COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 019454-11**

Isidro Aguinaga	Employee
Sage Engineering & Contracting Inc.	Employer
AIM Mutual Insurance Co.	Insurer

REVIEWING BOARD DECISION
(Judges Harpin, Calliotte and Long)

The case was heard by Administrative Judge Poulter.

APPEARANCES
Jeffrey S. Smith, Esq., for the employee at hearing
Earlon L. Seeley, III, Esq., for the employee on appeal
Kimberly Davis Crear, Esq., for the insurer

HARPIN, J. The employee appeals from a decision awarding him § 35 partial incapacity benefits and limited §§ 13 and 30 medical benefits. We affirm.

On July 29, 2011, the employee was transporting a bobcat on a trailer to a job site when his vehicle was struck by a truck. He was then taken by ambulance to a hospital. Later, under the care of a neurosurgeon, he received physical therapy and cortisone shots. (Dec. 4.) The employee filed a claim for benefits, and, following a conference, the judge ordered § 35 benefits from April 1, 2012, to date and continuing. Both parties filed timely appeals. At the hearing, the employee filed a motion to admit additional medical records, pursuant to 452 Code Mass. Regs. § 1.11(6), based on inadequacy. The administrative judge denied this motion.

Dr. Steven Silver, the § 11A impartial examiner, initially opined that the employee could work with limitations on a part-time basis, but only for four hours a day. (Ex. 1, 8.) However, at his deposition, after viewing video surveillance evidence which included footage of the employee fishing, the doctor testified the video showed the employee capable of sitting or standing for five or six hours, and

thus that the employee was capable of working thirty hours a week.[1] The judge credited and adopted Dr. Silver's assessment that the employee was capable of working for thirty hours a week, and awarded § 35 benefits accordingly. (Dec. 6)

The employee appeals, arguing that the decision should be reversed and remanded because the judge's denial of his motion to admit additional medical evidence was arbitrary and capricious, in part because the administrative judge improperly adopted the impartial examiner's changed opinion, which he alleges was based on facts not in evidence. The employee also argues the judge erred by failing to open up the medical record due to the complexity of the medical issues.

The employee takes umbrage with the judge's adoption of Dr. Silver's change of opinion on the extent of employee's ability to work, going from twenty hours per week expressed in the doctor's report, (Ex. 1, 8), to up to thirty hours per week, based on his review of the video of the employee preparing for and actually fishing from a boat on March 22, 2012. (Dec. 6; Dep. 21-22.) The employee asserts that this finding constituted error, as it was based on the assumption that he had been fishing for five hours, when the judge found as fact, after reviewing the

[1] Dr. Silver testified:

> Q: Would that video cause you to increase your opinion regarding his ability to work full-time versus part-time?
> Dr.: I think he probably – if you can sit and stand for approximately five hours you can sit and stand for five, six hours.
> Q: Okay. So earlier in your testimony when you would limit him to 20 hours per week, I am hearing you say that you may –
> Dr.: Probably 30.
> Q: 30 hours a week. Okay. Just so I am clear, did you find that video to be inconsistent with the limitations described by Mr. Aguinaga to you?
> Dr.: Correct.
> Q: Does the video cause you to question the veracity of Mr. Aguinaga's presentation at the time of your July 2012 exam?
> Dr.: It does.
> Q: Okay. And just, if you could, elaborate for us?
> Dr.: His ability to fish is inconsistent with his complaints and his ability to work.

(Dep. 21-22.)

video, that the employee was seen fishing from 11:15 a.m. until 2:45 p.m. on a small boat, or for only three and a half hours. (Dec. 6, n. 1.)

The problem with the employee's argument is that it assumes Dr. Silver based his opinion only on the time the employee was actually in the boat. Had that been correct, the judge's adoption of the doctor's change of opinion would have been inconsistent and not based on facts found. See King v. City of Newton, 29 Mass. Workers' Comp. Rep. 13, 18 (2015)(internally inconsistent decision cannot stand); see also Brommage's Case, 75 Mass. App. Ct. 825, 828 (2009); Pilon Jr.'s Case, 69 Mass. App. Ct. 167, 169 (2007); Uka v. Westwood Lodge Hospital, 30 Mass. Workers' Comp. Rep. 129 (2016)(judge must find facts, and then adopt medical opinions that are consistent with those facts). However, Dr. Silver testified the employee could sit and stand "for the amount of time that he was able to sit and stand in that video." (Dep. 21; emphasis supplied.) In making that observation and forming his opinion, the doctor was referring to the entire video, not just the time the employee spent in the fishing boat. The actual time of the surveillance, which was pointed out to the doctor, (Dep. 15, 36), was from 9:51 a.m. on March 22, 2012, to 3:05 p.m., (Ex. 5), a little over five hours. During that time Dr. Silver observed the employee performing other activities outside the boat that involved bending, twisting and maneuvering. (Dep. 15, 18, 27, 36, 50, 51.) For that reason the doctor's change of opinion, that he would increase the employee's work limitations from twenty to thirty hours a week, was confirmed by what he saw in the whole video. The judge's adoption of that changed opinion was therefore supported by evidence in the record, and we will not disturb it. Brommage, supra at 827.

The employee argues it was also error for the judge to adopt Dr. Silver's opinion, as the doctor questioned the veracity of the employee by finding the video to be inconsistent with the limitations described by the employee at the time of the exam. (Dep. 22.) While it is improper for the doctor to assess and comment on the credibility of the employee, as it is the judge's role to make this assessment,

Moynihan v. Wee Folks Nursery, Inc., 17 Mass. Workers' Comp. Rep. 342 (2003), any error here is harmless, because the judge did not rely on the doctor's credibility opinion.[2]

The employee next argues that additional medical evidence should have been allowed on the grounds of inadequacy of the impartial physician's report. We disagree. The impartial report of Dr. Silver met the necessary criteria, addressing causal relationship and the extent of disability. Furthermore, the employee based his argument concerning inadequacy on the assumptions made by the impartial examiner relative to the amount of time the employee was observed fishing. We have already addressed this issue.

We find the employee's third argument, asserting that additional medical evidence should have been allowed due to medical complexity, to be without merit. This issue, raised for the first time on appeal, is waived. Torres v. Pine St. Inn, 9 Mass. Workers' Comp. Rep. 359 (1995)(issue not raised at hearing is waived).

We summarily affirm the remainder of the decision as to other issues raised by the employee.

So ordered.

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William C. Harpin
Administrative Law Judge

_____
Carol Calliotte
Administrative Law Judge

[2] The judge addressed credibility in the hearing decision: "I credit Mr. Aguinaga's testimony above, with the exception of his testimony with regard to the extent of his incapacity which I do not credit." (Dec. 5.) We accept the judge's findings on credibility, as we must, Carragher v. UMass Boston, 31 Mass. Workers' Comp. Rep. __ (October 11, 2017), and note that the employee's opinions on his own limitations are irrelevant.

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Martin J. Long
Administrative Law Judge

Filed: **March 26, 2018**