COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS	**BOARD NO. 041551-05**
Carole Evangelista	Employee
James N. Ellis, Sr. d/b/a Ellis & Associates	Third Party Claimant
Community Systems, Inc.	Employer
Atlantic Charter Insurance Company	Insurer

REVIEWING BOARD DECISION
(Judges Calliotte, Fabricant and Harpin)

This case was heard by Administrative Judge Lewenberg.

APPEARANCES
Steven M. Buckley, Esq., for the employee
Kevin P. Jones, Esq., for the insurer
James N. Ellis, Sr., Esq., for the Third Party Claimant

CALLIOTTE, J. The Third Party Claimant, James N. Ellis, Sr., (hereinafter "Ellis"), the employee's former counsel, appeals from a decision ordering the release of monies held in escrow from a lump sum settlement, to the employee and successor counsel, Steven M. Buckley (hereinafter "Buckley").[1, 2] The decision also denied Ellis' motion for the judge's recusal. Ellis's sole contention on appeal is that the judge violated the "Model Code of Judicial Conduct for State Administrative Law Judges" by denying

[1] On March 10, 2011, Ellis filed a "Third Party Claim/Notice of Lien" for attorney's services and out-of-pocket expenses totaling $8,585.37. See G.L. c. 221, § 50. However, Buckley actually initiated the dispute resolution process in the case before us through his "Third Party Claim/Notice of Lien," filed March 14, 2014. Ellis appealed the resulting conference order and hearing decision, thus becoming the de facto third party claimant. See Rodriguez v. Carilorz Corp., 23 Mass. Workers' Comp. Rep. 89, 90 n.3 (2009), citing Cordeiro v. New England Specialized Concrete, 22 Mass. Workers' Comp. Rep. 349, 354 (2008). In fact, he refers to himself as such. (Third Party Claimant's br., 1.) We do not adopt the judge's reference to Ellis as the "Case Party."

[2] Because the decision does not recite the history of the case, we refer to the board file for documentation throughout. See Rizzo v. M.B.T.A., 16 Mass. Workers' Comp. Rep. 160, 161 n.3 (2016)(permissible for reviewing board to take judicial notice of board file).

Ellis's motion that he recuse himself due to bias. We affirm the decision, and, in addition, order that the cost of the appellate proceeding be assessed against Ellis pursuant to G. L. c. 152, § 14(1).

The employee and the insurer entered into a lump sum agreement for $50,000, which was approved on March 4, 2014. Because Ellis and Buckley were unable to agree on the division of the attorney's fee, or the amount of expenses due Ellis, the $10,000 attorney's fee and $6,103.10 in claimed expenses were held in escrow by the insurer. Buckley then filed a "Third Party Claim/Notice of Lien" requesting that the administrative judge, who had had jurisdiction of the case from its inception, resolve the dispute.[3]

On August 25, 2014, Ellis filed a "Motion for Stay of Proceedings and for Recusal of Administrative Judge and Request for a Hearing." At a § 10A conference on September 22, 2014, at which a representative from Ellis's office appeared, the judge ordered that the proceeds held in escrow be released to the employee and her successor counsel. (Dec. 2.) Ellis appealed, and on June 23, 2015, renewed the motion he had

[3] The board file reveals that this administrative judge has issued three prior decisions related to the employee's December 14, 2005 injury. In the first decision of August 23, 2007, the judge awarded partial incapacity benefits, but found the employee had not met her § 1(7A) burden with respect to her alleged shoulder injury. The employee appealed, and the reviewing board summarily affirmed; on further appeal, the appeals court affirmed. Evangelista's Case, 74 Mass. App. Ct. 1118((2009)(Memorandum and Order Pursuant to Rule 1:28). The second hearing decision, issued on February 11, 2009, increased the employee's earning capacity from $300 to $400 per week. Again, following the employee's appeal, the reviewing board summarily affirmed; the appeals court affirmed as well. Evangelista's Case, 78 Mass. App. Ct. 1127 (2011)(Memorandum and Order Pursuant to Rule 1:28). The third hearing decision of January 31, 2011, allowed the employee to retain over $10,000 in § 36 benefits because the insurer had not appealed the conference order, although the judge found that, due to the employee's failure to testify, he was unable to assess permanent loss of function. The employee again appealed. During all of these proceedings, the employee was represented by Ellis or his representative. On March 10, 2011, Ellis filed a notice of lien for services rendered and out-of-pocket expenses in the amount of $8,585.37. The employee's successor counsel, Buckley, filed an appearance dated May 19, 2011. On July 27, 2011, he withdrew the employee's appeal of the third hearing decision. Buckley subsequently filed a claim pursuant to §§ 34A and 28. See Rizzo, supra.

previously submitted.[4] (Ex. 3 for identification.) In the motion, Ellis indicated he had "no intention of submitting the attorney's fee dispute which is the subject of the June 25, 2015 hearing, to the administrative judge for determination on its merits." Id. at 2. The judge responded via email later the same day, advising that he would "take live testimony on the merits of the Motion to Recuse on the record at the hearing," and instructing Ellis to "have all relevant and necessary witnesses available at that time." (Ex. 4, for identification.) Ellis responded via email on June 24, 2015, thanking the judge for his "laughable email" and declining the "invitation" expressed therein. Id.

At the hearing on Ellis's appeal, scheduled for June 25, 2015, neither Ellis nor a representative appeared. (Dec. 1.) The hearing went forward, as the judge had indicated it would, with Attorney Buckley and the insurer's attorney. The judge admitted as evidence documentation from the Worcester District Court Department, Small Claims Session, establishing that Ellis had filed a claim against the employee for reimbursement of legal expenses in the amount of $6,813.91 plus $150 in court costs, which was decided in favor of the defendant (employee) on June 1, 2015.[5] (Dec. 2; Ex. 1.) Admitted for

[4] Ellis's "Renewed Motion" requested that the hearing be stayed pending an evidentiary hearing on Ellis's judicial conduct complaint against the judge, which was pending before the director and senior judge. (Ex. 3, for identification, p. 1.) He alleged that recusal was appropriate because the judge, "on numerous occasions, had revealed an animus toward him such that any appearance of impartiality on the administrative judge's part can no longer be maintained." Id. at 2. Ellis further alleged he believed the judge had "disparaged him to another administrative judge and . . . neglected to disclose his intent to insert himself into adversary proceedings brought by third party Ellis seeking that administrative judge's disqualification." Id.

[5] The judgment stated, in part:

> This means that the defendant(s) does not have to pay the plaintiff(s) any part of the claim or costs in this claim.
>
> The plaintiff(s) does not have any right of appeal from this judgment. Uniform Small Claims Rule 8 provides that for good cause any party may file a motion within one year of judgment, with notice to the other parties, requesting the Court to vacate or amend this judgment.

(Ex. 1.) We need not address the effect of the judgment in Worcester District Court disallowing Ellis's claim for costs, which were in excess of those claimed in the proceeding before the judge.

identification were Ellis's June 23, 2015, Renewed Motion to Recuse, (Ex. 3, for identification), as well as the June 23 and 24, 2015, email correspondence between the judge and Ellis & Associates. (Ex. 4, for identification.)

At the hearing, the judge addressed Ellis' motion for recusal. Referencing Olivenza's Case, 87 Mass. App. Ct. 1130 (2015)(Memorandum and Order Pursuant to Rule 1:28), and cases cited therein, the judge stated he had had no knowledge or interaction with Attorney Ellis or his law firm or clients except through his role as a judge. Further, he had never met Attorney Ellis, and had only had judicial contact with him through correspondence or through attorneys in his office. (Tr. 9-12.) The judge concluded: "I have consulted my emotions and my conscience, and I am fully confident that I have no bias for or against the employee, Mr. Ellis, any of the attorneys in Mr. Ellis' office, or any other party to this case which would in any way impact my ability to hear the case and render a fair decision based on the facts and the governing law." (Tr. 12-13.) Accordingly, the judge orally denied the motion to recuse. (Tr. 13.)

In his written decision, the judge stated that he had articulated the basis for his denial of Ellis's recusal motion in the transcript. (Dec. 3) He then found that not only had Ellis failed to appear at hearing, but he had also filed and lost the Worcester District Court claim for expenses. (Dec. 3.) Accordingly, "[b]ased on the lack of prosecution of the claim and the finding by the Worcester District Court," id., the judge dismissed Ellis's Third Party Claim, and affirmed the conference order authorizing the insurer to release to the employee and successor counsel the funds which had been escrowed from the lump sum agreement. (Dec. 3-4.)[6]

Ellis appeals, alleging error in the judge's refusal to recuse himself. Ellis cites to "The Model Code of Conduct for State Administrative Law Judges," Canon 3C(1), (ABA 1995), which states:

> A state administrative law judge shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned,

[6] See G. L. c. 152, § 11, which provides, in relevant part: "Failure of a party to appear at a hearing shall not delay the issuance of a decision."

> including but not limited to instances where: (a) the judge has a personal bias or prejudice concerning the proceeding.

This standard is essentially the same as that established by the courts and followed by this board. See Lena v. Commonwealth, 369 Mass. 571, 574-575 (1976); Ryder's Case, 80 Mass. App. Ct. 1102 (2011)(Memorandum and Order Pursuant to Rule 1.28); D'Olimpio v. Bricklayers & Allied Craftsmen, 7 Mass. Workers' Comp. Rep. 25 (1993). The judge appropriately consulted his "emotions and conscience" and determined that he had no bias or prejudice against Ellis, or any extrajudicial knowledge or contact with any of the parties.[7]

More importantly, and dispositive to our decision, Ellis presented no evidence to support his allegations of bias, because neither he nor a representative of his office appeared at hearing to offer testimony or other evidence. This is not a new tactic for this third party claimant. In Ryder's Case, supra, Ellis also refused to participate in the evidentiary hearing to adjudicate his motion to have the judge recuse himself on grounds of bias. Upholding the administrative judge's denial of Ellis' motion to recuse and his award of the claimed attorney's fee to successor counsel, the court stated:

> The settled rule is that an administrative adjudicator receives a presumption of integrity and impartiality. See Withrow v. Larkin, 421 U.S. 35, 56-58 (1975); Massachusetts Auto Rating & Acc. Prevention Bureau v. Commissioner of Ins., 401 Mass. 282, 298 (1987); Foster from Gloucester, Inc. v. City Council of Gloucester, 10 Mass. App. Ct. 284, 294 (1980). *A litigant challenging the presumption must offer meaningful evidence to overcome it.*
>
> The AJ correctly adjudicated the motion for recusal. He offered the proponent of the motion evidentiary opportunity to substantiate the allegation of bias. *No legal authority entitles the proponent of such a motion to insist upon the recusal of the judge from the recusal decision in the first instance. That position*

[7] "When an administrative judge is requested to recuse, the judge must consult first his own emotions and conscience as to whether he can make a fair and impartial decision. Passing that test, he must next attempt an objective appraisal of whether a party may reasonably question his impartiality." D'Olimpio, supra at 28. Although the judge here did not perform the objective part of this test, we do not find it necessary to recommit for such findings, in light of Ellis' failure to participate in the hearing and put on the record any facts that may have been relevant in conducting an objective appraisal.

> *would, in effect, create a per se standard requiring a judicial officer merely accused of bias, however irresponsibly, to withdraw from the accusation and perhaps from the case. As a matter of fairness and as a matter of efficient adjudication, no such standard exists. If it did, disappointed or devious litigants could disqualify administrative adjudicators and judicial officers from cases by mere accusation, however unfounded.*

Ryder's Case, supra (emphases added).

Here, the judge offered Ellis an opportunity to present evidence to substantiate his allegations of bias, as well as his claim for attorney's fees and expenses. Once again, Ellis chose to boycott the hearing in an attempt to "disqualify [the administrative judge] by mere accusation." Ryder's Case, supra. The obvious and appropriate action would have been to present evidence on the motion to recuse and on the merits of the case, and then appeal the decision if he was dissatisfied. Because Ellis failed to follow these basic adjudicatory procedures, he cannot now complain about the result. There was no error in the judge's denial of the motion for recusal, or in his dismissal of Ellis's claim for attorney's fees and costs. See Ryder, supra; see also Cotter v. Hawkeye Constr. Co., 22 Mass. Workers' Comp Rep. 149 (2008)(where employee's attorney walked out of hearing after his motion to recuse was denied, reviewing board upheld judge's denial and dismissal of employee's claim). Accordingly, we affirm the decision.

Successor counsel has requested costs, fees and penalties be awarded against Ellis. Because there is no legal justification for Ellis's conduct, and because the court in Ryder's Case, supra, has put Ellis himself on notice that "to insist upon the recusal of the judge from the recusal decision in the first instance," id., is not the correct standard to be utilized where allegations of bias are made, we conclude that this appeal has been put forward by Ellis without reasonable grounds.[8] The legislature has determined that the fee

[8] G. L. c. 152, § 14(1)(b), provides, in relevant part:

> If any administrative judge or administrative law judge determines that any proceedings have been brought or defended by an employee or counsel without reasonable grounds, the whole cost of the proceedings shall be assessed against the employee or counsel, whomever is responsible.

authorized by § 13A(6) is a fair approximation of the cost of the appellate proceeding. Accordingly, we order Ellis to pay employee's successor counsel $1,618.19.

So ordered.

Carol Calliotte
Administrative Law Judge

Bernard W. Fabricant
Administrative Law Judge

William C. Harpin
Administrative Law Judge

Filed: ***March 9, 2016***