COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS

BOARD NO. 029366-07

Justin O'Leary	Employee
McDonald's	Employer
Massachusetts McDonald's S.I.G.	Self-Insurer

REVIEWING BOARD DECISION

(Judges Horan, Costigan and Fabricant)

The case was heard by Administrative Judge Lewenberg.

APPEARANCES

Paul S. Danahy, Esq., for the employee
Elizabeth A. Fleming, Esq., for the self-insurer

HORAN, J. The employee appeals from a decision denying and dismissing his claim for worker's compensation benefits. We affirm the decision.

On September 11, 2007, the employee began working as a manager trainee for the employer. (Dec. 5.) He claimed his work activities over the first two weeks of his employment caused an injury to his right arm and wrist. (Tr. 12.) The self-insurer denied the employee's claim. Thereafter, the judge denied the claim at conference, and the employee appealed. (Dec. 2-3.) Prior to the hearing, the employee was examined pursuant to § 11A by Dr. Hillel D. Skoff. Doctor Skoff's May 8, 2008 report was admitted into evidence at the hearing. (Stat. Ex. 1.)

In his report, Dr. Skoff stated the employee had a normal physical exam, and opined he was not disabled. He noted the employee reported a work history commencing from the beginning of the summer of 2007, and described his managerial and cooking duties as "bimanual and highly repetitive." Id. Regarding the causation issue, and the employee's diagnosis, Dr. Skoff opined:

Based on the history and the absence of other documented provocation,

> I think it would be credible to assume that there is a cause-and-effect relationship between [the employee's] employment at McDonald's and his development of wrist pain. I would term the type of malady produced by his employment as a repetitive strain injury.

Id. at 2. At his deposition, which followed the employee's testimony at hearing, Dr. Skoff was informed the employee had not worked the entire summer of 2007, but had worked only a few weeks commencing September 11, 2007. (Dep. 17-19.) The doctor responded as follows:

> Now, so then the question becomes, how long do you have to work at a job to get [a] repetitive strain injury. Well, I don't think anybody has an answer for that. But first you have to establish what they're doing is, in fact, highly repetitive.
>
> . . .
>
> So then to make the case that this is a repetitive strain injury, especially given the short period of time, you would have to show that what he was doing during that short period of time was indeed highly repetitive. . . . If you could not show that what he was doing during that time was highly repetitive, then neither by time nor job description would a good case for repetitive strain be made. And I think that's where we are.

(Dep. 20-21; 24-25.) The doctor also revealed he could not recall specifically what the employee told him he did at work, but instead based the opinions contained in his report on his concept of how hard employees worked at McDonald's.[1] (Dep. 26-29.)

In denying and dismissing the employee's claim, the judge concluded, *inter alia*, that Dr. Skoff changed his opinion "when given the accurate history of work duration. . . ."[2] (Dec. 7.) On appeal, the employee challenges this finding. We

---

[1] Dr. Skoff testified, "when I look in the back there, the people who are working are usually working pretty hard . . . they've got a lot of orders to fill, and they're always sort of busy. . . . But that's my concept." (Dep. 26.)

[2] At his deposition, Dr. Skoff conceded his opinion might change "[i]f you could provide me with more factual information . . . if you provided me with a detailed summary about what his actions actually were during the time frame that we've now established . . . that

need not reach this precise issue, because any alleged error proves harmless in light of the judge's other findings.

It is axiomatic that a judge "need not adopt the conclusions of an impartial medical examiner's . . . report in a workers' compensation case where the judge finds the factual foundation of the report not credible." Brommage's Case, 75 Mass. App. Ct. 825 (2009). Here, the judge found the employee's testimony regarding the repetitive nature of his work to be "a gross exaggeration of the requirements of the job." (Dec. 6.) The judge discredited the employee's testimony that "he worked for the employer for three weeks to a month." (Dec. 5.) Instead, based on his review of all the evidence, the judge found "[t]he employee worked a total of five and a half days over two weeks." (Dec. 5-6.) The judge also credited testimony, provided by other witnesses, that "the employee was not a reliable employee." (Dec. 6.) Most importantly, the judge did not credit the employee's testimony that "his job required frequent highly repetitive hand motions. . . ." (Dec. 7.) Thus, it is abundantly clear the judge's factual findings concerning the employee's work activity did not square with Dr. Skoff's understanding of same. See footnote 1, supra. "The [impartial medical examiner's] report is not entitled to any weight unless the fact finder believes the facts on which the report is based." Brommage, supra at 828. Given the judge's findings of fact, his denial and dismissal of the employee's claim was proper. Accordingly, we affirm the decision.

So ordered.

Mark D. Horan
Administrative Law Judge

Patricia A. Costigan
Administrative Law Judge

Bernard W. Fabricant
Administrative Law Judge

Filed: SEP 14 2010
Dept. of Industrial Accidents

would be the information that I would need which might dissuade me from this opinion." (Dep. 32.)