COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 058795-94**

William McCarty	Employee
Wilkinson & Company	Employer
National Union Fire Insurance	Insurer

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

APPEARANCES
Michael C. Akashian, Esq., for the employee
Edward F. McGourty, Esq., for the insurer

CARROLL, J. The employee appeals a second time, and the insurer cross-appeals, from a decision in which an administrative judge awarded closed periods of incapacity benefits under §§ 34 and 35, for a work related contact dermatitis. As to the insurer's appeal on the issue of average weekly wage, we summarily affirm the decision. Among the many issues argued by the employee, one has merit. The employee contends that the judge mischaracterized the present disability opinion of the § 11A dermatologist, and rejected it for arbitrary reasons stemming from that mischaracterization. We agree that the decision is fatally flawed due to the judge's unsupported findings concerning both the medical and lay evidence, which resulted in the judge's conclusion that the employee could return to his job of tile mechanic. We conclude from the undisputed evidence in both the original and recommital hearings, as a matter of law, that the employee cannot return to full duty tile work. Therefore, we reverse the decision. See Yates v. ASCAP, 11 Mass. Workers' Comp. Rep. 447, 451 (1997). We recommit the case for further findings on the extent of incapacity.

The facts of this case are set out in McCarty v. Wilkinson & Co., 11 Mass. Workers' Comp. Rep. 285 (1997), in which the reviewing board reversed the judge's conclusion that the employee could return to his job as a tile mechanic, and recommitted

the case for further findings on the extent of incapacity. Suffice it to say, on November 4, 1994, the employee developed a severe allergic reaction to a particularly toxic type of epoxy (Kerapoxy) used in the grout for the tiling of the Third Harbor Tunnel. (Dec. 6-7.) At the hearing on recommittal, the judge held further proceedings on the issue of epoxy use in the tiling industry, and directed the parties to present expert testimony regarding the nature of products used in the industry. (Dec. 2.) He also ordered that the employee be reexamined by the § 11A physician. The parties deposed the doctor a second time as well. (Dec. 8-11.) Based on this new evidence, along with that presented in the first hearing, the judge again concluded that the employee could return to his job as a tile mechanic. (Dec. 20.)

> The first findings of fact pertinent to the present appeal are as follows:
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> The impact on Mr. McCarty's ability to earn his prior wages depends in large part on what specific restrictions the Impartial Physician places upon him. At numerous points Dr. Waldman acknowledges his knowledge of the tile setting trade and its typical materials is quite limited and -- beyond avoidance of Kerapoxy, which is no longer being used on this project -- that more specific limitations beyond mere speculation, would be "impossible for me to assess based on the information before me."

(Dec. 11.)

> It is axiomatic that the employee has the burden of proof on all elements of his claim. In the current dispute, the only medical evidence in the record states that the single specific medical restriction imposed on Mr. McCarty is that he should avoid or take reasonable precautions when using Kerapoxy. The employee has failed to prove that he is unable to work with any occupational products other than Kerapoxy. He has also failed to prove that Kerapoxy remains in current usage within his occupation.

(Dec. 14, emphasis in original.)

These findings are erroneous.[1] The impartial physician's uncontradicted testimony on the employee's medical restrictions did not contemplate only Kerapoxy. Where there

[1] It appears that the administrative judge has attempted to attack the impartial physician's opinion at its foundation vis-a-vis the doctor's competency to opine beyond the issue of Kerapoxy to epoxies in general, but the judge mischaracterizes the doctor's testimony, (Dep. II,

is uncontradicted medical evidence, a judge may reject it only if he clearly and sufficiently states his reasons for doing so in findings with an adequate basis in the record. Padilla v. Mellon Bank Corp., 13 Mass. Workers' Comp. Rep. 10 (1999). Galloway's Case, 354 Mass. 427 (1968). Dr. Waldman opined explicitly that the employee must "avoid contact with *epoxies and the entire epoxy resin complex* whenever and insofar as possible." (Dep. II, 51, emphasis added.) Likewise, in Dr. Waldman's first deposition he clearly stated: "The only thing I can comment on is that epoxy is as nearly obviously the culprit here as we can find." "I'm reasonably certain that he can't work with epoxy." (Dep. I, 25.) The doctor's opinion goes to *all* epoxy use, not just the Kerapoxy that triggered the employee's dermatitis. The doctor also opined that re-exposure to epoxies would most likely trigger another intensive attack of hand eczema. (Dep. II, 27.) "In general, allergy of the contact dermatitis kind, once evinced and proven by patch test, usually does not disappear, although it may modify downward somewhat by hardening or scarring of the skin." (Dep. I, 20-21.) Thus, to the extent that the judge based his conclusion that the employee could return to tile work on the mistaken notion that the impartial physician only restricted the employee from using Kerapoxy, the decision is arbitrary and capricious.

Next, the judge places great weight on the § 11A physician's apparent misunderstanding concerning the frequency of epoxy use in the tile industry. The judge's findings, supported by the unrebutted testimony of the employee, were that epoxy is used *infrequently* in tile grouting, and that most grout is non-epoxy. (Dec. 8; 4/13/96 Tr. 38-39, 50, 65; 11/21/97 Tr. 48.) The impartial physician considered that epoxies are "pervasive in the tile industry." (Dep. II, 13.) While we recognize the discrepancy, we do not see that it has any significance to the question of the employee's ability to return to work as a tile mechanic. As the judge correctly noted, the undisputed evidence was that epoxies would be present, at some point and in some measure, upon the employee's return to tile work. There is no evidence in the record upon which a restriction from

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17, 25, 50, 58, 61), and the erroneous attack does nothing to diminish the doctor's medical opinion on the effect of epoxy on the employee's skin.

epoxy use could be posited as a condition of returning to work for the employer. Indeed, the medical evidence is that, upon reexposure to epoxy, the employee "will react again at least as badly as he did before." (Dep. I, 40.) We conclude that the judge's second reason for rejecting the § 11A physician's opinion -- that the employee would not be exposed to illness-inducing substances on his return to work -- is also arbitrary and capricious.

The judge then advances a theory of a safe workplace for the highly epoxy-sensitive employee, despite the undisputed use of epoxy in the tiling industry. The judge states as follows:

> Having heard the employee's testimony and reviewed the Insurer's Exhibit #2, I find that the [employer's] "Precautions For Epoxy Grouting" were not fully and properly implemented to prevent this contact dermatitis. (This is not to suggest serious misconduct on either the part of the employer or the employee, merely that the precautions were not allowed to meet their potential effectiveness.) Had the protective clothing requirements been effectively in place and properly maintained on the job site, I find that, more likely than not, the contact dermatitis would not have occurred, *and would be adequate to prevent any reoccurrence in the future if Mr. McCarty were again to use Kerapoxy.* I rely in part on the expert medical opinion expressed on Page 15, Lines 20-23 and generally on Page 25 of Dr. Waldman's first deposition in making this finding *and my own acquired knowledge as an Administrative Judge regarding the efficacy of work-place personnel protective measures and equipment.*
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> . . .
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> I further find that the *medically suggested* use of protective equipment (particularly involving the hands) is a common precaution in that occupation and many others in the construction industry. It is not a bar to performing such work, merely an appropriate safety measure.

(Dec. 12-13; emphasis added.) The judge once again misstates the medical limitations of the employee. However, we go past that error and read the findings to comport with the evidence – that the employee is medically restricted from exposure to *any epoxy*. We conclude that the judge's reliance on protective gear as the basis for the employee's work capacity as a tile mechanic using epoxies is arbitrary and capricious, because it is wholly without evidentiary support.

First, the Insurer's Exhibit 2, "Precautions for Epoxy Grouting," describes the proper use of protective clothing. This exhibit cannot be read to support the inference

that use of the protective gear would be a total prevention against any exposure to epoxy, and the corresponding flare-up of dermatitis, as it states, "Avoid skin contact *as much as possible*" and "*Wash off skin if contacted as soon as possible.*"

The exhibit goes on to say that "[s]ome people may produce an allergic reaction to the epoxy grout," and that they should seek medical attention. The protective gear, in other words, is no guarantee against the employee's exposure to epoxy. The §11A physician opined along the same lines. Dr. Waldman testified in answer to the insurer's examination at his second deposition:

> Q: [I]f he were physically capable of returning to his prior occupation, in the sense that he did not have this exposure to epoxy resin, in your opinion would he be able to perform the functions of the job of a tile setter physically?
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> . . .
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> The answer is, with the understanding that it's only the epoxy resins that I know of which are keeping him from returning to work. If there were an alternate material -- I hesitate to say better protection, because this all took place while wearing appropriate clothes and the Tyvek suits.
> I think of his disability as being focal - that is, regarding the epoxy resin only - and that's, in my mind, the only reason that would keep him from returning to his previous employment, the *fact that I don't know of any way of avoiding contact with the epoxies.*

(Dep. II, 25.) The doctor further testified:

> So [for] advise, if he were going to go back to tile setting in some form, and if avoidance of epoxies in all forms was not a possibility, to use as much protection, at least two forms. My suggestion, therefore, would be barrier cream beneath the gloves in case any material got through the cuff or through the seam or ate its way through the glove. *But I would be hesitant to suggest that even double barrier would necessarily protect him from flare-up of the allergy.*
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> . . .
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> [T]he best advice would be to avoid contact with epoxies and the entire epoxy resin complex whenever and insofar as possible. That's the prudent answer.

(Dep. II, 50-51.)

Thus, the "prudent answer" of the only physician testifying in this case, whose testimony was prima facie evidence of the employee's degree of disability pursuant to

§ 11A(2), was for the employee to stay away from epoxy; the "medically suggested" protective gear, (Dec. 12), would only help to a certain degree. It does not represent "a way to guarantee no exposure to epoxy in any application," which is what the doctor wanted to see in order to clear the employee for a return to tile work. (Dep. I, 21.) As we have noted, there is no evidence of a duty restriction offered by the employer that would allow such an avoidance of epoxy. All told, nothing in the evidence meets and supplants the doctor's opinion on the efficacy of protective equipment; all of the evidence – the insurer's and employee's alike – supports the same conclusion reached by the doctor. Therefore, there is no evidentiary support for the judge to find as fact that the protective gear would actually prevent "any reoccurrence." (Dec. 12.)

In finding that complete protection is possible, the judge also relies on his "acquired knowledge as an Administrative Judge regarding the efficacy of work-place personnel protective measures and equipment." Id. This "foundation" for the judge's opinion fails as support for his finding allowing a return to tiling work, as it is overly generalized, conjectural and boot-strapping. We cannot accept that the realm of the expertise of administrative judges in weighing vocational factors to determine an earning capacity reaches the topic of workplace protective equipment frequently enough to give administrative judges expertise as to workplace protective equipment. Contrast Mulcahey's Case, 26 Mass. App. Ct. 1 (1988) (adjudicatory expertise of administrative judges recognized as to earning capacity in general). As the judge does recognize, the relevance of workplace protective equipment to the Act is as to the issues of serious misconduct under §§ 27 or 28. (Dec. 12.) These are clearly not matters in this case. Indeed, a search of the term, "protective," in combination with "clothing," "equipment" or "gear" in all of the reviewing board decisions from 1986 until the present yields only two cases, neither of which have the topic as an issue. See Perkins v. Eastern Transfer, Inc., 12 Mass. Workers' Comp. Rep 370 (1998); Dalrymple v. Reidy Body and Paint Shop Inc., 10 Mass. Workers' Comp. Rep. 275 (1996). Cf. Robinson v. General Motors Corp., 13 Mass. Workers' Comp. Rep. 207, 213 (1999) (administrative judges sitting on multiple cases involving the same doctor come to recognize a physician's point of view).

We conclude that the judge's finding that the protective gear would allow the employee to work with epoxy, based on his "acquired knowledge," is an example of an impermissible inference, because it is not "within the bounds of reason." Miranda v. Atlantic Paper Box, 12 Mass. Workers' Comp. Rep. 510 (1998). In rejecting as arbitrary a judge's conclusion that the employee had an undisclosed gainful employment, Miranda quoted Semerjian v. Stetson, 284 Mass. 510, 514 (1933): "The permissible drawing of an inference is a process of reasoning whereby from facts admitted or established by the evidence, including expert testimony, or from common knowledge and experience, a reasonable conclusion may be drawn that a further fact is established." The judge's inference of perfect protection against epoxy exposure is plainly against common knowledge and sense as well as the record evidence. As there is no evidence, expert or otherwise, to support the inference that the judge reached, the conclusion stemming from that inference cannot stand. We reverse the decision in its conclusion that the employee could return to tiling work, and exposure to epoxies.

We once again recommit the case for further findings on the extent of the employee's incapacity.

So ordered.

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Martine Carroll
Administrative Law Judge

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Frederick E. Levine
Administrative Law Judge

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Susan Maze-Rothstein
Administrative Law Judge

Filed: **February 21, 2001**
MC/jdm