COMMONWEATLH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS	**BOARD NO. 026880-99**
Julian Melendez	Employee
City of Lawrence	Employer
City of Lawrence	Self-insurer

REVIEWING BOARD DECISION
(Judges Carroll, Levine and Costigan)

APPEARANCES
Joseph P. McKenna, Jr., Esq., for the employee
John J. Morrissey, Esq., for the self-insurer

CARROLL, J. The employee appeals from an administrative judge's finding that he was not credible and her consequent denial of his claim for weekly incapacity and medical benefits. We recommit the case to the administrative judge for further findings because we cannot tell whether the judge, in making her credibility determination, considered all of the evidence submitted by the employee. In addition, it appears that the judge based her credibility determination, in part, on a finding which had no basis in the evidence.

Julian E. Melendez, who has a ninth grade education, is married and was thirty-nine years old at the time of the hearing. Since 1984, he had worked as a security guard, a laborer, or a maintenance worker. In 1993, he began working as a school department custodian with the City of Lawrence. Mr. Melendez claims that, while at work on May 11, 1999, he injured his neck and back. He did not return to work after that day, and was terminated on July 8, 1999 for "abandoning" his employment. (Dec. 2-3.)

Following a § 10A conference, an order issued awarding payment of § 34 benefits from May 12, 1999 to July 15, 1999. Both parties appealed to a hearing de novo. (Dec. 2.) Dr. Richard Warnock, a physician appointed pursuant to § 11A, diagnosed low back strain and cervical strain causally related to lifting at work. He opined that the employee

was temporarily partially disabled, but could perform light sedentary work involving minimal lifting, restricted ambulation and the ability to sit or stand at will. (Dec. 3.)

In her decision denying the employee's claim, the judge found that Mr. Melendez had sustained back and neck injuries at work in 1998 and in a basketball game in January 1999. She noted that he was able to move some of his personal belongings on November 4, 1999, and performed light work driving and raking leaves for just over a month in the spring of 2000. She further found that approximately two weeks before the alleged injury, the employee had received notice of a disciplinary hearing to be held on May 12 (the day after he claims to have been injured), and she commented that he had previously received written warnings for absences and fraudulent time sheets. (Dec. 3.) Without further analysis, the judge concluded:

> I did not find the employee's testimony of an injury at work on May 11, 1999 to be credible. He has not persuaded me that an industrial accident occurred on that date. Accordingly, although the report of the impartial medical examiner is adequate, it is based upon inaccurate information and does not provide a basis for an award of benefits.

(Dec. 3.)

The employee appeals, making three arguments. First, he argues that there is no indication in the decision that the administrative judge admitted or considered medical records which she stated at hearing would be allowed into evidence for credibility purposes. We agree.

The records in question are those of Lawrence General Hospital, Dr. Mansour and Dr. Morley. The self-insurer submitted some of these records for impeachment purposes only: one page of notes from Dr. Mansour encompassing dates of treatment 11/23/98, 1/5/99, 1/27/99 and 2/1/99, (Self-insurer Exhibit 2); and one page of notes from Dr. Morley dated 5/13/99, (Self-insurer Exhibit 3). (Dec. 1.) There is no indication in the decision that any additional medical records were submitted by the employee to explain or contradict the allegedly impeaching evidence. However, the transcript reveals that such evidence was to have been admitted. In response to the self-insurer's offer of Dr. Morley's office notes of May 13, 1999, to impeach the employee's credibility,

employee's counsel stated that he had no objection to its submission, as long as the complete records of Dr. Morley, Dr. Mansour, and Lawrence General Hospital were allowed into evidence. (Tr. 86-87.) The judge first suggested that employee's counsel offer the complete package on re-direct. (Tr. 87.) However, after admitting the one-page notes of Dr. Mansour and Dr. Morley submitted by the self-insurer as Self-insurer's Exhibits 2 and 3, respectively, (Dec. 1; Tr. 88), she came up with another plan:

> The Judge: . . . Would you like to have a chance to prepare that and send it to me in the mail, 'cause I'd just as soon not have your editorial notes?
>
> Mr. McKenna: For the sake of clarity, Your Honor, it will be the records of Dr. Mansour, Dr. Morley and the records of Lawrence General Hospital.
>
> The Judge: Okay. When I receive those notes, I will mark and admit those into evidence as, let's see, that would be Employee's Exhibit No. 3, would it?
>
> Mr. McKenna: Yes, Your Honor.
>
> The Judge: And that's all for credibility, that's not for medical context.

(Tr. 88-89.)

The board file indicates that on November 28, 2000, employee's attorney mailed the certified medical records from Lawrence General Hospital, Dr. Mansour and Dr. Morley to the judge. However, the judge did not list these records among the exhibits, nor did she mention them elsewhere in the decision.[1] We therefore cannot tell whether she considered them at all.

> Although the omission of witnesses and an exhibit from the lists typically set forth at the beginning of a decision strays from the preferred practice, it is not *ipso facto* conclusive that the administrative judge failed to consider the evidence when reaching his ultimate conclusions. But in this case, these omissions are accompanied by a lack of discussion or recognition of this evidence within the text of the decision. As a result we must recommit the case. On recommittal the judge

[1] The decision does list an Employee Exhibit 3, which the judge had said would be the medical records mailed in by the employee. However, Employee Exhibit 3 is a letter dated November 17, 1999 from the Mount Sinai Home for Men, marked for identification only. (Dec. 1, Tr. 24-26.)

> should, at a minimum, identify all the witnesses and exhibits, and make such additional findings as will clarify the degree to which the evidence was relied upon. See Warnke v. New England Insulation Co., 11 Mass. Workers' Comp. Rep. 678, 680 (1997).

Saccone v. Department of Pub. Health, 13 Mass. Workers' Comp. Rep. 280, 282-283 (1999). See also Keefe v. M.B.T.A., 15 Mass. Workers' Comp. Rep. 129, 133-134 (2001) (because judge failed to list three witnesses or discuss their testimony, reviewing board could not determine if the judge's ultimate conclusions had an adequate foundation).

The certified medical records mailed in by the employee were submitted only to corroborate the employee's testimony that he did, in fact, suffer an industrial injury on May 11, 1999. And, as the employee points out, the Lawrence General Hospital records of May 12, 1999 support his claim that he reported to them not just a prior work injury seven months earlier, but increased low back pain with recent lifting (the prior three days) at work. In addition, Dr. Morley's office note of July 1, 1999 indicates that Mr. Melendez told Dr. Morley he injured his back at work on May 11, 1999. "It is fundamental that the judge weigh and consider the evidence he has admitted." Warnke v. New England Insulation Co., 11 Mass. Workers' Comp. Rep. 678, 680 (1997). Here, it does not appear that the judge did that. Like other findings, findings on credibility must be based on the evidence of record. If they are not, they are arbitrary and capricious. Pittsley v. Kingston Propane, Inc., 16 Mass. Workers' Comp. Rep.____ (September 9, 2002), citing Yates v. ASCAP, 11 Mass. Workers' Comp. Rep. 447, 454-455 (1997), and Truong v. Chesterton, 15 Mass. Workers' Comp. Rep. 247, 249 (2001). Thus, failure to consider all the evidence in evaluating the employee's credibility renders the judge's decision arbitrary and capricious. We therefore recommit this case so that the judge can make additional findings regarding how the Lawrence General Hospital records and the records of Dr. Mansour and Dr. Morley affect her credibility determination.

In a related argument, the employee contends that the judge's finding that he sustained back and neck injuries in a basketball game in January 1999, (Dec. 3), is not

supported by the evidence. This is reversible error, argues the employee, because it also may have affected the judge's finding that the employee's testimony that he injured his neck and back at work was not credible. We agree. Dr. Mansour's note of January 5, 1999, which was part of Self-insurer's Exhibit 2 as well at part of the medical packet submitted by the employee but not listed as an exhibit and apparently not considered by the judge, indicates that on January 5, 1999, the employee saw Dr. Mansour for a contusion and laceration above his right eye, as well as a questionable cerebral concussion, which he suffered while playing basketball the previous evening. There is no mention of any neck or back injury or pain. The next entry by Dr. Mansour, dated January 27, 1999 mentions upper and lower back pain which developed spontaneously. There is no basis in the evidence submitted by the self-insurer and considered by the judge (or, for that matter, in the evidence submitted by the employee and apparently not considered by the judge) for the judge's conclusion that the employee injured his neck and back in a basketball game in January 1999. The judge's finding is thus arbitrary and capricious. Yates, supra at 454-455. Since the records in question were submitted only on the issue of credibility, it would appear that the judge factored this arbitrary finding into her credibility analysis. This was error. See Truong, supra at 250-251 (judge erred to the extent that he factored erroneous evaluation of the medical evidence into his credibility determination).[2]

We recommit this case to the administrative judge for further credibility findings consistent with this decision. If, on recommittal, the judge should find the employee credible, her finding that the impartial medical report was based on an inaccurate history must be reconsidered as well.

So ordered.

[2] The employee also argues that the judge erred by mentioning that the employee received notice of a disciplinary hearing scheduled for May 12, 1999, and had previously received written warnings for absences and fraudulent time sheets. However, the employee's attorney, though initially objecting to questioning on this subject, did not object to subsequent questions on the same subject. (Tr. 79-83.) To the extent the judge drew any adverse inferences from these findings, we see no error.

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Martine Carroll
Administrative Judge

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Frederick E. Levine
Administrative Law Judge

Filed: **September 23, 2002**
MC/jdm

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Patricia A. Costigan
Administrative Law Judge