COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUTRIAL ACCIDENTS **BOARD NO. 012639-97**

Ronald Wheeler	Employee
Yellow Freight Systems, Inc.	Employer
Yellow Freight System Corp.	Self-insurer

REVIEWING BOARD DECISION
(Judges Maze-Rothstein, McCarthy and Wilson)

APPEARANCES
Brian C. Cloherty, Esq., for the employee
Michael A. Fager, Esq., for the self-insurer

MAZE-ROTHSTEIN, J. The employee appeals from a decision denying his claim for further compensation benefits. For the reasons that follow, we recommit the case. See G. L. c. 152, § 11C. We also conclude that counsel for the self-insurer has violated G. L. c. 152, § 14(1) by frivolously obstructing the employee's cross-examination of the § 11A physician at deposition and order the statutory penalty.

On March 24, 1997, Mr. Wheeler was hit by a forklift that backed into him, and trapped him between a post and the lift itself. The insurer accepted liability for his injuries and paid § 34 total incapacity weekly indemnity benefits. A discontinuance of those benefits was allowed by a hearing decision. Mr. Wheeler's claim for further benefits is the subject matter of the hearing decision on review. He sought benefits for a psychological injury, Post Traumatic Stress Disorder (PTSD) and depression, for which the employee had been treating at the Veterans' Administration. The claim was denied at conference. Aggrieved, the employee appealed to a full evidentiary hearing. (Dec. 5.)

Mr. Wheeler was examined by a G. L. c. 152, § 11A, physiatrist on May 9, 2000. The doctor opined that the employee's major limitations were due to depression, anxiety, stress and self-imposed deconditioning, all not causally related to the accident. He also

opined that the employee's subjective complaints were not consistent with the objective findings, and symptom magnification was evident. (Dec. 5-6.)

When the employee deposed that same § 11A doctor on December 7, 2000, the cross-examination by the employee's counsel was precipitously terminated and the deposition suspended. This occurred when counsel for the self-insurer obstructed the testimony, because he objected to questions, of any kind, being asked regarding the employee's medical records, which the doctor had reviewed. When the employee sought relief in the form of sanctions, the judge ruled, on the basis of inadequacy and medical complexity, that the parties should be allowed to submit additional medical evidence on the employee's orthopedic condition, since the deposition could not be resumed in a reasonable amount of time. (Dec. 6.) Next, the judge adopted the § 11A physician's untested and unexplored opinion that the employee had no objective findings of physical impairment that would prevent him from returning to his usual occupation. The judge also allowed additional medical evidence on the employee's psychological condition, on the basis of medical complexity. (Dec. 7, 14.)

The self-insurer introduced the report and deposition testimony of its expert psychiatrist, Malcolm P. Rogers, M.D. In his March 17, 2000 report, Dr. Rogers related the employee's PTSD to his Vietnam experience, exacerbated by his industrial injury: "I believe that the PTSD has combined with his physical injuries to prolong his need for psychiatric treatment." The doctor related the employee's depression to his chronic pain, in a pattern that was suggestive of somatization disorder. Dr. Rogers opined that neither the PTSD nor the depression was medically disabling. The judge adopted Dr. Rogers' expert medical opinions. (Dec. 7-8, 14.)

The self-insurer also introduced a report of its expert orthopedist, Robert Levine, M.D., who opined that there were no objective findings to support the employee's complaints, and that he was capable of returning to his work as a truck driver. The judge adopted Dr. Levine's expert medical opinion without reservation. (Dec. 9, 14.)

The employee deposed the psychologist with whom he had been treating at the Veterans' Administration, Sean R. Stetson, Ph.d. Dr. Stetson also attributed the

employee's PTSD to his Vietnam experience. He further opined that the industrial accident triggered an exacerbation of that pre-existing condition. Dr. Stetson opined that the employee was totally disabled due to his industrial injury. The judge did not adopt Dr. Stetson's expert opinions. (Dec. 8-9, 11.)

The judge made numerous credibility findings discrediting the employee's testimony. He determined that the employee's claim of working 60-70 hours per week was not credible as he had a "stipulated average weekly wage of less than $600.00."[1] (Dec. 10.) The judge discredited the employee's testimony that the occupation of truck driving kept the intrusive thoughts of his Vietnam experience out of his mind prior to his industrial injury. The judge also disbelieved the employee's testimony that he had not been paid for tasks he performed for a friend, who was an electrical contractor. The judge rejected the employee's testimony regarding the length of his Vietnam duty, and that he had been wounded in combat, but never awarded the Purple Heart. Finally, the judge did not believe that the employee needed to continue to take narcotic medications, thereby preventing him from truck driving. (Dec. 10.)

The judge applied the § 1(7A) standard of "a major" causation to the employee's claim for the entire constellation of conditions alleged in his claim of psychological disability, as he determined that the employee's emotional sequela to his physical injury was an exacerbation of pre-existing PTSD and depression conditions. (Dec. 12.) See Lagos v. Mary A. Jennings, Inc., 11 Mass. Workers' Comp. Rep. 109, 111-112 (1997). The judge concluded that, (because the treatment notes of the employee's psychotherapy sessions had not been introduced in evidence), he could not assess whether or not the employee's emotional problems had as a major cause his industrial injury. The judge therefore concluded that the employee had failed to meet his burden of proving "a major" causation under § 1(7A) for his psychological claim for medical and incapacity benefits, as the employee's PTSD and depression pre-existed the exacerbating effects of the

[1] The employee retracted the stipulation. (November 6, 2000 Tr. 5-6.)

industrial injury. (Dec. 12, 14.) On the strength of these findings, the judge denied and dismissed the employee's claim for the resumption of incapacity benefits. (Dec. 15.)

The employee challenges the decision on many fronts, some of which are meritorious. First, we agree with the employee that the judge's handling of the § 11A physician's opinion, in light of the self-insurer's obstruction of the doctor's deposition, was arbitrary and capricious. The issue arose from the following exchange, which was triggered by the entirely appropriate cross-examination attempted by the employee's counsel, using medical records that the doctor had reviewed in formulating his opinion:

> MR. CLOHERTY: [T]he doctor has before him the medical records that were submitted to him by the Department of Industrial Accidents. Okay? Now you are telling me that I do not have the right to cross-examine this doctor based upon the records that he reviewed?
>
> MR. FAGER: Yes, because those records are not in evidence. They are not part of the record of this hearing. They are not in evidence. This is hearsay. It's an attempt to get around the statute to get those records into evidence and you know it and I know it and it's not allowable.
>
> . . .
>
> I don't want them even being part of the record. I don't even want the questions in the transcript. The problem with what you are asking me to do [motion to strike] allows those questions to be part of the transcript and I don't even want them there.
>
> . . .
>
> MR. CLOHERTY: . . . [I]f you're instructing this doctor who is not my witness and he's not your witness -- he has the unfortunate situation of being selected by the Industrial Accident Board to examine and comment on this particular case and I have to conduct a cross-examination of him and I have to do it by using the records that were provided to him by the Department of Industrial Accidents. Now all I can say is this. If you are not going to – first of all, you can't prevent me from asking these questions, and I don't even think you can prevent the doctor from answering them, but I don't want you to sit here and keep raising your voice. Your objection is noted.
>
> MR. FAGER: My objection is continuing. The only person that can ask [sic] this question is Judge Harris. We have to go and talk to him

before we proceed with this deposition if you are going to ask questions about this record.

MR. CLOHERTY: Well, let me say this to you Michael. I am not going to pay another $500 to come back here to ask this doctor these questions.

MR. FAGER: Then I guess you shouldn't ask them, should you?

Q: Doctor, you reviewed the medical records of the Spaulding Rehab and Dr. Harold Rosenblatt, is that correct?

A: That is correct.

Q: Doctor, would you please turn to page – excuse me, the office visit of April 28, 1999.

A: Okay.

Q: Do you have that?

A: Yes, I do.

MR. FAGER: Now I would object to you asking questions about this. This doctor can only testify to what he found on his examination. He has done that. You cannot offer these records. You cannot question him as a method of getting these records into evidence. These records are not part of the record of this hearing and you cannot get them in this manner.

MR. CLOHERTY: Are you through?

MR. FAGER: No, I am not through until you agree that in fact you can't do this or until the judge makes a specific ruling that you can.

MR. CLOHERTY: So I am not going to agree with you.

MR. FAGER: Then I guess we have to go talk to Judge Harris, don't we?

MR. CLOHERTY: So you are going to prevent this witness from answering these questions?

> MR. FAGER: Yes, I am.
>
> MR. CLOHERTY: And how are you going to do that?
>
> MR. FAGER: *I'll talk over the record so that she cannot make a record of it if I have to because I know she can't write down what two people are saying at the same time.*
>
> MR. CLOHERTY: Very good. Since you are going to obstruct the continuation of this deposition, I will move to suspend based upon Attorney Fager's representation and we will get a clarification from the judge.

(Dep. 69-74, emphasis added.)

The judge's response to parties' inquiry regarding the suspension of the deposition was to allow the parties to introduce additional medical evidence, without requiring a resumption of the deposition, or countenancing the employee's request for sanctions for counsel's obstruction of the doctor's testimony. (Dec. 6-7; Employee's Brief 22-23.) Then, despite the improperly thwarted cross examination, the judge nonetheless adopted the § 11A physician's opinion in its entirety. (Dec. 7.) Under these circumstances, the adoption of the § 11A doctor's testimony, where cross-examination was obstructed, was an arbitrary and capricious denial of due process.

There is no question that the self-insurance counsel's obstruction denied the employee his opportunity to cross-examine the doctor regarding the underlying medical records. Such a denial of the opportunity to put forward his medical case under § 11A was a clear due process violation under O'Brien's Case, 424 Mass. 16 (1996). Counsel's conduct at the deposition was unseemly, and his assertion of this "defense" to the doctor's examination was without reasonable legal grounds.

In conducting his cross-examination, counsel for the employee had every right to use the underlying medical records that the § 11A physician had reviewed. This is so fundamental as to raise the specter of bad faith on the part of self-insurer counsel in contesting the point. In rejecting a facial constitutional challenge to G. L. c. 152, § 11A, the Supreme Judicial Court could not have been clearer as to this proposition:

> A second reason that O'Brien's facial challenge must fail is that there is, in a very real sense, as opportunity for the claimant to develop and put before the relevant decision makers medical testimony she considers favorable to her claim. The impartial medical examiner will have before him any medical records relevant to the issues before him. See § 11A(2)("[c]laimant to submit to such examiner all relevant medical records, medical reports, medical histories, and other relevant information requested"). That means that at least the claimant and perhaps the insurer may procure, if they wish, medical reports bearing on their contentions and that they will be able to offer these to the impartial medical examiner for his consideration. Thus the examiner, as to the prescribed medical issues, stands in the position of a master or arbitrator who has considered evidence from both parties and whose determination of the medical issues the administrative judge reviews in the stage three hearing. And as a final aspect of the fairness of this procedure, at least in response to a facial challenge, the parties may go so far in challenging the examiner's report as to depose the examiner "for purposes of cross-examination." § 11A(2). *In such deposition and cross-examination, the challenging party may inquire into the basis of the examiner's report, whether he considered the medical records and reports submitted to him by that party, how the examiner was able to reach an unfavorable conclusion in the light of such records and reports, and in this way bring these materials to the administrative judge's attention in the stage three hearing* and perhaps argue on their strength that the judge should authorize additional medical testimony. The deposition and cross-examination will, of course, be part of the record on review before the reviewing board.

O'Brien's Case, supra at 23-24, (emphasis added; footnote omitted).[2]

In light of the highlighted language above, we are disappointed that self-insurer counsel would assume such a frivolous posture, and – even more so – that the judge would not hear and allow the employee's request for sanctions without hesitation. Although not specifically sought in the employee's appeal to the reviewing board, we

[2] Even without the explicit approval of the employee's use of the underlying medical records in O'Brien, supra, the proposition that an expert may use as foundation records and reports that are not in evidence, but which are of a type reasonably relied upon by physicians in formulating expert opinions and, if introduced, would have been independently admissible, has long been established. See Dept. of Youth Services v. A Juvenile, 398 Mass. 516, 528-532 (1986). Taken out of the strict § 11A context, all of the employee's medical records, if prepared with the appropriate procedural formalities of G. L. c. 233, § 79G, would have been independently admissible. Section 11A's very structure recognizes that these records are crucial – i.e. reasonably relied upon – in the examiner's assessment of the employee's medical status, a fact not lost on the O'Brien court.

award § 14(1) sanctions against self-insurer counsel, on our own initiative. That statute provides, in pertinent part:

> If any administrative judge or *administrative law judge* determines that *any proceedings* have been brought or defended by an employee *or counsel without reasonable grounds*, the whole cost of the proceedings shall be assessed against the employee or counsel, whomever is responsible.

G . L. c. 152, § 14(1), as amended by St. 1991, c. 398, § 35.

At the outset, the self-insurer's general defense against the claim had a colorable basis. However, the defense tactics waged at the deposition, then maintained at the § 11C appeal proceeding, were without reasonable grounds. That same defense caused a due process violation that then went unchecked and became incorporated in the hearing outcome. Therefore, we assess "the whole cost of the proceedings" upon that counsel, as provided by § 14(1). We will retain jurisdiction over this issue. We request that counsel for the employee submit, within ten days of the filing of this decision, an affidavit of all of the costs that have been incurred in pursuing his claim for further compensation benefits, from the filing of the claim through oral argument before the reviewing board. Such costs under § 14(1) do not include attorney's fees. Compare G. L. c. 152, § 14(2). Counsel for the self-insurer will then have ten days from such submission to object to any item contained therein. After consideration of such materials, we will issue an order for the § 14(1) penalty.

We recommit the case so that the employee may continue the deposition of the § 11A physician, also at the expense of the self-insurer's counsel.

Another issue requiring recommittal involves the nature of the employee's psychological claim for benefits. While the record indicates that the employee's PTSD pre-existed the industrial injury, in that it was causally related to his Vietnam experiences, the judge erred in finding that the employee's depression also pre-existed the industrial injury. The adopted medical testimony of the self-insurer's expert psychiatrist, Dr. Rogers, does not support this finding, as asserted by the judge. (Dec.

14.) Dr. Rogers explicitly indicated that the depression condition post dated the industrial injury by two years although that after-occuring condition also related to the employee's PTSD. (Dep. 42, 43.) Moreover, the doctor's opinion on the depression was much more focussed on the employee's reaction to his industrial injury, in terms of his loss of self-esteem at not being able to work. (Rogers Dep. 42-43, 50; Roger's March 17, 2000 Report, Dep. Ex. 2.) Thus, as the medical evidence established that the employee's depression did not have pre-existing component, which would make it susceptible to analysis under § 1(7A)'s "a major" causation standard, this aspect of the employee's psychological claim should have been assessed under the simple causation standard. The judge did not address this distinction, instead lumping the two psychological conditions together. Contrary to the judge's finding, (Dec. 12), the depression as a sequel to his physical industrial injury – is compensable under the simple, "as is" standard of causation. See Cirignano v. Globe Nickel Plating, 11 Mass. Workers' Comp. Rep. 17 (1997). While we sustain the findings as to PTSD, we reverse the finding as to the employee's depression. On recommittal, the judge should reassess whether the employee's treatment for depression may be compensable separate and apart from the PTSD.[3]

Finally, the employee argues that many of the judge's findings discrediting the employee are arbitrary and capricious. We agree with some of the assertions. We do not see the issue of the employee's having not received a Purple Heart as germane to this claim. We do not think that the employee's average weekly wage – as determined in the prior proceeding, and not stipulated in the present hearing – should be held against him. We also do not think that some inexactitude in testimony regarding time spent in the

[3] We are puzzled by the judge's commentary that the Veteran's Administration provides the medical services without cost to the employee. (Dec. 12, 14.) And, we caution that such a collateral source, available to the employee for payment of work-related treatment, is not to be considered by the judge. See G. L. c. 152, § 38, amended by St. 1986, c. 662, § 33, which reads:

> Except as expressly provided elsewhere this chapter, no savings or insurance of the injured employee independent of this chapter shall be considered in

military, over thirty years prior to the hearing, can fairly be used to discredit the employee. See Daly v. City of Boston School Dept., 10 Mass. Workers' Comp. Rep. 252, 258(1996)(de mininus discrepancies in testimony improper basis for discrediting witness). The judge on recommittal should remove from his consideration of the employee's testimony such extraneous matters as these.

Accordingly, we recommit the case for completion of the deposition testimony at the self-insurer's expense and for further findings consistent with this opinion. The parties shall address the § 14(1) penalty as discussed above.

So ordered.

Susan Maze-Rothstein
Administrative Law Judge

William A. McCarthy
Administrative Law Judge

Filed: May 16, 2003

Sara Holmes Wilson
Administrative Law Judge

determining compensation payable thereunder, nor shall benefits derived from any other source than the insurer be considered in such determination.