COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 04773595**

Joseph A. Garbarino	Employee
Vining Disposal, Inc.	Employer
Providence Washington Insurance Company	Insurer

REVIEWING BOARD DECISION
(Judges Levine, Maze-Rothstein, and Carroll)

APPEARANCES
Jeffrey A. Gorlick, Esq., for the employee
Michael A. Fager, Esq., for the insurer

LEVINE, J. The employee appeals from an administrative judge's decision denying him workers' compensation benefits pursuant to G. L. c. 152, § 27A. That section provides that if it is found that, at the time of hire, an employee knowingly and willfully made a false representation as to his physical condition which his employer relied upon in hiring him, when the employee knew or should have known that it was unlikely he could fulfill the duties of the job without incurring a serious injury, and an injury related to the misrepresented condition occurs, then the employee is not entitled to benefits under c. 152. The employee argues that the insurer has failed to prove the elements of § 27A. We hold that the administrative judge's finding as to the first element of § 27A -- that the employee knowingly and willfully made a false representation as to his physical condition at the time of hire -- is based on an error of law; furthermore, there is need for the judge to revisit the issue of the employer's reliance (the second element). Therefore, we reverse the decision in part and recommit the case for further findings.

The employee, who was 42 years old at the time of the hearing, had worked as a laborer or truck-driver/delivery man for most of his life. He dropped out of school after

the eighth grade due to reading problems related to dyslexia. On January 9, 1994, the employee was involved in a non-work-related motor vehicle accident. He was treated for a lower back injury. At the time of this accident, the employee was working as a truck driver delivering windows for a company called Lynn Industries. As a result of this injury, the employee could not continue this employment. (Dec. 5-6.) While still treating for this injury, the employee applied for a job with the present employer, Vining Disposal, Inc., as a garbage truck driver and trash collector. He completed an employment application on July 5, 1994, which included a pre-employment physical examination and drug testing. He was hired on July 6, 1994, and began work the next day. On June 24, 1995, approximately one year after he was hired, an MRI examination revealed a disc herniation at the L4-5 level. (Dec. 6.) Several months later, on November 20, 1995, as he lifted a barrel of wet leaves at work, Mr. Garbarino felt a sharp pain in his back which radiated to his legs. He went out of work, and subsequently, on November 4, 1996, underwent back surgery. He had serious complications, and has been unable to work since the date of his industrial injury. (Dec. 6-7.)

The insurer paid the employee benefits without prejudice until March 27, 1996; thereafter, the employee filed a claim for ongoing § 34 benefits. Following a § 10A conference, an order issued awarding the requested benefits. The insurer appealed to a hearing de novo, which was held over three days (March 10, 1997, April 2, 1997, and April 14, 1997).[1] At hearing, the insurer raised § 27A as a defense. In addition to the impartial medical examiner's report and deposition testimony, the parties were allowed to submit medical records "to address the issues of Sections 1(7A) and 27A." (Dec. 2.) The judge found that the insurer prevailed in the § 27A affirmative defense, and that the employee was therefore not entitled to benefits. (Dec. 19.)

The employee appeals, alleging that the insurer has failed to prove all the elements of § 27A. General Laws c. 152, § 27A (St. 1991, c. 398, § 51A) states, in its entirety:

[1] Although the decision states that there were only two days of hearing, (Dec. 1), the record reveals that there were three.

> In any claim for compensation where it is found that at the time of hire the employee knowingly and willfully made a false representation as to his physical condition and the employer relied upon the false representation in hiring such employee, when such employee knew or should have known that it was unlikely he could fulfill the duties of the job without incurring a serious injury, then the employee shall, if an injury related to the condition misrepresented occurs, not be entitled to benefits under this chapter. Retention of an employee who rectifies any misrepresentation made to his employer regarding his physical condition subsequent to the hire but prior to the injury shall restore any right to compensation under this chapter.

We agree that the decision is flawed as to two of the elements of § 27A.

The first element of § 27A which the insurer must prove is that, at the time of hire, the employee knowingly and willfully made a false representation as to his physical condition. The judge's findings on this element are as follows:

> I find that the employment application completed by Mr. Garbarino in July 1994 for his current position of Class B truck driver does not include his record of employment after September 1993 with Lynn Industries which ended when he became disabled by the motor vehicle accident described earlier. On reviewing the Physical Examination Form which was attached to that application, I find that Mr. Garbarino checked off (or answered) "No" for the following Health History questions: "Head or spinal injuries"; "Extensive confinement by illness or injury"; and "Permanent defect from illness, disease or injury". I therefore find that Mr. Garbarino failed to inform the examining physician [Dr. E. Gunther] that he had been unable to work as a truck driver as a result of the January 1994 motor vehicle accident previously described.

Dec. 12.

Later, the judge again found that the employee

> . . . failed to include his last employer (Lynn Industries) and his reason for leaving (disabled by motor vehicle injury to his back) on that employment application [Insurer's Exhibit #3], thus knowingly and willfully withholding relevant employment history from the information that his employer relied upon in making the decision on whether or not to hire him in July 1994.

Dec. 14-15. Finally, the judge summarized his finding on the first element of § 27A:

> . . . I find that Mr. Garbarino knowingly and willfully misrepresented his medical condition by failing to inform his employer and their medical examiner about his ongoing treatment for what was later proven to be a disc herniation with Drs. John Greenler, Douglas Howard, and Thomas Jevon; and also failed to include on the application his last previous employment which was ended by his back injury. This satisfies element (1).

(Dec. 15-16.)

For benefits to be denied under § 27A, the employee must make a knowing and willful false representation regarding his physical condition. The judge's finding that the employee misrepresented his prior work history by *withholding* information about his last employer and his reason for leaving, is not a finding that he "knowingly and willfully," § 27A, misrepresented anything, including his medical condition. The general rule at common law is that mere silence is not a representation, and, in the absence of a duty to disclose, silence as to a material fact does not constitute fraud or misrepresentation. See Urman v. South Boston Savings Bank, 424 Mass. 165, 168 (1997), and cases cited. As in any arms length transaction, we see nothing in the relationship between a prospective employee and a prospective employer which would impose a duty of disclosure. "Such nondisclosure does not amount to fraud and is not a conventional tort of any kind." Greenery Rehabilitation Group v. Antaramian, 36 Mass. App. Ct. 73, 77 (1994). See Stetson v. French, 321 Mass. 195, 198 (1947)("It is also true that ordinarily mere silence is not a fraudulent concealment, and that there must be something in the nature of positive acts with intent to deceive"); Nei v. Boston Survey Consultants, 388 Mass. 320, 322 (1983); Swinton v. Whitinsville Sav. Bank, 311 Mass. 677, 678-679 (1942). As the Legislature has not defined the term "misrepresentation" in the statute, the concept of misrepresentation appearing in § 27A is presumed to be the same as in the common law. See Riley v. Davison Constr. Co., 381 Mass. 432, 438 (1980). Particularly instructive is a comparison of the text of § 27A -- "knowingly and willfully made a false representation" -- with the text of another anti-fraud section of the Act, § 14 -- "*concealed or knowingly failed to disclose that which is required by law to be revealed."* (Emphasis added.) If the Legislature intended that the scope of § 27A include the type of omissions the judge found

as actionable misrepresentations under the statute, certainly it would have said it with the specificity of the language used in § 14.

Moreover, the facts of the present case do not present a case of partial disclosure that would impose upon the employee a duty to tell the whole story. "Although there may be 'no duty imposed upon one party to a transaction to speak for the information of the other . . . if he does speak with reference to a given point of information, voluntarily or at the other's request, he is bound to speak honestly and to divulge all the material facts bearing upon the point that lie within his knowledge.' " Kannavos v. Annino, 356 Mass. 42, 48 (1969). In Kannavos, the court addressed a seller's representation that certain houses were investment property, having been converted to rental apartments, without disclosing the material fact that the property was only zoned for single family occupancy. Id. at 46. The omission to disclose the illegal nature of the converted property was held to be actionable deception in light of the affirmative assertion (partial disclosure) of the rental investment character of the houses. Id. at 49. The court assumed that, "if the vendors had been wholly silent and made no references whatsoever to the use of the . . . houses, they could not have been found to have made any misrepresentations. Id. at 46-47, citing Swinton, supra. The present case is distinguishable because here there was no disclosure at all, from the perspective of the Kannavos analysis, as to the "given point of information," the employee's back condition.[2] The employee's failure to answer all the inquiries put to him as to his work history resulted in an inadequate and partial disclosure of just that, his work history. We do not see work history as synonymous with "physical condition" under § 27A. Therefore, we reverse the judge's finding that the employee's failure to inform the employee of his back condition or his reason for leaving his last employment were knowingly false representations as to his physical condition.

[2] The one statement that could support a finding of a knowingly false representation, "No head or spinal injuries" (see infra),either does or does not warrant imposition of the § 27A bar in its own right. If it is found on recommittal to be a § 27A misrepresentation, there will be no need to analyze the work history omissions, because the first element of the statute will already be satisfied.

The one piece of evidence that could support a finding of a knowing and willful misrepresentation is the employee's marking the "No" box next to the language "Head or spinal injuries" in the "Health History" section of the "Physical Examination Form," which was part of the employee's pre-employment physical examination. (Dec. 12; Ins. Ex. 3.) This evidence makes this case appropriate for recommittal, because the judge made no findings on whether this answer was a knowing and willful misrepresentation as to the employee's physical condition. The closest the judge comes to making such a finding are his findings on that first element of § 27A at Dec. 12 and 15-16:

> I find that Mr. Garbarino checked off (or answered) "No" for the following Health History questions: "Head or spinal injuries"; "Extensive confinement by illness or injury"; and "Permanent defect from illness, disease or injury". I therefore find that Mr. Garbarino failed to inform the examining physician [Dr. E. Gunther] that he had been unable to work as a truck driver as a result of the January 1994 motor vehicle accident previously described.[3]
>
> I find that Mr. Garbarino knowingly and willfully misrepresented his medical condition *by failing to inform his employer and their medical examiner about his ongoing treatment for what was later proven to be a disc herniation* . . . .

(Emphasis added.) These findings are based on the failure to disclose information, which is not within the scope of the § 27A bar for misrepresenting physical condition. On recommittal the judge must make specific and definite findings as to whether the

[3] We note that the other two responses cited by the judge as support for the ultimate finding of § 27A's application -- the employee's responding "No" to "Permanent defect from illness, disease or injury" and "Extensive confinement by illness or injury" -- are simply not misrepresentations, given the evidence in the record. There was no indication that the employee suffered any "extensive confinement" from his lumbar sprain. Nor was there any evidence of any "permanent defect" related to the employee's complaints of low back pain at the time of his hire. An MRI indicated a disc herniation only in June 1995, one year *after* his hire. (Dec. 6.) Such findings are therefore arbitrary and we reverse them. See Ottani v. Ottani Tree Service, 9 Mass. Workers' Comp. Rep. 633, 637 (1995). On recommittal, the judge should disregard these responses in his assessment of whether the employee "knowingly and willfully made a false representation as to his physical condition" under § 27A.

employee's "No" response to "Head or spinal injuries" is a knowing and willful misrepresentation.[4]

The words "knowingly and willfully" necessarily refer to a subjective intent to deceive. "The burden . . . was upon the [insurer] to prove that any misrepresentation . . . was made with actual intent to deceive . . . . Actual intent to deceive is not presumed, but must be proved." Davidson v. Massachusetts Casualty Ins. Co., 325 Mass. 115, 119 (1949). See discussion of state of mind requirements for finding of "willful" and "knowing" actions in Still v. Commissioner of the Dept. of Employment and Training, 423 Mass. 805, 811-813 (1996). "An incorrect statement does not necessarily indicate actual intent to deceive." Rappe v. Metropolitan Life Ins. Co., 322 Mass. 438, 440 (1948). "'The intent with which a person acts is usually a question of fact . . . to be determined from his declarations, conduct and motive, and all the attending circumstances' (Casey v. Gallagher, 326 Mass. 746, 749) but there must be evidence from which that intent may be found." Galotti v. U.S. Trust Co., 335 Mass. 496, 501 (1957). In an unemployment benefits case involving the question of *willful* disregard of an employer's orders, Jean v. Director of the Div. of Employment Sec., 391 Mass. 206 (1984), the court remanded the case for further findings:

> We have stated specifically that the "critical factual issue" in considering whether an employee's alleged misconduct is in wilful disregard of his employer's interest is the employee's state of mind at the time of the misconduct. [Citation omitted.]
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> . . .
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> The board did not, however, make subsidiary findings regarding [the employee's] wilful disregard of his employer's interest. . . . "In absence of any finding on the basic factual issue of the employee's state of mind, the agency decision cannot stand."

Id. at 209, quoting Reavey v. Director of the Div. of Employment Sec., 377 Mass. 913, 914 (1979). Similarly, we consider that findings regarding the employee's state of mind in the alleged Health History misrepresentation are crucial to the determination of the

[4] Such representation made on a medical examination questionnaire as part of an application for life insurance can be a misrepresentation. See Giannelli v. Metropolitan Life Ins. Co., 307 Mass. 18, 23-24 (1940).

§ 27A issue.

The employee's testimony on this issue needs to be considered by the judge in his analysis:

> Q: Now, I would like you to look at the column. There are three columns. I would like you to look at the third column, the one on the right-hand side of the page. The very first statement there indicates that there is no history of head or spinal injuries, isn't that correct?
>
> A: Yes.
>
> Q: And you signed that document, did you not?
>
> A: Yes.
>
> Q: Do you recall if that doctor asked you if you had a problem with lower back injuries?
>
> A: No.
>
> Q: No, you don't recall, or she did not?
>
> A: No, I don't recall. This here says head and spine. I have no head or spine problems.

(April 14, 1997 Tr. 28-29.) There was no other testimony regarding what the examining physician asked the employee. In fact, Mr. Berg, the employer witness, admitted that he knew nothing about the employee's physical examination. (April 2, 1997 Tr. 21-22.) At the same time, the intention to deceive may be shown by circumstantial evidence. See Galotti, supra. For example, the omissions which the judge erroneously found to be misrepresentations (see pp. 3-4, supra) could be probative. Likewise, the ongoing nature of the employee's medical treatments at the time of hire could inform the judge's impression of whether the employee intended to deceive the employer in the Health History. Then, too, the employee's eighth grade education and dyslexia are also relevant to the inquiry; whether he knew that "spinal" referred to the "back." In any event, these are all matters for the judge to weigh in his fact finding when he examines the evidence on recommittal.

In the event the judge finds a misrepresentation satisfying the first element of § 27A on recommittal, the judge must also revisit the second element.[5] This is because the judge appeared to find that the employee's omissions constituted representations upon which the employer relied thus satisfying the second element. The judge based his finding that the employer relied on the employee's misrepresentations on credited testimony of Mr. Berg, the Operations Manager for the employer with the authority to speak for the employer's hiring policies. The judge found that the employee "failed to include his last employer (Lynn Industries) and his reason for leaving (disabled by motor vehicle injury to his back) on that employment application [Insurer's Exhibit #3], thus knowingly and willfully withholding relevant employment history from the information that his employer relied upon in making the decision on whether or not to hire him in July 1994." (Dec. 14-15; see also Dec. 16.) That finding of reliance was based on omissions, which, as discussed above, do not constitute misrepresentations as a matter of law. Whether the testimony of Mr. Berg can support the conclusion that the employer relied upon the employee's misrepresentation in the Health History, if so found, or whether there is any other evidence of the employer's reliance in the record, are questions that the judge must also determine on recommittal.[6] Finally, the employer's reliance on the employee's misrepresentations must be found to be reasonable under the circumstances. Boston Five Cents Sav. Bank v. Brooks, 309 Mass. 52, 55 (1941). See Turner v. Johnson & Johnson, 809 F.2d 90,97 (1st Cir. 1986)(applying Massachusetts law, court ruled experienced business people could not have reasonably relied on oral misrepresentations in negotiations toward written contract).

Moreover, the judge's findings on the employee's withholding employment history from the employer is flawed in another way. The judge found that "In all areas where the testimony of Mr. Garbarino and Mr. Berg are inconsistent regarding the hiring

[5] The second element of § 27A is that "the employer relied upon the false representation in hiring such employee." (Emphasis added.)

[6] We note that Mr. Berg testified that he did not know whether he interviewed the employee. (April 2, 1997 Tr. 19-20.)

process, I expressly credit the version of Mr. Berg, whom I found to be highly credible, rather than that of the employee whom I did not find credible." (Dec.15.) The testimony of the employee regarding the subject gap in his work history was that he did, in fact, tell the employer -- in the person of the interviewer, Mr. Spencer -- that he was out of work because of his January 1994 motor vehicle back injury. (March 10, 1997 Tr. 35; April, 14, 1997 Tr. 29-30.) As to this version of the hiring process, Mr. Berg had nothing to say; he did not know whether he interviewed the employee. (April 2, 1997 Tr. 19-20.) Therefore, the judge could not credit any aspect of Mr. Berg's testimony "rather than" the employee's testimony regarding what he said at that interview. We do not know what it was that the judge intended to say in these findings, since we do not know how he viewed the employee's testimony, independent of the unwarranted comparison to that of Mr. Berg. The employee's testimony is crucial, as the credibility of the employer's stated reliance on the alleged misrepresentation (no "head or spinal injuries") would be put into question by a credited oral representation to the contrary made by the employee. On recommittal, the judge should clarify his findings on this point.[7]

Finally, in the judge's assessment of whether the employee knew or should have known that his physical condition put him at risk of suffering a serious injury if he took the job with the employer (the third element of § 27A), the judge erroneously imputed to the employee the presumed knowledge of his attorney. (Dec. 18.) There is no record evidence of anything that the attorney told the employee regarding his ability to return to work. Any such findings are speculative; they cannot be the basis for the conclusion that the employee had the requisite knowledge regarding his physical condition.

However, the judge's findings otherwise support his conclusion that the third element of § 27A was satisfied.[8] The judge found that the employee's treating physician, Dr. Greenler, disabled him from truck driving only a month before his hire, and

[7] This same testimony by the employee that he told Mr. Spencer that he was out of work because of the January 1994 motor vehicle back injury could also bear on the first element of § 27A -- whether he knowingly and willfully misrepresented his back condition.

[8] Of course, for the insurer to prevail under § 27A, it must prove all the elements of § 27A.

continued to partially disable the employee as late as January 1995. (Dec. 11-12, 16.) The judge credited the testimony of Mr. Berg, who stated that the heavy lifting requirements of the truck driving job were made clear to all applicants at the time of hire. (Dec. 14.) The judge found that the employee was taking narcotic pain medication at the time of hire and continuing, which would generally preclude commercial driving. (Dec. 16.) Thus, even though the judge erroneously imputed presumed knowledge of the employee's attorney to the employee, the judge's conclusion that the third element of § 27A was satisfied is adequately supported by his findings of fact. The error is harmless.

Accordingly, we reverse the decision as to the findings regarding the first two elements of § 27A and recommit the case for further findings consistent with this opinion. As to all other matters argued by the employee, the decision is affirmed.

So ordered.

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Frederick E. Levine
Administrative Law Judge

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Susan Maze-Rothstein
Administrative Law Judge

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Martine Carroll
Administrative Law Judge

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