COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 037772-05**

Emmanuel Tsitsilianos	Employee
Worcester Housing Authority	Employer
Massachusetts NAHRO SIG	Insurer

REVIEWING BOARD DECISION
(Judges Long, Fabricant and Calliotte)

This case was heard by Administrative Judge Benoit.

APPEARANCES
Richard D. Surrette, Esq., for the employee
John M. Dealy, Esq., for the insurer

LONG, J. The employee's appeal from a decision denying his claim for § 34 temporary total and § 34A permanent and total incapacity benefits alleges, "[t]he administrative judge erred as a matter of law in denying the employee's motion to strike the 11A report of Michael Kahn, M.D." (Employee br. 2.) Finding merit in the employee's argument that the impartial physician's opinion was tainted due to the doctor's possible review of non-medical material, we strike the § 11A report and deposition testimony, vacate the decision, and recommit it for the judge to allow additional medical evidence and/or a further impartial examination.

The lengthy procedural history of the claim outlined in the current decision provides an accurate backdrop for our analysis.

> Two hearings have been held in this matter previously. Hearing decisions were issued by Administrative Judge Steven Rose on December 27, 2007 and by [the current Administrative Judge] on May 9, 2013. The Employee filed appeals to the Reviewing Board on each Hearing Decision.
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> With regard to the 2007 Hearing Decision, the Reviewing Board issued a Summary Disposition. Tsitsilianos' Case, 22 Mass. Workers' Comp. Rep.

364 (2008), affirming the Hearing decision and the Appeals Court affirmed the Reviewing Board Summary Disposition pursuant to Rule 1:28, Tsitsilianos' Case, 74 Mass. App. Ct. 1118 (2009).[1]

With regard to the 2013 Hearing Decision, the Reviewing Board issued a Decision, Tsitsilianos v. Worcester Housing Authority, 28 Mass. Workers' Comp. Rep. 165 (2014) affirming the Hearing Decision and there was no further appeal.[2]

The current claim in this matter was the subject of a §10A Conference on December 14, 2015. The resulting Conference Order dated December 22, 2015 denied the Employee's claim. The Employee appealed the Conference Order.

Pursuant to §11A, the Employee was examined by Michael W. Kahn, M.D., a Board-certified psychiatrist, whose Impartial Examiner report dated March 14, 2017, constitutes prima facie evidence of the matters contained therein. The Employee's Motion to Strike the Impartial Report of Michael W. Kahn, along with the Insurer's Opposition to the Employee, Emmanuel Tsitsilianos' Motion to Strike the Impartial Report of Michael Kahn, M.D., were reviewed and the Motion was denied. A hearing de novo took place before me on May 10, 2017. The insurer took the deposition of Michael Kahn, M.D. on June 6, 2017. Following the deposition, I received the Employee's Renewed Motion to Strike the Impartial Report of Michael Kahn, M.D., and the Insurer's Opposition to Employee Emmanuel Tsitsilianos' Renewed Motion to Strike Impartial Report of Michael Kahn, M.D. After I reviewed both documents, on August 15, 2017 I denied the Renewed Motion. The Insurer and Employee each submitted a Closing Argument in a timely manner. The record closed on August 29, 2017. I have carefully examined all the exhibits, the transcript of the deposition of Dr. Kahn, and the Closing Arguments.

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[1] Judge Rose's December 27, 2007, decision established liability for a September 6, 2005, industrial injury to the employee's legs after he was struck by an automobile. The employee was awarded § 35, temporary partial incapacity benefits, from January 19, 2006, to date and continuing and § 30 benefits for the physical injuries and psychiatric treatment as well. Rizzo v. M.B.T.A., 16 Mass. Workers' Comp. Rep. 160, 161 n.3 (2002)(judicial notice taken of board file.)

[2] Judge Benoit's May 9, 2013, decision denied the employee's claim for temporary total and permanent and total incapacity benefits, finding the employee failed to prove his condition resulting from his industrial accident worsened since the close of the record in Judge Rose's December 27, 2007, hearing decision.

> The Employee's Closing Argument includes a request for Reconsideration of the Prior Denials of his Motion to Strike the Impartial Report. I have reconsidered the Motion to Strike The Impartial Report, and I deny it still.

(Dec. 2-3.)

The employee's initial Motion to Strike the Impartial Report of Michael Kahn, M.D. was filed after the impartial examination and before the hearing took place on May 10, 2017. The employee's motion alleged, in part, as follows:

> At the beginning of the impartial examination, Dr. Kahn informed the employee that he had done outside research on him prior to the examination. Dr. Kahn stated that he had "checked him out" and "googled" him. Dr. Kahn said that his internet research indicated that the employee had "sued many employers". The manner and tone in which this information was delivered conveyed the impression that Dr. Kahn disapproved of the employee's past litigation history.

(Ex. 5.) On May 9, 2017, the judge notified the parties that he had denied the motion and at the hearing, indicated his denial of the motion did not foreclose the filing of a new motion once evidence was further developed in the case. (Tr. 7-8.) Rizzo v. M.B.T.A., 16 Mass. Workers' Comp. Rep. 160, 161 n.3 (2002)(judicial notice taken of board file.) At the hearing, employee's counsel stated his intention to renew the motion to strike and, in the alternative, requested that the report be deemed inadequate or the issues complex, requiring additional medical evidence. (Tr. 10.) Rizzo, supra. The employee's renewed motion and request to submit additional medical records was denied, leaving the impartial report and deposition testimony of Dr. Kahn as the only medical evidence in the claim.

At the hearing held on May 10, 2017, the employee was the only witness to testify regarding the alleged improprieties of the impartial examination, and his testimony was consistent with the substance of the motion to strike the impartial report. (Tr. 13-14.) After the hearing, the parties deposed Dr. Kahn on June 6, 2017, and the following is the initial colloquy regarding the employee's allegations of improper impartial protocol.

> Q. Did you, in addition to whatever history he provided during the examination, did you do any independent investigation of lawsuits involving Mr. Tsitsilianos?

A. I'm trying to remember. I may have Googled him afterwards but I can't be sure whether I did that or not.

Q. So you may have Googled just Mr. Tsitsilianos' name?

A. Yes. Maybe with one other identifier such as Worcester.

Q. And is that something that you typically do as part of your impartial examinations?

A. I do it sometimes if the patient isn't able to give me a good history or is – isn't able to give me a good history.

Q. And do you recall whether Mr. Tsitsilianos was able to give you a good history?

A. As I mentioned in my report, he was fairly vague about a number of aspects of his history.

Q. So you can't recall specifically but you may have done that?

A. Yes. It's funny, I can't recall whether I did or not. I think I was tempted to. I can't recall whether I did, because I wasn't sure it would be a legitimate source of information. That's why it's not cited.

Q. So the information that's cited in the report is based upon just what he told you during the examination?

A. It's based upon just what he told me and whatever records I received.

Q. If you had Googled Mr. Tsitsilianos, was that something that would have also made it into your report?

A. No.

(Dep. 10-12.)

Thereafter, Dr. Kahn was questioned extensively by both attorneys regarding the doctor's practice of conducting outside/internet research on impartial examinees. The gist of said testimony was that Dr. Kahn admitted to undertaking such outside research in the past with impartial examinations, but he could not be sure whether he had done so in Mr. Tsitsilianos' case. (Dep. 18-20; 24; 31-33.) Following the deposition, the employee filed a renewed motion to strike Dr. Kahn's report, citing to relevant portions of Dr. Kahn's deposition testimony. The judge again denied the employee's motion on August 15, 2017. Rizzo, supra.

In his April 9, 2018, hearing decision, the judge made the following findings regarding the impartial examination:

> The parties deposed Dr. Kahn on June 6, 2017 and he stated under oath the following facts and/or opinions:
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> ….

- Whenever I am considering doing any kind of record review or investigation, I always ask permission of the person first.

- I did not ask permission of Mr. Tsitsilianos, and that's why I indicated that in the end I decided to not Google him.

(Dec. 6.)

….

I do not find to be credible the Employee's allegations of Dr. Kahn having stated at the § 11A examination that he had performed Internet research of the Employee's prior litigation. I find that it is more likely than not that Dr. Kahn did not perform, at any time, any independent research into the Employee's prior litigation.

(Dec. 7.) The judge denied the employee's claim for total incapacity benefits. (Dec. 8.)

The employee argues, "452 CMR 1.14(2)[3] prohibits non-medical evidence from being submitted to an impartial physician." (Employee br. 5.) In Martin v. Red Star Express, 9 Mass. Workers' Comp. Rep. 670 (1995), we emphasized the importance of maintaining impartiality and the appearance thereof.

> Impartiality is the very cornerstone of the §11A medical examiner system. If bias, partiality, or the appearance of same is at issue, the judge must address it and make findings in that regard… [w]here the appearance of impartiality has been compromised… the §11A examiner's opinion is inadequate, and the judge must allow the introduction of additional medical evidence.

Id. at 674. While the judge did address the impartiality issue and made findings as required, the record here compels reversal of those findings.

> Generally, the issue of whether impartiality has been compromised is left to the discretion of the judge, who must make findings and a ruling. "If bias, partiality, or the appearance of same is at issue, the judge must address it and

[3] 452 Code Mass. Regs. 1.14(2) provides, in pertinent part:

> Once the impartial physician has been selected or appointed, the administrative judge shall submit to the impartial unit all approved medical records, any hypothetical fact patterns and any stipulations of fact for transmission to the impartial physician. No party or representative may initiate direct, *ex parte* communications with the impartial physician and shall not submit any form of documentation to the impartial physician without the express consent of the administrative judge.

> make findings and a ruling in that regard. See G.L. c. 152, §11B." Martin, supra at 673. However, where, as here, the record will support only one conclusion, we will rule on the issue as a matter of law.

Amoroso v. U. Mass Med. School, 19 Mass. Workers' Comp. Rep. 233, 237 (2005), citing Tallent v. MBTA, 9 Mass. Workers' Comp. Rep.794, 799 (1995).

In the present case, the testimony of both the employee and the impartial physician confirms that Dr. Kahn makes a practice, albeit allegedly rarely, of conducting outside internet research on the employees the doctor examines on behalf of the Department. We think it notable that the employee's allegations of improprieties were voiced prior to the hearing and, more importantly, over a month before the June 6, 2017, deposition. Rather than casting doubt on the employee's allegations, Dr. Kahn's deposition testimony actually corroborates at least some of what the employee alleged; namely that the doctor admits to conducting unauthorized internet/outside research on impartial examinees. The internet research referenced throughout the proceedings is the type of non-medical documentation/information prohibited by 452 Code Mass. Regs. 1.14(2). See Barrett v. Kiewit Atkinson Cashman, 19 Mass. Workers' Comp. Rep. 286, 289 (2005)(452 Code Mass. Regs. 1.14[2] clearly does not permit non-medical evidence, such as the opinion of a vocational expert or a conference memorandum, to be forwarded to the impartial physician prior to the report's preparation). While neither party was responsible for the possible transmission of the prohibited information to the impartial doctor, the source of the prohibited material does not matter.

The doctor's deposition testimony clearly reveals that he could not be sure whether or not he had conducted the disallowed internet research, as he waffled between stating, "I may have Googled him afterwards but I can't be sure," (Dep 11), and "I'm not sure but I don't believe I did," (Dep. 24), and his final testimony that he was "90 percent certain" that he did not ask the employee's *permission* to conduct the internet research. (Dep. 33.) "[A]n impartial medical opinion that is self-contradictory, with no further explanation, cannot attain the prima facie status that § 11A(2) mandates. Nunes v. Town of Edgartown, 19 Mass. Workers' Comp. Rep. 279, 282, (2005). "'The impartial

physician's opinion evidence is inadequate because it is too self-contradictory to "[compel] the conclusion that the evidence is true…"" Id., quoting from Brooks v. Labor Management Servs., 11 Mass. Workers' Comp. Rep. 575, 580 (1997)(internal citation omitted). Considering the entirety of Dr. Kahn's vacillating testimony, the judge's finding "that it is more likely than not that Dr. Kahn did not perform, at any time, any independent research into the Employee's prior litigation," (Dec. 7), is not supported by his testimony and cannot stand. Moreover, whether Dr. Kahn was actually influenced by any internet research he had done on the employee is not the issue. "It is the appearance of partiality or interest created by the fact of [possible internet research] which taints the only medical evidence in this case, and thus adversely affects the employee's due process rights." Amoroso, supra at 236. We agree with the employee that the report and deposition testimony of Dr. Kahn should have been stricken and that additional medical evidence was required to address the extent of the employee's claimed incapacity.

We are further troubled by Dr. Kahn's reasoning for conducting the improper outside research, revealed during his deposition as follows:

> Q. (By insurer's counsel.) What would have been the reason for or the purpose to go and do a search on –
>
> A. It would have been to see if he in fact had – there are records of the other lawsuits that he had talked about.
>
> Q. So whether –
>
> A. Try to confirm.
>
> Q. Fact checking?
>
> A. Fact checking. Exactly.

(Dep. 19.)

We view this testimony as "a serious flaw in the impartial medical evidence . . . involv[ing] the impartial physician's improper foray into the realm of credibility assessment, and it necessitates a recommittal for additional medical evidence. Moynihan v. Wee Folks Nursery, Inc., 17 Mass. Workers' Comp. Rep. 342, 344 (2003). As we held in Moynihan,

> The judge abdicated his own fact-finding authority by relying on the doctor's improper and unduly prejudicial testimony, rather than ignoring it, as he ought to have done.
>
> . . . . [W]here this type of [ ] violation occurs, not only is additional medical evidence mandated, but the impartial medical evidence must also be, and hereby is, stricken from the record.

Id. at 347.

Accordingly, we hold that the judge erred, as a matter of law, in denying the employee's motions to strike the §11A examiner's opinion. We reverse the judge's decision and recommit the case to him for the admission of additional medical evidence, which may include a new impartial medical examination with a different doctor, and for a new decision based on that evidence and the testimony already on record, excluding the report and deposition testimony of Dr. Kahn, which are hereby stricken from the record. We also note that the insurer raised causal relationship and § 1(7A) as defenses and these issues must also be addressed on recommittal.

Because the employee appealed the hearing decision and prevailed, an attorney's fee may be appropriate under § 13A(7). Employee's counsel must submit to this board, for review, a duly executed fee agreement between the employee and counsel. No fee shall be due and collected from the employee unless and until the fee agreement is reviewed and approved by this board.

So ordered.

Martin J. Long
Administrative Law Judge

Bernard W. Fabricant
Administrative Law Judge

Carol Calliotte
Administrative Law Judge

Filed: **November 1, 2019**