COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS

BOARD NO. 044974-00

Joseph Leary	Employee
M.B.T.A.	Employer
M.B.T.A.	Self-Insurer

REVIEWING BOARD DECISION
(Judges Koziol, McCarthy and Costigan)

APPEARANCES
Bernard J. Mulholland, Esq., for the employee
Paul A. Brien, Esq., for the self-insurer

The case was heard by Administrative Judge McManus.

KOZIOL, J. The employee appeals from a decision denying his claim for § 34A permanent and total incapacity benefits. The employee argues the judge erred by referencing and relying on a five-year old surveillance videotape not admitted in evidence, and in performing her analysis under § 1(7A)'s "a major" cause standard.[1] Because we agree the judge erred with respect to the videotape, we vacate the decision and recommit the case for further findings.

The employee's accepted work injury to his lower back occurred on November 7, 2000. (Dec. 5.) As a result of prior proceedings before a different judge, the employee was awarded § 34 total incapacity benefits which he received from the date of the accident through July 12, 2001. Thereafter, pursuant to a Form 113 Agreement to Pay Compensation, approved on December 6, 2005, the

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

> If a compensable injury or disease combines with a pre-existing condition, which resulted from any 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.

employee received § 35 partial incapacity benefits at the maximum rate from July 13, 2001, through the exhaustion of those benefits on July 12, 2006. (Ex. 7.) The employee then filed the present claim for § 34A benefits from July 13, 2006, and continuing. (Dec. 3.) The employee proceeded on the theory that his back condition had been worsening, and he could only perform domestic tasks minimally. (Dec. 6-7.) Pursuant to a § 10A conference order, the current judge ordered the self-insurer to pay the employee § 34A permanent and total incapacity benefits from July 13, 2006 through the date of the hearing.

The § 11 hearing was conducted on August 16 and 17, 2008. Finding the matter medically complex, the judge allowed the parties to supplement the § 11A report with additional medical evidence. (Dec. 3.) During the hearing, the employee was cross-examined regarding alleged activities appearing on a surveillance videotape, which was neither viewed during the hearing nor entered in evidence, but which self-insurer's counsel alleged reportedly showed the employee at a Home Depot in 2002, handling boards of lumber.[2] (8/16/08 Tr. 84-90.)

The self-insurer submitted the report and deposition testimony of its § 45 examining physician, Dr. Robert Chernack, who examined the employee on August 25, 2006. In his report, Dr. Chernack stated that he viewed photographs of the employee handling wood boards at the Home Depot on October 4, 2002, as well as an investigator's report of these and other alleged activities. (Ex. 16, 6.) Doctor Chernack diagnosed a history of strain/sprain of the employee's lower back superimposed on multiple-level underlying degenerative changes. Nevertheless, Dr. Chernack opined the work injury bore no relationship to the progression of those degenerative changes and, at the time of his examination, all of the employee's medical restrictions, which he opined resulted in a partial disability, were due to the pre-existing and progressive degenerative condition, not

[2] No objection was made to this line of questioning.

the work injury. (Dec. 10-12.) Dr. Chernack also concluded: "[t]he surveillance performed demonstrate[s] that he is able to move large amounts of lumber in and out of his truck on his own and walk when he wishes to without any problems." (Ex. 16, 11; Chernack Dep. 44-47.)

In her decision, under the heading "Medical Treatment, Medical Complaints/Extent of Disability," and again under the heading, "Vocational Profile," the judge referenced the activity alleged to be depicted on the 2002 videotape. (Dec. 7-8, 14.) Under the heading, "Medical Expert Opinion," the judge reviewed all of the medical evidence and ultimately made the following finding: "I find the opinions of Dr. Robert Chernack compelling and convincing, and adopt these as such."[3] (Dec. 8-12.) Based on Dr. Chernack's medical opinions, the judge found the employee's disability was not related to the accepted injury but went on to conclude, again based in part on Dr. Chernack's opinions, that the employee was partially incapacitated and capable of performing work in the open labor market. Accordingly, she denied and dismissed the employee's claim. (Dec. 12-15.)

We agree that the judge committed prejudicial error by making findings based on alleged activities appearing in a surveillance videotape not in evidence, and by adopting Dr. Chernack's opinions, which also discussed and offered opinions based on that, and other non-evidentiary material. "Constitutional due process requirements apply to board hearings and decisions." Haley's Case, 356 Mass. 678, 682 (1970). As such, "[n]othing can be considered or treated as evidence which is not introduced as such." Id. at 682. None of the alleged surveillance materials was admitted in evidence nor did any become part of the

[3] Doctor Chernack's were the only medical opinions adopted by the judge.

hearing record.[4] Yet the judge's findings show she considered and treated the alleged surveillance material as evidence.

Moreover, as argued by the employee, the error was compounded by the judge's adoption of Dr. Chernack's opinions. Dr. Chernack's report reflects he also considered and used non-evidentiary surveillance materials in formulating his opinions. Indeed, in his report, Dr. Chernack described his review of surveillance photographs taken at the Home Depot in 2002, recited excerpts from an investigator's report, and discussed additional activities allegedly observed in 2002 but never mentioned by self-insurer's counsel at hearing. (Ex. 16, 6.)

Doctor Chernack's opinion violates the precepts governing expert opinion testimony. Patterson v. Liberty Mutual Ins. Co., 48 Mass. App. Ct. 586 (2000). Where an expert opinion is grounded on assumptions and information not established by the expert's direct personal knowledge or by admissible evidence in the record, the opinion is incompetent and inadmissible. Id. at 594. The purported surveillance videotape, photographs, and investigator's reports from 2002, also do not constitute proper foundational materials under the "independently admissible" formulation established in Department of Youth Servs. v. A Juvenile, 398 Mass. 516, 531 (1986), and adopted in Mass.G.Evid. § 703, at 214(2008-2009)(proper foundation may include "facts or data not in evidence if the facts or data are independently admissible and a permissible basis for an expert to consider in formulating an opinion."). This is particularly true where, as here, the material was generated four years before Dr. Chernack examined the employee and nearly six years before the hearing; the employee's 2006 claim was based on an alleged worsening of his medical condition; and even Dr. Chernack opined the employee's

[4] The employee not only had no recollection of purchasing any wood at Home Depot, but also never testified to the amount of wood or the alleged dimensions of the boards, which self-insurer's counsel posited were "twenty-four" boards that were "one by six by eight," and which the judge found were "reportedly eight feet in length and six inches thick." (8/16/08 Tr. 84; Dec. 7, 17.)

underlying medical condition had not remained static.[5] Under these circumstances, even if offered properly though the testimony of the investigator, such stale evidence, falling four years outside the disputed period of incapacity, would not be relevant to the dispute. As such, the surveillance data was not independently admissible in any form. See Mass.G.Evid., § 703, supra. Accordingly, Dr. Chernack's medical opinion could not properly be relied upon by the judge.[6]

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[5] Doctor Chernack opined the MRI reports from December 2000 and November 2005 "show the normal progression of increasing degenerative changes over time." (Ex. 16, 10-11; Chernack Dep. 75.)

[6] Although not argued, we observe that Dr. Chernack's opinions at deposition cannot be reconciled. See Nunes v. Town of Edgartown, 19 Mass Workers' Comp. Rep. 279, 285 (2005). Doctor Chernack testified:

> Q: Okay. The symptoms that Mr. Leary's now complaining of, you indicate that your opinion is that those are strictly the result of the degenerative changes and are unrelated at this point in time to the strain that he suffered in November of 2000; is that correct?
>
> A: Yes, sir. I believe that's correct.

(Chernack Dep. 70.) Despite testifying he expected the employee's lumbar strain would resolve within 12 weeks of injury and his symptoms should have resolved before 2007, Dr. Chernack, when asked again, was unable to answer that question:

> Q: So is it fair to say then, at some point in time, the acute symptoms he was feeling from the lumbosacral strain should have resolved and that any pain he's been complaining of since then would be from the degenerative changes in his back?
>
> A: I'm not sure if I follow your question. I'm sorry.
>
> Q: Okay. If we assume that under normal circumstances a person who suffers a lumbosacral strain is going to resolve that problem within roughly 12 weeks, and that seven years after the accident or incident the person's complaints of pain are now consistent with degenerative changes, is it fair to say that at some point in time the acute strain symptoms resolved and that the symptoms he's now suffering began at a latter point in time?
>
> A: I'm not sure if I can answer that. I don't think I can answer that.

The employee further argues the judge's consideration of the alleged surveillance material tainted her credibility findings, which were not favorable toward the employee. Credibility findings, although generally not reviewable, can be arbitrary and capricious if they are not based on record evidence. See Pittsley v. Kingston Propane, Inc., 16 Mass. Workers' Comp. Rep. 349, 351 (2002). In regard to the employee's credibility, the judge made the following findings under the heading, "Prior Medical History":

> The Employee reports a prior work related injury apparently to his back, 5 but cannot recall if he lost time from work as a result, or collects [sic] benefits as a result.
>
> Having had the opportunity to hear the Employee's testimony and observe his demeanor at the time of Hearing, I do not find the Employee credible in his complaints of pain and disability, and as such, do not adopt these. I find that his testimony with regard to his pain and physical capabilities contains multiple discrepancies and as a result, do not find that his pain and disability rise to the level complained of.
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> 5 See Hearing transcript, page 22, lines 6-16, where Employee counsel suggests it was a work related back injury, and the Employee does not dispute this.

(Dec. 8, 17.) The judge's findings regarding her credibility assessment are not specific enough to determine whether, or to what extent, the error may have influenced them. As a result, those findings must be vacated as well. Praetz v. Factory Mut'l Eng'g & Research, 7 Mass. Workers' Comp. Rep. 45, 47 (1993)(recommittal appropriate where reviewing board cannot "determine with reasonable certainty whether correct rules of law have been applied to the facts that could be properly found").

Lastly, because the decision must be vacated and, on recommittal, the judge cannot consider Dr. Chernack's opinions, we do not address the employee's argument that the judge erred in applying § 1(7A)'s "a major" cause standard.

(Chernack Dep. 70-73.)

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

So ordered.

Catherine Watson Koziol
Administrative Law Judge

William A. McCarthy
Administrative Law Judge

Patricia A. Costigan
Administrative Law Judge

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