COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS	**BOARD NO(s). 000318-96, 000319-96 000320-96, 000321-96 000322-96, 000323-96**

Robert Simcik	Employee
M.B.T.A.	Employer
M.B.T.A.	Self-Insurer

REVIEWING BOARD DECISION
(Judges McCarthy, Wilson and Smith)

APPEARANCES
William J. Gately, Jr., Esq., for the employee
Kerri A. Morrissey, Esq., for the self-insurer

MCCARTHY, J. The parties cross-appeal from a decision in which an administrative judge awarded the employee partial incapacity benefits for a fibromyalgia condition. The employee alleged that the disease was causally related to a series of traumas sustained in 1982–1985 while working for the M.B.T.A., a self-insurer. Robert Simcik argues on appeal that the hearing judge erred in setting the amount of weekly benefits, as well as the date for their commencement. We summarily affirm the decision as to the employee's appeal on these issues. The self-insurer on appeal contends that the judge erred by adopting medical opinions of the employee's expert physician and the § 11A examiner, causally connecting the fibromyalgia to Simcik's work. The self-insurer claims that the judge ignored factual discrepancies between the employee's testimony at hearing, and the history which he narrated to the doctors. The self-insurer argues that because of these discrepancies the medical opinions were not competent evidence on which to base an award of benefits, as a matter of law. For the reasons that follow, we recommit the case for the judge to clarify her handling and interpretation of the medical evidence. We otherwise agree with the self-insurer that the judge's application of G.L. c. 152, §§ 35F and 35B was contrary to law. We reverse the decision as to those issues.

Mr. Simcik, who worked as a repairman specialist doing electrical and mechanical work on M.B.T.A. trolleys at the Riverside facility, suffered a series of injuries while performing his work duties. The first was in April 1982, when he injured his back attempting to repair a panic raft on one of the trolleys. He was out of work for several months, and received workers' compensation benefits until August 1982. He was released at that time to return to light duty work, but none was available. The employee therefore returned to his regular duty employment. In November 1982, he fell off a ladder and reinjured his back, along with his neck. The employee then had four more work related accidents over the next several years in which he injured his elbow, knee and back. He continued to request light duty, but none was ever available to him. (Dec. 4.)

In July/August 1988 Simcik finally obtained a lighter duty job but it did not last and on September 1, 1988, he returned to his usual work at the Riverside facility. On that day, the employee had an argument with his supervisor, which resulted in his discharge pending an arbitration hearing. September 1, 1988 was the last day the employee ever worked for the self-insurer. (Dec. 5.)

Mr. Simcik suffers from a variety of medical ailments including diabetes, chronic bronchitis, kidney problems, sleep apnea, irritable bowel syndrome and retinopathy. In 1992, Simcik was diagnosed with fibromyalgia. Some years later he learned that his fibromyalgia might be related to his various work traumas and filed a claim. The employee's alleged symptoms include pain in his feet, legs, arms, wrists, fingers, shoulders, buttocks and back. (Dec. 5.) The self-insurer resisted the claim and a hearing was held on the employee's appeal from the § 10A conference denial of payment. (Dec. 2.)

Dr. Peter Schur, the impartial examiner pursuant to § 11A(2), examined the employee on August 27, 1997. Dr. Schur, an internist and rheumatologist, opined that the employee presented a classic case of fibromyalgia, with pain indications in twenty tender points, along with complaints of fatigue, sleep disorders and irritable bowel syndrome. (Dec. 7.) Dr. Schur opined that it was difficult to pin down the causal

relationship between the employee's work and his fibromyalgia, because of the length of time separating the traumas of 1982-1985 and his 1997 examination. (Dec. 8.) Nonetheless, Dr. Schur causally connected the employee's work and his fibromyalgia. (Dec. 9.) However, the history which the employee gave the doctor was not consistent with the facts as found by the judge at hearing. The employee informed the doctor that he had been unable to work since September 1, 1988 due to pain and fatigue but failed to tell him that he had been discharged on that date for disciplinary reasons. (Dec. 8.) The judge further found, as regarded Dr. Schur's causal relationship opinion:

> [H]e explicitly opined that incidents such as trauma, stress, injuries and illness lead to fibromyalgia (Dep. 25). Further, he opined that he relied at this point, regarding the question of causality, more on the relationship of timing in view of the fact that Claimant was examined and found to be disabled (Dep. 16). That is, Dr. Schur preferred to defer to Claimant's past medical history and treatment on the question of causality especially where Dr. Griffin, an orthopedist at St. Elizabeth's Hospital, disabled Claimant and where the Social Security Administration disabled him as well, i.e. placed him on SSDI. (Rep. 4, Dep. 41, 42).
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> It should be noted that Dr. Schur based the temporal relationship of the injury and the diagnosis on a 1988 date of disability because Claimant told him that he received SSDI back in 1988, when in fact Claimant did not receive SSDI benefits until 1992. Claimant was not truthful regarding the fact that he was working until September 1, 1988.

(Dec. 8.)

Ruling that the case presented a complex medical question, and an indefinite causal relation opinion on the part of Dr. Schur, the judge allowed the parties to submit their own medical evidence. (Dec. 2.) See § 11A(2). The self-insurer introduced the deposition of its expert, Dr. Earl Hoerner, but the judge did not adopt Dr. Hoerner's opinion. (Dec. 11-13.) The employee presented the medical reports of Dr. Michele Masi. (Dec. 9.) Dr. Masi diagnosed that the employee suffered from fibromyalgia, causally related to the multiple injuries which the employee suffered at work during the 1980s. (Dec. 10.) The judge noted that there were problems with the history the employee reported to Dr. Masi:

> Just as with the history provided Dr. Schur, Claimant led Dr. Masi to believe that he was disabled from work in 1988 because of medical conditions, i.e. severe back pain (Claimant Exhibit 2, May 18, 1995 report), rather than the fact that he was discharged from work for cause. Despite that fact, however, Dr. Masi reviewed his medical history in detail and nowhere was it indicated in those records that Claimant was disabled because of a work related injury. . . .
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> However, the emergency room records at Newton-Wellesley Hospital indicated that Claimant suffered several traumatic injuries over the years. In November 1982 he fell off a ladder and suffered the first injury to his neck and right elbow; in December 1982 he slipped down the stairs and noted the recurrence of back pain; in October 1983 he suffered another back injury with reported pain radiating down the leg when moving heavy equipment; in February 1984 he report left groin pain as a result of moving a heavy object and at the same time he reported a recurrence of low back pain the previous month; and in October 1985, he was struck in the front of the legs with machinery and reported some persistent pain in the calves (Claimant Exhibit 2, the May 18, 1995 report).
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> [T]esting indicated evidence of somatization disorder (Claimant Exhibit 2, May 18, 1992 (sic) report). Plain film and CT Scan of the lumbar spine showed various levels of spinal problems.

(Dec. 9-10.)

The judge adopted the opinions of Doctors Schur and Masi, as to the diagnosis of fibromyalgia and its causal connection to Simcik's work traumas in 1982-1985. (Dec. 13.) However, the judge discredited the employee's testimony due largely to his failure to tell those doctors that he was terminated for cause on September 1, 1988. Nonetheless, the judge turned her decision on the physical examinations of Doctors Schur and Masi, rather than the information the employee provided to them about when he became medically disabled. (Dec. 13.) The judge discounted the employee's claim of total incapacity, and awarded partial incapacity benefits for the causally related fibromyalgia condition from May 18, 1995, the date of Dr. Masi's first examination. (Dec. 14.) The self-insurer appeals to the reviewing board challenging the judge's adoption of medical evidence that was based on an inaccurate history of why the employee left work on September 1, 1988.

The self-insurer first contends that the adopted medical opinions both rely on the discredited temporal connection between the alleged onset of disability and the work related traumas in 1982–1985. Dr. Schur, the impartial examiner, opined: "I rely at this point regarding the question of causality more on relationship of timing relationship (sic) in that in view of the fact that he was examined back in 1988 and at that time felt by Dr. Griffin . . . to be disabled upon his examination and the ascertainment by SSDI subsequently based upon the earlier documentation that he was probably disabled at that time." (Impartial Examiner Report.) Dr. Schur further stated:

> [The employee felt] he was unable to work anymore as of September 1, 1988. At that time he was apparently evaluated by a Dr. Griffin at St. Elizabeth's Hospital (an orthopedist) and was determined to be disabled which according to the patient and documentation he showed me resulted in his being declared disabled by Prudential Insurance and a few years later also based upon the same documentation by John Hancock with disability being made retroactive to September 1, 1988 . . . . In addition the patient showed me documentation that he was declared disabled by social security disability, as of June, 1993 (sic) made retroactive to September 1, 1988 based upon documentation provided to them.

(Impartial Examiner Report.) However, the history recited by Dr. Schur was not what the judge found in her subsidiary facts, that, "the employee did not receive SSDI benefits until 1992" (Dec. 8), and that he had been terminated from employment for cause. The self-insurer's argument is correct, but we think that recommittal, not reversal, is the appropriate disposition.

This case is appropriate for recommittal for further findings to allow the judge to explain why the employee's failure to disclose the non-medical reason (termination for cause) for his leaving work does not invalidate the adopted medical opinions. In addition to relying on the impartial opinion, the judge based her conclusion to award benefits in part on the medical reports of Dr. Masi, the employee's expert. Dr. Masi was of the impression that the employee "was disabled from the MBTA in 1988 because of back pain." (Employee Ex. 2.) While recognizing that discrepancy, (Dec. 9), the judge seems to discount it. She notes Dr. Masi's recounting of several work-related traumatic injuries in 1982-1985, which Dr. Masi specifically opined to be at the root of the employee's

fibromyalgia, without reference to the temporal proximity of disability to the work incidents. (Dec. 10.) The judge then concluded that she was basing her decision regarding the diagnosis of fibromyalgia and causal relationship on the examinations of Doctors Schur and Masi rather than on any information the employee provided them about when he actually became disabled. (Dec. 13.)

De minimus discrepancies in histories should not bar the adoption of an expert opinion. Daly v. Boston School Dept., 10 Mass. Workers' Comp. Rep. 252, 258 (1996). "The probative value of this medical evidence is a question of fact for the administrative judge. . . . It is solely within the scope of the administrative judge's authority to resolve a disputed issue of causation in fact." Id. at 262, Smith, J., concurring in part and dissenting in part. On recommittal, the judge should make further findings illuminating her reasons for adopting medical opinions based on a history at partial variance from the one found by the judge.

There is another problem with the impartial opinion, and the judge's adoption of it, which needs attention on recommital. The "documentation" that the employee "showed" (see supra) Dr. Schur at the examination – apparently a report by Dr. Griffin and the SSDI determination of disability – were not included in the materials sent to the doctor.[1] These were materials that the employee apparently brought along with him to the examination. This directly contravenes 452 C.M.R. 1.14(2), which states: "No party or representative may initiate direct ex parte communication with the impartial physician *and shall not submit any form of documentation to the impartial physician without the express consent of the administrative judge."* (Emphasis added). There is nothing in the record indicating that consent was requested of the judge to have these documents given to Dr. Schur. Nor does the record suggest that Dr. Schur requested, directly or through the impartial unit, any of these documents. See Id. ("The impartial physician may request medical records and reports from providers who have treated the employee prior to the date of the selection or appointment of the impartial physician. Providers of diagnostic

[1] We take notice that these documents are not part of the board file.

services and testing shall send these records directly to the impartial physician upon request of the impartial physician or of the impartial unit.") Dr. Schur's opinion on causal relation, therefore, was based in large part on documents that were not properly before him. Regulations promulgated pursuant to § 5 are presumed to be valid, and our review is "as deferential as that to a legislative enactment." Greenleaf Finance Co. v. Small Loans Regulatory Board, 377 Mass. 282, 293 (1979). The self-insurer did not object to the use of these documents at deposition, (Schur Dep, 16-17, 24-25), - or anytime in this proceeding. On recommittal, the judge must decide whether this procedural irregularity so flaws the impartial opinion as to render it useless.

We now address the self-insurer's contentions regarding the judge's application of §§ 35F and 35B. Section 35F provided cost of living supplemental benefits to certain employees receiving partial incapacity benefits under § 35, from its effective date, November 1, 1986, until its repeal on December 23, 1991. See St. 1985, c. 572, § 45; St. 1986, c. 662, § 51; St. 1991, c. 398, §§ 67, 106 and 111. Under the provisions of G.L. c. 152, § 2A, § 35F "increase[d] the amount or amounts of compensation payable to an injured employee" and therefore only applied to injuries occurring on or after its November 1, 1986 effective date. The self-insurer is correct in its challenge to the judge's application of § 35F to this case. The industrial injuries to which the compensated fibromyalgia condition related occurred in 1982-1985, before the effective date of the statute. (Dec. 14.) Moreover, when viewed as a "subsequent injury" under § 35B (see infra), the judge's assignment of May 18, 1995 as the starting date for the employee's weekly § 35 benefits comes well after the repeal of the section. Therefore, no application of § 35F could attach to this alternate injury date. We reverse the judge's application of § 35F cost of living supplements to this case.

The judge's application of § 35B is also flawed. That section provides that:

> An employee who has been receiving compensation under this chapter and who has returned to work for a period of not less than two months shall, if he is subsequently injured and receives compensation, be paid such compensation at the rate in effect at the time of the subsequent injury, whether or not such subsequent injury is determined to be a recurrence of the former injury . . . .

(St. 1970, c. 667, § 1.) "The terms 'subsequently injured' and 'subsequent injury' in § 35B mean a worsening in the employee's physical or mental condition, which occurs at least two months after his return to work." Themmen v. M.B.T.A., 12 Mass. Workers' Comp. Rep. 180, 182 (1998). "An employee must establish that his condition has deteriorated. Calheta's Case, 14 Mass. App. Ct. 464, 465 (1982). Only then is an employee entitled to compensation at the rate in effect on the day the new period of incapacity commences." Id. The judge erroneously tied the application of § 35B in this case to the employee's termination of employment on September 1, 1988. (Dec. 14.) That termination was for cause and no medical deterioration can be found in the evidence to support the finding of a "subsequent injury" on that date.

We agree with the self-insurer that the correct date on which to assign the "subsequent injury" under § 35B is the date that the judge found for the commencement of § 35 benefits, May 18, 1995. As the judge so found, it was on that date that the employee could first prove his "subsequent injury – his medical deterioration due to his fibromyalgia." (Dec. 14.) If on recommittal, the judge allows the May 18, 1995 date to stand, the employee is subject to the rate of compensation that was in effect as of that "subsequent injury." Taylor's Case, 44 Mass. App. Ct. 495, 500 (1998). See G.L. c. 152, § 35 (St. 1991, c. 398, § 63). See also Don Francisco's Case, 14 Mass. App. Ct. 456 (1982). We reverse the judge's application of § 35B. On recommittal the judge should revisit this issue as well.

We return the case to the senior judge for recommittal to the administrative judge for further findings consistent with this opinion.

So ordered.

William A. McCarthy Administrative Law Judge	Sara Holmes Wilson Administrative Law Judge

SMITH J. concurring in part and dissenting in part. I agree that the judge's decision is flawed. I disagree that recommittal is the appropriate remedy. The judge found that the claimant was not a credible witness and did not provide an accurate history to the physicians who testified. (Dec. 13.) The judge's credibility finding renders speculative all the causation opinions based on such history. Apart from such unfounded opinions, there is no medical evidence in the record upon which a causation finding could be based. Therefore, as a matter of law, the claim must be denied for lack of proof. King's Case, 352 Mass. 488, 492 (1967).

An employee has the burden of proving all elements of his claim, including the causal connection between work activities on the dates of any alleged injuries and his disabling medical problems. Sponatski's Case, 220 Mass. 526, 527-528 (1915). Where, as here, causal relation between an employee's work and medical condition is a matter beyond common knowledge and experience of ordinary laymen, proof of causation must rest upon expert medical testimony. Sevigny's Case, 337 Mass. 747, 749 (1958). To have any probative value, such expert testimony must be founded on the facts found by the judge. Here they were not. The problem with the history was central to the opinions;[2] the discrepancy was not *de minimus*.

The judge recognized this dilemma and tried to fill the hole in the causation case by relying on results of medical examinations occurring years after the alleged injuries. (Dec. 13.) However, such reasoning is fallacious. The timing of the onset of a medical disease is clearly not a matter that a judge may determine from her own knowledge; it is a matter calling for a competent medical opinion. Ralph's Case, 331 Mass. 86, 90 (1954). The fact that an employee suffers a deterioration of health after a work injury will not,

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[2] It is clear that Dr. Schur's causation opinion relied on the erroneous belief that the employee left work in 1988 because of medical problems. (Schur Dep. 16, 23, 24, 41; Schur impartial medical report at 1: " . . . complaints of pain all over, fatigue and feeling that he was unable to work anymore as of September 1, 1988.") Dr. Schur did not know that the employee was fired for making racial slurs. (Schur Dep. 23; Self-Insurer Ex. 3.) "We usually never say that fibromyalgia is causally related to work." (Schur Dep. 25.) Dr. Masi's opinion was also based on

standing alone, support a finding of causation. King's Case, 352 Mass. at 489-490. Thus the judge cannot rely solely upon the observations of Doctors Schur and Masi, that Simcik was disabled by fibromyalgia in 1995 and 1996, to find causation.

The record contains no properly grounded expert medical opinion causally relating the employee's medical problems to work. Such positive medical testimony on the specific issue of causal relation was necessary to justify the award of compensation. See Look's Case, 345 Mass. 112, 115-116 (1962). The testimony was not forthcoming. Without it, the award cannot stand. There is no sense in ordering a futile recommittal. Crawford's Case, 340 Mass. 719, 721 (1960); Roney's Case, 316 Mass. 732, 739-740 (1944).

Because the facts as found by the judge can only support one result, recommittal is inappropriate. Goden v. Phalo Corporation, 9 Mass. Workers' Comp. Rep. 720, 721 (1995); Medeiros v. San Toro Mfg. Co., 7 Mass. Workers' Comp. Rep. 66, 68 (1993). The decision should be reversed and the claim denied. Sevigny's Case, 337 Mass. at 754; Tartas's Case, 328 Mass. 585, 587 (1952). I would so order.

Filed: February 17, 1999

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Suzanne E.K. Smith
Administrative Law Judge

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the false history that Simcik "was disabled from the MBTA in 1988 because of back pain." (Employee Ex. 2, Masi report of May 18, 1995, p. 5.)