COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS

BOARD NO. 018035-00

Ramon Frometa	Employee
Boston Marine Intermodel, Inc.	Employer
Arbella Protection Insurance Co.	Insurer

REVIEWING BOARD DECISION
(Judges Koziol, Horan and Fabricant)

The case was heard by Administrative Judge Hernández.

APPEARANCES
Paul F. Murphy, Esq., for the employee
Shawn F. Mullen, Esq., for the insurer

KOZIOL, J. The employee appeals from a decision authorizing the insurer to discontinue weekly § 34 total incapacity benefits as of the date of their exhaustion on May 3, 2003, denying his claim for § 34A benefits, awarding him reasonable §§ 13 and 30 medical benefits for his work-related physical injuries only, and denying his claim for medical treatment for his alleged psychological injuries. Finding no error requiring recommittal or reversal, we affirm the decision.

In 1993, Ramon Frometa immigrated to the United States from Cuba, where he had completed the tenth grade. He speaks little English, and since 1995, has worked primarily as a truck driver.[1] (Dec. 7-8.) On May 3, 2000, his tractor-trailer truck

[1] The decision states Mr. Frometa was a self-employed truck driver. (Dec. 8.) However, the insurer does not dispute that he was an employee of the employer and the transcript indicates that although the employee provided the truck, the employer told him where to deliver their products. (1/26/04 Tr. 54.) Although the decision also states the employee purchased the truck, (Dec. 8), the employee testified that Nelson Baptiste was listed as the truck's owner because the employee could not obtain financing to purchase the truck. (11/10/03 Tr. 43). As a result, he paid Mr. Baptiste $6,000, and was making monthly payments for the truck at the time of the accident. (1/26/04 Tr. 50-54.)

jackknifed on an exit ramp, and the trailer, but not the cab, rolled over.[2] The employee was discovered walking around the scene of the accident and was transported to the hospital. The admission records indicate he was wearing his seatbelt and sustained no major injuries, although he complained of pain in his neck, back, right ankle and right knee. The employee denied loss of consciousness or having struck his head. (Dec. 8.) Following normal x-rays and CT scans, he was discharged with a diagnosis of multiple contusions and sprains. (Dec. 9.)

Complaining mainly of low and mid-back pain and headaches, the employee began chiropractic treatment on May 17, 2000. On May 23, 2000, he underwent a brain MRI, which was normal. From June 23, 2000 through July 4, 2000, he was hospitalized at Beth Israel Deaconess Medical Center (Beth Israel) for suicidal ideation, fears he would harm his wife, and auditory hallucinations. (Dec. 9-10.)

The insurer accepted liability for the industrial accident and paid the employee weekly § 34 total incapacity benefits, based on his physical injuries, from the date of the accident, May 3, 2000, and continuing.. On July 2, 2002, the insurer filed a complaint to discontinue benefits based on an evaluation by a multidisciplinary panel of physicians. Following a § 10A conference, an administrative judge denied both the insurer's complaint to discontinue, and the employee's claim for prescription medications and treatment of his psychiatric disorder. (Dec. 4.) The insurer appealed, and two § 11A examinations were scheduled: one with Dr. Harry Senger, a psychiatrist, and the other with Dr. Thomas Sciascia, a neurologist. (Dec. 4, 15, 16.) Prior to the hearing, the judge allowed the employee's motion to join a claim for § 34A permanent and total incapacity benefits. (Dec. 4.)

By the time of the hearing the employee had undergone further psychiatric evaluations and treatment, including two more in-patient admissions at Beth Israel, from May 25, 2001 to June 6, 2001, and from March 15, 2002 through March 18,

[2] After the accident, "[t]he truck didn't work at all," (11/10/03 Tr. 43), and the employee learned there was no insurance coverage to repair it. (1/26/04 Tr. 53.)

2002. (Dec. 3; Ex. 19.) He was given multiple diagnoses, including major depressive disorder, organic brain injury and seizure disorder, chronic headaches, and severe uncontrolled hypertension. (Dec. 12.) Several physicians noted factors which impacted the employee's psychiatric condition, including unemployment and financial stress due to the loss of his truck, which made him unable to support his family in the United States, as well as his parents and three of his children who lived in Cuba. The employee was especially concerned about his father, who had suffered a stroke, and his mother, whom he felt could not live without his support. (Dec. 9, 10, 14.) In September 2003, he began electro-convulsive therapy for his depression, with little relief. (Dec. 15.) On October 23, 2003, two of his treating physicians, Dr. Perez-Cahill and Dr. Bullon, opined the employee's severe depression was caused by the trauma of his truck accident, and had permanently disabled him. (Dec. 15.)

The matter was then assigned to the administrative judge who conducted the hearing. At the hearing, the insurer denied any causal relationship between the employee's psychiatric condition and the accident, alleged the employee suffered from a pre-existing psychiatric condition, and raised § 1(7A)'s "a major cause" standard as a defense. The insurer also contended the employee's physical condition had resolved. (Dec. 5.) The judge found the medical issues complex and allowed the insurer's motion to submit additional medical evidence. The parties jointly submitted substantial additional medical records and they took the deposition testimony of both impartial physicians, the employee's treating psychologist, Dr. Perez-Cahill, and the insurer's panel psychiatrist, Dr. Joseph Strang. (Dec. 6.)

After discussing the opinions of numerous medical providers whose records were admitted, the judge adopted those of Dr. Strang, the insurer's panel psychiatrist, and Dr. Sciascia, the impartial neurologist:[3]

[3] The judge thoroughly recounted Dr. Strang's opinions regarding the employee's psychiatric condition and made specific detailed findings and rulings adopting those opinions. (Dec. 21-25, 33-36.) Though Dr. Sciascia's report contained his initial opinion that a causal connection existed between the employee's depression and the truck accident, after reviewing additional medical records at deposition, he testified that the *only* connection

> I adopt the opinions of Dr. Strang and Dr. Sciascia and find that the Employee's psychological/psychiatric problems are the result of his reaction to economic and social factors that are not causally related from [sic] the injuries suffered in the accident. I adopt the opinions of Dr. Strang and Dr. Sciascia and find that the Employee's psychiatric/psychological symptoms are related to the economic loss of his truck and his inability to earn money and support his family in Cuba. I find that the Employee's psychiatric injuries are causally related to economic factors and are not compensable under Chapter 152.

(Dec. 32-33.) The judge also adopted the opinion of Dr. Mercer, a neurologist, and Dr. Glick, an orthopedist, that the employee had no residual physical disabilities related to the accident.[4] (Dec. 35.) The judge ultimately concluded:

> I adopt the opinions of Dr. Sciascia and Dr. Strang and find that there is no medical nexus between the Employee's psychiatric condition and any medical condition or any of the medical injuries which did occur in the motor vehicle accident. I find that the Employee did not suffer a head injury in the accident. I do not credit the Employee's testimony as to depressive symptoms. I find that the medical evidence does not support that the Employee suffered an industrial injury that caused him to suffer from a seizure disorder. I find that the Employee's depression is related to economic and social factors and unrelated to any physical injury sustained in the motor vehicle accident.

(Dec. 37.)

The judge authorized the insurer to discontinue the employee's § 34 benefits as of May 3, 2003, the date on which they expired,[5] but ordered it to pay reasonable

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between the accident and the employee's psychological deterioration was temporal. (Dec. 18.) See Perangelo's Case, 277 Mass. 59, 64 (1931)("opinion of an expert which must be taken as his evidence is his final conclusion at the moment of testifying"). Dr. Sciascia did not believe the employee had suffered any gross brain damage due to the accident or that there was objective evidence the employee had a seizure disorder. (Dec. 17.) He testified the employee did not have a disability related to a neurologic physical condition. (Dec. 18.)

[4] Dr. Mercer opined the employee suffered cervical, thoracic and lumbar soft tissue injuries causally related to the accident. He was unable to identify an organic etiology for the employee's ongoing complaints of pain. (Dec. 18-19, 35.) Dr. Glick opined that any soft tissue trauma caused by the accident had long since resolved, and by December, 2000, the employee was objectively at a medical end point.

[5] The judge did not explain the evidentiary significance of this date. Cf. Foreman v. Hwy. Safety Sys., 19 Mass. Workers' Com Rep. 193, 196 (2006)(date chosen by judge to terminate

medical expenses for physical injuries resulting from the industrial accident. In addition, he denied the employee's claim for § 34A benefits, as well as his claim for §§ 13 and 30 benefits for psychiatric and psychological treatment. (Dec. 38.)

On appeal, the employee argues the judge erred by: 1) finding the employee had a pre-existing condition, which led to the application of the wrong causation standard; 2) failing to evaluate an alternative diagnosis of post-traumatic stress syndrome which, the employee maintains, would have established liability without the application of § 1(7A); and, 3) failing to review the employee's and his girlfriend's testimony regarding his injury.

The employee's first argument stems from the following portion of the judge's findings and analysis:

> Psychological injuries subsequent to physical injuries are compensable injuries provided such a disability or disorder can be causally connected as arising out of one's employment. Fitzgibbon[s]'s Case, 373 N.E.2d 1174 (1978). In order to establish that causal connection, an employee must establish that the prior physical work injury was the predominant cause of the individual's subsequent psychological injury. Brewer v. Bardon Trimount, Inc. . . ., [17] Mass. Workers' Comp. Rep. [99] (2003). An employee must establish that the chain of causation between the accepted physical injury and the current mental condition has not been broken. Cirignano v. Globe Nickel Plating, 11 Mass. Workers' Comp. Rep. 17 (1997). The employee must show that the psychological injuries are sequelae of the physical work injury.
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> In the absence of an affirmative answer to the predominant cause question, I find that the Employee did not meet his burden of proving his emotional claim for compensation under § 1(7A). Where the Employee comes to the workplace with such pronounced, pre-existing emotional issues as is [sic] presented in this case, I find that the mere statement in the reports of Dr. Senger, Dr. Kam-Hansen and Dr. Perez-Cahill, that the work incident caused his disability, is not sufficient to satisfy the heightened "predominant contributing cause" standard.

(Dec. 31, 36.) The employee contends that although he had prior depressive symptoms, they did not amount to a pre-existing condition of depression and as a

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benefits must be based on change in employee's medical or vocational condition). However, the insurer has not appealed; therefore, it cannot, and does not, complain it was incorrect.

result, the judge erred in finding he had a such a pre-existing condition implicating § 1(7A).[6] (Employee br. 13.)

We agree the judge's analysis was incomplete. Although he found the insurer established the employee had a pre-existing history of, and prior treatment for, depression, (Dec. 31), the judge made no determination of whether that condition combined with the work injury, implicating the "a major cause" standard of causation, or whether there was no combination, implicating the "but for" standard of causation.[7] See Vieira v. D'Agostino Assocs., 19 Mass. Workers' Comp. Rep. 50 (2005). Nonetheless, the error is harmless under the circumstances because the adopted medical evidence did not even satisfy the simple "but for" causation standard. The judge credited the opinions of Dr. Strang and Dr. Sciascia, and found "*no medical nexus* between the employee's psychiatric condition and any medical condition or any of the medical injuries which did occur in the motor vehicle accident." (Dec. 31-32, 37.) (Emphasis added.) He further found the employee's "depression is related to economic and social factors and unrelated to any physical injury sustained in the motor vehicle accident." (Dec. 37.) To the extent the employee argues the "overwhelming" evidence does not support the judge's findings, it is not within our purview to weigh evidence. General Laws c. 152, §11C ("The reviewing board shall

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[6] General Laws c. 152, § 1(7A), provides, in relevant part:

> Personal injuries shall include mental or emotional disabilities only where the predominant contributing cause of such disability is an event or series of events occurring within any employment. If a compensable injury or disease combines with a pre-existing condition, which resulted from an injury or disease not compensable under this chapter, to cause or prolong disability or a need for treatment, the resultant condition shall be compensable only to the extent such compensable injury or disease remains a major but not necessarily predominant cause of disability or need for treatment.

[7] Although not raised by the employee, we note the judge misstated the rule applied in Brewer, a case where the claim concerned a purely emotional injury. Brewer v. Bardon Trimount, Inc., 17 Mass. Workers' Comp. Rep. 99 (2003). The predominant contributing cause standard is applicable only to "emotional or mental disabilities directly triggered by work-related incidents that involve no physical trauma." Cornetta's Case, 68 Mass. App. Ct. 107, 117-118 (2007); Cirignano, supra.

reverse the decision of the administrative judge only if it determines that such administrative judge's decision is beyond the scope of his authority, arbitrary or capricious, or contrary to law."); Coggin v. Massachusetts Parole Bd., 42 Mass. App. Ct. 584, 589 (1997)("Once properly admitted, the probative value of the medical testimony is to be weighed by the fact finder, in this case, the administrative judge.").

There is no merit to the employee's second argument, that the judge failed to evaluate his claim in light of the alternative diagnosis of post traumatic stress disorder, offered by the § 11A psychiatrist, Dr. Senger. Contrary to the employee's assertions, the judge's decision contains a thorough discussion of that aspect of the claim. He made multiple detailed findings concerning Dr. Strang's opinions pertaining to the diagnosis of post-traumatic stress disorder, and the doctor's reasons for rejecting that diagnosis. (Dec. 22-24, 33-34.) The judge ultimately adopted "Dr. Strang's medical opinion that there was no evidence of post-traumatic stress disorder." (Dec. 36.) Insofar as the judge erred in finding Dr. Senger's opinion did not satisfy the "predominant contributing cause" standard applicable to purely emotional injuries,[8] (Dec. 31), the error is harmless because the judge unequivocally adopted Dr. Strang's conflicting opinion pertaining to that diagnosis, which could not be reconciled with Dr. Senger's opinion. See, e.g., Cooper v. City of Haverhill, 20 Mass. Workers' Comp. Rep. 307, 309 (2006)(judge's error in misstating one aspect of medical evidence did not affect the ultimate decision, and was thus harmless).

[8] As the judge found elsewhere in the decision: "Dr. Senger opined that there was a causal connection between the Employee's psychiatric diagnoses and the history of the injury because the prominent anxiety and depressive symptoms following the accident were consistent with that stressor and no other reasonable causation is found." (Dec. 15-16.) Doctor Senger's opinion that "[n]o other reasonable causation" exists amounts to an opinion that the work injury was the "only cause." As such, as a matter of law, it satisfies the predominant contributing cause standard. Avola v. American Airlines Co., 20 Mass. Workers' Comp. Rep. 293, 297-298 (2006)("only cause" opinion satisfies predominant contributing cause standard); Bouras v. Salem Five Cent Savings Bank, 18 Mass. Workers' Comp. Rep. 191, 193 (2003)(same); Sawicka v. Archdiocese of Boston, 14 Mass. Workers' Comp. Rep. 362, 370 (2000)(same).

We also reject the employee's assertion that Dr. Senger's opinion had to be accepted by the judge over Dr. Strang's because, as the impartial medical examiner, Dr. Senger's opinion had prima facie status. The rule is well established:

> "Prima facie evidence, in the absence of contradictory evidence, requires a finding that the evidence is true." Anderson's Case, 373 Mass. 813, 817 (1977). See Thomes v. Meyer Store, Inc., 268 Mass. 587, 588 (1929). Nothing in § 11A, however, requires the administrative judge to adopt the conclusions of the report or precludes him from considering additional medical evidence once it becomes part of the record. Indeed, "prima facie evidence may be met and overcome by evidence sufficient to warrant a contrary conclusion." Anderson's Case, supra at 817. Once properly admitted, the probative value of medical testimony is to be weighed by the fact finder, in this case, the administrative judge. Robinson v. Contributory Retirement Appeal Bd., 20 Mass. App. Ct. 634, 639 (1985). Barbieri v. Johnson Equip., 8 Mass. Workers' Comp. Rep. 90, 93 (1994). Thus it is "within the province of the [administrative judge] to accept the medical testimony of one expert and to discount that of another." Fitzgibbons's Case, 374 Mass. 633, 636 (1978).

Coggin, supra at 589.

Lastly, the employee alleges the judge failed to review and evaluate his testimony regarding his alleged head injury and the testimony of his girlfriend, Carmen Ortiz, concerning her role as an interpreter at the employee's medical appointments and her knowledge of his use of medications prior to the accident. (Employee br. 6-7.) We see no error. The evidence as to whether the employee suffered a head injury in the accident was equivocal. Moreover, the judge acknowledged that Ms. Ortiz testified as a witness in the case, and we are satisfied the judge considered her testimony. (Dec. 1.) "The judge was under no legal obligation to expressly discredit the testimony of the . . . witnesses." Yassin v. Gennaro's Eatery, 18 Mass. Workers' Comp. Rep. 237, 238-239 (2004). Because mere recitations of testimony are disfavored, the judge is obligated only to make findings based upon the evidence " 'which he deemed persuasive.' " Id at 239, quoting, Hilane v. Adecco Employment Servs., 17 Mass. Workers' Comp. Rep. 465, 471 (2003). Here, the judge resolved the conflicts in the evidence, found the employee did not sustain a head injury in the accident, and adopted the opinions of those physicians

who determined the employee had not suffered a head injury. Accordingly, we affirm the decision of the administrative judge.

So ordered.

Catherine Watson Koziol
Administrative Law Judge

Mark D. Horan
Administrative Law Judge

Bernard W. Fabricant
Administrative Law Judge

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