COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 077391-91**

Employee: Cletus L. Kijek
Employer: OSRAM Sylvania, Inc.
Insurer: National Union Fire Insurance Co.

REVIEWING BOARD DECISION
(Judges Smith, McCarthy and Wilson)

APPEARANCES
Frederick T. Golder, Esq., for the employee
Joseph B. Bertrand, Esq., for the insurer

SMITH, J. The employee, Cletus Kijek, appeals from a decision on his original liability claim for § 34 temporary total incapacity benefits, § 30 medical benefits and § 28 double compensation. The judge found that Kijek sustained a personal injury to his back arising out of and in the course of his employment. The judge was unpersuaded that this physical disability diminished Kijek's earning capacity, but found that the injury did necessitate medical treatment. He concluded that Kijek's injury was not the result of serious and wilful misconduct by the employer. (Dec. 151.) The judge therefore denied the claim for weekly compensation and § 28 benefits but awarded reasonable and necessary medical services pursuant to G.L. c. 152, § 30. (Dec. 157.)

On appeal, Kijek raises three main issues: 1) he should get a new hearing before a different judge because the judge did not inform him about the judge's prior employment as a selectman and the selectmen's dealings with the employer's predecessor corporation; 2) the evidence established his entitlement to § 35 partial compensation benefits; and 3) the evidence established his entitlement to § 28 benefits. We find no merit in any of these arguments.

The judge rendered a thirty-seven (37) page, carefully reasoned decision on December 27, 1996. Shortly thereafter, on January 5, 1997, Kijek filed a fifteen (15) page

Motion for Reconsideration listing one hundred and sixteen (116) reasons why his Motion should be allowed. The judge, without hearing, denied the motion, indicating that at least forty-six (46) of the reasons were flawed and two reasons made improper arguments. The judge specifically indicated that he did not rely on any alleged psychiatric diagnosis of paranoid schizophrenia in deciding the case. (Letter to Frederick T. Golder dated January 10, 1997.) The employee then appealed.

At a reviewing board pre-transcript conference, Kijek filed a Motion to Vacate the decision on the grounds that the judge had violated his ethical duty to disclose his prior employment as a selectman for the Town of Danvers during a time when the employer in this case was the largest employer and the second largest taxpayer in that community. (Motion to Vacate Decision.) At the employee's request, the case was returned to the hearing judge for a decision on the motion. (Letter to Judge McCarthy from Frederick Golder dated May 8, 1997.) The insurer and the employer filed an opposition to the Motion and requested the assessment of § 14(1) penalties. (Opposition filed May 20, 1997.) The judge decided to reconsider his ruling on the prior Request for Reconsideration and scheduled a consolidated hearing on both matters. After two more days of hearing on these motions, the judge denied the motions and deferred ruling on the § 14 claim. (Answer to Motion filed July 24, 1997.)

As the first issue on appeal, the employee asserts that the judge erred in denying his Motion to Vacate the decision. He contends that he is entitled to a new hearing before a different judge because the judge failed to reveal that when he had been a selectman, he had taken positions adverse to the predecessor corporation to this employer. (Employee's Brief 13-16.) The employee's brief contains general recitations from the Code of Judicial Conduct, but cites no authority specifically supporting the argument advanced. *See* 452 CMR 1.15(4)(a)(3) (". . . shall contain . . . citations to the authorities, statutes, rules, regulations and parts of the record on which the party relies."). The employee's bare assertion lacks merit in law or in logic.

Disclosure requirements exist to assure an impartial judgment. They are not intended to provide litigants with a means of obtaining a judge of their choice or a second,

more favorable, decision. *See* Edinburg v. Cavers, 22 Mass. App. Ct. 212, 217 (1986), *rev. denied*, 398 Mass. 1101 (1986) (discussing Superior Court disqualification rules). "Merely having met a litigant, knowing the litigant's name because of the litigant's public posture, . . . is not per se grounds for recusal. To mandate recusal, there must be extra-judicial knowledge of facts in dispute in the case being heard, or a relationship with the litigant or witnesses, **that causes the administrative judge to be biased or prejudiced for or against a party**." D'Olimpio v. Bricklayers and Allied Craftsmen, 7 Mass. Workers' Comp. Rep. 25, 25-28 (1993) (emphasis supplied); *see also* Commonwealth v. Gogan, 389 Mass. 255 (1983) (for general discussion of disqualification rules). The mere fact that the judge served as a selectman in a community where the predecessor corporation to this employer had a factory is not itself a reason to vacate the decision. Such a fact does not create an appearance of partiality or bias. Furthermore, although the employee insisted on disclosure of these facts, he did not ask the judge to recuse because of them. (May 29, 1997 Tr. 40.) The employee did not assert that the judge was actually biased or prejudiced against him. (May 29, 1997 Tr. 49-50; Employee's Brief 13-16.) Indeed, the record leads us to the conclusion that the judge demonstrated exceptional patience and consideration for this employee. We have no doubt that the judge reached a fair and impartial decision.

Once a decision is issued, only extraordinary reasons, such as a record of actual judicial bias, would compel us to remove the judge and vacate the decision. *See* Burns v. Purity Supreme, 2 Mass. Workers' Comp. Rep. 177, 181-182 (1988); Edinburg v. Cavers, *supra*, 22 Mass. App. Ct. at 217. No such reasons exist here. This challenge to the decision is utterly baseless and frivolous.

The employee's attorney next argues that the uncontroverted evidence establishes that Kijek sustained a personal injury and should have been awarded weekly partial incapacity compensation. The entire text of this argument focuses on the existence of an injury. (Employee's Brief 17-20.) The argument is specious because, as noted above, the judge found that the employee had received a personal injury. In this section of his brief, employee's counsel does not argue that the mere fact of injury entitled Kijek to compen-

sation.[1] Indeed, such a proposition would be contrary to clear and settled law,[2] and thus frivolous. Allen v. Batchelder, 17 Mass. App. Ct. 453, 458 (1984).

Next, the employee's attorney argues that the uncontroverted evidence establishes a violation of § 28, entitling him to double compensation. An award of § 28 benefits must be based on a finding that a high degree of risk existed that death or serious bodily injury would result from an employer's action or inaction when under a duty to act. The judge found that the employer made repeated efforts to improve the safety of the Arnold Saw; the employer did not fail to act. (Dec. 153-154.) Furthermore, the judge found no risk of death or serious bodily injury from the use of the saw. (Dec. 154-155.) The record contains substantial and weighty evidence to support each of these findings. On the facts found by the judge, the law required a denial of § 28 benefits. The employee's argument is essentially that the judge should have found the facts differently. (Employee's Brief 28.) This contention ignores our limited powers of review under G.L. c. 152, § 11C, and is frivolous. *See* Smoot v. Washington National Insurance Company, 360 Mass. 868 (1971).

As the final argument, the employee's attorney contends that the Motion for Reconsideration should have been allowed. (Employee's Brief 28-55.) This argument is also completely lacking in merit. The authority to reconsider a decision is vested in the judge's sound discretion. The judge conducted a lengthy hearing on the Motion, going patiently and painstakingly through each allegation one by one. (May 29, 1997 Tr. 4-12, 52-77; July 22, 1977 Tr. 1-97.) He then denied the Motion. (Answer filed July 24, 1997.) We see no abuse of discretion requiring vacation of that ruling. The judge is the final arbiter of questions of fact, and when he has already considered a matter in reaching a decision on a question of fact he ought not to be ordered to consider the same matter again. Lopes's Case, 277 Mass. 581, (1932), citing Sciola's Case, 236 Mass. 407, 414 (1920).

[1] But he does make this argument in section IV. (Employee's Brief 28, 35.)
[2] *See* Scheffler's Case, 419 Mass. 251, 256 (1994) (compensation is not awarded for personal injury as such but for incapacity for work).

In conclusion, the decision cogently addresses the reasons for being unpersuaded that Kijek was incapacitated during the claimed periods and that the employer committed serious and wilful misconduct. (Dec. 147-155.) Many of the medical documents were offered into evidence only for a limited purpose and could not be relied upon for finding medical disability. (Dec. 147-148.) Clearly, the judge's determination that Kijek was not credible formed the crux of his decision. (Dec. 150, 156.) The reviewing board lacks any authority to change this credibility assessment. Lettich's Case, 403 Mass. 389, 394 (1988). Because the decision was within the scope of the judge's authority, and was not arbitrary and capricious, or contrary to law, we affirm it. G.L. c. 152, § 11C.

The insurer has requested § 14(1) penalties. (Insurer's Motion to Strike Supplemental Brief, filed April 16, 1998.) Section 14(1) provides in pertinent part: "If any . . . administrative law judge determines that any proceedings have been brought . . . 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." We view the appellate tactics used by employee's counsel as comparable to those in S & R Realty Corp. v. Marron, 5 Mass. App. Ct. 800 (1977); Avery v. Steele, 414 Mass. 450, 451- 453 (1993) and Hahn v. Planning Board of Stoughton, 403 Mass. 332, 337 (1988), where penalties for frivolous appeals were imposed. Counsel's brief ignored the judge's specific findings, reargued the facts, argued matters not raised at hearing, made irrelevant and immaterial claims, and often failed to provide any relevant citation of authority. We hold that the appeal has been brought without reasonable grounds. Counsel is responsible his specious arguments. Pursuant to G.L. c. 152, § 14(1), we assess the employee's counsel $1,000 for the costs of this appellate proceeding.

So ordered.

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Administrative Law Judge
Suzanne E.K. Smith

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Administrative Law Judge
William A. McCarthy

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Administrative Law Judge
Sara Holmes Wilson

Filed: **January 7, 1999**