COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 037665-20**

Francis Donovan	Employee
MBTA	Employer
MBTA	Self-Insurer

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

The case was heard by Administrative Judge Barrett.

APPEARANCES
Robert T. Naumes, Jr., Esq., for the employee
Paul Brien, Esq., for the self-insurer

O'LEARY, J. The self-insurer appeals from the administrative judge's decision awarding the employee § 34A permanent and total incapacity benefits. On appeal, the self-insurer raises several arguments, including that the administrative judge erred by failing to consider the deposition testimony of the impartial physician in his decision. We agree that the administrative judge did not review or acknowledge the deposition testimony and inaccurately stated that the deposition did not occur. We recommit the case for the administrative judge to consider all evidence, including the deposition transcript of the impartial physician, as outlined in this opinion. The facts pertinent to the issues addressed on appeal follow.

Francis Donovan began working for the Massachusetts Bay Transportation Authority ("employer") in 2004 as a journeyman painter at the Everett, Massachusetts facility. (Dec. 5.) The employee has suffered multiple injuries to his right knee while working for the employer. (Dec. 6.) The most recent injury, which is the subject of this appeal, occurred on December 30, 2020, when the employee fell into a 15 foot-wide hole and injured his right knee. The employee returned to work on January 25, 2021, although

he was in "constant pain" and could not perform his duties as a painter. He was assigned to work in the sign shop, where he would "just sit…and cut stickers up." (Dec. 6.) The employee stopped working on March 23, 2021, and has not returned to work in any capacity. (Dec. 6.) The self-insurer accepted liability for the injury and commenced payment of § 34 temporary total incapacity benefits following the employee's injury, until the employee returned to work on January 25, 2021, then resumed payment on March 24, 2021, when the employee stopped working. (Dec. 4.)

On December 1, 2022, the employee filed a claim for § 34A permanent and total incapacity benefits. Rizzo v. M.B.T.A., 16 Mass. Workers' Comp. Rep. 160, 161 n.3 (2002)(reviewing board may take judicial notice of the board file). The claim came before the administrative judge for a conference pursuant to G. L. c. 152 § 10A on April 21, 2023, at which time the self-insurer was ordered to pay the employee § 34A benefits at the weekly rate of $1,277.27 based on an average weekly wage of $1,915.90 from April 21, 2023, and continuing. The self-insurer was also ordered to pay for medical treatment pursuant to §§ 13 and 30. The self-insurer filed a timely appeal. George P. Whitelaw, M.D., the § 11A impartial physician, examined the employee on September 28, 2023. Dr. Whitelaw diagnosed the employee as being "status post right total knee replacement with weakness and instability in the right knee." (Dec. 11.) A motion by the self-insurer to open the medical evidence was allowed on December 8, 2023, based on the complexity of the medical issues. A hearing *de novo* took place on May 16, 2024. Both parties requested permission to depose Dr. Whitelaw in their respective Hearing Memorandums, and that deposition took place on June 19, 2024. (Rizzo, supra; Self-Ins. br. 6; Employee br. 3.) The record closed on July 19, 2024. (Dec. 3.) The administrative judge issued a hearing decision on November 21, 2024, in which he ordered payment of § 34A benefits to the employee from March 24, 2021, to date and continuing, plus medical benefits and attorney fees.

In the decision, the administrative judge adopted the opinion of Dr. Patz and found that the employee's right knee injury was causally related to the December 30, 2020, industrial accident. (Dec. 14.) The administrative judge also adopted the opinion of Dr.

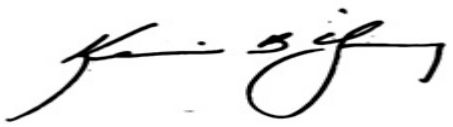
Whitelaw that the December 30, 2020, injury remains a major if not necessarily predominant cause of the employee's ongoing disability and need for treatment. (Dec. 14.) In adopting the opinion of Dr. Whitelaw, the administrative judge cited Dr. Whitelaw's written report only, noting that "[n]either party exercised their right to depose Dr. Whitelaw." (Dec. 3, 14.) Both the employee and the self-insurer agree that the administrative judge incorrectly stated in the decision that Dr. Whitelaw was not deposed. (Self-Ins. br. 6; Employee br. 13.) The self-insurer noted in its brief that the transcript of Dr. Whitelaw's deposition was sent via electronic mail by the stenographer to both parties and the administrative judge, but the Board file does not contain the transcript or correspondence regarding its submission. (Rizzo, supra; Self-Ins. br. 6.) The self-insurer also attached copies of email correspondence from June 27, 2024, and June 28, 2024, that showed the deposition transcript was sent to the administrative judge through his assistant. (Self-Ins. br. 11-17). The department's document management system, OnBase, contains neither the transcript nor any of the emails submitted. Rizzo, supra. The Reviewing Board has previously observed that the best practice for parties is to check OnBase within fourteen days of submitting an exhibit at hearing in order to ensure that it was received and entered in OnBase. That way, any missing material may be brought to the judge's attention in a prompt manner. See Kujtime Uka v Westwood Lodge Hospital 28 Mass. Workers' Comp. Rep. 19 (2014).

The self-insurer argues that the administrative judge's failure to consider Dr. Whitelaw's deposition requires the decision to be vacated, whereas the employee argues that the administrative judge's error in stating that Dr. Whitelaw was not deposed is harmless. (Self-Ins. Br. 6; Employee br. 13.) It is axiomatic that the judge must weigh and consider all properly admitted evidence. See Morrissey v. Benchmark Assisted Living, 20 Mass. Workers' Comp. Rep. 303 (2006), Stevens v. City of Brockton, 13 Mass. Workers' Comp. Rep. 166, 168 (1999). Here, the administrative judge not only failed to acknowledge the deposition of Dr. Whitelaw, but specifically and inaccurately stated that the deposition did not take place. (Dec. 3.) Complicating matters further, both the employee and self-insurer include multiple quotes and references to Dr. Whitelaw's

deposition testimony in their closing briefs to the administrative judge. Rizzo, supra. Failure to consider this portion of the medical evidence could adversely impact on substantial rights, foreclosing the parties from the opportunity to fully present the medical portion of their respective positions. Richard v. Edibles Rest., 8 Mass. Workers' Comp. Rep. 122, 125 (1994). See O'Brien's Case, 424 Mass. 16, 22 (1996).

Accordingly, we vacate the hearing decision and recommit the case the matter for further findings of facts consistent with this opinion. In the interim, the underlying conference order is reinstated. See, LaFleur v. Dept. of Corrections, 28 Mass. Workers' Comp. Rep. 179, 192 (2014).

So ordered.



Kevin B. O'Leary
Administrative Law Judge

Martin J. Long
Administrative Law Judge

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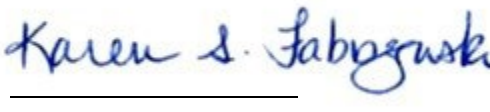

Karen S. Fabiszewski
Administrative Law Judge