COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NOS.: 014022-00**

James A. Faieta, III	Employee
Boston Globe Newspaper Company	Employer
New York Times Company	Self-Insurer

REVIEWING BOARD DECISION

(Judges Costigan, Levine and Wilson[1])

APPEARANCES

Lawrence Machione, Esq., for the employee
Paul S. Kelly, Esq., for the self-insurer

COSTIGAN, J. The self-insurer appeals from a decision in which the administrative judge found that the employee sustained a work-related low back injury on April 12, 2000, and awarded him a closed period of G. L. c. 152, § 35, partial incapacity benefits. We see no merit in any of the self-insurer's several arguments, and affirm the decision.

James Faieta, a high school graduate with training as an electronic technician, was thirty-nine years old at the time of the hearing. He began work for the employer in 1991 as a mailer, which involved unloading Boston Sunday Globe inserts (television, magazine and coupon sections, as well as store flyers) from a pallet onto a table, and then feeding them into various collating machines. The tables onto which the inserts were unloaded were designed to spin, so that when the inserts from one side ran low, the mailer could turn the table and unload from the other side. At times, the table did not spin, and the employee had to give it a good push or pull. The job required continual bending, turning, twisting, and repetitive light lifting. In a normal shift, the employee could move as much as 2000 pounds. (Dec. 4-5.)

[1] Judge Wilson no longer serves on the reviewing board.

Some four years prior to the injury at issue here, the employee suffered a work injury resulting in "possible lumbar herniations L3-4, L5-S1." He was out of work from May 1996 until January 2000, when he returned to work for the same employer. (Dec. 5.) Six months prior to his return, on July 6, 1999, the employee settled his 1996 back injury claim by way of a § 48 lump sum agreement. (Dec. 5; Self-ins. Ex. 2.) In the case before us, the employee alleged that on April 12, 2000, he re-injured his back at work while attempting to spin a table holding the newspaper inserts. (Dec. 5.) He was out from work for approximately a year and a half, and filed a claim seeking § 34 temporary total incapacity benefits or, alternatively, § 35 temporary partial incapacity benefits for that period of time. (Dec. 4.)

Following a § 10A conference, the employee's claim was denied and he appealed to a hearing de novo, (Dec. 3), at which the self-insurer not only disputed liability and causal relationship, but also asserted that the employee had filed a fraudulent claim under § 14(2). (Dec. 4.) Dr. James Hewson, an orthopedic surgeon, examined the employee pursuant to § 11A. After comparing MRI studies from 1998 and April 25, 2000, Dr. Hewson diagnosed the employee with left-sided lumbar disc protrusions at L2-3 and L3-4 causally related to the 1996 injury, and right-sided lumbar disc protrusions at L2-3, L3-4 and L4-5 causally related to the alleged incident of April 12, 2000. (Dec. 7-8.) The impartial examiner opined that the employee could lift no more than 50 pounds infrequently and could not return to heavy work involving bending, twisting or prolonged sitting. (Dec. 8.)

The judge found the report of the § 11A impartial physician adequate and the medical issues not complex. (Dec. 2, 9.) Thus, as the judge correctly noted, she was bound to accept the § 11A physician's opinions as prima facie evidence of the employee's medical condition, Murphy v. Commissioner of the Dept. of Indus. Accs., 415 Mass. 218, 224 (1993), unless to do so would deprive a party of due process of law. O'Brien's Case, 424 Mass. 16, 24 (1996).

Several other medical records[2] , offered by the self-insurer to impeach the employee's credibility, were admitted by the judge for that limited purpose only, and not as additional expert medical evidence[3] . (Dec. 1, 2; Tr. 75-77.) At the deposition of the impartial examiner, apparently off-the-record, the parties agreed to mark those records as exhibits to the deposition, (Dec. 2-3; Dep. 3-5), and the self-insurer questioned Dr. Hewson at length about the absence of a history of an April 12, 2000 work injury in any of those records. Dr. Hewson, who had opined in his report that the employee was partially medically disabled, causally related to the April 12, 2000 incident, conceded that the absence of such a history was inconsistent with what the employee told him. He agreed that it raised uncertainty in his mind "as to whether or not an accident occurred on that day," (Dep. 18-20), that it raised questions about the believability, credibility and truthfulness of the employee, (Dep. 30), and that it raised questions as to whether the doctor could support his finding of causation "with reasonable medical certainty." (Dep. 31-32.) Dr. Hewson agreed that, based on the medical records the self-insurer had presented to him, it appeared that the employee gave him "a misleading and inaccurate history of the sequence of events." (Dep. 39.)

The administrative judge, however, specifically rejected "the self-insurer's argument that the impartial medical examiner's opinion is weakened by alleged lack of candor by the

[2] Those records were: April 12, 2000 Sports Medicine North Orthopedic Surgery, Inc. report of Jeffrey Polansky, M.D. (Self-ins. Ex. 3); April 14, 2000 and April 17, 2000 North Shore Medical Group reports (Self-ins. Ex. 3A); April 15, 2000 Medical Treatment Center of Saugus records (Self-ins. Ex. 3B); April 17, 2000 Union Hospital & Atlanticare Medical Center records (Self-ins. Ex. 3C); April 17, 2000 Union Hospital Emergency Department records (Self-ins. Ex. 3D); and April 12, 2000 McKenzie Institute Lumbar Spine Assessment records (Self-ins. Ex. 4)..

[3] After the § 11A deposition, in its post-hearing memorandum, the self-insurer argued that because those exhibits, and other medical reports, were shown to Dr. Hewson and marked as exhibits to his deposition without objection or limitation, they were in evidence for all purposes, not just impeachment. The judge rejected that argument, noting that she had sustained the employee's objections at deposition to certain medical reports. As to the others records previously admitted at hearing, she confirmed her ruling "that the medical exhibits would be admitted for impeachment only," and that "the employee was entitled to rely on that ruling and not required to make an additional objection at the deposition of the impartial medical examiner." (Dec. 2-3.) We agree with the judge that the self-insurer's argument is without merit.

employee . . . ." (Dec. 9.) She resolved the liability and causal relationship issues in the employee's favor, (Dec. 9-10), but concluded that neither the impartial medical examiner's restrictions nor the employee's testimony established that the employee was totally incapacitated during the period of disability claimed. She found that although he could not perform his regular work for the employer, he could perform a variety of less physical jobs based on his education, experience, past employment, and his testimony about his daily activities. The judge assigned a $300 weekly earning capacity, and awarded the employee weekly § 35 partial incapacity benefits from April 13, 2000 to October 28, 2001. She denied the self-insurer's § 14 claim. (Dec. 10-11.) On appeal, the self-insurer makes a number of arguments which we address in turn.

Corroboration vs. Impeachment

The self-insurer contends that it was legal error for the judge to recite and rely upon passages in the medical records to corroborate the employee's claim of a work injury, when the records were admitted for impeachment purposes only. The records do not present a classic example of impeachment in that they do not contain express prior statements of the employee which are inconsistent with his sworn testimony at hearing. The "impeachment" argued by the self-insurer is the absence in the records of any history or reference to an incident or injury occurring at the employee's work site on April 12, 2000. "[I]t is not necessary that the prior statement be a complete, categorical, or explicit contradiction" of the employee's hearing testimony, P. J. Liacos, Massachusetts Evidence, § 6.7.2 (b), at 277 (7th ed. 1999). "It is sufficient if 'taken as a whole, either by what it says or by what it omits to say, [it] affords some indication that the fact was different from the testimony.' " Id., quoting Commonwealth v. West, 312 Mass. 438, 440 (1942).

Declarations or acts, *or omissions to speak or to act when it would have been natural to do so if the fact were as testified to*, may be shown by way of contradiction or impeachment of the testimony of a witness, when they fairly tend to control or qualify his testimony.

Langan v. Pianowski, 307 Mass. 149, 151-152 (1940), quoting Foster v. Worthing, 146 Mass. 607, 608 (1888) (Emphasis added.) A prior contradictory statement of a witness may consist of silence "in circumstances in which he naturally would have been expected to … disclose some fact and did not do so." Commonwealth v. Nickerson, 386 Mass. 54, 57 (1982).[4] However, impeachment, like beauty, is in the eye of the beholder. The judge saw things differently than did the self-insurer:

> The question of liability turns upon whether there was an incident at work on April 12, 2000 as described by the employee. The insurer points to several medical records at around that time that do not mention an incident at work. However, I found no reason to discredit the employee. It is not unusual for medical records to omit facts.

(Dec. 8.)

To the extent that the judge's finding of a compensable personal injury was based on her belief of the employee's testimony, it is final and immune from appellate review. Nee v. Boston Medical Ctr., 16 Mass. Workers' Comp. Rep. 265, 266 n.1 (2002), citing Lettich's Case, 403 Mass. 389, 394 (1988). However, "[l]ike other findings, findings on credibility

[4] "It is not every failure of a person to deny a statement made to him that can be regarded as an admission by him of the truth of the statement. Evidence of this nature is to be received with care and caution." Refrigeration Discount Corp. v. Catino, 330 Mass. 230, 237 (1953) (Emphasis added.) When, as here, it is the absence of a history of work injury that is alleged to constitute impeachment by silence, we think that the trier of fact should exercise even greater care and caution. Moreover, just as an express statement may be admitted as a prior inconsistent statement only if it can be attributed to the witness, P. J. Liacos, supra, citing Wingate v. Emery Air Freight Corp., 385 Mass. 402, 405 (1982), the medical records offered by the self-insurer were properly admissible only if the absence of a work injury history could be attributed to the employee. The employee, whom the administrative judge found credible, testified he mentioned his April 12, 2000 work injury to at least two of the medical providers. (Tr. 38, 72.) It is questionable whether the self-insurer met its burden of showing such attribution, (Tr. 95), but the employee did not object to the admission of the records for impeachment purposes. (Tr. 76, 95.)

must be based on the evidence of record. If they are not, they are arbitrary and capricious." Pinhancos v. St. Luke's Hosp., 17 Mass. Workers' Comp. Rep. ___ (September 4, 2003), quoting Melendez v. City of Lawrence, 16 Mass. Workers' Comp. Rep. 370, 374 (2002); Frager v. M.B.T.A., 17 Mass. Workers' Comp. Rep. ___ (November 26, 2003).

The self-insurer contends that the judge's assessment of the employee's credibility, and her ultimate liability finding, were tainted by her reliance on at least two of the medical records admitted for impeachment purposes only:

> More importantly, the employer's medical provider record of April 12, 2000 makes definite reference to "RLB *started today few hours*." [Emphasis original.] This corroborates that the employee went for medical care and reported that he had back pain on the right that had started a few hours ago. In addition, the records from the Medical Treatment Center of Saugus for April 15, 2000 note that the employee complained of back pain since "Teus," which I find is a likely misspelling of "Tues" for Tuesday. While I have carefully considered the fact that the office record of the employee's visit with Dr. Polansky on April 12, 2000 makes no mention of any back problem, I do not find it undermines the employee's credibility because the employee had seen the employer's medical department and was scheduled to return there on April 15, 2000 "for full evaluation." That coupled with the employee's credible testimony, *corroborated by the medical records*, [emphasis added,] that his pain got progressively worse, makes me convinced that more likely than not the employee did sustain an industrial injury on April 12, 2000, while attempting to spin a table device at work for the employer. That injury arose out of and in the course of employment.

(Dec. 8-9.) The self-insurer cannot have it both ways. It offered certain medical records into evidence for the limited purpose of impeachment, that is, of impeaching the employee's credibility. The judge was entitled to consider that evidence in assessing the employee's credibility. When evidence of a prior inconsistent statement of a witness has

been properly introduced, such evidence bears upon the weight to be accorded his testimony, but does not necessarily render his testimony unworthy of belief. See K. B. Hughes, Evidence, §§ 233 and 244 at 293-299 (1961). It is still for the judge to decide what weight should be accorded the testimony of the witness who has been the subject of the impeaching attack. Berggren v. Mutual Life Ins. Co., 231 Mass. 173 (1918)(all the impeaching information does is raise a conflict as to the credibility of the witness, and is never conclusive on that issue).

We do not agree with the self-insurer that the judge used the medical records substantively, that is, for other than assessing the employee's credibility. For example, we consider the judge's reference to the April 15, 2000 Medical Treatment Center of Saugus record, (Self-ins. Ex. 3B), and its affirmative history of back pain since Tuesday, (Dec. 8-9), as reflecting one reason why she deemed the employee's testimony credible. Tested against the mere absence of a history that the employee had injured his back at work three days earlier, that history supported her belief of the employee's testimony. We see no error.

Even assuming arguendo that the judge could not properly use the medical records for any purpose other than to find the employee not credible, some of the very same evidence came in with no limitation on its use, courtesy of the self-insurer's cross-examination of the employee:

> **Q:** April 12, 2000 may the record reflect they are the therapist notes. What I would like to ask you is to tell the Judge what you see here. Left work because of current episode, no answer, what are the three letters you see doctor [sic]?
> **A:** RLB.
> **Q:** Is it possible that you told this doctor, the therapist, that you had right low back problems that day?
> **A:** It's possible, but I don't recall it . . .
> **Q:** Okay. Do you see anything in this document that reflects you had an incident at

> work that day spinning the skids like you've testified?
> **A:** Says I [sic] started today for a few hours.

(Tr. 80-81.) As to the employee's scheduled April 15, 2000 follow-up in the employer's medical department, which the judge discussed, the employee testified on direct examination, without renewed objection by the self-insurer, that when he was seen there on April 12, 2000, it was his understanding that his problem was lower back pain and that the therapist who saw him wanted him to come back the following week and treat with her. (Tr. 38-39.) Moreover, on re-direct examination, without objection by the self-insurer, the employee read into the record a May 8, 2000 addendum to the Sports Medicine North Orthopedic Surgery, Inc. record offered by the self-insurer, (Self-ins. Ex. 3):

> It was not recognized in his initial note for evaluation of his low back that it was injured at work. While he was spinning a pallet jack he felt an acute onset of pain in through his lower back region and he was out of work per our recommendation since April 15th and is being treated for findings by MRI at this point. His work injury was on April 12th, 2000.

(Tr. 96.) As this corroborating evidence came in without limitation or restriction, the judge was entitled to give it full probative value. We see no error.

Section 1(7A)

The self-insurer argues that the judge failed to apply the heightened § 1(7A) "a major" causation standard to the employee's burden of proof, and that such error requires reversal of her finding that the employee sustained a compensable low back injury on April 12, 2000. Again, we disagree.

In order for § 1(7A) to apply to the employee's claim, the self-insurer had the burden of raising § 1(7A) below and producing evidence at hearing that the employee came within its terms. Rivera v. Con air Martin Indus., Inc., 17 Mass. Workers' Comp. Rep. 129, 131 (2003); Fairfield v. Communities United, 14 Mass. Workers' Comp. Rep. 79, 83 (2000). The self-insurer failed to do either. It thus waived the issue of § 1(7A), and the judge properly analyzed the employee's injury and disability under the standard of simple "as is" causation. Schmidt v. Nauset Marine Inc., 17 Mass. Workers' Comp. Rep. 326, 330 (2003); Frey v. Mulligan, Inc., 16 Mass. Workers' Comp. Rep. 364, 367 (2002). In any case, we note the employee's 1996 back injury was work-related, (Dec. 5; Self-ins. Ex. 2), and would not trigger the application of § 1(7A).

The Impartial Physician's Ultimate Opinion

The self-insurer argues that it was error for the judge to rely on the impartial examiner's original opinion on causation, expressed in his report, because the doctor ultimately recanted that opinion at deposition. We disagree. The judge adopted the opinion of the impartial examiner, expressed in his report, that the diagnosis of lumbar disc protrusion on the right was causally related to the work incident of April 12, 2000. (Dec. 8; Statutory Ex. 1.) At deposition, when presented with the medical records which did not specifically indicate that the employee injured his back at work on April 12, 2000, Dr. Hewson indicated that the history stated in those records raised serious questions in his mind as to whether, to a reasonable degree of medical certainty, the employee suffered an incident at work on April 12, 2000 which caused his incapacity. (Dep. 20, 31, 44.)

The judge, however, did not find that those records impeached the employee's credibility. Instead, as fact-finder and sole arbiter of credibility, she appropriately stated: "I do not accept the self-insurer's [sic] argument that the impartial medical examiner's opinion is weakened by alleged lack of candor by the employee for the obvious reason that I have found the industrial accident happened as described by the employee."[5] (Dec. 9.) " 'The history on which the medical expert relies is crucial to his opinion.' " Patient v.

[5] Based on that finding, the judge properly determined that the self-insurer's § 14 fraud defense was baseless. (Dec. 9.)

Harrington & Richardson, 9 Mass. Workers' Comp. 679, 682 (1995), quoting Scali v. Mara Prods., 6 Mass. Workers' Comp. Rep. 78, 80 (1992). Where, as here, the impartial physician's misgivings as to causation were based on a history not adopted by the judge, the judge appropriately ignored those misgivings. Indeed, it would have been reversible error for the judge to abdicate her fact-finding authority by crediting the impartial doctor's uncertainty and questions concerning the history the employee gave him. See Moynihan v. Wee Folks Nursery, Inc., 17 Mass. Workers' Comp. Rep. ___ (July 3, 2003).

The Judge's Vocational Analysis

The self-insurer next argues that the judge's vocational analysis was inadequate because she mistakenly assumed that the parties presented no vocational evidence. In fact, argues the self-insurer, there was testimony from both the employee and an employer witness as to the light duty nature of the employee's job which established his ability to return to work during his claimed period of incapacity. The determination of earning capacity is a question of fact, Johnson v. J.C. Madigan, Inc., 16 Mass. Workers' Comp. Rep. 72, 77 (2002), as to which the judge may use her own judgment, Mulcahey's Case, 26 Mass. App. Ct. 1, 3 (1998), considering relevant factors, including age, education, training and experience. Scheffler' s Case, 419 Mass. 251, 256 (1994). Here, the judge stated that, "[i]n the absence of vocational evidence from either party, I must decide the employee's earning capacity based upon my knowledge and experience as an Administrative judge." (Dec. 10.) She went on to find that although Mr. Faieta could not return to his work for the employer, "his medical restrictions and testimony about his daily activities show that he had an earning capacity." Id. She concluded, based on her knowledge and experience, that he could perform "a variety of less physical jobs such as security guard, retail sales or parking lot attendant," earning $300.00 per week. Id. We see no error in this conclusion.

We understand the judge's statement that neither party has offered "vocational evidence" to mean that neither party has offered *expert* vocational testimony. See Mendes v. Percor, Inc., 12 Mass. Workers' Comp. Rep. 487, 492 (1998), citing P. J. Liacos, Massachusetts Evidence, § 7.10.1 (6th edition 1994)("to be qualified as an expert, a witness must show to the administrative judge's satisfaction that he possesses sufficient special knowledge

and experience to be able to give competent aid to the judge in construing the particular facts of the case in dispute"). Certainly, neither the employee nor the employer witness, Mr. Schiavi, director of safety and environmental safety affairs for the employer, (Tr. 104), was qualified as an expert vocational witness. Even where a vocational witness has been qualified as an expert, the judge need not specify his reasons for rejecting his testimony, or even mention such testimony in reaching a conclusion on earning capacity. Schmidt v. Nauset Marine Inc., supra. Here, Mr. Schiavi's lay testimony was directed primarily to the duties of the employee's job, (Tr. 103-123), but the judge adopted the employee's description of his job duties and the way in which he was injured. (Dec. 4-5, 8-9.) Where the judge listed Mr. Schiavi as a witness, (Dec. 1), there is no requirement that she specifically discuss or make findings on his testimony. Compare Saccone v. Department of Pub. Health, 13 Mass. Workers' Comp. Rep. 280, 282-283 (1999)(failure to list witnesses and exhibits at beginning of decision, accompanied by failure to recognize or discuss them in text of decision, requires recommittal).

In addition, the judge's vocational findings satisfy the requirement that she perform a brief analysis of how the relevant vocational factors combine with the employee's medical disability to justify her finding of partial incapacity and an earning capacity assignment of $300.00. See Johnson, supra at 77. The impartial physician opined that the employee should not return to heavy work involving bending and twisting, nor should he do work involving prolonged and forced sitting. (Dec. 8.) The judge found that the employee could not return to his regular job, which involved unloading inserts from pallets onto a table and then feeding the inserts into a collating machine; required moving up to 2000 pounds per shift; and required repetitive bending, turning and twisting, as well as, at times, giving the table on which the inserts were placed a "good push or pull" to make it spin. (Dec. 6-7.) Though the majority of the lifting done by the employee may have been "light," the repetitive nature of it, and the total weight lifted combined with the bending and twisting component, justify the judge's finding that the employee could not return to his regular job. See Cordi v. American Saw & Mfg. Co., 16 Mass. Workers' Comp. Rep. 39, 46 (2002)(conclusion regarding incapacity at any point in time ordinarily requires expert medical testimony). The judge considered the employee's daily activities in conjunction with his medical restrictions, his education, and experience, and found that he could perform a variety of less physical jobs. (Dec. 10.) She assigned him the not insignificant earning capacity of $300 per week. We see no reversible error. Compare

Crowell v. New Penn Motor Express, 7 Mass. Workers' Comp. Rep. 1, 4-5 (1993)(judge's general finding that employee was not partially disabled did not emerge clearly from the matrix of his subsidiary findings).

The decision of the administrative judge is affirmed. Pursuant to § 13A(6), the self-insurer is directed to pay employee's counsel a legal fee in the amount of $1,276.67.

So ordered.

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Patricia A. Costigan
Administrative Law Judge

_____
Frederick E. Levine
Administrative Law Judge

Filed: January 30, 2004