

COMMONWEALTH OF MASSACHUSETTS

**DEPARTMENT OF
INDUSTRIAL ACCIDENTS**

**BOARD NOS. 039015-06
042105-06**

Jose Burgos
R & R Sales, Inc.
Massachusetts Trade SIG
Robert Harte
Workers' Compensation Trust Fund

Claimant
Employer
Insurer
Employer
Insurer

REVIEWING BOARD DECISION

(Judges Fabricant, McCarthy and Costigan)

The case was heard by Administrative Judge Lewenberg

APPEARANCES

Gary W. Orlacchio, Esq., for the claimant
Richard N. Curtin, Esq., and Thomas P. O'Reilly, Esq., for Mass. SIG at hearing
Paul M. Moretti, Esq., and Scott K. Lueker, Esq., for Mass. SIG on appeal
David J. O'Donnell, Esq., and Tieshia T. Cummings, Esq., for the Workers'
Compensation Trust Fund at hearing
Tieshia T. DeMato, Esq., for the Workers' Compensation Trust Fund on appeal
Paul L. Nevins, Esq., for R & R Sales, Inc.
Philip Olenick, Esq., for Robert Harte at hearing

FABRICANT, J. Massachusetts Trade SIG appeals from a decision finding that its insured, R & R Sales, Inc., was the claimant's employer at the time of injury, and ordering it to pay benefits. The insurer argues issues regarding the invocation by two witnesses of the Fifth Amendment privilege against self-incrimination. We see no error, and affirm the decision.

On November 19, 2006, a contractor, Robert Harte, and the claimant were removing copper pipe and wiring from a building owned by R & R Realty Trust. During this activity, a radiator suspended from the ceiling fell on the claimant, causing a severe injury to his right lower leg. Both employers denied Mr. Burgos worked for them.

Robert Raimondi, Sr., the owner of R & R Realty Trust and R & R Sales, testified at the hearing and exercised his Fifth Amendment right against self-incrimination,

declining to answer questions regarding his relationship with both the claimant and Robert Harte. Harte also invoked the Fifth Amendment. (Dec. 7-8.)

Based on the claimant's credible testimony, the judge found that R & R Sales was the employer, and, according to Robert Raimondi, was illegally paying his employee "under the table." The judge did not draw any adverse inference based upon Raimondi's invocation of his constitutional rights, but did discredit affidavits executed by Raimondi which were placed in evidence. The judge did not find the uninsured Robert Harte to be a subcontracting employer of R & R Sales, Inc. (Dec. 8.)

Massachusetts Trade SIG raises several issues regarding the judge's handling of the Fifth Amendment privilege against self-incrimination. First, it insists the judge should have drawn an inference that Harte was the employer, by his invocation of the Fifth Amendment. In addition, the insurer argues the judge should also have drawn a negative inference against Raimondi, as it speculates he personally, or R & R Realty Trust, might have been the actual employer of the employee. The judge did not err.

Although a negative inference is *permitted* from the invocation of the Fifth Amendment in the civil setting, it is not *required*. "Adverse inferences *may* be drawn against a party who invokes the Fifth Amendment privilege." Lentz v. Metropolitan Prop. & Cas. Ins. Co., 437 Mass. 23, 26 (2002)(emphasis added). As to Harte, the judge concluded that there was no evidence to support a finding that he was the actual, uninsured employer. A negative inference alone would not sustain such a factual finding, in the absence of corroborating evidence of the fact sought to be established. Quintal v. Comm'r of the Dept. of Employment, 418 Mass. 855, 861 (1994); Mitchell v. Silverstein, 323 Mass. 239, 240 (1948). Here, there was no such corroboration in the record.

The insurer takes particular issue with the judge's finding that he "*cannot*" infer Raimondi was an uninsured employer, due to the possibility that Raimondi invoked the privilege in order to avoid testifying about other incriminating activities. (Dec. 8, emphasis added; Ins. br. 19-20.) We do not place much stock in the judge's choice of that one word, and instead understand him to be saying that he simply was not persuaded by the insurer's proffered inference.

The insurer further contends the judge erred in allowing both Raimondi and Harte a blanket invocation of the Fifth Amendment. It argues the witnesses should have been required to invoke the privilege after each question posed by insurer's counsel. (Ins. br. 14-15.) See Commonwealth v. Martin, 423 Mass. 496, 502 (1996). However, the insurer did not initially attempt to question the witnesses, and instead simply reserved the right to recall them. (1/28/08 Tr. 14-18.) Eventually, the insurer did ask specific questions, to which the responses were the invocation of the Fifth Amendment.¹ (1/30/08 Tr. 4-33.) Thus, there was no error.

The insurer also argues that Raimondi should not even have been allowed to invoke the Fifth Amendment because he had waived the privilege by allowing inculpatory statements in his sworn affidavits into evidence. (Employee Exs. 3 and 4; Ins. Ex. 7.) The insurer further argues it was error to allow those affidavits into evidence, as they were hearsay and not subject to cross-examination. We deem that latter argument waived because the insurer did not preserve the issue by objecting to the introduction of the affidavits on the basis of hearsay or confrontation rights.² (1/28/08 Tr. 9-12.)

As to the alleged waiver of the privilege, we find none, for the simple reason that the affidavits were not incriminating. In general, Raimondi merely asserted in the affidavits that neither he nor any of his business entities employed the claimant, and denied any direct knowledge of any arrangement between Harte and the claimant. The effect was to point the finger at Harte as the employer. If credited, the affidavits would have been exculpatory as to Raimondi's liability as an uninsured employer or principal of an uninsured employer, R & R Realty Trust. Such statements did not expose Mr. Raimondi to criminal liability, and did not bar his later assertion of his right against self-incrimination.

¹ We see no issue in Raimondi's silence in response to the insurer's questions. The judge allowed the witness to do so, in lieu of invoking the Fifth Amendment in answer to each and every question. (1/30/08 Tr. 16-19.)

² Whatever incipient objection the insurer did pose, at page 10, did not mention those grounds as a reason for exclusion. In any event, the objection was withdrawn.

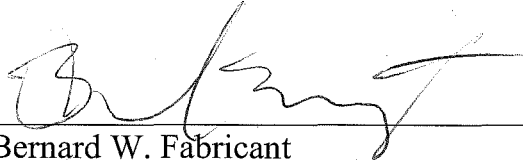
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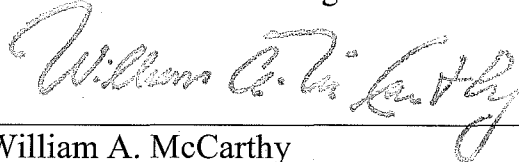
Finally, there was no error in the judge's exclusion of the Workers' Compensation Trust Fund Section 65 Questionnaire. (Ins. Ex. 5, for identification purposes only; Dec. 3.) The document was not authenticated, and it did not fall within any hearsay exception.

Accordingly, the decision is affirmed. Massachusetts Trade SIG shall pay counsel for the claimant a fee under the provisions of § 13A(6) in the amount of \$1,497.28.

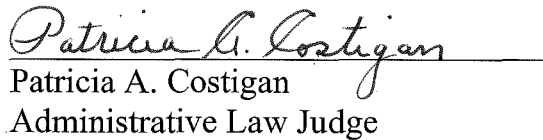
So ordered.



Bernard W. Fabricant
Administrative Law Judge



William A. McCarthy
Administrative Law Judge



Patricia A. Costigan
Administrative Law Judge

Filed:

