

COMMONWEALTH OF MASSACHUSETTS

**DEPARTMENT OF
INDUSTRIAL ACCIDENTS**

BOARD NO. 030768-96

Edward Goodsell
Nashoba Painters, Inc.
Eastern Casualty Insurance Company

Employee
Employer
Insurer

REVIEWING BOARD DECISION

(Judges Levine, Carroll & McCarthy)

APPEARANCES

Melissa J. Shufro, Esq., for the employee
Thomas M. Dillon, Esq., for the insurer

LEVINE, J. The insurer appeals the decision of an administrative judge awarding the employee §§ 13, 30 and 34 benefits.

Although a transcript was requested at the reviewing board pre-transcript conference, the hearing stenographer for the March 11, 1998 hearing date has left the department, and neither her stenographic notes nor an audio back up can be located. A transcript has been prepared for the May 14, 1998 hearing date. Without a transcript of the March 11, 1998 hearing date, we are unable to perform our appellate function. When a complete transcript cannot be produced in a case, due process requires reconstruction of the record sufficient to allow for evaluation of the merits of the appeal as well as the correctness of any rulings. Fitzsimmons v. Sigma Instruments, Inc., 7 Mass. Workers' Comp. Rep. 12 (1993). The reconstruction need not be total. Rather, there need only be so much reconstruction of the record as to allow for review. Id. at 14. The judge shall determine the extent of reconstruction necessary for proper appellate review. To do so, he may in his discretion require the parties to delineate the issues on appeal with more specificity. Reconstruction of the record has not been attempted, although counsel for both parties as well as the hearing judge are available.

We therefore return this case to the senior judge and ask that he assign the case to the original hearing judge to oversee the reconstruction effort. The parties are charged with preparing as completely and expeditiously as possible a stipulation of agreed upon salient facts and documentary evidence. We remind the parties that they have an “ ‘affirmative duty to use their best efforts to ensure that a sufficient reconstruction is made if at all possible.’ ” Fitzsimmons, supra at 15, quoting Commonwealth v. Harris, 376 Mass. 74, 79 (1978). The prepared stipulation shall be presented to the judge.

When the administrative judge is satisfied that the reconstruction effort sufficiently sets forth the evidentiary basis for the rulings and findings so that we may perform our appellate review, he shall return the case to us. If, in the opinion of the administrative judge, any portion of the reconstruction endeavor falls short, he may conduct a limited hearing.

So ordered.

Frederick E. Levine
Administrative Law Judge

Martine Carroll
Administrative Law Judge

William A. McCarthy
Administrative Law Judge

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Filed: **April 20, 2001**