**COMMONWEALTH OF MASSACHUSETTS**

| | |
|---|---|
| **DEPARTMENT OF INDUSTRIAL ACCIDENTS** | **BOARD NO. 019669-98** |
| Thu Van Truong | Employee |
| A.W. Chesterton | Employer |
| A.W. Chesterton | Self-insurer |

**REVIEWING BOARD DECISION**
(Judges Levine, McCarthy and Carroll)

**APPEARANCES**
Michael A Torrisi, Esq., and Robert D. Armano, Esq., for the employee
Thomas P. O'Reilly, Esq., at hearing, for the self-insurer
Paul M. Moretti, on brief, for the self-insurer

**LEVINE, J.** This case comes to the reviewing board on appeal by the employee from a decision of an administrative judge denying and dismissing his claim. Because it is unclear to what extent improper inferences drawn by the judge may have influenced his credibility findings, we recommit the case for further findings.

Thu Van Truong was thirty-nine years old at the time of the hearing in this matter. He was born in Viet Nam and educated through the ninth grade. He immigrated to the United States in 1982 and took two more semesters of schooling. In Viet Nam, he worked as a general laborer and secretary in a seafood company; in this country, he has worked as an electrical solderer and assembler, as a laborer at a floor sanding company and, beginning in January 1990, as a machine operator and laborer for the present employer. (Dec. 6.)

Mr. Truong alleges that on June 3, 1998 he injured his back and left leg at work when the long protective coat he was wearing caught in a revolving shaft of a braiding machine, forcing his body against the machine and causing him to twist. (Dec. 6.) The following day he sought treatment with a chiropractor, Dr. Peter Antonsen, who referred him to a neurosurgeon, Dr. Shapur Ameri. He was also seen by Dr. Jeffrey Zisk, with whom he had been treating over the prior year. (Dec. 6-7.) On August 21,

1998, Mr. Truong had an MRI which showed "post surgical changes[1] without interval change when compared to previous study of May 27, 1998. The degenerative changes of the L4-5 and L5-S1 disc level are also unchanged. There is no evidence of significant central canal or neuro foraminal stenosis." (Dec. 7.) Because his symptoms persisted, Mr. Truong underwent a myelogram on September 8, 1998 which showed L4-5 midline disc herniation involving the left root. A CAT scan showed similar findings. On November 18, 1998 Mr. Truong underwent lumbar discectomy. Id.

The self-insurer paid § 34 temporary total incapacity benefits on a without prejudice basis from June 4, 1998 to July 13, 1998. Thereafter, the employee filed a claim for further benefits, which the self-insurer opposed. Following a § 10A conference, the employee's claim was denied. Mr. Truong appealed to a hearing de novo. (Dec. 3, 7-8.) The employee's claim is that, although he had been having back pain and treatment prior to June 3, 1998, on that day he had a specific incident at work, which worsened his symptoms and condition.

Pursuant to § 11A, Mr. Truong was examined by Dr. Joseph Abate. Dr. Abate reported a diagnosis of status post L4-5 lumbar discectomy with residual scar which he causally related to the June 3, 1998 work accident. Dr. Abate further opined that the June 3, 1998 incident exacerbated Mr. Truong's previous residual symptomatolgy causing total disability and the need for the November 18, 1998 surgery. (Dec. 8.)

The administrative judge rejected the opinions of Dr. Abate and other physicians who causally connected the employee's medical condition to the alleged June 3, 1998 incident. (Dec. 11.) This is because the judge did not credit the employee's testimony that there was an incident at work on June 3, 1998; as a result, he denied and dismissed the employee's claim. (Dec. 18.) On appeal, the employee argues that the judge committed errors in his evaluation of the evidence warranting reversal.[2]

---

[1] Mr. Truong first underwent surgery on his lumbar spine in 1994. (Dec. 11.)

[2] The employee also argues that the judge erred in denying his request that the witnesses be sequestered. Whether to order sequestration is a matter of discretion for the trial judge. Liacos, Massachusetts Evidence, § 6.2 (7th ed. 1999). While the reasons given by the judge for denying

Generally, deference is given judges in their evaluation of the credibility of witnesses appearing live before them. Ighodaro v. All-Care Visiting Nurse Assn., 12 Mass. Workers' Comp. Rep. 415, 417 (1988). See also Lettich's Case, 403 Mass. 389, 394 (1988). However, deference is not given when the judge's expressed reasons for not crediting the employee are derived from inferences which are not reasonably drawn from the evidence. Cf. Kolkowski v. Sapphire Eng'g, 9 Mass. Workers' Comp. Rep. 295, 296 (1995). Such is the circumstance here.

In a May 7, 1998 report, the employee's treating neurosurgeon, Dr. Ameri, stated that he believed that the employee was suffering from lumbar disc disease and lumbar radiculopathy, and he advised the employee to undergo an MRI evaluation and to "avoid heavy lifting/strenuous exercise." (Employee Ex. 4; Dec. 14-15.) The employee did undergo an MRI evaluation on May 27, 1998. (Dec. 17.) With this information, the administrative judge found, inter alium, "that the need for . . . surgical intervention had already been under active consideration almost one month prior to the alleged industrial injury," (Dec. 15), and "that the diagnostic MRI of May 27, 1998 had documented that [the employee's] back condition warranted . . . surgical intervention one week prior to the alleged June 3, 1998 incident, even though the medical conclusion was not stated until after June 3, 1998." (Dec. 17.) In fact, Dr. Ameri, who eventually performed the surgery in November 1998, saw the employee on May 7, 1998, June 23, 1998, August 13, 1998 and October 6, 1998. It was only on October 6, 1998, after Dr. Ameri advised another MRI, did Dr. Ameri put in writing that he discussed with the employee treatment options, "including the possibility of surgical intervention." (Employee Ex. 4, office note of

---

the request -- "these are . . . open proceedings" and the request is "contrary to our normal operating practices" (Tr. 14-15) -- are erroneous, Liacos, supra, we perceive no abuse of discretion. Furthermore, the employee makes no persuasive argument that he was harmed by the failure to sequester, and the record suggests no harm.

October 6, 1998.) So the administrative judge's determination that surgery was being considered prior to June 3, 1998 is not reasonable.[3]

The administrative judge also purported to adopt the opinion of Dr. Zisk, another of the employee's physicians, "that there was no change in Mr. Truong's neurological examination and symptoms attributable to that alleged [June 3, 1998] incident." (Dec. 13.) Apparently, the judge derived this opinion from Dr. Zisk's statement in his June 11, 1998, report that the employee's symptoms were "essentially unchanged" on that date. (Employee Ex #14.) However, the administrative judge overlooked that Dr. Zisk stated in his June 4,1998, report that "just yesterday [the employee] had an event at work which increased the pains in his left leg and left side as well as increased his headaches." Id. Hence, Dr. Zisk's statement on June 11, 1998 that the employee's symptoms were "essentially unchanged" more likely was in reference to the way the employee reported he felt on that day as compared to how he felt on the previous visit (June 4, 1998) to Dr. Zisk when the employee reported an increase in symptoms. Therefore, the administrative judge's statement that he "adopt[s] the opinion of Dr. Zisk . . . that there is no change in Mr. Truong's . . . symptoms attributable to that alleged [June 3, 1998] incident" likewise indicates erroneous analysis.

We do recognize that at other points in the decision the judge appears to discredit the employee for reasons other than the erroneous inferences he drew from the medical evidence. And if these reasons stand independently of the tainted reasons, then the judge's finding on the employee's credibility might still stand. Thus, the judge stated:

> I find that Mr. Truong was not a credible witness regarding the circumstances of the alleged incident of June 3, 1998, nor his complaints of increased symptoms immediately after that date. Dr. Abate also commented that he was not sure if Mr. Truong was being entirely truthful with him during the Impartial Examination. Mr. Truong's evasiveness and lapses of recall during his testimony concerning the days immediately prior

[3] In his August 13, 1998 office note, Dr. Ameri did report that the employee "would now like to go ahead with surgical intervention." Dr. Zisk reported on June 29, 1998 that the neurosurgeon (presumably, Dr. Ameri) "suggested that repeat surgery may be necessary if symptoms do not improve in the next month or two." This latter quoted passage suggests that the result of the MRI test, by itself, was not a reason to undergo surgery.

> to and following the alleged incident was [sic] troublesome to this administrative judge, and I am simply unable to believe his testimony.

However, in the end, the judge did not separate his erroneous view of the medical evidence from his evaluation of the employee's testimony. He relied on both together to discredit the employee. Thus, he finally stated that his view – that surgery was warranted prior to June 3, 1998 – "further inclined [him] to find that the [alleged] incident of June 3, 1998 . . . did not in fact occur." (Dec. 17.) We cannot therefore conclude that the judge's erroneous evaluation of the medical evidence did not influence his evaluation of the employee's credibility.

It is appropriate, therefore, to recommit the case to the judge to reconsider his findings and to make new findings free of the aforesaid erroneous evaluations of the evidence.[4]

So ordered.

_____
Frederick E. Levine
Administrative Law Judge

_____
William A. McCarthy
Administrative Law Judge

_____
Martine Carroll
Administrative Law Judge

FEL/kai
Filed: June 28, 2001

[4] As he reconsiders and makes new subsidiary findings as to whether the alleged incident occurred, the judge should consider the testimony of all the witnesses who testified on that issue, including David Brown and Daniel Rubner.