COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 36867-95**

Tadeusz Susol Employee
Citiworks, Inc. Employer
Travelers Insurance Co. Insurer

REVIEWING BOARD DECISION
(Judges Wilson, McCarthy & Smith)

APPEARANCES
Johannes Z. Zlahn, Esq., for the employee at hearing
Steven H. Kantrovitz, Esq., for the employee on brief
Maureen H. McManus, Esq., for the insurer at hearing
Beth R. Levenson, Esq., for the insurer on brief

WILSON, J. The insurer appeals from the decision of an administrative judge, who denied its complaint to modify or discontinue the employee's weekly incapacity benefits. The insurer asserts that the judge erred in excluding from evidence a police report and that this error tainted the evidence on the employee's credibility. We see no error and affirm the decision.

Tadeusz Susol, forty-six years old at the hearing, received a high school education in his native Poland. He understands and speaks limited English. In May 1995 he began working for Citiworks, Inc. as a fence installer. His job included loading materials and supplies onto a truck, digging holes, mixing cement and lifting fence sections. He previously worked as a fence installer for another company and also delivered pizza. (Dec. 4, 5.)

On September 12, 1995, while lifting rolls of wire at work, the employee felt a sharp pain in his back that prevented him from straightening up for a period of time. He completed his day's work and then went to the hospital with symptoms of pain radiating down into his leg, making it difficult for him to walk or maintain balance. He

subsequently underwent an MRI. His symptoms did not improve, despite several nerve blocks. He presently takes Darvocet™ for pain. (Dec. 5, 6.)

The insurer commenced § 34 weekly payments for temporary, total incapacity, but subsequently filed a complaint to modify or discontinue those payments. A § 10A conference was held and an order issued allowing the insurer to discontinue § 34 payments and commence § 35 payments for temporary, partial incapacity. The insurer appealed that order, which set the stage for a hearing de novo. (Dec. 2.)

Pursuant to § 11A, the employee was examined by Dr. John Molloy, who rendered a diagnosis of herniated lumbar discs at multiple levels. Dr. Molloy opined that the employee was totally, medically disabled from any gainful employment, and that the employee's physical disability was causally related to his September 12, 1995 industrial injury. (Dec. 6.) The judge adopted the opinions of Dr. Molloy, denied the insurer's complaint to modify or discontinue compensation and ordered the insurer to pay continuing § 34 incapacity benefits. (Dec. 7, 8, 10.)

The insurer argues as its sole issue that the judge erred when he excluded from evidence a police officer's report on the ground that it constituted hearsay when it was, in fact, not hearsay, and that the judge's error tainted the evidence on the employee's credibility.

In the course of the hearing, the insurer attempted to introduce a police report. The employee raised a hearsay objection. The insurer countered that the report was not being offered for the truth of the matter asserted but, rather, to demonstrate that the employee was able to converse in English and, therefore, the report was not hearsay. (Tr. III[1], 8-10.) The judge initially sustained the objection on the grounds of hearsay, (Tr. III, 11), but further elaborated that, while the report was not being offered for the truth of the matter, it was prepared outside the courtroom, was of questionable reliability and would not be admitted. (Tr. III, 11-12.) The insurer pressed its point that it was offering the police report solely for impeachment purposes to counter the employee's testimony that

[1] "Tr. III" indicates testimony contained in the third transcript, dated February 13, 1998.

he was unable to communicate in English. (Tr. III, 12; Insurer brief, 5.) The judge then questioned the employee about his mastery of English and took judicial notice that "he understands and speaks limited English[,]" based on the employee's ability to answer in Polish questions asked in English, prior to those questions being translated. (Dec. 4 and n.1; Tr. III, 13.)

We see no error in the judge's sustaining the employee's objection to the admission of the police officer's report. Although a public record prepared by a public officer acting within the scope of his duty may be available for use for a nonhearsay purpose, see P.J. Liacos, Massachusetts Evidence § 8.13.1, at 506 (6th ed. 1994), a copy of a municipal record must nevertheless be authenticated, either by attestation of the officer who has charge of the record or testimony of a person with personal knowledge of the recorded statement. See P.J. Liacos, Massachusetts Evidence § 8.13.3, at 510 (6th ed. 1994), quoting G.L. c. 233, § 76, and citing Kaufman v. Kaitz, 325 Mass. 149 (1948). This was not done. (Tr. III, 11-12.)

Moreover, even had we agreed with the insurer's claim of error, we nonetheless would find such error harmless on the facts found by the judge. As the court stated in Indrisano's Case, 307 Mass. 520 (1940):

> [A] decree in a workmen's compensation case will not be reversed for error in the admission or exclusion of evidence, unless substantial justice requires reversal. The evidence admitted in this case over the objection of the insurer added so little to evidence admitted without objection, that the decree ought not to be disturbed even if the question had been properly raised.

Id. at 523 (citations omitted). In the case at hand, the judge found independently that the employee could speak and understand limited English. (Dec. 4.) Moreover, the judge concluded that the employee had no physical ability to perform any work. (Dec. 8.) The police report would have added nothing to the incapacity analysis. Accordingly, we affirm the decision of the administrative judge.

So ordered.

Sara Holmes Wilson
Administrative Law Judge

Filed: December 13, 1999

William A. McCarthy
Administrative Law Judge

Suzanne E.K. Smith
Administrative Law Judge