COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 009734-89**

Lester Bates	Employee
City of Beverly	Employer
City of Beverly	Self-Insurer

REVIEWING BOARD DECISION
(Judges Levine, Carroll & Maze-Rothstein)

APPEARANCES
Richard E. Daly, Esq., for the employee
Michael C. Lauranzano, Esq., for the self-insurer at hearing
Paul M. Moretti, Esq., for the self-insurer on appeal

LEVINE, J. Lester Bates, sixty-six years old at the time of hearing, suffered a myocardial infarction at work on August 19, 1975. (Dec. 4, 6.) The self-insurer accepted liability for this injury and paid § 34 temporary total incapacity benefits until his return to work on January 20, 1976. (Dec. 5, 6.) The employee returned to work on a part-time basis but eventually resumed his full-time work. (Dec. 6.) On January 28, 1977 he suffered a second myocardial infarction while at home. (Dec. 7.) In the interim between his first and second infarctions, the employee was laid off by his employer in a cost-cutting effort. Id.

The employee filed a claim for benefits for the second myocardial infarction; the self-insurer denied the claim. (Dec. 4.) A conference was held on October 13, 1989; the administrative judge denied the employee's claim. Id. The employee appealed to a hearing de novo. Id. A hearing was held on April 5, 1990. On June 13, 1990, the judge issued a decision denying and dismissing the employee's claim; he was not persuaded that the employee's second myocardial infarction was causally related to the first accepted myocardial infarction. (Dec. 11.) The employee has appealed that decision.

Through no fault of either party a hearing transcript cannot be produced.[1] Without a transcript, we are unable to perform our appellate function.

Where a transcript cannot be produced, either fully or partially, due process requires reconstruction of the record sufficient to allow for evaluation of the merits of the appeal and the correctness of the rulings. Fitzsimmons v. Sigma Instruments, Inc., 7 Mass. Workers' Comp. Rep. 12 (1993). It is not necessary that reconstruction be total. Rather, there need only be so much reconstruction of the record as to allow for review. The judge to whom this case is assigned shall determine the extent of reconstruction necessary for proper appellate review. To do so, he may in his discretion require the parties to delineate the issues on appeal with more specificity. There is nothing before us to indicate that reconstruction of the record, including the testimony, has been attempted. We note that counsel for both parties are available, together with whatever notes and copies of exhibits they may have. The parties are charged with preparing as completely and expeditiously as possible a stipulation of the agreed upon facts and documentary evidence. We remind the parties that they have an "'affirmative duty to use their best efforts to ensure that a sufficient reconstruction is made if at all possible.'" Fitzsimmons, supra at 15, quoting Commonwealth v. Harris, 376 Mass. 74, 79 (1978). The stipulation is to be presented to the administrative judge. If the judge finds that the required reconstruction cannot be achieved, a new hearing must be held.

The judge who conducted the hearing and issued the decision no longer serves in the Department. We therefore return the case to the senior judge and ask that he assign the case to a different administrative judge to oversee the reconstruction. When the administrative judge is satisfied that the reconstruction endeavor sets forth the evidentiary basis for the rulings and findings so that we may perform our appellate review, the judge shall return the case to us.

So ordered.

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[1] The hearing stenographer has left the department and no stenographic notes or audio backup of the proceedings can be located.

Frederick E. Levine
Administrative Law Judge

Martine Carroll
Administrative Law Judge

Susan Maze-Rothstein
Administrative Law Judge

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Filed: **March 22, 1999**