COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 008094-06**

Cheryl Brouder	Employee
Whittier Rehabilitation Hospital	Employer
Wausau Underwriters	Insurer

REVIEWING BOARD DECISION
(Judges Fabricant, Koziol and Levine)

The case was heard by Administrative Judge Preston.

APPEARANCES
John F. Pomykato, Esq., for the employee
Brian T. Dougan, Esq., for the insurer

FABRICANT, J. The insurer appeals from a decision awarding the employee permanent and total incapacity benefits pursuant to G. L. c. 152, § 34A. The insurer argues the judge erred by refusing to allow it to show the employee a surveillance videotape, or admit the videotape for impeachment purposes. In addition, the insurer argues that it was error for the judge to refuse to admit the videotape and accompanying surveillance reports as a business record. Finally, the insurer contends the medical evidence does not support a finding of permanent and total incapacity. We affirm the decision and address the insurer's argument regarding the exclusion of the surveillance videotape and the accompanying surveillance reports.

The employee, age forty-five at hearing, is a registered nurse. On March 21, 2006, she injured her left knee while moving a patient. (Dec. 3.) The insurer accepted liability for the injury and paid § 34 temporary total incapacity benefits. The insurer's discontinuance complaint was denied pursuant to the hearing decision filed on March 13, 2008.[1]

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[1] We take judicial notice of documents in the board file. Rizzo v. M.B.T.A., 16 Mass. Workers' Comp. Rep. 160, 161 n.3 (2002).

The employee's subsequent claim for § 34A benefits, beginning on September 2, 2008, resulted in a § 10A conference award, which the insurer appealed. At the hearing,[2] the insurer sought to introduce a surveillance videotape into evidence, solely through the employee's testimony on cross-examination, in order to impeach her credibility.[3] The insurer also sought to have the surveillance *reports* admitted as business records through the testimony of an employee of the company hired to do the surveillance, although not the investigator who actually performed the surveillance.

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[2] The hearing took place on December 8, 2009 and January 14, 2010. All transcript references herein are to the first day of hearing, and are designated, "Tr. I."

[3]

Mr. Duggan:	Your honor, I would like to show the employee the videotape. I believe she will be able to authenticate it. And I would also like to use it as impeachment evidence.
The Judge:	Counsel?
Mr. Pomykato:	I object, Your Honor. I would submit to your Honor that the rules of evidence would require counsel to have the maker of the videotape here, obviously, and allow me on behalf of the employee to cross-examine.
The Judge:	Yeah, unless and until you can authenticate it through the person that took it I am unwilling to have it shown. It would be hard for me to differentiate if it doesn't pass muster as evidence. It would be prejudicial so I am not going to watch it unless and until the person that took it can authenticate it.
Mr. Duggan:	Your Honor, it is my belief that the employee will be able to testify that that is her and that she did make those movements. I think that is relevant. I think she will be able to authenticate it that way.
The Judge:	I made my ruling.
Mr. Duggan:	Thank you.

(Tr. I, 38-39.)

The judge refused to accept either the reports or the videotape as exhibits.[4] (Id. at 57-61.)

The judge credited the employee's testimony regarding her pain and limitations, adopted medical opinions of permanent and total disability, and found that the employee suffers from depression caused by her chronically painful condition. (Dec. 3-5.) Rejecting the insurer's contention that the employer had made a legitimate job offer to the employee, the judge found that, even if it had, the employee remained incapable of working. (Dec. 4.) Section 34A benefits were thus awarded beginning on September 2, 2008. (Dec. 9.)

The insurer maintains the surveillance videotape demonstrates the employee was being less than honest about what activities she is capable of performing. It argues that if the judge had viewed the videotape, the employee's credibility would have been seriously compromised. The insurer further argues that the videotape is probative of the central issue in the case: the extent of the employee's incapacity.[5] (Ins. br. 6-7.)

"The admissibility of evidence 'is largely committed to the discretion of the trial judge.'" Commonwealth v. Leneski, 66 Mass. App. Ct. 291, 294 (2006), citing Henderson v. D'Annolfo, 15 Mass. App. Ct. 413, 429 (1983). Videotapes are admissible as evidence " 'if they are relevant, they provide a fair representation of that which they purport to depict, and they are not otherwise barred by an exclusionary rule.' " Viveiros's Case, 53 Mass. App. Ct. 296, 301 (2001), quoting Commonwealth v. Mahoney, 400 Mass. 524, 527 (1987). These requirements apply where a videotape is offered to impeach a witness's credibility. See Commonwealth v.

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[4] After the judge informed the employee's counsel that his prior ruling dealt only with ". . . whether or not [the insurer] could show a video to [the employee] that had not been authenticated," (Tr. I, 55.), the insurer moved to submit the surveillance reports into evidence. Id. at 60. However, when the judge asked if the insurer also wanted to "give me a videotape that was taken by somebody other than [the witness]," insurer's counsel answered affirmatively. Id. at 61.

[5] It is not clear whether the insurer sought to have the videotape admitted substantively, as well as for impeachment purposes, at hearing. (See Tr. I, 38-39.)

Lawson, 425 Mass. 528, 533 (1997)(judge properly excluded videotape offered for impeachment because it was made a year and a half after the crime had taken place, and was never proffered as a fair and accurate representation of the premises at the relevant time).

The insurer sought to show the videotape at the hearing in the hope that it would subsequently be able to enter it into evidence to impeach the employee's credibility. However, the judge would not allow the tape to be played without a proper authenticating witness, because he believed he might be prejudiced by viewing the videotape if he ultimately determined it was not admissible.

There are circumstances which may have permitted the judge to allow the videotape to be played. If the judge did not believe he, as the fact finder, could ignore potentially irrelevant and prejudicial aspects of the tape, he could have declined to view it himself, until the employee testified regarding its contents. Had the employee conceded she was depicted on the videotape and otherwise testified regarding its content, the videotape could have been admitted for impeachment purposes.[6] See Menard v. Allied Automotive Group, 19 Mass. Workers' Comp. Rep. 249 (2005)(videotape admissible for impeachment purposes after employee authenticated it by testimony he was depicted on tape).[7] Alternatively, as in cases where the jury sees or hears evidence later determined to be inadmissible, the judge could have viewed the videotape, and then limited its use to those portions of the tape, if any, he found to be relevant, non-prejudicial, and representative of the employee's actions. Cf. Commonwealth v. Harvey, 397 Mass. 351 (1987)(probative value of videotape was not outweighed by prejudicial effect where judge gave limiting instruction to jury clarifying the purpose for which it could be used).

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[6] Employee's counsel would then, of course, have the opportunity to rehabilitate the employee. See Liacos, Massachusetts Evidence, §§ 6.13 – 6.18 at 335-346 (7th ed. 1999).

[7] Our decision in Menard, supra, does not reflect whether the tape was authenticated after being viewed only by the employee, or whether the judge viewed it at the same time.

However, if there was error in the judge's refusal to allow the insurer to play the videotape, it was harmless. First, the insurer failed to show how the content of the videotape was relevant. The tape was made on May 19, 2008, May 30, 2008 and June 3, 2008, (Ins. br. 8; see Tr. I, 59). The employee claimed entitlement to § 34A benefits beginning on September 2, 2008. Because the surveillance video was taken several months prior to the employee's claim for permanent and total incapacity benefits, its relevance is questionable. See Leary v. M.B.T.A., 24 Mass. Workers' Comp. Rep. 73, 77 (2010)(stale evidence falling four years outside the disputed period of incapacity not relevant to the dispute). Moreover, the judge found the employee's condition had worsened since his March 2008 hearing decision. (Dec. 7.)

Even if the videotape were relevant, the insurer fails to show that it was prejudiced by the videotape's exclusion. Errors in the admission or exclusion of evidence are grounds for reversal only if they injuriously affect the substantial rights of a party.

> [T]he appropriate test is *whether the proponent of erroneously excluded, relevant evidence has made a plausible showing* that the trier of fact might have reached a different result if the evidence had been before it. Thus the erroneous exclusion of relevant evidence is reversible error unless, *on the record*, the appellate court can say with substantial confidence that the error would not have made a material difference.

DeJesus v. Yogel, 404 Mass. 44, 48-49 (1989)(Emphasis added.) See Massachusetts Guide to Evidence, § 103 (2008-2009 edition); and G. L. c. 231, § 119. Here, the insurer neither made an offer or proof,[8] nor sought to have the videotape marked for

[8] Generally, if evidence is excluded on cross-examination, as here, an offer of proof need not be made, since an offer must point to evidence "actually available and the cross-examiner will often be unable to state what the answer would have been if the question had been allowed." Commonwealth v. Barnett, 371 Mass. 87, 95 (1976); Liacos, supra, § 3.8.4 at 87-88. However, where the purpose or significance of the question is obscure or the prejudice to the cross-examiner is not clear, an offer may be required. See Commonwealth v. Ahearn, 370 Mass. 283, 286 (1976). Here, the proponent of the evidence, the insurer, knew what was on the videotape since it had commissioned it, and could easily have made an offer of proof regarding its contents. Because it did not, we cannot determine whether the insurer was prejudiced by exclusion of the videotape.

identification. Beyond the insurer's assertions that "the employee will be able to testify that that is her [sic] and that she did make those movements," (Tr. I, 39), we know nothing about what the videotape purported to show the employee doing. Thus, the insurer has provided us with no way to determine whether the judge might have reached a different result if he had admitted the videotape. Cf. Commonwealth v. Gordon, 389 Mass. 351, 353 (1983)(where no indication defendant made offer of proof concerning contents and relevancy of *audiotape* testimony, it is not possible to determine whether judge erred in excluding audiotape, which defendant attempted to introduce and have played to jury in effort to impeach police officer's credibility).

Absent an offer of proof, the insurer should at least have had the videotape marked for identification. See Commonwealth v. Lawson, supra at 533 n.7(where judge excludes videotape as exhibit, better practice is to have it marked for identification and included in record on appeal). Insurer's counsel did not make such a request. Accordingly, he "failed adequately to preserve this issue for appellate review when he neglected to ensure that [the videotape] was marked for identification. Thus, because the [videotape] is not part of the record before us we have no way of determining whether the [insurer] was prejudiced by the judge's error." Commonwealth v. O'Brien, 419 Mass. 470, 477 (1995), citing Commonwealth v. Hall, 369 Mass. 715, 724-725 (1976).[9]

Finally, there is no merit to the insurer's argument the surveillance reports were admissible as business records,[10] or that the judge erred by finding the employee permanently and totally disabled. We summarily affirm the decision as to those arguments.

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[9] Since we have held there was no showing of error in excluding the videotape, there is no merit to the insurer's argument it was erroneously prevented from showing the videotape to Dr. Hewson and Dr. Arvidson. See Leary v. M.B.T.A., 24 Mass. Workers' Comp. Rep. 73, 76-77 (2010).

[10] See G. L. c. 233, § 78.

The decision is affirmed. Pursuant to § 13A(6), the insurer shall pay employee's counsel an attorney's fee of $1,488.30.

So ordered.

Bernard W. Fabricant
Administrative Law Judge

Catherine Watson Koziol
Administrative Law Judge

Frederick E. Levine
Administrative Law Judge

Filed: