

COMMONWEALTH OF MASSACHUSETTS

**DEPARTMENT OF
INDUSTRIAL ACCIDENTS**

BOARD NO. 045641-96

John Martins
Jefferson Smurfit Co.
National Union Fire Insurance Co.

Employee
Employer
Insurer

REVIEWING BOARD DECISION
(Judges Wilson, McCarthy and Smith¹)

APPEARANCES

Emmanuel N. Papanickolas, Esq., for the employee
Timothy M. Dunlavey, Esq., for the insurer

WILSON, J. In his appeal of an administrative judge's decision, the employee raises numerous issues. Finding one of those issues dispositive, we return the case to the same judge for further consideration.

The employee was fifty-one years old at the time of the hearing in this matter. A native of Portugal, he worked at various jobs in Portugal before emigrating to the United States in 1973, whereupon he worked as a dishwasher, short order cook and machinist. It was in this last employment that he injured his low back and right leg on April 12, 1996. He continued to work, while receiving medical treatment, until November 12, 1996, when he left work on the advice of his doctor. (Dec. 570-571.)

The employee filed a claim,² which the insurer resisted. Following a § 10A conference, the insurer was ordered to pay ongoing § 35 benefits for temporary, partial incapacity. Both parties appealed to a hearing de novo. Pursuant to § 11A, the employee was examined by Dr. Joel Saperstein on April 7, 1998. In his report, Dr. Saperstein offered a diagnosis of low back strain, causally related to his April 12, 1996 work injury

¹ Judge Smith no longer serves as a member of the reviewing board.

² In his decision, the administrative judge states that this matter was before him pursuant to the insurer's complaint for discontinuance. (Dec. 569.) Both parties, in their briefs, state that the conference and hearing were the result of the employee's original claim. Our review of the board file supports the position of the parties.

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superimposed on degenerative arthritis, and opined that the employee was temporarily, partially disabled. (Dec. 569-570, 574.)

In his decision, the hearing judge awarded a closed period of benefits for temporary, partial incapacity. (Dec. 576.) The employee on appeal raises numerous issues, notably that the findings on incapacity and extent thereof are unsupported by the medical evidence, that the judge erred in finding that a bona fide job offer was made because the job offer did not conform to the medical restrictions imposed by Dr. Saperstein, and that the judge erred in finding that no deposition of Dr. Saperstein was taken. (Employee brief, 2.) The last issue, that the administrative judge erred by not considering the deposition testimony of Dr. Saperstein, is dispositive of the other issues enumerated.

In his decision, the administrative judge states that Dr. Saperstein was not deposed. (Dec. 570.) The employee asserts that Dr. Saperstein was indeed deposed and that testimony derived from that deposition indicates judicial error. (Employee brief, 8-9.) The insurer agrees that Dr. Saperstein was deposed and cites to the deposition in its brief, but maintains that the deposition testimony would in no way alter the judge's decision, and hence the exclusion is harmless error. (Insurer brief, 2, 4, 14-15.)

There is no deposition transcript in the board file and no cover letter to indicate that the deposition was ever submitted to the hearing judge. Without the deposition we cannot determine if the testimony contained therein would have altered the outcome of the case or was harmless error. On the record before us, we see no error. However, a deposition is an important piece of evidence and without it, we cannot fully determine if there has been error. See Fitzsimmons v. Sigma Instruments, 7 Mass. Workers' Comp. Rep. 12 (1993). Thus, we recommit this case to the administrative judge to determine if Dr. Saperstein's deposition was filed. If the judge finds that the deposition was filed, he must consider that testimony and make such further findings on incapacity as will address the issues set forth above. If, however, the judge finds that the deposition was not filed, he need not make additional findings on incapacity.

We summarily affirm the decision as to all remaining issues raised by the employee.

So ordered.

Sara Holmes Wilson
Administrative Law Judge

William A. McCarthy
Administrative Law Judge

Filed: February 8, 2001