COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 031829-96**

Harold Davis	Employee
Work, Inc.	Employer
Arrow Mutual Liability Insurance Co.	Insurer

REVIEWING BOARD DECISION
(Judges McCarthy, Wilson and Smith)

APPEARANCES
John D. Hislop, III, Esq., for the employee
John A. Morrissey, Esq., for the insurer

MCCARTHY, J. Harold Davis worked as a cook for a number of years for Work, Inc. Davis, who is now sixty-five years of age, claims that on May 3, 1996, he suffered a burn when his right forearm touched a hot oven door. Then he developed a systemic infection which was diagnosed as "staphylococcus aureus septicemia." This infection lead to destructive osteomyelitis. Mr. Davis was a hospital in-patient on multiple occasions for treatment of these serious injuries.

A claim for c. 152 benefits was filed and resisted by the insurer. The claim was denied at the conference level. The employee's appeal brought the case back to the same administrative judge for hearing de novo on April 2nd, May 11th and May 27, 1998. In her written decision filed December 18, 1998, the judge found that the employee did indeed sustain a personal injury arising out of and in the course of employment on or about May 3, 1996. She also found that the staphylococcus aureus septicemia and osteomyelitis are causally related to the industrial injury and that Mr. Davis is totally incapacitated by these conditions. The insurer was directed to pay temporary total incapacity benefits under § 34 of the Act from June 8, 1996 and continuing, medical expenses under § 30 and employee counsel fees under §13A. The case comes to us on

appeal by the insurer. In its brief and at oral argument, counsel for the insurer raises multiple issues. We turn directly to the issue which is dispositive of the appeal.

The insurer argues that the administrative judge's term had ended and her successor appointed before the decision was written and filed and thus the judge had no authority or standing to decide the case. The facts relevant to this issue are these. The hearing took place on April 2nd, May 11th and May 27, 1998, dates on which the administrative judge had undisputed authority to function as an administrative judge under G.L. c. 23E, § 4. On June 18, 1998, the judge began a six-year term as an administrative law judge pursuant to G.L. c. 23E, § 5. By August 31, 1998, a successor had been appointed by the governor, confirmed by the governor's council and sworn in to serve the unexpired portion of the administrative judge's six-year term. After starting her term as an administrative law judge, the former administrative judge (hereinafter, hearing judge) held a status conference with counsel. She asked if the parties would enter into a stipulation permitting her to finish the case and write a decision. Employee counsel was agreeable but counsel for the insurer was not. A spate of correspondence between counsel, the department's senior judge and the hearing judge ensued. Ultimately the hearing judge retained the case and by letter dated November 23, 1998, advised counsel that she was denying the insurer's motion to allow the introduction of additional expert medical testimony. Then, on December 18, 1998, the judge's hearing decision was filed.[1]

We have not been directed to any Massachusetts appellate case law in the briefs or at oral argument which is conclusive on the issue before us. We believe that the outcome here is driven by the plain language of two statutes. The first of these is G.L. c. 23E, § 4. It creates the office of administrative judge:

> There shall be within the division of dispute resolution an industrial accident board, in this chapter and in chapter one hundred and fifty-two called the board, which shall consist of twenty-one members, who shall be administrative judges appointed for six year terms by the governor with the

[1] The decision contains the following footnote: "Although no longer serving as Administrative Judge, I file this decision. See August 25, 1998 letter to parties." (Dec. 1.)

> advice and consent of the council . . . . Upon the expiration of the term of office of a member, such member or his successor shall be appointed or reappointed, as the case may be, for a term of six years by the governor with the advice and consent of the council, except that any member appointed to fill a vacancy occurring prior to the expiration of the term of his predecessor shall be appointed for the unexpired portion of such term.

The second statute is G.L. c. 30, § 8. It provides that:

> A public officer appointed for any term by the governor, with or without the advice and consent of the council, shall hold his office during the term for which he is appointed and until his successor in office has qualified, unless he is sooner removed in accordance with law. Unless otherwise provided, the beginning of the term of office of a public officer appointed by the governor shall be the date of his appointment, or, if he is appointed by the governor with the advice and consent of the council, it shall be the date of his confirmation; but no officer shall enter upon the duties of his office until he is duly qualified as provided by law.

(Emphasis added.)

Recently the reviewing board had occasion to apply c. 30, § 8. See Bernoskevich v. General Motors Corp., 13 Mass. Workers' Comp. Rep. (February 16, 2000). Bernoskevich challenged the authority of an administrative judge to file a decision after the expiration of his term. The reviewing board took "judicial notice that the judge remained in office and that the office was unfilled by a successor at the time she filed the subject decision." Bernoskevich, supra (Dec. 2.) The board concluded that the administrative judge who wrote and filed the decision had the authority to do so because a successor had not been appointed or qualified.[2]

The administrative hearing judge in the case before us did not serve a full six-year term before her appointment and qualification as an administrative law judge on June 18, 1998.[3] It is not necessary for us to confront the thorny question of whether the hearing

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[2] Bernoskevich is factually distinguishable on this critical point. In our case a successor was appointed and qualified.

[3] Although administrative judges and administrative law judges share certain duties, i.e. hearing lump sums under § 48 and third party petitions under § 15, the principal functions are separate and distinct. The administrative judge presides at conferences and evidentiary hearings

judge could simultaneously fulfill both roles[4] because on August 18, 1998, her successor began serving the unexpired portion of her term. Two people may not simultaneously hold the same administrative judgeship. The appointment and qualification of the successor in office ended the hearing judge's term as an administrative judge. This critical event took place on August 31, 1998.

When the hearing judge acted on the motion and decided the case after August 31, 1998, she did so without authority. The written decision is a nullity and has no force or weight. While the departmental senior judge has supervisory and administrative control of the administrative judges and administrative law judges (see G.L. c. 23E, § 6), his authority falls well short of the ability to confer jurisdiction over a case to a former judge whose term has expired and whose successor has been qualified. The case must now be returned to the senior judge for reassignment to a sitting administrative judge for hearing anew.

So ordered.

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William A. McCarthy
Administrative Law Judge

Filed: April 14, 2000

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Sara Holmes Wilson
Administrative Law Judge

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Suzanne E.K. Smith
Administrative Law Judge

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and has the burden of deciding the facts and applying the law. The administrative law judge sits as a member of a three-judge panel which reviews decisions of the administrative judges when appeals are taken under the provisions of § 11C of the Act.

[4] The question would be whether Bernoskevich would apply on these particular facts.