COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS

BOARD NO. 049277-03

Patricia Smith	Employee
Partners Healthcare System, Inc.	Employer
Partners Healthcare System, Inc.	Self-Insurer

REVIEWING BOARD DECISION
(Judges Horan, Costigan and Koziol)

The case was heard by Administrative Judge Taub.

APPEARANCES
James S. Aven, Esq., for the employee
Donald M. Culgin, Esq., for the self-insurer

HORAN, J. The employee appeals from a decision denying her claim for workers' compensation benefits for a September 15, 2003 industrial injury. We recommit the case for further findings of fact.

The employee worked as a registered nurse for the self-insurer in their Rockland office, where she was responsible for "central intake, processing referrals and arranging for . . . appropriate homecare services." (Dec. 4.) In August 2003, the employee began to suffer from numerous symptoms, including "fierce headaches, 'jumpy' vision, and balance problems." Id. She claimed these symptoms, which forced her to leave work as of September 15, 2003, were caused by pesticide spraying at work.[1] (Dec. 4-5.)

The employee's claim for incapacity and medical benefits was denied following a § 10A conference, and she appealed. On June 5, 2006, Dr. Barbara Scolnick examined the employee pursuant to § 11A, and issued a medical report. (Stat. Ex. 1.) In her report, Doctor Scolnick opined:

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[1] The parties do not dispute the employee's workplace had been treated, at least in July 2003, with Talstar, an insecticide used to eradicate mites. (Dec. 5.)

> In summary, I am at a loss to find out what is wrong with this woman. . . . I cannot find an organic cause for her symptoms. *The connection between the exposure and the symptoms is, in my opinion, to [sic] weak to be of any clinical or legal significance.*

(Stat. Ex. 1; emphasis added.) The employee filed a motion to open the medical evidence, arguing that Dr. Scolnick's report was inadequate or, in the alternative, requesting a finding of medical complexity.[2] See G. L. c. 152, § 11A(2). The motion did not request that Dr. Scolnick's report be stricken from the record. The judge heard the motion on the first day of the hearing, August 3, 2006, and denied it. (Dec. 2.)

On December 18, 2006, following the lay testimony at hearing, the employee deposed Dr. Scolnick. The doctor testified that in addition to reviewing the medical reports and records submitted by the parties, she received and reviewed non-medical evidence.[3] She iterated her opinion that she could not adequately explain the cause of the employee's symptomatology. (Dep. 47.)

On January 2, 2007, the employee filed a second motion requesting a finding of inadequacy and/or complexity. Under the heading of "inadequacy," the employee argued that Dr. Scolnick did not meet the eligibility criteria to serve as a § 11A medical examiner, appeared unqualified to address cases involving chemical exposures, and was biased.[4] Under the heading of "complexity," the

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[2] This, the first of two such motions, was filed by the employee on August 2, 2006. We take judicial notice of documents within the board file. Rizzo. v. M.B.T.A., 16 Mass. Workers' Comp. Rep. 160, 161 n.3 (2002).

[3] These non-medical exhibits included reports from the state's pesticide bureau, toxicologist, and the Division of Occupational Safety. Dr. Scolnick also reviewed an inspector's report prepared at the self-insurer's behest. (Dep. 33-34.) These reports were not admitted into evidence. See Patterson v. Liberty Mutual Ins. Co., 48 Mass. App. Ct. 586 (2000). Dr. Scolnick acknowledged she was influenced by, and relied upon, these reports. (Dep. 34, 56.)

[4] The allegation of bias centered, in part, on Dr. Scolnick's testimony that she did not know whether she had any past affiliation with the self-insurer, and could not say whether her husband, who was also in private practice, did:

employee cited passages from Dr. Scolnick's deposition in support of her argument. Again, the motion did not contain a request to strike Dr. Scolnick's opinion from the record.[5]

On May 30, 2007, the parties appeared before the judge to argue the merits of the employee's second motion concerning the adequacy of Dr. Scolnick's opinion, and whether the case was medically complex. Contrary to the statement of the case contained in her brief, the employee did *not* move to strike Dr. Scolnick's report "due to her receipt and review of non-medical documents, which had not been properly submitted through the . . . [j]udge for her review nor admitted into evidence at . . . hearing." (Employee br. 3.) The judge then issued a written ruling allowing each party to submit additional medical evidence based on his finding of medical complexity. Thereafter, the employee submitted the deposition testimony of Dr. Howard Hu, and the self-insurer submitted the deposition testimony of Dr. Thomas H. Winters. (Dec. 1.)

The judge found no merit to the employee's contention that Dr. Scolnick was unqualified to serve as an impartial medical examiner. (Dec. 3.) He adopted

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> Q: You don't know if he's connected to Partners in any way?
> A: Partners has so many relationships now with so many different medical clinics he might be. I don't know.

(Dep. 8.) Dr. Scolnick also acknowledged her name appeared on a document identifying members of an advisory committee for the Department of Psychiatry at Massachusetts General Hospital, but had no recollection of having served on the committee. (Dep. 11, 26-27.)

[5] Addressing the argument that Dr. Scolnick was unqualified to serve as an impartial medical examiner, the judge wrote: "At the time of her arguing for additional medical evidence on May 30, 2007, the employee had asserted that Dr. Scolnick's report and opinion ought to be entirely stricken from the record and moved for that." (Dec. 3.) In fact, the record is void of any request to strike either Dr. Scolnick's report or her deposition testimony. See discussion, infra. However, the charge of bias, by its nature, invites nothing less than a motion to strike. This is because if the impartial medical examiner is biased as to a party, his/her opinion *cannot* be considered. Amoroso v. University of Mass. Med. Sch., 19 Mass. Workers' Comp. Rep. 233, 237 (2005).

her medical opinion, concluding "I cannot and do not find it more likely than not that the symptoms of which Ms. Smith complains were brought about by a workplace chemical exposure." (Dec. 8.) The decision, like the judge's written ruling on the employee's second motion, failed to mention or discuss the employee's claim of bias. See footnote 4, supra. In denying and dismissing the employee's claim, the judge concluded his general findings as follows: "In the end, I found the analysis of Dr. Scolnick most convincing . . . that the exposure to the insecticide at work was not a major cause of the employee's symptoms." (Dec. 8.) The employee raises three issues on appeal.

The employee's first argument is that because Dr. Scolnick impermissibly reviewed and relied upon non-medical evidence prior to authoring her § 11A report, the judge erred by failing to strike her report from the record.[6] Barrett v. Kiewit Atkinson Cashman, 19 Mass. Workers' Comp. Rep. 286 (2005). In Barrett, the § 11A medical examiner had received and reviewed a copy of the report of the employee's vocational expert, contrary to 452 Code Mass. Regs. § 1.14(2).[7] Barrett, supra at 287-288. The § 11A examiner's reported opinion was adverse to the insurer. Id. at 288. Accordingly, citing the regulation, the insurer moved to strike the § 11A examiner's report from the record; the judge denied the motion. Id. On appeal, cognizant of the "sanctity of the impartial medical examiner system," we held:

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[6] It is unclear how Dr. Scolnick received the non-medical exhibits. The record fails to demonstrate that the judge authorized and/or caused the non-medical documents to be sent to Dr. Scolnick.

[7] The regulation, in pertinent part, provides:

> 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.

> Where, as here, the regulation has been violated, and the impartial medical examiner's reported opinion is adverse to *the objecting party*, the report must be stricken, and a new impartial medical examiner's opinion, and/or additional medical evidence, must be considered to fairly address the medical issues in dispute. See O'Brien's Case, [424 Mass. 16, 22-23 (1996)].

Barrett, supra at 289, 290. (Emphasis added.) Here, the employee never moved to strike Dr. Scolnick's report on the authority of Barrett.[8] Instead, intent on persuading the judge to permit her to admit her own medical evidence at hearing on complexity grounds, the employee pursued a different strategy, arguing as follows:

> Last issue on complexity is that while during the deposition it became apparent to us, to the attorneys, that she [Dr. Scolnick] had documents in front of her labeled non-medical exhibits for submission. And those were the Department of Agriculture report, dated 5-13-04 and the Division of Occupational Safety report, dated 2-3-05. . . . The Barrett case also stands for *the suggestion* that the impartial should only be evaluating medical records. Certainly, if she wanted to see these additional documents, the more appropriate way would have been for her to request through the Department so the parties could be involved in what other documents she considered.
> The last area that I ask your Honor to consider is what I label practicality and fairness; and that is, the admission of additional medical evidence does not bound [sic] the court to any decision. *It does not mean that the Court cannot accept the opinions of the impartial.*

(May 30, 2007 Tr. 7-8; emphasis added.)

Thus, contrary to her characterization of the argument she advanced at hearing,[9] the employee not only failed to move to strike Dr. Scolnick's report, she

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[8] Nor did the employee move to strike the report based on the authority of Patterson, supra at 590 n.12.

[9] See employee br. 3.

acquiesced to its use. Therefore, she waived her right to argue, for the first time on appeal, that the judge erred when he adopted Dr. Scolnick's opinion. Commonwealth v. Head, 49 Mass. App. Ct. 492, 494 (2000)(a party "may not try his case on one theory and then obtain appellate review on a theory not advanced below"); Green v. Town of Brookline, 53 Mass. App. Ct. 120, 128 (2001)(issue waived if not presented to judge below); Vassallo v. Baxter Healthcare Corp., 428 Mass. 1, 11 (1998)("established principle" that in civil cases, issues not properly raised in trial court will not be considered on appeal); Echeverria v. Costa Fruit & Produce, 24 Mass. Workers' Comp. Rep. ___ (January 11, 2010)(failure to move to strike medical expert opinion at hearing waived admissibility issue on appeal).

Next, the employee argues the judge's causation findings suggest he did not apply the correct rules of law. "It is the duty of an administrative judge to address the issues . . . in a manner enabling this board to determine with reasonable certainty whether the correct rules of law have been applied. . . ." Praetz v. Factory Mut. Eng'g and Research, 7 Mass. Workers' Comp. Rep. 45, 47 (1993). We agree, as the judge referenced the "a major" causation standard found in G. L. c. 152, § 1(7A), and the self-insurer did not raise § 1(7A) as a defense. (Dec. 2, 8.) Thus, the "as is" causation standard applies to the employee's claim. In view of Dr. Scolnick's opinion that, "[t]he connection between the exposure and the symptoms is, in my opinion, to [sic] weak to be of any clinical *or legal significance,"* (Stat. Ex. 1; emphasis added), and the applicable "as is" causation standard,[10] we recommit the case for more definite findings on the causation issue.

Lastly, the employee argues the judge erred when he failed to address the issue of bias. See footnote 4, supra. We agree. E.g., Lamb v. Louis M. Gerson Co., Inc., 11 Mass. Workers' Comp. Rep. 584, 587 (1997); Martin v. Red Star Express Lines, 9 Mass. Workers' Comp. Rep. 670, 673 (1995).

[10] E.g., Braconnier's Case, 223 Mass. 273 (1916); Crowley's Case, 223 Mass. 288 (1916).

Accordingly, we recommit the case for the judge to make further findings on the issues of causation and bias.

So ordered.

Mark D. Horan
Administrative Law Judge

Patricia A. Costigan
Administrative Law Judge

Catherine Watson Koziol
Administrative Law Judge

Filed: February 17, 2010