COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 008838-03**

William Docos	Employee
T. J. McCartney	Employer
Insurance Co. of the State of Pennsylvania	Insurer

REVIEWING BOARD DECISION
(Judges Costigan, Horan and Koziol)

APPEARANCES
Thomas C. McDonough, Esq., for the employee
Mark H. Likoff, Esq., for the insurer

The case was heard by Administrative Judge Bean.

COSTIGAN, J. The insurer appeals from the administrative judge's decision awarding the employee § 34A permanent and total incapacity benefits. Seeing merit in certain of the insurer's arguments, we recommit the case for the judge's reconsideration and further findings.

The employee suffered an industrial injury on January 14, 2003, when boards of sheetrock fell on him, causing a hyperextension of his right knee. By hearing decisions filed in 2005 and 2007,[1] the employee was awarded weekly incapacity and medical benefits. The employee underwent four knee surgeries between February 2003 and September 2006. (Dec. I, 824.) The surgeries were not successful, and the employee continued to have significant pain and limitations. (Dec. I, 825.)

In his 2007 decision, the judge made the following factual findings regarding the employee's work injury:

> The employee suffered an industrial injury on January 14, 2003. While he was carrying several large boards of sheetrock, he lost his balance, and fell

[1] The 2005 hearing decision was filed by a different administrative judge and is not implicated in the pending appeal. The 2007 hearing decision was filed by the same judge whose 2010 decision we now review. Accordingly, references herein to the 2007 hearing decision are designated, "Dec. I," and to the 2010 decision on appeal, "Dec. II."

backward with the sheetrock landing on top of him, striking him on the thigh. His right knee became swollen and painful. He was taken to the hospital.

(Dec. I, 824.) The judge awarded the employee § 34 total incapacity benefits for a closed period of post-surgery recuperation, and ongoing § 35 partial incapacity benefits. (Dec. I, 827-829.) The judge specifically adopted the opinion of Dr. John L. Doherty, Jr., and found that the employee developed back pain secondary to the altered gait caused by his right knee injury and surgeries. (Dec. I, 826, 828.)

In April 2009, the employee filed the instant claim for § 34A permanent and total incapacity benefits. (Dec. II, 212.) Following a § 10A conference, the judge filed an order which effectively denied the § 34A claim and continued the § 35 payments being paid pursuant to the 2007 decision.[2] Both parties appealed. (Dec. II, 213.) Pursuant to the provisions of § 11A, Dr. James Hewson, an orthopedic surgeon, examined the employee on September 29, 2009, and rendered a report of that same date. (Ex. 3.)

At the first day of hearing on January 19, 2010, the judge accepted the parties' stipulation that Dr. Hewson's impartial medical report was inadequate as to the employee's psychological claim.[3] The judge also declared the medical issues complex, and allowed the parties to submit additional medical evidence. (Dec. II, 215.) The judge adopted the medical opinions of the employee's treating physicians and the impartial physician, and found that the employee's knee and back pain, and his depression, were all causally related to the industrial accident. Based on the opinions of the impartial physician and several of the employee's doctors, as well as his belief of the employee's testimony regarding his pain and limitations, (Dec. II, 219), the judge determined that the employee was permanently and totally

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[2] Although the subject of the conference was the employee's claim, not a complaint by the insurer, the judge filed an "Order Denying Modification or Discontinuance." Rizzo v. M.B.T.A., 16 Mass. Workers' Comp. Rep. 160, 161 n.3 (2002)(judicial notice taken of contents of board file).

[3] In September 2009, the employee started seeing a psychologist for depression, (Dec. II, 217); prior to hearing, he successfully moved to join a claim for psychological injury.

incapacitated. (Dec. II, 215-220.)

The insurer correctly argues that in his 2010 decision, the judge found a wholly different origin of the employee's back pain than the altered gait he identified in his 2007 decision. (Dec. I, 826, 828.) In the decision before us on appeal, the judge found the employee sustained a distinct back injury contemporaneous with, and directly related to, the 2003 accident with the sheetrock panels:

> On January 14, 2003 the employee suffered an industrial injury when twenty sheets of sheet rock panels fell onto him, hyperextending and wrenching his knee *and injuring his back.*

(Dec. II, 214; emphasis added.) As support for this finding, the judge adopted the opinion of Dr. Nathan Raby, one of the employee's treating physicians, who assumed a history at odds with that credited in the 2007 decision: "The resulting [back] pain has gotten progressively worse since *first arising* at the time of the industrial injury." (Dec. II, 216; emphasis added.) The judge also adopted Dr. Raby's opinion that severe degenerative disc disease was contributing to the employee's back pain. (Ex. 4.)[4] Dr. Daniel LaLonde, Jr., another of the employee's treating physicians, also offered a causal relationship opinion misstating the origin of the employee's back pain: "[Dr. LaLonde] related [the knee and back] conditions to the 2003 industrial injury." (Dec. II, 217; Ex. 6.) Finally, Dr. Hewson, the § 11A impartial physician, relied on a history that a 3,000-pound load of sheetrock fell against the employee, pushing his right leg into hyperextension and pushing him against a game [sic] box. Dr. Hewson diagnosed "post-traumatic arthritis in the right knee status-post multi operations . . . [and] chronic low back pain due to lumbar muscle and ligament strain," both causally related to the incident of January 14, 2003. (Ex. 3.)

Plainly the judge erred in adopting expert medical opinions which were based

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[4] The insurer generally raised "causal relationship" as an issue, and denied it was responsible for "further back care." However, the insurer did not raise the provisions of § 1(7A) in defense of the employee's § 34A claim, as to either the right knee or the back. (Dec. II, 212; Ex. 2.)

on a history of injury contrary to, and inconsistent with, that which he found in his 2007 decision. As the judge's earlier finding with regard to the origin of the employee's back pain is the law of the case, see Brackett v. Civil Service Comm'n, 447 Mass. 233, 240 n.14 (2006), all of the medical evidence he adopted in his 2010 decision which addressed the employee's back pain was essentially without a proper foundation, and therefore not competent. See Patterson v. Liberty Mut. Ins. Co., 48 Mass. App. Ct 586, 597 (2000).

All told, there is no way of knowing how the incorrect history of the mechanics of this secondary diagnosis may have affected the judge's view of the employee's entire medical impairment. This error requires that we recommit the case for the judge to assess the employee's medical disability anew, exclusive of the adopted opinions which were based on an incorrect history of injury relative to the employee's back pain.

The insurer also contends the judge's findings did not adequately address the requisite worsening of the employee's medical condition, which must support the transition from partial to permanent and total incapacity status. See Foley's Case, 358 Mass. 230, 232 (1970). We agree. The employee's testimony of his worsening pain, although credited by the judge, (Dec. II, 214, 219), nevertheless needs corroborating expert medical opinion to support a finding of worsening. See Glowinkowski v. KLP Genlyte, 18 Mass. Workers' Comp. Rep. 203, 204-205 (2004). See also, Richardson v. Department of Emp. and Training, 21 Mass. Workers' Comp Rep. 185 (2007); Cash v. Metropolitan Dist. Comm'n, 21 Mass. Workers' Comp. Rep. 157 (2007). We do not agree with the insurer's contention that the medical evidence is devoid of such support, but it is problematic that the judge's worsening findings -- the employee's back pain at the time of the 2010 hearing was worse than at the time of the 2006 hearing, with more invasive treatment being contemplated, and the employee had increased his use of pain medication, (Dec. II, 214) -- are tied specifically to his erroneous findings on the nature and origin of the employee's back pain. Therefore,

on recommittal, the judge should reassess the factor of worsening. We also agree with the insurer that the judge needs to address and analyze, in greater detail, the employee's vocational factors, in conjunction with the revisited medical evidence.

Lastly, the insurer argues the judge "inappropriately demonstrated an attitude of dismissal or prejudgment as to certain information explored on cross-examination," (Ins. br. 15), based on some offhand comments the judge made during the insurer's questioning of the employee.[5] Although we think the judge should have refrained from such idle commentary, we do not consider that his comments indicated a lack of judicial impartiality, or a bias against the insurer.

Accordingly, we recommit the case for further findings consistent with this opinion.

So ordered.

Patricia A. Costigan
Administrative Law Judge

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[5] Among the several examples cited by the insurer, (Ins. br. 15-17), was the following exchange on the second day of hearing, during the insurer's cross-examination of the employee:

Mr. Likoff:	So you have some computer skills and you have a sense that you don't want to be a bump on a log.
Employee:	Right.
Mr. McDonough:	Objection, your Honor. It's not established he has computer skills. He works with a computer.
Mr. Likoff:	He just said yes.
The Judge:	If he could turn on the machine, pick up his e-mail, he has computer skills.
Mr. Likoff:	And he said he plays for four hours on his computer. I just heard him.
The Judge:	Well, I can play baseball too but the Red Sox are not interested. Let's continue.

(Feb. 2, 2010 Tr. 46.)

Mark D. Horan
Administrative Law Judge

Catherine Watson Koziol
Administrative Law Judge

Filed: