COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 85887-89**

Roosevelt Johnson	Employee
Boston City Hospital	Employer
City of Boston	Self-Insurer

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

APPEARANCES
James A. McDonald, Jr., Esq., for the employee
Margaret H. Paget, Esq., for the self-insurer

CARROLL, J. The employee appeals from a decision in which an administrative judge authorized the self-insurer to discontinue payment of § 35 weekly incapacity benefits as of April 9, 1996. The self-insurer's discontinuance complaint was the subject of a prior decision. That decision was appealed to the Reviewing Board. The Reviewing Board recommitted the matter for further findings on the opinions of the § 11A medical examiner because the administrative judge had mischaracterized those opinions in the decision. See Johnson v. Boston City Hospital, 12 Mass. Workers' Comp. Rep. 503 (1998). (Dec. I.) After recommittal, the judge issued a new decision. (Dec. II.) Because comments by the judge in this latest decision give rise to questions of bias, we again recommit the case.

Our earlier decision sets out the facts in this matter. There is no need to repeat them here. See Johnson, supra. Germane to the present appeal is the following statement by the judge regarding the employee's brief to the Reviewing Board filed in the appeal of the first decision:

> A far better example of "mischaracterization" of evidence is found on Page 5 of the employee's Brief to the Reviewing Board. Under argument #3, counsel states: "The decision summarily dismisses [other medical evidence] . . . in favor of a one-shot examination by Dr. Cater performed at the request of the self-insurer." It further argues that "Dr. Cater's report of

> April 4, 1995 acknowledges that he had no records available for review for his evaluation and report."
>
> It is clear from Dr. Cater's reports that he examined the claimant on April 28, 1994, April 4, 1995 and on April 9, 1996. Three separate examinations cannot honestly be presently [sic] as a "one-shot" examination. In Dr. Cater's 1995 report, he states that he also evaluated the claimant one year earlier and "all medical records available at that time have been returned to claims review . . . and are not available for my review today." In his next paragraph, Dr. Cater lists with specificity the newer records available to him on April 4, 1995, which include Dr. Molloy's 1994 Impartial Report, as well as the reports and narratives of Dr. Jacques. In the final paragraph of that report, Dr. Cater also stated: "Mr. Johnson brought with him to the examination the prior CT scan and MRI of his spine and these were reviewed."
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> *Only the most-generous phrasing would describe the employee's argument as a "mischaracterization." It appears to this reader to be a deliberate attempt to mislead the Reviewing Board – with some apparent success – and goes far beyond the bounds of legitimate and vigorous advocacy. Such conduct should not be tolerated by the Department.*

(Dec. II, 9-11, italicized emphasis supplied).

The employee argues, among other things, that the last paragraph of this excerpt evidences bias on the part of the administrative judge toward the employee's counsel requiring recommittal to a different administrative judge for a hearing de novo. We are unable to say that the words in question, per se, demonstrate bias. These words do, however, present a new issue for resolution by the judge. The situation is akin to a motion for a new trial based on newly discovered evidence. See DeLuca v. Boston Elevated Ry., 312 Mass. 495, 497 (1942).

Every party in a workers' compensation case is entitled to a fair and impartial determination. Robinson v. General Motors Corp., 13 Mass. Workers' Comp. Rep. 207, 215 (1999). If the judge's words demonstrate bias toward the employee's attorney and, inferentially, the employee, then there has not been a fair and impartial determination and a new hearing before a different judge is in order. The question that must be answered is whether or not this administrative judge was biased against the employee's attorney so as

to render him incapable on recommittal of fairly determining the outcome of the matter in dispute. Commonwealth v. Edgerly, 6 Mass. App. Ct. 241, 264 (1978). That question is usually a matter resting within the trial judge's discretion. MacDonald v. MacDonald, 407 Mass. 196, 203 (1990); Harris v. Board of Trustees of State Colleges, 405 Mass. 515, 527 (1989).

Therefore, we recommit the case to the administrative judge to pass upon the question of whether he should recuse himself. In so deciding, he must search his conscience. See Robinson, supra at 217.

So ordered.

Martine Carroll
Administrative Law Judge

Frederick E. Levine
Administrative Law Judge

Susan Maze-Rothstein
Administrative Law Judge

Filed: April 14, 2000