

COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS

BOARD NO.: 034740-02

Karen A. Amoroso
University of Massachusetts Medical School
Commonwealth of Massachusetts

Employee
Employer
Self-insurer

REVIEWING BOARD DECISION

(Judges Costigan, Horan and Fabricant)

APPEARANCES

Richard D. Surette, Esq., for the employee
Thomas J. Murphy, Esq., for the self-insurer

COSTIGAN, J. The employee appeals from an administrative judge's decision denying her claim for incapacity and medical benefits. The employee argues that because she and the § 11A physician were both employed by the University of Massachusetts Medical School (hereinafter "UMass Medical School"), the impartiality which is the safeguard of the § 11A system was compromised, and the impartial medical report should have been stricken. We agree, and reverse the judge's decision. We recommit the case for the admission of additional medical evidence, which may include a new impartial medical examination by a different doctor.

Karen Amoroso, age thirty-six at the time of hearing, was employed as a janitor by the UMass Medical School. Her duties included making beds, cleaning bathrooms, washing floors, and emptying trash. A few months before her industrial accident, she began to notice pain in her [left] knee, brought on by no particular incident. She underwent MRI testing and medical treatment, but missed no time from work. (Dec. 2.)

On October 1, 2002, Ms. Amoroso caught her pant leg on a wheelchair, and fell onto her left knee.¹ She was unable to continue working, and has not worked since. (Id.) On

¹ The judge found that the employee fell onto her right knee. (Dec. 1.) The employee testified that she fell onto her left knee. (Tr. 13.) The parties, as well as the § 11A impartial medical examiner, agree that the employee's work injury involved her left knee. (Employee br. 1, 2; Self-ins. br. 2, 3, 4; Stat. Ex. 1; Dep. 16, 17, 21, 22, 39, 41, 42, 45.)

October 11, 2002, ten days after her work injury, the employee injured her back in a motor vehicle accident. (Dec. 3.)

Because of her intervening back injury, the employee did not claim compensation benefits for her knee injury until February 2003.² (Dec. 4; Employee br. 2.) The self-insurer denied the claim, and following a § 10A conference, the administrative judge awarded the employee § 35 partial incapacity benefits and medical benefits from and after February 27, 2003. The self-insurer appealed to an evidentiary hearing, and the employee was scheduled for a § 11A impartial medical examination with Dr. Thomas Goss. (Dec. 2.)

Upon receipt of notice of the impartial medical examination, and three months before the exam was to take place, the employee filed a motion for the appointment of a new impartial physician on the ground that Dr. Goss could not reasonably be expected to maintain impartiality where both he and the employee are employed by UMass Medical School. (Employee's Motion for the Appointment of a New Impartial Physician, filed June 10, 2003.)³ The self-insurer opposed the motion, arguing that although Dr. Goss was a professor at the Medical School, he was more closely associated with the University of Massachusetts Memorial Hospital, a private entity. (Commonwealth's Opposition to Employee's Motion for the Appointment of a New Impartial Physician, filed June 23, 2003.) (See footnote 2, supra.) On July 8, 2003, the judge issued a terse written denial of the motion: "After review, I see no reason to appoint a new impartial physician in this matter." (Id.)

Dr. Goss examined the employee on September 5, 2003, and rendered a report bearing that same date. (Stat. Ex. 1.) Prior to hearing, the employee filed a motion to submit additional medical evidence arguing, *inter alia*, that the impartial report was inadequate due to the apparent bias of the impartial medical examiner stemming from his

² We take judicial notice of the employee's original claim, filed on January 9, 2003 and contained in the Board file. Rizzo v. M.B.T.A., 16 Mass. Workers' Comp. Rep. 160, 161 n.3 (2002). That claim sought § 34 total incapacity benefits or, in the alternative, § 35 partial incapacity benefits, from and after October 1, 2002. Both at conference and at hearing, however, the employee claimed § 35 benefits only, and only from and after February 27, 2003. (Employee Ex. 1.)

³ We take judicial notice of these documents in the board file. Rizzo, supra.

employment by UMass Medical School. (Employee's Motion to Supplement the Impartial Examiner's Report, filed January 2, 2004.) At the hearing on January 6, 2004, the judge declined to rule on the motion, indicating instead that employee's counsel could explore the issue of impartiality at Dr. Goss's deposition, after which, if he wished, he could renew the motion. (Tr. 57.)

Following the deposition, the employee filed a "Motion to Strike the Report of the Impartial Examiner," which the judge denied by letter dated March 24, 2004. Thus, the only medical evidence at hearing was the opinion of the impartial medical examiner, which had prima facie effect. See G. L. c. 152, § 11A(2).

At hearing, the self-insurer raised the affirmative defense of § 1(7A), contending that the employee bore the burden of proving her work injury was and remained a major cause of her disability or need for treatment. Adopting Dr. Goss's opinion, the judge found that the employee had suffered a relatively minor soft tissue injury at work on October 1, 2002, from which she would have fully recovered within four to six weeks, and that her ongoing complaints were related to pre-existing problems with her left knee. Because the employee did not claim benefits prior to February 27, 2003, by which time, according to Dr. Goss, any disability from the work injury would have ended, the judge denied the employee's claim for compensation. (Dec. 3-4.) In his decision, the judge addressed the employee's motions challenging Dr. Goss's testimony on the ground of bias with but one sentence: "An objection by the employee as to the impartial physician in this case was reviewed by me, and the objection overruled." (Dec. 2.)

On appeal, the employee argues that when the impartial physician is an employee of the employer defending the case, the impartiality of the § 11A examiner is necessarily compromised, and the impartial medical report is inadequate as a matter of law. (Employee br. 6.) The self-insurer acknowledges that Dr. Goss serves as a professor of the UMass Medical School and receives his paycheck from the Commonwealth. (Self-ins. br. 5; see also, Dep. 7, 10, 31.) It argues, however, that Dr. Goss is more closely affiliated with a private hospital, UMass Memorial Health Care, to which he is leased by the Medical School.⁴ (Self-ins. br. 4-6.) The self-insurer also cites Dr. Goss's testimony

⁴ At his deposition, Dr. Goss explained that a number of years ago, UMass Medical Center broke away from the medical school, and the medical center merged with Memorial Hospital to become UMass Memorial Health Care, a private institution, while the medical school remained under the state system. (Dep. 10, 35.) Both Dr. Goss and the

that he did not know the employee prior to examining her, and that he had acted fairly and without bias in formulating his opinions. (Self-ins. br. 6; Dep. 35.) Whether the doctor's assertions are true or false is not the issue. It is the *appearance* of partiality or interest created by the fact of shared employment which taints the only medical evidence in this case, and thus adversely affects the employee's due process rights. We agree with the employee that the judge's decision cannot stand.

"Impartiality is the very cornerstone of the § 11A medical examiner system." Martin v. Red Star Express Lines, 9 Mass. Workers' Comp. Rep. 670, 673 (1995). Accordingly, "an impartial physician acting pursuant to . . . § 11A must avoid even the appearance of partiality or interest." Tallent v. M.B.T.A., 9 Mass. Workers' Comp. Rep. 794, 799 (1995), citing Martin, supra. An allegation of partiality or bias on the part of the § 11A physician is a challenge to the adequacy of the impartial examiner's report. Cramer v. Wal-Mart, 12 Mass. Workers' Comp. Rep. 316, 318 (1998), citing Martin, supra.

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 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. Tallent, supra at 799.

Our decision in Kenner v. Carney Hosp., 10 Mass. Workers' Comp. Rep. 279 (1996), controls the outcome here:

The § 11A examiner's report and deposition stands alone as the pivotal medical evidence under the new Act. Because the parties' rights are dependent in great part on on this evidence and, absent inadequacy of the report or complex medical issues, no other medical evidence may be introduced, it is critical that the sole medical opinion be free of any taint of partiality. The § 11A medical examiner's affiliation with the self-insurer can only be construed as an appearance of

employee are employed by UMass Medical School. (Id. at 9-10, 13, 14.) Dr. Goss is a professor of orthopedic surgery at UMass Medical School, but he is also leased to UMass Memorial Health Care, where he serves as an attending orthopedic surgeon. (Id. at 7, 10, 34.)

partiality, if not a sympathetic inclination, (footnote omitted), and we conclude that the report and deposition are inadequate as a matter of law.

Id. at 281. We see no meaningful distinction between the facts of that case and those here. Dr. Goss admitted that he was employed by UMass Medical School. (Dep. 10, 14, 31.) The self-insurer points to the doctor's testimony that he spends most of his time at the hospital, not the medical school, and that he did not know the employee. These facts are irrelevant to the appearance of partiality created by the fact that his livelihood is dependent on the same employer for whom the employee worked. "[E]very effort should be made to avoid the appearance as well as the fact of favoritism or sympathetic inclination toward one party as against the other." Mattison's Case, 305 Mass. 91, 93 (1940).

Accordingly, we hold that the judge erred, as a matter of law, in denying the employee's motions regarding the appearance of partiality or conflict on the part of the § 11A impartial medical examiner. We reverse the administrative 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 decision anew based on that evidence.

So ordered.

Patricia A. Costigan
Administrative Law Judge

Mark D. Horan
Administrative Law Judge

Bernard W. Fabricant
Administrative Law Judge

Filed: August 24, 2005