COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 013656-16**

Anibal Rosado	Employee
Suddekor, LLC	Employer
MEMIC Indemnity Co.	Insurer

REVIEWING BOARD DECISION
(Judges Fabricant, Koziol and Calliotte)

The case was heard by Administrative Judge Daniels.

APPEARANCES
Thomas D. Downey, Esq., for the employee at hearing and on appeal
Ronald C. Kidd, Esq., for the employee at hearing and on appeal
Courtney J. Pidani, Esq. for the insurer at hearing and on appeal
John J. McCarthy, Esq., for the employer at hearing and on appeal

FABRICANT, J. The employer and the insurer appeal from the administrative judge's award of § 28 compensation, claiming error in the application of the legal standard for a finding of serious and willful misconduct under the statute.[1] The insurer and employer further allege error in the judge's denial of their motion to exclude testimony of the employee's expert. For the reasons that follow, we affirm the decision.

The employee was forty-six years old at the time of hearing. He started working as a production assistant through a temporary staffing agency and was later hired as a machine operator by the employer. He was required to work primarily on a resin impregnator machine that coats paper with resin and certain chemicals. The machine is

[1] General Laws, c. 152, § 28 states, in relevant part:

> If the employee is injured by reason of the serious and wilful misconduct of an employer or of any person regularly entrusted with and exercising the powers of superintendence, the amounts of compensation hereinafter provided shall be doubled. In case the employer is insured, he shall pay to the insurer the extra compensation paid to the employee. If a claim is made under this section, and the employer is insured, the employer may appear and defend against such claim only.

approximately one hundred to one hundred fifty feet long, and consists of about thirteen heating ovens, two coating sections, two wet sections and a converting section where paper is cut to size. The paper being processed consists of five-to-ten-foot rolls, weighing close to a half ton and loaded onto the machine with a forklift. Once a roll is loaded, the employee would manually thread the paper through the machine. The paper would then be wrapped on a bar and sent down further into the machine. At that point the machine would be powered on and the paper would be sent further down to a wet area, followed by three ovens for drying, another wet area in the middle of the machine, and then onto gravure rolls. (Dec. 8.)

The employee was also required to maintain and clean the machine. Most of his time was spent using a rag to clean the gravure rolls. He was trained to clean the rollers using a touch screen and knob control panel located in the middle of the machine. When paper would rip, the machine would power off completely. He then used a special plastic knife-type tool to rip the paper from the rolls as quickly as possible to prevent resin from solidifying on the rolls. After completing that task, he customarily restored power to the machine and, with the rolls spinning, grabbed a bucket with soap and went into the nip end area to wash the rollers.[2] (Dec. 9.)

On May 30, 2016, the employee was seriously injured when his right major arm became caught in the rolls while he was in the process of cleaning the machine. He suffered a crushing de-gloving injury to his right upper extremity and has not worked since the injury date. (Dec. 3, 4-5.)

The employee was taken to Baystate Medical Center where he remained as an inpatient for approximately two weeks. He underwent a series of about five surgical procedures, including repair of crushed tendons and skin grafting. Thereafter he treated with Dr. Richard Martin. On July 31, 2017, at the employee's last visit, Dr. Martin found that he was doing well and had no need for formal restrictions. He acknowledged the

[2] "The nip end is where the paper goes into the two gravure rollers with the upper one turning down and the lower one turning up to pull the paper through." (Dec. 9.)

likelihood of some ongoing functional limitations but felt that the employee could return to work. (Dec. 6.)[3]

The insurer commenced payment of § 34 benefits on May 31, 2016, and, based on findings in the report of the § 11A physician, paid $15,000, reflecting the maximum amount of benefits for disfigurement under § 36(k), and $10,805.47 in consideration of 20% permanent impairment of the right upper extremity.[4] (Dec. 2.)

The insurer filed a complaint to modify or discontinue benefits on September 7, 2017, which was the subject of a § 10A conference on February 21, 2018. The employee joined a claim for psychiatric treatment. A § 10A conference order dated February 22, 2018, instructed the insurer to continue payment of § 34 benefits until October 8, 2018, and then awarded ongoing § 35 benefits from October 9, 2018, and §§ 13 and 30 medical benefits, including payment for psychiatric treatment. On October 16, 2018, the employee's motion to join a claim for § 28 double compensation was allowed. Both parties filed timely appeals of the conference order, and a hearing *de novo* commenced on November 20, 2019. (Dec. 2-3.)

Witnesses at the hearing included the employee, three lay witnesses, and an expert. The judge credited the employee's testimony and found that his training on the subject machine occurred on the job for a month or two by "tagging along" with several co-workers. Because each worker had their own technique, the employee was left on his own to determine the most logical way of operating the machine. As for cleaning the machine, the employee was trained to go underneath in the nip end, while the paper was running on the rollers, and use a wet rag to remove built-up resin. The injury occurred when the employee was cleaning from the nip end while the machine was running, which

[3] Lifting restrictions of fifty pounds waist to shoulder and pushing/pulling up to seventy pounds were noted. The employee testified to psychological counseling for four to five sessions and sought no treatment thereafter. (Dec. 7.)

[4] Pursuant to § 11A(2), on June 15, 2018, the employee was examined by Dr. Hillel Skoff, a board certified upper extremity specialist. (Dec. 3.)

was consistent with the manner in which he was trained. (Dec. 10.)[5]

It was only after his injury that the employee became aware that there was a key switch safety mode on the control panel. It was his understanding that once the safety mode was engaged through the key switch, all the rollers would turn very slowly and separate to an appropriate space to prevent injuries. The employee never saw a key in the switch during the machine's operation, and he was not trained about what that mechanism was for. (Dec. 11.)

The judge also credited portions of the testimony of the employee's coworker, Peter Stellato, finding that Mr. Stellato worked for the employer from 2012 to roughly 2017, running every end of all the machines in the factory. He was trained in how to clean the rollers, and instructed to watch for pinch points, although he was not told which side of the rollers to stand on. On the date of the employee's injury, Mr. Stellato was working with the employee on the same machine, as a resin mixer on the "wet end" of the machine. Mr. Stellato agreed that when the employee was injured, there was no key in the key switch on the control panel and that he did not recall the key being in the key switch when the machine was installed. Indeed, he was unaware of the key switch safety feature, and only found out about it when the employees were told about it after the employee's injury. It was his understanding that the function of the key switch was to open the gravure rollers wider than the control panels could, and slow them down to lower the risk of someone being caught in a pinch point when cleaning. In addition, the key switch cleaning mode would slow the rollers more than controlling without the key system, and it could not be overridden by anyone else at any other control panel. He never saw the key in the control panel until after the employee's injury. (Dec. 18-21; Tr.

[5] The employee testified that all employees were required to participate in regular safety training programs on various topics. Regarding the operation and cleaning of the machine, the training involved going with other employees and observing what they did. (Dec. 12; Tr. I, 59-60, 72, and 74.)

II, 25, 26 and 37.)[6]

James Shaffer worked as a production supervisor for the employer from 2015 through February 2017. The judge credited his testimony that he was familiar with the operations of all machines and personally ran and cleaned the machine on which the employee was injured. For training, he observed and learned the operation from others and watched a series of generic safety videos that had nothing to do with this particular machine. He also followed his supervisor, Michael Laborde, for two weeks observing the cleaning and machine operations. (Dec. 21.) Mr. Shaffer agreed that the control panel regulated the speed of the rollers, turned them on or off, was used for the cleaning process and that the rollers could not be cleaned properly with the machine stopped. It was not until after the employee's injury that he learned that the key switch on the control panel was a safety feature that slowed the rollers down so they could be properly cleaned at a safe speed. The key switch was not part of his training and there was no key in the switch until after the employee's injury. (Dec. 22.)

Michael Laborde worked for the employer as an operations manager at the time of hearing, having started as a production assistant in June of 2011. At the time of the employee's injury, he was the Lead Foreman. His supervisory duties included overseeing all the activities of the employees on his shift and observing what they were doing in terms of cleaning the machine. His only training was on the job by other employees, and, prior to the employee's injury he had never seen the key switch operated. After the employee's injury, the entire cleaning process was re-evaluated and the cleaning process of the gravure rolls was updated to include the use of the key system and a lockout box for the key. This process then became uniformly used when cleaning the gravure rolls. (Dec. 23-25.) He admitted that the key system separates the rolls and slows them down so there is no in-running nip point, and if this system had been used the employee's injury would not have happened. (Dec. 26.) The judge found Michael Laborde's testimony credible, especially regarding his knowledge of the machine's operation

[6] The transcript of the hearing held on November 20, 2019, is referenced as "Tr. I." The transcript of the hearing held on November 21, 2019, is referenced as "Tr. II."

overall. However, he did not credit his testimony about having no knowledge about the key switch system and never having discussed this system with upper management before the employee's injury. Furthermore, the judge did not credit Michael Laborde's testimony that he never inquired about the key system since he had the ability to frequently view the key switch and the self-explanatory silhouettes of the cleaning and running modes on this machine. His testimony regarding the installation representative having never said anything to him about the key switch system or about the employer's system for cleaning the rolls, given the well-known hazard of the nip points exposed when cleaning the gravure rolls, also strained credulity. (Dec. 26-27.)

Finally, the judge adopted the opinion of George J. Wharton, the employee's expert witness, a registered professional engineer. Mr. Wharton opined that the employer and manufacturer had found that it was not practical to clean the rollers with the machine in the off position since the rollers needed to be turning slowly to clean effectively. Regarding the industry standards, he stated that the machine designer recognizes the hazards and tries to provide methods to prevent exposure to those and conveys that information to their end users through manuals and training. (Dec. 16.) Here, the system designed by the manufacturer to protect the operator while cleaning the rolls was a key switch system with a cleaning mode which, according to the manufacturer's manual, lifts and separates the rollers to the maximum clearance and slows them down to minimum speed. (Dec. 15; Tr. I, 104-105.) However, the employer's standard operating procedure (Ex. 6, sub-exhibit 1), did not mention the key system, or that cleaning should be from the out-running side as opposed to the in-running nip point. (Dec. 15; Tr. I, 105.) By not embracing the key switch system, the employer acted contrary to the industry standard. Mr. Wharton opined that since the machine was delivered with a key switch that has a cleaning mode, which is also referenced in the included manual, the employer's failure to utilize or even acknowledge its existence was a failure to use the machine in the way it was intended. (Dec. 16; Tr. I, 109-110.)

The judge found the employer violated § 28 and, accordingly, awarded the employee double compensation. He also allowed the insurer's request to modify benefits

back to the date of filing its discontinuance request on September 7, 2017, determining that the employee had a minimum wage-earning capacity to be adjusted with the minimum-wage level in the Commonwealth applicable during each calendar year. Rizzo v. M.B.T.A., 16 Mass. Workers' Comp. Rep. 160, 161 n.3 (2016)(reviewing board may take judicial notice of documents in board file). The employer and insurer appeal on identical grounds.

The first issue raised on appeal is whether the judge failed to properly apply the legal standard for a finding of serious and willful misconduct pursuant to the provisions of § 28. The insurer and employer argue the clear legal standard for a finding of double compensation under § 28 requires much more than mere negligence or even gross or culpable negligence. Rather, it requires conduct of a quasi-criminal nature, an intentional action done with the knowledge that it is likely to result in serious injury, or with wanton and reckless disregard of its probable consequences. The employee does not dispute that this is the standard, but maintains that the findings of the judge and the evidence on which they are based satisfy the requirements for an award of serious and willful misconduct. The employee contends it is the knowledge of the hazard and the employer's intentional failure to remedy it that determine whether its conduct rises to the level of an unreasonable risk of serious injury.

We first set forth the elements that must be met to prevail on a claim of employer misconduct pursuant to § 28:

> "The 'serious and wilful misconduct' which lays the foundation for double compensation under § 28 . . . 'is much more than mere negligence, or even than gross or culpable negligence. It involves conduct of a quasi-criminal nature, the intentional doing of something either with the knowledge that it is likely to result in serious injury or with wanton and reckless disregard of its probable consequences.'" O'Leary's Case, 367 Mass. 108, 115 (1975), quoting from Scaia's Case, 320 Mass. 432, 433-434 (1946). "[N]ot only must the actor intentionally do the act upon which he is sought to be charged, but also he must know or have reason to know . . . facts 'which would lead a reasonable man to realize that the actor's conduct not only creates an unreasonable risk of bodily harm to the other but also involves a high degree of probability that substantial harm will result to him." O'Leary's Case, 367 Mass at 116, quoting from Scaia's Case, 320 Mass. at 434, and citing Restatement (Second) of Torts § 500 (1965).

See Moss's Case, 451 Mass. 704, 713-714 (2008).

Drumm's Case, 74 Mass. App. Ct. 38, 41 (2009). In illuminating the meaning of quasi-criminal conduct which would support a finding of serious and willful misconduct, the court in Scaia's Case, supra, noted that it,

> resembles closely the willful, wanton and reckless or the wanton and reckless conduct which will permit recovery by a person in spite of contributory negligence on his own part . . . and the wanton and reckless conduct which in case of the death of the person injured will support a conviction for involuntary manslaughter, Commonwealth v. Welansky, 316 Mass. 383, 387-401 (1944), and the 'reckless disregard of safety' defined in Am. Law Inst. Restatement: Torts, § 500.

Scaia's Case, supra at 434.

Thus, actual intent to harm by the employer or supervisor is not required for double recovery. Doing, or failing to do, an act that the employer or a reasonable person would know, or have reason to know, creates an unreasonably high risk of bodily harm that involves a high degree of probability that substantial harm will result demonstrates sufficient intent. Smith v. Raytheon, 9 Mass. Workers' Comp. Rep. 477 (1995), citing Restatement (Second) of Torts § 500 (1965); quoting from Scaia's Case, supra; O'Leary's Case, 367 Mass. 108, 116 (1975). The Armstrong, supra, two-factor test, cited by the judge, is instructive: 1) the employer and its officers, supervisors and foreman knew that there was a dangerous condition necessitating further protection; and 2) the employee was assigned to the work without the employer taking adequate and effective precautions to ensure that no harm would come to the employee while he was exposed to any risks. Id. at 150; Dec. 30.

In the instant case, the judge set forth detailed subsidiary findings, based on the above principles, ultimately concluding:

> [T]he safest method of cleaning the gravure rolls would be to stop the machine. I find a reasonable inference …[that] the "work around" of the key switch cleaning mode the manufacturer built into this custom machine …was not sufficient for their production demands, so they resorted to a different "work around[,]" i.e., the cleaning mode described by the Employee and other witnesses of slowing and spreading the rollers but with an existing nip point narrow enough

to grab and pull the Employee into the rollers resulting in "devastating" injuries.

. . . .

I find a reasonable inference that [employer's] [f]oreman and/or [s]upervisors decided to train employees to clean the gravure rollers in any way possible to keep production going and to not damage the webs, which were extremely difficult to reset on the machine… [I]f the key switch system, with the widest spread and slowest speed of the rollers, had been used, the Employee's injury would likely have not occurred… [T]he employer had in place the key switch safety system which would likely have prevented the injury, but ***intentionally*** failed to disclose it or train employees on its operation and ***intentionally*** chose not to use it… [G]iven the employer's ***intentional*** decision not to use the key switch safety mode designed specifically for this custom machine in the face of the well-known nip points hazards, the employer acted with ***reckless disregard*** of the likely consequences of the very serious injuries of the type suffered by the employee. The employer committed an ***intentional omission*** when they decided not to use or train employees of a known reasonable safety device, specifically designed by the manufacturer for this very machine, to prevent exactly the type of injury suffered by the employee.

I find the employer's conduct made it inevitable that an injury such as the employee's would take place. . . I find the employer had the key switch safe cleaning mode in place and available, but chose not to use it, leading to the serious injuries. This is similar to the employer not using the available safety nets in the Armstrong Case, 19 Mass. App. Ct. 147 (1984) cited by the Employee. The decision in Armstrong was based upon two factors analogous to this case: the employer and its supervisors and foremen knew there was a dangerous condition needing further protection and the employee was assigned the work without the employer taking adequate and effective precautions to ensure the safety of the employee when exposed to those risks. As per Mr. Laborde, the injury would not have taken place if the employer followed the key switch safety cleaning mode designed for this machine. I also note and find that the key switch/lock-out tag out cleaning process has been uniformly followed since shortly after the employee's injury.

(Dec. 28-29.) (Emphases added.)

These findings proffered by the administrative judge align with the legal standard for recovery of benefits pursuant to § 28. Of crucial importance is the safety key provided by the manufacturer to the employer when the machine was delivered. None of the witnesses ever saw this key, and the employees operating the machine had no access

to it.[7] Furthermore, having this cleaning mode safety switch built into its custom machine is evidence the employer had knowledge of the hazard presented by the in-running rollers, as well as the ability to prevent it. Thus, the employer intentionally failed to take adequate precautions in the face of the known hazard which posed a high risk of substantial injury. The employer argues that in order to establish an award of § 28 benefits, the evidence must show that the injured employee or other co-workers made specific complaints to the employer of risk of serious injury from job conditions that resulted in injury, and the employer disregarded the complaints and information about the risks, and directed the employee to continue despite the risk of serious injury. (Employer brief 7-8.) As the Appeals Court stated in Armstrong's Case, supra at 150, n.5, "We interpret the word 'ordered' as meaning no more than that [the employee] was *assigned* by his foreman to that dangerous task during which he was injured." (Emphasis added.)

The judge addressed this issue head-on:

> Requiring the Employee, in a Section 28 case, to have to complain about a work hazard likely to result in serious injuries, then suffer serious injuries after being told by a supervisor to do it anyway, does not meet with the beneficent design of our statute. Here, the employer intentionally failed to train employees on the safer key switch cleaning mode feature, which would have significantly reduced the known risk of serious injury. To bar recovery under these circumstances allows a public policy of a more dangerous work environment for employees, which is against the beneficent design of our Worker's Compensation statute.

(Dec. 30.) As the employee points out, "when the entire sequence of events which led to Mr. Rosado's injury are thoroughly scrutinized, it is inarguable that the machine operators were denied the requisite knowledge of the safer method of performing the hazardous task of cleaning the gravure rollers and therefore deprived of any opportunity to demand safer measures be used." (Employee br. 3.) In other words, because the

[7] Mr. Stellato testified, without objection, that he believed "the key was in the upper offices with management." (Tr. II, 25.)

employee did not know the key lock safety system existed, he could not have demanded that it be used or refused to clean the machine unless it was implemented.[8]

The judge's findings clearly address the required standard necessary for a finding of double compensation under § 28: "the intentional doing of something either with the knowledge that it is likely to result in serious injury or with wanton and reckless disregard of its probable consequences." Drumm's Case, supra at 41, and cases cited.

We next address the insurer and employer argument that the judge improperly admitted and relied on the expert testimony of the employee's witness, George Wharton. We disagree.

The employer filed a motion in limine to exclude or limit the expert testimony of Mr. Wharton as lacking reliability under Commonwealth v. Lanigan, 419 Mass. 15 (1994). The insurer primarily cited the fact that Mr. Wharton did not physically inspect the machine involved in the employee's injury. Rizzo, supra. The judge denied the insurer's motion, found Mr. Wharton qualified as an expert witness, and adopted his expert opinions. (Dec. 18.)

The ultimate test of admissibility of expert evidence is the reliability of the theory or process underlying the expert's testimony. See Commonwealth v. Kater, 388 Mass. 519, 527 (1983). In Lanigan, supra, the court recognized that the reliability of a scientific theory or process underlying an expert's opinion does not need to be shown by the "general acceptance in the relevant scientific community." The Supreme Judicial Court has concluded that an expert opinion will be admitted if it is based on a "logically reliable" foundation, id. at 24, 26; thus, the issue of reliability is essentially a factual matter, within the sound discretion of the administrative judge to determine. Canavan's

[8] Cf. Drumm, supra (no § 28 violation where judge found employer failed to employ safety measures required by regulation to prevent employee from falling through trap door, and even cones and chains typically used by employer were not in place at the time of the accident). We note that Drumm is factually distinguishable from the instant case, as the hazardous condition was well known to all employees, and cones and chains were normally set up, but were removed in the instance where the accident occurred. In the instant case, the evidence shows the employer intentionally kept any knowledge of available and necessary safety features completely from its employees.

Case, 432 Mass. 304, 312 (2000). It is well settled that proposed expert testimony must assist the trier of fact. Commonwealth v. Francis, 390 Mass. 89, 98 (1983). Furthermore, the witness must be qualified, providing information based on a body of knowledge or method that is reliable, and the facts and or data relied upon must be sufficient to form an opinion that is not speculative from which the judge may receive appreciable benefit. Finally, the expert must apply the knowledge or principle to the facts of the case. Lightlab Imaging, Inc. v. Axsun Techs., Inc., 469 Mass. 181, 191 (2014); Canavan's Case, supra at 317. See Commonwealth v. Boyd, 367 Mass. 169, 182 (1975).

The appropriate standard of appellate review of the admissibility of scientific evidence at trial is whether the judge abused his or her discretion. Applying an abuse of discretion standard on appellate review allows trial judges the needed discretion to conduct the inherently fact-intensive and flexible Lanigan analysis, while preserving a sufficient degree of appellate review to assure that Lanigan determinations are consistent with the law and supported by a sufficient factual basis in the particular case. Canavan, supra at 312.

George Wharton, the employee's expert witness, holds a B.S. and M.S. in mechanical engineering and is a registered professional engineer. He also took a graduate-level course in human factors engineering at Cleveland State in 2007, and received a certificate for a 30-hour online OSHA training course in 2012. His career working in this field included building custom machinery for applying different coatings, designing machines, training and supervising. He later was involved in forensic engineering where he was hired by insurance companies to investigate industrial accidents. He has been qualified as an expert in both federal and state courts. (Dec. 13;Tr. I, 92-93, 95, 121-122.) He has testified about the type of machinery at issue here which uses control panels and safety lock mechanisms with the in-running nip points, which he referred to as a well-recognized hazard. He has been doing this work for fifteen years, and thinks he has investigated about a thousand cases. (Dec. 14; Tr. I, 98, 99.)

We note that neither the employer nor the insurer argues that any specific aspect of the expert witness' testimony or findings based thereon is inadmissible. Instead, the

admissibility of Mr. Wharton's testimony is attacked generally, based upon his alleged lack of experience with the subject machine, and with designing, installing maintaining or operating any similar machine, (Employer br. 13), as well as the contention that he based his testimony on documents that were part of the OSHA investigation of this incident which may otherwise be inadmissible. (Employer br. 14, 18.)

As noted above, Mr. Wharton is not only well-credentialed, but experienced, testifying that he had "too much" experience with accidents involving in-running nip points. (Tr. I, 99.) In his review of the subject accident, he reviewed the employer's own Root Cause Analysis of the accident and the employer's "Standard Operating Procedure." (Tr. I, 103-106; Ex. 6.) He also reviewed photographs and video of the subject machine, a statement of the employee, the machine manuals, and the relevant OSHA file, which is something that he customarily relies upon because, "OSHA is there right away [and] the information they get is very fresh and they sometimes get access to people they wouldn't otherwise get to in the course of [a] lawsuit…. (Tr. I, 103; Dec. 14.) In addition, he spoke to the employee and heard his testimony about what occurred. Given the issues in this case, he was comfortable testifying without having seen the actual machine. To him, the pictures are representative and what happened was clear. (Dec. 14; Tr. 1, 88, 98-99, 103.)

We see no evidentiary bar to Mr. Wharton's testimony because he did not actually see the machine in operation. His testimony was very specific and clear as to what materials he reviewed and relied upon in forming his opinions.[9] His professional history as a forensic examiner by definition requires the post-accident analysis of machinery often rendered inoperable. In further support of Mr. Wharton's relevant opinions, there was agreement among the three additional lay witnesses as to the operation of this machine. There is no abuse of discretion in the admission of testimony where accepted methods of analysis are applied to the material described herein. See Commonwealth v. Williams, 475 Mass. 705, 720 (2016)(no abuse of discretion where "substitute" medical

[9] His testimony was also subject to cross-examination. (Tr. I, 120-132.)

examiner allowed to render opinion even though he did not perform the autopsy). We agree here with the employee's observation that, taking the employer's argument to its logical extreme, no automobile accident reconstruction witness would ever be allowed to testify unless they actually observed the accident. (Employee br. 26.)

Regarding the objection to testimony based upon Mr. Wharton's review of the OSHA investigation file, we note that there is a difference between the facts contained in the OSHA investigation file, which may be otherwise admissible, and opinions contained therein which are not. It is entirely proper to offer in evidence an OSHA standard to show the relevant standard of care. However, the admission of OSHA citations, rather than OSHA standards, violates the prohibition against expressions of opinion and conclusions. Herson v. New Boston Garden Corporation, 40 Mass. App. 779, 793 (1996). Here, a review of the trial transcript reveals that the judge was very careful to note this distinction and rule accordingly,[10] at one point sustaining an objection to Mr. Wharton's testimony mentioning an OSHA citation. (Tr. I, 119.) Once again, we can discern no abuse of discretion.

The decision is affirmed.

Because the employee has prevailed in the insurer's appeal to the reviewing board, pursuant to M.G.L. c. 152 § 13A(6), the insurer shall pay a fee to the employee's attorney in the amount of $1,765.38, plus necessary expenses.

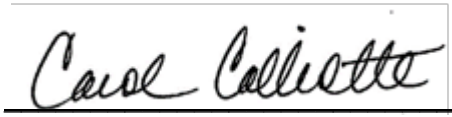
So ordered.

Bernard W. Fabricant
Administrative Law Judge

[10] Mr. Wharton made reference to two OSHA regulations that he felt were applicable to this case: 1910.212 A1 relates to the failure to guard an in-running nip-point (Dec. 15; Tr. 1, 115), and 1910.147 C4 refers to the control of "hazardous energy." (Dec. 15; Tr. 1, 118.) On cross-examination, the employer was able to elicit testimony from Mr. Wharton that the employer was, in fact, in compliance with regulation 1910.147 C4 regarding hazardous energy. (Dec. 18; Tr. I, 131.)

Catherine Watson Koziol
Administrative Law Judge

Filed: **March 25, 2022**



Carol Calliotte
Administrative Law Judge