COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NOS. 054402-98 057790-96**

Mario Correia, Jr.	Employee
UNICCO Service Company	Employer
Liberty Mutual Insurance Company	Insurer

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

APPEARANCES
Joseph Guerreiro, Esq., for the employee at hearing and on appeal
Mary B. Klegman, Esq., for the employee on appeal
Kevin P. Jones, Esq., for the insurer at hearing
Paul M. Moretti, Esq., for the insurer at hearing and on appeal

CARROLL, J. The employee appeals from a decision in which an administrative judge denied and dismissed his claim for compensation benefits based on the judge's findings that the employee and other witnesses were not credible. We recommit the case for the following reasons.

Mario Correia, Jr., 49 years old at the time of the hearing, was born in the Azores, where he attained a 4th grade education. (Dec. 4.) Mr. Correia, who worked for an office cleaning company, alleged that he injured his neck and back at work in a building at Totten Pond Road in Waltham on February 14, 1996 and again on March 3, 1998. (Employee Ex. # 1; Dec. 2.) In the first alleged incident, the employee claimed to have hit his head on the riser of a staircase, and then injured his neck while falling backwards into shelving in a closet underneath that staircase. The employee continued to work until March 12, 1996, and then underwent a C3-4 anterior cervical discectomy on March 27, 1996. He remained out of work for approximately eight months, but received his full pay throughout that period. (Dec. 4.) The employee returned to work in November or December of 1996, and alleged that he next injured his neck and back while using a heavy floor buffing machine on March 3, 1998. The employee left work on March 17,

1998, and has not returned. On April 1, 1998, a second surgical procedure was performed, in which the C6-7 disc was removed, with a fusion with a bone graft at that level. (Dec. 4-5.) The employee suffers from continued pain and limitation of motion, with significant spastic motions and shaking. (Dec. 5.)

The employee claimed total incapacity benefits – temporary and then permanent – from March 17, 1998 and continuing. (Dec. 3.) The judge denied the claim at the § 10A conference, and the employee underwent an impartial medical examination prior to the commencement of the full evidentiary hearing. (Dec. 2.) The impartial physician opined that the employee had a cervical spinal cord injury with residual weakness, numbness and evidence of significant nerve damage, all causally related to his February 14, 1996 injury. The doctor further opined that the employee was permanently and total disabled from any work activity, due to his 40% impairment resulting from the injury, loss of motion, loss of motor power, balance disorder and pain. (Dec. 6.)

The judge denied and dismissed the employee's claim on the basis of credibility – that the reported injuries had not actually occurred – thereby rejecting, as well, the impartial physician's causal relationship opinion. (Dec.8-9.) The employee challenges the decision on many fronts, most regarding the evidentiary support for and relevance of the judge's credibility findings. We see merit in many of the employee's contentions, and recommit the case for further findings as a result.

The judge's finding that the testimony of the employee's witness, Eusebio Bodelho, had no bearing on whether the employee suffered an industrial accident misses the mark. Mr. Bodelho's testimony was offered to corroborate the employee's testimony as to the setting of the first injury in the storage closet under the staircase. He was not offered as a witness to the closet incident, but as one who had informational background. That being the case, the fact that his employment with the employer was not contemporaneous with that incident was of no moment, as there was no indication that the closet had changed in the interim. (Dec. 6.) Particularly where the judge did not credit the employee's account of the accident partly because he could not give the judge a satisfactory description of the physical layout of the closet, see infra, the testimony was

indeed relevant, i.e., it did bear on the veracity of the employee's account. The judge's finding that Mr. Bodelho's testimony was irrelevant is arbitrary and capricious, and cannot stand.

The judge wholly discredited the employee's testimony: "I do not find Mr. Correia to be the least bit credible in his testimony that he experienced an industrial injury to his neck while employed by Unicco." (Dec 7.) Some of the judge's findings are sound: For example, the employee's testimony regarding his job duties when he returned to work from March 1996 to March 1998 was contradicted by the account of the insurer's witness, Mr. Venceslau Pires. (Dec. 6-7.) However, some of the judge's other credibility findings are simply not relevant to the issues involved in the case, and do not provide a sound foundation for the judge's conclusion that the employee did not suffer industrial accidents while working for the employer. The judge set out some of these as follows:

> I was troubled by his lack of candor in many other areas of his testimony, such as whether or not his work crews and himself were members of a labor union, the birthdates of his children, the dates he actually worked for Unicco, the actual building in which he worked and the physical description of the storage closet in which he allegedly injured himself.

(Dec. 8.)

Awkward syntax and a faulty memory are not the same as lack of candor. The judge's concern that the employee could not adequately describe the closet is particularly puzzling. The employee was testifying through an interpreter, and the cross-examination covering this topic is, indeed, a bit of a mess. We note that the judge's interjections did not assist:

> Q: How big was it?
>
> A: The size, I don't know how to tell you in meters, maybe. . .
>
> Q: We can understand meters.
>
> A: Maybe from here to the Judge and maybe from the Judge to the wall.
>
> Q: Okay. Now, you testified --
>
> THE JUDGE: I'm sorry. That does not translate unless it was a triangle.
>
> A: No. It was a square.

THE JUDGE: Which?

THE WITNESS: I don't make an idea exactly of how many meters.

THE JUDGE: From the Judge to that wall is approximately 8 feet, I believe. Is that the length or width?

THE WITNESS: That would be the length. The width would be like from here to the right there, close to you. The length was long, but the width was not that wide.

Q: Okay. Where was the door?

THE JUDGE: Let's get a dimension for the record. The record cannot reflect this information. That's about 4 feet from Mr. Correia to the corner of the desk; does Counsel agree?

MR. GUERREIRO: Yes.

MR. JONES: Yes.

MR. GUERREIRO: That's the best of his memory, I agree.

MR. JONES: About 8 feet.

THE JUDGE: 4 foot by 8 foot rectangle.

Q: Now, Mr. Correia, where was the door in relation to the room?

A: The door could be about here (indicating) where I am. I would have to go about where your -- the secretary is at your table.

MR. GUERREIRO: Which secretary are you mentioning?

A: The one where he is. I would have to walk where he is. Then there was the stairs. Inside of the closet, I would have to lean my head to go in. Inside of the closet, I would stand up. When I would get out, I would have to lean my head again. Then I didn't lean my head. I hit my head and went backwards against the shelves, and I fell. And that's what happened.

Q: Mr. Correia, do you know how many feet there were between the door to the closet and the stairway on the outside of the closet?

THE INTERPRETER: What else you said? I'm sorry.

MR. JONES: How many feet between the door to the closet and the stairs on the outside of the closet?

> A: To the inside of the closet I know. To outside -- to the outside, I don't know. Maybe we could –
>
> . . .
>
> THE JUDGE: . . . Quite frankly, I have at this point based on Mr. Correia's testimony, no concept, no visualization of what this closet looks like or where it is. Does Counsel have any idea of this closet?
>
> MR. JONES: Not yet.
>
> THE JUDGE: Are we going to get it in this fashion, or could we have it, perhaps, a graph? Would someone want to volunteer it to see if we can agree on what the closet plan looks like and then ask questions if they need to be asked?
>
> . . .
>
> THE JUDGE: Back on the record. The parties have agreed that none of the attorneys are familiar with the premises. Mr. Correia is unable to sketch it for us; and, therefore, there's no point to further discussion of the layout or arrangement of the closet room.

(January 11, 2001 Tr. 46-49, hereinafter referred to as "Tr. II.")

First, what counsel know about the closet is certainly not germane to the proceeding. Second, and more importantly, the confusion of this exchange is counterbalanced by the employee's testimony on direct that describes the layout without any of the confusion wrought from the cross-examination (albeit still with apparent translation problems):

> Q: Could you tell the Court what happened on that date of February 14th, 1996, when you were working for UNICCO?
>
> A: I went to building, the closet is underneath the stairs. When you go in you have to lower your head. And after you're in there we walk standing. I was looking at the materials are all there. When I was going to leave, I hit my head against the stairs, the thing, and I went with my –I went backwards. And I hit with my neck on the shelves and all the things that were against the wall.

(January 5, 2001 Tr. 17-18, hereinafter referred to as "Tr. I.")

The testimony is abundantly clear: that the closet is under the stairs; that one must duck to avoid hitting one's head on the underside of the staircase when entering the

closet; and that, once inside of the closet, one can stand up by getting under the higher part of the staircase. This is, in fact, exactly what Mr. Bodelho described in his testimony. (February 22, 2001 Tr. 35-36, hereinafter referred to as "Tr. III.") It was inappropriate for the judge to put the employee's drafting ability on trial, and then hold it against him as probative of the non-occurrence of the incident in the closet. Even if the employee's description of the closet was not sufficiently detailed for the analytical tastes of the judge, there was no dispute as to the existence of the closet underneath the staircase that posed a danger of bumping one's head, in any event. All in all, the judge's use of the confused cross-examination regarding the closet as support for disbelieving the employee was arbitrary and capricious

Other of the judge's "lack of candor" findings are also distinctly irrelevant to the issue of whether the employee suffered industrial accidents, or the cause and extent of his incapacity. First, we do not see how the employee's inability to remember the birthdays of his children has any bearing on his candor or lack thereof, nor do we believe it to be a valid factor in the assessment of a personal injury under the Act. Second, the confusion as to the dates of injury is entirely of the judge's own making, as he misstated the dates at the outset of the hearing. (Tr. I, 4-6.) We recognize, as the insurer points out, that counsel for the employee acceded to that statement of the claim. Certainly, it would have been better to correct the mistake at that time. However, that error on the part of counsel does not make the employee vicariously responsible for the *judge's* error regarding the dates of injury. It was distinctly unfair for the judge to use this issue against the employee as a factor in discrediting his testimony. These bases for the judge's credibility findings are arbitrary and capricious.

We do not accord deference to credibility findings that bear no relation to the issues that are in dispute at hearing. Pittsley v. Kingston Propane, Inc., 16 Mass. Workers' Comp. Rep. ___ (2002); Frey v. Mulligan Inc., 16 Mass. Workers' Comp. Rep. ___ (2002).

Finally, the judge erred by listing as witnesses people who did not testify (Maria Correia and Susan Costa), one of whose "testimony" (Maria Correia) he specifically

credited (Dec. 5.) Compare Provost v. John Peabody, Inc., 11 Mass. Workers' Comp. Rep. 352 (1997) (administrative judge's findings that were essential to a determination of fraud by the employee based on nonexistent witness constituted an error so fundamental that it could not be overlooked as harmless even though a witness may have given testimony similar to that attributed in the decision to the nonexistent witness).[1]

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

So ordered.

_____
Martine Carroll
Administrative Law Judge

_____
Sara Holmes Wilson
Administrative Law Judge

_____
Susan Maze-Rothstein
Administrative Law Judge

Filed: **October 8, 2002**
MC/jdm

[1] One of the employee's witnesses, Euselio Bodelho was also omitted from the decision's list of witnesses, (Dec. 1), but his testimony was discussed (Dec. 6.)