COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 32920-97**

Timothy L. Frager	Employee
M.B.T.A.	Employer
M.B.T.A.	Self-insurer

REVIEWING BOARD DECISION
(Judges McCarthy, Carroll and Costigan)

APPEARANCES
Kevin T. Daly, Esq., for the employee
Justin F.X. Kennedy, Esq., for the self-insurer

MCCARTHY, J. The self-insurer appeals from a decision awarding the employee § 34A permanent and total incapacity benefits for his August 31, 1997 closed head injury at work. The self-insurer expresses amazement at the administrative judge's conclusion that the employee cannot perform some sort of non-trifling occupation, and asserts that the administrative judge "bootstrapped" her findings to support her § 34A award by misusing the legal principles set out in Scheffler's Case, 419 Mass. 635 (1994). We agree with the self-insurer that the subsidiary findings of fact do not adequately support the judge's § 34A award, and necessitate a recommittal. Moreover, we reverse the § 34A award due to the judge's reliance on a deposition that was not placed in evidence in this proceeding. We recommit the case for a hearing de novo, as the judge has recently retired.

After graduating from Boston College, Mr. Frager played football in the Canadian Football League, worked as a corrections officer, then as an investigator in the Commonwealth's Abandoned Property Division, and finally as a train attendant and motorman for the self-insurer. (Dec. 3.)

On August 31, 1997, while in the course of his employment, a heavy metal overhead compartment and door opened and struck him on the head. The employee has

not worked since the injury. The injury resulted in symptoms of severe headaches, vomiting and memory loss. (Dec. 3-4.)

The employee received § 34 temporary total incapacity benefits per hearing decision until they were exhausted. The employee filed for § 34A permanent and total incapacity benefits or § 35 benefits in the alternative, as of September 4, 2000. While the claim was pending, the judge placed the employee on the maximum rate of § 35 benefits by way of a conference order of payment, which both parties appealed. (Dec. 2-3.)

The employee was examined by an impartial psychiatrist pursuant to § 11A(2). As the doctor rendered no opinion on diagnosis or causal relationship, the judge declared the impartial medical report inadequate, thereby allowing the parties to introduce their own medical evidence. (Dec. 2, 4.) The employee submitted, in relevant part, a January 10, 1999 report by the impartial physician in a prior hearing, Dr. Thomas Sciascia (a neurologist), a July 26, 2000 report and treatment notes of his former psychiatrist, Dr. J. Patrick O'Brien, and a December 4, 2001 report and treatment notes of his present psychiatrist, Dr. Henry D. Abraham.[1] Doctor Sciascia opined that the employee had a partial, temporary disability in January 1999. Doctor Sciascia noted that Mr. Frager was taking multiple medications to control his headaches and vomiting and thus was limited to working in a sitting position. In his December 4, 2001 report, Dr. Abraham diagnosed the employee with a post-traumatic temporal lobe disorder causally related to the 1997 injury at work. The doctor also noted that the employee's use of amitryptiline, klonopin, and perphenazine was partially helpful in treating his headaches and vomiting. Dr. Abraham reported that the employee's mental status examination confirmed short-term memory difficulties, irritability, and an explosive edge to his speech. Dr. Abraham did not opine on the extent of the employee's medical disability. (Dec. 5.) The judge made no findings on Dr. O'Brien's medical report or notes. We note, however, that Dr. O'Brien's assessment of the employee's disability as of July 26, 2000 was that he could

[1] The employee also submitted numerous other reports and letter from his treating physicians, all of which pre-dated the period of disability in dispute by close to two years and more. The judge made no findings on these medical submissions.

try to slowly reenter the work force by way of a retraining program or a part-time, low-stress job and that he would probably be able to slowly taper off his medications as his symptoms improve. (Doc. #1 of Employee's Ex. #3.) Dr. O'Brien's subsequent treatment notes, which cover the period of disability at issue up until December 29, 2000, indicate continued improvement with intermittent exacerbations of symptoms. (Doc. #2 of Employee's Ex. #3.)

The employee's account of his symptoms at hearing was that his headaches and vomiting were reduced to an average of twice a month. (Tr. 12.) Loud noises, smells such as gasoline, and upsetting conditions aggravate his symptoms, which also include memory loss and personality change in the form of anger and irritability. (Dec. 3-4.) The judge found, based on the testimony of the employee, and the adopted opinions of Drs. Abraham and Sciascia, that the employee continued to suffer from the effects of his work-related closed head injury. The judge concluded that "while the employee is able to perform some tasks, and is well educated, his ability to work is severely limited by his ongoing headache and vomiting attacks, his memory and concentration problems, and his emotional problems of anger and irritability." The judge continued: "Under the circumstances I do not think the employee is capable of obtaining substantial remunerative employment. Given the open-ended nature of the employee's condition, and Dr. Sciascia's statement that some people with the employee's condition will 'plateau' and be left with subjective complaints indefinitely, I conclude that the employee meets the criteria for § 34A benefits." (Dec. 6.)

The self-insurer argues that the judge's findings are deficient in a number of ways. We do not agree with the self-insurer's arguments regarding some of the judge's findings: The self-insurer considers arbitrary and capricious the judge's characterization of the employee's testimony of "twice" monthly headaches and vomiting as "several" times per month, and the judge's finding that the employee's wife "must" call him every day to remind him to pick up the children, when his testimony was that she *did* call him every day to that end. These are quibbles. More substantial is the self-insurer's placing at issue the judge's reliance on Dr. Sciascia's opinion that the employee was partially

medical disabled in January 1999 to support her finding of permanent and total incapacity from September 4, 2000 and continuing when all of the medical evidence otherwise established naught but improvement in the employee's condition, albeit with occasional exacerbations. It is certainly true that we have consistently stated the judge can credit the employee's testimony regarding pain and symptomatology to bolster an opinion of partial medical disability. Reynolds v. Kay Bee Toys, 16 Mass. Workers' Comp. Rep. 433, 437-438 (2002)("Partial medical impairment and total incapacity are not necessarily mutually exclusive"); Bowden v. Kelly, Inc., 13 Mass. Workers' Comp. Rep. 1, 4 (1999); Anderson v. Anderson Motor Lines, Inc., 4 Mass. Workers' Comp. Rep. 65, 67 (1990). Even so, the staleness of Dr. Sciascia's opinion on disability – twenty months prior to the disputed period of disability, and almost four years old by the time the decision was filed – certainly gives us pause as to the foundation of this § 34A award. The judge's disability assessment would appear to be strained past the breaking point under these circumstances.

But one clear error renders this decision reversible. The judge's findings on Dr. Sciascia's opinion, "that some people with the employee's condition will 'plateau' and be left with subjective complaints indefinitely," are not based on the record evidence. The employee submitted only the impartial medical report of Dr. Sciascia from the prior proceeding. That report does not contain any statement that could even colorably support the judge's finding; the quoted term, "plateau," is not present in the report. Our review of the board file, however, confirms that the judge's finding was based on Dr. Sciascia's deposition testimony at the prior hearing, (Sciascia Dep. 16), which, again, was not in evidence in this proceeding. It is axiomatic that "[a] decision is arbitrary and capricious . . . where crucial and material findings are made without support in the evidence." Coelho v. National Cleaning Contrs., 12 Mass. Workers' Comp. Rep. 518, 523 (1998).

Accordingly, the decision is reversed. As the administrative judge no longer serves with the department, we transfer the case to the senior judge for reassignment and a hearing de novo.

So ordered.

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William A. McCarthy
Administrative Law Judge

Filed: ***November 26, 2003***

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Martine Carroll
Administrative Law Judge

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Patricia A. Costigan
Administrative Law Judge