a judge's interpretation of the facts after weighing the evidence often goes hand in hand with a determination of believability, we find it appropriate to

[6] Of course the medical reasons for the restrictions require expert testimony.

return the case to the administrative judge on this second issue as well. See 32A C.J.S. Evidence § 1320 (1996).

We vacate the decision and recommit the case for the taking of testimony and further findings in accordance with this decision and the parties' stipulation.[7]

So ordered.

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William A. McCarthy
Administrative Law Judge

Filed: November 21, 2000

_____
Sara Holmes Wilson
Administrative Law Judge

[7] If there is a psychiatric claim, the economic use of judicial resources dictates that it be joined to these proceedings.