COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO.:** 009534-06

Kevin Cotter	Employee
Hawkeye Construction Co.	Employer
Arch Insurance Co.	Insurer

REVIEWING BOARD DECISION

(Judges Costigan, McCarthy and Horan)

APPEARANCES

Mathew P. Smith, Esq., for the employee at hearing
Paul A. Gargano, Esq., for the employee on appeal
David M. O'Connor, Esq., for the insurer at hearing and on appeal
James P. McKenna, Esq., for the insurer on brief

COSTIGAN, J. The employee appeals from an administrative judge's decision denying and dismissing his claim for lack of prosecution. The employee and his attorney were present for the hearing on the appointed date, as were insurer's counsel and two prospective witnesses for the insurer. (Ins. br. 5, n.3.) When the judge denied a verbal motion by employee's counsel that he recuse himself from the de novo hearing, employee's counsel announced his intention to leave the hearing room, and proceeded to do so, with his client in tow.

On appeal, the employee argues that the judge erred in denying and dismissing his claim, asserting that the hearing was not necessary because the judge could have found in the employee's favor based on the § 11A impartial medical report alone.[1] We could not disagree more. Not only was employee's counsel's conduct at the hearing reprehensible and sanctionable, but his appeal of the judge's dismissal of the claim is entirely frivolous, warranting the imposition of costs pursuant to G. L. c. 152, § 14(1).

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[1] The employee advances no argument on appeal that the judge's denial of his recusal motion was arbitrary or capricious or contrary to law. Therefore, that issue is waived. Green v. Town of Brookline, 53 Mass. App. Ct. 120 (2001); G. L. c. 152, § 11C.

In his decision, the judge recounted the events leading up to the dismissal of the employee's claim:

> The employee made a verbal motion requesting that I recuse myself from these proceedings. The request was made by Attorney Smith as follows:
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> . . . I'd ask that you recuse yourself from the case, just simply because I feel that the facts of the case have already been decided against me dating back to the conference. And that is my only request for the record. (Hearing Transcript, pp. 3, 4)
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> Stating for the record that I felt no partiality to any party in the case and had not pre-determined the facts, I denied the motion. After I denied the motion the employee's attorney declared his intention to leave the Hearing, an intention he had voiced earlier in an off-record conversation with opposing counsel and myself. The employee's attorney and the employee, who was present in the courtroom, then left the Hearing and did not return.

(Dec. 2.) The judge then denied and dismissed the employee's claim, due to his refusal to go forward and present evidence to meet his burden of proof. (Dec. 2-3.)

The employee's appeal challenges the judge's decision solely on the basis that he did not adopt the prima facie opinions of the § 11A physician to award the employee benefits, even though no § 11 hearing ever took place.[2] This argument plumbs the depths of absurdity. First, by their very terms, the § 11A impartial medical examination and resultant report exist only insofar as there is an appeal of the § 10A conference order to an evidentiary hearing:

> When any claim or complaint involving a dispute over medical issues is the subject of an appeal of a conference order pursuant to section ten A, the parties shall agree upon an impartial medical examiner. . . . The impartial medical examiner, so agreed upon or appointed, shall examine the employee and make a report at least one week prior to the beginning of the hearing. . . .

G. L. c. 152, § 11A(2). In most instances, the crux of the § 11 hearing is the testimony of the employee under oath. Without that evidence, the judge cannot determine whether the history

[2] Not surprisingly, the employee's brief is wholly silent as to what transpired before the administrative judge at the June 29, 2007 hearing. (Employee br. 1-4.)

upon which the impartial physician relied in formulating his opinions is an accurate one. We recently stated:

> To base an award of benefits solely on the impartial medical examiner's report would clearly violate, among other things, the insurer's due process right to challenge the factual foundation of the doctor's opinion, and ignore the express procedural requirements of our workers' compensation statute. See Haley's Case, 356 Mass. 678, 681-682 (1972); see also Patterson v. Liberty Mut. Ins. Co., 48 Mass. App. Ct. 586, 596 (2000); G. L. c. 152,§ 11.

Ferreira v. Forrest Homes of Massachusetts, 22 Mass. Workers' Comp. Rep. ___ (June 18, 2008). This foundational requirement for expert opinion testimony is so fundamental in workers' compensation cases as to render employee's counsel's argument on appeal patently frivolous.

Moreover, the impartial medical report ballyhooed by employee's counsel as proving the employee's claim was not even in evidence. The judge's decision identifies the exhibits in evidence as "NONE." (Dec. 1.) The judge did not admit the § 11A report as a statutory exhibit, and it is abundantly clear from the transcript of the hearing that employee's counsel did not delay his departure from the hearing room long enough to offer the report into evidence.

We conclude that this appeal has been put forward by employee's counsel[3] without reasonable grounds, in violation of G. L. c. 152, § 14(1).[4] We retain jurisdiction for future assessment of "the whole costs of the proceedings" against the employee's attorneys pursuant to § 14(1). In order to better ascertain that amount to be assessed upon attorneys Smith and Gargano, we direct that insurer's counsel provide them, and this board, with an affidavit describing the fees and costs incurred by the insurer in defense of both the employee's claim at hearing and this appeal. Insurer's counsel shall have twenty days from the filing date of this decision to comply with this

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[3] We place no responsibility on the employee either at the hearing before the administrative judge or in the prosecution of this appeal.

[4] General Laws c. 152, § 14(1)(b), provides, in pertinent part:

> If any administrative judge or administrative law judge determines that any proceedings have been brought or defended by an employee or counsel without reasonable grounds, the whole cost of the proceedings shall be assessed against the employee or counsel, whomever is responsible.

directive; employee's counsel shall have twenty days from receipt of the insurer's affidavit to respond in writing. We retain jurisdiction of the case for the sole purpose of determining the amount due under § 14(1).

"The conduct of the employee's attorneys in this case demonstrates a profound misunderstanding of the law and our dispute resolution process." Ferreira, supra. Accordingly, we refer this case to the senior judge for whatever action, pursuant to G. L. c. 152, § 7C,[5] she deems appropriate.

So ordered.

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Patricia A. Costigan
Administrative Law Judge

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William A. McCarthy
Administrative Law Judge

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Mark D. Horan
Administrative Law Judge

Filed: **June 27, 2008**

[5] General Laws c. 152, § 7C, provides, in pertinent part:

> The senior judge may, for cause, deny or suspend the right of any person to practice or appear before the department.