COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 005334-13**

Em Enid D'Sylvia	Employee
Alisande Cunningham Sweeney d/b/a Juniper Hill Farm	Employer
Workers Compensation Trust Fund	Insurer

REVIEWING BOARD DECISION
(Judges Harpin, Fabricant, Long)

The case was heard by Administrative Judge Poulter.

APPEARANCES
Daniel E. Blakesley, Esq., for the employee
Janice M. Toole, Esq., for the DIA Trust Fund
Michael J. Chernick, Esq., for the employer at hearing
Steven Louis Baumohl, Esq., for the employer on appeal

HARPIN, J. The uninsured employer appeals from a decision finding the employee sustained a work-related injury on January 29, 2013.[1] We affirm the decision.

The employee originally filed a claim against the Workers' Compensation Trust Fund (WCTF), as the employer was uninsured on the date of injury. At the conference held on July 15, 2015, the WCTF moved to join the employer as a party, which the judge allowed. (Dec. 3; Tr. I, 4.) Following the conference, on July 17, 2015, the judge ordered the WCTF to pay the employee § 35 benefits, which the WCTF and the employee appealed. (Dec. 3.) The employer did not file an appeal at that time. Id. The case proceeded to a hearing, with testimony taken on November 14, 2014, and December 19, 2014. By the next day set for hearing, July 24, 2015, the WCTF and the employee informed the judge they had reached a

[1] The hearing and status conferences took place over six days. The transcripts of those dates are designated as follows: "Tr. I," for November 14, 2014; "Tr. II," for December 19, 2014; "Tr. III," for July 24, 2015; "Tr. IV," for July 31, 2015; "Tr. V," for September 17, 2015; and "Tr. VI," for October 30, 2015.

settlement agreement, and they each were prepared to withdraw their appeals of the conference order. Id. (Tr. III, 3.) The judge noted, with the employer's attorney present, that with such withdrawals, "The case then shuts down. The litigation is then over." (Tr. III, 8.) The employer objected, after noting that the failure to file an appeal originally had been an oversight, and asked for time to petition the Director of the DIA to file a late appeal, even though under G. L. c. 152, § 10A(3), such petition had to be filed within one year from the date of the July 17, 2015, conference order. (Tr. III, 9-12.) The judge allowed the employer time to file such a petition, which she did on July 29, 2015. (Petition to Chief Judge or Commissioner. See Rizzo v. MBTA, 16 Mass. Workers' Comp. Rep. 160, 161 n.3 (2002)(permissible to take judicial notice of Board file.) In the meantime, the judge held a lump sum conference on July 31, 2015, with the WCTF, the employee, and her attorney present. The employer's attorney later alleged he did not receive notice of the conference, and thus did not attend. (Employer's br. 4.) After the lump sum presentation the judge held the settlement in abeyance, pending the outcome of the employer's petition to the Director. (Tr. IV, 12.) The Director responded in August, 2015, that she did not have authority to allow a late appeal at that time, but requested that the hearing judge and parties resolve the matter.[2] (Dec. 3.) After considering the employer's request, the judge did not allow the late appeal, id, likely because she lacked any authority to do so, that authority lying with the Director alone. Consequently, this should have been the end of the matter, as the employee and the WCTF had agreed to settle the underlying claim. However, on September 17, 2015, the next scheduled day of the hearing, the judge noted, without objection from any of the parties, that:

[2] A petition for the allowance of a late appeal can be submitted to the Director of the DIA, but only if the petition is sent within one year of the filing of the conference order. G. L. c. 152, § 10A(3). Although it is not stated in the Director's reply to the petition, this may be why she denied it. However, it is not clear why she suggested that the judge and the parties resolve the matter, as only the Director had that authority.

> the parties are in agreement with regard to all of the issues [except] the employee/employer relationship at the time of the accident. And so the only issue in dispute at this juncture is the employee/employer relationship at the time of the accident and all the parties are in agreement with regard to that and the decision coming from the Court will mark the other issues as being resolved."

(Tr. V. 3-4; Dec. 3.)

Nothing was said on the record by either the judge or the parties why the testimony continued, in the face of the agreed settlement, and the statement by the judge that she was holding the settlement in abeyance only until the Director made her decision on the employer's petition.[3] Testimony was taken on that day and on October 30, 2015. The decision was filed on January 7, 2016. (Dec. 9.) A lump sum agreement was then approved by the judge between the employee and the WCTF on January 13, 2016. (Approved Lump Sum Agreement, dated January 13, 2016. Rizzo, supra.)

Ordinarily, the settlement between the employee and the WCTF would have closed out the case. Teehan's Case, 7 Mass. App. Ct. 846 (1979)(a settlement reached while a case is on appeal renders moot the issues raised for judicial review.) However, the parties proceeded to complete the hearing process, through a decision, after the settlement was agreed on, in effect trying the case to

[3] An indication of the thinking of the parties and the judge was given at the oral argument, where the attorney for the WCTF noted that the employer's attorney wished to "try the case to conclusion because they had just begun putting their witnesses on." (O.A. Tr. 28.) She continued:

> We just thought, well, let's let the judge make the decision about whether this trial should be concluded. And we kind of ---and it was a little bit of professional courtesy, a little bit of, you know professional court – and then just simply deferring to the judge. . . . The attorney for the employee and myself didn't like the fact that we were depriving – we weren't giving extra professional courtesy to Attorney Chernick. We didn't like to see him get shut out either by lack of appeal. . . . If we withdrew, his argument was then this is going to be malpractice for me, and we didn't like that either. And I could tell the judge didn't like it. So just out of (sic) letting the judge make the decision, the judge did decide I want to hear this case.

(O.A. Tr. 29-10.)

conclusion by consent. See Martinez v. Georges Renovations, LLC, 33 Mass. Workers' Comp. Rep. ___ Note 5 (April 19, 2019)(failure to appeal a conference order ordinarily prevents party from raising any issues at hearing, but if the hearing is held on those issues by consent and without objection by the other parties, a valid decision results). In the unique circumstances of this case, and only in this case, we think it fundamentally unfair to the employer, after being allowed to put her case into the record and receive a decision, to be precluded from advancing her appeal because of the settlement to which she properly was not a part. We will therefore proceed to consider her issues on appeal.

The employee was 56 years old at the time of the hearing. Of the five witnesses who testified at the hearing, the judge found only her testimony credible. The employee had worked as a Licensed Practical Nurse (LPN) in California, from 2008 to November, 2012, and held LPN licenses in both California and Massachusetts. (Dec. 5.) The employee relocated to Massachusetts and sought work as an LPN, but while seeking such work she needed a place to stay. She saw an ad on Craigslist placed by the Juniper Hill Farm seeking someone for farming and personal care. (Dec. 5.) The employee communicated by e-mail with Alisande Sweeney Cunningham, the employer, and they agreed the employee would work two hours a day taking care of Ms. Sweeney's elderly mother, as well as cleaning and "odds and ends types of things." Id. No pay rate was discussed, although the employee understood that if she had to work more than two hours a day she would receive additional compensation. Id. She understood the payment would be in cash, but she was later told by Kelly Jepson, the farm manager, that she would never be paid. (Dec. 6.)

The employee arrived at the farm on December 9 or 10, 2012. She was given a room in the house and began work, which consisted of taking care of Ms. Sweeney's mother by sitting with her during the day, walking with her if she got up, because the employee knew her to be a fall risk, taking out the trash, doing dishes, and sweeping and cleaning the bathroom. (Dec. 6.) She also did some

secretarial work for Ms. Sweeney and Mr. Jepson. Id. The employee stated she worked at least five hours a day, and sometimes twelve hours a day when there was no one else to sit with Ms. Sweeney's mother. Id. Aside from her first week, the employee did not see Ms. Sweeney, who had gone to Florida. However, the employee spoke with Ms. Sweeney at least once a week by phone for the assignment of tasks. Id. The employee stated she worked thirty to forty hours a week. (Dec. 7.)

On January 29, 2013, the employee suffered an injury when she fell down the back stairs to the house where she was staying. (Dec. 7-8.) The employee had been cleaning up her room and was taking out her garbage, which was in accord with her usual household chores, such as cleaning the bathroom and other cleaning activities, which she performed after 10 p.m. (Dec. 9.) She felt pain in her back and neck after her fall. (Dec. 8.) She had to crawl up the stairs into the house, where a worker called 911, and the employee was then transported to Cooley Dickinson Hospital. Id. After the accident the employee did no more work for the employer. Id. She stayed in the house for another week, then moved out to stay with her cousin. Id.

The judge specifically credited and adopted the employee's testimony. She did not credit the testimony of the employer and her witnesses about the employee's alleged poor job performance. (Dec. 9.) The judge concluded that the employee had been an employee of Alisande Cunningham Sweeney at Juniper Hill Farm, and that the employee's fall and subsequent injury on January 29, 2013, had arisen out of and was in the course of her employment. Id.

The employer appeals, raising three grounds. She first argues that the "employment contract" between the employer and the employee was for only two hours a day, seven days a week, to take care of Ms. Sweeney's elderly mother, and that there was "no other firm mutual agreement" for work in excess of those fourteen hours a week. (Employer's br. 11-12.) The employer's attorney argued there was "no meeting of the minds for a contract beyond two hours a day." (O.A.

tr. 9.) Because of this limitation on hours, the employer asserts the employee did not qualify for workers' compensation benefits under G. L. c. 152, § 1(4).[4]

The employer acknowledges that the employee had a valid contract of hire with the employer for at least fourteen hours a week of work providing care for Ms. Sweeney's mother, in return for which the employee would receive free room and board. (Employers' br. 11-12; O.A. Tr. 9-12.) However, the problem with this argument, that the bar of § 1(4) excludes the employee from compensation because she worked less than sixteen hours a week, is that the employer never raised that bar at any time in the four days of testimonial hearing or several status conferences, nor in any motion or filing with the DIA. At the first day of the hearing, November 14, 2014, the employer's attorney stated the employer's defenses as "no industrial accident," and "we are denying, technically, at the time of the alleged industrial accident there was no employee/employer relationship." He also stated "whether there was ever any employee/employer relationship at any point in time." (Tr. I, 12.) The employer also denied the average weekly wage of $500.00 found by the judge at the conference. When asked by the judge for an alternative, the employer's attorney stated: "[o]n the best case scenario, all that will show is that she was allegedly supposed to work two hours a day," in exchange for room and board. (Tr. I, 13.) The attorney continued: "[t]here's no question. The initial arrangement was two hours a day for room and board. I don't think that's going to be in dispute by anybody." (Tr. I, 14.)[5] The employer's attorney also raised liability, disability and its extent, causal relationship, entitlement to §§ 13, 30, 36 and 51 benefits, and raised § 1(7A). Tr.

[4] General Laws c. 152, § 1(4) states, in relevant part, that:

> The provisions of this chapter shall remain elective as to employers of seasonal or casual or part-time domestic servants. For the purpose of this paragraph, a part-time domestic servant is one who works in the employ of the employer less than sixteen hours a week.

[5] The employer's attorney was clear the fourteen hours a week assertion went only to the amount of the average weekly wage. (Tr. I, 15.)

I, 14, 16.) When asked by the judge whether that was a complete recitation, the employer's attorney stated: "I believe so judge, I believe so." (Tr. I, 17.)

In a later document, when the employer petitioned the "Chief Judge or Commissioner" for permission to file her appeal late, she referred to her defenses to the employee's claim:

> The Alleged Employer's position has always been that, firstly she is not an employer as all personnel doing elder care with her mother are employed by Stavros, and secondly if Ms. DySlvia (sic)were so found to be an employee, she was not an employee at time of incident having been discharged due to incompetence, and thirdly, in any event the employee was not in the course of her duties at time of incident as she was emptying her personal trash at about midnight on a very cold, rainy, and icy night in barrels located to the side of the house in a very dark and unlit area, and with specific instructions to not do what she claims to have done.

Petition to Chief Judge or Commissioner, ¶ 18, July 29, 2015.

In her Hearing memorandum, filed on September 17, 2015, ten months after the first day of the hearing, the employer raised as defenses: liability, disability and its extent, causal relationship, proper notice, late claim, § 1(7A), and she denied entitlement to § 36 benefits and denied entitlement to §§ 13 and 30 benefits. ("Alleged Employer's Hearing Memorandum," dated September 17, 2015; Rizzo, supra.)

The employer thus did not raise as an issue the bar of § 1(4) to compensation for domestic servants working less than sixteen hours a week at any time at the hearing or in filings made prior to the date of the decision. The issue was raised for the first time in this appeal. As such, the issue is waived. Diaz v. M.B.T.A., quoting Wynn & Wynn, P.C. v. Massachusetts Commn. Against Discrimination, 431 Mass. 655, 674 (2000), 33 Mass. Worker's Comp. Rep. ___ (April 1, 2019)(" 'Objections, issues, or claims--however meritorious--that have not been raised' below, are waived on appeal").

The employer next argues the judge erred in allowing the employee's counsel to impeach his own witness, Kelly Jepson, the farm manager, by

questioning him about an alleged confrontation Mr. Jepson had with another worker at the farm, a year before the employee began working there. The questioning also involved an attempt by the employee's counsel to enter into evidence a police report allegedly detailing the bad act, (Tr. II, 47-52)[6], and in succeeding in having Mr. Jepson declared a "hostile" witness. (Tr. II, 35.) The employer objected strenuously and often to this line of questioning. (Tr. II, 17-55.) The counsel for the WCTF added her objections several times as well. (Tr. II, 20, 47.)

The employer is correct that impeachment of the employee's own witness by reference to prior bad acts is not allowed in Massachusetts courts. See G. L. c. 233, § 23.[7] Commonwealth v. LaVelle, 33 Mass.App.Ct. 36, 39 (1992) , aff'd 414 Mass. 146 (1993)("It is well established that "[s]pecific acts of prior misconduct of the witness . . . not material to the case in which [the witness] testifies cannot be shown by the testimony of impeaching witnesses or other extrinsic evidence to affect [the witness's] credibility.") Only usage of prior inconsistent statements is allowed, and then only to impugn the witness's credibility.

Were there no other circumstances, we would likely have to find significant error in the judge's evidentiary rulings. However, the judge's rulings in this case

[6] On the day of the hearing, the judge admitted into evidence a heavily redacted copy of the police report, (Tr. II, 54), but ultimately did not make the report a part of the record. (Ex. 8 listed as "Document not submitted," Dec. 2.)

[7] G. L. c. 233, § 23 states:

> The party who produces a witness shall not impeach his credit by evidence of bad character, but may contradict him by other evidence, and may also prove that he has made at other times statements inconsistent with his present testimony; but before proof of such inconsistent statements is given, the circumstances thereof sufficient to designate the particular occasion shall be mentioned to the witness, and he shall be asked if he has made such statements, and, if so, shall be allowed to explain them.

were harmless, because the only issue before her was whether the employee had an employment relationship with the employer on her date of injury, January 29, 2013. (Dec. 3; Tr. V, 3-4.) The employer has agreed in this appeal that the employee was in such a relationship on that date for fourteen hours a week, despite raising the employment relationship as an issue at the hearing.

> [The judge] did not address if Ms. Dsylvia (sic) was under a contract for hire for sixteen or more hours a week. The only firm terms the parties agreed upon were: 1) Ms. Dsylvia (sic) would provide two hours a day giving care to Ms. Sweeney's mother and doing some household chores and in exchange Ms. Sweeny would give Ms. Dsylvia (sic) free room and board

(Employer's br. 11-12.)

In oral argument the employer's attorney stated:

> And I'm suggesting that work- she was only entitled to workmen's (sic) comp as an employee under the contract for hire with such period as there was an agreement to. And I agree, the agreement was two hours a day, child – excuse me, domestic servant care.

(O.A. Tr. 9.)

> And I'm not contesting, in fact, she was an employee. That whatever injury she incurred, I would agree was under Judge Poulter's decision, would arise out of employment, if there was a contract for hire.

(O.A. Tr. 11.)

We have held infra. that the defense of the bar of § 1(4) for not working more than sixteen hours a week was waived as not being raised below at the hearing. Thus, the erroneous evidentiary rulings by the judge are irrelevant, as the objected-to testimony does not affect the ultimate and admitted fact that the employee was working for the employer at least for fourteen hours a week. The issue of Mr. Jepson's credibility might have entered into whether the employee worked more than fourteen hours a week, or whether she had been terminated before the date of injury, January 29, 2013, but that would have gone only to the determination of the employee's average weekly wage, or her employment status on that date. Given the concessions of the employer's attorney in these appellate proceedings, the evidentiary issue is irrelevant. Ferreira v. Town Homes of Mass.,

22 Mass. Workers' Comp. Rep. 125, 127 notes 4 and 5 (2008)(attorney held to concession of facts at oral argument).

The final issue raised by the employer is an assertion that she was denied due process. She alleges the judge "effectively denied Ms. Sweeney of due process of law to contest the terms of the Settlement Agreement," because her attorney was not given notice of, and was not allowed to participate in, the oral lump sum conference on July 31, 2015, and the formal approval of the written Lump Sum Agreement on January 13, 2016. (Employer's br. 26.) The employer asserts that as the WCTF can file a civil lawsuit pursuant to G. L. c. 152, § 65(2)(e), to recover from the uninsured employer all funds it has paid the employee, including that paid out as part of the Lump Sum Agreement, the "denial of due process flows from the unfairness under the totality of circumstances and the denial of a meaningful contemporaneous opportunity to be heard and challenge financial matters for which she would be liable for."(sic)(Employer's br. 26-27.)

An uninsured employer "may" be joined to any litigation between the WCTF and the employee, but the judge is not required to do so. See G. L. c. 152, § 65 (13)[8] and 452 Code of Mass. Regs. § 1.20(1, 2).[9] Arrington v. Tewksbury

[8] General Laws c. 152, § 65 (13)(emphasis added) states:

(13) Claims against the Workers' Compensation Trust Fund for payment of compensation pursuant to clause (e) of subsection (2) shall be handled in accordance with section ten; provided, however, that no penalty pursuant to section seven shall be levied against the fund and no referral fee pursuant to section ten or filing fee pursuant to section eleven A or eleven C shall be required of the fund. No voluntary payment for any period of time shall alone be held to foreclose the fund from defending any issue involved in a claim for compensation. *On a motion of a claimant or representative of the fund, an administrative judge may join the uninsured employer as a party.*

[9] 452 Code of Mass. Regs. § 1.20(1, 2) states:

(1) An administrative judge before whom a proceeding is pending may join, or any party to such proceeding may request the administrative judge to join, as a party, on written notice and a right to be heard, an insurer, employer, or other person who may be liable for payment of compensation to the claimant.

Home Painting, 14 Mass. Workers' Comp. Rep. 313, 314-315 (2000)(joinder of employer is at discretion of judge). Once joined the uninsured employer is entitled to all the rights of a party in the hearing, including the right to present defenses, cross-examine witnesses, present her own witnesses, argue objections, and appeal the decision. See. 452 Code of Mass. Regs, supra.; Arrington supra. The employer in this case not only had those rights, she exercised them extensively, throughout four days of hearing testimony and several status conferences, as well as this appeal. In fact, the last two days of the hearing, September 17, 2015, and October 30, 2015, were devoted solely to the testimony of the employer's witnesses. (Tr. V and Tr. VI.) It is difficult to imagine any greater exercise of due process rights than were afforded the employer in this case.

In regard to the lump sum settlement, the employer is correct that her attorney was not present at the oral settlement conference on July 31, 2015, or at the formal approval of the Lump Sum Settlement Agreement on January 13, 2016. (Approved Lump Sum Agreement, dated January 13, 2016. Rizzo, supra.) However, the issue of the settlement was discussed at length at the status conference on July 24, 2015, at which time the employer's attorney was present and argued the employer's right to continue the case in the face of the proposed settlement, asking at a minimum for the judge to hold off on approval of an settlement in order to allow him to ask the Director for permission to file a late appeal of the conference order. (Tr. III, 15-17.) While that permission was later denied (see infra.), the employer was nevertheless allowed to appear and present her case through two more days of hearing, as already noted.

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(2) A party to be joined shall not be allowed to raise a defense of late claim if the original claim was filed timely, but shall be allowed to raise any and all other reasonable defenses which would have been available to him had the claimant filed an original claim against the party to be joined, provided that the party requesting joinder, in the absence of mistake or inadvertence, made a reasonable attempt to ascertain the identity of the correct party or parties before the filing of the original claim.

The WCTF argues, in its brief, that the uninsured employer had no right to object to the settlement, as a settlement requires "the written consent of the employer if such employer is an experience modified insured." G. L. c 152. § 48(1) (WCTF br., 6.) By the specific language of the statute, then, an uninsured employer has no right to consent, or even to be heard, when a lump sum is considered by a judge or conciliator under § 48. The fact that the employer was not present for the consideration of the oral settlement terms on July 31, 2015 (Tr. IV), or the formal signing of the written agreement on January 13, 2006, is therefore not a due process violation, as she had no right to be present and heard in the first place. Yet she was given more than adequate opportunities to contest the proposed settlement before the judge. (See Tr. IV, and the two hearing dates of September 17, 2015 [Tr. V], and October 30, 2015[Tr. VI].) We see no merit to this argument.

We therefore affirm the decision of the administrative judge. As the employee did not file a brief in this appeal, nor appear at the oral argument, and did not have any benefits at stake because of her settlement with the WCTF, no § 13A(6) fee is due. Janocha v. Malden Mills Industries, Inc., 30 Mass. Worker's Comp. Rep. 165, 187 (2016)(an employee prevails for purposes of an attorney's fee when her benefits are at risk,)

So ordered.

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William C. Harpin
Administrative Law Judge

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Bernard W. Fabricant
Administrative Law Judge

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Martin J. Long
Administrative Law Judge

Filed: **May 29, 2019**