

**COMMONWEALTH OF MASSACHUSETTS**

**DEPARTMENT OF  
INDUSTRIAL ACCIDENTS**

**BOARD NO. 027204-10**

Kenneth Fleischmann  
Best Buy  
Insurance Company State of Pennsylvania

Employee  
Employer  
Insurer

**REVIEWING BOARD DECISION**  
(Judges Horan, Fabricant and Levine)

The case was heard by Administrative Judge Bean.

**APPEARANCES**

Steven H. Long, Esq., for the employee at hearing  
William R. Maher, Esq., for the insurer at hearing  
James W. Stone, Esq., for the insurer on appeal

**HORAN, J.** The insurer appeals from a decision awarding the employee ongoing partial incapacity benefits. Because the record does not reveal whether the judge ruled upon the insurer's motion to admit additional medical evidence, we recommit the case.

The employee sought total incapacity benefits owing to a neck injury suffered on October 16, 2010, when he allegedly "slipped and fell on water in the bathroom" at work.<sup>1</sup> (Dec. 163, 165.) Subsequently, he underwent two neck surgeries. (Dec. 163-164.) At the hearing, the only medical evidence was supplied by the impartial medical examiner, Dr. Victor A. Conforti. He testified that in 2003, the employee experienced "neck symptoms and was diagnosed with multi-level spinal degeneration in the neck." (Dec. 164; Dep. 10.) Dr. Conforti causally related the employee's neck injury to his fall at work, and opined that the accident remained a major cause of his disability. (Dec. 164-165; Dep. 13-16.)

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<sup>1</sup> The judge's decision indicates that while the employee also injured his knee in the accident, "his present claim is related only to his neck injury." (Dec. 164.)

The doctor also opined that as a result of his work injury, the employee had only a sedentary work capacity. (Dec. 165; Ex. 3, 2.)

In his decision, the judge credited Dr. Conforti's opinions, the employee's testimony "concerning his pain medication regimen," and the testimony of the insurer's vocational expert. (Dec. 165-166.) Concluding that the employee could only perform part-time work for minimum wage, the judge assigned him a weekly earning capacity of \$160. (Dec. 166.)

The insurer's appeal raises issues respecting the handling of its motion to admit additional medical evidence. We need only address whether the judge "was required under due process to rule on the Insurer's motion . . . prior to issuing his Hearing Decision."<sup>2</sup> (Ins. br. 5.)

At the hearing, the insurer raised the defenses of liability, disability, extent of disability, causal relationship, and § 1(7A). (Dec. 161.) Prior to the close of the evidence, the insurer filed a motion to admit additional medical evidence on the grounds of medical complexity. See G. L. c. 152, § 11A(2). The parties agree the motion was submitted, and that it was discussed at an untranscribed status conference before the judge. (Employee br. 3; Ins. br. 3-4.) However, the parties appear to disagree about what transpired at that conference. The insurer's motion is not in the board file, and the decision does not reference it.<sup>3</sup> "We have repeatedly stressed that all significant proceedings be transcribed for the purpose of assuring the record is adequate for addressing the issues raised on appeal." LaFleur v. M.C.I. Shirley, 25 Mass. Workers' Comp. Rep. 393, 397 (2011), and cases cited. The insurer was entitled to a ruling on its motion on, and prior to the close of, the record. See Mayo v. Save On Wall Co., 19 Mass. Workers' Comp. Rep. 1, 4 (2005)("a judge must be vigilant in assuring that the parties are timely

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<sup>2</sup> In light of our decision to recommit the case, we do not reach the issue of whether the medical issues here are complex "[a]s a matter of law." (Ins. br. 9.)

<sup>3</sup> See Rizzo v. M.B.T.A., 16 Mass. Workers' Comp. Rep. 160, 161 n.3 (2002)(we take judicial notice of the board file).

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apprised of all rulings. . . .”). Accordingly, we recommit the case for the judge to consider and rule on the insurer’s motion.

So ordered.

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Mark D. Horan  
Administrative Law Judge

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Bernard W. Fabricant  
Administrative Law Judge

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Frederick E. Levine  
Administrative Law Judge

Filed: **June 12, 2013**