COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 005259-05**

Manuel Cruz	Employee
Pet Edge Administrative Services Co.	Employer
Mass. Retail Merchants SIG	Insurer

REVIEWING BOARD DECISION
(Judges Koziol, Horan and Calliotte)

The case was heard by Administrative Judge Bean.

APPEARANCES
Teresa B. Benoit, Esq., for the employee at hearing
James N. Ellis, Esq., for the employee at hearing and on appeal
Thomas P. O'Reilly, Esq., for the insurer at hearing
Paul M. Moretti, Esq., for the insurer on appeal

KOZIOL, J. The parties cross-appeal from a decision awarding the employee § 34A permanent and total incapacity benefits from September 5, 2011, and continuing, and awarding a reduced attorney's fee in the amount of $3,974.00, plus necessary expenses. The insurer's claims of error require us to vacate the judge's decision in its entirety and recommit the matter for a hearing de novo before a different judge.[1]

The employee injured his right knee at work on February 10, 2005. As a result of prior hearing decisions, (Exs. 5-8),[2] the employee was awarded § 35 partial incapacity benefits, (Exs. 6, 7, 8), but his claim for weekly benefits and

[1] Because the employee filed his appeal first, the employee was considered the appellant and was entitled to file a reply brief upon receipt of the insurer's brief. 452 Code Mass. Regs. § 1.15(4)(h). The employee did not file a reply brief. While the disposition of this case renders moot the sole issue raised by the employee on appeal, we discuss it herein because it arises from the same general findings complained of by the insurer.

[2] Disputes between the parties have resulted in the judge issuing four prior hearing decisions, the second of which, (Ex. 6), was a decision on recommittal as a result of our decision in Cruz v. Pet Edge Admin. Servs. Co., 23 Mass. Workers' Comp. Rep. 175 (2009). The decisions are as follow: April 28, 2006, (Ex. 5); May 13, 2008, (Ex. 6); October 2, 2009, (Ex. 7); and April 19, 2011, (Ex. 8). (Dec. 194.)

medical treatment for major depression was denied and dismissed as not being causally related to his physical injury. (Ex. 7.) On April 19, 2011, based on the adopted opinion of an impartial medical examiner, orthopedic surgeon Dr. Christopher Bono, the insurer was ordered to pay for a right total knee replacement that had been recommended by the employee's treating orthopedist, Dr. William Tomford. (Ex. 8.) Despite the employee's exhaustion of his statutory entitlement to § 35 benefits, the judge continued to find the employee "partially disabled with a light and sedentary work capacity," and ordered the commencement of § 34 total incapacity benefits only "from the date of the total knee replacement surgery forward." (Ex. 8.) The employee decided he did not want Dr. Tomford, or any surgeon other than Dr. Bono, to perform the surgery. (Dec. 196.) He did not have the right total knee replacement surgery. (Dec. 194.)

The employee then filed the present claim alleging total incapacity from a combination of his physical injury and a psychiatric injury, seeking § 34 or § 34A benefits from September 5, 2011, and continuing. (Dec. 194, 198.) The claim was denied at conference. The employee appealed and was examined by an impartial medical examiner, psychiatrist Dr. Jason E. Mondale. The insurer defended, disputing disability and the extent thereof, and expressly alleging "no worsening as in Foley's Case." (Ex. 2.) In regard to the psychiatric injury, it also denied causal relationship, raised the defenses of res judicata and § 1(7A), and further denied entitlement to §§13 and 30 benefits. (Ex. 2.) In discussing the procedural posture of the claim and the issues in controversy, the judge noted, "[t]he employee is not seeking an order for the total knee replacement surgery as part of this claim having already secured an order, but presents the allegation that the insurer's refusal to provide this surgery in a manner acceptable to him is one of the causes of his psychiatric injury that is the basis for this claim." (Dec. 195.)

Dr. Mondale testified by deposition, and the employee and the workers' compensation insurance adjuster testified at the hearing. (Dec. 193.) The judge allowed the parties to submit additional medical evidence for the gap period prior

to Dr. Mondale's examination of the employee, and denied the insurer's motion for a finding of medical complexity. (Dec. 197-198.) The judge later denied the insurer's motion, made during Dr. Mondale's deposition, to strike his report. (Dec. 202.) The judge adopted Dr. Mondale's opinions that 1) the employee's depression had worsened since his last examination; 2) the diagnosis of major depression was related to his chronic knee pain; and 3) the employee was "totally and permanently disabled due to the industrial injury." (Dec. 196-197, 198.)

On appeal, the insurer contends the decision must be vacated and the matter forwarded to the senior judge for assignment to a different administrative judge for a hearing de novo. (Ins. br. 27.) We address three of its four claims of error that are intertwined and dispositive.[3]

The insurer argues the judge failed to address all the issues in controversy; specifically, its res judicata and § 1(7A) defenses. (Ex. 2.) The judge's decision fails to list or otherwise mention either defense. The insurer also argues the judge erred by denying its motion to strike Dr. Mondale's report. (Dep. 35.)

Dr. Mondale served as the impartial medical examiner in the employee's prior unsuccessful claim for total disability and medical benefits for the physical injury and its psychiatric sequela, depression. (Ex. 7.) In denying that claim in 2009, the judge adopted Dr. Mondale's opinion that there was no causal relationship between the employee's physical injury and his psychiatric condition. (Ex. 7.) We summarily affirmed that decision, which was later affirmed by the Massachusetts Appeals Court. Cruz's Case, 79 Mass.App.Ct. 1122 (2011)(Memorandum and Order Pursuant to Rule 1:28).

The judge's findings of fact and observation that "Dr. Mondale's 2012 opinions differ in some respects from the opinions he offered in 2009," lack any

[3] We do not address the insurer's claim that the judge erred by failing to conduct a proper vocational analysis. (Ins. br. 24-26.)

acknowledgement of, or analysis pertinent to, either defense.[4] (Dec. 197.) The insurer's motion to strike Dr. Mondale's report based on the res judicata defense also was denied without discussion.[5] The decision lacks sufficient findings of fact for us to determine whether the judge applied the correct rules of law. Praetz v. Factory Mut. Eng'g & Research, 7 Mass. Workers' Comp. Rep. 45, 47 (1993).

Such a situation normally requires us to vacate the decision and recommit for further findings of fact. However, recommittal to this administrative judge cannot occur because the appearance of impartiality has been compromised by the remainder of his decision. (Dec. 199-201.) Despite acknowledging that the employee did not seek any further order for, or concerning, the knee replacement surgery, (Dec. 195), the judge, referring to the events surrounding the employee's failure to have a pre-surgical evaluation with Dr. Bono and assuming Dr. Bono otherwise would have performed the surgery, created an issue: "*[t]his case was*

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[4] This is especially problematic where the judge found that the employee continues to be plagued by "unrelated health concerns (diabetes, insomnia, hypertension, sleep apnea) [which] might have had some effect on the ultimate result of the surgery," (Dec. 199), and which, along with personal issues, were the basis for Dr. Mondale's prior opinion that the depression was unrelated to the injury. (Ex. 7.)

[5] After questioning Dr. Mondale at deposition, the insurer moved to strike his report:

> Well, based upon the fact there has been a prior judicial determination that this condition is not causally related. This particular judicial determination has been affirmed by not only the reviewing board but the Massachusetts Appeals Court.
>
> And there has been no testimony that has changed that. That determination has been made. This is not a related condition. So anyway, I'm moving to strike.

(Dep. 35.) The insurer's brief argues the same point, from a slightly different angle, claiming Dr. Mondale's opinion lacked an adequate foundation and was speculative because he failed to consider facts established by the prior decision; specifically, the existence and impact of a myriad of unrelated medical and personal issues, which he previously opined were the cause of the employee's depression. (Ex. 7; Ins. br. 20-23.) We express no opinion on the merits of the insurer's motion as its determination requires findings of fact, the making of which are within the sole province of the administrative judge. English v. Atlantic Gelatin, 2 Mass. Workers' Comp. Rep. 285 (1988). The insurer is free to raise this issue again at the de novo hearing.

tried before me on the issue of $125!"[6] (Dec. 201)(emphasis original.) The insurer argues the judge erred in addressing an issue not before him. In addition, it argues that the judge's findings regarding this issue are "riddled not only with facially apparent bias, prejudice and impropriety, but also mischaracterizations and pure conjecture." (Ins. br. 15.) The insurer contends that the judge's bias and demonstrated partiality affected his consideration of the real issues in the case and that he further intended to punish, and in fact penalized, the insurer. (Ins. br. 12-17.)

By creating and discussing an issue not raised by the parties, (Dec. 199-201), the judge exceeded the scope of his authority. Mardersoian v. Trial Court of the Commonwealth, 29 Mass. Workers' Comp. Rep. ___ n. 1 (August 19, 2013); Hall v. Boston Park Plaza Hotel, 12 Mass. Workers' Comp. Rep. 188, 190 (1988). We set forth only the most pertinent portion of the judge's three-page discussion.

> The results of everyone standing on their rights is that the employee's suffering *must* continue. *This I find to be intolerable.* [Emphasis original.] With every passing day, given the employee's many health issues, the possibility of a successful knee replacement surgery and the easing of his psychiatric injury diminishes, to his detriment certainly, but also to the detriment of the insurer, who will continue to pay on this case and the employee's attorney who will continue to service an unhappy and needy client. The onus is on all three of the participants in this case but in particular on the two who are not dealing with daily intractable pain, depression and despair, an empty bank account[7] and the need to have a major joint cut from their bodies and replaced by plastic and metal.
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> I believe that the orthopedic and psychiatric aspects of this case likely would have resolved or been significantly improved in 2009 had the

[6] The difference between the pre-surgical examination fee requested by Dr. Bono and the payment offered by the insurer was $125.00. (Dec. 199.)

[7] The insurer takes issue with the judge's findings concerning the employee's finances, asserting that they were not grounded in the evidence. (Ins. br. 16.) We agree there was no evidence that the employee was in a "dire financial situation" with "an empty bank account." (Dec. 200.) The only evidence in the record regarding the employee's finances was that his wife worked, he received monthly social security payments, and that his financial situation did not allow him to go to dinner and the movies. (Tr. 20-21, 46.)

> $125 been paid and the surgery undertaken.[8] **I attribute the fact that this was not done primarily to the insurer and employee's counsel.[9]** [Emphasis supplied.] By the very nature of an employee's practice in workers' compensation law, an attorney is sometimes called upon to go above and beyond the normal limits of the practice on behalf of a client. A small gesture on the attorney's part in this case could have saved years of suffering for her client.[10] For this reason I am reducing the employee's

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[8] The judge's finding that "[w]ith every passing day" the possibility of a successful surgery "diminishes" and his finding regarding the expected quality of the employee's medical outcome from a surgical procedure that was never conducted, are opinions that are beyond the scope of a layman's knowledge, speculative, and erroneous. See Josi's Case, 324 Mass. 415, 417-418 (1949)(medical issues beyond the common knowledge and experience of a lay person require expert medical opinions).

[9] The judge came to this conclusion despite earlier finding, "[t]he insurer was within its rights in refusing to pay more than $250" for Dr. Bono's examination, and the employee's counsel was within her rights to "fil[e] a further claim for psychiatric treatment which expressly does not address the surgery issue." (Dec. 199-200.) Dr. Bono and the employee are noticeably absent from the judge's assessment of blame. At the outset of the hearing, the judge disclosed that Dr. Bono was his personal physician, he had performed a total hip replacement on the judge, and, "I think the world of Dr. Bono." (Tr. 10.) After this disclosure, the parties did not object to the judge hearing the case. However, because the surgery was not an issue in dispute, they could not foresee that the judge would create an issue about it on his own. The judge also found that the employee, "was within his rights to insist on the doctor in whom he has the most confidence performing this difficult, major surgery," oversimplifying the extent of the employee's rights under the law. (Dec. 200.) An employee's right to require the insurer to pay for any medical treatment is not unfettered and is limited by G.L. c. 152, § 13 (setting the rates for charges for treatment) and § 30 (permitting an employee to change specialists once without the insurer's permission). More importantly, this finding rested on the unsupported assumption that, despite previously acting as the impartial medical examiner in the employee's case, Dr. Bono was in fact willing to perform the surgery; the request at issue here was for an examination only. (Ex. 8.) We note that the Department's website contains a question- and-answer page for impartial medical examiners, entitled "Frequently Asked Questions by Physicians," which states in pertinent part:

> 10. May I refer the injured worker to another professional?
> No. You make your examination and formulate opinions from the medical records the Department provides you. **You may neither refer nor treat the worker after your examination is completed**.

http://www.mass.gov/lwd/workers-compensation/attorneys-information-for-workers-comp/best-practices/ime/faqs-by-docs.html (emphasis supplied).

> attorney's fee. (I note that the employee's attorney has already received two hearing fees and other payments totaling more than $10,000 in earnings) I assess no penalty against the insurer but observe that their [sic] continuing inaction will result in the continuing payments of Section 34A permanent and total disability compensation and for the needed orthopedic, pain management and psychiatric medications and treatment.

(Dec. 200-201.) From his findings of fact,[11] the judge drew a negative inference regarding the insurer's failure to offer to pay Dr. Bono in excess of the established examination rates.[12] The judge erred in drawing that negative inference.

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[10] Earlier, the judge suggested that counsel for the employee should have paid Dr. Bono the "$125 up front (and then expense it)." (Dec. 200.) Such a payment could not be "expense[d]" by counsel as it is not a "necessary expense" of litigation. 452 Code Mass. Regs. § 1.02. We also question whether the employee's attorney could properly pay for medical treatment incidental to the ordered total knee replacement surgery without obtaining a prohibited financial interest in the ongoing claim. See, Mass.R.Prof.C. Rule 1.8(e)(1) and (2), as appearing in 426 Mass. 1301, 1339 (1998)(prohibiting financial assistance to clients in connection with pending or contemplated litigation except for advancement of "court costs" and "expenses of litigation").

[11] The insurer takes issue with the judge's findings that the employee's attorney was "unable to convince the insurer to pay the extra $125," and that the insurer had demonstrated "intransigence" in regard to the requested payment for the examination. (Ins. br. 15-16.) The insurer correctly argues that there was no evidence that Dr. Bono's office or the employee's attorney ever replied to the insurer's offer to pay board rates for the examination or that the insurer was further contacted regarding the examination. The only evidence on the issue was the adjuster's testimony that after she responded to Dr. Bono's initial request, no one ever contacted her again about the request. (Tr. 66.) The complained of findings, unsupported by the evidence, were arbitrary and capricious. Castillo v. M.B.T.A., 24 Mass. Workers' Comp. Rep. 351, 358 (2012)(findings unsupported by the evidence are arbitrary and capricious and cannot stand).

[12] General Laws, c. 152, § 13(1), as amended by St. 2012, c. 224, § 146 (November 4, 2012), states in relevant part:

> (1) The rate of payment by insurers for health care services adjudged compensable under this chapter shall be established by the executive office of health and human services under chapter 118E or a governmental unit designated by the executive office; provided however that a different rate for services may be agreed upon by the insurer, the employer and the health care service provider.

Armstrong v. Commercial Air Tech., 16 Mass. Workers' Comp. Rep. 100, 102 (2002)("While it may be in the insurer's ultimate best financial interest to make a payment in excess of the established rates, it would be error to draw a negative inference from the insurer's election not to do so.") The judge further erred by using this negative inference as the foundation for ascribing blame to the insurer for the employee's failure to have the surgery, a situation the judge found to be "intolerable." (Dec. 200.)

Despite stating he was not penalizing the insurer for doing what the law allows, the judge's threat and order that the insurer's "continuing inaction" would result in the ongoing payment of § 34A benefits, resembles an order of civil contempt against the insurer. "Civil contempt is an equitable action where the power of a court is used to secure an aggrieved party the benefit of a decree or to coerce compliance with an order where there is undoubted disobedience of a clear and unequivocal command." Carter v. Shaughnessy Kaplan Rehab Hosp., 9 Mass. Workers' Comp. Rep. 437, 445 (1995), citing United Factory Outlet, Inc. v. Jay's Stores, Inc., 361 Mass. 35, 36 (1972). In addition to lacking the threshold showing of "disobedience of a clear and unequivocal command," the administrative judge "does not have the power to enforce [his] own judicial orders." Id. Thus, to the extent the judge intended to coerce compliance with a course of action he misguidedly believed was consistent with his prior order, the judge further exceeded the scope of his authority.

Lastly, the sole argument advanced by the employee on appeal, concerning the reduction in the employee's attorney's fee, stems from the same set of findings. (Employee br. 11-12.) The reduction in the employee's attorney's fee, not made for any valid reason set forth in § 13A(5), but clearly intended as a

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(footnote 12 cont.)

> Except as provided above, no insurer shall be liable for . . . health services in excess of the rate established for that service by the said executive office, regardless of the setting in which the service is administered . . . .

penalty for the employee's counsel's failure to pay Dr. Bono the $ 125.00, is also erroneous as a matter of law. Fox v. STG Props./ Scott Gerace, 26 Mass. Workers' Comp. Rep. 57, 61-62 (2012)("The punitive nature of the judge's reduction of the attorney's fee . . . runs afoul of the statute and case law.")

The judge's expressions of anger and frustration toward the insurer and the employee's attorney were inappropriate and lacked any basis in the law. The judge's failure to address the insurer's defenses, considered against the backdrop of his creation of a new issue, along with his comments, criticisms, and rulings against the insurer and the employee's attorney regarding that issue, call into question the judge's ability to rule impartially on the actual issues in controversy on recommittal.[13] We vacate the decision and award, and forward the case to the senior judge for assignment to a different administrative judge for a hearing de novo. The underlying conference order remains in effect pending the results of the hearing de novo. Lafleur v. M.C.I. Shirley, 25 Mass. Workers' Comp. Rep. 393, 396 (2011).

So ordered.

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Catherine Watson Koziol
Administrative Law Judge

[13] The Model Code of Judicial Conduct for State Administrative Law Judges, as promulgated by the American Bar Association, prescribes the code of conduct for administrative judges and administrative law judges at the Department of Industrial Accidents. G. L. c. 23E, §8. The code states in pertinent part:

> A state administrative law judge shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances where: (a) the judge has a personal bias or prejudice concerning the proceeding.

The American Bar Association, Model Code of Judicial Conduct for State Administrative Law Judges Canon 3(C)(1)(a). The insurer's citations to the Massachusetts Code of Judicial Conduct are misplaced.

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Mark D. Horan
Administrative Law Judge

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Carol Calliotte
Administrative Law Judge

Filed: ***September 16, 2013***