COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 023515-18**

Gregory Granz	Employee
MCICO MCI Concord	Employer
Commonwealth of Massachusetts	Self-Insurer

AMENDED REVIEWING BOARD DECISION

(Judges Koziol, Calliotte and Fabiszewski)
This case was heard by Administrative Judge Bean.

APPEARANCES

Paul S. Danahy, Esq., for the employee
Robin Borgestedt, Esq., for the self-insurer

KOZIOL, J. The self-insurer appeals from a decision ordering it to pay the employee a closed period of § 34 temporary total incapacity benefits from January 30, 2021, through July 20, 2021, followed immediately thereafter by ongoing § 35 benefits based on a minimum wage earning capacity of $570.00 per week, and §§ 13 and 30 medical treatment. The self-insurer raises five issues on appeal. We address them all and affirm the judge's decision.

On September 3, 2018, while working for the employer as a corrections officer, the employee injured his left thumb during an altercation with a prisoner, resulting in a tear of the employee's left ulnar collateral ligament. The self-insurer accepted liability for the injury and began paying the employee § 34 benefits. Subsequently, through two very detailed § 19 agreements, the employee received ongoing compensation for various periods under § 34 or § 35, while medically, he underwent treatment including three surgeries to his left thumb.[1] On October 29, 2020, the employee underwent the third, and

[1] Both agreements were executed on a without prejudice basis. The administrative judge approved the agreements on August 21, 2019, and March 24, 2020, respectively. Rizzo v. M.B.T.A., 16 Mass. Workers' Comp. Rep. 160, 161 n.3 (2002)(reviewing board may take judicial notice of the board file.)

most recent surgery, which consisted of a procedure to fuse the employee's metacarpal phalangeal joint of his left thumb. Rizzo, supra. Following the fusion surgery, the employee filed the present claim seeking § 34 or, in the alternative, ongoing § 35 benefits, beginning January 30, 2021, the day after the employee's benefits were due to expire under the terms of the fifth paragraph of the parties' March 24, 2020, § 19 agreement. Rizzo, supra.

The claim proceeded to a conference before the administrative judge on April 26, 2021. The judge's order required the self-insurer to pay the employee § 34 benefits from January 30, 2021, through August 29, 2021. (Dec. 842.) Both parties appealed. On July 20, 2021, Alan N. Ertel, M.D. examined the employee pursuant to § 11A. On January 11, 2022, the employee filed a motion for a finding of inadequacy regarding Dr. Ertel's report. Rizzo, supra. Subsequently, the judge allowed the parties to submit additional medical evidence,[2] (Dec. 842), and the parties listed their medical exhibits in their joint pre-hearing memorandum. Rizzo, supra. The matter proceeded to a hearing on February 14, 2022, and the record closed on May 6, 2022. (Dec. 842.) In his decision, issued May 17, 2022, the judge found the employee to be totally incapacitated from January 30, 2021, through July 20, 2021, and partially incapacitated from July 21, 2021, and continuing, assigning the employee a minimum wage earning capacity of $570.00 per week yielding a § 35 compensation rate of $691.37 per week. (Dec. 845.) He did not revise these orders in his Addendum to this decision issued on June 15, 2022. (Addendum to Dec. 857-863.)

On appeal, the self-insurer raises five claims of error, requesting relief in the form of reversal, without remand, of the award of six months of § 34 benefits. If remand or future proceedings are required, the self-insurer requests that a different administrative judge be assigned to the case. (Self-ins. br. 1, 24.) We address the arguments in the order presented in the self-insurer's brief.

[2] The board file contains no ruling on the employee's motion. Rizzo, supra. In his decision, the judge merely states that he allowed additional medical evidence to be submitted, without mentioning the employee's motion or providing any other ground for doing so. (Dec. 842.)

Because the self-insurer's first two arguments are interrelated and concern its same view of the facts, we address them together. First, the self-insurer argues the employee failed to carry his burden of proof, and, as a result, the decision "lacks an adequate basis for determining the date on which total disability ceased and partial disability began." (Self-ins. br. 6-9.) Second, the self-insurer argues the judge's decision is contrary to the record evidence and not adequately based on the facts in evidence. Id. at 9. Specifically, it claims the employee "provided no evidence that his condition changed at all during the period from 01/30/2021 to the date of the Hearing." Id. at 10.

The self-insurer's contention that the employee's condition was static throughout the period from January of 2021 through July of 2021 ignores the evidence adopted by the judge. The judge expressly relied on "the credible testimony of the employee and the persuasive medical opinions of Doctors Ertel, Kowal and Tolo" in making his determination in this case. (Dec. 844.) The employee's testimony alone showed that his ability to engage in activity, and the level of pain he experienced, were not the same throughout the period in dispute, but slowly improved as he continued to recover from his surgery. (Tr. 43-44, 64, 70-71.)[3]

In August of 2021, *after* Dr. Ertel's § 11A examination, he received an injection in the nerve called a "beta block." (Tr. 41, 42.) Since receiving the injection, he "was definitely feeling a lot better." (Tr. 72.) Indeed, it was around the time the September

[3] The employee returned to working out at a gym in January of 2021, following the fusion surgery, but he was only able to do "cardio work," which he described as "riding a bike," "doing legs" and "doing abs." (Tr. 64, 70.) At that time, the employee's thumb pain "was still really bothering me back then," the motion in his left hand was "horrible," his strength in his left hand was "bad," and his sensation "wasn't very good at all with the nerve in there, recovering from the surgery and having the metal plate in there." (Tr. 43-44.) Thereafter the employee "slowly" and "gradually" started getting some strength back in his hand. (Tr. 70-71.)

Comparing his condition in January of 2021 to June of 2021, he testified the condition of his left thumb "definitely progressed. My strength was definitely getting a little better. It wasn't as bad as it was after my surgery but it was still bothering me, yes." (Tr. 44.) His thumb pain "was still bothering me a lot," (Tr. 45), and, while he lost the motion in his thumb because of the joint fusion, "the function in my hand and fingers started getting a lot better. As I've started to work and use it more, yes. But it still was not completely better, no." (Tr. 44.)

22, 2021, gym surveillance video was taken, that he started being able to lift the weights shown in that video. (Tr. 72; Ex. 4, 25.)

The judge also adopted the opinions of the employee's treating hand specialist, Eric Tolo, M.D., who "wrote several stay out of work notes, the most recent dated July 20, 2021" and opined the employee's injury "prevents him from performing the essential duties of his job as a corrections officer." (Dec. 844.)[4] In addition, he adopted the May 20, 2021, opinion of Andrew Kowal, M.D., who

> noted that the employee continued to have significant nerve sensitivity, pain and stiffness in the thumb. This pain is variously described as "sharp, dull, aching, burning, throbbing, shooting, stabbing, lightening [sic] bolts, pressure, cutting, cramping, radiating, sore, tight, hot, tingling and terrifying." However it is described, the pain is characterized *as constant*.

(Dec. 844; emphasis added.) Regarding the video surveillance evidence, taken *after* Dr. Ertel's impartial examination and *after* the nerve block injection, the judge found:

> The employee is able to go to the gym four or five times a week. A private investigator surveilled him one day that he did go to the gym. The private investigator entered the gym and videoed the employee working out. The employee is seen working out on four exercise stations. He worked with pulleys and lifted some weights. He worked on a bench. These exercise functions were done without any obvious use of his left thumb, although his left hand was often in use. On another occasion he was observed putting a boat in the water, backing a boat trailer into the water, using a hand crank to disengage the boat from the trailer. He drove the boat once in the water. He was later seen reversing the process, putting the boat back on the trailer and driving away. I did not see any obvious left thumb use in putting the boat in the water or taking it out. I did observe him grabbing with the left hand using his palm and four fingers, avoiding use of his thumb.

(Dec. 843.) The judge also adopted the following pertinent opinions of Dr. Ertel:

> He offered a diagnosis of a significant injury to the employee's left, non-dominant thumb MP joint including an injury to the dorsal radial sensory nerve. Report, page 4. . . . He found the employee to be partially disabled. Report, page 4. He is

[4] The judge also noted Dr. Tolo's report of January 11, 2021, met the requirements of § 10. (Dec. 844.) In that note, Dr. Tolo stated, "Gregory Granz should remain out of work until further notice. I will reevaluate in one month with new x-rays and advance activity as tolerated." (Ex. 11.)

> unable to perform the fully [sic] duties of a corrections officer but can perform clerical tasks. Report page 4, deposition page 12, lines 9, 14, page 17, line 22, page 23, line 23, page 25, line 24. He could work in sales or in a sedentary job. Deposition, page 19, lines 9, 13. He can use tools if he bypasses the use of his left thumb. Deposition 18, line 21. He viewed the video (exhibit 4) at the deposition and stated the employee's use of his left hand is consistent with what he saw during his examination of the employee. Deposition, page 17, line 9.

(Dec. 844.) Regarding the employee's present condition, the judge found:

> Today the employee continues to suffer from nerve damage in his left thumb. He has a limited range of motion in the thumb. It remains painful. *He has pain free moments, but the pain always returns with use.* He feels pain whenever the back of his thumb is touched. Opening things and tying things are quite painful. He has learned not to use his thumb. Another surgery has been suggested but he is reluctant to have it.

(Dec. 834; emphasis added.)

The judge was free to credit the employee's testimony about his condition and his complaints of pain and to give it "decisive weight in [his] incapacity analysis," to support an award of total incapacity where the medical evidence may support only partial disability. Clement v. Berkshire Health Care Systems, Inc., 28 Mass. Workers' Comp. Rep. 225, 226-227 (2014). Here, the employee's testimony, combined with the adopted medical opinions, (in particular Dr. Kowal's opinions regarding his level of pain prior to the nerve block), and the judge's findings regarding his present condition support the finding that the employee was totally incapacitated and entitled to § 34 benefits during the disputed time period from January 30, 2021, to July 20, 2021, during which time his condition gradually improved to the point of partial incapacity. Sweet v. Eagleton School, 25 Mass. Workers' Comp. Rep. 25, 28 (2011)(judge fulfills responsibility by assessing employee's credibility, making findings on extent of pain and its effect on physical limitations in order to determine "as a practical matter" whether employable).

Next, the self-insurer argues that the judge violated its due process rights when he failed to "accept properly submitted evidence." (Self-ins. br. 11-16.) We find no merit to this argument. We set forth the pertinent facts. The parties identified their additional medical exhibits in their joint pre-hearing memorandum, and, on February 10, 2022, they

submitted their medical and non-medical hearing exhibits. Rizzo, supra. Later, at the hearing, the judge noted on the record that the self-insurer had submitted its additional medical evidence, which the judge marked as "Exhibits 5 through 9." (Tr. 3.) After discussing the Exhibit numbers assigned to the employee's additional medical evidence, the judge stated:

> Again No. 10 is not assigned for the expedient reason that the first nine exhibits fit nicely. And then Mr. Danahy has given me a nicely tabbed and numbered set of medicals starting at No. 1. And I just put a one in front of all of them and it becomes 11, 12, 13. . . . It makes it easier for me. *And the insurer will be getting me her non-medicals. And those will be stuck on at the end*."

(Tr. 4; emphasis added.) The self-insurer never sought to correct the judge's impression that it would submit only non-medical exhibits in the future. Nor did the self-insurer file a motion alerting the judge and the employee of its desire to provide additional medical evidence *after* the date of the hearing. Thus, despite having the employee examined by Bruce Leslie, M.D. on March 3, 2022, the self-insurer made no request to submit his report of that date. Instead, on April 13, 2022, the self-insurer expressly sought an extension of the record close date of April 29, 2022, for the *sole* reason that the § 11A medical examiner, Dr. Ertel, wanted to read and sign his deposition and had not yet done so. The employee assented to this request. The judge granted the request and extended the record close date to Friday, May 6, 2022. Rizzo, supra.

The self-insurer sent a hard copy of Dr. Leslie's March 3, 2022, report by overnight mail, to the judge's office at the Lawrence Regional Office of the Department. The receipt indicated it was delivered to the Department on May 5, 2022. (Addendum to Dec. 857.) Neither the judge nor his assistant was in the office that day, or on Friday, May 6th, and the individual who was in charge of the mail was out of work during that time due to Covid. (Addendum to Dec. 857-858.) The self-insurer did not send an electronic copy of the report to the judge until May 7, 2022. (Addendum to Dec. 858.)

Upon receiving the judge's decision, containing no reference to the March 3, 2022 report of Dr. Leslie, the self-insurer filed a timely Motion for Reconsideration. (Self-ins. br. 12.) The employee opposed the motion on the ground that the self-insurer had not

received authorization to submit the report. Id. The judge conducted a virtual, off-the-record status conference with the parties and addressed the issue in the Addendum to his hearing decision. (Addendum to Dec. 857-860.)

The primary flaw in the self-insurer's argument is that the judge's findings and ruling in his Addendum support his finding that Dr. Leslie's March 3, 2022, report was *not* "properly submitted" by the self-insurer, as it was untimely filed. The judge made the following pertinent findings of fact: "An email of the [March 3, 2022] Leslie report was sent to me on Saturday, May 7, 2022 at 7:57 A.M. The report was incomplete as it was missing page one. As it was late, I committed no error in excluding it." (Addendum to Dec. 858.) The judge excluded the report and concluded that the "Self-insurer's counsel acted improperly in submitting the Leslie report in the time and manner that she did." (Addendum to Dec. 860.) We agree.

We find no merit to the self-insurer's argument that any documentary submission, delivered in hard copy to the office of the Department of Industrial Accidents in a timely fashion, cannot be excluded from the record evidence. First, as a practical matter, this argument ignores the fact that since 2009, all board files are in OnBase, and exist in electronic format only. Morales v. Not Your Average Joe's, Inc., 31 Mass. Workers' Comp. Rep. 1, 5 (2017)("OnBase is the department's *only* board file and record")(emphasis original.) Second, for well over a year prior to this hearing, the Department's Senior Judge had issued a series of Administrative Bulletins, establishing directives for all hearing proceedings, both during and after the pandemic. Those directives expressly establish protocols for the submission of medical evidence, consistently stating that all medical exhibits must be submitted *electronically in pdf format* no later than five days prior to the hearing.[5] The self-insurer was well aware of

[5] The following Administrative Bulletins and a Reminder have issued since September of 2020, all requiring, under the heading **Hearings**, that any medical records "must be bookmarked and received by the Administrative Judge no later than five days prior to the Hearing (via email in pdf format)":

these directives and protocols, as demonstrated by the fact that it executed a pre-hearing memorandum in this case and electronically filed its hearing exhibits in advance of the hearing, all of which are activities required by these Administrative Bulletins. Nothing in these directives indicates that a hard copy of any medical report is a "properly submitted medical exhibit." Indeed, the directives are to the contrary.

The self-insurer alleges that, "Prior to the start of the 02/14/2022 Hearing, the Administrative Judge notified the parties that he would not review electronic records and that he required the parties to send him physical copies of all submissions." (Self-ins. br. at 11.) There is no record citation to support this claim. While a judge has discretion and an obligation to control the conduct of hearings and related proceedings, Casagrande v. Massachusetts General Hospital, 15 Mass. Workers' Comp. Rep. 383, 386 (2001), absent some type of hardship prohibiting a party from following department directives issued by the senior judge, and none is claimed here, a judge's additional request for hard copies of all submissions does not supersede a departmental directive requiring filing in electronic format, in the first instance. Indeed, assuming the judge actually made an off-the-record statement that he wanted hard copies of "all submissions," his findings and his ruling on

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EMERGENCY ADMINISTRATIVE BULLETIN 7, Re: Dispute Resolution Re-Opening Procedures, September 16, 2020. https://www.mass.gov/doc/emergency-advisory-bulletin-7-dispute-resolution-re-opening-procedures/download

Reminder Post-COVID Dispute Resolution Procedures, November 4, 2020. https://www.mass.gov/doc/1142020-post-covid-disupte-resolution-procedures-reminder/download.

EMERGENCY ADMINISTRATIVE BULLETIN 8, Re: 2021 Expectations for Dispute Resolution, February 26, 2021. https://www.mass.gov/doc/emergency-administrative-bulletin-8-2021-expectations-for-dispute-resolution/download.

ADMINISTRATIVE BULLETIN #10 Re: Post-Covid Changes for Dispute Resolution Events, June 24, 2021. https://www.mass.gov/doc/administrative-bulletin-10-post-covid-change-for-dispute-resolution-events/download.

We note that these rules remain in effect. **ADMINISTRATIVE BULLETIN #13**, Re: Dispute Resolution Process, September 23, 2022. https://www.mass.gov/doc/dia-administrative-bulletin-13/download.

the issue demonstrate he requested such action as an additional task. The judge did not intend or imply that mailing a hard copy of any submission relieved the parties of their obligation first, to properly submit materials in an electronic format and in a timely fashion. The judge expressly found the self-insurer emailed the record in an untimely manner *after* the close of the evidence, and concluded he did not err by excluding it from evidence. (Addendum to Dec. 858.) We agree.

Third, nothing in the record supports the contention that the self-insurer was free to submit this record without asking for the judge's permission and without, at the very least, notifying the judge and employee's counsel of its intent to do so. Indeed, except for Dr. Ertel's deposition, the judge made no ruling that he was accepting any further medical evidence after the hearing. Neither the judge nor the employee's counsel knew the self-insurer intended to submit any additional medical evidence at this stage of the proceeding. The judge correctly found it was incumbent upon the self-insurer, as a matter of practice and courtesy, both to the judge and opposing counsel, not only to provide advance notice of its desire to submit additional medical evidence at this stage of the proceeding, but most importantly, to request permission to do so. (Addendum to Dec. 858, 859.) There simply was no error on the part of the judge in excluding the March 3, 2022, report of Dr. Leslie.

Lastly, we find no merit to the self-insurer's assertion that the judge erroneously believed that the self-insurer's earlier objection to the employee's attempt to submit two of Dr. Leslie's prior reports, limited the self-insurer's right to submit the new report of March 3, 2022.[6] The argument completely mischaracterizes the judge's discussion and his findings. (Addendum to Dec. 858-860.) The judge's Addendum states that, at the

[6] The self-insurer expressly argued that, "There is no legal support for the Administrative Judge's position that the Self-Insurer's 452 C.M.R. 1.11(6) [sic] objection as to Dr. Leslie's earlier report, made at the time of Hearing, in any way limited its right to submit any reports from Dr. Leslie that it deemed to support its case." (Self-ins. br. 16.) Since 2017, the language relied upon as the ground for this objection has appeared at 452 Code of Mass. Regs. 1.11(5)(1/27/17), which reads in pertinent part: "a party may offer as evidence medical reports prepared by physicians engaged by said party. . . ."

time he read the parties' written closing arguments, he was unaware that the self-insurer intended, or attempted, to submit a new report from Dr. Leslie. (Addendum to Dec. 859.) Because he had no knowledge of the existence of the March 3, 2022, report, he believed the self-insurer's references to Dr. Leslie's opinions were based on opinions contained in his earlier reports, which were not in evidence. Id. The judge went on to further explain why, in any event, he would not have adopted the opinions rendered in Dr. Leslie's March 3, 2022, report, even if the report had been properly admitted. As the judge noted, the emailed report was missing the first page, and when the judge requested and received a new copy, he observed the missing page referred to the doctor's prior excluded reports. The judge found:

> The third report's lack of a sufficient history and its reliance on evidence contained in the first two reports relating to history, medical treatment and examination findings, that is excluded evidence, makes reliance on the report impossible. Even had the [earlier] reports not been excluded, they were never admitted and therefore, reliance on the third report would have been suspect due to its incomplete history.

(Addendum to Dec. 859.) This is not a ruling excluding evidence.[7] Rather, it is a ruling regarding the weight given to the report, which is part of the exclusive function of the administrative judge. McEwen's Case, 369 Mass. 851 (1976)(exclusive function of administrative judge to consider and weigh the evidence).

The self-insurer's remaining two claims of error contain four issues that stem from the same set of facts and are interrelated. For clarity, we begin by addressing the procedurally based claims.

First, the self-insurer argues its due process rights were violated when the judge failed to conduct the virtual status conference on its Motion for Reconsideration of the Hearing Decision on the record. "We have repeatedly stressed that all significant proceedings be transcribed for the purpose of assuring the record is adequate for

[7] The self-insurer advances no argument that the judge erred by finding the report itself was deficient and entitled to no weight.

addressing the issues raised on appeal." LaFleur v. M.C.I. Shirley, 25 Mass. Workers' Comp. Rep. 393, 397-398 (2011), citing Richardson v. Chapin Center Genesis Health, 23 Mass. Workers' Comp. Rep. 233, 235 (2009); Hill v. Dunhill Staffing Sys., Inc., 16 Mass. Workers' Comp. Rep. 460, 462 (2002), quoting Murphy v. City of Boston, 4 Mass. Workers' Comp. Rep. 169, 173 n.8 (1990); see also Davis v. P.A. Frisco, Inc., 18 Mass. Workers' Comp. Rep. 285, 287 n.4 (2004). Nonetheless, neither party objected to the judge conducting the proceeding without a stenographer at any time prior to, or during, the status conference on the self-insurer's motion for reconsideration. Also, the extremely detailed Addendum issued by the judge concerning the status conference, combined with the lack of any claim that the judge inaccurately described that event therein, presents us with an adequate record on which to review the issues raised on appeal. Accordingly, we see no due process violation in this case. Cf. LaFleur v. M.C.I. Shirley, 25 Mass. Workers' Comp. Rep. 393, 398 (2011)(where judge conducted the status conference off the record, despite the self-insurer's objection, and where "judge later refused to 'accept or consider' the self-insurer's written opposition filed after that proceeding," the judge thereby denied self-insurer the "opportunity to be heard at a meaningful time in a meaningful manner").

Second, the self-insurer argues the judge erred by addressing in his Addendum, an issue it did not raise in its Motion for Reconsideration. We find no error. A Motion for Reconsideration filed prior to any appeal by a party keeps the entire matter within the judge's jurisdiction. See Jussaume v. City of Lowell, 34 Mass. Workers' Comp. Rep. (December 29, 2020)(where motion was filed within appeal period and prior to appeal being filed, administrative judge retains jurisdiction over matter). When a judge entertains a Motion for Reconsideration, the judge is free to amend any of his findings of fact and rulings of law in an Addendum, or, as other judges often do, in a Decision on a Motion for Reconsideration. Thus, as a threshold matter, we do not agree that a judge automatically commits an error by addressing an issue not raised in the Motion for Reconsideration, so long as the judge keeps to the record and issues in dispute in the case. "Any reconsidered case that results in a contrary outcome should reveal reasoning that

justifies the contrary result." DeLuca v. Bingay & Son, 9 Mass. Workers' Comp. Rep. 59. 62 (1995). Here, there was no change in the outcome of the case.

Third, the self-insurer claims the judge "exhibited hostility and bias" against the self-insurer "through his inappropriate demeanor and inappropriate comments about the Self-Insurer during the Hearing, during the virtual status conference, and even in his 'addendum.' " (Self-ins. br. at 16-20.) Insofar as the self-insurer's claims of bias and alleged "inappropriate" statements are directed at the judge's conduct at hearing and at the status conference, we note that at no time prior to this appeal did the self-insurer assert that the judge's impartiality had been compromised or that he exhibited bias. The status conference was conducted on June 9, 2022,[8] Rizzo, supra, and the Addendum was filed June 15, 2022, (Addendum to Dec. 863), yet the self-insurer filed no motion alleging bias on the part of the judge during or after the status conference. Rizzo, supra. We have repeatedly stated that allegations of bias need to be brought to the attention of the administrative judge in the first instance so that the judge may conduct the proper analysis and determine whether recusal is necessary. Landis v. Commonwealth of Massachusetts, 32 Mass. Workers' Comp. Rep. 229, 231 (2018), citing Smith v. DMHNS 1 North Shore Area Danvers, 31 Mass. Workers' Comp. Rep. 221, 225 (2017)("claim of bias must be raised below, especially when the claimed bias occurs during a hearing, in order for the judge to address the claim and make findings on whether or not he has demonstrated bias towards a party"). Insofar as the allegations concern the hearing or status conference, they are waived.

We next address the self-insurer's allegations of improper conduct and comments on the part of the judge, only insofar as the Addendum is concerned. We do so in conjunction with the self-insurer's last argument, that the judge erred when he strayed from the record by making findings in his Addendum, " based on the off-the-record comments by the Employee's counsel rather than on the record evidence." (Self-ins. br.

[8] The Addendum states that the status conference was held on June 8, 2022, (Addendum to Dec. 860) but the board file contains correspondence indicating that it actually was held on June 9, 2022.

21.) At the very outset, the judge's Addendum indicates it was the judge's own decision to further address the issue of the self-insurer's conduct at hearing:

> The self-insurer has filed a motion for reconsideration and for a corrected decision. It bases these requests on the fact that I never considered the March 3, 2022 report of Dr. Bruce Leslie. In reviewing the hearing transcript to address the self-insurer's concerns I was reminded of certain provocative actions taken by the self-insurer/employer that deserve further comments. I address both issues below.

(Addendum to Dec. 857.) To the extent the judge was dissatisfied with his decision, and felt it needed more explanation, he was free to expand upon it in his Addendum.

Here, the judge used the Addendum to make more detailed findings about the events at the hearing, but issued no new orders as a result of the discussion and findings he made regarding the self-insurer's conduct. At the hearing, the judge alerted the self-insurer about his concerns that it offered certain evidence in an attempt to mislead him.[9] (Tr. 84-86.) He further indicated at the hearing that he had the impression that the self-insurer tried to deprive the employee of his right to representation.[10] (Tr. 98, 101-102.)

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[9] In short, the self-insurer's witness, Mr. Lawrence Machione, is the director of the Industrial Accident and Leave Unit for the Department of Corrections. He testified that in 2019 and 2020, the Department made attempts to engage the employee in a discussion about temporary modified work, prompting self-insurer's counsel to ask, "And did he ever reach out to engage in that discussion." (Tr. 74.) To which Mr. Machione answered, "Not to my knowledge, no, he did not." (Tr. 74.) The self-insurer continued to question Mr. Machione at length about the mechanics of the program and the program's success in returning other employees to work at the Department of Corrections. The self-insurer then elicited further testimony that if the employee had come back to the temporary modified work program, he could have bid into a permanent position that had less, or no inmate contact. (Tr. 74-79.) On cross-examination, Mr. Machione admitted that during the relevant time-period in dispute in this case, the employee was ineligible for the temporary modified work program because he lacked the medical clearance necessary to qualify for the program. (Tr. 83-84.) This sparked further questions by the judge, and the judge's statement that he felt this line of inquiry about the temporary modified work program was being brought up to mislead him. (Tr. 85.)

[10] That concern arose from Mr. Machione's testimony that the employee's attorney's response, on behalf of the employee, to the self-insurer's request that the employee engage in a discussion about the employer's temporary modified work program, was a failure on the employee's part to engage in a conversation about that program, with, as the judge noted, the implication being that the employee had acted improperly. (Tr. 98, 101-102.)

The record shows the judge gave the self-insurer ample opportunity to explain its position, (Tr. 86-97), including asking the parties to address the issues in their written closing arguments. (Tr. 103.) To the extent the self-insurer asserts that the judge's statements in his Addendum confirming his initial impressions provide evidence of bias, we note that a judge is allowed to comment on the behavior of the parties who appear before him, and that such comments are not the proper subject for a claim of bias. "The case law is clear that a negative impression of a party formed by a judge as *an adjudicator* [is] 'not a ground for the assertion of disqualifying bias.' " Sanchez v. Industrial Polymers & Chemicals Inc., 25 Mass. Workers' Comp. Rep. 61, 68 (2011), quoting from Robinson v. General Motors Corp., 13 Mass. Workers' Comp. Rep. 207, 215 (1999)(emphasis original), quoting from Civil Service Commn. v. Boston Mun. Court Dept., 27 Mass. App. Ct. 343, 348 (1989). In addition, "a judge's discretion permits 'reasonable inferences' from facts with evidential support, and where evidence does not compel one conclusion or another, a judge does not abuse his discretion in making a decision based on such reasonable inferences." DeLuca, supra at 62, citing Judkin's Case, 315 Mass. 226, 230 (1944); see Machado's Case, 356 Mass. 715, 720-721 (1969). The judge's findings are based on reasonable inferences, so there is no reversible error here.

Lastly, to the extent the Employee's counsel claimed during the status conference, that the self-insurer was engaging in a pattern of conduct with other Department of Correction employees in an effort to deprive them of counsel, we note the judge expressly declined to make any findings regarding this contention. (Addendum to Dec. 861.) Rather, he merely stated that employee's counsel raised this claim at that proceeding, (Addendum to Dec. 860-861), which the judge was required to report because he had no stenographic record of those events. To the extent the judge later used the words "pattern of conduct" to describe the self-insurer's actions, his findings were clearly limited to what he felt was a "pattern of conduct" by the self-insurer with regard to this employee only. (Addendum to Dec. 862-863.)

Accordingly, finding no error in the judge's decision, we affirm it. We also reject the self-insurer's request to order the assignment of a different administrative judge to any future disputes in this case. The self-insurer is ordered to pay employee's counsel an attorney's fee pursuant to § 13A(6), in the amount of $1,834.27, plus necessary expenses.

So ordered.

Catherine Watson Koziol
Administrative Law Judge

Carol Calliotte
Administrative Law Judge

Karen S. Fabiszewski
Administrative Law Judge

Filed: ***December 14, 2022***