COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS	**BOARD NOS. 057459-98 032300-00 011281-02 007144-06**
George A. Toppi	Employee
Turner Construction Company	Employer
Liberty Mutual Insurance Company	Insurer
Flat Iron Construction	Employer
Liberty Mutual Insurance Company	Insurer
S &F Concrete	Employer
Liberty Mutual Insurance Company	Insurer
D. Clancy & Sons, Inc.	Employer
Travelers Insurance Company	Insurer

REVIEWING BOARD DECISION
(Judges Levine, Fabricant and Koziol)

The case was heard by Administrative Judge Jacques.

APPEARANCES
Paul R. Chomko, Esq., for the employee
Jean Shea Budrow, Esq., for Liberty Mutual as insurer of Turner Construction
Joseph S. Buckley, Jr., Esq., for Liberty Mutual as insurer of Flat Iron Construction
Joseph J. Durant, Esq., for Liberty Mutual as insurer of S&F Concrete, at hearing
John J. Canniff, Esq., for Liberty Mutual as insurer of S&F Concrete, on appeal
Richard P. Bock, Esq., for Travelers Insurance Company

LEVINE, J. The employee appeals from a decision denying and dismissing all four of his claims for alleged right shoulder injuries. We reverse the judge's findings that the employee did not suffer industrial injuries to his right shoulder while working for two employers, Turner Construction Company (Turner) and Flat Iron Construction Company (Flat Iron). We otherwise affirm the decision.

George Toppi, age fifty-two at the time of hearing, is a high school graduate who also attended the University of Massachusetts for five semesters where he

majored in physical education and sports medicine. From 1993 until January 24, 2003, when he was laid off, the employee worked for various contractors as a union construction laborer. (Dec. 7-8.) The employee claims he sustained work related injuries to his right shoulder.

The Claims

The employee claims he first injured his right shoulder at Turner in August or September 1998, when he slipped while carrying sheetrock. He neither received treatment nor missed any time from work after the alleged injury. He stopped working only when he was laid off several days later. (Dec. 9-10.)

Shortly after the layoff, he went to work for Flat Iron. On August 26, 2000, he slipped while standing on a truck bed adjusting heavy materials. His right arm went up like a bird wing, causing a great deal of shoulder pain. He was diagnosed with a torn rotator cuff, for which he underwent surgery in December 2000. After the employee underwent eight months of work hardening and physical therapy, Dr. Gary Perlmutter, his treating physician, cleared him to return to full duty on February 11, 2002. (Dec. 11.)

Prior to filing the present claims, the employee had filed a claim against Liberty Mutual, as the insurer of Turner (Liberty/Turner), for the 1998 injury. In a 2004 hearing decision, an administrative judge found the employee did, in fact, sustain a shoulder injury in 1998, but was not incapacitated by that injury. Rather, the judge found any incapacity was due to the August 26, 2000 injury while the employee worked for Flat Iron. However, Liberty Mutual, as the insurer of Flat Iron (Liberty/Flat Iron), was not a party to those proceedings.[1]

[1] At the present hearing, the parties stipulated that Liberty/Flat Iron paid the employee without prejudice from August 27, 2000 to August 25, 2001, and that Liberty/Turner paid without prejudice from August 26, 2001 to February 11, 2002. (Dec. 7.)

(Dec. 10-11 and n.6; Tr. I,[2] 3-15.)

The employee's third alleged right shoulder injury occurred on March 14, 2002, when he fell through a hole while working for S&F Concrete (S & F), also insured by Liberty Mutual (Liberty/S&F). However, the employee did not report or seek treatment for an injury to his shoulder. Rather, he treated and filed a claim for an injury to his leg, knee and toe, which resulted in a 2003 hearing decision finding he sustained a toe injury which was not incapacitating. The reviewing board affirmed the decision denying his claim for benefits. (Dec. 12-13.)

Finally, the employee alleges that between October 16, 2002 and January 24, 2003, while he was working for D. Clancy & Sons (D. Clancy), his right shoulder "impinged" on three separate occasions. Nevertheless, he continued to work full duty until he was laid off on January 24, 2003. He did not report any of these alleged occurrences, seek medical treatment, or lose any time from work. (Dec. 13-14.) It was the claim against Travelers, as the insurer of D. Clancy, which generated the present case. The three claims against Liberty, as the insurer of Turner, Flat Iron and S&F, were joined at various points in the proceedings. (Dec. 3, n.1.) The employee sought § 34 or § 35 benefits as a result of his right shoulder injuries.

The Judge's Decision

The judge concluded the employee did not suffer *any* industrial injuries nor was he incapacitated after January 24, 2003. (Dec. 14-17.) With respect to the 1998 injury at Turner, the judge found, inter alium, that the employee was not injured at work and was not incapacitated. The judge based her findings on the employee's testimony that he did not seek treatment after the 1998 incident, that he continued to work, and that he did not stop working due to an injury but because of a layoff. (Dec. 10.)

Addressing the August 2000 injury at Flat Iron, the judge found:

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[2] The hearing dates in the present case were May 11, 2009 and August 19, 2009. The transcripts are referred to as Tr. I and Tr. II, respectively.

> On August 26, 2000, *the employee was standing on the bed of a truck adjusting heavy materials when his foot slipped causing his arm to go up like a "bird wing" and causing a great deal of pain.* The employee continued to work but sought medical treatment a few days later at Massachusetts General Hospital where he came under the care of Dr. Gary Perlmutter an Orthopedic Surgeon. The employee was diagnosed with a torn rotator cuff, and surgery was performed in December 2000. After surgery, he received physical therapy and work hardening for eight months and then on February 7, 2002, he was cleared to return to work without restriction. "Mr. George Toppi . . . is able to return to full duty employment with no restrictions on February 11, 2002." [See Ex: #9(a).] During the period that the employee was unable to work *due to his injury*—August 27, 2000, to February 11, 2002—he received § 34 workers' compensation benefits.

(Dec. 11; emphasis added.) Again crediting the employee's testimony, the judge found that the employee did not meet "his burden of proof that he was incapacitated as of January 24, 2003 as a result of the 2000 work place incident." (Dec. 12.)

The judge found "incredulous[ ]" the employee's claim of a right shoulder injury in March 2002 while working for S&F. She found the employee did not report or seek treatment for a right shoulder injury in March 2002; he did not tell his physicians he injured his shoulder then; he did not claim a shoulder injury in his original claim against Liberty/S&F arising out of the same set of facts; he denied the significance of any shoulder injury at that time; and, at one point in the present hearing, he even denied that he injured his right shoulder in the 2002 fall. (Dec. 12-13; Tr. II, 79.)

The judge also denied the claim against Travelers as the insurer of D. Clancy, the last of the four employers. The judge made extensive findings regarding the employee's physical activities after the January 24, 2003, layoff. She found the employee has "a keen interest in physical fitness" and exercises approximately fifteen to twenty hours per week. He runs, lifts weights up to twenty-five pounds, rides bikes and fishes. In addition, the employee visits a hunting club where he volunteers doing cooking and clean-up for fundraisers. (Dec. 8-9.) The judge also made the following findings:

> After the [January 24, 2003] layoff, the employee immediately began seeking more work from the union. When asked if he would have kept working for the employer if there had been work, the employee responded "absolutely." [Tr. Vol I, pg. 82] When asked if he left work on January 24, 2003, because of his shoulder, the employee responded "no." *Id.* The employee was "ready, willing and able" to continue working. *Id.* After being laid off, the employee collected unemployment insurance. The employee explored pizza delivery jobs, computer work, livery service positions, and department store work. The employee inquired of the Department as to whether taking a part-time job would "jeopardize" his case. (Vol. I; Tr. 108, 109.)
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> Once again, I rely on the employee's own peculiar testimony that he never reported an injury; did not seek medical treatment, and continued to work full duty in concluding that he has failed to meet his burden that he was incapacitated by an industrial accident.

(Dec. 14.)

The judge then turned to the medical evidence. On March 19, 2008, Dr. Alan Bullock examined the employee pursuant to § 11A; his report and deposition testimony were in evidence. Based on the history given him by the employee, Dr. Bullock opined the employee had suffered two shoulder injuries, in 1998 and 2000, and was permanently, partially disabled due primarily to the 2000 injury at Flat Iron. (Dec. 15.) Finding the medical issues complex, (Dec. 5), the judge allowed the parties to submit additional medical evidence. The additional evidence included the 2000-2006 records of Dr. Perlmutter, the employee's treating physician, and the August 27, 2002, report of Dr. William Shea. (Dec. 2-3.)

The judge rejected Dr. Bullock's impartial opinion because it was based on factors the judge did not find credible. The judge points out that Dr. Bullock, inter alia, was not aware of the employee's level of activity as well as the employee's work history after 2000. (Dec. 15.) Instead, the judge adopted Dr. Shea's opinion that, as of August 27, 2002, the employee was fully capable of working in an unrestricted

capacity.[3] In addition, the judge adopted Dr. Perlmutter's February 6, 2003 opinion that the employee "has done beautifully following his surgery"; "that he continues to function very well"; that he may continue to work "in a construction and laborious capacity"; and that "he has reached his maximal medical end result." (Dec. 14-15, citing Exs. 8 and 9[a].)

In her "Rulings of Law," the judge concluded: "The employee has failed to meet his burden of proving that his alleged injuries occurred out of and in the course of his employment for" any of the four subject employers. (Dec. 16.) Based on Dr. Shea's opinion and the employee's own testimony, the judge found no incapacity as a result of the alleged workplace incidents. She did not address causal relationship in her "Rulings of Law" "because the employee has not met his burden of proving *any* industrial accidents occurred."[4] (Dec. 17; emphasis added.)

The Appeal

On appeal, the employee makes several arguments. First, he maintains the judge's ruling that he did not suffer *any* industrial injury to his right shoulder is erroneous. We agree. The 2004 hearing decision established that the employee suffered a shoulder injury at work in 1998, while he was employed by Turner. Thus, principles of collateral estoppel apply to bar relitigation of that issue. Okroska v. Universal Plastics, 23 Mass. Workers' Comp. Reg. 193, 197 n.7 (2009). The judge apparently misinterpreted the 2004 decision as holding that the employee suffered *no*

[3] Dr. Shea was the § 11A examiner in the earlier claim against Liberty/Turner for the alleged 1998 shoulder injury. (Ex. 4.) Dr. Shea opined the employee suffered a period of temporary disability after injuring his right shoulder in 2000. (Dec. 16.)

[4] In various of her subsidiary findings of fact, the judge does appear to address causation. See, e.g., Dec. 11 ("he is not incapacitated from the work place incident"); Dec. 12 ("he has not met his burden of proof that he was incapacitated as of January 24, 2003, as a result of the 2000 work place incident"); Dec. 14 ("he has failed to meet his burden that he was incapacitated by an industrial accident"); Dec. 17 ("he was not incapacitated as a result of the work place incidents described herein").

industrial injury, when in fact, it held he did injure his shoulder in 1998, but suffered no resulting incapacity.[5]

The judge also erred in stating in her Rulings of Law that the employee did not suffer an industrial injury in 2000 while employed by Flat Iron.[6] Her subsidiary findings describe the incident in which the employee injured his arm and the treatment he received, including surgery, physical therapy, and work hardening. Significantly, the judge found that the employee received workers' compensation benefits "[d]uring the period...the employee was unable to work due to his injury." (Dec. 11.) Furthermore, both Dr. Shea, (Ex. 11), and Dr. Perlmutter, (Ex. 8), whose opinions the judge credited, opined the employee suffered a rotator cuff injury to his right shoulder in 2000. And, in its closing argument following the hearing, Liberty/Flat Iron stated that it "has not submitted evidence to rebut the claimed industrial injury of August 26, 2000." (Hearing br. 5.)[7] In these circumstances, we reverse the judge's conclusion that the employee did not suffer an industrial injury in 2000 while employed by Flat Iron.

We find no error in the judge's denial of the employee's claim that he injured his right shoulder while working for S&F in 2002 and while working for D. Clancy thereafter. Her subsidiary findings, summarized and quoted above at pages 4-5, adequately support this conclusion.

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[5] Although it was established that the employee injured his shoulder at work in 1998, the parties were free to litigate the issue of whether the employee was incapacitated after January 24, 2003, due to those injuries. See Burrill v. Litton Indus., 11 Mass. Workers' Comp. Rep. 77, 78-79 (1997). Nason, Koziol & Wall, Workers' Compensation § 16.20 (3d ed. 2003).

[6] Although the judge in the 2004 decision found the employee was injured in August 2000 while working for Flat Iron, principles of collateral estoppel do not apply to bar litigation of that issue because Liberty/Flat Iron was not a party to that hearing. See Okraska, supra; Heacock v. Heacock, 402 Mass. 21, 25 (1988).

[7] We take judicial notice of documents in the Board file. Rizzo v. M.B.T.A., 16 Mass. Workers' Comp. Rep. 160, 161 n.3 (2002).

The employee next argues the judge erred by finding he was not incapacitated as a result of an industrial injury after January 24, 2003, when he was laid off. We find no error, as the judge's findings were supported by the employee's own testimony in which he admitted that, but for the layoff, he was "ready, willing and able" to work. (Dec. 14-15.) As she was permitted to do, the judge gave " 'decisive weight' to the testimony of the employee," Brommage's Case, 75 Mass. App. Ct. 825, 828 (2009), quoting Dalbec's Case, 69 Mass. App. Ct. 306, 314 (2007), which was inconsistent with his claim that he was incapacitated for work.

The employee further argues the judge erred by rejecting the opinion of the impartial examiner, Dr. Bullock, and by relying on the February 6, 2003 opinion of Dr. Perlmutter, the employee's treating physician, and on the August 2, 2002 opinion of Dr. Shea, the impartial physician in the 2004 hearing decision, to find that the employee was not incapacitated after January 24, 2003. The judge was not required to adopt the impartial opinion. It lost its prima facie effect upon the introduction of medical evidence sufficient to warrant a contrary conclusion. Brommage, supra, citing Dalbec, supra at 313-314. Dr. Perlmutter's February 6, 2003, opinion that the employee could work in a laborious capacity and was not incapacitated from full-time work is such evidence. The judge was not required to adopt later opinions of Dr. Perlmutter that the employee's condition had worsened several months after his final layoff.[8] See Zapata v. Demoulas Supermarkets, 18 Mass. Workers' Comp. Rep. 310, 315 (2004)(judge may adopt all, part or none of a medical opinion, but may not mischaracterize it). In concluding the employee was not incapacitated, the judge made extensive findings on the employee's exercise regimen, including weight lifting, his mountain biking, fishing and volunteering activities, his ability to care for himself,

[8] It was dubious for the judge to rely on Dr. Shea's August 13, 2002 opinion to find that the employee was not incapacitated as of five months later, January 24, 2003. However, since Dr. Perlmutter's opinion and the employee's own testimony support the judge's finding of no incapacity as of January 24, 2003, that error does not require reversal. See Famiglietti v. City of Lynn School Dep't, 24 Mass. Workers' Comp. Rep. 29, 31-32 (2010)(error in stated adoption of impartial physician's opinion on causation rendered harmless by judge's adoption of treating physician's causation opinion).

and his reluctance to seek any employment which would jeopardize his ability to collect his pension or compensation benefits. (Dec. 8-9.) Again, the employee's "own peculiar testimony," (Dec. 14), overcame any medical opinion that the employee was incapacitated from work. See Fritz v. Living Assistance Corp., 22 Mass. Workers' Comp. Rep. 247, 253 (2008)("no medical expert, not even a § 11A impartial medical examiner, is the arbiter of an employee's credibility or the finder of fact").

Accordingly, we reverse the judge's findings that the employee did not suffer industrial injuries to his right shoulder in 1998, while employed by Turner, and in 2000, while employed by Flat Iron. We affirm the judge's other findings, including her conclusion the employee was not incapacitated beginning on January 24, 2003, when he was laid off.[9]

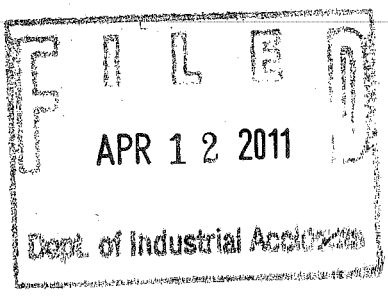
So ordered.[10]

Frederick E. Levine
Administrative Law Judge

Bernard W. Fabricant
Administrative Law Judge

Catherine Watson Koziol
Administrative Law Judge

Filed:



[9] The judge erred when she admonished that the employee "should not file another claim at the Department regarding the same incidents or same injury." (Dec. 16.) The employee has the right to seek further incapacity or medical benefits for established work related injuries. See G. L. c. 152, § 16.

[10] The insurer is not liable to pay an attorney's fee. See Gonzalez's Case, 41 Mass. App. Ct. 39 (1996), and G. L. c. 152, § 13A(7).