COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NOS. 027332-17**

Eileen Cournoyer	Claimant
Brett Cournoyer (Deceased)	Employee
Jari Kansanen	Employer
Acadia Insurance Company	Insurer

REVIEWING BOARD DECISION
(Judges Long, Koziol and Calliotte)

This case was heard by Administrative Judge Benoit.

APPEARANCES
Steven M. Buckley, Esq., for the claimant
Susan F. Kendall, for the insurer at hearing
John J. Canniff, Esq., for the insurer on appeal

This case returns to the reviewing board on remand from the Appeals Court, Cournoyer's Case, 100 Mass. App. Ct. 1122 (2022)(Memorandum and Order Pursuant to Rule 23.0). In the reviewing board's prior summary disposition, we affirmed an administrative judge's decision, including an award of § 33 burial expenses. In addition, the board ordered the insurer to pay §§ 13 and 30 medical benefits due, as a matter of law, citing the finding of a compensable injury and the Hearing Exhibit 14, ambulance and ER records. The court vacated so much of the reviewing board's summary disposition as affirmed the judge's award of § 33 burial expenses, and as ordered, sua sponte, §§ 13 and 30 medical benefits.[1]

In partially vacating our summary affirmation, the court found the judge's "award of burial expenses in the amount of $9,582" is unsupported by the record, "which is

[1] The Appeals Court affirmed the administrative judge's findings that: 1) Mr. Cournoyer was an employee of the employer pursuant to G.L. c. 152, § 1(4); 2) the claimant satisfied her burden of proving that the employee's heavy exertion at work was a major cause of his cardiac arrest and death pursuant to § 1(7A); and, 3) the employee had an average weekly wage of $1,400.00. Id.

entirely devoid of any factual support for the award of burial expenses" in that amount. The court also found that the reviewing board erred in ordering, sua sponte, the insurer to pay claimed §§ 13 and 30 medical benefits where the judge failed to make any findings of fact on the issue, noting that the proper course would have been to recommit the case to the administrative judge for further findings of fact on this issue.[2] The court vacated, rather than reversed, the awards and "remanded [the matter] for further review consistent with this memorandum and order."

Accordingly, as directed by the Appeals Court, we recommit the matter for further findings of fact and rulings of law on the issue of § 33 burial benefits and §§ 13 and 30 medical benefits. Because the administrative judge who conducted the hearing has retired, we hereby refer the case to the senior judge for assignment to a different administrative judge to conduct a de novo hearing pursuant to § 11B, addressing these two issues by making findings of fact and rulings of law on each issue in accordance with the Appeals Court decision attached hereto.

So ordered.

Martin J. Long
Administrative Law Judge

Catherine Watson Koziol
Administrative Law Judge

Filed: **April 19, 2022**

Carol Calliotte
Administrative Law Judge

[2] We note that both these issues were mentioned in a paragraph in the conclusion section of the insurer's brief to the reviewing board "to highlight the rampant mishandling of the evidence" and in support of its request for reversal of the judge's decision. (Ins. br. at 34.)

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

21-P-34

BRETT COURNOYER'S CASE.

MEMORANDUM AND ORDER PURSUANT TO RULE 23.0

Following the work-related death of the employee, Brett Cournoyer (Cournoyer), his spouse (claimant) was awarded survivors' benefits, pursuant to G. L. c. 152, §§ 31, 32 (£), in her claim against Cournoyer's employer, Jari Kansanen, and the employer's insurer, Acadia Insurance Company. The insurer appeals from a decision of the reviewing board of the Department of Industrial Accidents (board), which affirmed the administrative judge's decision, and further awarded the claimant medical benefits pursuant to G. L. c. 152, §§ 13, 30. On appeal, the insurer argues: (1) the administrative judge's finding that Cournoyer was an employee pursuant to G. L. c. 152, § 1 (4), was erroneous; (2) the claimant failed to satisfy the heightened standard of causation pursuant to G. L. c. 152, § 1 (7A); (3) the administrative judge's finding as to Cournoyer's average weekly wage was erroneous; (4) the award of burial expenses was unsupported by the evidence; and (5) where medical

benefits were not awarded by the administrative judge, the board exceeded its authority in awarding such benefits sua sponte. For the reasons set forth below, we affirm in part and reverse in part, and remand the case to the board.

1. Employment status. The insurer argues that the administrative judge's finding that Cournoyer was an employee, as defined by G, L. c. 152, § 1 (4), was erroneous and unsupported by the evidence. In particular, the insurer argues that the administrative judge failed to make sufficient findings as to the twelve MacTavish-Whitman factors used to determine whether a worker constitutes an employee for the purposes of G. L. c. 152. See Camargo's Case, 479 Mass. 492, 495 (2018). We disagree.

"The question of employment status within the meaning of G. L. c. 152, § 1(4), 'is essentially a question of fact for the board, not to be set aside if it is justified by the evidence .. "' (citation omitted). Whitman's Case, 80 Mass. App. Ct. 348, 353 (2011). "Findings of fact, assessments of credibility, and determinations of the weight to be given the evidence are the exclusive function of the administrative judge" (citation omitted). Goodwin's Case, 82 Mass. App. Ct. 642, 645 (2012). As such, we ''give due weight to the experience, technical competence, and specialized knowledge of the agency, as well as

to the discretionary authority conferred upon it" (citation omitted). Id.

In Camargo's Case, the Supreme Judicial Court held that the twelve MacTavish-Whitman factors comprise "the appropriate test to determine employment status for claims filed under G. L. c. 152."[1] Camargo's Case, 479 Mass. at 501. Here, while the administrative judge did ot explicitly lay out each of the twelve MacTavish-Whitman factors in his decision, that is not to say the administrative judge ignored them in his analysis. Contrary to the insurer's argument, the administrative judge's decision instead demonstrates that he found Cournoyer to be an employee with all applicable MacTavish-Whitman factors in mind. More specifically, the administrative judge found that Cournoyer

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[1] The twelve MacTavish-Whitman factors are as follows: (1) "the extent of control, by the agreement, over the details of the work"; (2) "whether the . . employed one is engaged in a distinct occupation or business"; (3) "the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision"; (4) "the skill required in the particular occupation"; (5) "whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work"; (6) "the length of time for which the person is employed"; (7) "the method of payment, whether by the time or by the job"; (8) "whether ... the work is a part of the regular business of the employer"; (9) "whether . . the parties believe they are creating the relation of master and servant''; (10) "whether the principal is ... in business''; (11) "the tax treatment applied to payment ... "; and (12) "the presence of the right to terminate the relationship without liability, as opposed to the worker's right to complete the project for which he was hired" (citations omitted). Camargo's Case, 479 Mass. at 495 n.3.

believed he was to be a "full-time, year-round" employee, to be paid at an hourly rate of thirty-five dollars per hour, and was also "highly skilled in heavy machine operation." See note 1, supra, citing Camargo's Case, supra at 495 n.3 (MacTavish-Whitman factors 4, 7, and 9). Furthermore, the administrative judge found that Kansanen retained control of Cournoyer's work "in every aspect," and such extensive control over Cournoyer's work is highly indicative of Cournoyer's status as an employee, as defined by G. L. c. 152, § 1 (4) See Madariaga's Case, 19 Mass. App. Ct. 477, 480-481 (1985) (although "basically done on a handshake," claimant was employee where, despite informalities, employer retained ultimate power to control claimant's actions). See also Whitman's Case, 80 Mass. App. Ct. at 353 n.4 (right to control, not actual supervisory control over worker's performance of duties, is decisive on whether worker achieves employee status within context of G. L. c. 152) Compare McDermott's Case, 283 Mass. 74, 76 (1933) (worker is employee where "at every moment, with respect to every detail, he [or she] is bound to obedience and subject to direction and control, as distinguished from a right of inspection and insistence that the contract be performed . or a right to designate the work to be done under the contract'').

At bottom, the insurer's appellate argument fails to rise above the level of mere dissatisfaction with the administrative

judge's careful evaluation of the evidence, and "[w]e will not disturb the [administrative] judge's findings that are 'reasonably deduced from the evidence and the rational inferences of which it was susceptible.'" Pilon's Case, 69 Mass. App. Ct. 167, 169 (2007), quoting Chapman's Case, 321 Mass. 705, 707 (1947). Thus, we discern no error.

2. Causation. Where a compensable injury combines with a preexisting noncompensable condition, G. L. c. 152, § 1 (7A) "imposes a heightened proof of causation on [the] employee" (citation omitted). Goodwin's Case, 82 Mass. App. Ct. at 646. Such heightened proof of causation requires the claimant to show the compensable injury was nonetheless still "a major but not necessarily predominant cause of disability or need for treatment."[2] G. L. c. 152, § 1 (7A). The insurer argues that the claimant has failed to sustain her burden on such heightened proof of causation. We disagree.

Here, the administrative judge accepted and adopted the medical opinion of Dr. Gore, the claimant's expert, who

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[2] Where an employee is found dead at work, the death is deemed prima facie evidence that the employee was performing his regular work duties on that day, and the death falls within the provisions of G. L. c. 152. See G. L. c. 152, § 7A. However, in such instances where the employee's death is caused by the combination of a compensable injury and a preexisting noncompensable condition, the employee still must satisfy the heightened causation standard found in G. L. c. 152, § 1 (7A). See Carpenter's Case, 456 Mass. 436, 448-449 (2010).

described Cournoyer's death as a "very common case of somebody who had cardiac risk factors, who likely had plaque buildup in [his] coronary arteries, was doing heavy exertion at work," and then suffered a cardiac arrest.[3] While Dr. Gore acknowledged that Cournoyer suffered from preexisting cardiac risk factors, he opined that he had "no doubt" that Cournoyer's physical activity at work caused his death, as "[t]he precipitating event to the cardiac arrest was heavy exertion."

While Dr. Gore did not use the "magic words" of G. L. c. 152, § 1 (7A), namely that the heavy exertion was a "major, but not necessarily predominant" cause of his death, an opinion that expresses the functional equivalent of such words is nonetheless sufficient. See Stewart's Case, 74 Mass. App. Ct. 919, 920 (2009). Therefore, where the administrative judge credited Dr. Gore's medical opinion that he had "no doubt" that the heavy exertion was the cause of Cournoyer's death, and that "[t]o suggest some other possible cause of the cardiac arrest is not reasonable," we discern no error in the administrative judge's determination that the claimant has satisfied the heightened causation standard of G. L. c. 152, § 1 (7A). See

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[3] The administrative judge accepted and adopted the opinion of the claimant's medical expert over that of the insurer's medical expert. The administrative judge was well within his discretion to do so. See Ingalls's Case, 63 Mass. App. Ct. 901, 902 (2005) ("Where there are conflicts in medical opinions, the resolution of those conflicts is for the administrative judge").

Goodwin's Case, 82 Mass. App. Ct. at 646-647 ('" major cause' need not be the 'major . **cause,''' nor need it even be** "the superior or greatest cause" [citation omitted]). See also Carpenter's Case, 456 Mass. 436, 445-449 (2010) (employee, who suffered from preexisting condition, met heightened causation standard where medical evidence demonstrated that death resulted from heavy exertion during work-related use of snow blower).

3. Average weekly wage. On appeal, the insurer argues that the administrative judge erred in his calculation of Cournoyer's average weekly wage. We disagree.

General Laws c. 152, § 1 (1), provides that average weekly wages are to be calculated by determining the earnings of the injured employee during the twelve months preceding the date of the injury, and dividing such earnings by fifty-two. However, where the length, terms, or nature of employment make it impracticable to calculate the employee's average weekly wage through this standard formula, there exist alternative methods of calculation. See G. L. c. 152, § 1 (1). See also Herbst's Case, 416 Mass. 648, 650 (1993). Here, as properly found by the administrative judge, none of these alternative methods were sufficient alternatives where the employee was only on his third day of employment, the employer had no other employees, and no evidence was presented of any other similarly situated employees. See Robichaud's Case, 292 Mass. 382, 383 (1935).

Nonetheless, the "injured employee is [still] entitled to have his average weekly wages computed in some way." Id.

In Morris's Case, the Supreme Judicial Court held that an employee, who previously worked for his employer part-time, and subsequently died in a work-related accident on his first day of full-time employment, was entitled to have his hourly wage calculated with the $1.25 per hour wage for full-time employees, where there existed sufficient evidence that the employee had in fact achieved full-time employment status as of the date of the accident. See Morris's Case, 354 Mass. 420, 426 (1968). **Here**, based on the testimony of both the claimant and Kansanen, the administrative judge found that Cournoyer was hired to be a full-time, year-round employee, at an hourly rate of thirty-five dollars per hour.[4] Thus, in reliance on Morris's Case, the

[4] The insurer argues there was insufficient evidentiary support for both Cournoyer's hourly wage of thirty-five dollars per hour, and his position as a full-time employee, rather than a seasonal employee. In particular, the insurer argues the administrative judge erred in considering the claimant's testimony, where such testimony constituted inadmissible hearsay. However, contrary to the insurer's argument, the claimant's testimony was not hearsay, but rather consisted only of "her impression," or her personal knowledge, of the specifics of Cournoyer's hourly wage and status as a full-time employee. Nonetheless, putting the claimant's testimony aside, Kansanen's uncontested testimony confirmed that Cournoyer was to be paid at an hourly rate of thirty-five dollars per hour. Kansanen further confirmed that Cournoyer was in fact likely going to be a full-time employee, as Kansanen testified that he often works straight through the winters. Thus, we discern no error in the administrative judge's findings. See Donnelly's Case, 304 Mass.

administrative judge calculated Cournoyer's average weekly wage to be $1,400.[5]

At bottom, "[t)he entire objective of wage calculation is to arrive at a fair approximation of [Cournoyer's] probable future earning capacity" (citation omitted). Gunderson's Case, 423 Mass. 642, 644 (1996). In light of the unique factual circumstances surrounding Cournoyer's employment and subsequent work-related death, and where our review of the board's decision is one of deference, we discern no error in the administrative judge's calculation of Cournoyer's average weekly wage, as it is both reasonable and grounded in adequate evidentiary support. See Scheffler's Case, 419 Mass. 251, 258 (1994) (board decision need only be factually warranted and not arbitrary and capricious). See also Goodwin's Case, 82 Mass. App. Ct. at 645 (we "give due weight to the experience, technical competence, and specialized knowledge of the agency" [citations omitted]).

4. Burial expenses. The insurer also claims that the award of burial expenses in the amount of $9,582 is unsupported by the record before us. We agree.

514, 516 (1939) ("findings of fact . . . will not be reversed if there is evidence to sustain them").

[5] The administrative judge calculated the average weekly wage by multiplying Cournoyer's hourly wage (thirty-five dollars per hour) by the total number of hours Cournoyer was expected to work each week (forty hours).

Pursuant to G. L. c. 152, § 33, the insurer shall pay all reasonable burial expenses, not to exceed eight times the applicable State average weekly wage. See G. L. c. 152, § 33. However, "[c]laims for payment of funeral expenses shall be accompanied by an itemized funeral bill together with a copy of a death certificate" (emphasis added). 452 Code Mass. Regs. §1.07(e) (2017).

Here, the record demonstrates, and the claimant even admits, that no such itemized funeral bill was ever formally entered into evidence at the hearing. The claimant, in vague and overly conclusory fashion, contends that where the administrative judge took judicial notice of the "board file," the failure to formally introduce an itemized funeral bill into evidence does not bar the award of burial expenses under G. L. c. 152, § 33.[6] However, in taking judicial notice of the board file, the administrative judge made no specific reference to burial expenses, an itemized funeral bill, or any other documentary evidence that would support the award of burial

[6] The claimant relies solely on the administrative judge's taking judicial notice of the board file for her argument in support of affirming the award of burial expenses. However, at oral argument, counsel admitted that the complete board file, which he speculated would contain evidence to support the award of burial expenses, was not submitted as a part of the record before us. Where counsel understood the record to be incomplete, he was under a duty to supplement the record to ensure that the record was adequate for appellate review. See Commonwealth v. Woody, 429 Mass. 95, 99 (1999).

expenses. Furthermore, upon transfer to this Court from the Department of Industrial Accidents, our review of the contents of the board file, contrary to the contentions of claimant's counsel at oral argument, does not provide any evidence to support the administrative judge's award for burial expenses.[7] Instead, the board file, like the record before us, is entirely devoid of any factual support for the award of burial expenses in the amount of $9,582. Thus, such award cannot stand, and we remand this issue to the board. See Goodwin's Case, 82 Mass. App. Ct. at 644-645 (finding of fact must have adequate evidentiary and factual support to avoid being arbitrary and capricious).

5. Medical expenses. Finally, the insurer argues that the board exceeded the scope of its authority in granting the claimant medical benefits pursuant to G. L. c. 152, §§ 13, 30. We agree.

Here, the board sua sponte awarded the claimant medical benefits, claiming such benefits were due as matter of law, which law the board failed to identify. This was also done

[7] At oral argument, counsel stated that the amount of burial expenses was an issue before the administrative judge at a previous conference, where evidence of such burial expenses and other damages was submitted. However, nothing in the board file, including the administrative judge's corrected order from such conference, dated May 7, 2018, provides any support for the calculation of such burial expenses.

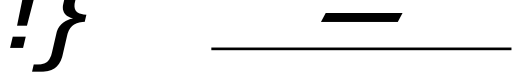
despite the fact that the administrative judge neither awarded such benefits nor made any specific findings of fact on the **issue.** "The board is an administrative tribunal and, accordingly, possesses only such authority and powers as have been conferred upon it by express grant or arise therefrom by implication as necessary and incidental to the full exercise of the granted powers" (quotation and citation omitted). Taylor's Case, 44 Mass. App. Ct. 495, 497 (1998). The board "is not a court of general or limited common law jurisdiction" (citation omitted). Hansen's Case, 350 Mass. 178, 180 (1966). As such, the board's authority is limited to affirming or reversing the administrative judge's decision, or alternatively, recommitting the case where appropriate for further findings of fact. See G. L. c. 152, § 11C. Therefore, upon affirming the administrative judge's decision, which was devoid of any discussion as to the claimant's entitlement to these medical benefits, the board's proper course of action would have been to recommit the case to the administrative judge for further findings solely on this issue, rather than awarding such benefits sua sponte. See Taylor's Case, supra at 498 ("Once the board affirmed the decision of the administrative judge, its authority over the case ended"). Cf. Bolduc's Case, 84 Mass. App. Ct. 583, 589 (2013) (where board reversed administrative judge's decision, board retained equitable authority to order

proper insurance carrier to assume payment of workers' compensation benefits, where such order was necessary to effectuate board's powers to properly adjudicate claim). We express no opinion on the propriety of the benefits themselves and the board is free to revisit the matter on remand.

Conclusion. So much of the decision of the reviewing board as awarded the claimant burial expenses pursuant to G. L. c. 152, § 33 and medical expenses pursuant to§§ 13 & 30 is vacated, and the matter is remanded for further review consistent with this memorandum and order. In all other respects, the decision of the reviewing board is affirmed.

So ordered.

By the Court (Meade, Henry & Singh, JJ.8),



Clerk

Entered: January 31, 2022.

8 The panelists are listed in order of seniority.