COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS	**BOARD NO. 048400-93**
Steven Carucci	Employee
S & F Concrete	Employer
U.S.F.& G. Insurance	Insurer

REVIEWING BOARD DECISION
(Judges Carroll, Levine and Maze-Rothstein)

APPEARANCES
William T. Salisbury, Esq., for the employee
David W. Perry, Esq., for the insurer at hearing
Donald E. Hamill, Jr., Esq., for the insurer on appeal

CARROLL, J. The employee and insurer appeal from a decision in which an administrative judge awarded the employee benefits on his original liability claim, while at the same time finding that the employee had engaged in fraudulent conduct proscribed by § 14. The employee challenges, among other things, the judge's finding of fraud. The insurer contends, among other things, that the judge's finding of fraud required him, in turn, to deny and dismiss the employee's claim for benefits in its entirety. As to these two predominant issues on appeal, we affirm the decision. However, we reverse the decision in part, and recommit the case for the judge to assess the penalty under § 14(2).

In the autumn of 1993, Steven Carucci worked as a laborer for the employer, doing construction work at a project at Deer Island. On November 18, 1993, the employee twisted his back while he was hauling lumber up a flight of stairs. He felt immediate pain, but worked for another hour with pain in his lower back, which radiated into his buttocks and leg. He reported the incident and injury and, although told to take it easy, remained on the job for the rest of the day. His pain worsened that night, and he did not return to work as a laborer, but consulted a doctor. (Dec. 180-181.)

Although he did not return to work the next day, Carucci drove to the Massachusetts Highway Department and signed a contract to plow snow for the

Commonwealth during the coming winter. The employee, who owned his own truck and plow, had performed plowing services for the previous few winters. The Commonwealth paid $55 per hour for plowing, with the employee responsible for his own expenses. (Dec. 181.) Commencing on December 11, 1993 and continuing until March 26, 1994, the employee grossed $10,202.50 plowing for the Commonwealth. (Dec. 181, 183.)

The insurer commenced § 34 weekly temporary total incapacity payments, without prejudice, on December 15, 1993, which payment was retroactive to November 19, 1993. (Dec. 173, 178, 183.) The insurer started investigating the employee's activities in mid-January 1994. (Dec. 184.) The investigator witnessed the employee plowing. However, the investigation did not uncover that the employee's work was for the Commonwealth. (Dec. 185.) On February 23, 1994, the insurer terminated the employee's with-out-prejudice payments pursuant to § 8(1), effective as of March 2, 1994. (Dec. 186.)

The insurer sent a request for an earnings report to the employee on February 28, 1994. Id. The employee returned it on March 29, 1994. The employee reported no gross earnings at any time from the date of his work injury, November 18, 1993. (Dec. 186; Insurer's Ex. 21.) The employee had received paychecks from the Commonwealth in the amounts of $550.00, dated February 25, 1994, and $302.50, dated March 18, 1994, for his plowing work. In May 1994, the employee received the remainder of the $10,202.50 that he earned from the Commonwealth for his winter 1993-1994 plowing. (Dec. 186.)

By May 1994, the employee began working for his own company, Picket Fences. On May 3, 1994, the employee reported to the insurer, through his attorney, that he was only performing supervisory work and no physical labor. On May 4, 1994, the insurer's investigators videotaped the employee performing physical labor in dismantling a fence and installing a new fence. In his report of the employee's fencing activities, the employee's attorney made no mention to the insurer of the employee's plowing during the preceding winter. (Dec 187.)

The employee's medical treatment started on November 30, 1993, when he was seen by Dr. Donald R. Pettit, who treated the employee conservatively. (Dec. 182.) Dr. Pettit's report of December 28, 1993 stated that the employee "has been out of work since

that time[,]" namely, the November 18, 1993 work injury. The doctor causally related the employee's disability to that event. (Dec. 193; Employee's Ex. 21.) The doctor ordered an MRI, which was performed on December 30, 1993. The MRI showed a disc herniation at L5-S1. Dr. Pettit stated in his report of January 17, 1994, that the employee "remains totally disabled for work as has been the case since the date of his injury." The doctor further stated that the employee could not even return to modified light duty work. (Dec. 193; Insurer's Ex. 36.) In his July 12, 1994 report, Dr. Pettit stated that the employee "began to work managing his own fencing company. He claims that he was only doing paperwork and sales and did none of the actual construction." (Employee's Ex. 21; Dec. 193-194.)

The employee was examined several times by Dr. John L. Doherty. In one of his four reports, prepared for the employee, the doctor stated on June 24, 1994 that the employee "has started his own fencing business. He sells fences but does not install them." (Dec. 195; Employee's Ex. 23.) The employee underwent surgery on December 13, 1994. The physician who performed the surgery, Dr. William P. McCann, stated in his October 24, 1994 report that the employee did not perform physical work in his fencing company. (Dec. 196-197; Employee's Ex. 24.) In a report prepared for the insurer, Dr. John F. Coldewey stated that the employee "remained out of work [after his work injury] until April 1994" and that the employee "started to manage his own fencing company" at that time. (Dec. 197; Employee's Ex. 25.)

All of the doctors who examined the employee agreed that the employee suffered from a disabling work injury. (Dec. 198-199.) In later reports, Drs. Pettit and Doherty clearly addressed the employee's medical status with a complete history of his post-injury work activities. (Dec. 194, 195, 199; Employee's Ex. 21, 23.) In his October 9, 1996 report, Dr. Doherty opined that the employee's snowplowing activity "did not do anything to aggravate his back as evidenced by my report dated March 1994 when he was able to do light work as stated by me and also as stated by an independent medical examiner . . . ." Moreover, the doctor did "not believe that anything in the fence business directly caused the ruptured disc to become worsened; the ruptured disc was already

there." (Dec. 195; Employee's Ex. 23.) Dr. Pettit concurred with Dr. Doherty, stating in his November 7, 1996 report that the employee's work-related herniated lumbar disc "was not caused by snowplowing or inserting fence posts . . . ." (Dec. 194; Employee's Ex. 21.)

On March 7, 1994, the employee filed a claim for ongoing temporary total incapacity benefits from the day after the termination of his without-prejudice payments, March 3, 1994. (Dec. 173; Insurer's Ex. 30.) The conference on the claim took place on August 17, 1994. (Dec. 189.) The employee amended his claim at that time to temporary total incapacity only from March 3, 1994 to April 15, 1994, and § 35 temporary partial incapacity from April 16, 1994 and continuing. (Dec. 174.) As of the time of the conference, the insurer knew that the employee was engaged in his fencing business. It also knew that the employee had plowed during the winter. However, it did not know the amount of the employee's earnings from plowing for the Commonwealth, nor that he had performed that work from December to March. The insurer discovered the details of the employee's plowing by means of further investigation some months later. (Dec. 189.) The judge denied the employee's claim at conference. (Dec. 174.) The employee appealed to a de novo hearing.

Although the employee underwent an impartial examination on October 19, 1994, the parties agreed to waive the report on the issue of present disability, because it preceded the employee's December 1994 surgery. (Dec. 174.) When the parties convened for the hearing on July 10, 1995, the employee amended his claim to temporary total incapacity from November 19 to 30, 1993 and from July 29, 1994 to April 15, 1995, and partial incapacity from December 1, 1993 to July 28, 1994 and from April 16, 1995 ongoing. The insurer defended on the grounds of liability, disability and extent thereof, causal relationship, average weekly wage, and alleged § 14 fraud and frivolous claim on the part of the employee. (Dec. 175.) As of September 16, 1996, the eighth day of hearing, the employee amended his claim a third time to seek temporary total incapacity benefits from December 1, 1994 to April 1, 1995, and partial incapacity benefits from April 2, 1995 and continuing. (Dec. 177.) A few days later, the insurer requested that the

judge allow joinder of the issue of recoupment of without-prejudice benefits paid from November 19, 1993 to March 2, 1994, due to the employee's most recent amendment to his claim. The employee contested that issue. The judge allowed the joinder. The judge then found the employee's refusal to concede that recoupment was due effectively amended the claim once again. The judge reasoned that "by refusing to concede that recoupment was due for the money paid from November 19, 1993 to March 2, 1994, the employee must assert that he is entitled to the money." (Dec. 178.)

The judge concluded that the employee had suffered an industrial injury on November 18, 1993, and that he had been incapacitated to some degree since that time. (Dec. 198.) The judge relied in particular on the later reports of Drs. Pettit and Doherty, which contained opinions that were based on an accurate and complete work history. (Dec. 199; Employee's Ex. 21, 23.) The judge noted that none of the medical evidence in the case contradicted the conclusion that the employee's present incapacity was causally related to his work injury. The judge referred to the insurer's argument that something in the employee's post-injury work activity aggravated his condition to the point of severing causal relationship as "speculation." The judge concluded that the employee was temporarily totally incapacitated from November 19, 1993 to December 10, 1993 and from August 1994 until early in 1995, and was partially disabled at all other times since the injury. (Dec. 199.)

The judge then addressed the insurer's allegation that the employee had engaged in § 14 fraud. The judge summarized that, "While I believe that the employee was truthful in his testimony at hearing, I find that he lied or purposefully deceived the insurer, employer, insurer's attorney, his own attorney, and representatives of the DIA including me, in the prosecution of his claim." (Dec. 201.) The judge then found eight instances of fraud. The following are the findings that we consider sustainable:

> He lied to or misled every doctor who examined him [by] not revealing his snow plowing activity or the physical nature of his fence work. . . . He listened to his attorney present a factually inaccurate presentation to me at the August 17, 1994 conference. There was no mention of the plowing as he requested total disability compensation during the entire plowing period. . . . He filed an erroneous earnings statement in March 1994.

(Dec. 201-202.) The judge noted that the attempts of Mr. Carucci to explain away his conduct were not credible. (Dec. 203.) The judge concluded his decision by rejecting the insurer's argument for denial and dismissal of the employee's claim:

> Although the insurer has asked that the employee's credibility lapses be construed in such a way as to deny all compensation, I cannot do that, as I have found independent medical reports that credibly establish disability. (Doctor's reports, including a finding of muscle atrophy, and MRI tests) Denial of all compensation may be a fitting penalty for the commission of fraud in a case such as this. However, there is no statutory basis upon which to base such a finding.

(Dec. 203-204.) The judge therefore ordered that the insurer pay the employee § 34 benefits from the date of injury until December 10, 1993, the day before the employee started plowing, and from December 1, 1994 to April 1, 1995. (Dec. 204.) The judge calculated the employee's $835.89 average weekly wage in accordance with the prevailing wage law. (Dec. 200, 204.) The judge noted that the employee's earnings from plowing surpassed the employee's average weekly wage, and did not award benefits for the employee's partial incapacity from December 11, 1993 to March 2, 1994. Nor did the judge award the employee benefits for his partial incapacity from March 2, 1994 until December 1, 1994, as the employee had withdrawn this period of his claim by way of his September 16, 1996 amendment. (Dec. 177, 204.) The judge ordered that the insurer pay the employee § 35 benefits based on an earning capacity of $480.00 per week, which the judge considered appropriate for someone who has run his own business. (Dec. 204-205.) The judge ordered that the insurer could recoup any overpayments made during the pay-without-prejudice period, as the employee had not been honest with the insurer about his work activities at that time. (Dec. 205.) The judge ordered that the insurer pay the employee's attorney fee under § 13A(5). Finally, the judge ordered that "the employee shall bear the whole cost of this proceeding including the costs of the insurer's attorney and his reasonable expenses and his own attorney and his reasonable expenses, pursuant to § 14(1)(b)." Id. Both parties appeal.

We first address the employee's appeal. We summarily affirm the decision as to the employee's contentions on appeal regarding the miscalculation of his average weekly wage and earning capacity. The decision is amply supported by the record evidence as to both of these issues.[1] The major point of the employee's appeal is his attack on the judge's findings of fraud. While we agree that not all of the judge's fraud findings are affirmable, we consider that three of them are supported by the record and the law.

The present case is governed by principles already addressed in various reviewing board decisions. First, we have concluded that the failure to report earnings on the appropriate form approved by the department not only is a violation of § 11D(1), but also constitutes "participat[ion] in the creation . . . of evidence which [the employee] knows to be false . . . ." § 14(2).[2]

> [When] that evidence is introduced "in any proceeding within the division of dispute resolution," the judge is required by G.L. c. 152, § 14(2), to impose costs and penalties. See Truex v. Quantum Machine-Stained Glass Coating, Inc., 9 Mass. Workers' Comp. Rep. 579, 580 (1995). [The employee] knowingly

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[1] On the issue of the employee's earnings while he was plowing, the employee argues that the judge erroneously failed to subtract expenses from his gross earnings. However, the judge was not in error where he did consider the expenses and concluded that the employee's net wages from plowing exceeded his average weekly wage. (Dec. 204). Compare Rogers v. Massachusetts Dept. of Public Works, 9 Mass. Workers' Comp. Rep. 539, 541-542 (1995) (where the administrative judge failed to address expenses at all).

[2] General Laws c. 152, § 14, provides, in pertinent part:

> (1)(b) . . . If any administrative judge . . . determines that any proceedings have been brought, prosecuted, 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.
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> (2) If it is determined that in any proceeding within the division of dispute resolution, a party . . . concealed or knowingly failed to disclose that which is required by law to be revealed, knowingly used perjured testimony or false evidence, knowingly made a false statement of fact or law, participated in the creation or presentation of evidence which he knows to be false, or otherwise engaged in conduct that such party knew to be illegal or fraudulent, the party's conduct shall be reported to the general counsel of the insurance fraud bureau. Notwithstanding any action the insurance fraud bureau may take, the party shall be assessed, in addition to the whole costs of such proceedings and attorney's fees, a penalty payable to the aggrieved insurer or employer, in an amount not less than the average weekly wage in the commonwealth multiplied by six.

> prepared the Employee's Earning Report which was entered into evidence at the hearing. [Insurer's Ex. 21; Dec. 186, 202.] That by itself is sufficient for the imposition of § 14(2).

Pirelli v. Caldor, Inc., 11 Mass. Workers' Comp. Rep. 380, 382 (1997)(emphasis added). Next, at various times the employee misled all of the physicians who examined him during the course of his claim, by not revealing the extent of his post-injury work activities. (Dec. 193-197.) Such provision of false information about his work status to doctors, whose reports were then entered into evidence at the hearing, is likewise a "participat[ion] in the creation . . . of evidence which he [knew] to be false." § 14(2). "Those actions are sufficient to trigger § 14(2) consequences." Pirelli, supra. See also Davis v. Cumberland Farms, 12 Mass. Workers' Comp. Rep. 526, 528 (1998). Finally, the employee was responsible for the claim that his attorney presented at the conference on August 17, 1994. The claim was for temporary total incapacity benefits for a period of several weeks in March 1994, during which the employee was still plowing for the Commonwealth. As the employee is principal to the agent attorney, he is bound by his attorney's false claim at conference under agency principles. Billert v. Rainbow Nursing Home, 13 Mass. Workers' Comp. Rep. ___, ___ (November 3, 1999). On these three findings, the judge's conclusions of § 14(2) fraud are well grounded. We affirm the decision as to the judge's finding of fraud.

The employee challenges the judge's order of recoupment of the benefits that the insurer paid without prejudice, from November 19, 1993 until March 2, 1994. We have denied, without analysis, an insurer's right to recoup benefits paid without prejudice. Sylvester v. Town of Brookline, 12 Mass. Workers' Comp. Rep. 227, 232 (1998). On the other hand, we have concluded more recently, with reasoned analysis, that administrative judges have the authority to address an insurer's right to recoupment as an equitable matter, even when the claim does not fall precisely within G.L. c. 152, § 11D, the explicit provision covering recoupment. Brown v. Highland House Apts., 12 Mass. Workers' Comp. Rep. 322, 324-325(1998). In the present case, we treat the insurer's request for recoupment of benefits paid without prejudice as being equitably within the scope of

§ 11D(1)-(2), which reads in pertinent part:

> (1) Any employee entitled to receive weekly compensation under this chapter shall have an affirmative duty to report to the insurer all earnings, including wages or salary earned from self-employment. Insurers shall notify employees of said duty on a form approved by the department. . . .
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> (2) An insurer in receipt of an earnings report indicating that overpayments have been made shall be entitled to recover such overpayments by unilateral reduction of weekly benefits, by no more than thirty percent per week, of any remaining compensation owed the employee; provided, however, that the reported earnings are of a kind that could have been considered in the computation of the employee's compensation rate. Where overpayments have been made that cannot be recovered in this manner, recoupment may be ordered pursuant to the filing of a complaint under section ten or by bringing an action against the employee in superior court.

St. 1991, c. 398, §32. Here, the employee sent the insurer a false earnings report that indicated he had no earnings over a four-month period, when in fact he had earnings. The earnings report period corresponded to the entire period of § 34 payments made by the insurer without prejudice. Since this is a situation which involves an earnings report, we consider it to come within the scope of § 11D(2), and specifically the final sentence thereof. It would be illogical for the statute to allow the recoupment right where an employee admits to earnings while receiving total incapacity benefits, but not where the employee falsely denies such earnings. Even without statutory authority "a judge has . . . authority under [his] equitable powers to address the recoupment issue." Brown, supra at 324. See Utica Mut. Ins. Co. v. Liberty Mut. Ins. Co., 19 Mass. App. Ct. 262, 265, 267 (1985) (the court authorized the department to fashion a remedy of impleader that was not provided by c. 152, but was at least consistent with the two insurer controversy provisions of G.L. c. 152, § 15A). In the end, the judge's order of recoupment -- "as the employee was not honest with the insurer during the pay without prejudice period, the insurer may recoup from the employee any overpayments made during the pay without prejudice period" (Dec. 205) -- is an exercise of his authority to weigh the competing considerations and order whatever recoupment he deems appropriate. Brown, supra at 326. We affirm the order of recoupment.

We now turn to the insurer's appeal. First and foremost, the insurer contends that equity dictates a dismissal of the employee's claim in its entirety, as the judge determined that he had engaged in fraudulent activity under § 14. The insurer cites as authority Shaw's Supermarkets v. DelGiacco, 410 Mass. 840 (1991), and Dawson v. Captain Parker's Pub, 11 Mass. Workers' Comp. Rep. 84 (1997). These cases are irrelevant to the judge's conclusion that the employee was both entitled to partial incapacity benefits and subject to penalties for fraudulent activity in pursuing his claim. The court in Shaw's Supermarkets, supra, interpreted § 27, which explicitly bars compensation "[i]f an employee is injured by reason of his serious and willful misconduct."[3] In Dawson, we construed § 1's definition of "wages" with regard to unreported tip income and affirmed the judge's findings on the employee's average weekly wage excluding such income. Id. at 86-87. The latter case did not stand for a bar to all compensation; the employee received compensation in that case. We point to the language of § 14(2), which sets out the penalties that the judge is to apply upon a finding of fraud thereunder. There is nothing in § 14(2) which provides that the employee's claim will be dismissed if he is found to have committed fraud. When the Legislature has intended such a sanction it has so stated. Thus, in §§ 27, 27A, and 8(2)(j) of the Act, the Legislature specifically stated that the employee shall not be entitled to benefits or compensation in the circumstances that come within those sections.

Nevertheless, there may be some discomfort with the notion that an employee should receive benefits despite having committed fraud. However, there are competent expert opinions which squarely support the judge's finding of incapacity.[4] These opinions are not tainted by fraud.

[3] Likewise, the Legislature's adoption of the Shaw's Supermarkets court's application of § 27 to employee misrepresentations as to physical conditions made at the time of hire, § 27A (St. 1991, c. 398, § 51A), bars entitlement to all compensation under c. 152.

[4] Although earlier medical reports were tainted by the false and misleading history provided by the employee, which is one of the bases for the judge's sustainable finding of § 14 fraud, later reports authored by each doctor were based on accurate histories in which all of the employee's post-injury work activity was fully disclosed. (Dec. 194-195.) In these reports, the doctors addressed the employee's disability status and each opined that the new information on the work

Moreover, the Legislature has determined the consequences when an employee commits fraud. The consequences include "a penalty payable to the aggrieved insurer . . . in an amount not less than the average weekly wage in the commonwealth multiplied by six." § 14(2) (emphasis added). Therefore, while there is no explicit statutory bar to compensation by virtue of § 14 fraud, the judge may consider a full balancing of the equities of the parties in assessing the amount of the § 14(2) penalty, i.e., whether to award a penalty greater than the minimum of six times the state average weekly wage. See Brown, supra (judge to consider equities in determining the amount of recoupment). This, the judge has not done. Thus, we agree with the insurer that the judge erred by failing to award penalties under § 14(2). We correct the judge's order directing penalties under "§ 14(1)(b)"[5] to read "§ 14(2)." The judge's findings on § 14 involve subsection (2) exclusively; namely, fraudulent conduct in prosecuting a claim for compensation. As a matter of law, it was § 14(2) penalties that the judge should have awarded on this record. That being so, we recommit the case for the judge to order the penalty under § 14(2) not already assessed. The judge did award attorney's fees and costs of proceedings under § 14(1)(b). However, those are also to be awarded under § 14(2) which reads, "Notwithstanding any action the insurance fraud bureau may take, the party shall be assessed, . . . the whole costs of such proceedings and attorneys' fees . . . ." G.L. c. 152 § 14(2). Therefore, we affirm that part of the order.

As to all other issues raised by the insurer, we summarily affirm the decision of

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activities made no difference to their disability and causal relationship opinions. The judge could rely, without error, on these reports to support his finding of partial incapacity. Moreover, Drs. Pettit and Doherty opined that neither the snowplowing nor the fence work contributed to the employee's medical disability. Therefore, the contention that the judge was constrained to find a subsequent injury, breaking the chain of causation to the original industrial injury, is without merit. See Squires v. Beloit Corp., 12 Mass. Workers' Comp. Rep. 295, 297-298 (1998).

[5] The judge erroneously issued his order under the frivolous claim subsection of § 14. Subsection 14 (1)(b) prohibits claims brought "without reasonable grounds." The fact that the judge found that the employee had prevailed in prosecuting his claim for compensation benefits, in spite of his fraud in doing so, indicates that this claim was brought with reasonable grounds.

the judge.[6]

Accordingly, we reverse the judge's order of § 14(1) penalties, and substitute § 14(2) therefor. We recommit the case for the judge to assess the penalty payable to the insurer, "in an amount not less than the average weekly wage in the commonwealth multiplied by six." The decision is affirmed in all other respects.

So ordered.

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Martine Carroll
Administrative Law Judge

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Frederick E. Levine
Administrative Law Judge

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Susan Maze-Rothstein
Administrative Law Judge

Filed: December 13, 1999

[6] The insurer complains that the judge made inconsistent credibility findings as to the employee's testimony, i.e., he credited his injury and pain but discredited his explanations of his fraudulent activity. There is nothing inconsistent in the pairing of these credibility findings. We know of no authority -- and the insurer has directed us to none -- in which a court has concluded that a judge must either credit or discredit a witness' testimony as an indivisible whole. The judge's credibility findings were within his authority as fact finder to weigh the evidence.