COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO.:** 046541-01

William Barrett	Employee
Kiewit Atkinson Cashman	Employer
National Union Fire Insurance Co.	Insurer

REVIEWING BOARD DECISION
(Judges Horan, Costigan and Fabricant)

APPEARANCES
Joseph P. McKenna, Esq., for the employee
Edward F. McGourty, Esq., for the insurer

HORAN, J. The insurer appeals from a decision awarding the employee § 34A benefits for a work-related neck injury. The insurer contends the judge erred on a number of issues; we need address only one, and recommit the case for a trial de novo.

The extent of the employee's disability was the sole issue at hearing. The judge based his benefit award on the employee's age, work history, credible complaints of pain, the medical opinion of Dr. B. Hoagland Rosania,[1] and the opinion of the employee's vocational expert. (Dec. 8.)

The gist of the insurer's appeal concerns the opinion of Dr. Rosania. Prior to examining the employee, he was supplied with copies of the medical reports submitted at conference. However, contrary to 452 Code Mass. Regs. § 1.14(2),[2] he was also

[1] Dr. Rosania was the § 11A impartial medical examiner. His was the only medical opinion in evidence. (Dec. 1.)

[2] The regulation provides, in pertinent part:

> [T]he administrative judge shall submit to the impartial unit all approved medical records, any hypothetical fact patterns and any stipulations of fact for transmission to the impartial physician. No party . . . shall . . . submit any form of documentation to the impartial physician without the express consent of the administrative judge.

mistakenly given a copy of a report by Paul Blatchford, the employee's vocational expert. (Dec. 2.) In his report, Dr. Rosania referenced Mr. Blatchford's assessment. Dr. Rosania placed restrictions on the employee's activities, including no lifting over 10 lbs., no lifting above shoulder level, and avoidance of actions requiring "mobility of the cervical spine." (Dec. 2-6; Ex. 2.) The parties agreed, at hearing and prior to deposing the doctor, to redact from Dr. Rosania's report that portion referencing Mr. Blatchford's opinion. (Dec. 2-3.)

The insurer deposed Dr. Rosania seeking, among other things, to discover the extent to which he based his opinion on Mr. Blatchford's vocational assessment.[3] Following review of the deposition transcript, the judge found "there is no evidence that Dr. Rosania relied on the opinion of the vocational expert" in formulating his opinion on the employee's medical restrictions. (Dec. 6.) The insurer correctly argues the deposition transcript indicates otherwise. When asked if the conclusions of the vocational expert were consistent with his "examination" of the employee, the doctor responded:

> I took the report into consideration and weighted it quite heavily regarding my comments on his ability to be vocationally rehabilitated. *But in the body of that report there were several references to the patient's ability to do certain things and I thought that was quite pertinent to his medical assessment also.*

(Dep. 34.) (Emphasis added.)

Following the deposition, the insurer filed a motion to strike the impartial medical report, arguing that Dr. Rosania's opinion had been improperly influenced by his receipt and review of the vocational expert's opinion.[4] The motion was denied. Therefore, only Dr. Rosania's opinion was *sub judice*. (Dec. 1.)

---

[3] By agreeing to "sanitize" the report, the insurer did not waive its right to investigate the matter further by deposing the expert.

[4] The decision makes no mention of this effort, which included a request to introduce additional medical evidence. The board file, however, contains the motion, and the judge's handwritten denial. Rizzo v. M.B.T.A., 16 Mass. Workers' Comp. Rep. 160, 161 n.3 (2002)(judicial notice of board documents proper).

We agree the impartial medical examiner's report should have been stricken, and that additional medical evidence was required to address the extent of the employee's claimed incapacity. In Martin v. Red Star Express, we duly noted:

> Impartiality is the very cornerstone of the § 11A medical examiner system. If bias, partiality, or the appearance of same is at issue, the judge must address it and make findings and a ruling in that regard . . . [w]here the appearance of impartiality has been compromised . . . the § 11A examiner's opinion is inadequate, and the judge must allow the introduction of additional medical evidence.

9 Mass. Workers' Comp. Rep. 670, 673 (1995). The regulation[5] clearly does not permit non-medical evidence, such as the opinion of a vocational expert, to be forwarded to the impartial physician prior to the report's preparation. Once such evidence reaches the impartial physician, and the opinion contained in the subsequent § 11A report favors its sponsor, the Rubicon[6] is crossed, and the presumption of impartiality is compromised.[7]

We view the regulation as a firewall to safeguard the sanctity of the impartial medical examiner system. We also disapprove of the practice of compelling a party to depose the impartial physician to inquire on the sensitive subject of undue influence. See LaGrasso v. Olympic Delivery Serv., Inc., 18 Mass. Workers' Comp. Rep. 48, 57 (2004)(when §

---

[5] 452 Code Mass. Regs. § 1.14(2), see footnote 2, supra.

[6] The Rubicon river, far north of Rome, was crossed by Julius Caesar with his army in 49 B.C. - an act of treason under Roman law. Therefore, "crossing the Rubicon" has long referred to actions that cannot be undone.

[7] Even if the impartial physician had testified he was certain he was not influenced by the vocational expert's opinion, doubts would legitimately remain in the minds of the litigants, counsel, and the judge. Human experience tells us it is difficult, if not impossible, to disregard what we have seen or heard. We realize trial court judges must occasionally instruct jurors to disregard inadmissible evidence. Even so, if the evidence is particularly strong, "asking the jury to disregard it may be tantamount to asking the jury to ignore that an elephant has walked through the jury box." Commonwealth v. Flebotte, 34 Mass. App. Ct. 676, 680 (1993), S.C., 417 Mass. 348 (1994). Here, we are dealing with a physician's opinion which, by law, is to be afforded *prima facie* weight. Moreover, this *prima facie* evidence becomes, in effect, conclusive evidence unless the judge allows additional medical "rebuttal" evidence to be introduced. See G. L. c. 152, § 11A(2); O'Brien's Case, 424 Mass. 16 (1996).

11A *report* is inadequate as a matter of law, neither party should be forced to depose the impartial physician to cure the inadequacy). We therefore disagree with the majority's approach in Moseley v. New England Fellowship for Rehab Alternatives, 13 Mass. Workers' Comp. Rep. 316 (1999). In Moseley, the § 11A examiner was improperly provided with a copy of the insurer's conference memorandum in advance of the examination. The memo was prepared by insurer's counsel and, unsurprisingly, presented the case in a light most favorable to the insurer. The resulting impartial physician's report failed to support the employee's present disability claim. Rather than strike the § 11A report, the judge allowed the parties to submit additional medical evidence. In dismissing the employee's appeal, the Moseley majority held that because the impartial's report did not, on its face, indicate reliance upon the memorandum, and because the judge admitted additional medical evidence, they could not conclude the doctor's impartiality had been compromised. Id. at 321. We agree with the dissenting judge, who wrote:

> Allowing, even inadvertently, the impartial medical examiner to view the insurer's memorandum advocating that the employee is not disabled and that such disability is not causally related to her work injury is tantamount to ex parte communication with the physician, and is improper . . . [w]e cannot assume, as the majority does, that this memorandum did not influence the impartial examiner.

Id. at 326-327.

Therefore, even if the judge had correctly concluded that Dr. Rosania's opinion was not affected by his receipt of the report,[8] such a finding would not cure the appearance of partiality or undue influence. See Amoroso v. Univ. of Mass. Medical School, 19 Mass. Workers' Comp. Rep. (August 24, 2005) (impartial medical examiner's opinion that he could express an unbiased opinion was insufficient to cure the appearance of partiality where both doctor and employee were employed by the same entity). Where, as here, the regulation has been violated, *and* the impartial medical examiner's reported opinion is adverse to the objecting party, the report must be stricken, and a new impartial examiner's opinion, and/or additional medical evidence, must be considered to fairly address the issues in dispute. See O'Brien's Case, supra at 22-23 (1996)("A decision by the administrative judge to foreclose further medical testimony where such testimony is necessary to present fairly the medical issues would represent grounds either for reversal or recommittal. In any case where these procedures still failed to offer a party an

[8] Which he could not do on the record before us.

opportunity to present testimony necessary to present fairly the medical issues, there then might well be failure of due process as applied in that case.") We therefore overrule our prior decision in Moseley v. New England Fellowship for Rehab Alternatives, 13 Mass. Workers' Comp. Rep. 316 (1999).[9]

We return the case to the administrative judge for a trial de novo consistent with this opinion. In the interim, the conference order awarding § 35 benefits is reinstated. In light of our holding, we do not reach the remaining appellate issues.

So ordered.

_____
Mark D. Horan
Administrative Law Judge

_____
Patricia A. Costigan
Administrative Law Judge

_____
Bernard W. Fabricant
Administrative Law Judge

Filed: October 12, 2005

[9] We express no opinion regarding the vitality of our holding in Howell v. Norton Co., 11 Mass. Workers' Comp. Rep. 161 (1997). In that case, *after* the impartial medical examiner had issued his report, and on the eve of his deposition, he spoke with the employee by phone. In that case, we held that "the judge fashioned an appropriate remedy and preserved the integrity of the judicial process when he allowed the selfinsurer's motion to submit additional medical evidence." Id. at 165. We are mindful the facts of the case at bar are unusual. Ordinarily, our impartial medical examiner unit exercises extreme vigilance to ensure that only medical information and hypothetical questions are submitted to the impartial medical examiners. Judges, and counsel, must also take steps to ensure that only authorized documents are forwarded to these physicians.