COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 035254-99**

Joseph E. Frey	Employee
Mulligan Incorporated	Employer
Public Service Mutual	Insurer

REVIEWING BOARD DECISION
(Judges Levine, Carroll and McCarthy)

APPEARANCES
James W. Stathopoulos, Esq., for the employee
Paul R. Matthews, Esq., for the insurer

LEVINE, J. The employee appeals from a decision in which an administrative judge denied his claim for compensation benefits because the judge determined that the employee was not credible in some of his testimony. Because those credibility findings are either irrelevant or were not connected to the merits of the claim, or are in conflict with the judge's findings regarding the merits of the claim, we recommit the case for further findings.

On May 6, 1999, the employee was working removing boulders from a trench when his left knee twisted and he felt a pop in his leg with immediate pain. He continued working and iced his knee at home for the next few days. He sought medical treatment, and underwent surgery on August 2, 1999. After a short period out of work, the employee returned to light duty. His leg discomfort continued and, on December 15, 1999, he left work permanently. The employee underwent additional surgery on March 2, 2000. (Dec. 3.) The employee had strained his left knee on occasions prior to the work incident of May 6, 1999. (Dec. 4.)

The insurer did not accept the employee's claim for compensation benefits. On June 1, 2000 a conference was held on the employee's claim for benefits. The judge

ordered payment of a closed period of temporary total incapacity benefits. The employee appealed that order to a full evidentiary hearing. (Dec. 2.)

The employee underwent a § 11A medical examination on August 1, 2000. The history that the employee gave the impartial physician included that he had only worked three days of light duty before leaving work for the last time. The doctor diagnosed the employee with a torn meniscus, causally related to the May 6, 1999 work incident, superimposed on and causing a worsening of a pre-existing arthritic knee. He concluded that there was a causal connection between the employee's knee condition and the work injury. The doctor opined that the employee was permanently and totally disabled from resuming his former occupation as a laborer, placing significant restrictions on his lifting, sitting or standing for any length of time. He further opined that the employee was at an end result regarding his torn meniscus until such time as he might consider a total knee replacement. (Dec. 4-5; Impartial Medical Report, 5-6.) The judge adopted the impartial physician's opinions. (Dec. 5.)

The judge concluded that the employee suffered an industrial injury on May 6, 1999 that resulted in a torn meniscus. (Dec. 7.) Notwithstanding that general finding, and his adoption of the impartial physician's diagnosis, causal relationship and disability opinions, (Dec. 5), the judge denied the claim. His basis for doing so was the employee's credibility regarding the extent of his pre-existing knee problems, the inconsistency in his reporting on how long he worked light duty, and his evasive testimony regarding a trip to Hawaii. "Because the employee's testimony is suspect in a number of areas, I am unable to consider it credible. I therefore cannot find that the employee's current medical condition is the result of the industrial injury of May 6, 1999. The employee's claim therefore must be denied and dismissed." (Dec. 6.)

The employee's appeal causes us to review the impact of findings based on the judge's assessment of credibility. We have visited the subject of credibility findings a number of times:

> Although credibility is generally a sound basis upon which an administrative judge may deny an employee's claim, findings regarding an employee's credibility must

> be based in the record evidence or reasonable inferences drawn therefrom, and pertinent to the claim. Truong v. Chesterton, 15 Mass. Workers' Comp. Rep. 247, 249 (2001). Otherwise, credibility findings may be overturned as arbitrary and capricious. Yates v. ASCAP, 11 Mass. Workers' Comp. Rep. 447, 454-455 (1997).

Pittsley v. Kingston Properties, Inc., 16 Mass. Workers. Comp. Rep. ___ (2002). In the present case, the judge's credibility findings and their impact on the outcome are problematic. First, the judge characterized the following testimony as "evasive":

> [The employee] admitted to having prior knee problems stemming from playing hockey. He also admitted to having prior knee soreness and stiffness in 1997. Additionally he had difficulty remembering whether or not he had taken oral medications for bursitis in the knee and whether or not he had informed his physician about his knee locking or giving.

(Dec. 6.) We do not understand how admitting to prior knee problems can reasonably be characterized as "evasive." And even if that testimony was aptly characterized as evasive, due apparently to the employee's demeanor, it is ultimately irrelevant to the claim. The impartial doctor was well aware of the employee's pre-existing knee problems, as his report readily indicates: "[H]e had a torn meniscus superimposed upon an already arthritic knee." (Impartial Medical Report, 5.) The impartial report also includes a detailed recounting of the employee's medical records, including those which describe the occurrence of knee problems prior to the industrial injury. Id. at 2-4. Thus, there is no inconsistency between the employee's testimony at hearing and the doctor's history regarding the employee's pre-existing condition that might pose an evidentiary issue (if properly objected to) regarding the foundation of the doctor's opinions. See Patterson v. Liberty Mut., 48 Mass. App. Ct. 586, 597-598 (2000); Buck's Case, 342 Mass. 766, 770-771 (1961).

Moreover, the only way that the employee's pre-existing knee condition would be relevant to the claim is under the § 1(7A) "a major" cause analysis.[1] However, the claim

[1] General Laws c. 152, § 1(7A), provides, in pertinent part:

was tried as a simple "as is" causation case. Because the insurer made no mention of the heightened "a major" cause standard either in its statement of issues in Insurer's Exhibit No. 1 or orally at the commencement of the hearing, (Tr. 3-4), that otherwise applicable standard of causation was effectively waived in this case. See Jobst v. Grybko, 16 Mass. Workers' Comp. Rep. ___ (2002)(insurer seeking advantage of § 1(7A) standard of "a major" cause must raise it). Contrast Hinton v. Mass. Mut. Life Ins. Co., 16 Mass. Workers' Comp. Rep. ___ (2002)(employee accepted applicability of § 1(7A)). The above-quoted findings, therefore, were not pertinent to that aspect of the claim.[2]

The judge next addressed an inconsistency between the employee's lay testimony and the history he provided to the impartial physician, as well as some contradictory testimony by the employee regarding the extent of his travels since he left work.

> Mr. Frey had given a history to Dr. Broome, the impartial examiner, that he worked only three days of light duty prior to leaving work permanently. Conflicting evidence was presented at hearing that the employee, in fact, continued to work light duty until December 1999. What is most troubling, however, was his denial under oath that he traveled other than to Buffalo to attend [a] wedding. Under further cross-examination the employee admitted to flying twelve and one-half hours to Hawaii and to remaining there for two weeks.

(Dec. 6.)

The impartial opinion regarding the employee's restrictions due to his disability was consistent with light duty work: "He has significant limitations as to his ability to lift, stand or sit comfortably for any length of time." (Impartial Medical Report, 5-6.) Thus, it is not clear how the employee's working at a light duty job, with discomfort, (Dec. 3), for a longer – rather than a shorter – period, bears on the overall compensability

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> If a compensable injury or disease combines with a pre-existing condition, which resulted from an injury or disease not compensable under this chapter, to cause or prolong disability or a need for treatment, the resultant condition shall be compensable only to the extent such compensable injury or disease remains a major but not necessarily predominant cause of disability or need for treatment.

[2] Since the insurer did not raise the § 1(7A) "a major" cause defense at hearing, its waiver of that defense precludes it from raising it on recommittal.

of the employee's causally related present disability.[3] This credibility finding, in conjunction with that regarding the employee's less-than-forthright testimony regarding his travels, (Tr. 27-29), makes this case appropriate for recommittal.

On recommittal, the judge must set out specifically what it is about the employee's lack of credibility that affects the compensability of the employee's causally related present disability, as found by the impartial physician and adopted by the judge. (Dec. 5.) It is not sufficient to summarily state that, due to the employee's lack of credibility, the judge "therefore cannot find that the employee's current medical condition is the result of the industrial injury of May 6, 1999." (Dec. 6.) The decision is inadequate in explaining how the employee's lack of credibility fits with the rest of the judge's findings indicating a compensable industrial injury and continuing disability. That the employee likely thought his trip to Hawaii was "something that . . . might affect his claim negatively," (Dec. 6), or that he downplayed the significance of his pre-existing knee condition, are points that are not germane to the question of whether the employee's "as is" claim is compensable. Moreover, those findings, or a finding that the employee lacks credibility, do not, ipso facto, bar an otherwise compensable claim; the lack of credibility must adversely affect, i.e., must be connected to, one of the substantive elements of the employee's case: liability[4], causal relationship or extent of incapacity. This is missing

[3] Furthermore, the impartial examination took place on August 1, 2000, which is after the employee's March 2, 2000 surgery; since the employee's light duty work occurred between August and December 1999, it is dubious that that information would bear on the impartial physician's evaluation of the employee in August 2000.

[4] The insurer has accepted that liability is established, (Tr. 29-30; Insurer brief, 7-8), and therefore on recommittal that issue may not be revisited. We do point out, however, the mistaken assumption that because the insurer did not appeal the conference order, it was precluded from contesting matters, including liability, that were covered by the conference order. (Dec. 5.) Cf. Grande v. T-Equip. Constr. Co., 10 Mass. Workers' Comp. Rep. 379, 381 (1996)("Since the hearing is a de novo proceeding . . ., the conference order is not part of the hearing evidence and should not in any way bear on the judge's ultimate disposition of the case"). See Black's Law Dictionary 721 (6th ed. 1990)(Hearing de novo is "[t]rying matter anew as if no decision has been previously rendered").

from the decision as it now stands. For an example of how credibility can be linked to elements of a claim, see Truong, supra at 250 ("I find that Mr. Truong was not a credible witness regarding the circumstances of the alleged incident of June 3, 1998, nor his complaints of increased symptoms immediately after that date"). In an analogous context, we concluded that an employee's fraudulent conduct under § 14(2) in filing a false earnings report did not bar the award of incapacity benefits otherwise due. Carucci v. S & F Concrete, 13 Mass. Workers' Comp. Rep. 405, 412-413 (1999).

Accordingly, we recommit the case for further findings consistent with this opinion.

So ordered.

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Frederick E. Levine
Administrative Law Judge

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William A. McCarthy
Administrative Law Judge

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Martine Carroll
Administrative Law Judge

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Filed: **September 17, 2002**