COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 047780-03**

William McNamee	Employee
University of Massachusetts Medical School	Employer
Commonwealth of Massachusetts	Self-Insurer

REVIEWING BOARD DECISION
(Judges Long, Calliotte and Fabiszewski)

This case was heard by Administrative Judge Benoit.

APPEARANCES
John K. McGuire, Jr., Esq., for the employee
Thomas J. Murphy, Esq., for the self-insurer

LONG, J. The employee appeals from a hearing decision dated March 17, 2021, (Decision V),[1] denying his "purely emotional injury" claim for § 34A permanent and total incapacity benefits from November 30, 2017, to date and continuing. The employee raises several issues in his appeal. We find merit in his primary argument, with which the self-insurer agrees, that the administrative judge utilized the incorrect "a major cause" standard for adjudicating this dispute. We hold that the correct standard for determining ongoing causal relationship in this purely emotional injury claim is simple, "but for" causation. We also agree with the employee that the judge impermissibly adopted Dr. Mufson's expert opinion but disagree that the judge erred in finding the § 11A examiner, Dr. Nestlebaum, exhibited either bias or the appearance of bias. We vacate the decision and, because the judge who heard the case has retired, refer the matter to the Senior Judge

[1] This claim has a total of five hearing decisions, which will be referred to as follows:
Decision I (William Constantino, Jr., Administrative Judge - dated June 12, 2007)
Decision II (Paul Benoit, Administrative Judge – dated July 8, 2010)
Decision III (Paul Benoit, Administrative Judge – dated May 21, 2014)
Decision IV (Paul Benoit, Administrative Judge – dated November 30, 2017)
Decision V (Paul Benoit, Administrative Judge – dated March 17, 2021)

for assignment to a different judge for adjudication consistent with our instructions contained herein.

The procedural history of the claim is lengthy, yet important for our analysis. We use the judge's accurate synopsis found in Decision V as follows:

> The employee filed a claim for § 34 benefits on June 21, 2004. The Hearing before Judge William Constantino, Jr., resulted in a Decision dated June 12, 2007, that ordered § 35 benefits from May 1, 2004, to May 15, 2005, and § 34 benefits from December 1, 2005, to date and continuing.[2]
>
> The employee filed a claim for § 34A and § 35 benefits on September 25, 2008. The Hearing before me resulted in a Decision dated July 8, 2010, that ordered § 34A benefits from September 1, 2008, to date and continuing.
>
> The employee filed a claim for § 8, § 28 and § 13A benefits on October 22, 2010. The Hearing before me resulted in a Decision dated May 21, 2014, that denied and dismissed the employee's claims. The Reviewing Board and Court of Appeals affirmed that Decision.
>
> The Self-Insurer filed a complaint to discontinue or modify benefits on April 1, 2015. The August 14, 2015 Conference before me resulted in an order denying the complaint. The Self-Insurer appealed that Conference order in a timely manner and a Hearing was held on November 15, 2016. There were no transcripts of depositions in evidence. The Decision was filed on November 30, 2017, in which the conclusion was that the employee failed to establish that it was more likely than not that the predominant cause of his condition were events that had occurred in the workplace, effective from the date of Dr. Nestlebaum's § 11A examination and continuing. The Self-Insurer was authorized to discontinue payment of weekly benefits to the employee effective as of January 5, 2016, and the Self-Insurer's right to seek reimbursement of benefits paid for the period from

[2] In Decision I, Judge Constantino found the employee was totally disabled as a result of a May 16, 2003, personal injury. He further found:

> [T]he predominant cause of Mr. McNamee's psychiatric disability is the overwhelming amount of work that he had at U. Mass Medical and the stress he experienced in attempting to handle that amount of work. I find that Mr. McNamee's psychiatric disability did not arise principally out of a bona fide personnel action. I find that Mr. McNamee has met the standards of causation for emotional incapacity to be compensable pursuant to Chapter [152, §] 1(7A) and § 29.

(Dec. I, 22-23.) Decision I was appealed by the self-insurer to the Reviewing Board, which summarily affirmed it on September 16, 2008. No further appeal was taken by the self-insurer.

> January 5, 2016, and thereafter was reserved. The Employee appealed the Hearing Decision of November 2017 to the Reviewing Board, which summarily affirmed the decision.
>
> The employee filed the instant claim for § 34A benefits, which came on for conference on September 11, 2018. The resulting conference order denied the claim. The employee appealed the 2018 Conference order in a timely fashion.
>
> . . . .
>
> A Hearing de novo began on November 26, 2019, and a second day of Hearing took place on December 13, 2019.

(Dec. V, 4-6.)

At the November 26, 2019, hearing, Dr. Zamir Nestlebaum's § 11A report dated June 12, 2019, was admitted into evidence, and later his deposition transcript dated February 14, 2020, was also admitted. Following Dr. Nestlebaum's deposition, the judge allowed the employee's motion to submit additional medical evidence. The employee thereafter submitted narrative reports dated April 20, 2018, and June 18, 2018, from his treating psychiatrist, Dr. Mark Cutler, together with Dr. Cutler's deposition transcript dated October 7, 2020. The self-insurer submitted a narrative report from Dr. Michael Mufson dated October 11, 2018.[3]

At the hearing on November 26, 2019, the employee claimed § 34A permanent and total incapacity benefits from November 30, 2017, or, in the alternative, § 35 temporary partial incapacity benefits for the same period. The insurer raised the issues

[3] On June 1, 2020, the employee also filed four motions prompted by the alleged lack of impartiality of the § 11A physician, Dr. Zamir Nestlebaum: 1) a motion to strike Dr. Nestlebaum's 2019 report and subsequent testimony; 2) a motion to strike Dr. Nestlebaum's report of January 5, 2016; 3) a motion to amend the employee's claim as of January 5, 2016, which was the date on which the November 30, 2017 hearing decision had discontinued benefits; and 4) a motion requesting that § 34A benefits be reinstated from the date of the allowance of the motions. On August 17, 2020, the judge denied the first three motions filed by the employee and declared that, following those denials, the fourth was moot. (Dec. 6.)

and defenses of disability and extent thereof, causal relationship and the third and fourth sentences of § 1(7A).[4]

In Decision V, currently on appeal, the judge wrote that, "The Employee, in his Closing Argument denies that the Employee has a Personality Disorder, and asserts that either (1) the industrial injury remains as the Predominant cause of ongoing incapacity, or, alternatively, (2) merely a linear causation chain from the personal injury to the current condition(s) is required." (Dec. V, 14.) The judge made the following rulings:

> The evidence fails to establish that it is more likely than not that the Employee had a preexisting non-compensable mental or emotional illness or personality disorder.
>
> The causation level that applies to this claim is that the Employee's industrial injury must be a *major, though not necessarily predominant cause* of incapacity.
>
> The evidence fails to establish that it is more likely than not that the Employee's industrial injury is or has been *a major cause of his current level of incapacity* from November 30, 2017 to the close of the record.
>
> The evidence fails to establish an appearance of lack of impartiality on the part of Zamir Nestlebaum, M.D., M.P.H., with regard to this case.
>
> The evidence fails to establish an actual lack of impartiality on the part of Zamir Nestlebaum, M.D., M.P.H., with regard to this case.

(Dec. V, 23-24; emphasis added.)

On appeal, the employee posits several deficiencies in Decision V, most notably that the judge,

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[4] The third and fourth sentences of M.G.L. c.152, § 1(7A) provide:

> Personal injuries shall include mental or emotional disabilities only where the predominant contributing cause of such disability is an event or series of events occurring within any employment. If a compensable injury or disease combines with a pre-existing condition, which resulted from an injury or disease not compensable under this chapter, to cause or prolong disability or a need for treatment, the resultant condition shall be compensable only to the extent such compensable injury or disease remains a major but not necessarily predominant cause of disability or need for treatment.

> [A]pplied the wrong causal relationship standard for on-going mental/emotional disability resulting from a 'purely mental/emotional industrial injury' when he denied compensation. Judge Benoit should have used the variously called 'simple causation connection,' 'simple causal chain,' 'chain of causation,' or 'but for' standard for adjudicating compensability for ongoing disability.

(Employee br. 1.) Finding merit in this and another of the employee's arguments, we vacate Decision V.[5]

In finding that the appropriate causation standard in this case was "a major but not necessarily predominant cause," the judge seemed to be seeking to strike a middle ground between predominant contributing cause and simple "but for" causation, based on his belief that,

> The Legislature's evident suspicion concerning purely emotional or mental injuries inexorably indicates that the proper standard for evaluation of claims for a person's remaining entitled to ongoing benefits based on purely emotional injuries is "major but not necessarily predominant". This puts it on the same level as those cases [] involving preexisting conditions, but is a higher standard than a simple "but for".

(Dec. 18.) We disagree, as do both the employee and insurer.

Section 1(7A)'s fourth sentence, on its face, requires that, where an insurer meets its burden of producing evidence that a pre-existing non-work-related condition combines

[5] In Decision IV, the judge utilized the "predominant contributing cause" standard to adjudicate the insurer's complaint to discontinue the employee's § 34A benefits. Despite appealing that decision, the employee did not challenge whether predominant cause was the appropriate standard. For the first time following the fifth hearing, the employee argues, in both his closing argument and appellate brief, that the simple "but for" causation standard applies to the issue of ongoing causal relationship in "pure mental/emotional" injuries. (See Employee br. 21-29; Ex. 14 for identification, Employee's Closing Argument.) Rizzo v. M.B.T.A., 16 Mass. Workers' Comp. Rep., 160, 161 n.3 (2002)(judicial notice taken of board file.) While challenging the employee's arguments, the self-insurer does not argue that principles of res judicata (claim preclusion) or collateral estoppel (issue preclusion) bar the employee from raising, or the judge from adjudicating, the currently applicable causation standard. See Boucher v. Edward Buick, Inc., 35 Mass. Workers' Comp. Rep. 1, 3-4 n.4 (2021)(collateral estoppel and res judicata are affirmative defenses which must be raised by a party); Litch v. American Airlines, 32 Mass. Workers' Comp. Rep. 235, 241 n.5 (2018)(res judicata not raised at hearing, and employee has waived issue on appeal). Accordingly, we address the issue raised by the employee.

with an industrial injury, the employee bears the burden of proving the work-related injury "*remains* a major cause" of the resulting disability or need for treatment. (Emphasis added.) MacDonald's Case, 73 Mass. App. Ct. 657 (2009). The employee's burden of proving "a major cause" in these combination injury cases is thus an ongoing obligation. See Spencer-Cotter v. North Shore Medical Ctr., 25 Mass. Workers' Comp. Rep. 315, 317 (2011)(where statute directs judge to determine whether work injury "remains" causally connected to disability, there can be no final adjudication of that affirmative defense, and insurer may raise it at any point in proceedings). The "remains a major cause" standard also applies where the mental sequelae of a physical injury combine with a pre-existing psychiatric condition. Cornetta's Case, 68 Mass. App. Ct. 107 (2007); Lagos v. Mary A. Jennings, Inc., 11 Mass. Workers' Comp. Rep. 109 (1997). Here, despite finding the employee did not have a pre-existing non-compensable "mental or emotional illness or personality disorder," the judge erroneously found "[t]he causation level that applies to this claim is that the employee's industrial injury must be a major, though not necessarily predominant cause of incapacity." (Dec. 18.)

As noted, all agree that the judge's use of the "a major but not necessarily predominant cause" standard in this case was error. (Insurer br. 14; Employee br. 22-23.) As held in many prior decisions, § 1(7A)'s fourth sentence and its accompanying "a major cause" standard, only applies to claims that involve a "combination" of pre-existing non-work related condition/s and a compensable work injury, Cornetta's Case, supra, a situation not present here.

This leaves the employee with only two other options for establishing entitlement to ongoing benefits in this dispute: either "but for" causation, or "predominant contributing cause." We turn first to the self-insurer's argument in support of its call for adopting the "predominant contributing cause" standard.

> Given that this is a pure emotional disability case, the self-insurer argues that the employee is held to a higher standard – the 'predominant contributing cause' standard. It further argues that this is an ongoing burden for an employee, not just during a liability hearing, as suggested by the employee.

(Self-insurer br. 14-15.)

In support, the self-insurer argues that Vallee v. Brockton Housing Authority, 31 Mass. Workers' Comp. 15 (2017) serves as precedent for our analysis here:

> In Valle [supra] liability for a pure psychiatric injury had already been established, and §§ 34 and 35 benefits ordered. The employee brought a subsequent claim for ongoing § 34 benefits. Dr. Khan served as the impartial examiner. His opinion was that environmental factors, much like those in the instant case, were much more predominant than events at work and that the incidents ceased to be a predominant contributing cause of his disability. The Reviewing Board acknowledged the "but for" analysis for physical disability cases but stated that the employee is held to a higher standard in a purely psychiatric case. It held that the employee was to be held to the predominant contributing cause standard and did so even though liability had long been established. In fact, the court concluded that "the only question before us is thus whether the predominant contributing cause of his present disability, since 2012, is his 2003 accident" [Vallee, supra at 21] even though the injury had already been found compensable.

(Self-insurer br. 15.)

While the self-insurer accurately recites a sentence from the Vallee case in its argument, our statement regarding the applicability of the predominant contributing cause standard to current disability claims in purely emotional injury cases was merely dicta, unsupported by any caselaw, which we now abandon as any potential precedent for this issue. In Vallee, there was *no* adopted expert medical evidence that the employee's ongoing incapacity was causally related in *any* way to the initial psychological injury.[6] Thus, our analysis of § 1(7A)'s third sentence in Vallee, supra, and the statement that "[t]he only question … is … whether the predominant contributing cause of … present disability … is [the original] industrial accident," id. at 21, was "judicial dicta not necessary to [that] particular decision." Sawicka v. Archdiocese of Boston, 14 Mass. Workers' Comp. Rep. 362, 367 (2000), citing Moss v. Old Colony Trust Co., 246 Mass

[6] Vallee also involved a situation where the employee was required to prove a worsening of his disabling psychiatric condition due to a prior decision ordering § 35 temporary partial incapacity benefits, another distinguishing factor.

139, 151 (1923). See Brown v. Commissioner of Correction, 336 Mass. 718, 720 (1958). As similarly noted in Sawicka, when the administrative judge below in Vallee "concluded that the § 11A medical evidence failed to support the employee's claim *at all* with regard to causal connection, any discussion of the *quantum* of proof that the employee had failed to adduce was surplusage…. As such, we need not follow it." Sawicka, supra.

For the reasons that follow, we reject the "predominant contributing cause" standard to analyze ongoing causal relationship in a "purely mental/emotional" personal injury claim, and instead adopt the "but for" causation standard. In doing so, we follow long-established rules of statutory interpretation and legal precedent. We look to the statutory development of the current version of the third sentence of § 1(7A) to analyze the issue of the causation standard required to establish ongoing disability for a "purely mental/emotional" personal injury. A rather concise review of § 1(7A)'s development is outlined in Cornetta's Case, supra, where the Appeals Court determined that the 1991 changes to the third and fourth sentences of § 1(7A) did not enlarge the scope of the third sentence to include claims other than purely mental/emotional claims: "However, neither of these alterations to G.L. c. 152, Sec. 1(7A), expanded the reach of the third sentence to cover emotional disabilities flowing from physical injuries." Id. at 117.

Applying the same logic, we likewise find that the alterations to the fourth sentence, where the "*remains* a major but not necessarily predominant cause of disability or need for treatment" language is found, do not apply to the third. There are no words or phrases that link or connect the sentences, nor do we discern any direct or implied indication of reciprocity between them. "Words and phrases shall be construed according to the common and approved usage of the language; but technical words and phrases and such others as may have acquired a peculiar and appropriate meaning in law shall be construed and understood according to such meaning." G. L. c. 4, § 6. "When a statute is plain and unambiguous, we interpret it according to its ordinary meaning." See Commonwealth v. Brown, 431 Mass. 772, 775 (2000), citing Victor V. v. Commonwealth, 423 Mass. 793, 794 (1996) "We are not permitted to add words to a

statute that "the Legislature did not see fit to put there." General Elec. Co. v. Department of Envtl. Protection, 429 Mass. 798, 803 (1999), quoting King v. Viscoloid Co., 219 Mass. 420, 425 (1914). See Commissioner of Revenue v. Cargill, Inc., 429 Mass. 79, 82 (1999)("Where, as here, the language of the statute is clear, it is the function of the judiciary to apply it, not amend it."); Commonwealth v. Russ R., 433 Mass. 515, 520-521 (2001).

Applying these basic tenets of statutory interpretation to § 1(7A)'s third sentence, we simply do not find any source to support the self-insurer's proposition that a "purely emotional" injury requires a showing that said injury *remains* the "predominant contributing cause" of disability once initial liability for the injury has been established. On its face, the third sentence defines what is required to establish a mental or emotional "personal injury" as the term is used in § 26 of M.G.L. c.152. The fourth sentence with its "remains" requirement, acknowledges a "compensable injury" has occurred and deals with the extent to which the combination injury is compensable. To adopt the self-insurer's argument would be to ostensibly insert the word "remains" (or another synonym) from the fourth sentence into the third sentence, which only the legislature can do. In fact, the legislature had the opportunity to do just that when it simultaneously amended § 1(7A)'s third and fourth sentences during the sweeping 1991 overhaul of G. L. c. 152. While the legislature raised the standard to its toughest version yet for proving "purely emotional" injuries as personal injuries under the statute, they did not add the further burden of having the employee repeatedly establish that his ongoing disability is "predominantly" caused by the initial emotional injury. It is simply not there. Nor does it make sense to impose this burden.

As we recently noted in Doe v. The Walker Home & School for Children, 34 Mass. Workers' Comp. Rep. 7 (2020), where successive insurer liability for a "hybrid" emotional injury was at issue, "the concept of an 'exacerbation' or 'aggravation' of disability to the slightest extent, [] is the foundation upon which successive insurer

liability is based."[7] Id. at 15. Similarly, the concept of "but for" causation is the foundation upon which ongoing compensability is analyzed in all classes of injuries, except one. The only instance where an employee is required to do anything more than establish "but for" causation is when § 1(7A)'s fourth sentence "combination injury" provisions are in play. In those instances, the work injury must "*remain* a major but not necessarily predominant cause of disability." Because there was no pre-existing non-compensable condition combining with a compensable injury in this case, we hold that the employee must prove only "but for" causation to maintain entitlement to ongoing benefits.

Next, we also agree with the employee's argument that the judge impermissibly adopted opinions of Dr. Mufson since they are based on a medical history that is contrary to findings made by the judge in Decision V. (Employee br. 31.) Specifically, the employee argues that, although the judge found that there was no evidence the employee suffered from any emotional/mental illness, including a personality disorder, prior to working for the employer, (Dec. 15, 18, 24), the judge erroneously relied on Dr. Mufson's opinion, which was based on his conclusion that the employee did have a pre-existing non-compensable mental or emotional illness in the form of a personality disorder. (Employee br. 31-32.)

We agree with the employee's argument and legal citations in support thereof. "It is axiomatic that the judge must find facts, and then adopt medical opinions consistent with them." Uka v. Westwood Lodge Hospital, 30 Mass. Workers' Comp. Rep. 129, 130 (2016). The opinion of a medical expert "is not entitled to any weight unless the fact finder believes the facts on which the report is based." Brommage's Case, 75 Mass. App.

[7] We referred to the psychiatric injury in Doe, supra, as "hybrid" because it initially stemmed from the employee's physical injury at her first employer and was later aggravated to the point of total disability at the subsequent employer due to non-physical causes. Despite the somewhat complex history of Doe's psychiatric injuries and the differing causation standards proposed by the parties, we held the established principles of the successive insurer rule, and its "but for" causation standard, were appropriately applied to resolve the dispute. Doe, supra, at 15-16.

Ct. 825, 828 (2009). Considering the glaring inconsistencies between the judge's findings, (as well as the original establishment of liability for a psychiatric injury) and the medical history upon which Dr. Mufson's report was founded, we agree that it was error for the judge to have adopted Dr. Mufson's opinions at all.[8]

The employee also takes issue with the judge's reliance upon Dr. Nestlebaum's impartial medical reports and deposition testimony to support Decisions IV and V, arguing that the doctor was biased. (See infra, note 4.) The employee argues, "Dr. Zamir Nestlebaum, the § 11A physician in this proceeding, and in the proceeding that resulted in the Decision filed on November 30, 2017, has now been revealed to have tainted both proceedings by having injected an appearance of an absence of impartiality into their adjudications." (Employee br. 9.) The employee's allegation of an absence of impartiality arose following the February 14, 2020, deposition of Dr. Nestlebaum where the entirety of the colloquy involving this issue was as follows:

> Q. (By employee counsel) So, Doctor, did you ever work at UMass Medical School?
> A. Yes.
> Q. What did you do there?
> A. I was the director of the Emergency Services.
> Q. For how long?
> A. For two years.
> Q. From when to when?
> A. 1988 to '90.
> Q. Did you know Tom Manning?

[8] We note that the judge could not have adopted Dr. Mufson's opinion because it is not clear that Dr. Mufson believed the employee suffered from a major depressive disorder as a result of a work-related injury, despite liability having already been established for the psychiatric injury in Decision I. See Adams v. Town of Wareham, 21 Mass. Workers' Comp. Rep. 207, 209 (2007)(in accepted case, error to permit insurer to challenge causal relationship of employee's present disability based on medical opinion rejecting liability for initial causation between work injury and employee's disability) Thus, there is no need, on recommittal, for the judge to resolve the inconsistencies in the two medical opinions. Cf. Sourdiffe v. U. of Mass/Amherst, 22 Mass. Workers' Comp. Rep. 319, 324-325 (2008)(adoption of inconsistent medical opinions requires recommittal for further findings of fact). Nor may Dr. Mufson's opinions and reports be considered by the new administrative judge on remand.

A. Yes.
Q. Were you aware when you examined Mr. McNamee that Tom Manning was the alleged protagonist in this whole thing?
A. Well, I saw his name in the report, somewhere in the records.
Q. How well did you know Mr. Manning?
A. Professionally. We weren't friends.
Q. Was he in any way a superior of yours or a direct report of yours?
A. No, I mean he was an administrator, he worked with the chairman, Aaron Lazare, but I reported to I think at that point directly to Aaron Lazare, the Chair.
Q. Did you go to the medical school?
A. Yes.
Q. And you graduated when?
A. From the medical school, '85, no, '81.

(Dr. Nestlebaum dep. 50-51.)

From this innocuous exchange during the deposition, the employee alleges that Dr. Nestlebaum lacked the appearance of impartiality and was perhaps biased due to his prior employment at University of Massachusetts Medical School almost thirty years ago and due to a prior professional "relationship" at that time with Thomas Manning, who the employee claimed was a major factor in the incidents leading to his injury.[9] As the

[9] The judge recounts Thomas Manning's role in a prior proceeding, Decision III, as follows:

> Tom Manning, as Deputy Chancellor For Commonwealth Medicine of the University of Massachusetts Medical School, participated in only one earlier hearing, i.e., that held in 2012, in which the single subject was the Employee's claim for double benefits under Sec. 28. Notably, Mr. Manning was not involved in the Employee's initial Hearing seeking Sec. 34 benefits, before Judge Constantino, back in 2006 and 2007, nor in the hearing seeking Sec. 34A benefits in 2010, and thus Tom Manning never testified against the Employee's claims for benefits under Sec. 34, 35, or 34A.
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> . . . .
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> There is no indication that Dr. Nestlebaum's present or future professional or personal prospects will be affected in any way by the testimony that he has given. Dr. Nestlebaum has testified that he has no conflict of interest, and I believe, accept, and agree with that statement. … Employee counsel's oft-repeated assertions of Dr. Nestlebaum having had "extensive involvement with Tom Manning" and "extensive two-year affiliation with Tom Manning" (1988-1990) have no basis in the evidence. His assertion of an "obvious appearance of partiality" is specious. I perceive no conflict of

sparse deposition testimony reveals, Dr. Nestlebaum knew Manning almost thirty years ago but stated they were not friends. More importantly, there was no testimony that demonstrated any ongoing relationship, either personal or professional and nothing to establish how closely the two worked together except that Dr. Nestlebaum did not report to Manning. The employee's description of the relationship in his brief is pure conjecture and speculation about information that could have been developed, or not, during the deposition. The employee asserts that the case is governed by our decisions in Amoroso v. U. Mass. Med. School, 19 Mass. Workers' Comp. Rep. 233, 236 (2005)(where injured employee and § 11A physician were at the time of the impartial examination, employed by the same employer, the appearance of impartiality has been compromised requiring finding of inadequacy of § 11A report), and Sirasombath v. Waters Corporation, 34 Mass. Workers' Comp. Rep. 19 (2020)(where impartial physician had previously been employed by the employer and was presently employed by the workers' compensation insurer in the case, the appearance of impartiality has been compromised and the impartial report stricken from the record as a result.) We disagree. As noted, Dr. Nestlebaum testified that he only knew Thomas Manning professionally almost thirty years ago, and Dr. Nestlebaum does not have any shared employment with the employee or insurer. "Generally, the issue of whether impartiality has been compromised is left to the discretion of the judge, who must make findings and a ruling." Amoroso, supra at 237. The judge did precisely that. He did not abuse his discretion in denying the employee's motions.

Lastly, we note that even if the judge had found that the appearance of impartiality had been compromised, the proper remedy would have been to declare the impartial report inadequate and to open the medical evidence, not to strike the doctor's report as

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> interest, or appearance of one. I reject the claim that there is even an appearance of []partiality on the part of Dr. Nestlebaum.

(Dec. V, 21-23.) Additional specific findings regarding Manning's testimony are noted in Dec. III, 5-7.

advocated by the employee. Peterson v. Mass State Lottery, 33 Mass. Workers' Comp. Rep. 109 (2019), citing Martin v. Red Star Express Lines, 9 Mass. Workers' Comp. Rep. 670, 673 (1995). As noted earlier, the judge allowed the employee's motion to submit additional medical records, which would have cured any lack of impartiality concerns had the judge found impartiality had been compromised.[10]

Since the administrative judge who issued the decision has retired, we refer the matter to the Senior Judge for reassignment to a different judge for further proceedings consistent with this decision.

Pursuant to G.L. c. 152, § 13A(7), employee's counsel shall submit a fee agreement for our approval.

So ordered.

Martin J. Long
Administrative Law Judge

Carol Calliotte
Administrative Law Judge

Karen Fabiszewski
Administrative Law Judge

Filed: **June 15, 2022**

[10] The employee also questions impartiality and/or bias by arguing that "Dr. Nestlebaum, in forming his opinions about the causal relationship of the employee's condition, obviously did not accept that the bulk of the employee's account of events at work were indeed true[.]" (Employee br. 30-31) We disagree with this assertion especially since Dr. Nestlebaum's impartial reports and deposition testimony confirm and acknowledge the employee's initial injury, diagnosis and initial causal relationship to work events based upon the history the employee now argues the doctor does not accept.