COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NOS. 055785-99 017213-00**

Karen A. Moynihan	Employee
Wee Folks Nursery, Inc.	Employer
Eastern Casualty Insurance Co.	Insurer

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

APPEARANCES
Michael F. Walsh, Esq., for the employee
John A. Smillie, Esq., for the insurer

CARROLL, J. The employee appeals from a decision in which an administrative judge denied and dismissed her claim for workers' compensation benefits stemming from alleged shoulder and neck injuries in September 1999 and April 2000. Because the § 11A doctor improperly engaged in fact finding, we reverse the decision and recommit the case for additional medical evidence, further proceedings and findings consistent with this opinion.

The employee was employed as a day care teaching assistant for seventeen years. Her job included tending thirty-four children, preparing their lunch, lifting them on and off the toilet, and cleaning. In September 1999, the employee allegedly injured the back of her right shoulder and neck while lifting a child onto a toilet. The employee continued to work while treating for pain in her right shoulder and neck, until April 14, 2000, her last day working. The employee claimed that her condition that had started in September 1999 had worsened while working until April 2000. The employee underwent cervical disc surgery on August 7, 2000. (Dec. 5-7.)

The insurer rejected the employee's claims, and benefits were awarded in a conference order that the parties cross-appealed. (Dec. 2.) The employee underwent an impartial medical examination. See G.L. c. 152, § 11A(2). The impartial physician diagnosed the employee as suffering from cervical strain and sprain, post-op cervical

surgery discomfort, including headache and neck pain. The doctor was unable to causally relate the employee's diagnoses to any specific work event in September 1999 or to picking up children in general. The doctor gave as reasons for his causal relationship opinion, that the employee had not reported a specific injury to him, and that there was a conflict in histories between the employee's and that noted in medical records. The doctor noted no worsening in the employee's symptoms from September 1999 until April 2000. The doctor opined that her neck pain disabled the employee. (Dec. 7-9.)

The judge adopted the impartial physician's opinions and noted the divergence between the employee's testimony at hearing of a specific incident in September 1999, and the history she gave the doctor, which included no such incident.[1] The judge did not credit the employee's testimony at hearing, relying specifically on the doctor's "misgivings about a specific incident." The judge further noted the lack of credible

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[1] There is a discrepancy as to the date of injury between September 15 and September 19. On that point, the judge found:

> The employee testified that the actual date of injury was September 19, 1999 when as a result of a specific incident she injured the back of her shoulder and neck on the right side while lifting a child onto a toilet . . . The employee told Mrs. McLaughlin, the owner of WFN, on September 19, 1999 about the pain in her neck and shoulder area. However, she did not inform Mrs. McLaughlin of a specific incident. *That evening*, the employee saw Dr. Perry at the South Boston Medical Center, who diagnosed her with muscle spasm and treated with an anti-inflammatory and prescribed heat. The employee testified that she told Dr. Perry that she injured herself lifting a child, however, *it is later noted that Dr. Perry did not indicate lifting a child as a cause of her pain, rather, his report indicates that the employee woke up with pain.*

(Dec. 6; emphasis added.) Given the judge's denial of the employee's § 11A motion for additional medical evidence for the gap period before the impartial examination, it is clear that Dr. Perry's report was not in evidence. At deposition, however, the impartial physician commented several times on the history contained in that report, particularly of the employee waking up with pain. (Dep. 7-8, 10, 12, 13-14, 30-32.) Certainly, there are other questions raised by the same history, which does not refer to the alleged child-lifting incident but does mention right shoulder pain of both one week's and two weeks' duration. Nevertheless, to the extent that the awakening-with-pain history influenced both the impartial physician's opinion and the judge's finding that the child-lifting incident of September 19, 1999 did not occur, we note that the report, contained in the Board file, is dated *September 20, 1999*, not September 19, 1999.

testimony that the employee's symptoms worsened between September 1999 and April 2000, and adopted the opinion of the impartial physician that no such worsening occurred. As a result, the judge concluded that the employee had failed to sustain her burden of proving either industrial injury claimed. (Dec. 10-12.)

The employee's appeal poses insubstantial arguments that do not merit discussion. That being said, however, we discern an issue that is simply too important to ignore. See Errichetto v. Southeast Pipeline Contractors, 11 Mass. Workers' Comp. Rep. 88, 91 (1997); McLeod's Case, 389 Mass. 431, 434 (1983). While we are aware that the decision is written in terms of credibility, which we are loath to review, a serious flaw in the impartial medical evidence is apparent in this case. That flaw involves the impartial physician's improper foray into the area of credibility assessment, and it necessitates a recommittal for additional medical evidence.

The impartial physician opined that the employee's disability was not causally related to her work, because the employee did not identify a specific incident that triggered her complaints, and the history that the employee gave to him was different than that which she had supplied to her treating doctors. (Dep. 7-8.) The doctor explained his impressions at his deposition:

> Q: Why is it, Doctor, that you're not able to establish that there was a work-related injury?
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> A: Two factors, one . . . the day after she alleged this to me, I was provided with information that she had seen some other doctor at the South Shore where she gave a different history. That she had woke with the pain and that she had had it for two weeks before, which was different than what she told me that that was within a day of the onset. So there was a conflict in histories.
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> Two, I could not define a discrete incident of an injury. There was no injury per se. It wasn't that I picked a kid up and hurt my neck. There was no defining injury. So I thought it's more likely than not I couldn't relate it to the actual job she had as opposed to she awoke one morning with a pain in the neck.
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> Q: So, Doctor, what you did was you chose not to accept her history; is that correct?

A: No. She didn't define any particular incident which is unusual, and I had secondary information that there was another history. That was possible. I had the combination of the two, and I thought that particular combination more likely than not made me make a judgment. I was asked to make a judgment. I could not make it a hundred percent, but I could make it 51 percent or more in that favor.

Q: But your judgment, Doctor, was based upon the history, right?

A: Completely on history and the material available to me.

Q: Doctor, aren't you called to make a medical decision and not a factual one?

A: A medical decision is always based on a history and a physical exam.

Q: But you chose in this case not to adopt her history, instead to rely upon medical records; is that fair to say?

A: I listened to her history, but I still couldn't relate it to an alleged injury at work. There was no alleged injury at work. It happened to occur during a time she was working. There's a big difference.

Q: There's a big difference, is that what you said?

A: Yes.

Q: What would be the difference, Doctor?

A: She said that while during the course of time she was working she developed a pain, *and she wanted to blame it on work*. I didn't think that was – there's other things going on in life than work. *She chose to blame it on the work.*

Q: Is the work she's doing not likely a cause of the problems that she's having with her shoulder and neck?

A: She couldn't define an incident where she injured herself.

(Dep. 7-9; emphasis added.)

Q: Doctor, when it came to the history that she had given you about work, you chose to basically rely upon, am I not correct, on that note of September 19th [sic], that she awoke with the pain, when you say she didn't describe accurately for you her history?

> A: I took all the histories into consideration ultimately, and *I was asked in a very specific way to make a specific judgment which was not necessarily medical as to whether or not in my opinion it was related to work. That has nothing to do with a medical judgment as to what she had.* I made that judgment to the best of my ability based on her history and all of the other material given to me.

(Dep. 13-14; emphasis added.)

The judge ill-advisedly relied on the doctor's testimony in denying the employee's claim. (Dec. 11.) We say, "ill-advisedly," because we see the doctor's testimony as a striking example of a § 11A physician's unauthorized *fact-finding.* We are at a loss to know what the doctor was talking about when he stated that he "was asked in a very specific way to make a specific judgment *which was not necessarily medical* as to whether or not in [his] opinion [the disability] was related to work." (Dep. 13-14; emphasis added.) We do not know who posed that question, but both it and the doctor's answer are off the mark. The impartial doctor's opinion, as we have reiterated for years now, is prima facie evidence of all matters regarding the employee's *medical* condition. See Scheffler's Case, 419 Mass. 251, 256 (1994). And we know that the doctor can indeed shed some light – albeit not prima facie – on the employee's vocational limitations in certain circumstances. See Simoes v. Town of Braintree School Dept., 10 Mass. Workers' Comp. Rep. 772 (1996). However, it is entirely improper for the doctor to assess and comment on the credibility of the employee. See Commonwealth v. Ianello, 401 Mass. 197, 202 (1987)("[a]n expert may not render an opinion on the credibility of a [lay] witness because the [fact-finder] is capable of making that assessment without the aid of an expert"). An opinion so venturing into the realm of credibility is "best excluded." Commonwealth v. O'Brien, 35 Mass. App. Ct. 827, 832, n. 6 (1994); Reed v. Canada Dry Corp., 5 Mass. App. Ct. 164, 166 (1977)(reversible error to allow expert testimony that could have "concerned an ordinary question of credibility to be resolved by the jury without the aid of expert opinion"). See Ianello, supra at 202-203. In making his "judgment" "[t]hat ha[d] nothing to do with a medical judgment as to what [the employee] had," (Dep. 14), the doctor assumed the judge's role in making the ultimate credibility call in the case. Making matters worse, the judge allowed the doctor to do so

by crediting the impartial physician's "misgivings" concerning the employee's history. (Dec. 11.) The judge abdicated his own fact-finding authority by relying on the doctor's improper and unduly prejudicial testimony, rather than ignoring it, as he ought to have done.

The doctor's opinion is rendered inadequate, as a matter of law, by his obvious and fundamental misunderstanding of his role in the dispute resolution process. Such § 11A evidence triggers substantial due process concerns, namely the employee's due process right to a decision on her claim *by an administrative judge* (rather than the impartial physician), and renders his entire opinion suspect. Additional medical evidence must be allowed as a result. See O'Brien's Case, 424 Mass. 16, 23 (1996)(failure of due process can result when party has not had "opportunity to present testimony necessary to present fairly the medical issues").[2] We further think that, where this type of O'Brien violation occurs, not only is additional medical evidence mandated, but the impartial medical evidence must also be, and hereby is, stricken from the record.

We therefore reverse the decision and recommit the case for further proceedings and findings as to whether either (or both) of the employee's alleged injuries of September 1999 (specific incident) and April 2000 (gradual accumulation of injurious work stresses from September 1999 to April 2000) is causally connected to her undisputed present medical impairment. See Zerofski's Case, 385 Mass. 590 (1982).

So ordered.

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Martine Carroll
Administrative Law Judge

[2] We certainly do not think that the Supreme Judicial Court's reference in O'Brien to the impartial examiner as standing "in the position of a master or arbiter who has considered evidence from both parties" was meant as an endorsement of the fact-finding usurpation we see in this case. Id. at 23.

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Patricia A. Costigan
Administrative Law Judge

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Susan Maze-Rothstein
Administrative Law Judge

Filed: **July 3, 2003**
MC/jdm