COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 003278-05**

Kathleen A. McGrath	Employee
NStar Electric and Gas	Employer
NStar Electric and Gas	Self-Insurer

REVIEWING BOARD DECISION
(Judges Horan, Costigan and Levine)

The case was heard by Administrative Judge Benoit.

APPEARANCES
John K. McGuire, Jr., Esq., for the employee
Joseph S. Buckley, Jr., Esq., for the self-insurer at hearing and on brief
Richard W. Jensen, Esq., for the self-insurer at oral argument

HORAN, J. The self-insurer appeals from a decision denying its complaint to discontinue or modify the employee's weekly compensation benefits. It argues the judge erred by consulting and relying, in part, on a learned treatise to determine whether a material component of the employee's testimony was credible. (Self-ins. br. 12, 14-15.) Because the judge's reliance upon the medical publication[1] was contrary to law, we vacate the decision and recommit the case for a hearing de novo before a different administrative judge.[2]

The judge found as follows:

> This case ultimately boils down to *whether I find the employee's account of being laid up for ten days of every month and/or needing to nap for at least ninety minutes to two hours every day to be credible.* My consideration of this issue has taken many hours of reading and re-reading

[1] In the circumstances of this case, we need not decide whether the book in question qualifies as a learned treatise. To the extent that it could so qualify, it would only be "admissible in actions of contract or tort for malpractice, error or mistake against physicians, surgeons, dentists, optometrists, hospitals and sanitaria. . . ." General Laws c. 233, § 79C.

[2] In light of our decision on this issue, we need not address the self-insurer's remaining arguments.

> of many parts of the record. The report of Dr. Kenney contains no indication of the employee telling him, or of other medical records indicating, that she has any days per month where she is incapacitated to the degree that she testified as being for about a third of each month, or that she naps at least two hours per day. The "gap medical" records and reports are similarly silent on these points. As she lives alone, there is no cohabitant for us to interview. The investigator who surveilled her on five occasions only saw her being active on one of them. *To determine the likely side effects of her medication, I have consulted The John Hopkins Consumer Guide To Drugs, (Medletter, 2003). She takes extra-strength Vicodin, which has drowsiness as a common side effect, four times a day; Lidoderm patches, which have no common serious side effects; morphine, which has drowsiness as a common side effect, at night; and Celebrex, which does not have drowsiness as a common side effect*.
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> My impression on the day of hearing, as recorded in a marginal notation, was that she was very honest. I find her account of the need to nap on an almost daily basis for 1 ½ to 2 hours to be credible.

(Dec. 10; emphasis added.) Based on the employee's physical restrictions, vocational profile, and her extraordinary need for rest, the judge denied the self-insurer's complaint. (Dec. 12-13.)

We agree with the self-insurer that the judge erred by relying on the hearsay source to gauge the effects of the employee's use of medication, and we cannot say with sufficient confidence that it did not affect his credibility finding. No exception to the general rule barring the admissibility of hearsay applies in this case. In Percoco's Case, 273 Mass. 429 (1930), the court held the admission of a medical treatise was error, as

> [o]pinions on medical matters or any other subject are not admissible except by testimony under oath and from a person skilled in such subjects. Statements contained in medical or scientific books cannot be used in evidence and counsel cannot be allowed to read to the jury from such works. To permit such evidence is to admit in evidence the statement of one, made out of court, not subject to cross-examination. The rule is stated in Commonwealth v. Jordan, 207 Mass. 259 at 271: ". . . medical books are not admissible in evidence for the purpose of showing the views entertained by their authors in regard to the matters in dispute."

Id. at 430-431. The Percoco court concluded that because the administrative judge "may have relied on some of the statements in the treatise," id. at 431, the decision needed to be reversed and the case retried. See also Framingham v. Department of Public Utils., 355 Mass. 138, 145 (1969). The same holds true here. Because the error went to a central issue in dispute, i.e., the employee's capacity to sustain work in the open labor market in light of her persistent fatigue necessitating rest for one and one-half to two hours during the day, it is not harmless. See, e.g., Fantasia v. Northeast Mfg. Co., Inc., 14 Mass. Workers' Comp. Rep. 200, 205 (2000). That there was no contemporaneous objection by the self-insurer is excused, because the judge consulted the source without advance notice to the parties.[3]

Finally, although a judge has investigatory powers under G. L. c. 152, § 11,[4] such authority remains subject to the rules of evidence applicable to hearings within the division of dispute resolution. See Haley's Case, 356 Mass. 678, 682 (1970)("Nothing can be considered or treated as evidence which is not introduced as such"); 452 Code Mass. Regs. § 1.11(5)("[T]he admissibility of evidence and the competency of witnesses to testify at a hearing shall be determined under the rules of evidence applied in the courts of the Commonwealth"); see also footnote 3, supra.

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[3] See Pobieglo v. Department of Correction, 24 Mass. Workers' Comp. Rep. 97, 100 (2010) ("due process considerations entitle the parties, *in advance* of a decision, to have reasonable notice of the evidentiary sources relied upon by the judge. . . ."); see also Fox v. STG Props./Scott Gerace, 26 Mass. Workers' Comp. Rep. ___, fn. 1 (April 17, 2012)(factual inquiries and investigations made by judge without notice to parties may violate due process rights).

[4] General Laws c. 152, § 11, provides, in pertinent part:

> At the hearing the member shall make such inquiries and investigations as he deems necessary, and may require and receive any documentary or oral matter not previously obtained as shall enable him to issue a decision with respect to the issues before him.

Accordingly, we vacate the decision and transfer the case to the senior judge for reassignment to a different administrative judge for a hearing de novo.[5]

So ordered.

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Mark D. Horan
Administrative Law Judge

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Patricia A. Costigan
Administrative Law Judge

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Frederick E. Levine
Administrative Law Judge

Filed: **June 5, 2012**

[5] We reinstate the conference order of August 11, 2009.