

NOTICE: Summary decisions issued by the Appeals Court pursuant to its rule 1:28, as amended by 73 Mass. App. Ct. 1001 (2009), are primarily directed to the parties and, therefore, may not fully address the facts of the case or the panel's decisional rationale. Moreover, such decisions are not circulated to the entire court and, therefore, represent only the views of the panel that decided the case. A summary decision pursuant to rule 1:28 issued after February 25, 2008, may be cited for its persuasive value but, because of the limitations noted above, not as binding precedent. See Chace v. Curran, 71 Mass. App. Ct. 258, 260 n.4 (2008).

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

18-P-918

MANUEL ACERO LAZO'S CASE.

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

The employee, Manuel Acero Lazo, appeals from a decision of the reviewing board of the Department of Industrial Accidents, which summarily affirmed the decision of an administrative judge denying his claims for workers' compensation benefits. On appeal, he contends that the administrative judge (1) improperly dismissed his claim against one of the insurers, and (2) erred by not adopting the opinion of an impartial medical examiner on the issue of causation and relying instead on his own "lay opinion" to conclude that Lazo failed to meet his burden of proof.¹ For the reasons that follow, we affirm.

Background. On December 5, 2014, Lazo was working for a roofing company, GM General Construction Services, Inc. (GM), on a project in Mashpee. He was twenty-six years old and had

¹ Lazo also argues that the administrative judge failed to state whether the industrial accident resulted in an injury. This argument requires no discussion as the administrative judge explicitly found that Lazo had not met his burden of proving that he had suffered an industrial injury.

worked as a farm worker in Ecuador and as a laborer performing roofing, siding, and snow removal in the United States. Lazo claims that he injured his back and hip when he slipped on some wet plywood while he was working on a roof. He slid down the roof a short distance, but remained on his feet and did not fall over the edge of the roof. Lazo was wearing a safety harness at the time, which stopped his fall. He continued to work passing shingles to coworkers until the end of the workday.

Approximately two days later, Lazo accepted an offer from GM to shovel snow, which he did throughout the following winter. Although Lazo testified that he sought medical treatment for back pain shortly after the accident, the administrative judge found that Lazo's treatment consisted of massages and an injection of "unknown material" from unlicensed persons in New York and New Jersey. Lazo did not receive any medical treatment from a licensed provider until January 8, 2015, when he went to the Kennedy Community Health Center in Milford.

Lazo stopped working around April 5, 2015, and filed workers' compensation claims against GM and, because GM was not insured, against the Workers' Compensation Trust Fund (trust fund). He also filed claims against Christian Pike, doing business as P&P Construction (P&P), the intermediate subcontractor for the Mashpee project that hired GM, and its insurer, AIM Mutual Insurance Company (AIM), and Scherneck

Property Services (SPS), the project's general contractor, and its insurer, ABC Mass. Workers' Compensation SIG (ABC). All of these parties denied coverage and Lazo's claims proceeded to a conference under G. L. c. 152, § 10A, before an administrative judge, who denied Lazo's claims. Lazo appealed, and a de novo hearing commenced on April 12, 2016.² See G. L. c. 152, § 11.

In advance of the hearing, Lazo was examined by an impartial medical examiner, Dr. Charles Kenny. Dr. Kenny prepared a report in which he noted that even with the assistance of an interpreter, Lazo is a "very poor historian [and] routinely fail[ed] to answer even simple questions appropriately." Ultimately, based on his review of the medical history provided by Lazo and the results of his examination, Dr. Kenny concluded that Lazo had "lumbosacral sprain with disk protrusions at L4-5 and L5-S1" and that a causal relationship existed between that diagnosis and the work-related accident of December 5, 2014. He further opined that Lazo was "temporarily totally disabled" with respect to his former occupation.

At the beginning of the hearing, the administrative judge dismissed ABC (SPS's insurance company) from the case because there was another insured entity in the chain of contractors between Lazo and SPS. The hearing then proceeded over three nonconsecutive days during which, among other information, the

² The hearing continued for two additional days.

administrative judge received in evidence Dr. Kenny's report and testimony from Lazo, Lazo's supervisor, and an individual who witnessed the accident.

In a decision dated August 15, 2017, the administrative judge found Dr. Kenny's report to be adequate, but declined to adopt his opinion on causation because Dr. Kenny had relied on incomplete and inaccurate information provided to him by Lazo. As the administrative judge explained, Dr. Kenny "lacked significant factual information concerning the details of the accident" and Lazo's activities following the accident. He found specifically that Lazo told Dr. Kenny that he was seen at a hospital fifteen days after the accident when, in fact, he was first seen for his back pain by a licensed medical professional seven weeks after the incident. In addition, Lazo did not inform the doctor that he shoveled snow for months after the accident. According to his report, Dr. Kenny believed that Lazo worked only two or three days after the accident and then could no longer work due to his injury. The administrative judge also determined, based on his own observations of Lazo during the hearing, that Lazo was not credible. He observed that Lazo sat during most of his testimony and did not appear to be in physical discomfort; Lazo did not squirm or change position and was able to lean down to pick up an object from the floor without difficulty.

The administrative judge concluded that Lazo had suffered a work-related accident on December 5, 2014, but failed to prove any disability or a need for medical treatment, any causal relationship between the accident and his claimed back injury, or any loss of earnings. Consequently, he dismissed Lazo's claims. The department's reviewing board summarily affirmed the administrative judge's decision.

Discussion. a. Standard of review. "In cases where the department's reviewing board summarily affirms the decision of an administrative judge, the reviewing court inspects the findings and reasoning of the administrative judge." Bronmage's Case, 75 Mass. App. Ct. 825, 827 (2009). "We consider whether the decision is factually warranted and not [a]rbitrary or capricious, in the sense of having adequate evidentiary and factual support and disclosing reasoned decision making within the particular requirements governing a workers' compensation dispute" (quotations and citation omitted). Id. "In so doing, we must ascertain whether the decision contain[s] conclusions which are adequately supported by subsidiary findings which are not lacking in evidential support or . . . tainted by error of law." Id., quoting Patterson v. Liberty Mut. Ins. Co., 48 Mass. App. Ct. 586, 587 n.5 (2000).

b. Dismissal of ABC. Lazo first argues that ABC should not have been dismissed from the case before any evidence was

presented to the administrative judge. Relying primarily on Monahan v. Washburn, 400 Mass. 126, 128 (1987), a case in which the Supreme Judicial Court stated that "[i]nvoluntary dismissal is a drastic sanction which should be utilized only in extreme situations[,] " Lazo claims that the judge acted precipitously. Even if we were to assume that Lazo is correct, he has suffered no harm. As we discuss in more detail below, we conclude that the administrative judge properly determined Lazo had failed to meet his burden that, more likely than not, an industrial injury which caused an incapacity for work occurred on December 5, 2014. In light of this conclusion, Lazo would not have fared any better if ABC had remained in the case.

c. Administrative judge's decision. Lazo's primary argument is that the administrative judge erred by not adopting Dr. Kenny's opinion. However, because that opinion was based on inaccurate information, the administrative judge did not act arbitrarily or capriciously when he declined to adopt it.

Under G. L. c. 152, § 11A (2), a report of an impartial medical examiner "shall constitute prima facie evidence of the matters contained therein," and absent contradictory medical evidence, an administrative judge is required to accept the report as true. Young's Case, 64 Mass. App. Ct. 903, 904 (2005). However, a report is not entitled to prima facie status where it is unsupported by admissible evidence, nor is the judge

required to give it any weight if he does not believe the facts on which the report is based. See Brommage's Case, 75 Mass. App. Ct. at 828.

Here, the administrative judge properly declined to adopt Dr. Kenny's opinion. His finding that the opinion was based on "defective data" is supported by the evidence and provides a sufficient basis for not accepting it. See Dalbec's Case, 69 Mass. App. Ct. 306, 314 (2007) ("the medical examiner's report may give way to a contrary conclusion for one or more reasons"). Furthermore, because no additional medical evidence was submitted, once Dr. Kenny's opinion was rejected, there was no medical evidence in the record to support Lazo's claims.³

Next, Lazo argues that the administrative judge impermissibly substituted his own opinion for that of an expert on the issue of causation. This argument is based on the judge's observations of Lazo at the hearing. We are not

³ We are not persuaded by Lazo's argument that he was denied due process because the administrative judge did not advise him in advance that he was disinclined to accept Dr. Kenny's opinion. The administrative judge was not required to provide such notice and, in any event, Lazo was not precluded from requesting the opportunity to depose Dr. Kenny (despite being informed of his right to do so) or introducing additional medical evidence. See Viveiro's Case, 53 Mass. App. Ct. 296, 296, 298-300 (2001) (administrative judge may authorize submission of additional medical testimony when circumstances require "due to the . . . inadequacy of the report submitted by the impartial medical examiner," however, "the burden was upon the employee, not the administrative judge sua sponte, to move to supplement the medical record").

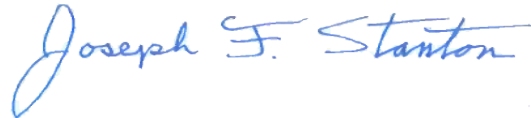
persuaded that those observations amounted to a substitution by the judge of his opinion over that of Dr. Kenny. In our view, the administrative judge was assessing Lazo's credibility. Assessments of credibility are the exclusive function of the administrative judge. See Pilon's Case, 69 Mass. App. Ct. 167, 169 (2007). Moreover, the administrative judge's finding that Lazo was not credible is amply supported by the evidence. Lazo provided Dr. Kenny with information that differed from his testimony, did not give a clear, precise timeline or description of events, and failed to produce records of his claimed medical "treatments."

Conclusion. In sum, "an employee has the burden of establishing, by a preponderance of the evidence, all the elements of [his] claim for workers' compensation benefits, including the fact of the requisite causal connection between [his] injury and workplace events . . . [and] cannot prevail if any critical element is left to surmise, conjecture or speculation or otherwise lacks evidential support." Patterson, 48 Mass. App. Ct. at 592. Here, the administrative judge made a reasoned decision based on the evidence before him that Lazo

failed to establish the elements of his claims. We therefore affirm the decision of the reviewing board.

So ordered.

By the Court (Vuono,
Ditkoff & Wendlandt, JJ.⁴),


Clerk

Entered: August 23, 2019.

⁴ The panelists are listed in order of seniority.