COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 053025-96**

Warren E. Pittsley	Employee
Kingston Propane, Inc.	Employer
Old Republic Insurance Company	Insurer

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

APPEARANCES
Michael S. Mehrmann, Esq., for the employee
Robert J. Doonan, Esq., for the insurer

WILSON, J. The employee appeals from a decision in which an administrative judge denied and dismissed his claim for benefits as a result of an industrial back injury occurring on June 3, 1996, on the basis that the employee was not credible. The judge's credibility determination hinged on the fact that the employee had suffered another incident while working for the same employer four months earlier, and had given his treating doctors incomplete histories regarding the two events. We vacate the decision and recommit the case for hearing de novo for the following reasons.[1]

Warren Pittsley worked as a truck driver delivering propane gas products to residential and commercial customers. (Dec. 5.) He experienced groin and left hip pain in February 1996, when pulling on a heavy propane hose at work. The employee continued working, and sought conservative treatment with Drs. Scorza and D'Sousa. (Dec. 6.) He then suffered an injury to his lower back in a work-related motor vehicle accident on June 3, 1996, which injury is the subject of the present claim. (Dec. 5.) The employee saw Drs. Birkenfeld and Fishbaugh some months later. Dr. Birkenfeld, a neurosurgeon, opined that the employee's pain originated in a left-sided L5-S1 disc herniation with mass effect on the left S1 nerve root, causally related to the February

[1] The administrative judge no longer serves in the Department.

1996 incident. The employee initially did not give Dr. Birkenfeld the history of the June 3, 1996 motor vehicle accident. On the other hand, the employee told Dr. Fishbaugh of the Braintree Rehab Hospital that he had injured his back on June 3, 1996. Dr. Fishbaugh noted that the employee described a one month history of low back and left leg discomfort as of September 23, 1996. (Dec. 6-7.)

The employee filed a claim for compensation benefits as a result of his June 3, 1996 motor vehicle accident, (Dec. 4), and underwent an impartial medical examination. See G. L. c. 152, § 11A. The impartial physician opined in his September 10, 1997 report and March 6, 1998 deposition that the employee suffered a left L5-S1 disc herniation causally related to the June 3, 1996 motor vehicle accident at work, and that the employee had not reached a medical end result. The judge adopted the opinions of the impartial physician, except for his opinion causally relating the employee's diagnosis and disability to the June 3, 1996 accident. The judge concluded that the February 1996 work incident, to which Dr. Birkenfeld had causally related the employee's medical condition, was most likely the event that was at the root of the employee's problems.[2] As a result, the judge denied the employee's claim for an industrial injury on June 3, 1996, because the employee was not credible, having "told each of two treating doctors two different fact situations that could be the cause of the injury." (Dec. 8-9.)

We agree with the employee that the decision is arbitrary and capricious. Although credibility is generally a sound basis upon which an administrative judge may deny an employee's claim, findings regarding an employee's credibility must be based in the record evidence or reasonable inferences drawn therefrom, and pertinent to the claim. Truong v. Chesterton, 15 Mass. Workers' Comp. Rep. 247, 249 (2001). Otherwise, credibility findings may be overturned as arbitrary and capricious. Yates v. ASCAP, 11 Mass. Workers' Comp. Rep. 447, 454-455 (1997). The instant decision presents the latter circumstance, because the occurrence of a possible industrial accident four months

[2] The judge allowed the parties to introduce additional medical evidence pursuant to § 11A(2), due to the complexity of the medical issues.

earlier than the claimed industrial injury was 1) fully and candidly brought out in the employee's direct testimony at hearing, 2) fully disclosed to and relied upon by the impartial physician in reaching his medical opinion, and 3) changes nothing relative to the compensability of this employee's resultant disability, in any event.

The judge's conclusion, denying the claim on the basis of credibility, is based exclusively on the incomplete histories relied upon by the employee's treating doctors.

> Under the circumstances, because [the employee] went to Dr. Scorza and Dr. D'Souza thinking that he had an inguinal hernia, whereas the pain was evidently coming from the strain of that effort.[3] If [the employee] suffered an injury [in February 1996], I would reserved [sic] the employee's rights to bring a further claim on the date alleged in February or thereabouts, but find, on causation, there is not persuasive evidence in this hearing that it arose on or about June 3, 1996. I cannot, on the evidence before me, find that it was causally related to employment, that it arose out of and in the course of his employment at Kingston Propane, Inc. on June 3, 1996. The employee has told each of two treating doctors two different fact situations that could be the cause of the injury. The credibility of the employee is the problem.

(Dec. 8; footnote added.)

We do not see the problem identified by the judge. The fact that the employee might have addressed one of the incidents with one treating doctor, and the other with a different treating doctor is equally as innocent as it is inculpatory. Many patients are not good historians. Examinations for the purpose of diagnosing and treating a medical problem are often not suited to coaxing a detailed recounting from the patient of all the possible contributors to the reason for seeing the doctor. Nor was there anything to gain by hiding the earlier injury at the same employment, because liability could have attached for that earlier date of injury, in any event. Moreover, when looked at as a matter of two work events, the causal relationship standard would be the same for either. Contrast G. L. c. 152, § 1(7A)(combination of *non-compensable* pre-existing condition with a

[3] The general lack of clarity of the judge's findings, of which the above sentence is just one example, is another reason to recommit this case. See Donohue v. Petrillo, 8 Mass. Workers' Comp. Rep. 36, 43 (1994)("[W]e refuse to accept as final a decision which displays little care and even lurches into occasional incoherence").

compensable injury must be assessed under "a major cause" standard). Finally, the employee was completely forthright as to the two occurrences in his testimony at the hearing. (January 5, 1998 Tr. 40-46.)

It is, of course, well-established that discrepancies between the history relied upon by an expert physician and that found by the judge based on the evidence adduced at the hearing can tarnish the persuasiveness and even the competence of the medical evidence. See Patterson v. Liberty Mut. Ins. Co., 48 Mass. App. Ct. 586, 597-598 (2000). Here, we cannot see how the existence of a prior work incident, which resulted in no time off from work, should have affected the analysis undertaken by the judge. In fact, the impartial physician's opinion that there was a causal relationship between the June 3, 1996 industrial accident and the employee's disability was based on a history that *explicitly* included the earlier event and the divergent medical records of the treating doctors. (Impartial Dep. 33-36, 75, 81; Impartial Medical Report.) Certainly, had there been two *claimed* dates of injury, the judge's conclusion regarding the employee's credibility would have been patently meritless. See Jaime v. Endicott & Colby, 12 Mass. Workers' Comp. Rep. 27 (1998). We see no reasonable explanation as to why this claim should be analyzed under any different standard.

That said, we are constrained to add that if the judge felt the earlier incident was of such significance, the practical course would have been to grant leave to the employee to amend his claim to comport with that evidence. See Collins v. M.B.T.A., 9 Mass. Workers' Comp. Rep. 805, 807-808 (1995)(where justice requires, amendment of claim is appropriate to conform with evidence adduced at hearing). We recognize that "[i]t is not a judge's function to be the trial strategist for any litigant[,]" any more than it is a judge's duty "to interfere with trial counsel's strategy." Draghetti v. Chmielewski, 416 Mass. 808, 815 (1994). Nevertheless, "the efficient use of adjudicatory resources requires the joinder of as many issues as might reasonably be combined in one hearing." Harris v. Raytheon Co., 4 Mass. Workers' Comp. Rep. 308, 310 (1990). " 'The whole idea is to get away from the cumbersome procedures and technicalities of pleading, and to reach a right decision by the shortest and quickest possible route.' " Bamihas v. Table

Talk Pies, 9 Mass. Workers' Comp. Rep. 595, 604 (1995)(Smith, J, concurring), quoting 2B A. Larson, Workmen's Compensation § 77A.10. The insurer would have then been within its rights to seek a continuance, if it legitimately considered itself prejudiced by such a turn in the litigation. As the parties waited almost three years for the judge to file his decision, that delay hardly would have affected the scheduling.

The decision cannot stand as it yields an arbitrary, capricious and unjust result. Accordingly, we vacate the decision, recommit the case for a hearing de novo and transfer the case to the senior judge for assignment to a new administrative judge.

So ordered.

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Sara Holmes Wilson
Administrative Law Judge

Filed: **September 9, 2002**

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Susan Maze-Rothstein
Administrative Law Judge

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Martine Carroll
Administrative Law Judge