COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO.:** 043302-96

Richard Ellison	Employee
NPS Energy Services, Inc.	Employer
Insurance Co.State of Pennsylvania	Insurer

REVIEWING BOARD DECISION

(Judges Costigan, Horan and Fabricant)

The case was heard by Administrative Judge Chivers.

APPEARANCES

David J. McMorris, Esq., and Zoran Malesevic, Esq., for the employee
John J. Canniff, Esq., for the insurer

COSTIGAN, J. In Ellison v. NPS Energy Servs., Inc., 20 Mass. Workers' Comp. Rep. 345, 346 (2006), we recommitted this case to the administrative judge for additional findings addressing the employee's vocational profile, as his original decision was "bereft of the analysis required by Frennier's Case, 318 Mass. 635 (1945) and Scheffler's Case, 419 Mass. 251 (1994)." We concluded the judge had erred by using the employee's failure to seek work "as the *only* non-medical factor cited . . . in his findings."[1] Id. at 347. (Emphasis original.) The judge was supposed to make "an appropriate individualized assessment of the employee's post injury earning capacity under the [above] principles . . . in consort with § 35D." Id. at 349.

On recommittal, the administrative judge concluded:

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[1] The board also took issue with the judge's statement that the employee had agreed to a work capacity for the last four years he collected § 35 partial incapacity benefits, and had not searched for work even then. We noted the judge's reasoning flew "in the face of our stated view that employees are not required to prove a 'worsening' to qualify for § 34A benefits following receipt of § 35 benefits under a § 19 agreement. See Dullea v. General Electric Co., 19 Mass. Workers' Comp. Rep. 91, 93 (2005); Listaite v. Worcester Telegram & Gazette, 17 Mass. Workers' Comp. Rep. 485, 488 (2003)." Ellison, supra at 347 n.5.

> There really are no further findings to be made in this case. Part of the initial problem, I felt, was that there was simply not strong enough evidence for the employee to prove his claim for total and permanent benefits based on the restrictions as outlined. The Reviewing Board plainly reverses this portion of the ruling.

(Dec. 2.) First, we did no such thing. We simply instructed the judge that, as a matter of law, neither the employee's failure to look for work, nor his agreement to receive partial incapacity benefits for four years, was dispositive of his claim of permanent and total incapacity. Second, we sent the case back to the judge for a vocational analysis, as we are not fact finders. The authority to find facts belonged exclusively to the judge, but he utterly abdicated that authority. The judge awarded the employee § 34A benefits with the following "analysis":

> Mr. Ellison is 76 years old. He has a long work history as a millwright which involved heavy work he can no longer do. *Apparently then* it is unlikely that he could find work in the open labor market.

(Dec. 2; emphasis added.)

We agree with the insurer that the decision and award cannot stand. Because the judge failed to perform the vocational analysis we required, recommittal is once again necessary. However, we have no assurance that another recommittal to this judge would be anything but an exercise in futility. Therefore, "we conclude that this is an extraordinary case, warranting assignment to a different administrative judge." Joseph v. City of Fall River, 16 Mass. Workers' Comp. Rep. 261, 264 (2002), citing Gallant v. TRW, Inc., 13 Mass. App. Ct. 901, 1003 (1982)(recommittal to [presiding member] for clarification or further findings would be exercise in futility).[2]

[2] There is ample precedent for this board to recommit a case to a different administrative judge even though the judge whose decision is the subject of the appeal is still a member of the industrial accident board. In addition to Joseph, supra, the reviewing board has done so numerous other times. See Nova v. Rocky Neck Seafood, 10 Mass. Workers' Comp. Rep. 759, 760 (1996); O'Connell v. U.S.V. Pharmaceutical, 9 Mass. Workers' Comp. Rep. 548, 549 (1995); Cowe v. Community Human Srv., Inc., 5 Mass. Workers' Comp. Rep. 113, 114 (1991); and Walsh (dec'd) v. General Electric, 4 Mass. Workers' Comp. Rep. 54, 56 (1990). In all of these cases, except Nova, the reviewing board acted without either party requesting that the case be reassigned to a different judge.

Our dissenting colleague posits that we think the judge merely misunderstood our holding on recommittal. To the contrary, we think his decision demonstrates a profound misunderstanding of his responsibility as the trier of fact. In Joseph, the judge "twice opened the record for additional medical evidence for contradictory and and independently arbitrary reasons." Joseph, supra at 261. We consider it no less egregious that the judge here, on a single evidentiary record and without adequate subsidiary findings of fact, made contradictory determinations as to whether the employee was permanently and totally incapacitated.

The dissent also suggests that this board customarily has recommitted a case to the same judge, if that judge is available, and has reassigned a case only "when multiple recommittals have demonstrated that a further one would be futile, [footnote omitted], or when due process considerations require recommittal to a new fact finder." In our view, the due process rights of the parties are very much at stake here, and because this judge abdicated his role as fact finder, we have no assurance those due process rights are best served by returning this case to him.[3]

Moreover, the Appeals Court has acknowledged the reviewing board's authority to recommit and reassign a case to a different administrative judge. In Insurance Co. of North America v. Department of Industrial Accidents (and John O'Connell), No. 95-J-817 (Memorandum and Order filed June 21, 1996), Justice Jacobs wrote:

> This AJ's unexplained inconsistent findings on O'Connell's credibility, based, as they were on a single record, warranted vacation of the decision as 'arbitrary or capricious.' See, e.g., Retirement Board of Somerville v. Contributory Retirement Appeal Bd., 38 Mass. App. Ct. 673-677-679 (1995), recommittal for further hearing and fact finding. G. L. c. 152, Secs. 10A and 11C. . . . Moreover, as a necessary adjunct to its adjudicatory function, see, e.g., Massachusetts Hosp. Assn. v. Department of Medical Sec., 412 Mass. 340, 341, 345 (1992), if for no other reason, the DIA could appropriately remand to an AJ other than that originally hearing the case. G. L. c. 152, Sec. 10A.

Id. See, also, Ronald Bongiovanni v. New England Tel. Co., No. 95-J-617 (Order filed February 29, 1996)("Should the board reverse the AJ's decision with respect to the employee's claimed post-September 8, 1986, disability, it shall immediately order a hearing on all issues . . . before a different administrative judge.")

[3] That neither party has asked for reassignment to a different administrative judge is understandable. Much like a motion for recusal, the risk of making a request for reassignment,

The dissent suggests that we should not consign this now eighty-one year old employee to litigating his § 34A claim "from scratch," and that recommittal to the same judge is consistent with the express policy contained in G. L. c. 152, § 10A. See footnote 8, infra. However, a "policy" is simply that, and it should not be used to trump the due process rights of the parties. [4] The issue here is whether the employee is entitled to permanent and total incapacity benefits for an accepted 1996 industrial injury. On the same evidentiary record, without any additional findings of fact, the judge reached opposite conclusions. Our dissenting colleague seems to think a tie-breaker recommittal is appropriate. We do not. Moreover, the employee's age, although a proper vocational factor to be considered, plays no role in the decision to reassign this case for a hearing *de novo*. Neither party's due process rights may be discounted simply because the employee is a senior citizen.

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only to have this board deny it and recommit the case to the same judge, could have a chilling effect on the party contemplating making such a request. We note that of the seven cases cited by the dissent as precedent for recommittal to the same administrative judge, (see footnote 8, infra), only two involved the board's denial of a party's request for reassignment to a different judge. Moreover, the examples of conduct identified by the board in Burrill as warranting reassignment to a different judge, are *among* the criteria. They are not all-inclusive. (See footnote 12, infra.)

[4] In Insurance Co. of North America, supra, Justice Jacobs also wrote:

> Contrary to INA's argument, I do not believe G. L. c. 152, Sec. 10A, which provides in part, . . . 'Except where events beyond the control of the department make such scheduling impracticable, the administrative judge assigned to any case referred to the division of dispute resolution shall retain exclusive jurisdiction over the matter and any subsequent claim or complaint related to the alleged injury shall be referred to the same administrative judge,' prohibits recommittal to a different AJ, as that section seems more properly aimed at efficient decision-making by an AJ familiar with the parties and the case, rather than mandating that a single AJ must, regardless of circumstances, follow a case from beginning to end.

Id., fn.2. The judge ultimately found "the AJ's unexplained and inconsistent findings on O'Connell's credibility were not irreconcilably inconsistent," and reversed the reviewing board's remand to a different administrative judge, but he clearly acknowledged the board's authority, under different circumstances, to do so.

Accordingly, we reverse the judge's decision, vacate his award of permanent and total incapacity benefits, and forward this case to the senior judge for reassignment to a different administrative judge for a hearing de novo on the employee's § 34A claim. We also vacate the judge's award of an enhanced legal fee to employee's counsel.[5]

So ordered.

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Patricia A. Costigan
Administrative Law Judge

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Bernard W. Fabricant
Administrative Law Judge

Filed: September 8, 2009

HORAN, J., concurring in part and dissenting in part. I agree with the majority that the judge misconstrued our holding in Ellison, supra, and that a second recommittal is necessary. I do not agree, however, with the majority's decision to order the parties to try the case *de novo* before a different administrative judge on the grounds that "another recommittal to this judge would [necessarily] be . . . an exercise in futility." Therefore, I dissent from that part of the majority's decision and order.

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[5] On the filing date of the judge's decision on recommittal, the statutory hearing fee under § 13A(5) was $5,103.04. The judge awarded a $7,000 fee "due to the work involved in the appeal to the Review [sic] Board that the employee and his attorney undertook in [sic] to obtain the benefits now ordered." (Dec. 3.) Although the issue is rendered moot by our reversal of the administrative judge's decision on recommittal, we think it worthwhile to point out that legal fees due for prosecution of appeals before the reviewing board are governed by §§ 13A(6) and 13A(7), and in all instances are awarded or approved by the reviewing board. We agree with the insurer that the administrative judge lacked authority to enhance a § 13A(5) hearing fee for efforts expended by employee's counsel before the reviewing board. See May v. MCI Framingham, 23 Mass. Workers' Comp. Rep. ____ (September 1, 2009).

I can find no case where a party has successfully challenged this board's authority to recommit cases to be heard by a different judge when the original judge is available.[6] In fact, as the majority points out, various single justices of the appeals court have expressly authorized the practice, even in light of the provisions of G. L. c. 152, § 10A.[7] All of this begs the crucial question: when the original judge *is* available to hear the case, and recommittal is necessary, when *should* we order recommittal to a different judge? Judiciousness and *stare decisis* require us to address this issue with consistency.

When deciding to recommit a case a second time, those familiar with our precedent know that we customarily recommit the case back to the same judge.[8] We have preferred this method over

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[6] Neither party has requested that this case be recommitted to a different judge. If the parties are not interested in trying the case *de novo* with a different judge, why should we force them to do so? I also note the employee is now eighty-one years old.

[7] General Laws c. 152, § 10A, provides, in pertinent part:

> Except where events beyond the control of the department make such scheduling impracticable, the administrative judge assigned to any case referred to the division of dispute resolution *shall retain exclusive jurisdiction over the matter and any subsequent claim or complaint related to the alleged injury shall be referred to the same administrative judge*.

(Emphasis added.)

[8] See, e.g., Seymour v. U.S. Tsubaki, Inc., 21 Mass. Workers' Comp. Rep. 211,212 (2007) (board denied insurer's request on second recommittal to assign case to different judge where causal relationship needed to be readdressed); Buckley v. Stahl USA, 21 Mass. Workers' Comp. Rep. 103, 104 (2007)(second recommittal for judge to clarify medical basis for award, no need to assign case to different judge); Wirtz v. Barry Wehmiller Group, 20 Mass. Workers' Comp. Rep. 273, 274-275 (2006)(board renews call for further medical findings on second recommittal to same judge); Stasinos v. Cherry, Webb & Touraine, 17 Mass. Workers' Comp. Rep. 222, 230 (2003)(second recommittal to same judge; judge also failed to address issue presented on first recommittal); McCarty v. Wilkinson & Company, 15 Mass. Workers' Comp. Rep. 76, 83 (2001)(case recommitted again to same judge for further findings on extent of employee's incapacity); Thompson v. Sturdy Memorial Hosp., 11 Mass. Workers' Comp. Rep. 663, 668 (1997)(second recommittal to same judge).

the practice of reassigning cases to another judge who, in most instances, must start the job from scratch.[9] We have departed from our standard approach only when the original judge is no longer available to hear the case,[10] when *multiple* recommittals have demonstrated that a further one would be futile,[11] or when due process considerations require recommittal to a new fact finder.[12]

Simply put, this is not such a case.

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Mark D. Horan
Administrative Law Judge

Filed: **September 8, 2009**

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[9] This practice is also consistent with the express policy contained in G. L. c. 152, § 10A. See footnote 5, supra.

[10] See, e.g., Pittsley v. Kingston Propane, Inc., 16 Mass. Workers' Comp. Rep. 349 (2002).

[11] Bongiovanni v. New England Tel. Co., 10 Mass. Workers' Comp. Rep. 240, 241 (1996)(reviewing board directed by single justice of appeals court not to recommit case a third time); Medley v. E.F. Hauserman Co., 10 Mass. Workers' Comp. Rep. 108, 111 (1996)(decision after second recommittal flawed, equity and justice require assignment to different judge). Notably, on at least one occasion, we have recommitted a case to the same judge thrice. Yates v. ASCAP, 11 Mass. Workers' Comp. Rep. 447 (1997). The exception to the multiple recommittal rule is Joseph v. City of Fall River, cited by the majority as an extraordinary case. In Joseph, the judge "twice opened the record for additional medical evidence for contradictory and independently arbitrary reasons." 16 Mass. Workers' Comp. Rep. at 264. I agree with the majority that the facts of Joseph justified recommittal to a different judge. I would place Joseph in the category of cases where due process considerations require reassignment to a different judge. The judge in this case, however, has done nothing as bizarre as what the judge did in Joseph.

[12] See Burrill v. Litton Industries, 11 Mass. Workers' Comp. Rep. 77, 83 (1997) for a discussion of when recommittal to a different judge would be required. These include instances of judicial bias or misconduct involving a party or counsel, an original judge's refusal to author a

second decision in proper form, or cases where the judge's credibility assessment was tainted by evidence he improperly admitted and considered. See also Nova, supra(reviewing board agreed with parties to recommit case to a different judge when original judge issued decision making credibility determination prior to completion of hearing); O'Connell v. U.S.V. Pharmaceutical, supra(case assigned to different judge where original judge issued first decision crediting employee's testimony, and on recommittal, without new testimony, issued second decision discrediting the employee's testimony).