COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 807941-85**

Ruthie L. Robinson Employee
General Motors Corporation Employer
Self-Insured

REVIEWING BOARD DECISION
(Judges Smith, Wilson and McCarthy)

APPEARANCES
Joseph P. Franzese, Esq., for the employee
Robert P. Jachowitz, Esq., for the self-insurer

SMITH, J. The employee appeals the decision of an administrative judge denying her claim for § 36 specific compensation for permanent impairment and § 30 medical benefits. The employee contends that the decision is arbitrary and capricious, and contrary to law, because the judge adopted both the decision in a prior proceeding and the § 11A impartial medical examiner's report on which that decision was based, and was biased against the employee's current medical expert. The case presents the perplexing administrative law question of whether an administrative judge in the Department of Industrial Accidents may rely on either the reputation of, or his prior experience with, a familiar expert witness. We vacate the finding about the doctor's reputation and recommit the case for further findings of fact regarding the expert's opinion.

Ruthie L. Robinson received a personal injury to her lower back on August 18, 1985. The injury arose out of and in the course of her employment on the General Motors assembly line. The self-insurer accepted liability and paid temporary total incapacity benefits until their exhaustion in July 1990. (Dec. 2-3.) Because of her date of injury, she was only entitled to continuing weekly compensation if she could prove that the injury rendered her totally and permanently incapacitated. See G. L. c. 152, § 35, as amended

by St. 1981, c. 572, § 2 (For this date of injury, there is an aggregate dollar maximum of $85,266 which is exhausted by payment of either § 34 or § 35 benefits, or any combination of both).

Robinson filed a claim for permanent and total incapacity. Dr. James Bono was appointed as the § 11A impartial medical examiner on the claim. Dr. Bono reported that he could not find any orthopedic reason why Robinson could not return to her heavy duty work on the automobile assembly line, that she was partially disabled due to subjective complaints that did not correlate with objective findings, and that she was capable of returning to part-time sedentary employment. (Judicial Notice # 1, Decision filed May 16, 1995, at 6.) The judge adopted Dr. Bono's opinion and therefore denied the § 34A claim. (Judicial Notice # 1 at 7.)

Within months of that decision, Robinson switched doctors and, in September 1995, began treating with Dr. Emilio Jacques. (Dec. 6.) Thereafter, relying on a report from her new doctor, Ruthie Robinson filed the current claim for § 36 specific compensation for permanent impairment and § 30 medical bills.[1] The insurer filed a notification of denial, asserting that "[a]ny permanent disfigurement, functional loss, and Section 13/30 not related to original injury." (Insurer's Notification of Denial filed January 16, 1997.)[2] Despite the insurer's request to have the case assigned to the same judge who had handled the § 34A claim, for administrative reasons, the new claim was assigned to a different judge for conference. (Insurer Motion filed September 5, 1997; Letter from Senior Judge to Robert P. Jachowicz, dated September 9, 1997.) At conference before the new judge, the insurer identified "causal relation of medical expenses and loss of function to indus-

[1] She filed multiple claim forms, making amendments. (Amended claims filed January 25, 1997, March 14, 1997, September 6, 1997, and September 20, 1997.) We note the lack of any record evidence of compliance with 452 Code Mass. Regs. §§ 6.04(4)(c) and (5), requiring exhaustion of utilization review procedures prior to filing claim for payment of medical benefits. By amended claim dated September 6, 1997, the employee did comply with the medical bill documentation requirement of 452 Code Mass. Regs. § 1.07(2)(c)(1).

[2] Further denials were filed in response to the amended claims, on February 12 1997, March 25 1997, September 10 1997, and September 26 1997. All the claim denials asserted the defense of no causal connection between any present disability and the work injury.

trial injury" as the medical issues in dispute. (Conference Memorandum Cover Sheet, September 11, 1997.) After conference, the claim was denied and Robinson appealed to a hearing de novo.

At the hearing, the insurer maintained its defense of no causation. (Dec. 2, 4; Insurer Ex. 1.) Despite the mandatory provisions of G.L. c. 152, § 11A, the judge allowed the parties to forego a § 11A impartial medical report and present their own medical evidence.[3] (Dec. 2.) The employee presented the opinion of her new doctor, Dr. Emilio Jacques, that she was unable to return to her prior work, needed ongoing medical care, and had a 20% permanent impairment according to the AMA Guidelines for Permanent Impairment due to chronic lower extremity radiculopathy and chronic pain syndrome caused by her industrial accident. (Employee Ex. 2.) She also presented a 1986 EMG report of lumbar radiculopathy affecting primarily the L4 and L5 roots, with mild ongoing denervation, (Employee Ex. 3), and a 1990 MRI report of a tiny central and slightly right-sided disc herniation that did not come in contact with the anterior aspect of the thecal sac at L4-5, and a mild-moderate diffuse disc bulge at L5-S1 with associated posterior bony ridging and a small central and right-sided disc herniation projecting towards the region of the right lateral recess. (Employee Ex. 4.)[4] The insurer presented 1990 reports of the employee's prior treating physician, releasing her to work with no restrictions and opining that she had made a full recovery without any residual effects or loss of function. (Ins. Exs. 2[5] and 3.)

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[3] Notwithstanding their agreement to do so, the parties had no right to opt out of the requirement for an impartial medical examination in this case of disputed medical issues. Nor did the judge have authority to allow such action. 452 Code Mass. Regs. § 1.10(5)-(7) permits parties to agree to forego the impartial examination only in certain limited circumstances, none of which apply here. See also 452 Code Mass. Regs. § 1.02 (definition of "Dispute over medical issues" as used in § 11A contains no exclusion for a case of the present nature). Utilization of the statutorily mandated impartial medical examination procedure may have prevented the present dispute.

[4] These reports had been submitted to and considered by the impartial medical examiner in the prior § 34A case. See Judicial Notice # 1, report of Dr. James Bono, dated December 27, 1994, at 1.

[5] This report had been entered as Self-Insurer Ex. 4 in the prior proceeding. Judicial Notice # 1, at 2.

In addition, the judge took judicial notice of the entire board file. The earlier decision denying Robinson's § 34A claim, and the exhibits to that decision, including the § 11A impartial medical report and deposition prepared for that proceeding, the MRI and EMG reports, and the June 27, 1990 report of the employee's then treating physician, became Judicial Notice # 1 in the present case. (Dec. 1, 3.) Employee's counsel conceded at oral argument that the parties were aware of the judicial notice; the employee did not preserve an objection to it for appellate review.[6]

In his decision, the new judge adopted all of the factual findings made by the earlier judge in the § 34A case. (Dec. 3.) The judge found Robinson to be "totally lacking in credibility about the extent of her alleged symptoms and disability." (Dec. 4.) The judge specifically discredited Robinson's reports of pain going down her right leg and in other parts of her body besides her back:

> By Findings of a previous Judge, she injured only her low back. I therefore find that all of those symptoms and complaints to body parts other than her back are unrelated to her accepted industrial injury and are totally disregarded here. However, they do provide some indication of the employee's bizarre history in this long-standing matter and her propensity for attempting to mislead the self-insurer, the medical examiners and the Department.

(Dec. 4.) Furthermore, the judge was influenced by the fact that, years ago, Robinson told her employer that she made a full recovery. (Dec. 6; Insurer Ex. 4.[7])

The judge discredited Dr. Jacques' opinion that Robinson continued to be disabled as a result of her 1985 industrial accident, finding:

> *As usual,* Dr. Jacques states medical opinions of total disability starting with his first treatment of Mrs. Robinson in 1995 – over ten years after the industrial injury and one year after the prior Judge determined that "her partial disability is based only on her subjective complaints alone" and found her "capable of returning to gainful employment in a part-time sedentary position." [Decision Pages 6-7] *I find Dr. Jacques to be utterly lacking in ability to make fair and rational assessment in disputed Workers' Compensation matters, and I give his opinion exactly zero weight in my deliberations.*

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[6] At the pretranscript conference in this appeal, the parties waived preparation of the hearing transcript. (Letter to counsel dated July 23, 1998.)

[7] On July 8, 1990, Ruthie Robinson had written her employer that she "was back to normal."

(Dec. 4-5, emphasis added.) The judge further found that Dr. Jacques was a "physician of *questionable reputation* for accurate evaluation." (Dec. 6, emphasis added.)

The judge adopted the opinion of Robinson's former treating physician, who, on June 12, 1990 had discharged Robinson from his care on the basis that "*she [had] made a full recovery with no residual effects and no loss of function*." (Dec. 5, quoting Self-Insurer Ex. 2, emphasis supplied.) The judge also relied on the impartial physician's report in the prior proceeding that Robinson was partially disabled, based on her subjective complaints, but that her medical presentation was entirely lacking in objective findings. (Dec. 5.) The judge further found that a MRI examination of Robinson on November 10, 1990, (Employee Ex. 4), indicated no disc herniation. (Dec. 6.)

Having concluded as a fact that Robinson failed to meet her burden of proving that her medical treatment by Dr. Jacques and her permanent impairment were causally related to the work injury of August 19, 1985, the judge denied and dismissed Robinson's claim for §§ 30 and 36 benefits. (Dec. 6-7.) Robinson appeals to the reviewing board, requesting a hearing de novo before a different judge. For the reasons that follow, we recommit the case to the same judge for further findings of fact.

Robinson first argues that the judge erred in adopting the opinion of the impartial medical examiner in the prior proceeding. We disagree. The opinion was judicially noticed, without objection, and constituted competent evidence for the judge to consider. The weight to be assigned the opinion, in light of the passage of time, was for the judge to decide.

Robinson next argues that the judge prejudged her credibility and claim by adopting the other findings contained in the prior § 34A decision. We disagree for the reason previously stated. The prior decision was properly admitted, without objection, through judicial notice, and became competent evidence in the present proceeding supporting the judge's credibility finding. We note that, in reaching his unfavorable credibility determination, the judge also relied upon his personal observations of the employee as a witness and her prior written statement, which contradicted her current claim. (Dec. 6.) Questions

of credibility based upon personal observations of an administrative judge, who is the sole fact-finder in workers' compensation proceedings, are not subject to our review. See Lettich's Case, 403 Mass. 389, 394 (1988). Although an administrative judge's determination of an employee's credibility is final, for the reasons subsequently stated, the judge may revise his credibility assessment of Robinson on recommittal.

Robinson next contends that the judge failed to evaluate all the medical evidence, including the diagnostic test results. We disagree, but have concerns about one part of his evaluation. The judge found that the 1990 MRI report, admitted as Employee Exhibit 4, did not show a herniated disc at L5-S1. (Dec. 6.) However, the MRI did report a "small central and right-sided disc herniation" at L5-S1. (Employee Ex. 4.) This misperception of the evidence is not harmless as a herniated disc may cause radiculopathy, nerve root pain, generating symptoms in other parts of the body than the back. (See Dep. 19-22.) The judge used the existence of symptoms in body parts other than the back as a reason to discredit the employee. (Dec. 4.) On recommittal, the judge should revisit the MRI report and make any revisions in his findings, as he deems appropriate in light of it.

Next the employee argues that the judge acted arbitrarily in finding no causation because the insurer had not raised that issue. This contention is utterly lacking in merit. As described above, the insurer listed this defense in its Notifications of Denial, and maintained it through conference to hearing.

Finally, Robinson asserts that the judge arbitrarily and capriciously disregarded Dr. Jacques' opinions for the reasons not grounded in the hearing record. It is clear that the insurer did not present evidence that Dr. Jacques had a questionable reputation or was biased favorably towards employees in general. However, it is also clear that Dr. Jacques was the physician for whose bills the employee was seeking payment, and as such may be biased in favor of the reasonableness and necessity of the medical treatment that he had provided. We conclude that the judge did not apply the correct legal principles in evaluating Dr. Jacques' testimony. Accordingly, we vacate the evaluation and recommit the case for new factual findings about Dr. Jacques' testimony, based upon the application of the following legal principles.

"[Administrative judges] are expected to act without self-interest or personal animus, but they are not expected to be free from preconceptions grounded in the policies of the law they administer *or from knowledge of conditions in the community to which that law applies*." Valentine v. Rent Control Board of Cambridge, 29 Mass. App. Ct. 60, 73 (1990) (emphasis added). Administrative judges at the Department of Industrial Accidents are routinely presented with contradictory medical opinions, although their frequency has somewhat diminished since the 1991 creation of the impartial medical report system. See O'Brien's Case, 424 Mass. 16, 20 (1996). "Dueling doctors" are retained to help present their party's medical viewpoint to the administrative judge. The universe of physicians willing to testify is limited; some physicians routinely give opinions in disputed workers' compensation cases. Administrative judges, through sitting on multiple cases involving the same doctor, come to recognize a physician's point of view.

The bias of a witness goes only to his credibility and is not a reason for exclusion of his testimony. Assessors of Pittsfield v. W.T. Grant, 329 Mass. 359, 361 (1952). When confronted with a biased medical expert, the judge must consider the doctor's opinion and apply such discounts and adjustments to compensate for its bias, as his administrative experience indicates. See New England Tel. & Tel. v. Board of Assessors, 392 Mass. 865, 870 (1984). In other words, although the judge must weigh the opinion, he may use his judicially acquired knowledge of the expert's bias in the weighing process. See D'Amour v. Board of Registration in Dentistry, 409 Mass. 572, 583 (1991), quoting Arthurs v. Board of Registration in Medicine, 383 Mass. 299, 310 (1981) ("The board may put its expertise to use in evaluating the complexities of technical evidence. However, the board may not use its expertise to substitute for evidence in the record."). Where, as here, there are competing medical opinions, the judge may completely discount the opinion of one expert and rely exclusively on the other, without further explanation. Coggin v. Mass. Parole Bd., 42 Mass. App. Ct. 584, 589 (1997).

However, a different approach is required where extra-judicial information colors the judge's appraisal of an expert opinion. A judge may acquire knowledge of physician bias through ex parte conversations with other judges, attorneys or parties. Such infor-

mation is an unreliable basis for judgment, as it stems from hearsay uncontrolled by the rigors of adjudication. Reliance upon such information is impermissible. See 452 Code Mass. Regs. § 1.17 and S.J.C. Rule 3:25(A)(4) (prohibiting ex parte communications); In the Matter of Orfanello, 411 Mass. 551(1992) (attorney suspended for ex parte discussion with judge intended to influence case disposition).

Here the judge discounted the opinion of Dr. Jacques in part because of the general reputation of the doctor in the workers' compensation community for giving biased assessments. (Dec. 4-6.) The admissibility of such reputation evidence is governed by the rules of evidence as applied in the courts of the Commonwealth. 452 Code Mass. Regs. § 1.11(5). Section 21A of G.L. c. 233 provides:

> Evidence of the reputation of a person in a group with the members of which he has habitually associated in his work or business shall be admissible to the same extent and subject to the same limitations as is evidence of such reputation in a community in which he has resided.

To be admissible, the reputation must have been so much discussed and considered that there is in the community a uniform and concurrent sentiment which can be stated as a fact. It cannot just be an opinion of a single person or a few members of the community. Liacos, Massachusetts Evidence § 6.9.1 (6th ed. 1994).

Reputation evidence cannot be considered unless it is properly made part of the hearing record. 452 Code Mass. Regs. § 1.11(5) ("The decision of the administrative judge shall be based solely on the evidence introduced at hearing"). Here, neither party offered reputation evidence. The only other way for it to have become part of the record was for the judge to introduce it. Section 11 of c. 152, permits an administrative judge to "make such inquiries and investigations as he deems necessary" and "to receive any documentary or oral matter not previously obtained as shall enable him to reach a decision with respect to the issues before him." However, a judge may not secretly add to the hearing record. The parties must be informed of the judge's investigative reach and be provided with the opportunity to confront the evidence being admitted. See Liacos, *supra,* §§

2.6-2.10; G.L. c. 30A, § 11(4-5). The record does not indicate that the judge gave any such notice.

Moreover, this type of reputation evidence is not easily susceptible of judicial notice, as it is often subject to reasonable dispute. See Proposed Mass. R. Evidence 201 (judicial notice requires the fact to be generally known or capable of being accurately and readily determined). A judge may not rely on his private knowledge of particular facts that are not matters of which he can take judicial notice. Furtado v. Furtado, 380 Mass. 137, 140, n. 1 (1980).

For these reasons, we conclude that the judge erred as a matter of law in finding that Dr. Jacques had a "questionable reputation for accurate evaluation." (Dec. 6.) We strike that finding and recommit the case for a new appraisal of Dr. Jacques' testimony based solely on the record evidence.

The employee contends that the record compels a conclusion that the judge is unable to exercise impartial judgment in this case, and therefore we should order a reassignment for hearing de novo. We disagree, although we find the judge's remarks regarding the employee's medical expert unusual and even imprudent. See MacCormack v. Boston Edison Co., 423 Mass. 652, 665 (1996) (judge's expression of favorable reputation of opposing witness); Commonwealth v. Coleman, 390 Mass. 797, 800 (1984) (judge's comment that he made up his mind about credibility before all the evidence had been received).

Every party in a workers' compensation case has the right to a fair and impartial determination. D'Olimpio v. Bricklayers & Allied Craftsmen, 7 Mass. Workers' Comp. Rep. 25, 26 (1993); Art. 29 of the Massachusetts Declaration of Rights. As a general rule, in deciding a claim, an administrative judge may consider only information that has been properly offered and admitted. 452 Code Mass. Regs. § 1.11(5). If private information causes the administrative judge to prejudge the value of evidence, then the constitutional right to a fair hearing may require the judge's recusal.

> An important exception to this general rule of the invalidating nature of prejudgment of adjudicative facts, however, involves situations where the prejudgment

> has arisen through the prior official involvement or the participation of the administrative adjudicator of the case.

Cella, Administrative Law and Practice, § 314 (1986). The case law is clear that a negative impression of a party formed by a judge *as an adjudicator* [is] 'not a ground for the assertion of a disqualifying bias.'" Civil Service Comm'n v. Boston Mun. Court Dept., 27 Mass. App. Ct. 343, 348, quoting Perez v. Boston Housing Authority, 379 Mass. 703, 740 (1980) (emphasis added). An administrative judge's negative impression of an expert witness formed out of his prior judicial experience should be similarly treated.

Assignment to a different judge upon recommittal after hearings have been completed ought not to be done except for compelling reasons. Edinburg v. Cavers, 22 Mass. App. Ct. 212, 217 (1986). We have never held that a judge was disqualified from sitting on remand because he was reversed on earlier rulings. "[A]n earlier expression of opinion as to a matter to be decided does not disqualify a judge or indicate a want of competency to hear fairly and decide impartially all issues." Commonwealth v. Coleman, 390 Mass. at 802, quoting King v. Grace, 293 Mass. 244, 247 (1936). A judge's indulgence in very emphatic criticism of a witness is not necessarily grounds for reassignment on recommittal. See Perez v. Boston Housing Authority, 379 Mass. 703, 740 (1980) (caustic criticism of party in judge's order). Even where a judge erred by prejudging the evidence, and his decision was reversed on appeal, the court found no error in his hearing the case on recommittal. Preston v. Peck, 271 Mass. 159, 163-164 (1930); decision on recommittal, 279 Mass. 16, 19 (1932).

This is not an extreme case like MacDonald v. MacDonald, 407 Mass. 196 (1990), where the court disqualified a judge whose overt acts on remand had evidenced great bias against the parties and their attorneys and substantial disregard for the court's opinion. In MacDonald's original appeal, the court had reversed the dissolution of an attachment. MacDonald, 401 Mass. 513 (1988). The court had noted that dissolution was only appropriate where the attachment was invalid or fraudulent, facts not alleged in the case. Id. at 514-515. On recommittal, the judge held a nonevidentiary hearing and *sua sponte* moved to vacate the attachment on the grounds of fraud and deceit of the parties and their coun-

sel. The judge then found the fraud he alleged. In the second appeal, the court concluded that there was no evidentiary basis for the judge's findings of a fraud on the court. 407 Mass. at 201. It construed the judge's action on recommittal as as an open challenge to its ruling and condemned it as lawless judicial action. Id. at 203.

An administrative judge whose decision is reversed should not himself give vent to personal spleen or respond to the recommittal as a personal grievance. Id. A judge's mind ought always to be open to the truth and susceptible to every right influence flowing from the evidence. See Dittemore v. Dickey, 249 Mass. 95, 99-100 (1924) (master not disqualified). Bias or prejudice preventing such impartial weighing of the evidence will disqualify an administrative judge. Beauregard v. Dailey, 294 Mass. 315, 324 (1936). Ordinarily, the question of disqualification is left to the judge's discretion. MacDonald, 407 Mass. at 203. We are unwilling to assume that, on recommittal, this particular administrative judge will act in the egregrious fashion as did the judge in MacDonald. To the contrary, we assume that the judge will accept this appellate ruling and will fairly and impartially determine the facts in accordance with the law herein instructed.

Because here, unlike MacDonald, the properly admitted record evidence would support the result reached by the judge, we cannot say at this point that justice requires a reassignment and hearing de novo. See MacCormack, supra, at 666. We note the specific language of the Workers' Compensation Act that provides: "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." G.L. c. 152, § 10A(1). We leave the question of recusal to the judge's conscience. See Haddad v. Gonzalez, 410 Mass. 855, 862 (1991).

Accordingly, we recommit the case to the administrative judge for further findings of fact and conclusions of law consistent with this opinion. In light of the passage of time and the erroneous failure to apply the provisions of § 11A(2) to this case, see n. 3 supra,

the judge may take such further evidence as he deems necessary to do justice, including but not limited to ordering a § 11A(2) impartial medical examination.

So ordered.

Suzanne E.K. Smith
Administrative Law Judge

Sara Holmes Wilson
Administrative Law Judge

MCCARTHY, J., (dissenting), There were only two issues before the administrative judge in this case. One was whether Dr. Emilo Jacques provided adequate and reasonable health care services such that Ms. Robinson was entitled to have the self-insurer pay for same. Doctor Jacques then was not merely an expert medical witness with an opinion to proffer. His medical bill was at stake!

The majority accurately reports the judge's view of Dr. Jacques. Without benefit of any evidence on reputation, the judge volunteered that Dr. Jacques was a physician of questionable reputation for accurate evaluation and utterly lacking in ability to make fair and rational assessments in disputed workers' compensation matters. Not surprisingly, the employee requests a hearing de novo before a different judge. In my view she is entitled to it.

It is beyond argument that the parties have a right to a fair and impartial determination of the issues. The majority seeks to recommit the case to the same judge for a new appraisal of Dr. Jacques' testimony. The employee may well feel uneasy, even queasy, about her chances of a fair and impartial determination of this disputed issue, the importuning by the majority notwithstanding. The judge has already gone on record with the pronouncement that he gives Dr. Jacques " . . . opinion exactly zero weight in my delib-

erations." (Dec. 5.) Going in against that preconception, Robinson and Jacques have no reason to be optimistic about winning an order directing payment of the bill. Common sense and the ruling in MacDonald v. MacDonald, 407 Mass. 196 (1990), suggest to me that the senior judge in the exercise of his duty and prerogative should disqualify the judge and assign this case to a different administrative judge for hearing de novo. I would ask that he do so.

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William A. McCarthy
Administrative Law Judge

Filed: June 24, 1999