COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 19802-20**

Ellen Brunelle	Employee
Department of Mental Health	Employer
Commonwealth of Massachusetts	Self-Insurer

REVIEWING BOARD DECISION
(Judges O'Leary, Fabricant and Long)

The case was heard by Administrative Judge Bean.

APPEARANCES
Gia M. Bradley, Esq., for the employee
Arthur Jackson, Esq., for the self-insurer

O'LEARY, J. The employee appeals from the administrative judge's decision denying her claim for § 36(1)(k) benefits.[1] We affirm the hearing decision.

The employee, Ellen Brunelle, was sixty-two (62) years old at the time of hearing. She has been employed as a physical therapist for the Massachusetts Department of Public Health at the Tewksbury State Hospital since 2005. Her job was physical in nature and required her to lift patients out of bed and into chairs, usually with some help from the patient. (Dec. 15 Bean 20.) Prior to her industrial accident she had never had a knee or hip injury, although she did have periodic back complaints that she treated with a chiropractor. (Dec. 15 Bean 20.)

On July 28, 2020, the employee was walking quickly at work when her foot was caught on a raised tile causing her to fall, landing on both knees and resulting in severe pain in her right knee. She iced her knee and texted her supervisor with news of the injury. She drove home with some difficulty at the end of her shift. Her husband then

[1] The judge's decision, as well as all file pleadings, inexplicably refer to "§ 36k" which we presume is actually a reference to § 36(1)(k), the relevant portion of which provides that payment for bodily disfigurement is "not to exceed fifteen thousand dollars," and disfigurement shall not be "purely scar based, unless such disfigurement is on the face, neck or hands."

drove her to urgent care, where her knee was immobilized and she was given crutches and a prescription for Percocet. She was out of work for one month, then returned for one day, which she spent catching up on paperwork. She was out of work from July 28, 2020 to April 28, 2021, except for that one day return. (Dec. 15 Bean 20.) A 2022 hearing decision found the employee to be partially disabled as of April 29, 2021, due to injuries to her knee, hip and low back. (Dec. 15 Bean 20.) Rizzo v. M.B.T.A., 16 Mass. Workers' Comp. Rep. 160, 161 n.3(2002)(permissible to take judicial notice of board file).

The current claim for § 36(1)(k) disfigurement benefits is based upon her limp. (Dec. 15 Bean 19). The claim went to a § 10A conference before the administrative judge on November 28, 2022, and the self-insurer was ordered to pay to the employee $15,000 in § 36(1)(k) benefits (Dec. 15 Bean 19), which has been held in escrow pending the self-insurer's appeal. (Dec. 15 Bean 22). There was no §11A impartial medical examination. At hearing, the employee also sought penalties pursuant to § 14(1), as well as an enhanced legal fee pursuant to § 13A(2). The hearing was conducted on March 10, 2023, and the record closed on June 9, 2023. (Dec. 15 Bean 19).

The administrative judge took into consideration the testimony of the employee, as well as medical and non-medical exhibits, specifically: four surveillance reports and accompanying videos; reports of Dr. James Nairus, Dr. Kenneth Polivy, Dr. Margaret Lobo, Dr. Joseph Bernard, Dr. Steven Andriola, Arsenault Chiropractic, Dr. Robert Pennell, and Dr. David C. Morley's §11A impartial report from the 2022 hearing. (Dec. 15 Bean 18-19). Following his review and consideration of the videos and medical evidence, the administrative judge found that the employee was not entitled to the § 36(1)(k) benefit claimed at that time, stating, "[t]he record on the key issues involved---is there a limp? and has the employee reached maximum medical improvement?---is murky and dated." (Dec. 15 Bean 23). The administrative judge was not able to determine through the submitted evidence whether there was actually a limp, further stating that there was "…no definitive medical statement on the employee's limp that I have

confidence in. I do no[t] have confidence in my own observations—was there really a limp, or was I under the influence of the power of suggestion?"[2] (Dec. 15 Bean 23). Ultimately, the employee's claim for § 36(1)(k) benefits was "denied and dismissed as premature," as the administrative judge also felt that maximum medical improvement had not been reached. (Dec. 15 Bean 23)[3].

The employee presents several issues on appeal, including whether the administrative judge improperly allowed the self-insurer to rely on § 1(7A)[4] and whether the administrative judge exhibited bias in allowing the matter to continue to hearing. The employee also raises as an issue whether the denial of the claim for § 36(1)(k) was arbitrary and capricious, contrary to the record evidence, and indicative of the administrative judge's bias in favor of the self-insurer. We affirm the administrative judge's denial and discuss further the merits of the appeal based on the issues raised regarding § 1(7A) and bias.

With respect to the § 1(7A) issue presented by the employee, the argument centers on the prior establishment of liability for an industrial injury, but the present claim is for a limp, or the extent thereof, and the insurer contests whether it is causally related to the industrial injury. When the issue was raised on multiple occasions during the 2023 hearing, there was no objection to its assertion on the record.[5]

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[2] The judge stated in his decision: "Limps can come and go. As I watched the four videos I strained hard to see a limp that was barely perceptible. Had I not been looking for the limp, I likely would not have been conscious of one. (Dec. 15 Bean 23).

[3] Citing his review of records from Dr. Lobo, Dr. Nairus, Dr. Morley, and Dr. Polivy the judge noted: "The record relating to maximum medical improvement is also murky."

[4] G.L. c. 152, section 1(7A) states, in relevant part: "If a compensable injury or disease combines with a pre-existing condition not compensable under this chapter, to cause or prolong disability or a need for treatment, the resultant condition is compensable only to the extent such compensable injury or disease remains a major but not necessarily predominant cause of disability or need for treatment."

[5] Relevant portions of the transcript are as follows:

Therefore, the argument that the insurer should not have been allowed to raise the issue is moot. Counsel cannot agree to an issue on the record and then argue against its inclusion on appeal.

Nevertheless, the administrative judge in his decision only notes that this issue was raised by the insurer. There appears no requisite § 1(7A) analysis nor further discussion, other than to find that there was no evidence presented to support a § 1(7A) claim, "…except for challenges to the initial causal relationship of the hip and back injuries to the industrial accident which are subject to the doctrine of *res judicata.*" (Dec. 15 Bean 21).

MR. JACKSON: Judge, and I apologize, I should have brought it up in the beginning but we are raising 1(7A) on this case. And I don't know if there is any -- are you disputing our ability to raise 1(7A)?
MS. BRADLEY: Well, you can raise it. I'll have any [sic] own legal argument on it. I can't prevent you from raising it.
MR. JACKSON: Okay.
THE JUDGE: So you want 1(7A). And I haven't read any of these doctors reports. I assume one of them says that she had a knee problem or a back problem or a hip problem prior to July 28, 2020.
MR. JACKSON: Well, you know I would point specifically to Doctor Morley's impartial, Judge, report where he indicates that the employee has an aggravation of preexisting medial compartment degenerative joint disease.
(Tr. 109)

THE JUDGE: So I'm going to allow you to add the 1(7A). If I don't see anything in your writing then I just got a note here, read Morley. And if Morley doesn't bowl me over with something then --
MR. JACKSON: Sure.
THE JUDGE: You are allowed 1(7A). And a lot of times it's something to get you in the door but not much further. So point me in the direction you want me to go.
MR. JACKSON: Okay.
MS. BRADLEY: And the other report is Doctor Polivy, Page 6. He addressed the preexisting conditions but also says the knee injury is related -- her work injury combined with both preexisting condition render this symptomatic. And he gives a major causation opinion on that.
THE JUDGE: All right. So you've got your paragraph written.
(Tr. 110)

As to the argument that the administrative judge showed bias, we address this only because of the severity of such an argument. Just because a judge does not rule in a party's favor, it does not equate to an exhibition of bias. We have repeatedly held that "any claim of bias must be raised at the time the party asserts it became manifest; otherwise it is waived." Landis v. Commonwealth of Massachusetts, 32 Mass. Workers' Comp. Rep. 229, 231 (2018), citing Smith v. DMHNS 1 North Shore Area Danvers, 31 Mass. Workers' Comp. Rep. 221, 225 (2017)("claim of bias must be raised below, especially when the claimed bias occurs during a hearing, in order for the judge to address the claim and make findings on whether or not he has demonstrated bias towards a party"). The employee's failure to raise the judge's alleged bias against it at the hearing, constitutes a waiver of its right to raise it on appeal. See Landis, supra; Green v. Town of Brookline, 53 Mass. App. Ct. 120, 128 (2001), quoting Wynn & Wynn, P.C. v. Massachusetts Commn. Against Discrimination, 431 Mass. 655, 674 (2000) ("Objections, issues or claims – however meritorious – that have not been raised" below, are waived on appeal). The employee did not raise a claim of bias at hearing, only in subsequent filings after the decision of the judge was issued. As such, the argument is without merit.

We find that the administrative judge's decision is adequately supported by the evidence presented and considered in reaching his conclusions.

Accordingly, the decision of the administrative judge is affirmed.

Kevin B. O'Leary
Administrative Law Judge

Bernard W. Fabricant
Administrative Law Judge

Filed: **June 27, 2024**

Martin J. Long
Administrative Law Judge