COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS	**BOARD NO. 036235-09**
Karen L. Wunschel	Employee
Charter Communications	Employer
Ins. Co. State of Pennsylvania	Insurer

REVIEWING BOARD DECISION
(Judges Fabricant, Horan and Koziol)

The case was heard by Administrative Judge Preston.

APPEARANCES
Paul L. Durkee, Esq., for the employee
Carey H. Smith, Esq., for the insurer

FABRICANT, J. The insurer appeals from a decision[1] awarding $79,950.15 pursuant to § 36, and home health care benefits pursuant to §§ 13 and 30. The insurer argues that the employee's failure to comply with the evidentiary standard, required by 452 Code Mass. Regs. § 1.07(2)(i), disqualifies consideration of the employee's § 36 claim ab initio.[2] The insurer further argues that the health care benefits awarded pursuant to §§ 13 and 30 are not qualified compensable medical expenses under the standard established by Klapac's Case,

[1] The decision was filed on April 2, 2015. Subsequently, a decision labeled "CORRECTED Decision" was filed on April 17, 2015.

[2] 452 Code Mass. Regs. § 1.07(2)(i) provides, in relevant part:

> All claims for functional loss under the provisions of M.G.L. c. 152, § 36 or § 36A shall include a physician's report which indicates that a maximum medical improvement has been reached and which contains an opinion as to the percent of permanent functional loss according to the American Medical Association's guide to physical impairment.

355 Mass 46 (1968).[3] While we affirm the decision regarding the award of § 36 benefits, due to procedural irregularities we are compelled to vacate the award of §§ 13 and 30 benefits and order a recommittal for a hearing de novo on that issue only.

The employee sustained workplace injuries that were the subject of an unappealed 2011 hearing decision. (Dec. 4.) Subsequently, the employee filed claims for benefits pursuant to sections 13, 30 and 36.[4] At hearing, no witness testimony was taken, and the judge issued his decision based solely upon consideration of the prior unappealed decision, medical evidence, and written memoranda submitted by the parties. (Dec. 4.)

The insurer raises two issues on appeal. First, the insurer argues that the employee's failure to comply with the evidentiary requirements of 452 Code Mass. Regs. § 1.07(2)(i), disqualifies consideration of her § 36 claim. There is no dispute the employee initially failed to present a medical evaluation made pursuant to AMA guidelines, as required by the regulation.[5] Nevertheless, the claim was referred from conciliation to conference. The record is devoid of any reference to a formal contemporaneous objection raised by the insurer at the time the claim was sent forward by the conciliator. The remedies available to the insurer

[3] In Klapac, the court found the term "medical services," as used in § 30 in this context, refers to "the services of a nurse or trained attendant rendered under the direction and control of a physician and has been restricted to services so rendered." We have applied this definition to the current language found in § 30 referencing "health care services." DeOliveira v. Calumet Constr. Corp., 29 Mass. Workers' Comp. Rep. __ (October 27, 2015); see also Santana v. Belden Corp., 5 Mass. Workers' Comp. Rep. 356 (1991)(award of homemaker services affirmed).

[4] We take judicial notice of the board file. Rizzo v. M.B.T.A., 16 Mass. Workers' Comp. Rep. 160, 161 n.3 (2002).

[5] The Conciliation Recommendation Form dated October 24, 2013 indicates that the medical opinion submitted in support of the § 36 claim did not include an assessment according to AMA guidelines as required under 452 Code Mass. Regs. § 1.07(2)(i). Regardless, the case was sent forward to a § 10A conference. However, the employee did submit an assessment of her loss of function pursuant to the AMA Guidelines at hearing. See footnote 6, infra.

included a formal request to rescind the referral to the conciliation manager, the senior judge, or both. As the insurer did not avail itself of any of its available options, the issue is deemed waived.[6]

The second issue raised by the insurer concerns the award of §§ 13 and 30 benefits for home health care services, which claim was supported by the opinion of Dr. S. Patricia Dilley: "[T]he Employee requires a home health aide 6 hours per day 7 days per week to assist her with activities of daily living and personal care. . . ." (Dec. 7.) The insurer argues this is an erroneous award as the services provided by a home health aide do not rise to the level of "medical services" as defined by the statute.

We are not at liberty to consider the merits of the insurer's argument on this issue, because there is no hearing record.[7] The judge's decision does indicate that the parties appeared before him for a hearing on December 11, 2014, but there was no stenographer present, and no transcript of the proceedings was recorded. (Dec. 1, 4.) As there is no reliable memorialization of those proceedings, we are unable to address this issue in any meaningful way.

We therefore affirm the decision on the award of § 36 benefits, vacate the remainder of the decision, reinstate the § 10A conference order regarding the award of §§ 13 and 30 benefits only, and recommit this case for a hearing de novo, on the record, for a decision consistent with this opinion. The insurer is to pay the employee's counsel a fee of $1,618.19 pursuant to § 13A(6).

So ordered.

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Bernard W. Fabricant
Administrative Law Judge

[6] We note that the judge made appropriate findings on the merits of the § 36 claim based on the adopted medical evidence, which included an analysis pursuant to the AMA Guidelines by Dr. Jennifer Weyler. (Dec. 6.)

[7] The parties disagree as to whether this issue was before the judge for consideration.

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Mark D. Horan
Administrative Law Judge

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Catherine Watson Koziol
Administrative Law Judge

Filed: **December 22, 2015**