COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS	**BOARD NOS. 023786-99 056280-99**
Francisco Garcia	Employee
Valentine Plating Company	Employer
AIM Mutual Insurance Company	Insurer
George Farina Landscaping	Employer
Granite State Insurance Company	Insurer

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

APPEARANCES
William J. Doherty, Esq., for the employee
Ronald C. Kidd, Esq., for AIM Mutual Insurance Company
Eugene M. Mullen, Jr., Esq., for Granite State Insurance Company

MAZE-ROTHSTEIN, J. In this multi-insurer case, AIM Mutual, the insurer for Valentine Plating Company, appeals an administrative judge's award of weekly incapacity benefits, alleging a number of errors. Because we agree with some of those contentions, we recommit the case for further findings. See G. L. c. 152, § 11C.

Francisco Garcia began working at Valentine Plating as machine operator in December of 1998. Initially, he worked in the core section where he ground and buffed chrome pieces such as screws and brake plates. In that department the lifting requirements of the job were approximately sixty to seventy pounds. (Dec. 2; Tr. 12.) Anthony Valentino, one of the principals of the company, recalled that, in May of 1999, he promised Mr. Garcia an eventual pay increase for coming to work with him on a different production line doing heavier work. (Dec. 3.) Mr. Garcia claims that he injured his back in May of 1999 while attempting to move a 55-gallon barrel full of screws.

Mr. Garcia further alleges that he told Steven Valentino, another of the principals of the company, about the injury, and was fired after complaining about his back for a week. (Dec. 2-3; Tr. 14.) Anthony testified that Steven fired Mr. Garcia shortly after he switched production lines over a dispute about the promised pay increase. (Dec. 3.) Anthony rehired Mr. Garcia a few weeks later and put him back to work in his original section, performing lighter work than that which he had performed prior to his dismissal. However, Mr. Garcia worked only three more days until he went to Mercy Hospital and got an "out of work note." (Dec. 3.) When he presented the note to Steven, Mr. Valentino again fired him. (Dec. 3.) Anthony and Steven Valentino testified that Mr. Garcia never mentioned a back injury to them prior to bringing in the note from the hospital. (Dec. 3-4.) Another employee, Otis Gaynor, testified that Mr. Garcia complained of back pain once while working on Anthony's production line, but that Mr. Garcia looked okay to him. (Dec. 4.)

Mr. Garcia was out of work for several months until November of 1999, when he tried some light work for Farina Landscaping. However, that work temporarily aggravated his symptoms, so he stopped working. (Dec. 4.)

Mr. Garcia initially treated conservatively, undergoing physical therapy in June and July of 1999. He began treating with Dr. Cowan in September of 1999. In December of that year, after trying the landscaping work, he had an MRI, which showed a herniated disc at L4-5. (Dec. 3, 4.) He had back surgery in March 2001. (Dec. 4.)

Mr. Garcia originally filed a claim against AIM Mutual alleging a May 31, 1999 date of injury while working for Valentine Plating. Following a G. L. c. 152, § 10A, conference on that claim, from which a denial issued, the employee filed a claim against Granite State, alleging that he was injured on November 10, 1999, while working for George Farina Landscaping. Again a conference denial was issued. The employee appealed both denials, and the two claims were consolidated at a de novo hearing. (Employee Brief, 1-2; AIM Mutual Brief, 1-2; Granite State Brief, 1-2; see Dec. 2.)

Prior to hearing, the employee was examined, pursuant to § 11A, and the

subsequent report and deposition testimony were admitted into evidence. (Dec. 1, 2.). That doctor confirmed that Mr. Garcia had a herniated disc at L4-5 and attributed his "injury and need for surgery to the work injury at Valentine Plating Company." (Dec. 4.) He opined that "if Mr. Garcia is believed as to his limited activities for the landscaping company in November of 1999, that that [sic] is an unlikely cause of his herniation and need for surgery." (Dec. 5.) At the time of the § 11A examination on May 24, 2001, (Stat. Ex. 1), Mr. Garcia was only a few months post surgery, and the physician felt it was not advisable for him to return to any sort of work at that point, though it was too soon to give any final disability ratings. (Dec. 4.)

In his decision, the judge found:

> The employee's testimony, if believed, outlines a classic case of a work related back injury. The case then comes down to credibility. Given the events surrounding Mr. Garcia's termination, this would also be a case where an employee might have been trying to get back at an employer through an exaggerated back claim. (Exaggerated since another employee supports Mr. Garcia's claims of back pain while working for the employer.) What persuades me in favor of the employee is the objective evidence of the herniated disc as shown in the MRI of December 1, 1999. Without that herniation, it would be much easier to believe that Mr. Garcia was indeed exaggerating his back pain to get back at his employer. But under this scenario, the employee would have been just "lucky" that his MRI showed a herniated disc.
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> Of course, a second scenario is that Mr. Garcia actually herniated his back while working at the landscaping job. But I note he did treat with physical therapy for two months after leaving Valentine Plating, and this suggests he had continuing problems with his back at that time. While the limited activity at the landscaping job may have convinced him that there was still something seriously wrong with his back, I rely on the testimony of Mr. Farina, Juan Sosa and George Shean to find that Mr. Garcia's activity for them was extremely limited and therefore adopt the opinion of Dr. Colley that this was not likely the cause of Mr. Garcia's herniation or need for surgery.

(Dec. 5-6.) The judge found that the employee had a minimum wage earning capacity from the time his physical therapy ended until he underwent surgery, but that he was otherwise totally disabled. Accordingly, he ordered AIM Mutual to pay two months of

§ 34 benefits beginning June 1, 1999; § 35 benefits from August 1, 1999 until the employee's back surgery on March 1, 2000; and § 34 benefits thereafter. (Dec. 6-7.)

AIM Mutual makes a number of interrelated arguments. At the heart of its complaints is the charge that the judge failed to make adequate subsidiary findings to enable the reviewing board to determine with reasonable certainty whether correct rules of law have been applied. Crowell v. New Penn Motor Express, 7 Mass. Workers' Comp. Rep. 3, 4 (1993), citing Zucchi's Case, 310 Mass. 130, 133 (1941). The workers' compensation statute authorizes a determination that a decision requires recommittal for further findings where appropriate. G. L. c. 152, § 11C. This discretionary standard enables the reviewing board to "be the guardians of both the form and substance of the hearing judge's decision" to ensure principles of law are accurately applied to facts found from evidence properly in the record. See Donahue v. Petrillo, 8 Mass. Workers' Comp. Rep. 36, 43 (1994); DeCristoforo v. HER Constr. Co., Inc., 14 Mass. Workers' Comp. Rep. 102, 104 (1998). While we do not agree with all of the insurer's contentions, we do find a sufficient lack of specificity to warrant recommittal.

The insurer argues that the judge's subsidiary findings contain a number of recitations of testimony without clear factual findings. See Cicerone v. Quincy Adams Restaurant & Publ. Inc., 14 Mass. Workers' Comp. Rep. 62, 66 (2000). Specifically, AIM argues that the administrative judge never stated whether he believed the employee or the employer's version of events, or even whether or how an industrial accident occurred. In his subsidiary findings, the judge did recite the testimony of a number of witnesses without indicating what testimony he adopted. (See Dec. 2-4.) Though, as the two paragraphs quoted above reveal, the judge ultimately made it clear that he believed the employee, ("What persuades me in favor of the employee . . . ."), we still do not know what specific aspects of the employee's testimony he believed, how those aspects relate to liability and whether he believed the testimony of the Valentino brothers in any respect. "It is the judge's duty to address the conflicts in the evidence with clear findings of fact that resolve the issues in controversy." Evers v. City of Boston, 11 Mass. Workers'

Comp. Rep. 636, 638 (1997). Without such clear findings, we cannot tell what evidence the judge actually found as fact and whether those findings are untainted by legal error. Id.

The dearth of specific findings is particularly troubling with respect to the employee's alleged work at Farina Landscaping. Since the only findings on point are that the employee performed "extremely limited," (Dec. 6), "light work in landscaping," (Dec. 4), we cannot tell exactly what the judge believes the employee did at Farina. Moreover, the judge's finding that Mr. Garcia actually worked at Farina Landscaping is inconsistent with his stated reliance on the testimony of three witnesses, two of whom (George Farina and George Shean) testified that Mr. Garcia did not work for Farina at all in November 1999. (Tr. 98-99, 105-106.) See Simas v. Modern Cont. Obayashi, 12 Mass. Workers' Comp. Rep. 104, 108 (1998)(where subsidiary findings are mutually inconsistent or erroneous, it is appropriate to recommit the case for further findings).

The precise nature of Mr. Garcia's work at Farina is significant to the insurer's argument that the judge misapplied the successive insurer rule by suggesting that, for Granite State, Farina's insurer and the second on the risk, to be liable, the employee would have to have herniated a disc at his second employer. Without actually setting forth the legal standard he applied, or deciding which theory of injury he accepted as fact, the judge stated that "a second scenario is that Mr. Garcia actually herniated his back while working at the landscaping job." (Dec. 5.) Since the judge did not make findings on the employee status of Mr. Garcia at Farina Landscaping or indicate what the applicable legal standard was, we cannot tell what legal standard he applied to what facts., i.e., whether the successive insurer rule applies and was applied correctly, or whether the law regarding subsequent non-work related activity applies and was correctly applied.

If Mr. Garcia was an employee of Farina, and if he had sustained a compensable back injury while working for Valentine, then under the successive insurer rule, liability is assessed against the second insurer if a second injury is "even to the slightest extent a

contributing cause of the subsequent disability." Rock's Case, 323 Mass. 428, 429 (1948). Even a "disabling increase in symptoms of some days' duration" may impose liability on a second insurer. Long's Case, 337 Mass. 517, 521 (1958). If the pain is occasional after the first injury, but with subsequent work becomes more severe, a finding of a second injury will be upheld. Conversely, where the pain has been continuous following an original injury, subsequent incapacity following a second employment will usually be deemed a recurrence chargeable to the first insurer. Burke v. Burns & Roe Enterprises, 15 Mass. Workers' Comp. Rep. 332, 336-337 (2001). Here, the judge found a temporary aggravation at Farina and a return to baseline pain. (Dec. 5.) However, he made no findings regarding whether the employee's pain had been continuous or how long the aggravation lasted, nor did he cite any evidence, expert medical or lay testimony, to support a finding that the aggravation was temporary and the pain after the employee's work at Farina was the same as before.

If Mr. Garcia suffered an aggravation of his initial back injury at Farina, but was not an employee of Farina,[1] the determination as to whether AIM remained liable for any ensuing incapacity would proceed differently:

> [I]f the [non-work-related] activity is a normal and reasonable one and not performed negligently, the insurer who paid compensation during the first period of disability may be responsible to pay the second disability if the fact finder is satisfied that the second disability period is the natural and proximate result of the original injury.

Rizzo v. M.B.T.A., 16 Mass. Workers' Comp. Rep. 160, 162 (2002), quoting Twomey v. Greater Lawrence Visiting Nurses Assoc., 5 Mass. Workers' Comp. Rep. 156, 158 (1991). On recommittal, the judge should make clear findings regarding whether Mr. Garcia was an employee of Farina or not, and then analyze the case under either the successive insurer rule or under the law regarding subsequent non-work related injuries.

The insurer also complains that the judge made a number of prejudicial evidentiary

[1] Granite State points out that the judge failed to determine whether Mr. Garcia was ever an employee of Farina Landscaping in November 1999, despite the fact that Granite State raised

rulings during the deposition of the impartial physician which warrant a reversal. We disagree. An administrative judge's decision will not be reversed for error in the admission or exclusion of evidence unless substantial justice requires reversal. See Indrisano's Case, 307 Mass. 520, 523 (1940); Bracey v. Hogan Regional Ctr., 13 Mass. Workers' Comp. Rep. 161, 163 n. 2 (1999). The party seeking reversal of the administrative judge's evidentiary ruling bears the burden of demonstrating prejudice. Chamberlain v. DeMoulas Markets, 14 Mass. Workers' Comp. Rep. 187, 191 (2000), citing Cohen v. Liberty Mut. Ins. Co., 41 Mass. App. Ct. 748, 752 (1996). Here, the insurer first takes issue with questions posed to the impartial doctor asking him whether the employee had sustained a "work injury," and argues that its motion to strike the doctor's response should have been sustained.[2] The insurer maintains that such questions

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employment status as an issue at hearing.

[2] The first question and answer was:

> Q: Okay. And based upon your examination, Doctor, and the history provided to you by Mr. Garcia, and your review of the records you had available to you at that time, did you have an opinion as to whether Mr. Garcia sustained a work injury?
> Mr. Kidd: Objection. The basis for the objection is whether or not he sustained a work injury is for the administrative judge to decide.
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> . . .
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> A: Could you repeat the question?
> Q: Sure. . . . [W]hat was your opinion contained in your report with regards to whether there was a work injury and the date of the work injury, if you had an opinion as to that?
> Mr. Kidd: Objection for the reasons previously stated.
> A: On the basis of the examination, all the notes presented to me, I was of the opinion that the patient sustained a herniated lumbar disk at the L4-5 level while working for Valentine Plating and that there was causal connection between the disk and the work injury.
> Mr. Kidd: Motion to strike. It's beyond the question asked.

(Dep. 8-9.)

The second question and answer were:

> Q: Doctor, based upon the hypothetical to you, discounting—the objections are noted for the record. It's the judge that determines the facts.
> But based upon the hypothetical as presented to you, do you have an opinion as to the causal relationship of Mr. Garcia's –opinion as to whether he sustained a work injury on May 31, 1999?

(Dep. 14.)

. . .

and answers infringed on the fact-finding province of the judge. However, the insurer has cited no cases in support of its contention that there was prejudicial error in the overruling of its objection and motion to strike, and we have found none. Indeed, we note that it is specifically within the province of the physician to give such an opinion, based on the physical demands of work, particularly where there is the possibility of an injury at two different workplaces:

> Whether the employee sustained a personal injury by reason of the work done by him . . . , and whether if he did there was a causal connection between the injury and the ensuing incapacity were not matters that could be determined by the board from its own knowledge; these were matters calling for expert medical testimony. Sevigny's Case, 337 Mass. 747, 749[(1958)]. . . .

Casey's Case, 348 Mass. 572, 574 (1965). The § 11A physician is charged with rendering an opinion on whether any medical disability was caused by "a personal injury arising out of and in the course of the employee's employment." G. L. c. 152, § 11A. The second hypothetical clearly acknowledges the judge's fact-finding authority. (Dep. 16). We detect no encroachment on judicial authority to determine what actually happened where the § 11A doctor has rendered an opinion based on his examination, the history given to him by the employee, and the medical records provided to him.

AIM also argues that the judge should have sustained its objection to a hypothetical question because the lay testimony does not support some of the facts the impartial was asked to assume. We find no error. Certainly, "a trial judge has wide, though not unlimited, discretion in the admissibility of hypothetical questions." Barbieri v. Johnson Equip., 8 Mass. Workers' Comp. Rep. 90, 92 (1994), citing MacKay v. Ratner, 353 Mass. 563, 567 (1968).

> "A hypothetical question to an expert cannot rely on misstatements of material facts." Bursaw v. B. P. Oil Co., 8 Mass. Workers' Comp. Rep. 176, 180 (1997), citing Bagge's Case, 369 Mass. 129, 134 (1975). However, slight factual errors in

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> A: In my opinion, it is as stated in my notes, in my report. In my opinion, based upon a reasonable degree of medical certainty, the patient sustained a herniated lumbar disk while working for Valentine Plating and the herniation occurred at the L4-5 level.

(Dep. 16.)

> a hypothetical question will not undermine an expert's opinion. Compare Barbieri v. Johnson Equipment, 8 Mass. Workers' Comp. Rep. 90, 94 (1996); Daly v. City of Boston School Dept., 10 Mass. Workers' Comp. Rep. 252, 257 (1996); see LeBlanc v. Ford Motor Co., 346 Mass. 225, 232 (1963). Moreover, minor errors in a hypothetical question go to the weight rather than to the admissibility of the proffered evidence. Barbieri, supra, at 94, citing Potter v. John Bean Division of Food Machinery and Chemical, 344 Mass 420, 424 (1962).

Bernardo v. Hallsmith Sysco, 12 Mass. Workers' Comp. Rep. 397, 403 (1998). The insurer maintains error in the history given the § 11A examiner of increasing back pain after working one of the plating lines. Mr. Garcia testified that he felt something pull in his back when he was pulling out a barrel full of screws, but that "it wasn't that bad." (Tr. 14.) He further testified that he told Steven Valentino that his back was hurting that same day and every day for the rest of the week. (Tr. 15.) Though the employee's testimony does not precisely match the scenario the impartial doctor was asked to assume, (i.e., a specific incident after which he worked for a week with complaints versus a gradual increase in back pain), we believe any discrepancy is insignificant, affecting the weight rather than the admissibility of the physician's opinion.

The insurer also takes issue with that part of the hypothetical question which asked the doctor to assume that after Mr. Garcia returned to work, he "had to stop working a short time after due to increasing difficulties." (Dep. 11.) However, the employee's testimony clearly comported with this aspect of the hypothetical in that he stated that after he returned to work, he worked only three days, stayed home because of his back Saturday and Sunday, and went to the hospital on Monday. (Tr. 18-19.)

Finally, the insurer cites as inaccurate the part of the hypothetical which asked the doctor to assume that the employee "performed some raking but no lifting" at Farina Landscaping. (Dep. 12.) The employee testified that, in addition to raking, he bent over and picked up the leaves and put them in a basket, but that he did not lift the basket. (Tr. 40-41.) There was no inquiry at hearing as to the extent of the lifting. Given the scant testimony on point, we see no error in asking the doctor to assume that the employee did

not perform lifting at Farina. In addition, a similar question assuming light raking was posed to the § 11A physician and answered without objection. (Dep. 55-56.) Thus, the doctor's opinion in response to that question was entitled to full evidentiary weight, even if it would have been excluded had a proper objection been made. Santos v. George Knight & Co., 14 Mass. Workers' Comp. Rep. 289, 293 (2000). Error, if there was any, in overruling the objection to the first hypothetical question, was therefore harmless.

AIM also argues that the administrative judge erred in basing his assessment of the employee's credibility on an MRI conducted six months after the employee stopped working for the first employer and one month after his alleged employment with Farina. ". . .[F]indings regarding an employee's credibility must be based in the record evidence or reasonable inferences drawn therefrom and pertinent to the claim." Pittsley v. Kingston Propane, Inc., 16 Mass. Workers' Comp. Rep. 349 (2002), citing Truong v. Chesterton, 15 Mass. Workers' Comp. Rep. 247, 249 (2001). Certainly an MRI which shows a disc herniation is relevant to corroborating the employee's testimony that he suffered an injury. See Melendez v. City of Lawrence, 16 Mass. Workers' Comp. Rep. 370 (2002)(judge erred by failing to consider medical records submitted to corroborate his testimony that he suffered an industrial injury on a specific date). AIM's complaint seems to be that, because the MRI was done six months after Mr. Garcia left his employment with Valentine Plating, it is not pertinent to determining where or when the employee suffered an injury. However, the judge did not base his determination that the employee injured his back while working for Valentine Plating solely on the contents of the MRI. He also based his credibility finding on the corroborating testimony of a co-employee who "supports Mr. Garcia's claim of back pain while working for the employer." (Dec. 5.) In addition, the judge noted that "he did treat with physical therapy for two months after leaving Valentine Plating, and this suggests he had continuing problems with his back at that time." Id. Finally, in assessing the employee's credibility, the judge relied on the testimony of three other witnesses that Mr. Garcia's work at Farina Landscaping was "extremely limited." (Dec. 5-6.) Thus, the judge drew the inference

that the employee was credible when he testified that he injured his back at Valentine Plating from the positive MRI, the corroborating testimony of the co-employee at Valentine Plating, the fact that he had physical therapy for two months after leaving Valentine Plating, and the testimony of three witnesses from Farina.

While all the forgoing inference based findings lend support to the conclusion that the herniation took place at Valentine, taken together they are shy of one necessary element to reach causal relationship between the first employment and the herniation requiring surgery - - a medical opinion. Josi's Case, 324 Mass. 415, 417-418 (1949)(where the facts needed to establish medical causation exceed common lay knowledge, expert medical evidence required); Sevigny's Case, 337 Mass. 747, 749 (1958). None of the inferences drawn from the lay testimony may properly substitute for the requisite expert medical opinion of causal relationship between the diagnosed herniated disc and the employee's work for Valentine or Farina. On recommittal, the judge should identify the medical evidence he relies on in finding that herniated disc is causally related to work at Valentine.

Accordingly, we reverse and recommit the judge's decision for more specific subsidiary findings and for an analysis of the case under either the successive insurer rule or the rule regarding subsequent non-work-related injuries.

So ordered.

Filed: May 16, 2003

Susan Maze-Rothstein
Administrative Law Judge

William A. McCarthy
Administrative Law Judge

Patricia A. Costigan
Administrative Law Judge