

## COMMONWEALTH OF MASSACHUSETTS

### DEPARTMENT OF INDUSTRIAL ACCIDENTS

BOARD NO.: 053514-98

David Pelchat  
Demoulas Supermarkets  
Demoulas Supermarkets

**Employee**  
**Employer**  
**Employer**

### REVIEWING BOARD DECISION

(Judges Horan, McCarthy and Fabricant)

The case was heard by Administrative Judge Dike.

### APPEARANCES

George A. Ramirez, Esq., for the employee at hearing  
Brian P. Barry, Esq., for the employee on appeal  
Thomas P. O'Reilly, Esq., for the self-insurer at hearing  
Paul M. Moretti, Esq., for the self-insurer on appeal

**HORAN, J.** The self-insurer appeals from a decision awarding the employee permanent and total incapacity benefits. We recommit the case.

The self-insurer correctly notes that the decision fails to list or discuss two of its exhibits, to wit: surveillance tapes and the employee's bank statements. We cannot discern, from a fair reading of the decision, whether the judge considered this evidence. See Melendez v. City of Lawrence, 16 Mass. Workers'Comp. Rep. 303, 304 (2002). The self-insurer has a due process right to know the judge reviewed its evidence. Haley's Case, 356 Mass. 678, 682 (1970); Hamel v. Dela, Inc., 20 Mass. Workers' Comp. Rep. 233, 234-235 (2006); Warnke v. New England Insulation Co., 11 Mass. Workers' Comp. Rep. 678, 680 (1997).

Notwithstanding the employee's argument to the contrary, the error is not harmless, as the evidence bears directly on the issues of the employee's claimed incapacity, and his credibility. Commonwealth v. Federico, 425 Mass. 844, 852-853 (1997)(see cases cited); see Horneman v. Brown, 286 Mass. 65, 72 (1934) (exclusion of evidence was not harmless error where such evidence, if admitted, may have "throw[n] doubt upon the basis of the plaintiff's case").

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Accordingly, we vacate the decision.<sup>1</sup> Because the judge no longer serves on the industrial accident board, we recommit the case for a hearing de novo before another administrative judge.

So ordered.

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Mark D. Horan  
Administrative Law Judge

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William A. McCarthy  
Administrative Law Judge

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Bernard W. Fabricant  
Administrative Law Judge

**Filed:** February 3, 2009

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<sup>1</sup> In light of our holding, we need not address other issues raised by the self-insurer.