COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS	**BOARD NO. 042332-05**
Scott Sweet	Employee
Eagleton School	Employer
American Home Assurance	Insurer

REVIEWING BOARD DECISION
(Judges Horan, Costigan and Fabricant)

This case was heard by Administrative Judge Rose.

APPEARANCES
Patrick C. Gable, Esq., for the employee
William C. Harpin, Esq., for the insurer

HORAN, J. The insurer appeals from a decision awarding the employee § 34A benefits. It maintains the judge erred in finding the employee permanently and totally incapacitated because the § 11A impartial medical examiner, whose opinion the judge adopted, considered "the same pain factors and limitations cited by the judge, [and] found the employee capable of sedentary work." (Ins. br. 1.) We affirm the decision.

The employee, age forty-four at hearing, left high school in the tenth grade and failed in two attempts to obtain his GED. Since 1994, he has worked for several companies owned by the same individual, painting and doing maintenance work requiring lifting up to one hundred pounds. All of his prior work experience involved physical labor, such as driving, loading and unloading trucks, operating a ski lift, and hooking metal beams to oil rigging. (Dec. 3-4.)

On December 26, 2005, the employee injured his back at work. (Dec. 4.) The insurer accepted liability and paid § 34 benefits through exhaustion. (Dec. 6.) Thereafter, the employee filed a claim for permanent and total incapacity benefits under § 34A. At conference the judge ordered the insurer to pay § 35 partial incapacity benefits. The employee appealed. (Dec. 2.)

On January 28, 2009, Dr. Mark Linson conducted the § 11A examination. His report and deposition testimony were the only medical evidence admitted at hearing. Dr. Linson opined that, despite his pre-existing lumbar degenerative disc disease, the employee's work injury remained a major cause of his disability. He found the employee had sixty percent of normal back motion, a tender low back, a tentative gait, and normal leg neurological testing. He restricted the employee to part-time sedentary work activity (four hours a day, five days a week) with no standing, sitting or walking more than fifteen minutes without an opportunity to change positions, and only occasional lifting of up to ten pounds. (Dec. 5-6.) At his deposition, Dr. Linson testified it would be hard "to imagine someone with more restrictions than this, by even a little bit, working at all." (Dep. 24.) The doctor made it clear he did not consider vocational factors in his disability analysis: "[t]hat's not my role, nor job, and that's why I even indicated in my report that his work capacity would have to be evaluated by the discretion of the Court." (Dep. 20.) The judge adopted Dr. Linson's opinions on causation and the extent to which the employee's work injury restricted his physical ability to work. (Dec. 6.)

At the hearing, the employee testified to consistent, progressively increasing pain in his back, which radiated into his right hip and leg. He related that physical activity increased his pain, causing him to lie down several times during the day. The employee also noted that because cold or wet weather worsened his symptoms, he remained at home on such days, and that his pain medication caused coordination, balance and memory problems. (Dec. 4-5.) The judge found the employee "entirely credible" with respect to his "subjective pain and subjective physical limitations." (Dec. 5.)

Addressing the impact of the employee's physical impairment on his ability to earn, the judge found:

> [T]he employee is 44 years of age with less tha[n] a tenth grade education. He cannot return to any of his previous employment as all his previous jobs

> required bending and lifting greater than 10 lbs. At hearing there was contradictory expert vocational testimony as to the ability of the employee to obtain part-time sedentary employment within Dr. Linson's restrictions. However, *I find the employee's testimony in reference to his subjective pain and subjective physical limitations entirely credible.* I have found credible that during inclement weather the employee often finds it necessary to stay in his home. On a daily basis he has to lie down and spends most of his day in a recliner. *I find that these credible subjective pain factors and limitations render the employee entirely unemployable in any position in the open labor market. The employee would be an inherently unreliable employee with excessive absenteeism which would not be tolerated.*

(Dec. 8; emphasis added.) Accordingly, the judge awarded the employee permanent and total incapacity benefits. (Dec. 8-9.)

On appeal, the insurer argues that because the judge adopted Dr. Linson's opinion respecting the employee's physical limitations, and credited the same level of pain the employee reported to the doctor, the judge was bound to adopt the doctor's conclusion that the employee was only partially disabled.[1] As part of its argument, the insurer maintains the judge did not perform an adequate vocational analysis. We disagree.

It is by now axiomatic that an impartial examiner's opinion is prima facie evidence only as to *medical issues*, which may include "the employee's ability to perform certain tasks and state restrictions on his ability to work." Scheffler's Case, 419 Mass. 251, 257 (1994). However, the prima facie status of the impartial opinion may be overcome when the judge gives "decisive weight to the credible testimony of the worker about his limitations." Dalbec's Case, 69 Mass. App. Ct. 306, 313-314 (2007). Consistent with this principle, we have held that a judge may credit an employee's complaints of pain to award total incapacity benefits in the face of a medical opinion of partial disability. See, e.g., Brown v. Northeast Underpinnings, Inc., 22 Mass. Workers' Comp. Rep. 329, 331 (2008), *aff'd sub*

[1] With this argument, the insurer would have us equate disability with incapacity. Although related, they are distinct concepts. See e.g., Guzman v. Act Abatement Corp., 23 Mass. Workers' Comp. Rep. 291, 300 (2009), and cases cited.

nom. Brown's Case, 76 Mass. App. Ct. 1105 (2009)(Memorandum and Order pursuant to Rule 1:28); Anderson v. Anderson Motor Lines, 4 Mass. Workers' Comp. Rep. 65 (1990). Indeed, it is error for an administrative judge to defer to an impartial physician's opinion regarding the credibility of the employee's subjective complaints of pain and limitations. Moynihan v. Wee Folks Nursery, Inc., 17 Mass. Workers' Comp. Rep. 342, 347 (2003). The judge must make his own credibility findings. Larti v. Kennedy Die Castings, Inc., 19 Mass. Workers' Comp. Rep. 362, 370 (2005). This is precisely what the judge did here. He did not, as the insurer maintains, substitute his lay opinion respecting the employee's physical limitations for that of the impartial physician. He merely fulfilled his responsibility to assess the employee's credibility, to make findings regarding the extent of his pain and its effect on his physical limitations, and to determine whether, as a practical matter, he was employable.

Moreover, we cannot assume, as the insurer does, that the employee complained of the same level of pain at his impartial examination with Dr. Linson as he did at the hearing held nearly six months later.[2] Nor can we assume that Dr. Linson and the judge were similarly influenced by the employee's complaints. As Dr. Linson acknowledged, his job was not to consider vocational factors in assessing the employee's medical disability. (Dep. 20.) It is the judge's job to decide whether the employee can obtain and retain "remunerative employment of any kind within his ability to perform." Frennier's Case, 318 Mass. 635, 639 (1945).

The insurer acknowledges the judge could have utilized vocational factors to find the employee totally incapacitated even though he was partially medically disabled, (Ins. br. 9), but contends the judge erred by not adopting any of the expert vocational testimony, and by otherwise failing to conduct an adequate

[2] In fact, the insurer acknowledges the impartial physician did not quantify the amount of pain the employee experienced. (Ins. br. 11.)

vocational analysis. We disagree. The judge was under no obligation to credit the opinion of any vocational expert. Martin v. Sunbridge Care and Rehab. for Hadley, 22 Mass. Workers' Comp. Rep. 1, 5 (2008), citing Sylva's Case, 46 Mass. App. Ct. 679, 681 (1999). Here, the judge noted that contradictory expert vocational testimony was presented by both parties regarding the employee's ability to obtain part-time sedentary employment within Dr. Linson's restrictions. (Dec. 8.) Rather than credit the vocational testimony, the judge relied on his own expertise to conclude the employee was "entirely unemployable . . . [as he] would be an inherently unreliable employee with excessive absenteeism which would not be tolerated." Id. It was squarely within the judge's power to consider "the attitudes of personnel managers" in addressing the issue of the employee's incapacity. Scheffler, supra at 256.

Based on the employee's credible complaints of pain, the restrictions imposed by Dr. Linson, as well as the employee's age (44), limited education (less than tenth grade), and a history of manual labor that the employee could no longer perform, the judge did not err in concluding the employee was "entirely unemployable in any position in the open labor market." (Dec. 8.) Accordingly, we affirm the decision. Pursuant to § 13A(6), the employee's attorney is awarded a fee of $1,488.30.

So ordered.

Mark D. Horan
Administrative Law Judge

Patricia A. Costigan
Administrative Law Judge

Bernard W. Fabricant
Administrative Law Judge

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Dept. of Industrial Accidents