COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 024292-97**

Mark DeCristoforo	Employee
HER Construction Company, Inc.	Employer
Granite State Insurance Co.	Insurer

REVIEWING BOARD DECISION
(Judges Maze-Rothstein, Carroll & Levine)

APPEARANCES
Erin M. Clasby, Esq., for the employee
Craig A. Russo, Esq., for the insurer

MAZE-ROTHSTEIN, J. Finding no compensable personal injury arising out of and in the course of employment, an administrative judge dismissed the employee's claim for continuing benefits. The employee appeals that decision alleging errors. Because the arguments have merit, we recommit the case.

Mark DeCristoforo was thirty-five years old at the time of the hearing. A union carpenter, he was assigned to jobs through a union hall. On June 3, 1997, HER Construction hired him to do framing work on dormitory additions at Stonehill College. The employee claims that, on June 6, 1997, while working on an unfinished roof, he fell on to the roofing frame and injured his lower back, fractured a right rib and seriously aggravated a pre-existing work-related cervical condition. (Dec. 4, 8.)

The insurer paid the employee G. L. c. 152, § 34 weekly total temporary incapacity benefits on a without prejudice basis. See G.L. c. 152, § 8(1). On July 30, 1997, the insurer terminated those benefits. See G.L. c. 152, § 8(2). Thereafter, the employee filed a claim for compensation that met with the insurer's resistance. The claim was denied at a § 10A conference and the employee timely appealed to a hearing de novo. The issues at the hearing were liability (whether or not an industrial injury occurred), disability and extent thereof, causal relationship and § 1(7A). The judge

bifurcated the hearing, taking evidence on initial liability and extent of a pre-existing condition in phase I, leaving extent of medical disability and earning capacity to be dealt with in phase II. (Dec. 2, 3, 4.)

In his decision, issued after the close of testimony in phase I, the judge dismissed the employee's claim stating, "I find that Mr. DeCristoforo did not sustain a compensable injury, arising out of and in the course of his employment with HER Construction on June 6, 1996 [sic]." (Dec. 13.) It is the subsidiary findings on which this conclusion rests which prompt the employee's appeal.

Our standard of review differs from that of the courts' arbitrary, capricious and contrary to law in one particular. The statute authorizes a determination that a decision requires recommittal for further findings where appropriate. G. L. c. 152, § 11C.[1] This discretionary standard enables the reviewing board to "be the guardians of both the form and substance of the hearing judge's decision" to ensure principles of law are accurately applied to facts found from evidence properly in the record. See, Donahue v. Petrillo, 8 Mass. Workers' Comp. Rep. 36, 43 (1994). Adhering to this § 11C standard, we address the subsidiary findings called into question by the employee and conclude that the decision is tainted with legal error and contains key liability findings without support in the record. As the record itself can support more than one result, recommittal is appropriate. See, Medeiros v. San Toro Mfg., 7 Mass. Workers' Comp. Rep. 66, 68 (1993)(reversal appropriate where the evidence, and all rational inferences, can support only one result).

First, the judge erred in analyzing the mechanism of the alleged industrial accident. He found as follows:

> Mr. DeCristoforo testified as follows to the scenario of the alleged fall: "I was putting plywood down on the rafters and my foot slid through the rafters. Then I fell on my side on the rafters . . . My leg went through from my hip, to my ribs, to my shoulder and head on the rafters…. Just my leg went right through the rafters." [Transcript, Pages 25-26] *Having more*

[1] The actual language of G. L. c. 152, § 11C reads in pertinent part as follows: "The reviewing board may, when appropriate, recommit a case before it to an administrative judge for further findings of fact."

> *than just a passing familiarity with construction framing procedures*, I find Mr. DeCristoforo's description of the incident to be seriously lacking plausibility and inconsistent with the nature of his described injuries. Since the starting course of plywood sheathing was already in place, according to the testimony of both Mr. Baptista and the claimant, a carpenter would then be standing on those flat sheets and placing successive sheets over the exposed rafters in front and slightly above where he would be standing, depending on the pitch of the roof. If one were to fall onto exposed rafters, it would be akin to "falling uphill" with the upper body and arms first to strike the rafters. For Mr. DeCristoforo to fall through exposed rafters with his "leg went through from my hip, to my ribs, to my shoulder and head on the rafters" would indicate that he had to have fallen straight down through that narrow 16" gap between exposed framing members and either strike the floor below or grab onto a rafter to keep from falling further. If only a single leg had fallen between the rafters, his descent would have been stopped at his crotch level and he could not have struck his ribs with any force or struck his cervical area unless there were some other physical gyrations which he failed to describe.

(Dec. 7-8)(emphasis added.) This commentary reveals that the judge went beyond the parameters of credibility determinations, which are properly within his discretion, to reach his conclusion. See Lettich's Case, 403 Mass. 389, 394 (1988) It appears that the judge erroneously substituted his personal knowledge for evidence in the record. Even if the administrative judge has "more than just a passing familiarity with construction framing procedures,"(Dec. 7), he "may not use [his] expertise as a substitute for evidence in the record" to become in effect a silent witness in the proceeding. Arthurs v. Board of Registration in Medicine, 383 Mass. 299, 310 (1981). Contrast Mulcahey's Case, 26 Mass. App. Ct. 1(1988)(where adjudicatory expertise of board members on earning capacity issues has been legally sanctioned). The reasoning behind this principle is evident: For a fact to be relied upon it must be in the record so that the parties may confront and dispute it and to enable appellate review as to the propriety of the findings and conclusions. If a judge relies on proficiencies that appear nowhere in the record, effective judicial review is impossible as the bases for the findings "would become lost in the haze of so-called expertise. . . ." Arthurs, supra at 310. This is not to say that an administrative judge is precluded from ever applying personal knowledge,

however, that knowledge should not be the *sole* basis for rulings or findings made. Commonwealth v. Gilchrest, 364 Mass. 272, 278 (1973). It is imperative that there be some evidence in the record to corroborate the judge's personal knowledge, if utilized. Id.; see also D'Amour v. Board of Registration in Dentistry, 409 Mass. 572, 585 (1991) (failure to put in the record the basis for the use of "expertise" renders the decision incapable of appellate review). Further, the judge's personal knowledge should be disclosed to the parties, who may then either address it by submission of evidence or request a recusal. Otherwise, the judge's "expertise would then be on its way to becoming a 'monster which rules with no practical limits on its discretion.' " Arthurs, supra at 310, quoting Baltimore & Ohio R.R. v. Aberdeen & Rockfish R.R., 393 U.S. 87, 92 (1968).

Here, there is no evidentiary basis for the judge to determine that the circumstances surrounding the alleged workplace injury were "akin to falling uphill."[2] (Dec. 7.) We must, therefore, recommit the decision for further findings on this point. For all practical purposes, the judge has notified the parties *ex post facto* of his "expert" account of the mechanics of the alleged workplace injury. Accordingly, he should afford the parties the opportunity to provide further testimony as to the structural characteristics of the roof involved and the mechanism of the alleged injury in relation thereto. The allowance of further testimony is consistent with the basic due process principle of the opportunity to present testimony necessary to fairly address a disputed issue in the case, liability. See Coggin v. Massachusetts Parole Board, 42 Mass. App. Ct. 584, 589 (1997).

Additionally, the administrative judge drew an improper negative inference in stating that

> Mr. DeCristoforo's scenario [of how he fell] makes no sense whatsoever and describes a situation which could not have gone unnoticed by other workers in the immediate area, of which there were several. Mr. DeCristoforo did not provide any such co-workers as witnesses to confirm his claim of a [sic] alleged fall at work, even though he testified that "there

[2] The evidentiary record fails to provide any information as to the pitch of the roof. Such determinations of fact are necessary to enable proper appellate review.

> were two other people on the ground below me" and one of them "asked if I was okay."

(Dec. 8)(citation omitted.)

As to absent witnesses to an incident at the workplace on June 6, 1997, that the employee did not produce, the general rule is as follows:

> [W]here a party has knowledge of a person who can be located and brought forward, who is friendly to, or at least not hostilely disposed toward, the party, and who can be expected to give testimony of distinct importance to the case, the party would naturally offer that person as a witness. If, then, without explanation, he does not do so, the [judge] may, if [he] think reasonable in the circumstances, infer that person, had he been called, would have given testimony unfavorable to the party. . . ."

Commonwealth v. Figueroa, 413 Mass. 193, 199 (1992), quoting Commonwealth v. Schatvet, 23 Mass. App. Ct. 130, 134 (1986). However, because an adverse inference can be fatal, or nearly so, to the position of the noncalling party – implying that the party purposely attempted to hide significant information – its use should be confined to clear cases and implemented with caution. Id. The rule should only be exercised with appropriate safeguards. The trier of fact must establish that the possible witness is in control of the party and available. Grady v. Collins Transport Co. 341 Mass. 502, 504 (1960). "Control" simply means that the party and the possible witness have such a relationship that it is likely that the witness's presence could be procured. Id. at 504-505. "Available" is similar in meaning to "control." Id. at 505. The transcript in this case lacks any indication that the employee had control of his co-workers and that they were available. Absent that, an adverse inference could not be properly made and was an abuse of discretion. Id. We reverse the finding to that effect.

Though the judge found additional bases for denial in his view of the employee's medical condition just prior to the incident,[3] said condition was not dispositive of the question of a further work related injury. Moreover, the judge did not isolate his findings on the employee's antecedent medical condition from his impermissible opinion about the mechanism of the injury when addressing liability. Thus, because the errors go to a central and sharply disputed issue in the case and because they were an incalculable part of the foundation for the ultimate finding on liability, having a plausible injurious affect on the substantial rights of the parties, we can not deem them harmless. See DeJesus v. Yogel, 404 Mass. 44, 47-49 & n. 4 (1989)(addressing the issue of and standard for finding harmful error); Gompers v. Finnell, 35 Mass. App. Ct. 91, 95 (1993). Contrast LaPlant v. Maguire, 325 Mass. 96, 98 (1949) and Bendett v. Bendett, 315 Mass. 59, 65-66 (1943) (illustrating harmless error where the evidence is cumulative).

Accordingly, we recommit the case for further findings without consideration of the disallowed findings, and for further testimony as either party deems necessary in light of this opinion. If the judge determines that the employee was injured within the scope of his employment, he should then address the extent of incapacity and any diminution in the employee's earning capacity as a result. The administrative judge's findings

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[3] The judge also found, "The Brockton Hospital Outpatient Physical Therapy Referral records of May 8, 1997 indicate 'pt [patient] relates recent right rib fx's [fractures.]' " (Dec. 9.) However, the first reference to the employee's rib fractures is contained in a physical therapy note of June 24, 1997, weeks after the alleged industrial accident.

A package of medical records from Brockton Hospital was submitted as a joint exhibit. (Dec. 1; Medical Exhibit 1.) In that exhibit is a page, labeled "Physical Therapy Cervical Spine Evaluation," on which is written the above-referenced notation, "pt. relates recent right rib fx's." This page is undated. However, in the notes under the "Physical Therapy Assessment" in the Brockton Hospital Outpatient Physical Therapy Referral is the June 24, 1997 note, which states: "See cervical spine evaluation form for findings, plan and goals." The undated Physical Therapy Cervical Spine Evaluation containing the reference to the employee's rib fractures is the only form of its kind in evidence. As such, the judge's conclusion, "The medical evidence is overwhelming that [the employee] had . . . fractured his rib long before the date of his alleged fall" (Dec. 10) is dubious at best. Though the packet appears largely in chronological order, the evidence itself is far from "overwhelming". Id.

regarding such incapacity, if any, should conform to the principles expounded in Scheffler's Case, 419 Mass. 251, 256 (1994).

So ordered.

Susan Maze-Rothstein
Administrative Law Judge

Martine Carroll
Administrative Law Judge

Filed: April 14, 2000

LEVINE, J. (Dissenting) I agree that the judge erred both when the judge relied on his purported expertise to discredit the employee's description of the alleged industrial injury and when the judge cited the employee's failure to call co-workers as witnesses on his behalf. However, I disagree that these errors require reversal and recommittal. This is because the judge gave several other unchallenged, error-free reasons for denying the claim. As a result, the aforesaid errors the judge did make were not "of such significance as to substantially affect the judge's conclusion." Decker v. Boston Rent Bd., 13 Mass. App. Ct. 907 (1982).

The judge found that for some time prior to the alleged industrial injury of June 6, 1997, the employee had been receiving treatment for cervical and lumbar pain. He had been prescribed medications and physical therapy; he had taken a couple of weeks off from work. (Dec. 8, 9). On June 5, 1997, one day prior to the alleged fall, the employee was treated at the Brockton Hospital for cervical and lumbar tenderness. On that day an MRI was scheduled for June 13, 1997. (Dec. 9). Furthermore although the employee had visited extensively at the Brockton Hospital prior to the alleged incident of June 6, 1997, the judge found it "somewhat inexplicable" that three days after the alleged industrial injury, the employee sought treatment at Good Samaritan Hospital "for

treatment which involved the same body parts." (Dec. 10). The judge further observed that

> those Good Samaritan records contain no mention of [the employee's] significant past history of cervical radiculopathy. Mr. DeCristoforo also saw Arthur Carrier, M.D., … on June 17, 1997 and July 1, 1997. There is absolutely no mention in those records of any of the past cervical and lumbar history, but Dr. Carrier does mention that "On this occasion despite the fact that he stated he'd not had significant problems in the past, he tells me that he has been treating with another physician who [sic] name he would not give me."

Id.

Thus, for medical[4] and unchallenged other reasons, the judge found the employee's case unpersuasive:

> The medical evidence is overwhelming that Mr. DeCristoforo had injured his neck, lumbar spine, shoulder, fractured his rib long before the date of his alleged fall.[5] He was on strong medications; had been prescribed a cervical collar; had been scheduled for MRI testing; and had visited an emergency room for continued ongoing pain and discomfort only one day prior to the alleged fall. He had no health insurance and had only started work with this employer a few days prior. He alleges a serious fall which aggravated his already-compromised cervical spine on Friday and does not go to any hospital for three days -- and then goes to a different hospital and a different physician without giving them his pertinent past medical history, rather than returning to those medical personnel who have already scheduled MRIs and a follow-up visit for his long-standing problems! This inconsistent action raised serious question regarding the claimant's motivation.

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4 Recall that the judge's errors set out in the text of the majority relate to non-medical aspects of the case.

5 I agree with footnote 3 supra, that the evidence that the employee fractured his rib long before June 6, 1997 is not "overwhelming." However, the Brockton Hospital records the parties jointly submitted are in chronological order. Between an April 9, 1997 Emergency Department record and a May 8, 1997 series of records, appears an undated record entitled, "Physical Therapy Cervical Spine Evaluation." This record contains the entry, "pt related recent right rib fx's." Given that this record appears in what is the otherwise chronologically correct order of records, the judge fairly could infer that the aforesaid record is in chronological order and therefore the employee fractured his rib prior to June 6, 1997. I would also note that immediately after the aforesaid physical therapy record is a May 8, 1997 record entitled "Brockton Hospital Outpatient Physical Therapy Referral." The juxtaposition of these two records suggests they are related and also warranted the judge to infer that the rib fracture occurred prior to June 6, 1997. Or, put

(Dec. 10-11, emphasis in original). The judge's analysis -- despite the errors made -- warrants the conclusions he reached. This is not an appropriate case for recommittal. The decision should be affirmed. Decker, supra. Compare Garbarino v. Vining Disposal, Inc., 12 Mass. Workers' Comp. Rep. 173, 181 (1999)(in a § 27A case, the judge erroneously imputed to the employee the presumed knowledge of his attorney that the employee's physical condition put the employee at risk of suffering a serious injury if he went to work for the employer; nevertheless, this error was held to be harmless because other of the judge's findings supported his conclusion that the employee had such knowledge).

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Frederick E. Levine
Administrative Law Judge

another way, these records support the judge's conclusion that the employee did not satisfy his burden of proof that he fell at work on June 6, 1997.