COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 029555-14**

Suzana Amorim	Employee
Tewksbury Donuts, Inc.	Employer
Massachusetts Retail Merchants SIG	Insurer

REVIEWING BOARD DECISION
(Judges Calliotte, Harpin and Long)

This case was heard by Administrative Judge Preston.

APPEARANCES
Michael A. Torrisi, Esq., for the employee at hearing and on appeal
Christopher L. Maclachlan, Esq., for the employee on appeal
Thomas P. O'Reilly, Esq., for the insurer at hearing
Paul M. Moretti, Esq., for the insurer on appeal

CALLIOTTE, J. The insurer appeals[1] from an administrative judge's decision ordering it to pay § 34 temporary total incapacity benefits from November 27, 2015, and continuing, for a September 22, 2014, workplace injury. We recommit the case for the judge to address two of the many issues the insurer raises: 1) that the judge failed to rule on objections made in the medical depositions; and 2) that statements the judge made in the decision indicate a lack of impartiality. Because resolution of these two issues may impact the other issues raised by the insurer, we do not address the remaining issues at this time.[2]

[1] The employee also appealed, but withdrew her appeal prior to the filing of appellate briefs. Rizzo v. M.B.T.A., 16 Mass. Workers' Comp. Rep. 160, 161 n. 3(2002)(reviewing board may take judicial notice of documents in Board file)(see also Insurer br. 2, n.1).

[2] The insurer also raised the following issues: 1) the judge improperly rejected the impartial examiner's medical opinion based on his own extrajudicial and subjective lay opinion; 2) the judge improperly shifted the burden of proof and drew impermissible adverse inferences regarding the job offers made by the insurer; 3) the judge mischaracterized the impartial opinion, and made insufficient findings for appellate review; 4) the judge failed to conduct a proper vocational analysis under § 35D; and 5) the judge's ruling on complexity was intended to circumvent § 11A and punish the insurer for unilaterally discontinuing benefits.

The employee managed a donut franchise from 2005 until she suffered injuries to her left knee and low back in 2014. (Dec. 5-6.) The insurer paid § 34 benefits pursuant to a conference order, but terminated them on November 27, 2015,[3] after offering the employee an allegedly suitable job based on the medical restrictions in the § 11A report of Dr. Joseph Abate. (Dec. 7.) Finding the impartial report adequate, but the medical issues complex, the judge allowed the parties to submit additional medical evidence. (Dec. 4.) In his decision, the judge adopted parts of the opinions of Dr. Abate, Dr. Vladan P. Milosavljevic, and Dr. David C. Morley, to find the employee totally disabled as a result of her industrial accident. (Dec. 8-15, 18.) In addition, the judge found that neither of the two job offers made by the employer was suitable. (Dec. 6-7.) Accordingly, the judge awarded the employee ongoing § 34 benefits from the date of discontinuance. (Dec. 18.) However, he denied the employee's claims for § 8(5) penalties for illegally discontinuing benefits and for § 14(1) costs and penalties for unreasonably defending against a claim. (Dec. 15-17, 18.) The insurer's appeal is before us.

Both parties agree that the judge failed to rule on objections raised during the depositions of Dr. Abate and Dr. Milosavljevic, whose opinions he adopted, in part. (Insurer br. 24; Employee br. 2.) The employee concedes that failure to make such rulings cannot be considered harmless error, and that recommittal is necessary. (Employee br. 2.) See Nanigan v. CPC Eng'g Corp., 8 Mass. Workers' Comp. Rep. 118, 120 (1994)(judge's failure to rule on objections in medical deposition may constitute error of law if evidence is otherwise insufficient to support judge's findings on incapacity). We agree that recommittal is appropriate for the judge to rule on objections in the two medical depositions.[4] See Ayotte v. Lahey Clinic Hosp., 29 Mass. Workers'

[3] The employee claimed § 34 benefits from November 17, 2015, (Ex. 2, Employee Hearing Memorandum), but the judge correctly found the insurer terminated benefits on November 27, 2015, and awarded benefits from that date. (Dec. 7, 18; see Form 107.) Rizzo, supra.

[4] 452 Code Mass. Regs. 1.12(6), provides, in relevant part:

Comp. Rep. 121, 123 (2015), and cases cited (parties are entitled to know what evidence is presented against them and to have an opportunity to rebut it and develop a record for meaningful appellate review).

The insurer argues, however, that we should ask the senior judge to reassign the case to a different administrative judge due to statements the judge made in his decision which call into question his impartiality. The insurer contends the judge exhibited bias in the following ways: criticizing the insurer for not producing as a witness the author of two job offers the employer made to the employee; placing undue emphasis on that person's absence in refusing to consider the job offers suitable; criticizing the insurer for discontinuing benefits based on Dr. Abate's report; mischaracterizing Dr. Abate's opinion by stating, without supporting medical evidence, that his examination and conclusions, in part, were "bizarre, if not laughable" (Dec. 16); and creating and discussing an issue not raised by the parties, thereby exceeding the scope of his authority. (Insurer br. 29-30.)

"Whenever a claim of judicial bias is raised, the judge involved must address that claim and make findings on whether or not he has demonstrated bias towards one or the other party." Comeau v. Enterprise Electronics, 29 Mass. Workers' Comp. Rep. 187, 193 (2015), citing Johnson v. Boston City Hosp., 14 Mass. Workers' Comp. Rep. 110, 112 (2000)(where insurer alleges bias based on statements made in judge's decision, case must be recommitted for judge to rule on whether he can fairly determine the outcome of the matter in dispute or whether he should recuse himself). Because the complained-of statements and findings appear in the written decision, and did not arise during the hearing, the insurer here, as in Johnson, supra, could not raise the issue of bias below, and the judge did not have the opportunity to address that claim. In certain circumstances, we have found the judge's impartiality or the appearance of impartiality compromised,

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All objections to questions and all motions relevant to testimony shall be set forth with particularity, and with the reasons in support thereof, and no administrative judge shall be required to rule on any objection or motion unless such reasons or statements have been made.

without the judge below having addressed his ability to be impartial. See, e.g., Cruz v. Pet Edge Admin. Servs. Co., 27 Mass. Workers' Comp. Rep. 159, 167 (2013)(reviewing board forwarded case to senior judge for assignment to different administrative judge because judge's expressions of anger and frustration in decision, as well as failure to address insurer's defenses, creation of new issue, and comments, criticism and rulings against insurer and employee's attorney on that issue, compromised the appearance of impartiality and called into question judge's ability to rule impartially on issues in controversy). However, in most circumstances, we think it is more appropriate to allow the judge against whom the charge is brought to make the initial determination, particularly where, as here, the parties agree the judge has made an error requiring recommittal for further rulings.[5] See Johnson, supra at 112, citing MacDonald v. MacDonald, 407 Mass. 196, 203 (1990) (question of whether judge is biased is usually a matter resting within the trial judge's discretion).

Accordingly, we vacate the decision and recommit this case to the judge to, first, address the insurer's argument that the case should be reassigned to a different judge due to statements in his decision which call into question his impartiality. If the judge determines that he can impartially decide the case, he should then rule on the objections made and supported in the two medical depositions. Once he has completed those tasks, he should reconsider his findings and make additional findings and rulings, as necessary.

So ordered.

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[5] The Model Code of Judicial Conduct for State Administrative Law Judges, as promulgated by the American Bar Association, applies to administrative judges and administrative law judges at the Department of Industrial Accidents. G.L. c. 23E, § 8. The code states, in relevant part:

> A state administrative law judge *shall disqualify himself or herself* in any proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances where: (a) the judge has a personal bias or prejudice concerning the proceeding.

(Emphasis added.) See Cruz, supra at 167, n. 13.

Carol Calliotte
Administrative Law Judge

William C. Harpin
Administrative Law Judge

Martin J. Long
Administrative Law Judge

Filed: ***June 9, 2017***