COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS	**BOARD NO. 040731-96 037266-96**
Anastasios Karsaliakos	Employee
K & L Concrete Service Co.	Employer
Gary Pinsonneault	Employer
Eastern Casualty	Insurer
DIA Trust Fund	Insurer

REVIEWING BOARD DECISION
(Judges McCarthy, Wilson and Smith[1])

APPEARANCES
Thomas H. O'Neill, Esq., for the employee at hearing
Paul G. Lalonde, Esq., for the employee on appeal
Thomas M. Dillon, Esq., for Eastern Casualty at hearing and on appeal
Paul Ingraham, Esq., for the DIA Trust Fund at hearing

MCCARTHY, J. Anastasios Karsaliakos filed claim for benefits due to injuries sustained when a stairway collapsed at a construction site. The claimant alleges that on June 10, 1996, he suffered an industrial injury arising out of and in the course of his employment with Gary Pinsonneault, a subcontractor for K & L Concrete. The claimant filed a claim seeking weekly incapacity benefits and medical expenses against both Mr. Pinsonnault and against K & L Concrete. As Pinsonneault was uninsured, the Trust Fund appeared on his behalf in these proceedings.

Following a conference, an order of payment directed Eastern Casualty, insuring K & L Concrete, to pay § 35 weekly indemnity benefits for the period June 10, 1996 to February

[1] Judge Smith no longer serves as a member of the reviewing board.

12, 1997 together with reasonable medical expenses. The judge denied the claim against the Trust Fund. The claimant appealed both conference orders and the case returned to the same administrative judge for a full de novo evidentiary hearing.

Doctor Steven A. Silver examined the employee under the provisions of § 11A of the Act. The hearing judge deemed Dr. Silver's report to be inadequate and allowed the parties to submit additional medical evidence. This additional medical evidence and the impartial examiner's report were marked as exhibits at the hearing. There were two lay witnesses, the claimant and Rita Lacasse, the treasurer of K & L Concrete. The claimant's testimony substantially conflicted with that of Lacasse. The claimant testified that Gary Pinsonneault hired him as a cement worker and that he was to be paid $14.95 per hour working a forty-hour work week. (Dec. 4.) He further testified that he was injured on June 10, 1996, his first day at work, when a staircase collapsed.

Rita Lacasse testified that Gary Pinsonneault often did subcontract work for K & L Concrete. To her knowledge Mr. Pinsonneault never hired anyone to assist him in fulfilling the terms of his contracts with K & L Concrete. (Dec. 5.) She further testified that the work on the job where the injury occurred could be performed by one person. Significantly, she also testified that no concrete was scheduled to be delivered on June 10, 1996, the day the claimant was injured. Rather, the concrete was scheduled to be delivered and poured the next day, June 11, 1996. (Dec. 5.) According to Lacasse's testimony, the prevailing wage for a new cement worker is about $10.00 per hour. In addition, Mr. Pinsonneault was being paid about $450.00 for this job. (Dec. 6.) The hearing judge found the testimony of Rita Lacasse to be credible, (Dec. 5), and the testimony of Mr. Karsaliakos " . . . not persuasive or credible." (Dec. 6.)

The hearing judge concluded that the claimant was not an employee and thus not entitled to any c.152 benefits. The judge denied the claim against both Eastern Casualty and the Trust Fund. On appeal, the claimant raises three issues.

The hearing judge directed the parties to submit draft decisions to him. The claimant contends that the judge adopted so much of the insurer's draft decision as to raise doubts as

to whether there was a sufficient " badge of personal analysis." We disagree. The claimant concedes that twenty five percent of the language of the decision belongs to the judge. (Claimant brief p. 5.) While the claimant is correct in stating that it is incumbent upon a judge to render a decision that is the product of his independent judgement, it is also true that a judge is entitled to solicit and incorporate draft findings of fact into the final decision. Rutanen v. Ballard, 424 Mass. 723, 727 (1997) (fact that some findings were taken verbatim from proposed findings was insufficient to override the presumption that the judge made an independent judgement as to the facts). We are not persuaded that the decision before us is so lacking an independent analysis such that the decision should be set aside.

Next, the claimant argues that judge erroneously admitted hearsay evidence and relied on this inadmissible hearsay in reaching the decision to deny an employee – employer relationship. As indicated earlier, there were only two lay witnesses in this proceeding. Gary Pinsonneault did not respond to a subpoena. During direct examination, Rita Lacasse was asked whether Gary Pinsonneault ever employed Mr. Karsaliakos.

> "Q. Do you know if Gary Pinsonneault ever employed Mr. Karsaliakos did [sic]?
> A. Gary told me he didn't. I don't know if – Gary did state to me that he had never-
> Mr. O'Neill: Objection to what Gary may have said.
> Judge: I'll sustain that objection." (Tr. 75)

Although he sustained the objection, in the decision the judge found that "Gary Pinsonneault often did contract work for K & L Concrete and was never known to Rita Lacasse to hire an employee." (Dec. 5.) It appears that after properly excluding the hearsay at the hearing, the judge then impermissibly relied on the objectionable answer in his decision. As it appears that the judge based his decision on hearsay testimony ostensibly excluded, we must reverse the decision and recommit for further findings with respect to the status of the claimant at the time of his injury.

Several months after the lay testimony was taken, the claimant filed a motion requesting the judge to recuse himself from this case. Claimant's counsel, by subpoena, sought the appointment schedule of the impartial examiner, Dr. Silver, for the date of the

impartial examination in order to cross-examine on the number of patients seen that day by the doctor.[2] On receipt of the subpoena, Dr. Silver telephoned the administrative judge to ask whether he should comply with it. The judge apparently advised the impartial physician that he need not comply. In response to the motion for recusal, the judge stated that his phone conversation did ". . . not constitute ex parte communication which would prejudice the employee's (sic) case, . . ." and then denied the motion. (Dec. 3.) We disagree with the claimant that the judge's phone conversation with the impartial examiner demonstrates a violation of his obligation to be free of bias or prejudice and completely impartial. The general tenor of § 11A and the rules interpreting and applying it indicate that all communications with the impartial examiner should be funneled through the administrative judge or the impartial medical unit of the Department. 452 Code Mass. Regs. § 1.14(2). The claimant failed to do that when he subpoenaed the doctor's records without first clearing it with the administrative judge. While the judge's response to the impartial examiner's phone inquiry may have been ill advised, we hardly think it demonstrated bias.[3] See Howell v. Norton Co., 11 Mass Workers' Comp Rep. 16 (1997) (where § 11A doctor had ex parte phone call with employee, but judge then allowed additional medical evidence, appearance of impropriety cured).

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[2] The claimant contends that Dr. Silver failed to perform an adequate physical examination in part because there were so many other patients present at the doctor's office on the date of the impartial examination, that lack of time would have precluded a thorough examination. (Tr. 40-45; claimant's brief 7).

[3] The number of patients seen by the §11A examiner on the date of the examination in question may be relevant to the adequacy of the examination. The question of course is academic if on recommittal the judge again concludes that the claimant was not an "employee" at the time of his injury. If this finding changes and the judge on recommittal finds the claimant to be an employee, the doctor may be deposed with respect to the number of patients seen on the day in question by the § 11A physician. This could be done without revealing the identify of these patients.

We note that the impartial examiner's report was deemed to be inadequate by the judge who then followed the provisions of § 11A and opened up the proceeding for additional medical evidence.

We now return this case to the hearing judge for a new decision. If justice and equity require it, the judge at his discretion may allow the presentation of further evidence before filing his decision anew.

So ordered.

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William A. McCarthy
Administrative Law Judge

Filed: **October 23, 2000**

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Sara Holmes Wilson
Administrative Law Judge