COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 008361-10**

Gregory LeBlanc	Employee
Keystone Maintenance and Construction	Employer
North River Insurance Company	Insurer

REVIEWING BOARD DECISION
(Judges Fabricant, Koziol and Levine)

This case was heard by Administrative Judge Benoit.

APPEARANCES
Paul S. Danahy, Esq., for the employee
Byron G. Mousmoules, Esq., for the insurer

FABRICANT, J. The employee appeals from a decision denying and dismissing his claim. We affirm.

The employee, a fifty-six year old millwright, alleged he was injured on April 16, 2010, his second day back at work following an eighteen-month absence due to an earlier industrial injury. The judge denied the employee's claim following a § 10A conference, and the employee appealed to a § 11 evidentiary hearing. On December 15, 2010, Dr. Marc Linson examined the employee pursuant to § 11A. His report and deposition are in evidence. Finding the medical issues complex, the judge opened the record for additional medical evidence. Both parties submitted additional medical records without objection. (Dec. 3.)

The employee testified that he was injured while attempting to operate a stuck lever during the installation of a solar turbine at the Gillette facility in South Boston. He slipped forward, hit his head and then fell backward, landing on his buttocks. After reporting the incident to his foreman, he then went to Gillette's medical clinic. (Dec. 5.) He testified he initially felt pain in his neck, and then numbness in the fourth and fifth fingers of his left minor hand. (Tr. 32-34.) He was taken by ambulance to Tufts Medical Center, where he was admitted

overnight for testing. Since then, he has treated conservatively with Dr. Richard Fraser, who prescribed medication; he has also had a few chiropractic treatments. Although he testified he has made great progress with his neck and low back, which he also alleges was injured, he complains of numbness in the fourth and fifth fingers of his left minor hand, as well as a decrease in strength and a tendency to drop things. Additionally, he claims to have side effects from prescribed medications, including confusion, disordered thoughts, depression and inability to drive. He has not returned to work. (Dec. 5.)

At hearing, the insurer raised liability, disability and causal relationship, including § 1(7A),[1] (Dec. 1), arguing that the claimant had radicular symptoms in his left arm, similar to those currently alleged, following a 2008 non-work-related motorcycle accident, and that his neck and back complaints were pre-existing conditions, as well as the subject of prior lump sum agreements. (Tr. 5.) Two of the three prior lump sum agreements were admitted into evidence. (Dec. 8; Exs. 6 and 7.)

In his decision, the judge noted that this was the fourth industrial injury suffered by the employee since 2005. (Dec. 4.) He observed that the employee's prior industrial injuries had resulted in lump sum agreements of varying amounts in which liability had been accepted.[2] He noted that the injuries in these claims were primarily to the lumbar and cervical spine, (Dec. 8-9), which the employee

---

[1] G.L. c. 152, § 1(7A), provides, in relevant part:

> If a compensable injury or disease combines with a pre-existing condition, which resulted from an injury or disease not compensable under this chapter, to cause or prolong disability or a need for treatment, the resultant condition shall be compensable only to the extent such compensable injury or disease remains a major but not necessarily predominant cause of disability or need for treatment.

[2] The first lump sum agreement for the 2005 injury could not be located, so the description of the employee's injury was taken from the impartial physician's report. (Dec. 9, n.3.) The judge found that § 36 benefits were paid in all three settlements. (Dec. 9.)

also claimed to have injured in April 2010. Further, in the context of discussing Dr. Linson's deposition testimony, the judge noted that the employee had suffered a 2008 non-industrial injury to his left shoulder while lifting a motorcycle, necessitating surgery to the left rotator cuff on January 23, 2009. (Dec. 6.; Tr. 47, 54, 77-79.) On September 11, 2009, the employee had two more surgeries to his left upper extremity: a carpal tunnel release and a ulnar nerve subcutaneous transposition. (Dec. 5.)

Assessing the medical evidence, the judge credited that part of Dr. Linson's impartial report indicating "strain to the neck and lower back were not ongoing and not significant enough to impact his impairment or disability presently." (Dec. 6.) He further found that the employee's major complaint at the time of the impartial examination was "discomfort in his left arm with numbness down the left arm including the fourth and fifth fingers." Id. However, the judge found that the employee did not tell Dr. Linson he had experienced numbness in the fourth finger of his left hand prior to the April 16, 2010, incident, or that he suffered a non-work-related motorcycle injury requiring rotator cuff surgery in 2008. (Dec. 6, 7.) When he was informed of this at his deposition, Dr. Linson opined that "it is more likely than not that the originating injury for the numbness and tingling described by the Employee at the time of his Impartial Physician examination in December 2010 was the non-industrial motorcycle incident of 2008." (Dec. 7.) Moreover, the judge adopted Dr. Linson's opinion that ulnar nerve transposition surgery, such as the employee underwent prior to April 2010, is usually performed for symptoms involving the fourth and fifth fingers. He also adopted Dr. Linson's opinion that the employee's examination did not reveal any atrophy commensurate with the numbness or tingling described by the employee or the lack of grip strength he demonstrated.[3] Id.

[3] Nonetheless, the judge adopted Dr. Linson's opinion that the employee had restrictions; he could do a full-time light to moderate job not involving intense work with his left

The judge also adopted parts of several other medical opinions which indicated, contrary to the employee's testimony, that he had experienced numbness and tingling in the fourth and fifth fingers of his left hand prior to the April 16, 2010 incident.[4] These included a notation of Dr. George Lewinnek, the insurer's examiner for the 2008 industrial injury, indicating that the employee complained of pain in his neck and numbness in the third, fourth and fifth fingers of his left hand at the time of his December 22, 2008, examination. (Dec. 4.) The judge also adopted Dr. Lewinnek's January 19, 2011, opinion that there was "no evidence of a new injury to the Employee's left hand that can be related to the April 2010 accident." (Dec. 8.) The judge credited Dr. Lewinnek's opinion that the employee suffered from long-standing degenerative disc disease in the neck and back which was "not aggravated in any appreciable fashion by the incident in April 2010," and that there was no disability or impairment causally related to the incident. (Dec. 8.)

The judge then made the following comments, with which the employee takes issue:

> At a time when the American economy has suffered terribly, particularly in the building trades, Insurers have paid the employee approximately $352,035.00, tax-free, in weekly incapacity benefits and lump sum settlements. While a history of past workers' compensation does not disqualify one from being entitled to workers' compensation benefits resulting from a subsequent injury, be it new or an aggravation of a prior injury, in certain situations it can be a factor in assessing the credibility of a claimant and the worthiness of his claim.

---

minor arm or prolonged posturing with the neck or low back, or lifting more than 15 pounds, the bulk of which would have to be done with the right arm. (Dec. 6.)

[4] The judge adopted the Longview Orthopedic records of February 5, 2009, indicating a history of tingling over his fifth digit overnight, and an assessment of "[l]eft apportionment complaints following left shoulder surgery performed by Dr. Burbank." (Dec. 4.) He also relied on the March 12, 2009, Health Alliance Hospital Rehabilitation progress notes indicating that the employee complained of numbness in the second, third and fourth fingers. (Dec. 4-5.)

(Dec. 9.) Addressing the employee's credibility, the judge observed :

> The Employee's testimony indicated a two-part industrial accident, consisting of (1) falling forward and striking his head, and (2) falling backwards and landing on his buttocks. This is not consistent with the records of Tufts Medical Center, which speak instead of only a forward fall. It is inconsistent with the history reflected in the reports of Dr. Linson or Dr. Lewinnek. He indicated to Dr. Linson that he had not experienced problems with his fourth and fifth fingers prior to April 2010, saying instead that his earlier problems involved only his thumb, index finger, and long finger, but there are credible medical records that contradict this assertion. Much of his testimony concerning ongoing problems with pain, sleep difficulties, and side effects of medications seemed to me to be quite rehearsed, and at one point in my notes I made an annotation to that effect. His testimony regarding negative side effects concerning his ability to think and function contrasted with his ability to fully participate in the Hearing. I observed the Employee closely during his time on the stand, and among my observations was that, immediately after testifying to how difficult it was for him to turn his head from side to side, he had no observable problem turning his head to look toward the court reporter and me.

(Dec. 10.) The judge concluded:

> After reviewing all of the evidence and taking into consideration all factors, including the Employee's multiple claims involving the same body parts and significant discrepancies in his testimony, I do not credit the Employee's testimony. To the extent that Dr. Linson's report and testimony credited the Employee's statements, I do not accept, adopt, or rely on it.

(Dec. 10.) Finding the employee was not injured on April 16, 2010, the judge denied and dismissed his claim. (Dec. 11.)

On appeal, the employee maintains that the judge 1) erred by relying on Dr. Lewinnek's opinion which was based on an inaccurate factual foundation; 2) mischaracterized and then impermissibly dismissed Dr. Linson's opinion; and 3) impermissibly relied on the employee's history of prior accepted work injuries to discredit the employee's testimony. (Dec. 15.) We disagree.

First, the employee maintains the judge erred by adopting Dr. Lewinnek's opinion because the history on which he relied was inaccurate. Dr. Lewinnek's

January 19, 2011, report made no mention of the 2006 work injury, indicated that the October 17, 2008, injury was in 2007 in one paragraph, and failed to mention that any of the employee's prior injuries involved the employee's neck. (See Ex. 12.) Regardless, such omissions are irrelevant to his ultimate opinion. In his 2011 report, Dr. Lewinnek mentioned fewer prior injuries than the employee actually had, yet he still opined that there was "no evidence of a new injury [to the left side of hand] that can be related to the April of 2010 incident"; "no disability that is causally related to the incident in April of 2010"; and "no impairment that is causally related to the incident in April of 2010."[5] Id. (Dec. 7-8.)

Next, the employee argues the judge was required to adopt Dr. Linson's § 11A opinion that the April 16, 2010, work injury was a major cause of the employee's current incapacity because Dr. Linson expressed this opinion after being thoroughly apprised of the inconsistencies in the employee's testimony at deposition. We disagree. Dr. Linson's opinion did not retain its prima facie status once additional medical evidence was admitted, permitting a finding to the contrary. See Tucker v. Stanley & Sons, Inc., 24 Mass. Workers' Comp. Rep. 239, 244 (2010), and cases cited. The judge was free to adopt all, part or none of the impartial opinion. Echeverria v. Costa Fruit & Produce, 24 Mass. Workers' Comp. Rep. 1, 3 (2010), and cases cited. Here, he did not adopt Dr. Linson's causation opinion because, while the doctor credited the employee's history and complaints, the judge did not:

> [Dr. Linson] chose to believe the Employee even after discounting some of what the Employee said concerning the lack of prior problems with his fourth and fifth fingers. Determination of the credibility of a witness is the function of the Judge rather than the Impartial Physician, and I disagree with Dr. Linson on this point.

(Dec. 10.) This is entirely permissible. See, e.g., Brommage's Case, 75 Mass. App. Ct. 825 (2009); Strength v. Siemens Westinghouse, 25 Mass. Workers'

[5] As mentioned above, Dr. Lewinnek was the insurer's examiner for the employee's 2008 injury, and presumably was informed of the employee's prior work injuries at that time.

Comp. Rep. 149, 151 (2011)(judge free to disregard impartial physician's opinion based on history he discredited); Tucker, supra(judge free to reject impartial opinion and adopt another medical opinion, where impartial opinion was based on history of injury judge did not find).

Finally, with respect to the employee's argument that the judge erroneously relied on a history of the employee's prior accepted work injuries to discredit his testimony, we find no error. "Credibility determinations are the sole province of the hearing judge, Lettich's Case, 402 Mass. 389, 394 (1988), and we will not disturb them unless they are arbitrary and capricious, or derived from inferences which are not reasonably drawn from the evidence." Lefebvre v. Sandelswood, Inc., 21 Mass. Workers' Comp. Rep. 135, 141 (2007)(additional citations omitted). The judge did state that in certain situations, *a history of prior compensation claims* can be a factor in assessing the employee's credibility. However, his subsequent findings indicate that he relied, not on the fact the employee had filed prior claims and settled them, but on medical reports which contradicted the employee's position at hearing, thus revealing "significant discrepancies in his testimony." (Dec. 10.) The reports included Dr. Lewinnek's examination performed for the October 17, 2008, accepted work injury in which he noted that the employee had complained of numbness in the fourth and fifth fingers, as well as several other medical records generated prior to the April 16, 2010, incident. (Dec. 4; see n.4, *supra*.) Contradicting these reports, the employee told Dr. Linson that he had not experienced problems with his fourth and fifth fingers before April 16, 2010, (Dec. 10), and so testified at hearing. (See Tr. 62, 80, 87.) The inconsistency between the medical records of the employee's prior claims regarding the onset of numbness and tingling in his fourth and fifth fingers, and the employee's testimony at hearing and statements to his doctors, is therefore a significant and appropriate basis for the judge's credibility determination.

The judge bolstered his decision with other permissible bases for not crediting the employee: 1) the inconsistency in the histories given to Dr. Linson, Dr. Lewinnek, and the hospital on April 16, 2010; 2) his observation that the employee's testimony appeared to be rehearsed; and 3) his observation that the employee's testimony regarding negative side effects concerning the ability to think and function contrasted with the employee's ability to fully participate in the hearing. (Dec. 10.) See, e.g., Comeau v. Enterprise Elecs., Inc., 26 Mass. Workers' Comp. Rep. ___ (2012)(that the employee's accounts of the incident varied somewhat in the histories given to certain doctors was a matter for the judge to reconcile, based on credibility findings); Harwood v. Corporate Environmental Advisors, 26 Mass. Workers' Comp. Rep. 51, 54-55 (2012)(judge may base findings on personal observations of employee); Truong v. Chesterton, 15 Mass. Workers' Comp. Rep. 247, 250-251 (2001)(if reasons for credibility determination, other than erroneous inferences drawn from evidence, stand independently of tainted reasons, credibility decision may stand). There was no error.

While we acknowledge that it might have been preferable for the judge to refrain from discussing the employee's prior lump sum agreements to the extent he did,[6] given the appropriate bases cited for the judge's ultimate credibility findings, any error was harmless. The decision is affirmed.

So ordered.

[6] The employee does not allege, nor do we find, any violation of G.L. c. 152, § 48(4) or (5), which provide, in relevant part: "[S]uch [lump sum] agreement shall affect only the insurer and the employee who are parties to such lump sum agreement and shall not affect any other action or proceeding arising out of a separate and distinct injury . . . " The cases discussing these provisions deal with whether a judge may offset compensation in a subsequent claim by the amount awarded under a prior lump sum agreement. See, e.g., Stillman v. General Dynamics, 23 Mass. Workers' Comp. Rep. 121 (2009). They do not address whether a judge may consider an employee's statements, made in the course of medical treatment for prior compensable injuries, with respect to his credibility.

_____
Bernard W. Fabricant
Administrative Law Judge

_____
Catherine W. Koziol
Administrative Law Judge

_____
Frederick E. Levine
Administrative Law Judge

Filed: **December 4, 2012**