COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 015304-04**

Robert Healy	Employee
Richard Burbridge	Employer
AIM Mutual Insurance Co.	Insurer

REVIEWING BOARD DECISION
(Judges Levine, Costigan and Fabricant[1])

This case was heard by Administrative Judge Hernández.

APPEARANCES
Robert L. Noa, Esq., for the employee at hearing
James N. Ellis, Esq., for the employee on appeal
Charles E. Berg, Esq., for the employee on brief
Michael K. Landman, Esq., for the insurer

LEVINE, J. The employee appeals from a decision in which both his claim for § 34A permanent and total incapacity benefits and his claim for benefits due to a psychiatric injury were denied. We recommit the case for further findings on the employee's psychiatric claim.

We briefly set forth the facts in this matter. From 1984 to 2004, the employee had been a licensed commercial lobsterman. Beginning in 1995, he also worked as a carpenter for Richard Burbridge (the employer). There is no dispute that on April 2, 2004, while working for the employer, the employee developed a respiratory condition. (Dec. 5; Ins. br. 3.) Subsequently, the employee has received § 34 and § 35 benefits. There have also been several proceedings related to the 2004 industrial injury. (See Dec. 2- 4.)

The employee's present claim for benefits for a work related psychiatric condition was denied after a conference on June 3, 2009. The employee appealed to a

[1] Judge Fabricant recused himself and did not participate in panel deliberations.

hearing, at which he claimed § 34A or § 35 benefits beginning March 3, 2009. He also sought §§ 13 and 30 benefits due to the alleged psychiatric injury. (Dec. 4.)

On October 27, 2009, pursuant to § 11A(2), the employee was examined by Dr. Robert Naparstek,[2] (Dec. 11), who is board certified in internal medicine and public health/occupational environmental medicine. (Naparstek Dep. 10). Dr. Naparstek repeated his prior medical opinion that the employee suffered from reactive airway dysfunction syndrome causally related to the April 2004 work related exposure. He further opined that the employee had developed secondary environmental sensitivities as a result and was not yet at a medical end result. The impartial examiner recommended vocational rehabilitation and that any future work the employee undertook occur in a demonstrably clean environment, free from environmental triggers. (Ex. 1; Dec. 11, 12.) Dr. Naparstek opined that the employee was permanently disabled from working as a lobsterman or as a construction worker. He further opined that the employee suffered from reactive depression caused by the work related exposure and that this contributed to the employee's disability. Although Dr. Naparstek testified that the employee was totally disabled from gainful employment because of his environmental problems, he also opined that the employee may be able to work from his home as he has not experienced respiratory symptoms there. (Naparstek Dep. 11, 12, 28-29; Dec. 12.)

Based on medical complexity, the administrative judge allowed the employee's motion to admit additional medical evidence. (Dec. 5; Tr. 4-6.) The judge adopted the impartial examiner's medical opinion that the employee has exertional dyspnea and cough that preclude him from his prior employment, either as a lobsterman or as a construction worker. (Dec. 18.) The judge also stated that in a previous decision he adopted the medical opinion of Dr. Morris and "find that chemicals can irritate the employee's airways with lasting sequelae such as the symptoms the employee is experiencing." Id. Nevertheless, the judge found that the employee's medical

[2] Dr. Naparstek also served as the impartial examiner in an earlier proceeding. (Dec. 2, 11-12; Ex. 1.)

condition had not worsened, that he still maintained an earning capacity, and thus, the employee had not met his burden of proof that he was entitled to § 34A benefits. (Dec. 18-19.) The judge also determined that the employee was not psychiatrically disabled from employment due to the industrial incident of April 2, 2004. (Dec. 19.)[3]

The employee raises several issues for our review. We summarily affirm the decision as to all but one of those issues. There is merit in the employee's argument that the administrative judge erred in excluding the impartial physician's opinion as to the causal relationship of the psychiatric condition to the industrial injury.[4]

The impartial examiner opined that the employee's reactive depression was caused solely by the employee's work related exposure. (Naparstek Dep. 11, 12.) After Dr. Naparstek first expressed his opinion, (Naparstek Dep. 8-9), insurer's counsel objected "based upon the Doctor's expertise . . . being in physical medicine and not psychiatry and, therefore, he doesn't have a foundation to state that opinion." (Naparstek Dep. 9-10.) The judge sustained the objection. (Dec. 22.) Thereupon, employee's attorney proceeded to interrogate the doctor as to his education and experience with respect to the area of mental health. (Naparstek Dep. 10-11.)

After answering those questions, there were the following questions and answers and objection:

> Q: I would ask you based upon your education, training, and experience and the fact that you are a medical doctor licensed in the Commonwealth of Massachusetts, do you have an opinion to a reasonable certainty as to whether or not the reactive depression suffered by Mr. Healy that you found is causally related to the industrial exposure?

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[3] In denying this claim, the judge's findings (unlike his recitals of evidence) were cryptic:

> As for his psychiatric injury, I find that the employee is not psychiatrically disabled from employment because of the [subject industrial injury]. The employee conceded that he has not sought psychiatric treatment in four years and his breathing difficulties have been and remain the primary reason of [sic] being unable to return to work.

(Id.)

[4] On the employee's contention that an impartial physician specializing in psychiatry should have been appointed, see Howe v. Ken Weld Co., 25 Mass Workers' Comp. Rep.__ (June 27, 2011).

> A: Yes, I have the opinion. And to a reasonable degree of medical certainty it is my medical opinion that the reactive depression is caused solely by a result [sic] of his work-related exposure.
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> Q: Let me ask you also, building on that just for a moment, doctor, there is some history with regard to Mr. Healy that he did have a period of time where he had some difficulty with alcohol and did have difficulty going through a divorce where there was some level of depression that Mr. Healy suffered from in the past relative to alcohol, to a divorce from his wife, financial difficulties, and his children that, growing up, were perhaps discipline problems.
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> With that hypothetical would you have an opinion as to whether or not the industrial exposure represents a major though not necessarily predominant cause of the reactive depression that you found Mr. Healy to suffer from?
>
> A: Yes. It is my medical opinion that it is the sole component that caused his reactive depression.
>
> Q: Thank you.
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> MR. LANDMAN: Again, I will object for the record.

(Naparstek Dep. 11-12.) The judge again sustained the objection. (Dec. 22.) We agree with the employee the judge erred in sustaining the objection.[5]

To be qualified to testify, "[t]he crucial issue is whether the witness has sufficient education, training, experience and familiarity with the subject matter of the testimony." Letch v. Daniels, 401 Mass. 65, 68 (1987). The expert need not be a specialist in the specific medical field at issue. "There is no requirement that the impartial physician be a specialist in the particular departments of medicine in whose fields the employee may place his alleged incapacity at the time of the hearing." Mattison's Case, 305 Mass. 91, 93 (1940)(impartial physician, appointed under a predecessor statute, not disqualified because he was an orthopedist rather than

[5] This objection was not made with the specificity required by 452 Code Mass. Regs. § 1.12(6). If the objection is read to be a repeat of the earlier quoted objection, it came late as the answer(s) to the question(s) had already been given. More appropriately, the insurer should have moved to strike the answer(s). See generally Liacos, Brodin, Avery, Massachusetts Evidence, §§ 3.8.1– 3.8.3 (7th ed. 1999).

neurologist where employee claimed a post-traumatic anxiety neurosis due to physical injury). Dr. Naparstek testified that both of his board specialties deal with the psychiatric symptoms of patients, (Naparstek Dep. 10-11); he also was educated and trained in psychiatry. (Naparstek Dep. 11.). The specialty of the impartial examiner goes to the weight of his testimony, not its admissibility. Howe, supra. As the judge erred in sustaining the objection to Dr. Naparstek's testimony on the employee's mental condition, the case must be recommitted so that the judge can consider it.

We also point out that, in an April 5, 2007 hearing decision[6] involving the same parties, the judge denied the employee's psychiatric claim. In that decision the judge did not explicitly address whether the employee suffered a psychiatric injury causally related to the 2004 industrial injury. Instead, the judge found that the employee was not psychiatrically disabled from employment because of any 2004 industrial injury. (April 5, 2007 Dec. 14, 16.) This aspect of the decision was summarily affirmed by the reviewing board. Healy v. Richard Burbridge, 22 Mass. Workers' Comp. Rep. 109, 110 (2008).

In the April 2007 decision, the judge recited the testimony and adopted the opinion of Dr. Robert Weiner, a psychiatrist. In so finding, and reflecting Dr. Weiner's reports, the judge recounted several non-work related life stressors apparently affecting the employee's mental health. (April 5, 2007 Dec. 9-10, 14-15.) In contrast, in the present decision, those life stressors are absent from the decision. Thus, in the judge's recitation of the contents of Dr. Weiner's May 4, 2009 report (and consistent with it), those non-work related stressors are not mentioned. Instead, the judge wrote, "Dr. Weiner opined that the Employee was experiencing major depression . . . causally related to his physical condition . . . and that the Employee could benefit with the resumption of antidepressant medication, as well as counselling." (Dec. 12-13; Ex. 5.) Dr. Weiner also opined that the employee "does

[6] We take judicial notice of the contents of the board file. Rizzo v. M.B.TA., 16 Mass. Workers' Comp. Rep. 160, 161 n.3 (2002). This 2007 decision is also referred to in the present hearing decision on appeal before us. (See Dec. 3.)

not have a lengthy history of anxiety problems prior to his industrial injury. The anxiety symptoms he now experiences are related to physical impairments and their sequelae." (Ex. 5.)

The only other evidence the judge recited in his decision on the psychiatric claims was that given by Dr. Steven Hoffman, a psychiatrist.[7] According to the decision, Dr. Hoffman opined that the employee was "completely disabled on the basis of psychiatric disorders alone . . . [and] that the psychiatric conditions became totally disabling in their own right within a few months of the original injury." (Dec. 13.) Dr. Hoffman also opined that "the predominant contributing factor of his mental disorders since his [industrial] injury has clearly been the client's breathing problem." (Ex. 2; Hoffman Dep. 11-12, 14.)

The recited medical testimony is unanimous in diagnosing the employee with a psychiatric condition, of one sort or another, causally related to the subject industrial injury. Despite reciting this evidence, the judge, as noted above, rejected the employee's psychiatric claim.

There can be no question that the issue as to the employee's psychiatric condition requires expert medical evidence. And a judge "must rely on . . . uncontradicted [expert medical] testimony which had to do with a matter beyond the common knowledge and experience of a layman." Galloway's Case, 354 Mass. 427, 431 (1968). If a judge rejects such testimony, "he must clearly and sufficiently state the reasons for doing so in findings with adequate support in the record." Payton v. Saint Gobain Norton Co., 20 Mass. Workers' Comp.Rep. 297, 303 (2007). The case must be recommitted for the judge to address the uncontradicted medical evidence.

In the circumstances, the fact that a prior decision denied the employee's then psychiatric claim does not bar the employee from bringing it again. "[A] new claim or complaint on present incapacity or causal relationship between the original work

[7] In his decision, the judge did recite Dr. Naparstek's opinion on the employee's psychiatric condition. (Dec. 12.) But, as discussed earlier, the judge sustained the objection following this testimony. (Dec. 22.)

injury and the present incapacity presents a new and different issue from that of original liability, and as such is not barred from adjudication by the prior judgment." Burrill v. Litton Indus., 11 Mass. Workers' Comp. Rep. 77, 79 (1997). Spencer-Cotter v. North Shore Medical Ctr., 25 Mass. Workers' Comp. Rep.__ (September 19, 2011).

On recommittal, the judge is to reconsider the psychiatric claim and its effect on the employee's incapacity claim. We also point out that, even if there is no impact on the extent of incapacity as a result of the employee's psychiatric condition, the employee may still be entitled to medical benefits therefor under § 30 of the Act. See Tigano v. Acme Boot Co., 8 Mass. Workers' Comp. Rep. 145, 148 (1994).

So ordered.

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Frederick E. Levine
Administrative Law Judge

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Patricia A. Costigan
Administrative Law Judge

Filed: **November 3, 2011**