COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 038010-94**

Soledad Colon Employee
Kitty's Restaurant & Lounge Employer
Public Service Mutual Ins. Co. Insurer

REVIEWING BOARD DECISION

(Judges McCarthy, Smith and Wilson)

APPEARANCES

Vincent M. Tentindo, Esq., for the employee at hearing and on brief
John J. Canniff, Esq., for the employee on brief and at oral argument
Martha E. Krache, Esq., for the insurer at hearing and on brief
Peter M. McElroy, Esq., for the insurer at oral argument

MCCARTHY, J. Soledad Colon, now forty-six years old, came to the United States from her native Columbia in 1986. Although she does not speak it, Mrs. Colon is able to read a little English. (Dec. 4.)[1] In 1994, Mrs. Colon began work at Kitty's Restaurant & Lounge (hereafter "Kitty's") busing tables. Earning $5.75 per hour, she cleaned tables, arranged new place settings and carried dishes and silverware to the dishwasher. There was no time to sit on this job. (Dec. 5.) Mrs. Colon was concurrently employed by New Balance Shoe Company (New Balance) and worked forty hours a week as a machine operator, earning $6.00 per hour. (Dec. 5.)

The parties agree that on September 9, 1994, while in the course of her employment at Kitty's, the employee fell near the dishwashing machine and injured her left shoulder and left side. (Dec. 5.) She was taken by ambulance to Lawrence General Hospital where x-rays were taken and a neck brace prescribed. She was advised to remain out of work for a week. (Dec. 5.) On September 16, 1994, the employee returned

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[1] Her testimony at hearing was taken through an interpreter. (Dec. 4.)

to both jobs despite continued discomfort. She did her regular job at Kitty's, but at New Balance she was given light-duty work. The judge

> . . . credit[ed] the employee's testimony that when she returned to her concurrent employment, she did not do her regular job which required pulling on a machine. She was given a job of putting shoelaces in shoes. She tried to work for two weeks, but could not meet the production requirements because the medication made her sleepy. Also she had difficulty working because the pain in her low back and because (sic) the pain in her low back and lower extremities. The employee was terminated from New Balance, because she was unable to perform her job duties and no lighter duty work was available.

(Dec. 6.)

In performing her regular work at Kitty's, Mrs. Colon required assistance taking trays off the cart. On October 27, 1994, she left work at Kitty's because the pain in her back and leg became worse.

Mrs. Colon brought a claim for benefits and after a § 10A conference, the insurer was ordered to pay a two month closed period of § 35 benefits and ongoing § 34 benefits. The insurer appealed to a hearing *de novo*. (Dec. 2.) Mrs. Colon treated with Dr. Marvin who recommended an MRI and prescribed physical therapy. He then referred her to Dr. Cook, a neurologist. She also treated with several other doctors. (Dec. 7.)

On November 2, 1995, the employee was examined by Dr. Donald Pettit, the § 11A physician, who then submitted his medical report as required by the statute. In response to the employee's motion to introduce additional medical evidence, the administrative judge found the medical issues complex and allowed the motion. By letter dated May 31, 1996, the employee offered the medical report of Dr. Bianchi, who had examined the employee on behalf of the insurer, but the judge refused to accept it into evidence. Employee counsel then requested permission to depose Dr. Bianchi and this request was also denied. (Dec. 3-4.)

Doctor Pettit, the impartial examiner, reported that the "MRI findings are coincidental degenerative changes" and "that the disc herniation does not represent an acute injury consequent to her fall of 9/9/94." (Dec. 8; Ex 2 at 2.) He estimated that the

employee was totally disabled for a period of two weeks following the September 1994 incident and partially disabled into March 1995, the medical disability being causally related to the September 9, 1994 work injury. Although Dr. Pettit felt that Mrs. Colon was capable of returning to work after March 1995, he thought that it would be reasonable to obtain a neurological evaluation " 'in order to definitively answer what correlation there might be between the symptoms and signs.' " (Ex 2, at 2; Dec. 8.) On May 8, 1996, Dr. Bruce Cook, a neurologist, examined the employee. He found no neurological explanation for her ongoing pain nor any " . . . ongoing deficit consistent with her claimed disability." (Dec. 8.)

Relying on the medical opinions of the § 11A physician and Dr. Cook, the judge found a two-week period of total incapacity, followed by a six month closed period of partial incapacity. (Dec. 9, 11.) The administrative judge determined that by May 8, 1996, there was no medical evidence causally relating Mrs. Colon's symptoms to the injury of September 9, 1994. (Dec. 11.) The judge awarded a closed period of § 34 benefits from October 28, 1994 to November 11, 1994, and § 35 benefits from September 12, 1994 to September 15, 1994 and from November 12, 1994 to May 8, 1996, based on an earning capacity set at $240.00 per week during the periods of partial incapacity. Finally, the administrative judge ordered the insurer to pay medical expenses under § 30 and legal fees and expenses under § 13A. (Dec. 13.) The employee appeals; she raises two issues.

First, counsel argues that in refusing to allow the deposition of Dr. Bianchi the judge defeated "the spirit of fair and full inquiry" (Brief 8) and thereby erred. Counsel for the insurer responds that in refusing to accept Dr. Bianchi's report of examination commissioned by the insurer and in refusing to permit the employee to depose the doctor, the judge explicitly relied upon relevant Board regulations. The regulation cited by the judge reads in pertinent part as follows:

> At a hearing pursuant to M.G. L. c. 152 § 11 . . . in which the administrative judge has made a finding . . . that additional testimony is required due to the complexity of the medical issues . . . a party may offer as evidence medical reports prepared by physicians <u>engaged by said party</u>,

> together with a statement of said physicians qualifications. (emphasis added).

452 Code Mass Regs 1.11(6)(c).

The employee offered the report pursuant to this regulation. However, it creates a hearsay exception allowing the introduction of one's *own* medical experts. As Dr. Bianchi was engaged by the insurer, the judge did not err in relying upon the above-cited regulation in refusing the offer of his report. Based on another regulation, the judge refused the employee's request to depose Dr. Bianchi. "Pursuant to 452 C.M.R. 1.12(5), any party may, for the purpose of cross-examination, depose the physician who prepared an admitted medical report." (Dec. 3, 4, emphasis added). If there are other possible bases which would have made the report or deposition of Dr. Bianchi admissible on behalf of the employee, they have not been argued; thus we affirm the judge's disposition of this issue. Cf. Ramacorti v. B.R.A., 341 Mass. 377 (1960) (discussing circumstances under which one party can use the expert hired by the opposing party).

Next and finally, the employee argues that the retroactive reduction of weekly benefits (the decision reduced the benefits ordered at conference and resulted in an over-payment of approximately $20,000.00) was arbitrary, capricious and contrary to law. Specifically, the employee contends that the award of an earning capacity of $240.00 is not supported by the evidence. We agree. Mrs. Colon earned $240.00 a week in her concurrent employment at New Balance. In setting the employee's earning capacity at $240.00 per week the judge seems to be saying that the employee was capable of performing her former work at New Balance. Yet the judge also found that when the employee went back to New Balance she did light duty work and was terminated shortly after her return because her pain and medication kept her from maintaining production requirements. (Dec. 6.) The judge also credited the employee's testimony that she needed assistance in performing her work at Kitty's (Dec. 6); that standing causes throbbing pain; that sitting can be tolerated up to an hour and three quarters; that she cannot lift items because she is unable to bend. (Dec. 9.) The establishment of an earning capacity of $ 240.00 per week seems at odds with these subsidiary findings.

Accordingly, we return this case to the senior judge for recommittal to the hearing judge for further findings on the employee's earning capacity.

So ordered.

William A. McCarthy
Administrative Law Judge

Filed: March 16, 2000

Suzanne E. K. Smith
Administrative Law Judge

Sara Holmes Wilson
Administrative Law Judge