COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS	**BOARD NOS. 001428-11 000244-11 002156-11 002487-11 004377-11**
Joao DeOliveira	Employee
Calumet Construction Corp. Star Insurance Company	Employer Insurer
MAR Construction Acadia Insurance Company	Employer Insurer
Master Construction Corp. Workers' Compensation Trust Fund	Employer Insurer
Impact Carpentry, Inc. Liberty Mutual Insurance Company	Employer Insurer
MC Construction, Inc. Workers' Compensation Trust Fund	Employer Insurer

REVIEWING BOARD DECISION
(Judges Koziol, Horan and Harpin)

The case was heard by Administrative Judge Benoit.

APPEARANCES
Morton Shuman, Esq., for the employee
Joanne D. Walter, Esq., for Star Ins. Co. at hearing
John J. Canniff, Esq., for Star Ins. Co. on appeal
Alicia M. Delsignore, Esq., for Acadia Ins. Co.
Timothy Foley, Esq., for Workers' Compensation Trust Fund
Shelley Harvey, Esq., for Liberty Mutual Ins. Co.

KOZIOL, J. Star Insurance Company (Star) appeals from a hearing decision ordering it to pay benefits, pursuant to § 18,[1] to the employee, who was

[1] General Laws c. 152, § 18, provides, in relevant part:

injured while employed by an uninsured sub-contractor of Star's insured, Calumet Construction Corp. (Calumet). Star raises three issues on appeal. First, it claims the judge erred in applying § 18 so as to find the general contractor responsible because he did not identify the employee's employer. Second, it argues the judge's determination of the employee's average weekly wage was arbitrary and capricious. Lastly, it claims the judge acted beyond the scope of his authority and contrary to law by ordering the insurer, pursuant to § 30, to assign a nurse case manager to assist the employee in finding suitable housing and to pay a portion of the cost of his handicapped housing. We affirm the award of compensation to the employee, but recommit the matter for the judge to identify the employee's employer on the date of injury.

The employee was severely injured as a result of a fall that occurred on January 5, 2011, his second day of work as a framing carpenter at a building site.[2] He sustained a spinal cord injury and is paraplegic. (Dec. 18.) He also sustained "a significant brain injury requiring partial lobectomy of the right and left frontal lobes as well as parenchymal damage to the left temporal and left parietal lobes."

> If an insured person enters into a contract, written or oral, with an independent contractor to do such person's work, or if such a contractor enters into a contract with a sub-contractor to do all or any part of the work comprised in such contract with the insured, and the insurer would, if such work were executed by employees immediately employed by the insured, be liable to pay compensation under this chapter to those employees, the insurer shall pay to such employees any compensation which would be payable to them under this chapter if the independent or sub-contractors were insured persons .... This section shall not apply to any contract of an independent or sub-contractor which is merely ancillary and incidental to, and is no part of or process in, the trade or business carried on by the insured, nor to any case where the injury occurred elsewhere than on, in or about the premises on which the contractor has undertaken to execute the work for the insured or which are under the control or management of the insured.

[2] The hearing took place over the period of four days. The transcript from February 11, 2013 will be referred to as "Tr. I"; the transcript from February 12, 2013 as "Tr. II"; the transcript from February 13, 2013 as "Tr. III"; and, the transcript from March 25, 2013 as "Tr. IV".

(Id.) The employee testified he has no memory of who hired him to work at the construction site, of working at the construction site, or of the accident. (Tr. I, 165.)

Calumet was the general contractor at the building site. There was conflicting evidence regarding the identity of the party Calumet hired to perform the framing work. As a result, claims were also made against four other parties. Two of those parties were insured on the date of injury: MAR Construction Corp. (MAR), insured by Acadia Insurance Co. (Acadia), and Impact Carpentry, Inc. (Impact), insured by Liberty Mutual Insurance Co. (Liberty). The other parties, Master Construction Corp. (Master) and MC Construction, Inc. (MC) were uninsured on the date of injury, requiring involvement of the Workers' Compensation Trust Fund (WCTF) pursuant to G. L. c. 152, § 65(2)(e).

The parties stipulated the employee "suffered a compensable personal injury," has been totally disabled since the date of the injury and has a disability causally related to the industrial injury. (Dec. 3; Tr. I, 8.) However, each insurer and the WCTF denied liability for the employee's injuries, and raised the defenses of lack of employee/employer relationship, disputed average weekly wage, and denied the employee's entitlement to § 30 benefits. (Dec. 2-3.)

Star argues the judge erred by finding it responsible for payment of the benefits owed to the employee pursuant to § 18. (Star br. 11.) We disagree. The judge's findings unraveled a complex, tangled evidentiary web and supported the inferences he drew to arrive at his ultimate conclusion that Star was responsible for paying the employee's workers' compensation benefits. (Dec. 9-17.)

The judge found that Calumet hired Carlos Berto as the framing subcontractor on this project. (Dec. 11.) The judge did not believe Mr. Berto's testimony that he was acting as a broker for Impact. (Dec. 9.) Moreover, the judge found that Impact was not a party to a contract with Calumet and was not a subcontractor on the project. (Dec. 15-16.) The judge also determined that MAR was not a subcontractor on this project. (Dec. 14-16.)

Carlos Berto was the President, Treasurer, Secretary and Director of MC, which was uninsured for workers' compensation purposes. (Dec. 9-11.) The judge permissibly inferred from the evidence that Ricardo Silva and Ricardo Alves were the same person, and that Ricardo Silva and Ricardo Da Silva "are names of the same person, as the corporate documents of Master Construction Corporation and MAR Construction, Inc. list those two names with the same middle initial ('O') and the same address ('1 Mayhew Slip Unit B, Milford, MA 01767')." (Dec. 12.) We refer to this individual hereinafter as Ricardo Silva. (Dec. 12.) The judge found that other workers on the project had been hired by Ricardo Silva, and that Ricardo Silva instructed one of those workers, Lucas DeSousa (Lucas), to pick up the employee and another worker and bring them to the job site for their first day of work. (Dec. 12.)

Lucas believed Carlos Berto was the foreman on the project and thought that Carlos Berto was employed by Calumet. (Dec. 12.) The judge found, "[r]ight after the industrial injury, Carlos Berto informed Lucas that the Employer was **Master Construction Corporation**." (Dec. 15, emphasis original.) The judge found that when it became apparent that Master was uninsured for workers' compensation, "Mr. Berto and/or Mr. Silva" took action to "attempt to direct responsibility to the insurer of MAR Construction, Inc." (Dec. 15-17.) Thus, the judge's findings show that two uninsured subcontractors were involved in the framing project, Carlos Berto (MC) and Ricardo Silva (Master). "Credibility determinations are the sole province of the hearing judge, Lettich's Case, 402 Mass. 389, 394 (1988), and we will not disturb them unless they are arbitrary and capricious, or derived from inferences which are not reasonably drawn from the evidence." Lefebvre v. Sandelswood, Inc., 21 Mass. Workers' Comp. Rep. 135, 141 (2007)(additional citations omitted).

Despite his extensive findings of fact, the judge ultimately made no finding specifically identifying the employee's employer. (Dec. 9-17.) Notwithstanding this omission, we disagree with Star that the employee failed to prove his

entitlement to benefits under §18 because the judge's findings identify two uninsured parties involved in the framing contract work, either of whom alone, or acting in concert, ultimately must be determined to be the employee's employer. Thus, insofar as the employee's entitlement to benefits is concerned, whether he was employed by Master, MC, or both, is academic: he was employed by an uninsured subcontractor, requiring an award of benefits against Star as the general contractor pursuant to § 18. (Dec. 11, 16.) Accordingly, the judge properly applied § 18 to award the employee benefits.

Star argues, however, that the judge did not make necessary findings about the relationship between Carlos Berto and Ricardo Silva, and that it is entitled to know the precise identity of the employee's employer. These findings are important because § 18 states, in pertinent part:

> The insurer shall also be entitled to recover from the uninsured independent contractor or the uninsured sub-contractor all compensation benefits and expenses, medical, hospital or otherwise, that it has paid or may become obligated to pay on account of any injury to the employee or employees of any such uninsured independent contractor or uninsured sub-contractor.

Accordingly, we recommit the matter for the judge to make further findings of fact pertaining to this issue: 1) defining the relationship between Carlos Berto and Ricardo Silva; and, 2) defining their respective employment relationships to the employee.

Star also asserts the judge's determination of the average weekly wage was erroneous. Specifically, it argues the judge acted arbitrarily and capriciously by failing to consider the nature of the employment and the claimant's status. (Star br. 14.) The determination of the average weekly wage is a factual question. More's Case, 3 Mass. App. Ct. 715 (1975). Star's argument fails because it rests in part, on Star's version of the facts, not those facts found by the judge.

The judge's decision reveals the methodology used to calculate the average weekly wage: it was factually sound and neither arbitrary nor capricious. (Dec.

17.) The judge acknowledged many factors account for the wages of a worker such as the employee. The judge found the employee had completed only one day of work and was not able to provide information about his pay rate. (Dec. 17.) The judge found the employee's skill to be more than a helper and less than a full carpenter.[3] (Dec. 17.) He determined, based on the evidence, that the employee would be expected to work, on average, forty hours per week. (Dec. 17.) Pursuant to §1(1),[4] the judge relied on testimony of a construction industry consultant and a vocational consultant to determine a reasonable approximation of the average weekly wage for the employee. (Dec. 17, Tr. III 5-8, 39-41.) The judge's conclusions were based on his specific findings of fact. Cf. Dawson v. D. Cronin's Welding, 23 Mass. Workers' Comp. Rep. 85 (2009)(where judge failed to make credibility determinations or findings to resolve the factual issue of average weekly wage, his conclusions were internally inconsistent).

Star's reliance on Hogan v. William Mascioli d/b/a Add-A-Room, 25 Mass. Workers' Comp. Rep. 139 (2011), is misplaced. In that case recommittal for further findings of fact was warranted because the average weekly wage assigned

[3] We note the judge also found the employee does not speak English, has a fifth grade education, and that "his only skills have been those of a carpenter." (Dec. 19.)

[4] General Laws c. 152, § 1(1), provides in relevant part:

> "Average weekly wages", the earnings of the injured employee during the period of twelve calendar months immediately preceding the date of injury, divided by fifty-two; but if the injured employee lost more than two weeks' time during such period, the earnings for the remainder of such twelve calendar months shall be divided by the number of weeks remaining after the time so lost has been deducted. Where, by reason of the shortness of the time during which the employee has been in the employment of his employer or the nature or terms of the employment, it is impracticable to compute the average weekly wages, as above defined, regard may be had to the average weekly amount which, during the twelve months previous to the injury, was being earned by a person in the same grade employed at the same work by the same employer, or, if there is no person so employed, by a person in the same grade employed in the same class of employment and in the same district.

by the judge conflicted with the credited testimony of the employee as to the hours and days worked. Id. at 140, 142. Star's further argument, that the judge's determination of average weekly wage was erroneous because it can only be based on earnings reported as taxable income, lacks merit. (Star's br. 16-17, 18.) Indeed, "[i]f the insurer's argument were adopted, an employee whose entire wages were paid 'under the table' would not be entitled to any weekly compensation, a patently unfair result." Blanco v. Alonso Constr., 26 Mass. Workers' Comp. Rep. 157, 160 n.4 (2012).

Lastly, Star contends the judge acted beyond the scope of his authority and contrary to law by ordering the insurer, pursuant to § 30, to locate and secure handicapped housing for the employee and to pay reasonable expenses for suitable housing costs in excess of $350 per month, the cost of the employee's monthly rent prior to his injury. We disagree.

The judge's findings support his award of § 30 benefits and were legally sound. He found, in relevant part:

> The scope of health care that is reasonable and necessary must bear a relationship to the scope of the injury. The [WCTF] has set a shining example of what degree of care and attention is appropriate for an Insurer to provide persons with catastrophic injuries.[5] Certainly such a person's injuries and impairments create unique needs in terms of housing. It can hardly be denied by thoughtful people that one's home is the place of one's refuge and a catalyst for one's physical and mental wellbeing. Retention of a nursing case manager to facilitate the paraplegic person's suitable housing has been beneficial for the [WCTF]. . . . I find that the provision of a nurse case manager to assist the Employee in procuring the necessities of life, such as locating and obtaining suitable housing, is reasonable and adequate health care for the victim of [sic] an injured paraplegic Employee, and that it lies within the ambit of § 30.
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> * * *

[5] The record shows the judge's findings were based on the testimony of the Department of Industrial Accidents's Deputy Legal Counsel, Yvonne Vieira-Cardoza, who was charged with overseeing the WCTF. Attorney Vieira-Cardoza testified about the WCTF's practice of hiring nurse case managers to assist injured employees who suffer from paraplegia in finding suitable housing and equipment to meet their medical and physical needs, as well as the cost-savings associated with doing so. (Tr. III, 60-71.)

> Our statute does not specify that the Insurer must provide adequate ***medical*** care; it mandates furnishing adequate and reasonable ***health*** care. I find that the provision of handicapped suitable housing for a paraplegic victim of a horrific industrial accident is within the parameter of furnishing of "adequate and reasonable health care services . . . together with the expenses necessarily incidental to such services" as those terms are set forth in M.G.L. c. 152, § 30. I find that the reasonable expenses inherent in that task that individuals incur due to an Insurer's failure to provide them are compensable. In the case at hand, the Employee has resided in a Holiday Inn because, as he credibly testified, the alternative was to be out on the streets, i.e., homeless. In his affidavit, Attorney Shuman indicated that the rates have ranged from $59 to $79 per night, which are [sic] reasonable.

(Dec. 19-22.)

Star begins by arguing that the Act does not require it to "locate housing for the [employee] under Section 13 and 30" and that "the hiring of a real estate agent is in no way a medical service or an expense incidental thereto."[6] (Star br. 19, 20.) The argument lacks merit.

Star, the other insurers, and the WCTF, stipulated that handicapped housing is medically necessary for the employee. (Star br. 19; Tr. I, 9, II, 4.) It has long been recognized that "medical services" are not limited to those "rendered by a human agency"; consequently, a medically necessary relocation to a different climate is a compensable "medical service" under § 30. Levenson's Case, 346 Mass. 508, 511 (1963)(where physician and judge find trips to Florida to be

[6] As the judge noted, (Dec. 21), § 30 states, in pertinent part, "[t]he insurer shall furnish to an injured employee adequate and reasonable health care services, and medicines if needed, together with the expenses necessarily incidental to such services. . . ." G. L. c. 152, § 30, as amended by St. 1991, c. 398, §53. Prior to its amendment in 1991, § 30 stated, in pertinent part, "[t]he insurer shall furnish to an injured employee adequate and reasonable medical and hospital services, and medicines if needed, together with the expenses necessarily incidental to such services. . . ." Star advanced no argument below or on appeal, that the current version of § 30 has effectuated any change in the nature of "services" it is required to provide the employee. We do not see the amendment as effectuating any substantive restriction on the scope of the nature of the "services" available to injured employees under § 30. Especially, where the words "health care services" have been in Section 13 (concerning the rates of payment for such services) since 1973, while the language of § 30 remained unchanged for nearly 18 years thereafter. G. L. c. 152, § 13, as amended by St. 1973, c. 1229, § 4M.

medically necessary, employee should be reimbursed under § 30 "for the expenses of the trips to Florida"). Having stipulated to its medical necessity, the handicapped housing should not be treated any different than a medically necessary relocation to a different climate. In addition, by stipulating that handicapped housing is medically necessary, the employee did not have to produce evidence of a doctor's advice, or order for such housing, in order for it to be adjudged compensable under § 30. Levenson, supra at 511; Cf Klapac's Case, 355 Mass. 46, 49 (1968)(service must be rendered under direction and control of physician).

Moreover, contrary to Star's assertions, the judge did not require it to "hire a real estate agent" for the employee, but ordered it to assign a nurse case manager to assist the employee in securing his medically necessary handicapped housing. Notably, Star advances no argument that the payment of the services of a nurse case manager are not compensable, or unreasonable, under § 30.

The judge's findings amply support his conclusion that the employee's unique needs require Star to take an active role in providing him with benefits required under § 30, including his medically necessary handicapped housing. To the extent Star argues that it is not responsible to make arrangements for delivery of that service, it ignores the statutory language. The Act states, "[t]he insurer shall furnish to an injured employee adequate and reasonable health care services, and medicines if needed, together with the expenses necessarily incidental to such services. . . ." G. L. c. 152, § 30.

> "Furnish" means to provide or supply. Its significance may vary with the connection in which it is found. It is used here to describe a duty placed upon an insurer respecting a workman who receives "a personal injury arising out of and in the course of his employment." Such a person manifestly is presumed by the act to be under more or less physical disability and hence not in his normal condition of ability to look out for himself. The word "furnish" in such connection imports something more than a passive willingness to respond to a demand. It implies some degree of active effort to bring to the injured person the required humanitarian relief.

Panasuk's Case, 217 Mass. 589, 593 (1914); See Lopes's Case, 74 Mass.App.Ct. 227, 229 n.4 (2009)(regarding appointment of legal representative of employee's estate, "Section 39 does not specify how the insurer's obligation to 'furnish' such services may be discharged. We assume that the insurer would fulfil its obligation by engaging an attorney on behalf of the putative representative").

Star's remaining contention, that the employee's "inability to locate his own housing is not the result of his industrial accident; it is the result of his lack of effort in locating such space, his own undocumented status and his lack of a guarantor in the event that he defaults on his rent," fares no better. (Star br. 26.) First, the decision contains no finding that the employee failed to make reasonable attempts to secure handicapped accessible housing. Second, Star's argument that the employee's status as an undocumented worker hinders his ability to find housing, because it renders him ineligible for federally subsidized housing for the disabled, is legally inconsequential and rests on a premise antithetical to Chapter 152.

The issue of the employee's status as a documented or undocumented worker is irrelevant to this dispute. Medellin v. Cashman KPA, 17 Mass. Workers' Comp. Rep. 592, 608 (2003)(injured employee's status as "undocumented immigrant worker" is not a bar to eligibility for, and receipt of, workers' compensation benefits under Chapter 152). More importantly, the Act does not permit Star to lessen its burden to furnish the employee with handicapped housing by foisting that responsibility on federal or state subsidized facilities.[7]

[7] Star recounts the testimony of Patricia Morrill of the Milford Housing Authority, that although the employee has not returned the rental application for one of the six fully handicapped accessible units at Maher Court, which is managed through a federal housing program, his undocumented status would bar him from receiving that housing. (Star's br. 25; Tr. II, 50-52.) It also argues that the employee applied for "state-aided housing," which is not fully handicapped accessible and which his undocumented status does not bar him from receiving. (Star br. 25.) Star notes that state-subsidized housing costs would be 30% of the applicant's income. Id.

Estey v. Burns Int'l Sec., 17 Mass. Workers' Comp. Rep. 53, 61 (2003)("Because the 'MassHealth Buy-In and The Pharmacy Program,' funded by the taxpayers of the Commonwealth, is paying the other ninety per cent [of the employee's medications], it is beyond dispute that the insurer is not in compliance with that provision of § 30 which mandates that 'the reasonable and necessary cost of such [health care] services shall be paid by the insurer' "). Indeed, where the insurer allows governmental entities to pay for health care services it is responsible to furnish under § 30, it does so at its peril. See e.g., Borgosano v. Babcock & Wilcox Power Co., 10 Mass. Workers' Comp. Rep. 120, 122-126 (1996)(Federal law preempted §§ 13 and 30, requiring workers' compensation insurer to reimburse Department of Veterans Affairs for health care services provided to injured employee at rates in excess of those prescribed by § 13).

The provision of wage replacement and medical benefits for employees, who sustain work-related injuries, is part of the cost of doing business in this Commonwealth. See Ahmed's Case, 278 Mass. 180, 183, 184 (1932)("The Workmen's Compensation Act was a humanitarian measure enacted because of a belief that previous remedies had failed to give the adequate relief to employees for personal injuries arising out of their employment commensurate with risks demanded by modern conditions"). The Legislature's development of a private insurance scheme for the provision of benefits, as encompassed in Chapter 152, is evidence of its intent to keep the provision of these benefits a private obligation, rather than the responsibility of government. See Ahmed, supra at 183-184. Thus, workers' compensation, as part of a greater social safety net, was designed to prevent individuals whose ability to earn has been impaired or eliminated as a result of an industrial injury from becoming dependent upon the state for survival.[8]

[8] We also observe that the employee's placement on a waiting list for state subsidized handicapped housing places him in consideration for such unit before other disabled individuals who do not have the benefit of the protections provided by Chapter 152. (Tr. II, 50.)

Because Star stipulated that handicapped housing is a medical necessity for this employee, it is Star's responsibility alone to furnish the employee with handicapped housing. Estey, supra; G. L. c. 152, § 13(1)("[n]o employee shall be liable for health care services adjudged compensable under this chapter").

Lastly, Star alleges there is no differential between the cost of handicapped accessible housing and the employee's prior housing costs. Again, the judge's findings of fact that such a differential exists, are based on the evidence in the record and are not speculative. The employee requires housing that accommodates a wheelchair in order to perform basic functions of living. The employee testified that prior to the accident he rented a room in a second-floor apartment which he shared with three other individuals. (Tr. I, 170-171, 178-179.) The judge credited the employee's testimony that his former $350/month room is no longer suitable for his needs.[9] (Dec. 19.) Even the lowest figure found by the judge for the room at the hotel where the employee has been staying, $59 per night, yields a monthly (30 nights) cost of $1,770. (Dec. 21.) The judge followed existing case law by requiring Star to pay the employee's handicapped housing expense to the extent it exceeds $350 per month, (Dec. 21-22). See Levenson, supra at 512-513(where employee required medically necessary relocation to Florida during winter months, he was entitled to § 30 compensation to the extent his reasonable living expenses in Florida exceeded his normal cost of living).

[9] The employee's rental application for Rolling Green apartments, where he tried to secure accessible housing post-accident, required him to complete a form and also required verification from his prior landlord. (Tr. IV, 27, 37-40.) The employee's application indicated his prior rent was $950 per month; his prior landlord indicated the rent for the "unit" was $950.00 per month. (Ex. 43.) The judge was not required to find that the employee paid $950.00 per month for rent and could reasonably infer from this evidence that the "unit" was the apartment, or the total rent, for the apartment in which the employee paid for an individual "room." In any event, "[w]here there is evidence to support a judge's decision, it is not arbitrary or capricious notwithstanding that evidence also exists suggesting a contrary conclusion." Radke v. Eastham Founds., 7 Mass. Workers' Comp. Rep. 197, 203 (1993).

Because the judge's findings are factually warranted and based on reasoned decision making, we affirm the decision ordering Star to pay the compensation awarded to the employee. (Dec. 21-22.) Pursuant to G. L. c. 152, § 13A(6), the insurer shall pay employee's counsel an attorney's fee in the amount of $1,618.19. Otherwise, we recommit the matter for further findings of fact as identified herein.

So ordered.

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Catherine Watson Koziol
Administrative Law Judge

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Mark D. Horan
Administrative Law Judge

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William C. Harpin
Administrative Law Judge

Filed: **October 27, 2015**