COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 96031-88**

Merton E. Round, Jr.	Employee
King Size Company	Employer
American International Adjustment Company	Insurer

REVIEWING BOARD DECISION
(Judges Wilson, McCarthy and Smith)

APPEARANCES
Lawrence R. Holland, Esq., and Paul R. DeRensis, Esq., for the employee
Justin F.X. Kennedy, Esq., for the insurer

WILSON, J. The insurer appeals a decision in which the administrative judge, over the insurer's objection, allowed the employee's introduction of a report of a licensed social worker to support his claim of a mental or emotional industrial injury. Because there is no exception to the inadmissibility of such hearsay evidence, the admission of the report was erroneous. Moreover, the judge's specific reliance on the report in awarding benefits renders the error prejudicial, rather than harmless. We therefore recommit the case for further findings without consideration of the social worker's report.[1]

The employee suffered an emotional injury within the meaning of G.L. c. 152, § 1(7A), related to a series of events at work in 1988-1989. (Dec. 5-6, 9.) In reaching this conclusion, the judge weighed conflicting medical opinions of the employee's and the insurer's experts. The judge made the following general finding:

> The decision of this case turns upon which medical expert's opinion I accept. I conclude that Dr. Beckhardt's [employee's expert psychiatrist] opinion is more probably correct. I reject Dr. Bursztajn's [insurer's expert psychiatrist] opinion as not likely correct for several reasons. . . . Finally, *three mental health experts, Dr. Beckhardt, Dr. Salzman and Mr. Griffin, diagnosed the employee with persistent depression complicated by his personality traits. I found those diagnoses to be*

[1] We do not find merit in the insurer's other arguments.

> *more reasonable and mutually reinforcing, so that I believe it is more likely than not that Dr. Beckhardt's opinion is correct.*

(Dec. 9-10; emphasis added.)

The insurer objected to the admission of Mr. Griffin's report, (Employee's Ex. 4), as he is a licensed social worker, and not a physician. (August 6, 1996 Tr. 3-4.) Physicians' opinions are admissible in workers' compensation hearings under 452 Code Mass. Regs. §1.11(6): "[A] party may offer as evidence medical reports prepared by physicians engaged by said party, together with a statement of said physicians' qualifications." Social workers are accorded no such privileged treatment. Nor is there any other statutory or common law hearsay exception that would aid the employee here. Nonetheless, the judge admitted Mr. Griffin's report into evidence, despite the hearsay rule, when the proper ruling was to sustain the insurer's objection to the introduction of Mr. Griffin's report.

As with all issues concerning evidentiary rulings on appeal, however, we must determine whether the erroneous ruling affected the substantial rights of a party: namely, whether it could have materially affected the result. See DeJesus v. Yogel, 404 Mass. 44, 47- 48 & n.4 (1989). We cannot say, in light of the emphasized language quoted from the decision above, that the error in admitting Mr. Griffin's report was harmless. The present case is governed by Gompers v. Finnell, 35 Mass. App. Ct. 91 (1993). In that opinion, the Appeals Court remanded the case for a new trial because the judge had erroneously admitted hearsay statements of hospital personnel (other than doctors) that went to causal relationship of the plaintiff's injuries. Id. at 93-95. The court concluded: "Because the inadmissible opinions went to a central issue in the case, as to which the two expert witnesses were in sharp dispute, we have no basis for deeming the errors harmless. Compare Grant v. Lewis/Boyle, Inc., 408 Mass. 269, 275 (1990)" Id. at 95.

In the present case, as well, Mr. Griffin's opinion went to a central issue in the case -- the dispute between the employee's and the insurer's experts over medical causation. We cannot say that the admission did not materially affect the result, particularly because the judge explicitly concluded that the diagnoses of the employee's

experts, including that of the social worker, Mr. Griffin, were "mutually reinforcing[.]" (Dec. 10.) It was on this basis that the judge found the employee's medical evidence more persuasive than that of the insurer's expert. (Dec. 9-10.) Moreover, because the present case turns on conflicting medical opinion, it is distinguishable from cases such as Bendett v. Bendett, 315 Mass. 59, 65-66 (1943), where the court held the admission of cumulative evidence, "that add[ed] nothing to evidence already in the case," indicated no probability of prejudice.

> The plaintiff had already testified, without objection, to the items of account contained in the book, using the book to refresh his memory of those items. He had been cross-examined about those items. Thus the jury had been made familiar with everything material that was contained in the book. The admission of the [hearsay] book in evidence merely put before [the jury's] eyes what they knew already. . . . We do not see how the defendant was harmed.

Id. at 65. See also id. at 66 for other cases of harmless error in admitting or excluding cumulative hearsay evidence.

Because the judge relied on the improperly admitted report that was not cumulative as a matter of law, we vacate the decision, and recommit the case to the administrative judge for a new decision without consideration of the social worker's report.

So ordered.

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Sara Holmes Wilson
Administrative Law Judge

Filed: April 28, 1999

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Suzanne E.K. Smith
Administrative Law Judge

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William A. McCarthy
Administrative Law Judge