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 Long, Koziol and Calliotte)

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

LONG, J. The insurer appeals from a Remand Decision ordering it to pay § 34 temporary total incapacity benefits from November 27, 2015, and continuing, for a September 22, 2014, workplace injury. The case was previously appealed by the insurer and recommitted by this board for the judge to rule on objections made during the medical depositions, and to address the insurer's argument that statements made by the judge in his decision call his impartiality into question. Amorim v. Tewksbury Donuts, Inc., 31 Mass. Workers' Comp. Rep. 93 (2017). On recommittal, the administrative judge stated that his impartiality was not compromised. He ruled on the medical deposition objections, but otherwise maintained the same rulings issued in his first decision. In its appeal from the Remand Decision, the insurer again requests that the decision be vacated and the case forwarded to the senior judge for reassignment, due to the administrative judge's lack of impartiality. (Insurer br. 26-28). We agree with the insurer that the Remand Decision demonstrates at least the appearance of partiality on the part of the administrative judge, calling into question his ability to render a fair decision.

Accordingly, the decision must be vacated and forwarded to the senior judge for reassignment and a hearing de novo on the merits.

The employee managed a donut franchise from 2005 until she suffered injuries to her left knee and low back in 2014. (Dec. I, 5-6.) The insurer paid § 34 benefits pursuant to a conference order, but terminated them on November 27, 2015, after offering the employee an allegedly suitable job based on the September 10, 2015, § 11A report of Dr. Joseph Abate. (Dec. I, 7.) Dr. Abate opined that the employee had injured her left knee at work and temporarily aggravated her lumbar degenerative disc disease. He felt she was disabled for approximately six months, had no continuing disability as a result of her industrial accident, and was capable of full employment. (Ex. 1.) At the hearing on December 8, 2015, the judge ruled that the impartial report was adequate; however, finding the medical issues complex, the judge allowed the parties to submit additional medical evidence. (Dec. I, 4.) The judge ultimately adopted parts of the opinions of Dr. Abate, Dr. Vladan P. Milosavljevic and Dr. David Morley, to find the employee totally disabled as a result of her industrial accident. (Dec. I, 8-15, 18.) The judge awarded the employee ongoing § 34 benefits from the date of discontinuance, but denied the employee's claims for § 8(5) penalties for illegally discontinuing benefits and for § 14(1) costs and penalties for unreasonably defending against the claim. (Dec. I,[1] 15-18.)

> Regarding Dr. Abate's opinion, the judge found,
>
> I adopt only so much of Dr. Abate's opinion that goes to the employee's actual industrial injuries and treatment. I do not adopt his unqualified opinion regarding the Employee's capacity for work or his claim that she was magnifying her symptoms because he believed she was not in enough pain while he examined her when he was sticking a needle repeatedly into her legs.

(Dec. I, 9.) The judge concluded,

> The resulting exam with Dr. Abate sticking an injection needle repeatedly into the Employee, and then concluding that the employee was not making "correct" subjective responses to his question(s) is bizarre, if not laughable. This is

[1] The decision filed on July 26, 2016, is referred to as "Dec. I." The decision filed on August 11, 2017, is referred to as "Remand Dec."

> confirmed when Dr. Abate acknowledged at the deposition that the Employee sustained a left knee injury that required surgical repair and an aggravation of a pre-existing degenerative lumber [sic] disease condition resulting from the industrial accident on September 22, 2014.

(Dec. I, 16.)

In its first appeal, the insurer objected to the above-quoted findings for numerous reasons, including the judge's alleged lack of impartiality. In the Remand Decision, the administrative judge addressed the issue of impartiality as follows:

> I affirm to the Reviewing Board that my impartiality never waivered, [sic] was never compromised and remained intact through hearing and writing of the decision. My impartiality in this case shall continue if there is a further remand.
>
> I weighed all the evidence before I wrote the decision. I found the employee to be a credible witness especially regarding her complaints of pain from her industrial injuries. I found the medical issues presented a complex picture and authorized additional medical evidence to be submitted by the parties.
>
> I adopted various medical opinions in my decision. I adopted a portion of Dr. Abate's opinion. However, I did not adopt his opinion surrounding the physical examination segment wherein he stuck an injection needle repeatedly up and down the Employee's legs to assess her pain level.
>
> I was wary of that section of the 11A examination. I had questions and concerns that were not addressed in the hearing record regarding consent, authorization, legality, methodology, accuracy, oversight, boundaries, safety and privacy of that portion of the examination that was conducted.
>
> In conclusion, I adopted the Employee's credible testimony of her pain symptomology. I did not adopt Dr. Abate's opinion of symptom magnification.
>
> I have completed the requested remand tasks and advise this panel that I do not have additional findings and rulings.

(Remand Dec., 1-2.)

The insurer's appeal of the Remand Decision requests that the decision be vacated and the matter forwarded to the senior judge for assignment to a different administrative judge for a hearing de novo. (Ins. br. 26-28.) The insurer asserts multiple claims of

error; we address one that is dispositive.[2]

The insurer argues:

> [T]he judge's attempt to justify his unsupported findings on recommittal, without any further evidence, supports the insurer's argument. The judge stated "I had questions and concerns that were not addressed in the hearing record regarding consent, authorization, legality, methodology, accuracy, oversight, boundaries, safety and privacy of that portion of the examination that was conducted." The judge exceeded his authority. He is not an advocate. Draghetti v. Chmielewski, 416 Mass. 808, 815 (1994); MacEachern v. Trace Construction Co., 21 Mass. Workers' Comp. Rep. 31, 37 (2007). "We can only read the judge's statement that he was 'uncomfortable' with Dr. Abate's opinion as indicating his uninformed disagreement with it." Behre v. General Electric, 17 Mass. Workers' Comp. Rep. 273, 277 (2003). The employee did not raise any issue regarding consent. The employee did not raise any issue regarding authorization. The employee did not raise any issue regarding legality. The employee did not raise any issue regarding methodology. The employee did not raise any issue regarding accuracy. The employee did not raise any issue regarding oversight. The employee did not raise any issue regarding boundaries. The employee did not raise any issue regarding safety. The employee did not raise any issue regarding privacy. Further, the employee did not testify that she did not consent; that she did not authorize or otherwise submit to the examination; that the examination was illegal; that improper methodology was employed; that the testing was not accurate; that there was improper oversight; that the examination was outside generally accepted medical boundaries; that she was unsafe; or that her privacy was violated. Importantly, there was no expert opinion to support or justify the judge's question or concerns or stated reasons for rejecting Dr. Abate's opinions.

(Insurer br. 13-14.) The insurer continues,

> Here, the judge's comments in his decision about an issue that was not before him reasonably triggers questions concerning partiality.
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> … Moreover, the judge's criticism of the insurer for discontinuing benefits based on Dr. Abate's report and also the judge's mischaracterization of Dr. Abate's examination and opinions without any expert medical opinion that Dr. Abate's examination opinions were "laughable", "bizarre" or "unqualified" established

[2] Accordingly, we do not address the insurer's claims that the judge erred by rejecting the §11A impartial report; mischaracterized the impartial examiner's opinion and substituted his own opinion; failed to conduct a proper vocational analysis; improperly drew a negative inference about the insurer's job offers; and abused his discretion by finding medical complexity. (Ins. br. 19-26.)

> that the judge's impartiality compromised the remainder of his decision. Cruz [v. Pet Edge Admin. Servs. Co.], 27 Mass. Workers' Comp. Rep. [159], 163 [(2013)]. Indeed, by creating and discussing an issue not raised by the parties and also creating in his remand decision justifications not advanced by the employee, the judge exceeded the scope of his authority. Id. at 164.

(Insurer br. 27.)

We agree with the insurer that the judge erred by exceeding the scope of his authority as disclosed by his findings in the Remand Decision. Those findings reveal the judge's interjection of additional issues, and his "questions and concerns that were not addressed in the hearing record," (Remand Dec. 2), lack the appearance of impartiality. These additional issues, which neither party placed in dispute, and the judge's acknowledgment that his analysis involved material that was "not addressed in the hearing record," id., raise due process concerns.

It is the administrative judge's responsibility to "set forth the issues in controversy, the decision on each, and a brief statement of the grounds for each such decision." G. L. c. 152, § 11B. The record reflects that the employee claimed § 34 temporary total incapacity benefits from November 17, 2015, to date and continuing; § 8(5) or § 14(1) penalties for illegal discontinuance and improper termination; § 13 and 30 medical benefits; § 36 benefits; and § 50, appropriate interest. The insurer raised as defenses, disability and extent of incapacity, and causal relationship, including § 1(7A); and denied entitlement to §§ 13, 30 and 36 benefits, and §§ 8 and 14 penalties. (Dec. I, 3.) The employee filed a motion to find the impartial report inadequate and/or the medical issues complex. The judge allowed the employee's motion with respect to medical complexity but found the impartial report adequate. The employee's motion makes no reference to the manner in which the impartial examination was conducted nor does it express any concerns regarding the employee's safety, boundaries, consent or privacy during the impartial examination.[3] Moreover, the employee did not assert that

[3] Rizzo v. MBTA, 16 Mass. Workers' Comp. Rep. 160, 161 n.3 (2002)(judicial notice taken of board file).

the § 11A physician used unreliable methodology in examining her at any point in the hearing. Canavan's Case, 432 Mass. 304, 309-312, 315 (2000)("The purpose of the Lanigan test is to prevent an expert from offering testimony to a fact finder that is not based on reliable methodology"; however, in order to raise and preserve issue, counsel must make timely objection challenging foundation of expert's testimony). During the doctor's deposition, employee's counsel questioned the doctor regarding his findings of symptom magnification and neither raised an objection nor moved to strike the doctor's opinion based on the methodology used by the doctor to arrive at his opinion.[4]

[4] During questioning from employee's counsel at the deposition of Dr. Abate, the pinprick test used by the doctor was addressed, in pertinent part, as follows:

Q. And you would expect some symptoms relating to those injuries; is that correct?
A. Yes.
Q. But in this case you feel they're being magnified or overstated –
A. Yes.
Q. -- is that correct? And you based that on your exam; is that correct?
A. Yes.
Q. And you base [your opinion regarding symptom magnification] primarily on the pinprick testing; is that correct?
A. Yes.
Q. And so in this particular case, you used what type of device to test her sensation?
A. I used a needle that is used in giving injections.
Q. And what did you do with it?
A. You know, pressing onto the skin.
Q. And from what area of her body would you be doing that? On what area of her body?
A. Well, I do it on the – both sides of the body, both legs up and down.
Q. Okay, so you took a pin –
A. Hmm-hmm.
Q. -- and you jabbed her with a pin –
A. Yes.
Q. -- going up and down her leg?
A. Yes.
Q. And you felt that she magnified what she was feeling based on – or lack of feeling
A. Yes.
Q. -- based on what you were doing?
A. Yes.
Q. And in this case, was it an over-reaction or an under-reaction? In other words, was she feeling or showing signs of too much pain or not enough pain?
A. Not enough pain.

> "It is not a judge's function to be the trial strategist for any litigant[,]" any more than it is a judge's duty "to interfere with trial counsel's strategy." Draghetti v. Chmielewski, 416 Mass. 808, 815 (1994). "Where there is no claim, and therefore, no dispute … the judge strayed from the parameters of the case and erred in making findings on [an] issue not properly before him." Battaglia v. Analog Devices, Inc., 20 Mass. Workers' Comp. Rep. 31, 32 (2006), quoting Medley v. E.F. Hausermann Co., 14 Mass. Workers' Comp. Rep. 327, 330 (2000), quoting Gebeyan v. Cabot Ice Cream, 8 Mass. Workers' Comp. Rep. 101, 102-103 (1994).

MacEachern v. Trace Construction Co., 21 Mass. Workers' Comp. Rep. 31, 37(2007).

We have considered a second remand to the same administrative judge. However, despite the judge's assertions to the contrary, his rulings based on additional issues and "questions and concerns that were not addressed in the hearing record," cast doubt on his ability to impartially adjudicate the disputed issues. Accordingly, we vacate the decision

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Q. So, in fact, as you were administering this test, she was showing signs of -- would we call it numbness?
A. Yes.
Q. And you felt that that was a magnification of her condition; is that correct?
A. That's correct.
Q. And her reaction would be subjective; is that correct?
A. Yes.

(Dep. 19-21.)

Insurer's counsel followed up on this issue with the final question asked during the deposition:

Q. Okay. Now, and counsel asked you some questions about your pinprick testing and the symptom magnification. Doctor, if I understand it correctly, when you're doing a pinprick testing given normal human anatomy there are certain responses that you as a clinician would expect when performing these examinations, correct?
A. Yes.
Q. Okay. And, in fact, if I understand it correctly, the – one of the bases for the symptom magnification was that her responses were not consistent with your knowledge of human anatomy, correct.
A. That's correct.

(Dep. 42.)

and award, and forward the case to the senior judge for reassignment to a different administrative judge and a hearing de novo. Cruz v. Pet Edge Admin. Servs. Co., 27 Mass. Workers' Comp. Rep. 159, 167 (2013) (where appearance of impartiality has been compromised and judge's ability to rule impartially on issues in controversy is called into question, reassignment to different judge is appropriate). The underlying conference order remains in effect pending the results of the hearing de novo. Lafleur v. M.C.I. Shirley, 25 Mass. Workers' Comp. Rep. 393, 396 (2011).

So ordered.

Martin J. Long
Administrative Law Judge

Catherine Watson Koziol
Administrative Law Judge

Carol Calliotte
Administrative Law Judge

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