

COMMONWEALTH OF MASSACHUSETTS

**DEPARTMENT OF
INDUSTRIAL ACCIDENTS**

BOARD NO. 033760-07

Ibrahim Elballat
Boston Market
ACE American Insurance Co.

Employee
Employer
Insurer

REVIEWING BOARD DECISION
(Judges Horan, Koziol and Fabricant)

APPEARANCES

Joyce E. Davis, Esq., for the employee at hearing
Ibrahim Elballat, pro se, on appeal
James D. Chadwell, Esq., for the insurer

The case was heard by Administrative Judge Tirrell.

HORAN, J. The employee and insurer cross-appeal from a decision awarding the employee § 34 benefits. On appeal, the employee submits he was incompetent to testify at the hearing, with the result that his testimony was largely false. Despite having prevailed, he seeks reversal and recommitment. The insurer requests we vacate the award of benefits and assess costs and penalties against the employee pursuant to §§ 14(1) and (2). Because the employee's partial recantation on appeal raises multiple questions of material fact that were not presented to the judge for adjudication, we are compelled to recommit the case for further findings.¹

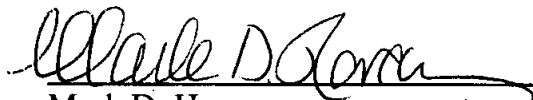
On May 31, 2007, the employee fell at work. The judge found that, as a result of his fall, the employee suffered from a concussion, TMJ syndrome, and a right ankle sprain. (Dec. 5-6.) Crediting the employee's testimony, and adopting the medical opinions of the § 11A impartial physician and the employee's treating doctor, the judge awarded ongoing § 34 benefits as claimed, commencing on November 23, 2007. (Dec. 7-10.)

¹ In light of our disposition, we do not reach the remaining issues raised by the parties.

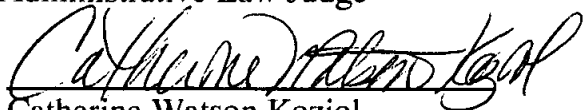
On appeal, the employee claims that at the time of the hearing, he “was under incompetent mental and physical health condition because I did not take my medication on that day.” (Employee br. 6-7). Although he maintains his injuries are work-related, the employee avers his case “has been corrupted intentionally or unintentionally without the knowledge of the DIA judges.” (Employee br. 1, 19.) These allegations present factual issues beyond the scope of our standard of review. See G. L. c. 152, § 11C. Because we do not make credibility findings and weigh evidence,² we must recommit the case to the judge for further findings of fact to address the issues raised by the employee’s appeal.

Based on the employee’s partial recantation of his hearing testimony, the insurer’s appeal seeks, *inter alia*, recoupment of the benefits paid pursuant to the judge’s decision. The insurer’s recoupment request is premature. On recommitment, the judge should address this issue only if his decision results in a reversal of the benefits awarded previously; he is also free to address the insurer’s §§ 14(1) and (2) claims.

So ordered.



Mark D. Horan
Administrative Law Judge

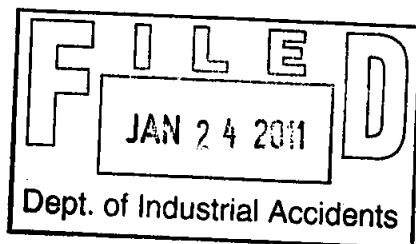


Catherine Watson Koziol
Administrative Law Judge



Bernard W. Fabricant
Administrative Law Judge

Filed:



² See Lettich’s Case, 403 Mass. 389, 394-395 (1988).