COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO.:** 012374-07

Christopher Connors	Employee
Verizon	Employer
Verizon New England	Self Insurer

REVIEWING BOARD DECISION

(Judges Koziol, Costigan and Horan)
The case was heard by Administrative Judge Bean.

APPEARANCES

John A. Wolkowski, Esq., for the employee
Susan F. Kendall, Esq., for the self-insurer at hearing
John J. Canniff, Esq., for the self-insurer on appeal

KOZIOL, J. The employee appeals from an administrative judge's decision denying and dismissing his claim for workers' compensation benefits. The employee sought § 34 total incapacity benefits for an alleged mental stress injury he claims to have sustained as a result of a series of events arising out of and in the course of his employment as a service technician for the self-insured employer. Liability for the alleged injury was hotly contested over the course of five days of hearing held May 8, May 9, June 12, September 3, and September 19, 2008. We reach only one of the issues raised by the employee on appeal because it is dispositive, requiring reversal of the decision and recommittal for a hearing de novo before a different judge.

The error occurred when the judge refused to allow one of the self-insurer's witnesses to testify, accepting instead, over employee's counsel's objection, self-insurer's counsel's offer of proof as to the alleged anticipated substance of the witness's testimony.[1] (9/19/08 Tr. 13-24.) The witness,

[1] Prior to hearing the self-insurer's offer of proof, the judge informed the parties that he would accept the self-insurer's counsel's version of the witness's anticipated testimony "as true and credible." (9/19/08 Tr. 5-6.) After hearing the offer of proof, (9/19/08 Tr. 20-23), the judge informed the parties that he was going to bifurcate the proceedings stating, "I'm going to close the record. I'm going to take a look at my fourteen pages of notes. I'm going to deal with this case in all of it's [sic] non-medical aspects." (9/19/08 Tr. 24.)

who was subpoenaed by the self-insurer, attended the first day of hearing, May 8, 2008, but was dismissed when it became clear his testimony would not be reached that day. (Dec. 567.) Thereafter, counsel for the self-insurer excused the witness from attending the next two days of hearing because she did not believe that he would be reached as a witness on those days. (Dec. 567.) Self-insurer's counsel informed the witness that he would be testifying on the fourth day of hearing, September 3, 2008. (Dec. 567.)

The events of September 3, 2008, were not conducted on the record. Instead, the judge drafted a memorandum about those events at the end of that day. (9/19/08 Tr. 2.) The judge read his memorandum into the record on the last day of hearing, September 19, 2008, at which time he also provided commentary expressing his views about the propriety of the witness's, and his own, conduct, his impressions of the case, his assessment of the credibility of other witnesses who had already testified, and the inferences he believed he could draw concerning the witness's refusal to appear on September 3, 2008.[2] (9/19/08 Tr. 2-13.)

We summarize the pertinent events. Sometime before September 3, 2008, the witness received independent legal advice that he was under no obligation to appear at the fourth day of hearing because the self-insurer's subpoena had not been served properly. (Dec. 567.) When the witness did not appear on September 3, 2008, an employer representative, who was present at the hearing, called the witness by telephone. When the witness expressed his reason for not attending, the judge told the employer representative to inform the witness that he expected him to appear. (Dec. 568.) The witness still refused to appear. Then the judge spoke to the witness on the telephone and the conversation deteriorated rapidly, abruptly ending when the witness terminated the telephone call. (Dec. 568; 9/19/08 Tr. 5-6.)

---

[2] In an effort to provide the parties with a fair opportunity to retry this case, we have refrained from reproducing the judge's commentary in this decision. We observe however, that his actions, including his failure to conduct his inquiry with the witness on the record, produced multiple errors. Chief among them, as further illustrated infra, was the compromise of the appearance of impartiality. We also observe the judge's decision indicates that only three witnesses, including the employee, testified in this case. (Dec. 566.) The record reveals however, that by September 3, 2008, four witnesses, including the employee, had testified. The judge's decision does not list the fourth witness as having testified nor does it mention that witness's testimony in any fashion. (6/12/08 Tr. 33-48.)

Without any apparent input from the self-insurer, and although the witness was not called by the employee, the judge decided to require the employee's attorney to secure the witness's attendance:

> I instructed the employee's attorney, . . . to convince the witness to appear or I would ask that [the self-insurer's counsel] describe [the witness's] anticipated testimony. I would accept her version as true and credible. And then if the evidence warrant [sic] it, I will determine that the employee's actions were as the insurer [sic] alleged . . . and would decide the case in favor of the insurer [sic].
>
> I gave him thirty minutes. At 10 o'clock I was informed that the witness was not on the clock until eleven, when he was to attend [a meeting]. Once he arrived at work, he would be instructed to report to my courtroom. He was expected by 11:15.

(9/19/08 Tr. 5-6.)

> After being informed that the witness had left work due to illness, the judge suspended the proceedings. The matter was rescheduled for hearing on September 19, 2008. At that time, the judge made the following statements on the record.
>
> I postponed this action until Friday, September 19, 2008. At this time I will be - - - I'll hear from [the witness] . . . concerning [his] actions on September 3, 2008.[3]
>
> [The witness] is expected to produce a note from his doctor concerning his illness of September 3 rd, 2008. It's my understanding there is no note.
>
> Gallery: I handed it to the management team, Your Honor, at the Chelmsford garage.
>
> The Judge: [The witness] has just informed me that there is a note and it is not in his possession.
>
> One course of action contemplated is the one that I discussed with the parties on September 3 rd, that I will accept [self-insurer's counsel's] summary of [the witness's]

[3] Despite the witness's attendance at the hearing on September 19, 2008, and the judge's statement that he would hear the witness, the remainder of the record shows the judge never heard his testimony. (9/19/08 Tr. 8-25.)

> anticipated testimony, accept that as accurate. And if there is sufficient credible evidence upon which to make a finding. . ., I will make the finding and issue a decision to that effect.

(9/19/08 Tr. 5-8.) After further describing his understanding of the law,[4] the judge explained his actions:

> But I have a courtroom to run. Certain things have to be done in particular ways. There was no excuse for an individual to not be here. And this individual by his actions may have cost [the employee] thousands of dollars. Again, I don't know that to be true, but it very well may be.
>
> [Employee's counsel], I assume you would object to my not hearing from [the witness] and accepting the inferences, as I have described them?
>
> [Employee's counsel]: I think I would have to, Your Honor.

(9/19/08 Tr. 13.) Employee's counsel not only objected to the judge drawing those inferences, but also to the judge's accepting as credible evidence, an offer of proof from the self-insurer's counsel, "ostensively [sic] based upon conversations that she had with [the witness], in order to prepare for his testimony, being readily accepted as credible without having the opportunity of any cross-examination or eliciting any other testimony from [the witness] with respect to what his overall knowledge would be. . . ." (9/19/08 Tr. 13-14.) Employee's counsel further explained, "I think that offer of proof by [self-insurer's counsel], as to what his testimony would be, taken as

---

[4] The judge discussed his understanding of the law regarding the potential defect in the subpoena; his view that the witness's attorney, who apparently was not present at the proceedings, may have a Board of Bar Overseers problem and may need to be reported to the Senior Judge of this Department; and, his view that the witness faced potential criminal liability for his prior failure to appear, concluding therefore, that the witness could not testify without having an attorney advise him. (9/19/08 Tr. 9-12.) We observe that the witness was not subpoenaed by the judge, see G. L. c. 152, § 11B, and nothing in the recorded proceedings substantiated the judge's statements. Moreover, the judge's decision neither mentions his conclusion that the witness could not testify without the advice of his attorney, nor relies upon that conclusion as being the ground for the judge's refusal to allow the witness to testify. (Dec. 565-582.)

gospel truth, without the opportunity of cross-examination, would unduly prejudice [the employee], unjustifiably so, and certainly would be an appealable issue." (9/19/08 Tr. 15.) Despite agreeing with counsel that his actions "may not withstand appellate scrutiny," the judge went on to state:

> But, I am given wide discretion in the running of the courtroom and in the bringing of witnesses in to testify. It's unduly prejudicial to you, or to your client you say, not to hear from him. But then - - and perhaps you're right. But what I've had to deal with these past couple of weeks is the prejudice suffered by the insurer's - - the insurer [sic].

(9/19/08 Tr. 15-16.) The judge then accepted the self-insurer's offer of proof describing the witness's anticipated testimony, and he closed the record in the case. (9/19/08 Tr. 20-24.) Nonetheless, further proceedings occurred that, once again, were not conducted on the record. The judge described those events as follows:

> On September 23, 2008 [self-insurer's counsel] wrote a letter to me which I received a day or two later. In it she asked me to note her objection to the refusal to take [the witness's] testimony. I had noted [employee's counsel's] objection but not hers on the 19th. Facing an objection from both parties, I felt compelled to reconsider my actions. I scheduled a status conference for October 3, 2008. At that conference I informed the parties that I felt compelled to recuse myself from this case. I found the actions of [the witness] to be quite troubling. I formed the opinion that he was not a credible person and I would not credit any testimony that he would give. Given that circumstance, taking his testimony would be a waste of time. With my bias announced, there was nothing that I felt that I could do but remove myself from the case.
>
> However, despite the parties' joint objection to my refusal to take [the witness's] testimony, objections that have not been renounced, the parties urged me to reconsider my recusal decision. They orally made a joint motion for me to stay on the case and decide it, despite my objectionable actions involving [the witness's] testimony and my findings concerning his veracity. Perhaps in error, I allowed [the attorneys] to persuade me to rescind my recusal decision and decide this case on its merits. The record closed with my allowance of the joint motion of the parties that I reverse my recusal decision.

(Dec. 569-570.)

Indeed, judges have broad discretion in controlling courtroom proceedings, See 452 Code Mass. Regs. § 1.11(7)(administrative judge shall control conduct of parties, attorneys, and witnesses),

but that discretion is not unfettered and cannot be extended so far as to deny a party due process of law. Haley's Case, 356 Mass. 678, 682 (1970)("Constitutional due process requirements apply to board hearings and decisions.") By accepting and crediting self-insurer's counsel's offer of proof (9/19/08 Tr. 5-6, 13-24), the judge denied the employee the right to cross-examine the witness, thereby denying the employee due process of law. We reject the self-insurer's argument that the error was somehow cured by the judge's latter statement that taking the witness's "testimony would be a waste of time" in any event because the judge "would not credit any testimony that he would give." (Dec. 570.) The judge did not state that he was reversing his decision to credit self-insurer's counsel's offer of proof. The employee simply had no opportunity or means to rebut or cross-examine the offer of proof which the judge made clear he would credit and consider as substantive evidence in the case. It cannot be overstated that the error went to the heart of the matters in controversy, as the judge acknowledged the case hinged on credibility determinations. (9/19/08 Tr. 8.)

Moreover, the inescapable conclusion that must be drawn, regardless of the witness's apparent willingness to testify on September 19, 2008, is that without taking that testimony, the judge accepted and adopted the inferences he advised the parties he would draw from the witness's failure to appear on September 3, 2008. All of those inferences went to the heart of, and were adverse to, the employee's claim. (9/19/08 Tr. 8-9.)

We also find no merit to the self-insurer's argument that the employee lost the ability to argue the due process issue on appeal because he assented to the judge's subsequent reversal of his decision to recuse himself from the proceedings. Despite joining in the motion that the judge reconsider his recusal determination, the employee did not withdraw his objection to the judge's actions concerning the witness. (Dec. 570.) More importantly, once the judge made the determination that he must recuse himself from the case because of his own bias, he had no authority to reverse that finding or to continue to preside over the matter, no matter what the parties urged him to do. "Once a judge concludes that there are grounds for recusal, he must completely dissociate himself from participating in the case." Parenteau v. Jacobson, 32 Mass. App. Ct. 97, 104 (1992).[5] The judge's actions to the contrary only confirm our conclusion that

[5] The Court's discussion about recusal and the appearance of impartiality was based on S.J.C. Rule 3:09, Canon 3 (C)(1)(a). Id. at 99-104. The conduct of administrative judges and administrative law judges at the Department of Industrial Accidents is "subject to the Model Code of Judicial Conduct for State Administrative Law Judges as promulgated by the American

the employee's right to procedural due process was violated. As stated by the Appeals Court, "a courtroom has no place for a judge whose impartiality in a matter may be reasonably questioned. . . ." Id. at 104.

Our decision breaks no new ground. We are mindful that "[i]mpatience, discourtesy or bad manners, regrettable though they are in those exercising the judicial function, do not invalidate a trial or require the setting aside of a decision provided the essentials of sound judicial conduct are not violated." Ott v. Board of Registration in Medicine, 276 Mass. 566, 574 (1931). However, "[a] decision which is based upon conduct wanting in impartiality, upon a biased attitude of mind and upon refusal to permit essential cross-examination within reasonable limits must ordinarily be held to be clearly wrong." Id. at 576. Under the circumstances, the decision is vacated and the matter must be returned to the senior judge for assignment to a different judge for a hearing de novo on all issues. See Nova v. Rocky Neck Seafood Corp., 10 Mass. Workers' Comp. Rep. 759, 760 (1996); Crowe v. Community Human Service, Inc., 5 Mass. Workers' Comp. Rep. 113, 114 (1991).

So ordered.

_____

Catherine Watson Koziol
Administrative Law Judge

_____

Patricia A. Costigan
Administrative Law Judge

Bar Association." General Laws, c. 23E, § 8. The Model Code of Judicial Conduct for State Administrative Law Judges contains a cognate provision, stating in pertinent part:

> A state administrative law judge shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances where: (a) the judge has a personal bias or prejudice concerning the proceeding.

The American Bar Association, Model Code of Judicial Conduct for State Administrative Law Judges Canon 3(C)(1)(a).

_____

Mark D. Horan
Administrative Law Judge

Filed: ***December 15, 2009***