COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO.:** 049571-01

Debra Reinke	Employee
City of Holyoke School Department	Employer
City of Holyoke	Self-insurer

REVIEWING BOARD DECISION

(Judges Costigan, McCarthy and Horan)

APPEARANCES

Thomas J. Donoghue, Esq., for the employee
Katherine A. Moore-Kocot, Esq., for the self-insurer

COSTIGAN, J. The self-insurer appeals from an administrative judge's decision ordering it to reimburse the employee the expense[1] of a "Nautilus Sleep Systems" mattress prescribed by her doctor following surgery for a work-related low back injury. The self-insurer advances three arguments on appeal. First, it argues that the employee purchased the mattress without notice to it, thereby depriving the self-insurer of its right to utilization review under 452 Code Mass. Regs. § 6.00 et. seq.[2] As that issue was not

[1] The administrative judge did not specify the amount the self-insurer was ordered to pay the employee. The manufacturer's invoice, dated February 4, 2002, reflects that the price of the mattress was $1,999.99. After a $100.00 discount and including $129.00 in freight charges, the total amount the employee paid was $2,028.99. (Employee Ex. 5.)

[2] 452 Code Mass. Regs. § 6.01, entitled "Scope and Authority," provides:

> 452 CMR 6.00 is promulgated pursuant to M.G.L. c. 152, §§ 5, 13 and 30 as most recently amended by St. 1991, c. 398. 452 CMR 6.00 shall apply to all claims irrespective of date of injury for health care services rendered on or after October 1, 1993. 452 CMR 6.00:
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> (a) requires workers' compensation insurers to undertake utilization review;
> (b) references the guidelines and review criteria that the Department of Industrial

raised before the administrative judge, we deem it waived.[3] Wynn & Wynn, P.C. v. Massachusetts Comm'n Against Discrimination, 431 Mass. 655 (2000).

Second, the self-insurer contends that the employee did not meet her burden of proving the mattress was medically reasonable and necessary and, therefore, the judge erred in

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> Accidents (DIA) requires providers to consider when treating certain medical conditions, and set forth the mechanism for the development, endorsement, dissemination, and implementation of future guidelines;
> (c) sets forth the nature of utilization data that must be reported to the Department of Industrial Accidents;
> (d) sets forth the methods for quality assessment that will be used by the Department of Industrial Accidents;
> (e) sets forth the nature of the mechanisms that DIA [sic] will use to ensure compliance with 452 CMR 6.00; and
> (f) concerns adequate and reasonable health care services provided to workers' compensation recipients, including consideration for cost containment.

[3] We note that on the self-insurer's issues statement, (Self-ins. Ex. 1), the box next to "Deny entitlement to § 13 and § 30 benefits," is not checked. Only the box designated "Other" is checked, and in handwriting, "Medical Issue" is the only dispute identified. At the hearing, the parties framed the issue thusly:

> Mr. Donoghue: I think the only issue is the bill for the nautilus mattress, your Honor.
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> Judge: All right. And your opening.
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> Ms. Moore-Kocot: And the city's position is, your Honor, based on the medicals that have been provided to date, even the doctor has not substantiated his position. Though she has requested this mattress it has, in fact not been submitted to the insurer to date that it's medically and reasonably necessary within the confines of the statute.

(Tr. 5.)

finding it was. We disagree. Although the employee's treating neurosurgeon may have acknowledged that when he gave the employee a prescription for the mattress on February 1, 2002, he did not "have any literature support, prospective randomized clinical trials, double-blind clinical studies or objective data regarding the utility of this matter other than Mrs. Renke [sic] requested it stating that it benefitted her," (Employee Ex. 3), in this case we do not consider proof of medical reasonableness and necessity as requiring such scientific support. In any event, the employee also introduced a report of her primary care physician, Dr. Lesser, in which he described the mattress as a "godsend," alleviating the employee's pain and enabling her to sleep. The doctor stated that the mattress had "proven itself to have genuine therapeutic value." (Employee Ex. 4.) We acknowledge the retrospective nature of Dr. Lesser's opinion,[4] but we agree with the administrative judge that the opinion was adequate evidentiary support for a finding that the mattress was a reasonable and necessary medical expense. (Dec. 3.)

Lastly, the self-insurer argues that the judge erred as a matter of law in ordering reimbursement to the employee in excess of rates established by the rate setting commission,[5] as provided in § 13(1). Section 13(1) of c. 152, as amended by St. 1996, c. 204, § 36, provides in pertinent part:

> (1) The rate of payment by insurers for health care services adjudged compensable under this chapter shall be established by the division of health care finance and policy under the provisions of chapter one hundred and eighteen G; provided, however, that a different rate for services may be agreed upon by the insurer, the employer and the health care service provider.
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> Except as provided above, no insurer shall be liable for hospitalization expenses adjudged compensable under this chapter at a rate in excess of the rate set by the said division, or for other health services in excess of the rate established for that service by the said division, regardless of the setting in which the service is administered . . . .

[4] Indeed, even utilization review can be undertaken retrospectively. See 452 Code Mass. Regs. 6.02 (definition of utilization review.)

[5] The self-insurer frames this issue as whether the judge erred in ordering payment above and beyond the rate set by the "rate setting commission." However, the medical service at issue here was provided in February 2002, well after the 1996 amendment to § 13(1) which substituted "division of health care finance and policy under the provisions of chapter one hundred and eighteen G," for "rate setting commission under the provisions of chapter six A." St. 1996, c. 204, § 36.

We agree with the self-insurer that under the express provisions of § 13, the administrative judge lacked authority to order reimbursement to the employee at any rate in excess of that established by the Massachusetts Division of Health Care Finance and Policy, under the provisions of G. L. c. 118G. Cicerano v. Torello Painting Co., 18 Mass. Workers' Comp. Rep. 158 (2004). The problem is, we cannot discern from the decision exactly what amount of reimbursement the judge did order, let alone whether it comported with the applicable rate, if one exists. See footnote 1, supra. Therefore, recommittal is necessary. See Crowell v. New Penn Motor Express, 7 Mass. Workers' Comp. Rep. 3, 4-5 (1993)(where there is no way to discern the reasoning behind the judge's award of benefits, recommittal is appropriate); G. L. c. 152, § 11C.

At the request of the self-insurer, the administrative judge took judicial notice of pages 89 and 90 of 114.3 Code Mass. Regs. 40:00, which contain over three dozen entries and codes pertaining to beds, hospital beds and mattresses. (Tr. 4; Self-ins. br., Appendix 4.) None of those entries, however, refers to a "Nautilus Sleep Systems" mattress, nor do any of the entries differentiate rates based on mattress size.[6] Accordingly, on recommittal, the administrative judge must determine whether any of the mattresses, for which rates have been established, is equivalent or analogous to the Nautilus mattress and, if so, he may award reimbursement to the employee at that rate only. In his discretion, the judge may re-open the record and take additional evidence on this issue. If the judge determines that there is no such equivalent or analogous mattress, he must make a specific finding as to the dollar amount of reimbursement due the employee. In either case, the self-insurer is entitled to a credit for the amount of reimbursement paid pursuant to the original decision.

We recommit the case for further findings on this issue, consistent with this opinion. Pursuant to § 13A(6), employee's counsel is awarded a fee of $1,312.21.

So ordered.

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Patricia A. Costigan
Administrative Law Judge

[6] The self-insurer also protests the employee's purchase of a "top of the line, ultimate Nautilus, king size bed." (Self-ins. br., 6.)

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William A. McCarthy
Administrative Law Judge

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Mark D. Horan
Administrative Law Judge

Filed: February 16, 2005