

## Fundamental Fairness Paramount in Workers' Compensation Hearings

A recent unpublished Appellate Division case, *Haggerty v. Crothall Service Group*, addressed due process and fundamental fairness. The case, decided on May 3, overturned a Judge of Compensation's decision finding the employee's expert to be credible after an unrecorded, in-chambers discussion with the expert.

The employee sustained injury to her left shoulder while working for Cape May Regional Medical Center (Crothall Service Group). She initially tore her left rotator cuff and bicep tendon performing her job duties as a housekeeper. She had surgical repair and then sustained injury to her cervical spine and left shoulder again, performing her job duties. That resulted in a second shoulder surgery. She began to complain of right shoulder injury due to overuse and filed separate workers' compensation claims for each injury. Her claims were then amended over a year later to add a derivative right shoulder injury and she had right shoulder surgery.

In 2015, she obtained an order for medical and temporary disability benefits for treatment with an orthopedist, Dr. Matthew Pepe. Dr. Pepe referred her to Dr. Peter Corda for pain management. Dr. Corda then referred her to Dr. Charles Krome who recommended platelet-rich plasma injections.

The injections did not provide relief. Dr. Krome then recommended stem cell therapy for the right shoulder. According to Dr. Krome, this was an appropriate conservative measure, but the employee would still likely require a total shoulder replacement in a few years.

The employee filed a motion for medical benefits in 2018 seeking to have the stem cell treatment. Crothall opposed the motion on the basis that stem cell therapy was not approved by the U.S. Food and Drug Administration (FDA). Dr. Krome still endorsed stem cell therapy as "medically necessary." The matter was conferenced in Judge's chambers. As the Judge had questions for Dr. Krome, the employee's attorney called the doctor from chambers. Dr. Krome was not under oath and only the Judge asked questions.

At the next listing, only the employee testified. She stated she did not want another shoulder surgery as she needed to work in order to care for her terminally ill husband. She was aware the stem cell therapy was not FDA approved but wanted to proceed.

The Judge entered an Order requiring Crothall to provide the stem cell therapy. The Judge said he found Dr. Krome to be "polite and credible" in the telephone conference. He also commented that Dr. Corda provided correspondence that stem cell therapy was widely used in professional sports. Crothall had not provided any expert report or testimony.

Crothall filed an appeal arguing the Judge erred in determining Dr. Krome was credible based on an unrecorded telephone call with no normal testimony. Crothall also argued the treatment was not adequately accepted. With regard to the Judge's determination of a physician's credibility simply based on a phone call, the Appellate Division noted, "Even if credibility could be determined in that manner, without a record there is no ability to review what was said." Where an important issue is discussed in chambers, "a record must be made or a summary placed on the record of what transpired in chambers."

The Appellate Division also stated the Judge of compensation was "required to hold a hearing where Crothall could cross-examine witnesses." The Appellate Division was very critical of the lack of recorded testimony of Dr. Krome and the failure to allow respondent to cross-examine the doctor.

It should be noted that the Court never ruled on stem cell therapy as ordered by the Judge of compensation.

**Comment:** The rules of evidence may be relaxed in a workers' compensation proceeding. However, this

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case reminds all practicing attorneys that the concept of fundamental fairness and due process is still paramount.

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