COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 016248-95**

James Moskovis Employee
Polaroid Corporation Employer
Self-Insured

REVIEWING BOARD DECISION
(Judges Smith, Wilson and McCarthy)

APPEARANCES
Mark H. Likoff, Esq., for the employee at hearing
Arthur G. Zack, Esq., for the employee on appeal
David L. Cronin, Esq., for the self-insurer at hearing
Timothy F. Nevils, Esq., for the self-insurer on appeal

SMITH, J. The employee appeals the decision of an administrative judge denying and dismissing his claim for further weekly compensation benefits, but ordering reasonable, necessary and causally related medical, hospital and psychological services. The employee argues that the judge's decision adopting the opinion of the impartial examiner, a neurologist, over that of the employee's examining neuropsychologist was arbitrary and capricious. We disagree, and therefore affirm the decision.

James Moskovis was a 46 year-old high school graduate with three semesters of college at the time of the hearing. (Dec. 3.) In 1978, he began working for the employer, first as a laborer, and later as a security guard, a materials handler, and a machinist. In 1995, he became senior materials coordinator, a job that required him to monitor and prioritize the delivery of materials to and from the employer's warehouse. He helped unload trucks, lifting up to fifty pounds regularly, and also performed some work on the computer and handled paperwork involved with deliveries and shipping. (Dec. 4.)

On Friday, April 28, 1995, Moskovis was pulling a materials cart out of a freight elevator when the overhead gate on the elevator came down and struck him on the back of the head. (Dec. 4.) Dazed and shaken, he nevertheless finished his day's work, and then went to the employer's medical clinic. (Dec. 4-5.) He returned to work on Monday, May 1, but began experiencing pain in his neck, head and jaw and had to leave after a few hours. He sought medical treatment from his primary care physician, an orthopedic surgeon and a neurologist. He was out of work for four months, until September 1, 1995, when he returned to work for the employer, initially part-time and eventually full-time. (Dec. 5.) The employee filed a claim for weekly incapacity benefits. Following a § 10A conference, the self-insurer was ordered to pay a closed period of compensation, ending October 31, 1995. Neither party appealed that order. (Dec. 1.)

On February 29, 1996, the employee filed the pending claim for further compensation. On December 18, 1996, after conference, the self-insurer was ordered to pay § 35 benefits based on the employee's actual earnings from December 14, 1995 until November 10, 1996 when he left work, and $200 per week thereafter. Both parties appealed to a hearing de novo. (Dec. 1.) At hearing, Moskovis claimed § 35 benefits from November 1, 1995 until November 10, 1996; § 34 benefits from November 11, 1996 until October 27, 1997; and ongoing § 35 benefits. (Dec. 2.)

Pursuant to G.L. c. 152, § 11A(2), Moskovis underwent an impartial medical examination. The report of an impartial physician, Dr. Locke, was admitted into evidence. The judge found the case to be medically complex and allowed the parties to submit additional medical evidence. (Dec. 2.)

After hearing, the judge made the following factual findings: After his return to work in September 1995, Moskovis worked for over a year, until November 10, 1996. For much of this time, he was in charge of operations at the automatic warehouse on the night shift, working essentially as a production supervisor, performing lighter work than he had done prior to his injury. (Dec. 5.)

During this period between September 1995 and November 1996, Moskovis continued to complain of pain in his neck, jaw, head and back, especially with repetitive activity. (Dec. 6.) A neurosurgeon diagnosed back and neck soft tissue injuries, and Moskovis underwent a course of physical therapy. (Dec. 5-6.) In June of 1996, he began treating with a clinical psychologist for depression and pain management. Finally, on November 10, 1996, Moskovis stopped working because, he said, he could no longer sustain "the pain and the pressure." (Dec. 6.) There was no evidence that he had any particular medical treatment on or shortly after leaving work. To the contrary, with the exception of some physical therapy visits, Moskovis had no medical treatment, other than psychological counseling, for his work injuries between November 10, 1996 and March of 1997, when he was evaluated at the Beth Israel Pain Management Center. Id. After receiving a series of facet injections and plates to relieve his jaw pain, Moskovis returned to work four hours a day as a materials coordinator, a position Moskovis considered a "demotion." (Dec. 7.) In November 1997, nine months after the impartial medical examination, Moskovis underwent neurological testing by J. Mark Carper, Ed.D., a licensed psychologist. In late January 1998, he began treating with speech and language pathologists at the Beverly Hospital Center for Communication Disorders. Id. At the time of the hearing, Moskovis was working part-time for the employer. (Dec. 8.)

In his decision, the judge adopted the opinion of the impartial physician, a neurologist, except for his opinion that no further treatment was required. (Dec. 9.) The impartial medical examiner diagnosed Moskovis with a closed head injury without loss of consciousness, and a cervical strain, causally related by history. The doctor found no objective evidence to support Moskovis' claimed symptoms and concluded that, at the time of the examination, Moskovis had no neurological disability and was able to perform his regular job duties. (Dec. 8-9.) The judge relied upon the opinion of Moskovis' treating psychologist to find that Moskovis suffered from depression as a result of his work injury and that his psychological

treatment was reasonable, necessary and related to his industrial injury. (Dec. 10.) The judge rejected the treating psychologist's opinion that Moskovis' psychological condition rendered him totally or partially unable to earn wages. Instead the judge adopted the opinion of Dr. Mufson, an assistant clinical professor of psychiatry at Harvard Medical School, certified by the American Board of Psychiatry and Neurology, with an added qualification in forensic psychiatry. Dr. Mufson reported that the employee's MMPI test supported a diagnosis of somatoform pain disorder with somatization (the conversion of mental experiences or mental states into bodily symptoms) and thus a psychological basis to the employee's symptoms. (Self-insurer Ex. 2, at 5.) The judge adopted "that portion of the opinion of Dr. Mufson which states that the psychiatric condition of the employee did not disable him from working." (Dec. 10.)

Finally, the judge found that the report of J. Mark Carper, a doctor of education and licensed psychologist, that Moskovis had " 'diffuse bilateral, cognitive deficits, consistent with mild traumatic brain injury[,]' " (Employee Ex. 2), was "insufficient to causally relate any alleged cognitive deficits to Moskovis' work injury." (Dec. 10.) The judge also stated that he found the opinion of the impartial neurologist, Dr. Locke, "more persuasive on this issue." (Dec. 11.) The judge therefore concluded that "[t]he employee has failed to establish that [his work] injuries resulted in a work incapacity at any time material to this proceeding." (Dec. 11.) He denied and dismissed Moskovis' claim for weekly benefits, but awarded reasonable, necessary and causally related medical, hospital and psychological services. (Dec. 12.)

Moskovis appeals, raising several issues. First, he contends that the judge erred in finding the opinion of Dr. Locke more persuasive than that of J. Mark Carper. Section 11C does not permit us to weigh the evidence. It is solely the prerogative of the administrative judge to determine the persuasiveness of the medical opinions. Coggin v. Massachusetts Parole Bd., 42 Mass. App. Ct. 584,

589 (1997). The test is not what we would find as facts from the cold appellate record. Marconi v. Crusader Paper Co., 10 Mass. Workers' Comp. Rep. 609, 611 (1996), *aff'd*, Mass. App. Ct., No. 97-P-899 (January 20, 1999). If a factual finding, such as no continuing causation or incapacity, is supported by competent evidence in the record and is based upon correct legal principles, we must affirm it. Reis v. Anchor Motor Freight Inc., 9 Mass. Workers' Comp. Rep. 82, 84-85 (1995); see Buck's Case, 342 Mass. 766, 769-770 (1961).

The employee further argues that Dr. Locke did not express an opinion on the issue of the cognitive effect of the injury on Moskovis' brain. He contends that the evidence presented by Dr. Carper, who conducted a battery of tests to evaluate intellectual functioning, attention span, concentration and memory skills, motor skills, and problem solving ability, was the only evidence on this issue. He therefore contends that the findings are inadequate because the judge did not provide a rational basis for rejecting Dr. Carper's opinion. We disagree with that characterization of the record. First, we note that J. Mark Carper is not a medical doctor, but merely a licensed psychologist with a doctorate in education. We know of no legal requirement that an administrative judge must give reasons for the choice of a physician's disability opinion over that of a licensed psychologist, other than that he found the medical doctor's opinion more persuasive. The judge's choice was rational in light of the relative qualifications of the experts.

Dr. Locke reported that the employee had recovered from the effects of his head injury. As such, his opinion directly contradicted that of the licensed psychologist, Dr. Carper.[1] Dr. Locke's opinion was consistent with that of the only

[1] Dr. Carper performed the cognitive testing and rendered his report nine months after the impartial medical examination occurred and a month after the psychiatric evaluation. At the time they rendered their opinions, neither the impartial physician nor the board certified psychiatrist had Dr. Carper's report to review and on which to comment. The employee had the opportunity, which he chose not to exercise, to depose the doctors and ask them about the conclusions of the psychologist. In such deposition and cross-examination, the employee could have inquired into the basis of their reports, and how they were able to reach an unfavorable conclusion in the light of the cognitive test results.

other physician whose opinion was in evidence, the psychiatrist Dr. Mufson, who had performed psychological testing. What we end up with in this case is contradictory opinions on the extent of medical disability and continuing causation offered by different specialists. The judge was free to adopt Dr. Locke's medical opinion over J. Mark Carper's competing opinion. See Coggin, *supra,* citing Fitzgibbon's Case, 374 Mass. 633, 636 (1978).

Moskovis argues that Dr. Locke was not qualified to express an opinion on whether the employee suffered cognitive dysfunction as a result to the head injury. We repeat that "[t]here is no requirement that the impartial medical examiner be a specialist in the particular departments of medicine in whose fields the employee may place his alleged medical disability at the time of the hearing." Dupras v. Water Divs. of Millipore, 10 Mass. Workers' Comp. Rep. 1, 4-5 (1996). Section 11A(2) qualified the impartial medical report for admission, and no objection has been preserved to its foundation for appellate review.[2] Once the impartial report was in evidence, the judge was required to give it prima facie weight. G.L. c. 152, § 11A(2). The admission of additional medical evidence because of the complexity of the medical issues did not deprive the judge of his authority to accept the impartial report. See Coggin, *supra*.

We further note that J. Mark Carper's report was offered into evidence under the authority of 452 Code Mass. Regs. § 1.11(6). (Motion to Allow Submission of Medical Reports in lieu of Deposition, dated March 12, 1998.) The self-insurer timely objected to its admission as hearsay not covered by this board regulation. (Self-Insurer's Opposition to Employee's Motion, dated April 21, 1998.) The judge erroneously overruled the insurer's objection.[3] Rule 1.11(6) only

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See O'Brien's Case, 424 Mass. 16, 23 (1996). Neither party presented any evidence about the scientific validity of the cognitive and MMPI testing and their medical value in determining whether brain impairment and/or somatic dysfunction exists.

[2] The parties waived preparation of the hearing transcript.

[3] The judge, without providing the opportunity to be heard on the motion, granted it the day it was received. (Rulings on Post-hearing Motions, dated April 17, 1998.) The insurer requested reconsideration of the judge's ruling, (Self-Insurer's request for

covers *medical* reports prepared by *physicians*. Dr. Carper is not a physician. Thus Rule 1.16 did not authorize the admission of his report. Without specific statutory or regulatory authority for its admission, Dr. Carper's report was inadmissible hearsay. It is not appropriate to use that document as a basis to vitiate the decision and recommit the case for further findings of fact. See Pas-Teur, Inc. v. Energy Services, Inc., 11 Mass. App. Ct. 967, 968 (1981) (although defendant did not appeal, it may nevertheless raise any ground asserted below in support of the judgement in its favor).

We conclude that the decision is adequately supported by the evidence in this record, is untainted by relevant error of law, and reflects rational decision making within the particular requirements of the workers' compensation act, G.L. c. 152. See Scheffler's Case, 419 Mass. 251, 258 (1994). Consequently, we affirm it. G.L. c. 152, § 11C.

Reconsideration, dated April 24, 1998), which the judge denied. In admitting the document, the judge indicated that he would "consider the relative qualifications of the several experts in determining which opinions to adopt or reject." (Ruling on Self-Insurer's Request for Reconsideration, dated April 27, 1998.)

So ordered.

Suzanne E.K. Smith
Administrative Law Judge

Filed: September 17, 1999

Sara Holmes Wilson
Administrative Law Judge

MCCARTHY, J. (dissenting) When the issues of causation and extent of medical disability are beyond the common knowledge and experience of laypersons, the administrative judge must rely on expert medical testimony. Galloway's Case, 354 Mass. 427, 431 (1968). Of course, an administrative judge is free to determine the probative value of such medical testimony and to reject it if he is not persuaded by it. However, where the expert testimony is uncontroverted there must not only be a basis for such rejection on the record, but the judge must make subsidiary findings which rationally support his conclusion. Monteiro v. Nelson Cleaning Servs., 12 Mass. Workers' Comp. Rep. 147, 150-151 (1998); Cook v. Somerset Nursing Home, 8 Mass. Workers' Comp. Rep. 164, 166 (1994); Robinson v. Contributory Retirement Appeal Bd., 20 Mass. App. Ct. 634, 640 (1985) (emphasis added). It follows that a judge is never free to mischaracterize medical testimony. Ata v. KGR, Inc., 10 Mass. Workers Comp. Rep. 56, 57 (1996).

In this complex case, medical testimony was clearly necessary to establish causal relation and extent of incapacity. The judge adopted the opinion of Dr. Locke, the impartial neurologist, who found no neurological disability. (Dec. 8.)

He further adopted the opinion of Dr. Inz, a psychologist, that the employee suffered from depression as a result of his work injury, but found, based on the opinion of Dr. Mufson, a psychiatrist, that the employee's depression did not incapacitate him from working. (Dec. 10.) Neither the neurologist, the psychologist nor the psychiatrist addressed the issue of cognitive deficits. That issue was addressed only by Dr. Carper, the neuropsychologist, and, as such, was uncontroverted.

The judge found that Dr. Carper's opinion, that the employee had "'diffuse bilateral, cognitive deficits, consistent with mild traumatic brain injury'" (Dec. 10, Employee Ex. 2, 6), was "insufficient to causally relate any alleged cognitive deficits to the employee's work injury." (Dec. 10.) This finding mischaracterizes the medical evidence. It is very clear, from the statement itself and from the context in which it was made, that Dr. Carper causally related the employee's cognitive deficits to his work injury which occurred when an elevator gate struck him on the back of the head. Of course, the judge was not required to adopt Dr. Carper's opinion on causal relationship, but it was a mischaracterization of that opinion, and thus error, to state that the doctor's statements were insufficient to establish causal connection.

Moreover, if the judge chose not to adopt Dr. Carper's opinion on this issue, he was bound to explain why in light of the fact that Dr. Carper's opinion was uncontroverted. Monteiro, supra at 147. The explanation that Dr. Locke's opinion was "more persuasive on this issue" (Dec. 11) does not comport with the evidence because Dr. Locke did not even proffer an opinion regarding any cognitive deficits Mr. Moskovis suffered. Dr. Locke performed a neurological examination, which involved some observation of the employee's speech, language function, orientation and memory, but was primarily a physical examination. (Self-Insurer Ex. 1, 4.) Dr. Locke did not conduct any of the fifteen tests to determine cognitive deficiencies which Dr. Carper performed, and thus Dr. Carper's opinion that the employee suffered "'diffuse, bilateral, cognitive deficits,

consistent with mild traumatic brain injury'" (Dec. 10) stands alone on this issue. The reports and opinions of Dr. Locke and Dr. Carper were complementary rather than contradictory.

I agree with the employee that the judge was required to provide reasons for choosing to disregard the uncontroverted opinion of Dr. Carper. Furthermore, the reasons the judge gave for rejecting the neuropsychological opinion are arbitrary. I would recommit the case for consideration of Dr. Carper's opinion regarding cognitive deficits on the issues of causal relation and extent of incapacity. If the judge did not find Dr. Carper's opinion persuasive, he should make subsidiary findings based on the evidence which rationally support his conclusion.

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William A. McCarthy
Administrative Law Judge

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