COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 030060-96**

Jayson Kulisich Employee
Greater Lowell Family YMCA Employer
Eastern Casualty Insurance Company Insurer

REVIEWING BOARD DECISION
(Judges Carroll, Wilson and Maze-Rothstein)

APPEARANCES
James C. Dragon, Esq., for the employee
Mark A. Sullivan, Esq., for the insurer at hearing
Mark A. Sullivan, Esq. and Kerry G. Nero, Esq., for the insurer on brief

CARROLL, J. The reviewing board has previously addressed this case. See Kulisich v. Greater Lowell Family YMCA, 14 Mass. Workers' Comp. Rep. 137 (2000). In Kulisich, we recommitted the decision for findings as to whether the employee was injured in the course of his employment as that phrase from G. L. c. 152, § 26, has been interpreted in the context of horseplay injuries.[1] Kulisich, supra. A second decision issued. (Hereinafter, "Dec. II".) The employee appeals that decision claiming error in the judge's failure to rule on the employee's motion for allowance of additional testimony. We agree with the employee and recommit the case a second time for a ruling on the motion and further findings should the motion be allowed.

[1] The judge's first decision stated that the issue presented was whether the employee engaged in serious and willful misconduct on the job within the meaning of § 27, which led to his disabling injury. (Dec. I, 551.) General Laws c. 152, § 27, as amended by St.1935, c. 331, reads in pertinent part:

> "If the employee is injured by reason of his serious and willful misconduct, he shall not receive compensation . . . ."

Section 27 was never raised by the insurer. The case was recommitted for the judge to address the correct issue raised by the insurer, § 26. General Laws c. 152, § 26, as amended by St. 1991, c. 398, § 40, reads in pertinent part:

> "If an employee . . . receives a personal injury arising out of and in the course of his employment . . . he shall be paid compensation by the insurer or self-insurer . . . ."

As the facts have been previously set forth in their entirety, we do not restate them here. See Kulisich, supra at 138. We do, however, briefly reiterate the issues raised that were addressed on recommittal. We instructed the administrative judge to determine whether or not the employee suffered an injury while in the course of his employment. In doing so, four criteria were to be considered when assessing the nature of horseplay as it relates to compensability of injuries arising out of such activity. They are:

> (1) the extent and seriousness of the deviation, (2) the completeness of the deviation (i.e., whether it was commingled with the performance of duty or involved an abandonment of duty), (3) the extent to which the practice of horseplay had become an accepted part of the employment, and (4) the extent to which the nature of the employment may be expected to include some such horseplay.

Id. at 140, quoting 2A Larson Workers' Compensation Law § 23.01 (1999).

In his second decision, the administrative judge restated his previous findings as to the employee's injury, the subsequent physical impairment and that the injury arose out of the employee's employment as a lifeguard. However, in reversing his award of benefits, he added that it did not occur in the course of employment and that the activity was a complete deviation from the employer's expressly stated policy to not engage in such unsafe activity. (Dec. II, 620, 622.) The judge reasoned that engaging in horseplay is inconsistent with the stated responsibility as a lifeguard, which is to provide a safe environment for those people in the waterfront areas. (Dec. II, 620.)

Prior to the issuance of his second decision, during a telephone status conference scheduled by the judge, the employee orally moved that additional testimony be taken from witness, Jason Cyr,[2] a request that was met with opposition by the insurer. (Affidavit of James C. Dragon, Esq.). No ruling was made. The employee argues error in the judge's failure to rule on the motion. We agree.

It is unclear as to whether the judge thought he did not have discretion to hear the

[2] Jason M. Cyr's sworn statement, detailing his knowledge as a camp counselor present when the employee was injured, would seem to support a finding contrary to the judge's finding that the employee's injury did not occur in the course of employment. (Affidavit of Jason M. Cyr).

testimony of Jason Cyr,[3] or did not consider there to be a motion before him for leave to have the additional testimony of Jason Cyr.[4] However, it was clear to the parties that the judge did have the discretion and that there was a motion.

The insurer rightly concedes and agrees with the employee's contention that there is no rule restricting an administrative judge from admitting additional testimony when a case has been recommitted. (Insurer's brief 4.) See Shaw's Supermarkets, Inc. v. Delgiacco, 410 Mass. 840, 846, n.5 (1991) ("On remand, it is within the judge's discretion whether to receive additional evidence to determine whether the injury was causally related to the misrepresentation [as to medical status when hired at issue in that case] or make that determination on the existing record"). Further, the insurer does not dispute that a motion to have additional testimony was made, rather, argues that it was not in writing. (Insurer's brief 5-6.) The contention does not hold water. There is no bar to a judge's considering an oral motion during the course of a proceeding. Makino, U.S.A., Inc. v. Metlife Capital Credit Corp., 25 Mass. App. Ct. 302, 317 (1988)(no error in judge's considering oral motion for summary judgment in the middle of trial). Although an administrative judge in consideration of a motion does not necessarily have to make specific findings of fact and may exercise discretion in the allowance or denial, the judge is, however, required to make a ruling, and his disposal of the motion is to be guided by the exercise of sound discretion, meaning sound judicial discretion, enlightened by intelligence and learning, and controlled by sound principles of law. Howard v. Beacon Constr., 11 Mass. Workers' Comp. Rep. 290 (1997)(judge does not

[3] See affidavit of James C. Dragon, Esq., stating that the judge had noted that the reviewing board did not specifically direct the administrative judge to take additional evidence.

[4] See Dec. II, 619, wherein the administrative judge seems to feel that the employee's counsel was only "considering" presenting a motion to allow him to present additional testimonial evidence and that such motion was not presented at either status conference. This contradicts a telephone conversation between the judge and employee's counsel on the day of the scheduled December 2000 status conference in which the judge indicated that the conference was cancelled, that he would note employee's request to take additional evidence in Decision II and that insurer's opposition would be sustained because the reviewing board had not specifically directed him to admit further evidence. (Affidavit of James C. Dragon, Esq.)

lose the power to rule on a motion even though a decision has been issued and an appeal is pending).

Although an administrative judge has broad discretion as well as an obligation to control the conduct of hearings and related proceedings, judicial discretion is not unbridled and is subject to appellate review. Saez v. Raytheon Corp., 7 Mass. Workers' Comp. Rep. 20, 22 (1993); Ackroyd's Case, 340 Mass. 214 (1960). Notwithstanding that discretion, a judge has to set and conduct hearings and related proceedings, and fundamental due process requires that all parties be afforded "fair opportunity" to develop a case for the adjudicator's consideration. Meunier's Case, 319 Mass. 421, 427 (1946). Here the record is unclear as to whether these principles have been met.

Although § 26 was raised as an issue prior to hearing, the judge's first decision did not acknowledge or discuss § 26. Kulisich, supra at 139. It was not until our recommittal for further findings based on § 26, which did not restrict the judge as to the admission of further testimony, that the judge addressed the § 26 issue. Given the judge's reexamination of the evidence as it pertains to § 26, we can not determine whether both parties were given a fair opportunity to present all their relevant evidence prior to Decision II. In the circumstance, we think it appropriate to recommit the case so that the judge can consider and rule upon the employee's motion for allowance of additional testimony. Depending upon the ruling, further findings may be required.

So ordered.

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Martine Carroll
Administrative Law Judge

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Sara Holmes Wilson
Administrative Law Judge

Filed: **June 24, 2002**
MC/jdm

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Susan Maze-Rothstein
Administrative Law Judge