COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 06201-13**

Virouna Sirasombath	Employee
Waters Corporation	Employer
Liberty Mutual Insurance Corporation	Insurer

REVIEWING BOARD DECISION
(Judges Long, Koziol and Calliotte)

This case was heard by Administrative Judge Benoit.

APPEARANCES
Michael Ready, Esq., for the employee
Jessica Bobb, Esq., for the insurer

LONG, J. The employee appeals from a decision denying and dismissing her claims for § 34, § 35 and/or §34A incapacity and §§ 13 and 30 medical benefits alleged to be due as a result of a chemical exposure incident that occurred on March 7, 2013. The employee presents several issues on appeal, most of which are interrelated and concern the § 11A impartial physician's impartiality. Specifically, the employee argues that because the impartial physician, Dr. Brian Swotinsky, had previously been employed by the employer, and was employed by the insurer at the time he conducted the impartial examination, the report and deposition testimony of Dr. Swotinsky should have been stricken from the record. The employee further argues that the administrative judge's findings of complexity and inadequacy and the allowance of additional medical evidence were insufficient remedies for the obvious conflict of interest, especially considering the judge's specific reliance upon Dr. Swotinsky's opinion in the hearing decision. We agree with the employee and vacate the judge's decision. We strike Dr. Swotinsky's report and testimony and recommit the case to the judge for the scheduling of a new impartial

medical examination with a different doctor and for a new decision based on that medical evidence and any additional medical evidence that the judge, in his discretion, may allow.

The employee alleged an injury occurred on March 7, 2013, while working as a synthesis operator creating chemical compounds. While attempting to test a pump connection, the employee removed her respirator face mask and alleged that she inhaled ammonium hydroxide. She felt a burning sensation in her throat and on the left side of her face, had difficulty breathing, experienced shortness of breath, and began coughing. (Dec. 5.) The employee sought medical attention on March 12, 2013, and was advised to be out of work until April 8, 2013, and then to return to light duty for one month. The employee returned to work in April 2013, and her employment ended on September 30, 2013. (Dec. 5.)

The employee's claims were denied by the administrative judge following a conference on May 24, 2017, and the employee's appeal of the order prompted an impartial examination by Dr. Robert Swotinsky on August 3, 2017. (Dec. 2.) On August 25, 2017, upon receipt of the impartial report and some seven months prior to the hearing, employee's counsel filed a "Motion to Strike the Report of the Impartial Physician Based on Bias." (Dec. 3; Ex. 5.) The basis for the motion, when initially filed, was the impartial physician's prior employment with the employer in the case, Waters Corporation. The crux of the employee's argument in her initial motion to strike, which she maintained throughout the course of these proceedings, is as follows:

1. The employee was evaluated by Dr. Robert Swotinsky at the request of the Department of Industrial Accidents on August 3, 2017.
2. In his report dated August 6, 2017, Dr. Swotinsky states,
   "This claim involves an exposure to ammonia at the Waters Corporation Taunton facility. From 1998 to 2007, I served as consulting occupational health medical director to Waters based in Milford, MA. I visited Waters' Taunton facility several times."
3. Impartiality is the cornerstone of the impartial medical examiner[']s system, Martin v. Red Star Express, 9 Mass. Workers' Comp. Rep. 670, 673 (1995).
4. The fact that Dr. Swotinsky was employed as the consultant occupational health medical director by the employer in this case raises the issue of bias and casts doubt on the impartiality of the report.

5. The report of Dr. Swotinsky should not be admitted into evidence due to the fact that he worked for the employer in this case.

(Ex. 5.)

The judge denied the motion to strike the impartial report but opened the record on the basis of complexity and allowed the introduction of additional medical records, ostensibly to cure any defects in the impartial opinion resulting from the allegation of bias.[1] At the de novo hearing held on March 21, 2018, the employee renewed the motion to strike the impartial report, and the judge again denied the request but made it clear that additional medical records were being allowed due to a finding of complexity. (Tr. 10-16.) Each party submitted additional medical records for the judge's consideration, (Exs. 8-15, 20), and the impartial report was admitted as the first exhibit in the proceeding. (Ex. 1.)[2]

Following the hearing, the employee took the deposition of Dr. Swotinsky on June 26, 2018, and then filed a further motion dated August 1, 2018, entitled "Employee's Motion to Deem the Report of the Impartial Physician Inadequate and to Strike the Report of the Impartial Physician Based Upon Bias Arising Out of the Impartial Physician's Employment with Liberty Mutual Insurance Company." (Dec. 3.) See Rizzo

[1] In an email to the parties dated August 28, 2017, the judge explained his ruling as follows:

> I have the employee's Motion, the Insurer's Opposition, and the § 11A report of Dr. Swotinsky.
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> This is a regrettable situation, but in my view it is not one that requires a striking of Dr. Swotinsky's report, as his association with the employer terminated in 2007 and he has expressed directly his opinion as to a conflict of interest.
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> Mindful of the Employee's concerns, I shall open the record on the basis of complexity and allow the parties to introduce additional medical records and reports without restriction except as to time, which will probably be as of the date of the Hearing. I shall also allow parties to depose physicians, and defer until the date of hearing a decision on the number of such depositions.
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> I expect that this decision will completely satisfy neither party. In any event, that's my decision on the motion, and we move on.

(Dec. 4; Ex. 7.)

[2] One of the employee's submissions was a report authored by Robert Todd, M.D., dated November 14, 2014.

v. M.B.T.A., 16 Mass. Workers' Comp. Rep. 160, 161 n.3(2002)(reviewing board may take judicial notice of contents of board file). During Dr. Swotinsky's deposition, it was discovered that not only had he previously been employed by the employer in the case, but he was presently employed by the insurer in the case, Liberty Mutual Insurance Company. (Dep. 14-19.) The employee's new motion to strike provided in pertinent part:

> 3. The deposition of Dr. Swotinsky was taken on June 26, 2018. In his deposition, Dr. Swotinsky testified that he is currently employed by Liberty Mutual Insurance Company and has worked for Liberty Mutual Insurance Company since 2013. His work for Liberty Mutual Insurance Company involves reviewing disability claims, working with case managers to figure out how to process claims and speaking with doctors about their records. (Deposition, page 14).
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> 4. In his deposition, Dr. Swotinsky testified that he bills Liberty Mutual Insurance Company directly for the work he performs for them and he is paid by Liberty Mutual Insurance Company. He testified that he works for Liberty Mutual Insurance Company daily. He stated, "[e]very day, but I do a little bit. Some days more than others." (Deposition. Page 15).
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> ….
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> 6. Dr. Swotinsky's curriculum vitae states he is and has been a consultant for Liberty Mutual Insurance Company since 2013. (Deposition, pages 17-19, exhibit 2).
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> ….
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> 8. With regard to the employee's prior motion to strike the impartial report based upon bias arising out of his business relationship with Waters Corporation, the insurer stated in its opposition brief, "If Dr. Swotinsky worked or consulted with Liberty, the bias would be overwhelming enough to have his report stricken in that circumstance."
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> ….
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> 10. The ongoing business relationship between Dr. Swotinsky and Liberty Mutual Insurance Company is an indicia of bias that is so compelling and strong that the only sufficient remedy is to strike the report and opinion from the record.

(September 5, 2018 Motion Hearing, Ex. A.) See Rizzo, supra.

A motion hearing to address the employee's new motion to strike was held on the record on September 5, 2018, and, by way of an email to the parties on September 6, 2018, the judge again denied the request to strike the impartial report, stating in relevant part:

> In the present case there is the appearance of possible partiality. From the cases cited, it appears a finding of inadequacy is warranted and required. **I find, therefore, that the report of Dr. Swotinsky is inadequate**. As mentioned above, the medical record has already been opened.
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> . . . .
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> Relative to the Motion to Strike the § 11A Report 29 Mass. Practice, Workers' Compensation, § 16.19 includes the following statement: "Moreover, unless there is a compelling inference that bias fatally contaminated [the] case ab initio, there is no requirement that the impartial medical examiner's report be stricken from the record; rather a finding of inadequacy appears to have been accepted as an adequate remedy in most cases." Taking everything into consideration, I do not find that there is a compelling inference that bias fatally contaminated the case *ab initio*. Accordingly, **I deny the Motion to Strike the § 11A report**.

Rizzo, supra (emphasis in original).

The March 19, 2019, hearing decision denied and dismissed the employee's claims, based primarily upon the May 10, 2017, medical opinion of Dr. Thomas Winters, (Ex. 20), who found no causal relationship or disability associated with the incident. In the hearing decision, under the heading "Discussion," the judge found as follows:

> The Employee has urged repeatedly that the § 11A report of Dr. Swotinsky be stricken on the basis of bias, most recently during the deposition of the doctor. I have not taken that step, as I have felt that the proper remedy has been to open the medical record for additional opinions of physicians and/or other medical providers, without limitation. To the best of my recollection, the Impartial Physician roster has had a dearth of physicians specializing in occupational medicine, and I believe Dr. Swotinsky was the only one not living on Cape Cod. When I chose him to perform the § 11A examination, I was unaware of his past ties to Waters Corporation or present ties to Liberty Mutual, and I note that he was very forthcoming in revealing the Waters Corporation connections, including his comments on the first page of his report, as well as his work with Liberty Mutual. Any

> *prima facie* status of his medical opinion was eliminated in light of these factors. (Emphasis in original.) I have read his report and the transcript of his deposition, but his testimony has not been a significant factor in my decision making process, *other than the comments that he wrote concerning the report and opinions of the Employee's expert, Robert Todd, M.D.* (Emphasis added.) Rather, I have examined carefully the medical documents submitted by . . . each party and weighed the probative value of each to the best of my ability. I find that Dr. Winter's report is the most insightful by far, and it is on the basis of his opinions that I have made my decisions.

(Dec. 7-8.)

On appeal, the employee argues that the impartial physician's relationship with the employer and insurer fatally contaminated the case *ab initio,* and the employee's motions to strike the report and opinion of the impartial physician should have been allowed: "The report and opinion of the impartial physician should have been stricken ab initio. The record is contaminated by entering it into evidence and relying upon the report and opinion of the impartial physician. This contamination is akin to pouring poison into a well and then suggesting that one should drink the water." (Employee br. 17.)

Upon review of the impartial report and testimony of Dr. Swotinsky, medical reports of Dr. Todd and Dr. Winters, and the hearing decision, we agree with the employee. "In general, the question of inadequacy resulting from bias is left to the discretion of the administrative judge, who has the duty to resist tenuous, baseless, or frivolous challenges to the impartial physician's report." Paganelli v. Mass. Turnpike Authority, 21 Mass. Workers' Comp. Rep. 9, 17 (2007). Here, the judge was aware of the bias issue and went to great lengths to minimize any bias concerns when he allowed the submission of additional medical evidence. "We note, however, that there may be situations in which the indicia of bias are so strong that opening the record as to medical evidence will not be a sufficient remedy." Bennett's Case, 81 Mass. App. Ct. 1142

(2012)(Memorandum and Order Pursuant to Rule 1:28), and cases cited.[3] This claim embodies a situation wherein the indicia of bias are so strong that allowing additional medical evidence was an insufficient remedy to cure the bias or the appearance of bias

While the judge stated that Dr. Swotinsky's testimony "has not been a significant factor in my decision making process, other than the comments that he wrote concerning the report and opinions of the Employee's expert, Robert Todd, M.D.," the fact remains that the objectionable medical evidence was a factor, significant or not, in the ultimate decision of the judge. The judge's reliance upon Dr. Swotinsky's opinion in any manner, even if such reliance was "insignificant," was error.

The insurer cites to Howell v. Norton Co., 11 Mass. Workers' Comp. Rep. 161 (1997), and argues that the opinions of Dr. Swotinsky and Dr. Winters are so similar that Dr. Swotinsky's opinions are rendered cumulative so that any reliance thereon is merely harmless error. (Insurer br. 7) We disagree with the premise of this argument since Dr. Swotinsky's report and opinions discredit the studies and reports relied upon by the employee's expert, Dr. Todd, while the report of Dr. Winters contains no similar rejection of Dr. Todd's opinions. The judge specifically relied upon this dissimilar aspect of Dr. Swotinsky's opinion in the decision when he factored in "the comments that he wrote concerning the report and opinions of the employee's expert, Robert Todd, M.D." (Dec. 8.) Furthermore, the Howell decision "discern[ed] no compelling inference that bias fatally contaminated [the] case *ab initio*." Howell, supra at 165. In Howell, the alleged bias involved an impartial physician speaking with an employee by telephone after he had written his report, but prior to the impartial physician's deposition. In the present case, the impartial physician's shared employment with both the employer and insurer involves bias of a different sort that permeated the entire impartial process from the beginning, exemplifying a "compelling inference that bias [did] fatally contaminate[ ] this case *ab initio*." Id.; see Amoroso v. University of Mass. Medical School, 19 Mass.

[3] See, e.g., Barrett v. Kiewit Atkinson Cashman, 19 Mass. Workers' Comp. Rep. 286 (2005) (§ 11A report must be stricken, as presumption of impartiality was compromised once impartial physician viewed vocational report).

Workers' Comp. Rep. 233, 236 (2005)(judge erred as a matter of law by failing to strike impartial report where § 11A physician and employee worked for same employer). Cf. Peterson v. Mass. State Lottery, 33 Mass. Workers' Comp. Rep ___ (May 21, 2019)(upholding judge's finding the appearance of impartiality had not been compromised where impartial physician and employee's treating physician were affiliated with same healthcare group and may have met on one occasion).

Only where the record will support but one conclusion will we rule on the issue of bias as a matter of law. Amoroso, supra at 237, citing Tallent supra; Paganelli supra. Where the impartial examiner was previously employed as a medical professional for the employee's employer, and also concurrently employed by the insurer at the time of the impartial examination and deposition, and during the actual hearing, we hold, as a matter of law, that the impartial examiner's report fatally contaminated the case *ab initio*. The appearance of impartiality, if not impartiality itself, is lacking where the impartial medical examiner is employed by the insurer. As a result, the impartial medical examiner's report should have been stricken from the record, and not considered at all by the judge. Amoroso, supra.

The employee also argues the hearing decision is deficient because it does not address the initial liability issue raised by the insurer and fails to provide a sufficient basis for the judge's denial of the employee's claim of psychiatric injury. In light of our decision to vacate the hearing decision and recommit the case to the judge, we direct the judge to address these and all issues raised by the parties in his subsequent hearing decision.[4].

Accordingly, we hold that the judge erred, as a matter of law, in denying the employee's motions to strike the §11A examiner's evidence. We vacate the judge's decision and recommit the case to the judge for the scheduling of a new impartial medical examination with a different doctor. Thereafter, the judge must issue a new decision

[4] We note that the insurer also raised the fourth sentence of § 1(7A), an issue not touched on by the judge.

based on that evidence, and any additional medical evidence that the judge, in his discretion, may allow.

Because the employee appealed the hearing decision and prevailed, an attorney's fee may be appropriate under § 13A(7). Employee's counsel must submit to this board, for review, a duly executed fee agreement between the employee and counsel. No fee shall be due and collected from the employee unless and until the fee agreement is reviewed and approved by this board.

So ordered.

Martin J. Long
Administrative Law Judge

Catherine Watson Koziol
Administrative Law Judge

Carol Calliotte
Administrative Law Judge

Filed: ***February 18, 2020***