COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO.:** 043472-05

Luis E. Rosa	Employee
Massachusetts Dept. of Mental Retardation	Employer
Commonwealth of Massachusetts	Self Insurer

REVIEWING BOARD DECISION

(Judges Costigan, Horan and Fabricant)

The case was heard by Administrative Judge Murphy.

APPEARANCES

William J. Doherty, Esq., for the employee
Terrence H. Buckley, Esq., for the self-insurer

COSTIGAN, J. The employee appeals from a decision denying his claim for § 34 total incapacity benefits relating to an accepted industrial injury. (Dec. 3, 4.) He argues the judge's refusal to consider the deposition testimony of the § 11A impartial medical examiner was an abuse of her discretion. We disagree, and affirm the decision.

The employee, then forty years old and employed as a bilingual human service coordinator, injured his back and neck while moving a cubicle at work on December 22, 2005. The self-insurer paid compensation benefits on a without prejudice basis until January 30, 2006. Following a § 10A conference on the employee's claim for further total incapacity benefits, at which the self-insurer did not contest liability, the administrative judge awarded § 34 and medical benefits from January 30, 2006 and continuing. The self-insurer appealed from that order.

The impartial physician, Dr. Allan Bullock, examined the employee on September 6, 2006. He diagnosed a L4-5 herniated disc without nerve root impingement, and chronic discogenic pain, causally related to the work injury. The doctor opined:

> Mr. Rosa strained his back at work. He was treated conservatively with an extensive amount of treatment with no benefit. He continues to have pain in his neck and in his back. The neurologic findings do not fit a nerve distribution. I think this gentleman did

> strain his back, strain his neck. His neck has reached an endpoint. His back I do not think needs any further conservative management. It is conceivable that removal of the disc and fusion of L4 and L5 would be reasonable if he is having enough symptoms to warrant this. I think his back was strained superimposed on some chronic changes, but the basic diagnosis was a strain superimposed on the degenerative changes; the degenerative changes [are] manifested by spur formation and some narrowing of the L4, L5 area. At this time, Mr. Woods [sic] should do no repetitive bending, should do no lifting beyond 20 pounds, and should be able to change his position every 15 to 20 minutes.

(Stat. Ex. 1, p. 2.) Neither party moved for additional medical evidence based on inadequacy of the impartial medical report or complexity of the medical issues. (Dec. 2.)

In her decision, the judge stated she allowed the parties thirty days from the February 23, 2007 hearing to *submit* the deposition testimony of Dr. Bullock. (Id.)

The hearing transcript reflects she gave the parties thirty days to *conduct* the deposition. (Tr. 69.) In any event, the self-insurer requested, and the judge allowed, an extension of time to March 26, 2007 to *take* the doctor's deposition. (Dec. 2.) By letter dated March 21, 2007, the self-insurer notified the judge of a scheduling conflict with the March 26 th date, and that it had rescheduled the deposition to April 9, 2007. A similar letter dated March 31, 2007 followed.[1] However, the self-insurer did not ask the judge for an additional extension of time to take the deposition and submit the transcript, that is, it did not, at any point prior to the actual deposition, request that the date set for the close of the record be extended.

In her decision, the judge noted:

> By request dated April 9, 2007 and postmarked April 11, 2007, Insurer sought another extension[. A]s the record closed March 26, 2007, the request was denied and the transcript of the late scheduled deposition is not considered in this decision.

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

(Id.)[2] Adopting the impartial physician's opinions as reflected in his report, (Stat. Ex. 1), the judge concluded that although the employee's symptoms had worsened since his work injury, he was not incapacitated from performing what she found was his largely sedentary job. She therefore denied the employee's claim for weekly incapacity benefits, but awarded ongoing medical benefits "for the diagnosed condition." (Dec. 6.)

On appeal, the employee contends the judge abused her discretion by not allowing the self-insurer's request for an extension of time for the close of the record, and by not accepting Dr. Bullock's deposition testimony into evidence. Quite apart from the issue of the *employee's* standing to complain about the judge's denial of the *self-insurer's* request, "[i]t is well settled that an administrative judge has broad discretion in setting procedure for matters assigned to [her] docket," including "broad discretion on determinations of record closure." Weitkunat, Jr. v. Springfield Muffler Co., 17 Mass. Workers' Comp. Rep. 252, 256 (2003), citing Kerr v. Palmieri, 325 Mass. 554, 557 (1950)(general proposition that granting of a motion to permit additional evidence after trial has been closed rests within discretion of judge). We consider it nothing short of cavalier that the self-insurer waited until the very day of the rescheduled deposition to prepare a written request to the judge for an extension of time, and then did not even expedite delivery to the judge by facsimile or e-mail transmission, instead consigning its request to the United States Postal Service two days later. Moreover, the employee took no steps to extend the close of the record until his letter of April 17, 2007, requesting that the judge reconsider her April 13th ruling. We are satisfied the judge did not abuse her discretion in denying both requests on the ground that the record was closed.

Accordingly, we affirm the judge's refusal to accept into evidence the deposition testimony of the impartial physician, as it was taken after the close of the evidentiary record. We summarily affirm the decision as to the other issues argued by the employee.

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[2] As the judge had allowed the self-insurer an extension of time to March 26, 2007 to take Dr. Bullock's deposition, the date set for the close of the record could not reasonably have been that same date, given the time necessary for preparation and submission of the deposition transcript. However, even allowing a week for such preparation, the record would have closed on April 2, 2007. The self-insurer did not request a further extension until April 9, 2007 (using the date of its letter), or April 11, 2007 (using the postmark), or April 13, 2007 (when its letter was received by the judge). Moreover, the judge did not receive the transcript of the April 9, 2007 deposition until April 20, 2007. See footnote 1, supra.

So ordered.

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Patricia A. Costigan
Administrative Law Judge

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Mark D. Horan
Administrative Law Judge

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Bernard W. Fabricant
Administrative Law Judge

Filed: August 17, 2009