COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 011325-98**

Phuc Tran	Employee
Constitution Seafoods, Inc.	Employer
Legion Insurance Company	Insurer

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

APPEARANCES
Michael W. Zinni, Esq., for the employee
Donald E. Hamill, Jr., Esq., for the insurer

COSTIGAN, J. The employee appeals from a decision in which the administrative judge found him not credible and denied his claim for further weekly incapacity benefits. The employee had claimed temporary total incapacity benefits under G. L. c. 152, § 34, from December 4, 1998 to January 21, 2002, and permanent and total incapacity benefits under § 34A thereafter.[1]

The employee mounts five challenges to the judge's decision. First, he contends that the § 11A impartial medical examiner's opinion of permanent partial disability warranted an award of incapacity benefits. Second, he argues that the

[1] The insurer had resisted the employee's original claim. After a § 10A conference, the judge ordered the insurer to pay § 34 benefits from January 19, 1998, the date of the employee's alleged injury, (Dec. 6), to December 4, 1998, on or about which date he suffered a stroke. (Dec. 7.) Even the employee's medical expert acknowledged that the stroke was unrelated to the industrial injury. (Dec. 14.) The insurer appealed from the conference order but the employee did not. The insurer subsequently withdrew its appeal, (Dec. 2), thereby accepting liability and conceding temporary total incapacity to December 4, 1998. "Failure to file a timely appeal [of a conference order] or withdrawal of a timely appeal shall be deemed to be acceptance of the administrative judge's order and findings. . . ." G. L. c. 152, § 10A(3). The employee petitioned the commissioner of the department for permission to file a late appeal of the conference order, see id., but his petition was denied. (Dec. 2.) He then filed the instant claim, which was denied by the judge at conference, and again in the hearing decision we review.

impartial physician's opinion regarding the need for medical treatment to address the employee's diagnosed occipital neuritis warranted an award of medical benefits under § 30. Third, the employee posits that the judge erred in adopting an expert medical opinion which did not factor in the effects of the employee's stroke. Fourth, he maintains that the judge's finding of no incapacity is based on inconsistent or erroneous subsidiary findings. Fifth and finally, the employee argues that based on the insurer's withdrawal of its § 10A appeal and the judge's adoption of an expert medical opinion which spoke to a work capacity only as of May 24, 1999, he was at least entitled to an award of incapacity benefits from December 4, 1998 to that date. Finding no merit in any of these arguments, we affirm the judge's decision.

The employee, fifty years old at the time of hearing, was born in Vietnam and completed six years of schooling there. (Dec. 5.) He worked as a fisherman for fifteen years in Vietnam and served in the Vietnamese Army. (Dec. 6.) He immigrated to the United States in 1982, (Dec. 5), and worked as a fish cutter for various employers since that time. He began work for Constitution Seafoods in March 1997. His work as a fish cutter was physically intensive and tiring, requiring him to carry, sometimes alone and sometimes with the assistance of co-workers, baskets of fish weighing up to one hundred pounds, to a table where he cut the fish with a knife. (Dec. 6.)

On January 19, 1998, the employee slipped on a plastic bag at work and fell backward onto the cement floor.[2] The employee's supervisor drove him to the

[2] The administrative judge specifically discredited the employee's testimony, (Tr. 18, 39-40), that he passed out when he fell. (Dec. 6.)

Carney Hospital for treatment, where an interpreter assisted him.[3] The employee complained of low back pain, and x-rays of his lumbar spine were taken. That hospital record, offered by the insurer and admitted into evidence, (Ex. 9), does not refer to the employee having passed out or having sustained a head or neck injury. (Dec. 6.) The employee underwent a course of physical therapy for four or five months post-injury. In December 1998, the employee felt dizzy and was taken to the hospital where he was diagnosed as having a stroke.[4] (Dec. 7.)

Pursuant to the employee's appeal of the conference denial of his claim, he was evaluated on March 1, 2001 by Dr. Michael H. Freed, the § 11A impartial medical examiner. Dr. Freed diagnosed a large, central disc herniation at L3-4, which he causally related to the employee's industrial injury, but he found no objective evidence of radiculitis. Rather, he reported his concern about the employee's symptom amplification. The doctor opined that a cervical MRI scan should be obtained to address the diagnosis of occipital neuritis, but that the employee had reached a medical end result and was permanently partially medically disabled as a result of the industrial injury. (Dec. 7-8.)

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[3] The employee was assisted by a "professional translator" at the § 11A impartial medical examination. (Ex. 2, 1; Ex. 6, 10-11, 13, 28.) He also testified through an interpreter at the hearing. (Dec. 3.) The judge noted the employee's testimony that he is able to read and write only Vietnamese, (Tr. 10-11), but he specifically credited the employee's later testimony, (Tr. 51), that he took his driver's license examination in English. (Dec. 5-6.)

[4] The employee testified that he was scheduled to undergo back surgery by Dr. Selland on the day he suffered the stroke. (Tr. 25, 43-44, 57.) The judge requested that the employee produce records from the doctor confirming that surgery was not only proposed but scheduled. (Tr. 44-45.) An August 9, 2001 report from Dr. Selland stated only that, "he was advised to undergo surgery, but unfortunately experienced a stroke. . . ." (Ex. 8.) The judge noted that although this report confirmed that surgery had been proposed, no records were produced confirming that surgery had been scheduled. The judge inferred from that fact that such records did not exist. (Dec. 7.) Contrary to the employee's argument, that inference was permissible under the circumstances, and supportive of the judge's credibility findings. Compare Truong v. Chesterton, 15 Mass. Workers' Comp. Rep. 247, 249-251 (2001) (judge's inference that surgery had been considered before employee's alleged work injury not supported by the evidence and, thus, not reasonable).

The employee deposed the § 11A physician for the purpose of cross-examination on August 17, 2001. Citing numerous examples, Dr. Freed reiterated his opinion as to the employee's symptom amplification/magnification, (Ex. 6, 13-16, 35-36, 41-42), although he acknowledged that the employee's complaints of pain in his lumbar region and buttocks were "consistent with" and "appropriate for" the herniated disc. (Ex. 6, 15-16, 57-58.) Dr. Freed opined that the employee's headache complaint "maybe . . . was consistent with occipital neuritis," which, though not causally related to the lumbar disc herniation, was causally related to the industrial accident. (Ex. 6, 17-18.) The doctor opined that based on his March 1, 2001 examination, the employee was not capable of performing his fish cutter's job, (Ex. 6, 23-24), and that he had "plateaued" with a permanent partial impairment of thirteen per cent under AMA guidelines.[5] (Ex. 6, 22.)

Initially, the administrative judge found the § 11 report adequate except for the "gap period" prior to the March 1, 2001 impartial medical examination. (Dec. 4.) Following the hearing and his review of Dr. Freed's deposition testimony, the judge ruled that the medical issues were complex, particularly with respect to disability and extent of disability. (Dec. 4.) The parties therefore were allowed to submit additional medical evidence outside of the "gap period." The employee submitted two reports from his treating osteopath, Dr. Curtis Penney, dated January 23, 2001 and May 20, 2001, and the August 9, 2001 report of Dr. Selland. (Ex. 8.) The insurer submitted the Carney Hospital records for the employee's January 19, 1998 emergency admission, (Ex. 9), the July 27, 1998, May 24, 1999

[5] In his report, the doctor had noted a *fifteen* per cent permanent partial *disability* of the whole body. (Ex. 2, 5.) At deposition, he corrected what he termed those "two typographical errors." (Ex. 6, 22.) These were more than scrivener's errors, however. The impartial physician's report is the equivalent of the doctor's testimony on direct examination, and "[e]ither party shall have the right to engage the impartial medical examiner to be deposed for purposes of *cross-examination*." G. L. c. 152, § 11A(2) (emphasis added).

and August 7, 2000 reports of its medical expert, William Donahue, M.D., and the doctor's deposition testimony. (Ex. 7.)

Adopting, in part, the opinions of Dr. Freed, the administrative judge found that the employee's diagnosed large central disc herniation at L3-4 was causally related to the industrial injury, that the employee had reached a medical end result, that there was no objective evidence of radiculitis, and that, due to the herniation, the employee was "partially disabled." (Dec. 15.) The judge also adopted, in part, the opinion of Dr. Donahue, the insurer's medical expert, that the employee was able to work without limitation as of May 24, 1999. The judge noted that "[i]nsofar as the employee has not provided credible testimony that his condition has worsened since this date, I find that since that date he has been able to work without limitations." (Id.) The judge further adopted "all of Drs. Freed's and Donahue's opinions regarding symptom amplification," and he discredited the opinions of Dr. Selland. As to the employee's other medical expert, the judge found that Dr. Penney's reports were devoid of any opinion as to disability. (Id.)

Based on the absence of a corroborating history in the Carney Hospital records, (Ex. 9), the administrative judge discredited the employee's testimony that he had injured his head and neck, and had passed out, when he fell at work on January 18, 1998. (Dec. 16.) The judge did not credit the employee's subjective complaints of pain, as testified to and reported to Drs. Freed and Donahue, (id.), and for that reason, he ruled that any medical treatment for pain that the employee had prior to the decision was not compensable. (Dec. 18.) The judge denied the employee's claim for weekly benefits. (Id.)

The employee first argues that "the Impartial Physician's opinion of a permanent partial disability warrants an award of benefits." (Employee brief 1, 5-6.) We disagree for several reasons, including that the employee misstates the doctor's opinion. Dr. Freed testified that, contrary to his written report, (Ex. 2, 5), the employee did not have a *fifteen* per cent permanent partial medical *disability*, but rather a *thirteen* per cent permanent *impairment* of the whole person,

according to the American Medical Association guidelines. (Ex. 6, 23-24.) See footnote 5, supra. As a general rule, "the opinion of an expert which must be taken as his evidence is his final conclusion at the moment of testifying." Perangelo's Case, 277 Mass. 59, 64 (1931). Therefore, the judge should not have cited to the § 11A report as support for his finding that the employee "is partially disabled." (Dec. 15.) Just as medical disability and incapacity are not equivalent terms, Casagrande v. Massachusetts Gen. Hosp., 12 Mass. Workers' Comp. Rep. 137, 139 (1998), medical disability and impairment are different. The impartial doctor explained the difference:

> Impairment is the loss of a particular body function. The disability is the inability of that patient to do things as a result of that loss. There can be individuals who are severely impaired who are very able and vice versa.

(Ex. 6, 52.) For that reason, the employee's argument that the judge should have awarded him at least partial incapacity benefits fails.

Dr. Freed did opine that, as of his March 1, 2001 examination, the employee could not then return to work as a fish cutter, but this medical disability opinion likewise did not require the judge to award § 35 benefits. It is axiomatic that an opinion of medical disability does not mandate a finding of compensable incapacity. "[T]he history upon which the medical expert relies is crucial to his opinion." Saccone v. Department of Pub. Health, 13 Mass. Workers' Comp. Rep. 280, 282 (1999), citing Patient v. Harrington & Richardson, 9 Mass. Workers' Comp. Rep. 679, 682 (1995).

> Although the extent of medical limitations and the causal relationship of those limitations to a work injury are matters usually beyond the common knowledge and experience of lay persons and require expert testimony, the weight assigned an expert's opinion is dependent upon the accuracy of the facts assumed by the expert. See Galloway's Case, 354 Mass. 427, 431 (1968); Cormier's Case, 337 Mass. 714, 716 (1958).

Id.

It is well-established that a judge may consider the employee's pain to find total incapacity despite a medical opinion that the employee has some physical ability to work. Anderson v. Anderson Motor Lines, 4 Mass. Workers' Comp. Rep. 65, 68 (1990). However, the converse is equally true. Provided his credibility assessment is not arbitrary or capricious, see Melendez v. City of Lawrence, 16 Mass. Workers' Comp. Rep. 370, 374 (2002), a judge's disbelief of an employee's testimony about the occurrence of an injury, the nature of the injury sustained, and/or his complaints of pain and physical restriction, can trump an expert medical opinion of causal relationship, disability and/or the need for medical treatment. Kelleher v. United Parcel Serv., 10 Mass. Workers' Comp. Rep. 735, 736-737 (1996)(impartial physician's equivocal opinion regarding causal relationship of employee's right knee condition to physical therapy for work-related left elbow injury irrelevant because judge discredited employee's account of origin of knee pain). Compare Cipoletta v. Metropolitan Dist. Comm'n, 12 Mass. Workers' Comp. Rep. 206, 208 (1998)(judge could not properly discredit employee's subjective reports of pain and adopt expert medical opinion of total disability based solely on those reports).

The judge did not, as the employee argues, "substitute his own opinion for that of the prima facie opinion of the Sec. 11A medical expert."[6] (Employee brief 6.) As reflected in his decision, the judge simply did not believe the employee's complaints and, therefore, he was not bound to award compensation based on the § 11A doctor's medical disability opinion which assumed the veracity of those

[6] Not only does the employee misconstrue the § 11A opinion, he misapprehends the evidentiary weight it carried. Once additional medical evidence, warranting a contrary conclusion, is admitted, as it was in this case for reasons of medical complexity, (Dec. 4), the prima facie effect of the impartial physician's testimony ends. It no longer has special weight. "[T]he prima facie evidence in the impartial report loses its artificial legal force when it is met with other evidence that warrants a contrary conclusion." Bedgunis v. Paul McGuire Chevrolet, 9 Mass. Workers' Comp. Rep. 801, 803 (1995), citing Cook v. Farm Serv. Stores, 301 Mass. 564, 566 (1938).

complaints.[7]

Moreover, Dr. Freed opined that notwithstanding the disc herniation, he found no objective evidence of radiculitis or lumbar radiculopathy, (Ex. 2, 4; Ex. 6, 24-26, 42-44), but ample evidence of symptom amplification by the employee. (Ex. 2, 4-5; Ex. 6, 13-17, 35-36, 40-42, 55-56.) The insurer's medical expert echoed that opinion. (Ex. 7, 11-13, 16-18, 22, 29-31, 37-38.) In light of those expert medical opinions, the judge's credibility findings are neither arbitrary nor capricious, and we will not disturb them. Lagos v. Mary A. Jennings, Inc., 14 Mass. Workers' Comp. Rep. 21, 26 (2000), citing Lettich's Case, 403 Mass. 389, 394 (1988).

It is axiomatic that "the ultimate probative value of the medical testimony is to be weighed by the administrative judge." Barbieri v. Johnson Equip., 8 Mass. Workers' Comp. Rep. 90, 93 (1994), citing Robinson v. Contributory Retirement Appeals Bd., 20 Mass. App. Ct. 634, 639 (1984). The administrative judge was free to adopt all, part, or none of any of those expert medical opinions, Hannon v. Gillette Co., 7 Mass. Workers' Comp. Rep. 287, 291 (1993), and his credibility

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[7] Notwithstanding his adoption of Dr. Freed's opinion as to partial medical disability, the judge inferred that the opinion was "based upon subjective complaints of pain." (Dec. 9.) He need not have drawn such an inference, given Dr. Freed's direct testimony that none of his findings upon examination of the employee was objective:

> Q. And would it be fair to say, then, that the examination of the cervical spine, the lumbar spine, and your neurological examination -- that any findings that were made, number one, were subjective in nature, is that correct? They were subjective findings as opposed to objective findings?
> A. Yes.
> Q. And, number two, that there was significant symptom magnification throughout the cervical and the lumbar examination?
> A. Yes.
> Q. And when we talk about symptom magnification, Doctor, are we talking about the ability for the examiner to attribute veracity to the complaints of pain that the individual is making?
> A. It does make it difficult for us.

(Ex. 6, 41-42.)

findings were a valid reason not to adopt the § 11A examiner's opinion as to disability, such as it was.

For that same reason, Dr. Freed's opinions as to the diagnosis of occipital neuritis, its causal connection to the employee's slip and fall injury, and the need for medical treatment, did not, as the employee argues, require the judge to award the employee medical benefits for that condition. The doctor's report reflects that the history of injury he received from the employee was that

> [h]e was carrying a tray of fish and ice, weighing approximately 100 pounds. He was using both upper extremities. He slipped on water, falling backwards. *He landed on his back and struck his head. He was rendered unconscious for a couple of minutes.*

(Ex. 2, 1; emphasis added.) The judge, however, did not credit the employee's testimony that he passed out or that injured his head or neck when he fell. (Dec. 6.) As "the weight assigned an expert's opinion is dependent upon the accuracy of the facts assumed by the expert," Patient, supra at 682, based on the judge's credibility findings as to the nature and extent of the employee's injury, there was no error in his denial of medical benefits for occipital neuritis.

The employee next argues that the judge erred in adopting Dr. Donahue's opinion that, as of his May 24, 1999 examination, the employee was able to work without limitations. (Ex. 7, 18.) The employee cites to the doctor's acknowledged failure to take into account the employee's stroke when opining as to the employee's work capacity. (Id. at 38.) The doctor's concession notwithstanding, the law is clear that such after-occurring, non-related medical conditions cannot factor into the judge's analysis of an employee's incapacity. Where, as here, the employee has a work-related injury (to his low back), followed by a disease or injury unrelated to his employment (the stroke), the judge must " 'narrowly focus on and determine the extent of physical injury or harm to the body that is causally related solely to the work injury.' " Cordi v. American Saw & Mfg. Co., 16 Mass. Workers' Comp. Rep. 39, 45 (2002), quoting Patient, supra at 683. "[T]he

determination is limited to incapacity caused not by the blend of the work injury and the after-occurring malaise, but by the work-related condition alone." Simoes v. Town of Braintree School Dept., 10 Mass. Workers' Comp. Rep. 772, 774 (1996). The judge correctly excluded from his incapacity analysis the effects of the employee's unrelated stroke.

The employee stands on no better ground in his next argument. He contends that because the insurer had conceded total disability to December 4, 1998 by withdrawing its appeal of the § 10A conference order, and the adopted opinion of Dr. Donahue spoke only to the employee's full work ability as of May 24, 1999,[8] he was entitled to weekly total incapacity benefits for the period between those two dates. Again, we disagree.

It is axiomatic that the employee bore the burden of proving every element of his claim, including the extent and duration of his incapacity. Valdes v. Tewksbury Hosp., 16 Mass. Workers' Comp. Rep. 196, 198 (2002), citing Ginley's Case, 244 Mass. 346, 347-348 (1923). The judge's allowance of additional medical evidence for the pre-impartial examination gap period, (Dec. 4), afforded the employee the opportunity to do so. See O'Brien's Case, 424 Mass. 16 (1996).

Having reviewed the employee's medical evidence, (Ex. 8), we find no opinion which could satisfy the employee's burden of proof for the period at issue. As the judge correctly noted, Dr. Penney's reports of January 23, 2001 and May

[8] Dr. Donahue's May 24, 1999 examination of the employee was the second of three he performed on behalf of the insurer. See G. L. c. 152, § 45. All three of his reports were offered as exhibits at his August 20, 2001 deposition. (Ex. 7, 13, 18, 23.) Based on his first examination of the employee on July 27, 1998, the doctor testified that he was "unable to find an objective basis for orthopedic impairment," and, "[h]aving found no impairment, I would be unable to find a disability or reason for restricting employment." (Id. at 12.) Although the doctor's opinion was irrelevant for the period from July 27, 1998 to December 4, 1998, because the extent of the employee's incapacity benefits during that period was not an issue in controversy, see footnote 1 infra and Medley v. E. F. Hauserman Co., 14 Mass. Workers' Comp. Rep. 327, 329 (2000), the judge could have relied on and adopted Dr. Donahue's July 27, 1998 opinion to find no compensable incapacity from and after December 4, 1998.

20, 2001 are devoid of an opinion as to the extent of the employee's medical disability. (Dec. 14, 15.) Dr. Selland's report of August 9, 2001 contains his findings on physical examination of the employee when he last saw him on June 20, 2000, and the doctor's opinions that "his back condition is directly related to his 1/19/98 [sic] work related injury," and "he *is disabled* from gainful employment of any type on the basis of his back injury, as a direct result of the 1/19/98 [sic] work related injury." (Ex. 8; emphasis added.) Because these opinions attest to the employee's medical disability in June 2000, and are without any qualifying language as to its extent, i.e., partial or total, we do not think they satisfy the employee's burden of proving total incapacity from December 4, 1998 to May 24, 1999. We need not so decide, however, because, as was his prerogative, the judge did not credit Dr. Selland's opinions. (Dec. 15.)

Lastly, for all of the reasons discussed, we see no merit to the employee's argument that the judge's subsidiary findings as to disability were inconsistent or erroneous. The judge's findings, particularly his credibility findings, are unambiguous and do allow us to determine with reasonable certainty that correct rules of law were applied to facts that were properly found. Lockheart v. Wakefield Eng'g, 16 Mass. Workers' Comp. Rep. 302, 304 (2002), quoting Praetz v. Factory Mut. Eng'g & Research, 7 Mass. Workers' Comp. Rep. 45, 47 (1993); G. L. c. 152, §§ 11B, 11C. Accordingly, we affirm the decision.

So ordered.

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Patricia A. Costigan
Administrative Law Judge

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Susan Maze-Rothstein
Administrative Law Judge

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Martine Carroll
Administrative Law Judge

Filed: **June 26, 2003**