COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 024199-08**

Phillip B. Strength	Employee
Siemens Westinghouse Generator Service, Inc.	Employer
Liberty Mutual Insurance Co.	Insurer

REVIEWING BOARD DECISION
(Judges Fabricant, Koziol and Levine)

The case was heard by Administrative Judge Jacques.

APPEARANCES
Steven M. Buckley, Esq., for the employee
Jean M. Shea Budrow, Esq., for the insurer

FABRICANT, J. The employee appeals from a decision in which the administrative judge denied and dismissed his claim for benefits, finding the work injury described in his testimony did not occur. We affirm the decision.

The judge found that the employee is a millwright who performed heavy labor throughout his entire career. He began working for the employer in March 2008, and was required to attend regularly scheduled safety meetings in which the importance of prompt reporting of injuries was stressed. The employee testified that on May 19, 2008, he was moving a two hundred fifty pound turbine part when he heard a pop in his left shoulder and experienced immediate pain. The employee described working with pain for the next few days before requesting a layoff in order to return to his home in Montana. The employee never reported the May 19, 2008 incident to the employer, whose first notice of the incident was the filing of the present claim for benefits in September 2008. (Dec. 5-7.)

On May 30, 2008, the employee saw his primary care physician and was informed that he suffered from congestive heart failure and diabetes. Although the employee's injury is alleged to have occurred less than two weeks prior to these diagnoses, there is no mention of it anywhere in that medical record. (Dec. 7.)

Additionally, the medical records from a subsequent cardiologist appointment and a follow up appointment with his primary care physician in late June 2008 are, likewise, devoid of any reference to a work injury to the left shoulder. (Dec. 8.) In fact, the first recorded reference to any left shoulder pain appears in the notes of a follow-up exam on July 7, 2008 in which the employee complained of shoulder pain which "*started last fall*" about "*8 or 10 months* ago when he was back east." (Dec. 9; emphasis added.) Additionally, notes from the employee's orthopedic surgeon on July 17, 2008 indicate that he complained of left shoulder pain which had been bothering him for over a year. (Dec. 9.) The judge did not credit the employee's testimony that his medical providers all failed to accurately record his medical history as he reported it to them. (Dec. 10.)

Although the § 11A impartial physician wrote that the employee reported a left shoulder injury while working on May 19, 2008, the doctor did not opine on any causal relationship in his report. (Ex. 1.) The judge denied the claim. She concluded: 1) the employee's account of his work injury lacked credibility because of his failure to report it to his employer; 2) the numerous contemporaneous medical records omitted any history of the event; 3) the chronology in later records established shoulder pain well before the alleged work incident of May 2008; and, 4) the employee's testimony alleging his medical providers erred in recording the history of his injury lacked credibility. (Dec. 10-11.)

The employee's argument on appeal is essentially a challenge to the judge's credibility findings. As such, it lacks merit. See Figueiredo's Case, 49 Mass. App. Ct. 906, 907 (2000)(credibility findings not subject to appellate review); Fortier v. Ambulance Sys. of America, 13 Mass. Workers' Comp. Rep. 442, 444 (1999)(same). The judge was free to find that the employee's testimony at hearing was impeached by the lack of any mention of the injury in the many medical records introduced for that limited purpose. See Faieta, III v. Boston Globe Newspaper Co., 18 Mass. Workers' Comp. Rep. 1, 5-7 (2004)(discussion of proper limited use of medical records for impeachment of employee, particularly as to absence of reference of

injury therein). Moreover, the employee argues that the impartial medical opinion was inadequate due to the rejection of the history upon which it was based. See Lorden's Case, 48 Mass. App. Ct. 274, 279-280 (1999). However, because the employee did not move for a finding of inadequacy at hearing, that issue is not properly before us. See Viveiros's Case, 53 Mass. App. Ct. 296, 300 (2001).

The employee's argument targeting the judge's lack of findings on the issue of medical causation is without merit. While the impartial physician's failure to opine on causal relationship might normally render the report inadequate, (Dec. 3, n. 2), the judge's decision was, instead, based on liability, i.e., whether the incident occurred. Having found that the injury did not occur as the employee testified, the lack of a causation opinion is moot. Moreover, the impartial physician's deposition testimony urged by the employee, (e.g., Dep. 50), could not be adopted because the judge rejected the history it was based upon. See Tran v. Constitution Seafoods, Inc., 17 Mass. Workers' Comp. Rep. 312, 319 (2003)(judge free to disregard impartial doctor's opinion based on history which judge discredited); Tucker v. Stanley & Sons, Inc., 24 Mass. Workers' Comp. Rep.___ (2010).

The other issues argued by the employee on appeal lack merit. Accordingly, the decision is affirmed.

So ordered.

Bernard W. Fabricant
Administrative Law Judge

Catherine Watson Koziol
Administrative Law Judge

Frederick E. Levine
Administrative Law Judge

Filed: