COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 029024-21**

Jeff Stacy	Employee
Unitil Corporation	Employer
Travelers Indemnity Co. of Connecticut	Insurer

AMENDED REVIEWING BOARD DECISION

(Judges Koziol, Fabricant and Fabiszewski)
This case was heard by Administrative Judge Maher.

APPEARANCES

Joseph P. McKenna, Jr., Esq., for the employee
Edward E. McCarthy, Esq., for the insurer at hearing
John J. Canniff, Esq., and Robert S. Martin, Esq., for the insurer on appeal

KOZIOL, J. The insurer appeals from a decision ordering it to pay the employee § 34 temporary total incapacity benefits from February 21, 2021, to date and continuing along with §§ 13 and 30 medical benefits. The insurer's appeal raises two interrelated issues, contending the judge erred by: 1) finding the hazard of contracting COVID-19 was inherent in the employment; and, 2) basing that finding on the employee's status as an "essential worker." (Ins. br. 11-21.) We disagree and affirm the decision.

The parties agree that the employee's total disability is related to COVID-19, and do not dispute the underlying facts concerning the employee's job duties and his exposure to COVID-19. (Dec. 3.) The only issue in controversy at hearing was whether the employee's "exposure and development of COVID-19 is a personal injury as a result of a workplace accident pursuant to Section 1(7A)."[1] (Dec. 3.) We briefly set forth the pertinent facts as found by the judge. At all times relevant to this dispute, the employee

[1] General Laws, Ch. 152, § 1(7A), states in pertinent part:

> "Personal injury" includes infectious or contagious diseases if the nature of the employment is such that the hazard of contracting such diseases by an employee is inherent in the employment.

worked as a head linesman for the employer, where his job was "physical and demanding." Id. He and his crew installed, repaired and replaced all manner of overhead and underground electrical service, transformers, poles and wiring to homes, and he was required to be readily available for emergency work. (Dec. 4.) The judge found:

> Every day the workers would come into the garage together at the beginning and end of their shifts. They would gather and wait for their orders. When the repair jobs were assigned, they all went into the stockroom to get parts and equipment. The employee credibly testified that they worked shoulder to shoulder while collecting the supplies. This practice continued during the pandemic, and they all were required to wear masks until November 2020. The mask wearing rules were relaxed after that and nine of the eleven workers would still congregate in the garage and would not wear masks. Two of the workers stayed outside and continued to wear masks. They worked in teams and when on the road they had two men in each truck.
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> . . .
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> In February of 2021, [the employee] was working a lot of overtime because they had snowstorms and more predicted storms coming in. When that happens, they go on alert and have assigned overtime shifts and during the month, he was working at least sixty hours a week. On February 17, 2021, his co-worker Jim, who rode with him in the bucket truck, was not feeling well and they and the rest of the linemen got tested at Carewell. Eight of the eleven utility workers tested positive for COVID, including his teammate Jim, who he shared the cab of a truck. The Employee was negative and kept working, picking up the extra hours and continued working until February 21, 2021, when he had symptoms. He reported he was not feeling well to management and tested positive for COVID. Since that time, he has treated for severe shortness of breath, was hospitalized and on a ventilator and testified that he has depression. He has not returned to any type of work.

(Dec. 4-5.) The judge adopted the opinion of the § 11A impartial medical examiner, Thomas A. Morris, M.D., that the employee's exposure to SARS-CoV-2 and subsequent development of COVID-19, was causally related to his employment, he developed COVID-19 in the course of his employment, and as a result of chronic sequelae of COVID-19, he is totally disabled and unable to perform any physical exertion. (Dec. 7.)

The judge took judicial notice of Governor Baker's emergency orders regarding the COVID pandemic. (Dec. 6.) He found that "on March 10, 2020, Governor Baker

declared a state of emergency" and that "all Emergency and Public Health Orders issued pursuant to the emergency terminated on June 15, 2021." Id. In particular, the judge found:

> On March 23, 2020, the Governor declared that workers who maintain, ensure, or restore, or are involved in the reliable development, transportation, fuel procurement, expansion, or operation of the generation, transmission, and distribution of electric power, including call centers, *utility workers*, engineers, retail electricity, constraint maintenance, and fleet maintenance technicians who cannot perform their duties remotely were essential. The Administration issued a series of subsequent bulletins revising the restrictions on and opening of "brick and mortar" businesses allowing restaurants to provide outside service and other businesses to open according to the Department of Public Health's guidelines.

(Dec. 6; emphasis original.) Addressing the heart of the disputed issue, the judge went on to find:

> I must address whether the definition of "Personal Injury" includes infectious and contagious diseases if the nature of the employment is such that the hazard of contracting such diseases by an employee is inherent in the employment. The facts and environment in this case are unlike prior cases where the primary exposure was not related to the specific jobs [the employees] were doing. The Governor gave us a basis to make a finding that there was danger inherent to the jobs he declared as essential. In order to deal with this emergency, the Commonwealth took drastic emergency action to ensure the survival and safety of its citizens. That action was an order by the Governor assuring the continued operation of essential services in the Commonwealth in addition to closing certain workplaces and prohibiting gatherings of more than ten people on March 23, 2020. Included in the list of essential workers were "utility workers" who were engaged in maintaining electrical services to homes and businesses that were still allowed to open. I for one sincerely appreciate that the Governor took steps to ensure my lights, heat, power, and computer worked so I could be safe, comfortable, and able to actually work remotely. There is no reasonable argument that the Employee in his capacity as a utility worker did not provide an essential service. In doing so, utility workers and the other workers that the Governor specifically deemed as essential workers were sent out to work in an obviously dangerous environment and put at risk of being infected. The risk of infection or contagion was so likely at that time, that public gatherings of more than ten and virtually all manner of work in brick and mortar facilities such as offices and factories were shuttered. Clearly the definition and characteristics of the essential employment as outlined

> by the Governor to [sic] warrant a finding that the danger is inherent therein. The Administration gradually relaxed reopening of certain businesses. However, the Executive Order regarding essential workers was not rescinded until June 15, 2021. Because they were required to work to keep us safe, during this specific time period, when the Pandemic was raging, that the risk of infection was inherent to their work during the time that the Governor's Emergency Order was in place from March 20, 2020 to June 15, 2021. To find otherwise flies in the face of the beneficent intention to the Workers' Compensation Statute.

(Dec. 9-10.)

Citing our decision in Lussier v. Sadler Brothers, Inc., 12 Mass. Workers' Comp. Rep. 451, 452 (1998), the insurer first argues that existing case law requires reversal of the decision. In Lussier, a factory worker contracted tuberculosis from an infected co-worker. Id. at 451. Reversing the judge's award of workers' compensation benefits, we stated, "[w]e fail to see anything in the present employment that conceivably would make tuberculosis 'essentially characteristic' of the employee's machine operating job." Id. at 452. However, we agree with the judge that the existing case law is inadequate to address the present situation, which occurred in the environment of a global pandemic, with government-imposed restrictions on business operations. This brings us to the insurer's second argument, which it breaks into two parts.

First, the insurer claims the judge erroneously relied on COVID-19 Order No. 13, issued March 23, 2020, which designated the employee as an "essential worker," because the judge failed to acknowledge that Order was rescinded by COVID-19 Order No. 37, issued June 6, 2020, and effective at 12:01 am on June 8, 2020. (Ins. br. 17-20.) The insurer argues that as a result, on the date of injury, February 21, 2021, "[the employee] was **not** an essential worker under Order 13." (Ins. br. 19; emphasis original.) The insurer asserts the judge's finding to the contrary is a mischaracterization of the evidence that requires reversal.

We do not see the judge's finding as a mischaracterization of COVID-19 Order No. 37. While COVID-19 Order No. 37 states that COVID-19 Order No. 13 "is rescinded effective at 12:01 am on June 8, 2020," it is replete with references to the

rescinded Order and can only be understood in context of that Order.[2] COVID-19 Order No. 37, at 7. COVID-19 Order No. 37, is entitled an "Order Authorizing The Re-Opening Of Phase II Enterprises" and deals with businesses that were closed by COVID-19 Order No. 13, and that remained closed as part of Phase 1 of the Governor's reopening plan. Id. COVID-19 Oder No. 37 defines "Phase II Enterprises" and prescribes actions that must be taken by businesses as part of their "brick-and-mortar premises" reopening plan. Id. at 2-5. It makes no attempt to erase the characterization of the employee as an "essential worker." Accordingly, we agree with the judge's conclusion that the employee retained the status as an "essential worker" during the active State of Emergency,[3] and

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[2] For example, page 3 of COVID-19 Order No. 37 states in pertinent part:

> Phase II enterprises are businesses or other organizations that are designated as such on the chart attached as Schedule A or businesses and other organizations that meet each of the following conditions:
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> a. not previously permitted to open their premises as an Essential Service or Phase I enterprise pursuant to Section 1 of COVID-19 Order No. 33;
> b. not closed by any COVID -19 Order separate from or in addition to COVID-19 Order No. 13;
> c. not excluded or excepted from the terms of this Order in Section 5; and
> d. not designated as a Phase III or Phase IV enterprise on the chart attached to Schedule A.

(Emphasis original.)

[3] We note that the judge may have overstated the date of the termination of the employee's status as an "essential worker," but even if he erred in that regard, the issue is not relevant to our case on appeal. We merely note that COVID-19 Order No. 69, "Order Announcing The Termination Of The March 10, 2020 State Of Emergency And Rescinding COVID-19 Executive Orders Issued Pursuant To The Massachusetts Civil Defense Act," specifically stated that, with the exception of certain enumerated Orders that were to stay in effect until June 15, 2021, none of which are any of the Orders at issue in this decision, "[e]ffective at 12:01 am on May 29, 2021, all COVID-19 Orders that have issued above my signature and pursuant to the Civil Defense Act since my March 10, 2020 declaration of a state of emergency are rescinded in full. . . ." We observe that there is nothing in COVID-19 Order No. 37 stating that COVID-19 Order No. 13 was "rescinded in full," adding further support to our analysis.

that the employee was still deemed an "essential worker" on his date of injury, February 21, 2021.

Second, the insurer argues that, in any event, the judge erred by finding the "essential worker" classification "equates to a legal finding that the risk of contracting the disease is inherent in the employment" and he "misinterpreted the transitory essential worker status as imbuing the nature of that employment with an inherent risk that simply did not exist." (Ins. br. 21.) The determination of whether a risk of contracting a disease is inherent in the employment, is a question of fact. Perron's Case, 325 Mass. 6, 9 (1949)("When, because of the nature of the employment, a possibility exists that an employee may contract an infectious or contagious disease, it becomes a question of fact whether the likelihood of infection or contagion is so essentially characteristic of the employment as to warrant a finding that the danger is inherent therein.") As the judge correctly noted, during the pandemic, businesses were shuttered for the most part in the Commonwealth, with the exception of those providing "essential services." Here, for the benefit of the public, the employer was allowed to operate its business as usual throughout the State of Emergency, while other businesses could not. Thus, the employer experienced an economic benefit deprived of other businesses, while simultaneously exposing its workers to an increased risk of exposure or transmission of the disease which was the cause of the invocation of the Declaration of a State of Emergency and the subsequent Executive Orders, COVID-19. Against this unique backdrop we find no error in the judge's findings of fact, or his analysis that those findings support his further finding that on the date of injury, the hazard of contracting COVID-19, was inherent in his employment as an "essential [utility] worker."

Accordingly, we affirm the judge's decision. The insurer is ordered to pay employee's counsel an attorney's fee pursuant to § 13A(6), in the amount of $1,866.87, plus necessary expenses.

So ordered.

Catherine Watson Koziol
Administrative Law Judge

Bernard W. Fabricant
Administrative Law Judge

Karen S. Fabiszewski
Administrative Law Judge

Filed: ***February 7, 2024***