

COMMONWEALTH OF MASSACHUSETTS

**DEPARTMENT OF
INDUSTRIAL ACCIDENTS**

BOARD NO. 063402-93

Richard Miller
Mass. Turnpike Authority
Mass. Turnpike Authority

Employee
Employer
Self-Insurer

REVIEWING BOARD DECISION
(Judges Smith, McCarthy and Wilson)

APPEARANCES

John F. Trefethen, Jr., Esq., for the Employee at hearing
Gillian B. Schiller, Esq., for the Employee's Executrix on brief
Scott A. Smith, Esq., for the Self-Insurer at hearing and on brief

SMITH, J. The employee's executrix¹ appeals from a decision after recommittal, which discontinued the employee's total compensation as of the date of the second impartial medical examination. On recommittal, the judge adopted the impartial medical examiner's opinion that the employee's work-related back strain had resolved and was no longer of any consequence. (Dec. II, 10.) Because the recommittal decision is adequately supported by the evidence in this record, is untainted by error of law, and reflects rational decision making within the particular requirements of the workers' compensation act, we affirm it.

Richard Miller had low back problems for over thirty years. (Dec. I, 5; Dec. II, 8.)² He underwent L5-S1 spinal fusion surgery in 1960. (Dec. I, 5; Dec. II, 10.) Since then he worked with chronic recurrent low back pain as a mail loader for a railroad, a track man laborer, a custodian, a corporate president of a company which constructed and installed

¹ The employee died on March 17, 1997, and the executrix of his estate, Doris Miller, is prosecuting the appeal.

² Dec. I refers to the original decision filed June 28, 1995, and Dec. II refers to the decision after recommittal filed May 30, 1997.

septic tanks and, most recently, as custodian for the Massachusetts Turnpike Authority. (Dec. I, 4-5; Dec. II, 4-5, 8.) On June 8, 1992, he sustained a work injury to his low back that incapacitated him from June 10, 1992 until June 28, 1992. (Dec. II, 2.) He then returned to work and, on February 3, 1993, sustained another low back injury arising out of and in the course of his employment. As a result of the second injury, he was incapacitated for two days. He then returned fulltime to his usual custodial duties, "averring no residuals." (Dec. II, 2, 4, 8.)

On July 26, 1993, Miller received a third injury to his low back arising out of and in the course of his employment as a custodian for the Massachusetts Turnpike Authority. (Dec. II, 2,8.) The Turnpike Authority accepted the claim and began payments of compensation. Subsequently, the self-insurer filed this complaint to discontinue benefits. After conference, the judge denied the discontinuance request. (Conference Order filed January 12, 1995.) The self-insurer appealed to a hearing de novo and the judge appointed an impartial medical examiner pursuant to G.L. c. 152, § 11A. The impartial physician, Dr. Caprio, diagnosed the third injury as a back strain. He also diagnosed "status post ruptured disc with fusion, old; chronic low back, secondary to degenerative disease of the spine with spinal stenosis, however, neurologically intact . . . degenerative osteoarthritis of the cervical spine with a benign exam; and resolved bilateral adhesive capsulitis." (Dec. II, 7.) Adopting the impartial opinion, the judge found that the 1993 back strain was no longer of any consequence as of February 21, 1996, and terminated compensation as of that date. (Dec. II, 10.) The employee died on March 17, 1997. No claim is made for benefits after that date. (Letter from employee counsel, dated March 25, 1997.)

The sole issue on appeal is whether the administrative judge exceeded the scope of his authority by failing to restrict his determinations to issues set forth by the Reviewing Board in its recommittal order. (Employee's brief 6.) In our prior decision, we vacated the general finding of no causal relationship and remanded for a new decision consistent with our decision. In our decision, we noted that it was unclear from the record whether G.L. c. 152, § 1(7A) applied, and that the judge had made no findings about whether Miller's prior injuries were work-related. Miller v. Massachusetts Turnpike Auth., 10 Mass.

Workers' Comp. Rep. 629, 630 n.2 (1996). We permitted the judge to take such additional evidence as he found that justice required. Id. at 632.

In response to our decision, at the recommittal hearing, the self-insurer maintained that whatever disability Miller had was related to his pre-existing condition of degenerative disc disease, and not as a result of his July 26, 1993 work injury. (August 1, 1996 Tr. 4-5.) The self-insurer specifically raised § 1(7A) as an issue. Id. at 6. Miller testified that he had no medical treatment from 1985 until he hurt his back in 1992-1993. (Dec. II, 5.) The parties stipulated that the June 8, 1992 and February 3, 1993 injuries were work-related and that, after each, Miller resumed his usual custodial work. (Dec. II, 2.) In the original case, prior to recommittal, the impartial medical examiner had opined that 75% of the employee's disability was due to his prior spinal fusion and degenerative disc disease, the balance to the back strain. The employee underwent a second impartial examination after the recommittal order. The impartial medical examiner's opinion about the degree of causal contribution changed with the passage of time. After the latest examination on February 21, 1996, the doctor opined that 99% of the employee's disability was due to pre-existing degenerative disc disease and only 1% was due to the work related strain of July, "long resolved." (Dec. II 6, 7, 10; see also Impartial Report, dated April 12, 1996, at 4.) The judge did not act arbitrarily or capriciously in adopting this opinion.

Nor did the judge act contrary to law in terminating compensation. The facts found by the judge established a compensable injury on July 26, 1993 that had combined with a pre-existing condition, which resulted from an injury or disease not compensable under the workers' compensation act. The judge was required by G.L. c. 152, § 1(7A) to determine whether the injury of July 26, 1993 remained a major cause of the employee's ongoing disability and need for treatment. The medical evidence clearly established that by the date of the second impartial examination, it did not. Section 1(7A) therefore required the judge to conclude that, after that date, the claim no longer remained compensable.

The judge's decision after recommittal was within the scope of his authority, and was not arbitrary or capricious, or contrary to law. Consequently, we affirm it. G.L. c. 152, § 11C.

Richard Miller
Board No. 063402-93

So ordered.

Suzanne E. K. Smith
Administrative Law Judge

William A. McCarthy
Administrative Law Judge

Filed: February 14, 2000

Sara Holmes Wilson
Administrative Law Judge