COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 009896-96**

Laurie Moseley	Employee
New England Fellowship for Rehab Alternatives	Employer
Arbella Indemnity Insurance Co.	Insurer

REVIEWING BOARD DECISION
(Judges Smith, McCarthy and Wilson)

APPEARANCES
John Moran, Esq., for the employee
Robert Doonan, Esq., for the insurer

SMITH, J. The employee appeals from a decision that awarded a closed period of further compensation benefits beyond the period voluntarily paid by the insurer. The judge found that the employee had recovered from the effects of her physical injury, and failed to prove that the depression from which she suffered was causally connected to the work injury. The employee argues that the judge applied the wrong legal standard to her mental injury claim, and based his decision on improperly admitted evidence. Because the judge's decision relied upon inadmissible evidence that refuted a central contention of the employee, we recommit the case for limited further proceedings.

We review in detail the procedural history of the case, as it illuminates the propriety of a limited recommittal. When the insurer discontinued its voluntary payments without prejudice, Laurie Moseley filed the pending claim for back and knee injuries arising out of and in the course of employment on March 11, 1996. (Employee's claim dated June 3, 1996.) The insurer contested causal relationship and extent of incapacity. The parties designated an orthopedic specialty for the impartial medical examiner. (Conference Memorandum dated September 3, 1996.) After the § 10A conference, a judge ordered ongoing total compensation, and the insurer appealed for a § 11 de novo hearing. On November 14, 1996, pursuant to § 11A(2), Moseley underwent an impartial

medical examination by Dr. James S. Broome, an orthopedic surgeon. (Court Ex. 1; Ins. Ex. 6.) The conference judge then recused and the case was reassigned.[1] The case was reached for hearing before the newly assigned judge on July 22, 1997. The new judge planned to retire at the end of October 1997. The judge informed the parties that the record would close on September 5, 1997, forty-five days after the hearing.[2] (Tr. 4.)

At hearing, Moseley moved to add a psychiatric injury to her claim, and the judge granted her motion. (Dec. 3.) The insurer agreed that an industrial injury had occurred on March 11, 1996 but continued to contest causation and extent of incapacity. (Dec. 3; Tr. 4-5.) The judge entered into evidence the impartial medical examiner's report. Moseley moved to give the impartial medical examiner's opinion no weight and to authorize the submission of additional medical evidence. As reasons therefore, she argued that Dr. Broome, the impartial physician, had been prejudiced by his review of a conference memorandum containing the report of an insurance adjuster. She also argued that the impartial medical examiner's report was inadequate and that the case was medically complex due to her psychiatric problems. Over the insurer's objection, the judge granted the motion, specifically requesting additional medical evidence on the extent of Moseley's preexisting emotional disability and how it was affected by the accepted work injury. (Dec. 4; Tr. 211-217.)

In response to the judge's request for more information on the psychiatric claim, the insurer made an oral motion to compel Moseley to provide a medical authorization so that it could obtain Moseley's psychiatric records, including those from the Thorne Clinic. (Tr. 217- 218.) The judge approved the motion to compel the medical authorization. (Tr. 218.) As the deadline for completion of the evidence was nearing, the insurer informed the judge that it had not received the necessary medical or psychological

[1] The judge apparently made a scrivener's error in his decision when he indicated that "I issued an Order . . . ." (Dec. 3; *compare* Conference Order filed September 24, 1996.)

[2] See 452 Code Mass. Regs. § 1.12(5)(b), which provides in pertinent part: "All depositions shall be submitted at the time requested by the administrative judge but no more than 60 calendar days from the close of lay testimony, provided that a party may motion the administrative judge for an extension for cause for no more than 30 calendar days."

authorizations from Moseley, and that it was unable to arrange for the deposition of the impartial medical examiner before October 3, 1997. (Letter dated August 22, 1997.) On August 27, 1997, Moseley finally gave the insurer the authorization forms.

Despite the written authorization, unbeknownst to her attorney, Moseley verbally instructed the Thorne Clinic to withhold a part of her records.[3] The insurer learned of this conduct on September 16, 1997. At a status conference on October 3, 1997, the judge was informed that the deposition of the impartial physician, Dr. Broome, had not been held because the insurer had not received the requested psychiatric records. In response, the judge extended the deadline for the submission of evidence until October 16, 1997. (Insurer's Brief 3.)

When the insurer finally obtained the Thorne Clinic records, it tried to arrange for the impartial medical examiner's deposition. Dr. Broome was then unavailable until October 17, 1997, one day after the deposition deadline. The insurer requested additional time to submit Dr. Broome's deposition: "If additional time cannot be provided, kindly advise, and I will take off the deposition of Dr. Broome, since this matter will have to proceed to another hearing before another Judge." (Letter to Judge from Robert J. Doonan, dated October 7, 1997.) Subsequently, the insurer informed the judge that Dr. Broome's deposition had been cancelled and that its brief and medical records would be submitted by the deadline of October 16, "so that you may prepare a decision prior to your departure from the Department of Industrial Accidents on October 31, 1997." (Letter to Judge from Robert J. Doonan, dated October 14, 1997.) The insurer did not request that the case be reassigned to another judge so that the deposition could occur.

On the deadline for submission of evidence, October 16, 1997, the insurer timely submitted its brief together with the records of Falmouth Hospital, Dr. Schillizzi, Beth Israel Hospital, Falmouth Hospital Rehabilitation Department, Dr. Leahy, Dr. Pick, and

[3] The insurer stated in its brief and at oral argument that, after the employee attorney produced the authorization for the Thorne documents, his client told Thorne to withhold certain records. The employee did not dispute this representation.

the Thorne Clinic. Moseley objected to the admission of these records because the insurer failed to provide 10 days written notice of its intent to offer them into evidence, as required by G.L. c. 233, § 79G. The insurer responded that Moseley created the situation that made impossible compliance with the "ten day rule" of c. 233, § 79G. It argued that Moseley should not be allowed to benefit from her obstructive and dilatory tactics. It proposed admission of the records as a cure for Moseley's failure to comply with the judge's production order, and suggested other bases for the admission of the documents. The judge overruled Moseley's objection and admitted the medical records as Exhibits 7-12. (Dec. 2; handwritten ruling on motion dated 10/22/97.)

On October 24, 1997, just days before his retirement, the judge filed the decision. He found that Laurie Moseley injured her back in a fall at work on March 11, 1996. (Dec. 5.) The judge adopted the opinions of the impartial medical examiner, Dr. James Broome. At the time of his examination on November 14, 1996, Dr. Broome noted no present physical problems. He opined that any injury that Moseley had suffered from her fall had long since resolved. He causally related Moseley's strained back to the work injury. The doctor also diagnosed a variety of social and medical problems of a psychological or psychiatric nature, none of which he related to the work injury. (Dec. 7.)

The judge considered the information in the other medical records that had been admitted as exhibits, and, "giving the employee the benefit of the doubt,"[4] adopted so much as was consistent with Dr. Broome's report. (Dec. 7-8, 10-13.) The judge found that "none of the medical records in evidence suggest that the employee's psychological component to the claim can be supported to the degree required by Section 1(7A), i.e. a predominant cause of her psychological problems." (Dec. 12.) He therefore adopted Dr. Broome's opinion that the psychological problems were unrelated to the work-related back injury. Id. The judge further found: "With insufficient evidence to the contrary . . .

[4] (Dec. 7.) See also (Dec. 8): "I give the benefit of the doubt to the employee." In so doing, the judge clearly misallocated the burden of proof. Antoniou v. Marshall's/Mellville Corp., 11 Mass. Workers' Comp. Rep. 260, 261 (1997). However, the insurer did not request relief for this legal error.

there was no causal relationship between the industrial injury to her back and her psychological symptomatology based upon the opinion of Dr. Schillizzi." (Dec. 14.) The judge concluded that there was a causally related medical problem only up to the date of the impartial report. As of that date the judge found "that a causal relationship no longer exists to the degree required by Section 1(7A). . . ." Id. As a result, the judge awarded § 34 benefits only up to that date. (Dec. 14.)

Moseley raises three issues on appeal. First she contends that the judge applied the wrong legal standard to her psychiatric claim. The judge applied "a predominant cause" standard. Moseley contends that the law merely required her to prove "a" causal connection. We see no reversible error. The judge awarded total compensation benefits up to November 25, 1996, the date when Dr. Broome opined that causation no longer existed. The judge found *no* causal connection *at all* between the work injury and the ongoing psychiatric problems. If the judge erred in applying "a predominant cause" rather than "a major cause" standard to Moseley's claim, any error in the required degree of contribution made no difference to the outcome of the case.

Although Moseley presented the testimony of Dr. Ackil that the work injury was a major cause of her subsequent emotional problems, (Dep. 24-25), the judge did not adopt that opinion. Rather, the judge adopted the contrary view of Dr. Broome that the psychological problems were not causally connected to the industrial injury. (Dec. 10.) In choosing between the dueling causation opinions, the judge was heavily influenced by the contents of the Thorne Clinic records. (Dec. 10-11; Insurer Ex. 12.) The judge also adopted the Gosnold-Thorne Counseling Center September 16, 1996 therapist's assessment that family matters were at the heart of Moseley's then emotional problems. (Dec. 11; Insurer Ex. 12.) The judge was entitled to choose between the competing causation opinions. Coggin v. Massachusetts Parole Board, 42 Mass. App. Ct. 584, 589 (1997). His choice was not arbitrary or capricious or contrary to law. G.L. c. 152, § 11C.

Next, Moseley argues that the judge erred in adopting the impartial medical examiner's opinion, because it was allegedly tainted by receipt of the insurer's conference memorandum. The memorandum contained a statement of the case by Robert Doonan,

presenting the case from the insurer's perspective. Moseley argues that the judge should have struck the impartial medical report of Dr. Broome because the doctor received this improper information. An impartial medical examiner should only see "medical records, . . . hypothetical fact patterns and any stipulations of fact . . . ." 452 Code Mass. Regs. § 1.14(2). However, the receipt of information in violation of the board procedures does not necessarily require that the impartial opinion be struck. Howell v. Norton Co., 11 Mass. Workers' Comp. Rep. 161, 165 (1997).

Here, the language of the impartial report does not compel a conclusion that the impartial medical examiner was so biased by receipt of this document as to render any reliance on his report arbitrary and capricious. On its face, the impartial report recites that this document was reviewed but does not otherwise indicate reliance on its contents. Moreover, Dr Broome's findings were similar to those of other medical experts whose reports the judge allowed to be admitted, Dr. Ackil and Dr. Pick. (Dec. 7.) Thus the record does not compel the conclusion that the report was based on facts not proven.[5]

Assuming arguendo, that the doctor was influenced by the improperly submitted document, the judge was not required to exclude his opinion from evidence. The bias of a witness goes only to his credibility and is not a reason for exclusion of his testimony. Assessors of Pittsfield v. W.T. Grant Co., 329 Mass. 359, 361 (1952). The judge "fashioned an appropriate remedy and preserved the integrity of the judicial process when he allowed the . . . motion to submit additional medical evidence." Howell, supra, at 165. The judge did not act arbitrarily or capriciously in weighing the impartial medical opinion along with those of the other medical experts whose reports were admitted. See Id.; Coggin v. Massachusetts Parole Bd., 42 Mass. App. Ct. at 588-589 (discussing the weighing process when additional medical evidence is admitted).

[5] Where an impartial report is based upon facts not proven, a judge may disregard it. See Scheffler's Case, 419 Mass. 251, 259 (1994) (impartial opinion not afforded prima facie weight where based on inaccurate assumptions). Through a deposition, Moseley could have inquired into the basis of the impartial opinion and thereby demonstrated whether it was in fact based on facts not grounded in the record evidence. See O'Brien's Case, 424 Mass. 16, 23 (1996). She chose not to depose Dr. Broome and therefore did not exercise the opportunity to develop this line of argument.

As the final issue, Moseley argues that the additional medical evidence offered by the insurer[6] was improperly admitted. The rules of evidence applied in the courts of the Commonwealth, together with the Board rules and the Workers' Compensation Act, govern the admission of evidence before the Board. 452 Code Mass. Regs. § 1.11(5).

Moseley contends that the insurer's failure to follow the procedures of G.L. c. 233, § 79G, specifically the requirement for ten days written notice of intent to introduce a certified record into evidence, made the insurer's additional medical evidence inadmissible.[7] The insurer does not dispute that it failed to provide the notice required by G.L. c. 233, § 79G. It responds that all the records other than those of the Thorne Clinic had been provided to the judge, both parties and the impartial medical examiner at the § 10A conference. Thus, it says, Moseley was on notice that the records would be used by the insurer after additional medical evidence was allowed. It argues that Moseley was

[6] The exhibits were #5 Dr. William Schillizzi's Note of December 11, 1991, #7 Falmouth Hospital Records, #8 Medical Records of Dr. Schillizzi, #9 Medical Records of Beth Israel Hospital, #10 Medical Report of Dr. Michael Leahy, #11 Medical Report of Dr. Robert Pick and #12 Thorne Clinic Therapy Records. (Insurer's Ex. #6 is merely a second copy of the Court Ex. #1, the impartial medical report of Dr. James Broome.)

[7] General Laws Chapter 233, § 79G, provides, in pertinent part:

> In any proceeding commenced in any court, commission or agency, an itemized bill and reports, including hospital medical records, relating to medical, dental, hospital services, prescriptions, or orthopedic appliances rendered to or prescribed for a person injured, or any report of any examination of said injured person, including, but not limited to hospital medical records, subscribed and sworn to under the penalties of perjury by the physician, dentist, authorized agent of a hospital or health maintenance organization rendering such services or by the pharmacist or retailer of orthopedic appliances, shall be admissible as evidence of the fair and reasonable charge for such services or the necessity of such services or treatments, the diagnosis of said physician or dentist, the prognosis of such physician or dentist, the opinion of such physician or dentist as to proximate cause of the condition so diagnosed, the opinion of such physician or dentist as to disability or incapacity, if any, proximately resulting from the condition so diagnosed; provided, however, that written notice of the intention to offer such bill or report as such evidence , together with a copy thereof, has been given to the opposing party or parties, or to his or their attorneys, by mailing the same by certified mail, return receipt requested, not less than ten days before the introduction of same into evidence, and that an affidavit of such notice and the return receipt is filed with the clerk of the court, agency or commission forthwith after said receipt has been returned. (Emphasis supplied).

not prejudiced by their last minute offer. (Insurer's Motion in Support of Admission of Additional Medical Records dated October 22, 1997.)

Records obtained at a § 10A conference level do not automatically become evidence at the § 11 hearing. They must be properly offered as exhibits, or judicially noticed, thereby giving the opposing party an ample opportunity to rebut what is in them. Manoli's Case, 12 Mass. App. Ct. 222, 224-225 (1981). The purpose of the c. 233, § 79G, notice is to give the opposing party the opportunity to cross-examine the physician whose report is being offered. Grant v. Lewis/Boyle, Inc., 408 Mass. 269, 274 (1990); see 452 Code Mass. Regs. § 1.11(6) ("Pursuant to 452 CMR 1.12(5), any party may, for the purpose of cross-examination, depose the physician who prepared an admitted medical report"). Because notice was not timely provided, Moseley was potentially deprived of the cross-examination opportunity that the statute safeguards. Nevertheless, the Legislature's adoption of G.L. c. 233, § 79G, did not restrict the admission of evidence under common law principles or other exceptions to the hearsay rule. Phelps v. MacIntyre, 397 Mass. 459, 462-463 (1986). We therefore discuss whether the medical records introduced by the insurer were admissible under another statutory, regulatory, or common law exception to the hearsay rule.

We start first with the insurer's last exhibit, the Thorne Clinic therapy records, on which the judge so heavily relied. They consist primarily of notes produced by licensed social workers regarding Moseley's mental health treatment from 1990 through 1997. The insurer proffered these records under G.L. c. 233, § 79. (Insurer's Motion in Support of Admission of Additional Medical Records dated October 22, 1997.) There is no ten-day notification requirement under this statute.

Chapter 233, § 79 provides in pertinent part:

> Records kept by hospitals, dispensaries, or clinics, and sanatoria under section seventy of chapter one hundred and eleven[8] shall be admissible, . . . as evidence in

[8] Section 70 of c. 111 provides that hospitals and clinics subject to licensure by the department of public health or supported in whole or in part by the commonwealth, shall keep records of the treatment of the cases under their care including the medical history and nurses' notes. The employee did not contest that these records were kept under this provision.

> the courts of the commonwealth so far as such records relate to the treatment and medical history of such cases and the court may, in its discretion, admit copies of such records, if certified by the persons in custody thereof to be true and complete . . . . (Emphasis added.)

The Industrial Accident Board is not a "court" in the strict meaning of the word. However, in construing statutes governing the admission of evidence, the Board has been found to be included in that statutory term. Pigeon v. Employers' Liability Assur. Corp. Limited, 216 Mass. 51, 56 (1913). We therefore conclude that c. 233, § 79, applies to proceedings before the Board and can authorize the admission of evidence in our § 11 hearings.

The certified Thorne Clinic records fit within the scope of G.L. c. 233, § 79. A four-part analysis determines the admissibility of a hospital or clinic record under this statute:

> First, the document must be the type of record contemplated by G.L. c. 233, § 79. Second, the information must be germane to the patient's treatment or medical history. (Citation omitted.) Third, the information must be recorded from the personal knowledge of the entrant or from a compilation of the personal knowledge of those who are under a medical obligation to transmit such information. Fourth, voluntary statements of third persons appearing in the record are not admissible unless they are offered for reasons other than to prove the truth of the matter contained therein, or, if offered for their truth, come within another exception to the hearsay rule or the general principles discussed *supra*.

Bouchie v. Murray, 376 Mass. 524, 531 (1978). Applying this analysis to the present case, all four factors are satisfied. These are clinic records, specifically introduced for their probative value as to Moseley's medical history and treatment. The records consist of first hand notes of licensed social workers who conducted therapy sessions with Moseley. Finally, to the extent that the records contain any third person hearsay, the judge's findings based on the records, (Dec. 10-11), do not refer to it. We conclude that the Thorne Clinic records were admissible under G.L. c. 233, § 79. The judge did not err in admitting them.

The insurer proffered the report of its expert, Dr. Robert Pick, (Insurer Ex. 11), under the authority of 452 Code Mass. Regs. § 1.11(6). (Insurer's Motion in Support of

Additional Medical Evidence, dated October 22, 1997 at p. 6.) That rule provides that when a judge has allowed additional medical testimony, either party may offer as evidence "medical reports prepared by physicians *engaged by said party*, together with a statement of said physician's qualifications" (emphasis supplied). Like c. 233, § 79, this regulation does not require advance notice for admission. In her brief, Moseley does not contend that Exhibit 11 is inadmissible under this rule. The judge did not err in admitting Dr. Pick's report.

The Falmouth Hospital records, (Insurer Ex. 7), and Beth Israel Hospital records, (Insurer Ex. 9), are admissible both under the provisions of c. 233, § 79, discussed above and under a special provision of the Workers' Compensation Act. Section 20 of c. 152 provides, in pertinent part:

> Copies of hospital records kept in accordance with section seventy of chapter one hundred and eleven, certified by the persons in custody thereof to be true and complete, shall be admissible in evidence in proceedings before the division or any member thereof.

The judge did not err in admitting these hospital records.

That leaves for our consideration the medical reports and records of Drs. Michael Leahy, (Insurer Ex. 10), and William Schillizzi, (Insurer Ex. 5 and 8), treating physicians. Months prior to the deadline for the submission of evidence, the insurer had been made aware of the existence of these reports and records, as they had been produced by Moseley at the § 10A conference. Moseley's dilatory conduct in authorizing the release of her psychiatric records did not prevent the insurer from timely noticing either of these doctor's records under c. 233, § 79G, or from summonsing either physician to testify.

Exhibits 5, 8 and 10 are out-of-court statements offered for the truth of their contents. As such, they are inadmissible in the absence of an exception to the hearsay rule. The insurer has proposed that 452 Code Mass. Regs. § 1.11(6) makes the exhibits admissible. However, neither doctor was a physician engaged by the insurer, so their reports are not admissible under that regulation.

To be entitled to a new decision based on the record apart from these exhibits, Moseley must demonstrate that she was prejudiced by the admission of these records. We are loath to reach that conclusion based upon the record as it currently stands. As the judge has retired, a new decision will of necessity require a re-hearing before a new judge. The law should not encourage such an expenditure of time and money unless it is necessary to provide fundamental fairness. An error in the admission of evidence is not grounds for a new hearing unless the error has injuriously affected substantial rights of the appellant. Indrisano's Case, 307 Mass. at 523.

Ordinarily where hearsay medical reports go to a central issue in a case over which experts are in sharp dispute, the error is found to injuriously affect the substantial rights of the parties. Grant v. Lewis/Boyle, Inc., 408 Mass. at 275; Round v. King Size Company, 13 Mass. Workers' Comp. Rep. __ (April 28, 1999). The judge 's decision contains lengthy and detailed recitations of Dr. Schillizzi's reports, (Dec. 10-12), and those of Dr. Leahy. (Dec. 8, 12.) It is clear that in reaching his decision the judge adopted and relied upon them. These exhibits constituted part of the reason why the judge discredited the countervailing diagnosis and causation opinions of Dr. Ackil, Moseley's expert witness. On the other hand, we are cognizant that this record contains an overwhelming amount of other medical evidence, which also supports the judge's conclusion that there was no causally related incapacity remaining as of November 26, 1996. Errors in admitting merely cumulative evidence should not be a basis for reversal of a decision. Caccamo's Case, 316 Mass. 358, 363 (1944); Vomvoris's Case, 360 Mass. 874 (1972).

Further findings of fact are necessary to determine whether the admission of these exhibits violated the employee's fundamental due process rights. Because the evidence in question was offered at the closing of the case, we cannot determine whether the lack of technical compliance with the notification requirements of c. 233, § 79G, in reality foreclosed Moseley's opportunity to cross-examine these physicians, or whether their lack of testimony was the result of Moseley's freely made tactical decision. Without a good faith assertion by Moseley of her right to cross-examine her treating physicians,

fundamental fairness does not compel a retrial; the admission of their reports would be too insubstantial a reason to reverse the decision.

We therefore find it appropriate to recommit the case for the limited purpose of providing Moseley with the opportunity to cross-examine that G.L. c. 233, § 79G, contemplates. Should she choose to exercise that opportunity, the new judge shall retake the lay testimony and issue a new decision on the basis of the existing medical evidence, including exhibits 5, 8 and 10, supplemented by such cross-examination. Of course, the judge must base any new decision on the correct burden of proof. See n. 3, supra. By correctly placing the burden of proof on the employee, the new judge could reach a decision that Moseley was not incapacitated for the entire period prior to November 26, 1996. Thus a new decision could conceivably award Moseley fewer benefits than the current decision. Should Moseley choose not to cross-examine the doctors on their reports, the case shall be returned to the reviewing board for affirmation of the current decision.

So ordered.

Suzanne E.K. Smith
Administrative Law Judge

Sara Holmes Wilson
Administrative Law Judge

MCCARTHY, J. (dissenting) The conference memorandum prepared by counsel for the insurer was intended for the judge's eyes only. It was a perfectly proper effort to convince the judge to deny the claim. Presumably through inadvertence, this memorandum was sent to Dr. Broome, the § 11A examiner together with many medical

reports and records. This submission is not permitted by § 11A[9] and is in direct contravention of 452 Code Mass.Regs. § 1.14(2).[10] In my view, this serious procedural irregularity can only be remedied by a hearing de novo.

The adoption of the "impartial examiner" as the exclusive arbiter of medical disputes was a radical departure from the system it replaced. If this system is to be credible and effective, the statute and implementing regulations must be scrupulously followed.

In O'Brien's Case, 424 Mass. 16 (1996), the Supreme Judicial Court upheld the constitutionality of § 11A, which gave prima facie status to the report of an impartial physician. The court cited two reasons for its decision. First, the provisions of § 11A(2) allow the judge to authorize submission of additional medical testimony when the medical issues are complex or the report of the impartial examiner is inadequate. Id. at 22. Second, the claimant has the opportunity to put relevant testimony favorable to her claim before the impartial examiner, who stands in the position of a master or arbitrator. Id. However, the court noted that, "where these procedures still failed to offer a party an opportunity to present testimony necessary to present fairly the medical issues, there then might well be failure of due process. . . ." Id.

Here, though the judge allowed additional medical evidence to be submitted, the procedure nevertheless failed to allow the employee to fairly present her case because the judge ultimately relied upon the impartial physician's opinion, which was tainted by a non-medical memorandum advocating the insurer's position. As indicated above, the regulations, which are to be accorded the same deference as the statute, Simcik v.

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[9] The examiner is to get "all relevant medical records, medical reports, medical histories, and any other relevant information . . . ." G.L. c.152, § 11A(2).

[10] The cited regulation reads in pertinent part as follows:

> Once the impartial physician has been selected or appointed, the administrative judge shall submit to the impartial unit all approved medical records, any hypothetical fact patterns and any stipulations of fact for transmission to the impartial physician. No party or representative may initiate direct, ex parte communication with the impartial physician and shall not submit any form of documentation to the impartial physician without the express consent of the administrative judge.

M.B.T.A., 13 Mass. Workers' Comp. Rep. 31, 36 (1999), recognize the necessity of ensuring the impartiality of the § 11A examiner by providing him only with "all approved medical records, any hypothetical fact patterns and any stipulations of fact. . . ." 452 Code Mass. Regs. § 1.14(2). These regulations specifically prohibit any direct exparte communication between the parties and the impartial physician. Allowing, even inadvertently, the impartial examiner to view the insurer's memorandum advocating that the employee is not disabled and that such disability is not causally related to her work injury is tantamount to ex parte communication with the physician, and is improper. See Demeritt v. Town of North Andover School Dept., 11 Mass. Workers' Comp. Rep. 630, 634 (1998) (any ex parte contact with the impartial medical examiner is improper).

We cannot assume, as the majority does, that this memorandum did not influence the impartial examiner. The impartial physician devoted an entire paragraph to the contents of the insurer's conference memorandum:

> There is a report of the Conference Memorandum of the Employer and the Insurer. This discusses the medical issues in dispute as to whether an injury occurred, whether or not she is disabled, whether there is a causal connection, and whether her injury is the result of the pre-existing back problems or pre-existing fibromyalgia and not compensable. There are issues raised by the insurer as to disclosure. These will be dealt with at the end of the report. The Conference Memorandum of the Employer and the Insurer follows with a statement of the case. I have read the statement of the case by Robert Doonan [insurer's attorney], signed on September 3, 1996.

(Impartial Report 2.) He ultimately concluded that "[the employee] has seemingly overwhelming psychological and/or psychiatric problems and social problems which continue to bedevil her and occasion her sadness and depression. I do not believe any of these can be lain at the foot of her employer, however." (Impartial Rep. 5.) The impartiality of the § 11A examiner is key to ensuring the integrity of the impartial system. As we stated in Martin v. Red Star Express Lines, 9 Mass. Workers' Comp. Rep. 670 (1995):

> Impartiality is the very cornerstone of the § 11A medical examiner system. 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. . . . In

> administering the § 11A system of resolving medical issues, we must heed the principle: ". . . it is of prime importance, in the disposition of cases before us, not only that justice be done but that it appear to be done." (Citations omitted) All aspects of the adjudicative process should maintain not only impartiality, but also the appearance of impartiality. To the extent that the opposite is conveyed, the system is undermined. The integrity of a case's disposition is as essential to public confidence as is the disposition itself. (Citations omitted) Finally, procedures must "further the accuracy"of a judge's determination on material issues in dispute or serious due process problems arise. See Aime v. Commonwealth, 414 Mass. 667, 682 (1993).

Id. At 673. In the circumstances of this case, and given the importance of maintaining the integrity of the impartial process, I would reverse the decision and order a hearing de novo.

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William A. McCarthy
Administrative Law Judge

FILED: October 8, 1999