COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 026436-10**

Mario DePascale	Employee
Big House Fine Dining	Employer
Hartford Insurance Company	Insurer

REVIEWING BOARD DECISION
(Judges Horan, Fabricant and Calliotte)

The case was heard by Administrative Judge Braithwaite.

APPEARANCES
Gia M. Bradley, Esq., for the employee
Joseph M. Spinale, Esq., for Hartford Insurance Company at hearing
Christopher L. Maclachlan, Esq., for Hartford Insurance Company on appeal

HORAN, J. The insurer appeals from a decision awarding the employee $10,940.70, pursuant to § 36(1)(k),[1] for a work-related limp. We affirm the decision.

The employee claimed disfigurement benefits for a limp caused by his work-related left knee injury. (Dec. 4.) At a conference before a different judge, he was awarded, inter alia, $8,205.53. (Dec. 2.) Both parties appealed, and pursuant to § 11A(2), the employee was examined by Dr. James Bono. Dr. Bono issued his report on March 11, 2015. The judge found the doctor "did not address the limp specifically in his report," but noted that Dr. Bono did report the employee walked "without an obvious limp." (Dec. 5; Ex. 1.)

[1] General Laws c. 152, § 36, provides, in pertinent part:

> (1) In addition to all other compensation to the employee shall be paid the sums hereafter designated for the following specific injuries; provided, however, that the employee has not died from any cause within thirty days of such injury.
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> . . .
>
> (k) For bodily disfigurement, an amount which, according to the determination of the member or reviewing board, is a proper and equitable compensation, not to exceed fifteen thousand dollars; which sum shall be payable in addition to all other sums due under this section.

On June 2, 2015, following the receipt of Dr. Bono's report, the insurer withdrew its appeal of the conference order. (Dec. 2.) The judge correctly noted the insurer's withdrawal left "the total amount of sec. 36(k) (sic) compensation" as the sole issue at hearing. (Dec. 2.) G. L. c. 152, § 10A(3); Giraldo's Case, 85 Mass. pp. Ct. 1109 (2014)(Memorandum and Order Pursuant to Rule 1:28)(preclusive effect given to unappealed conference order); Harris v. Plymouth County Sheriff's Dept., 29 Mass. Workers' Comp. Rep. ___ (December 15, 2015); Vallieres v. Charles Smith Steel, Inc., 23 Mass. Workers' Comp. Rep. 415 (2009). Stated otherwise, the causal relationship between the employee's injury and his limp was established when the insurer withdrew its appeal of the conference order.[2]

At hearing, the judge observed the employee walking, and concluded he "displayed a slight limp." (Dec. 4.) The judge specifically "credited the employee's testimony and representation of his limp." Id. The judge also credited the *insurer's* witness, who testified he conducted a surveillance of the employee and found him to have a "slight" or "minor" limp. (Dec. 4-6.) Accordingly, the judge awarded the employee $10,940.70. The judge arrived at this amount by multiplying the state average weekly wage on the date of the employee's injury by ten, "which is in the middle of the 'slight' range in the sec. 36 regulations."[3] (Dec. 6.)

The insurer appeals, arguing the judge erred by assessing the employee's limp without consideration of Dr. Bono's opinion. We disagree.

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[2] At hearing, the insurer attempted to raise, as an affirmative defense, the "combination" injury provision contained in General Laws, c. 152, § 1(7A). In light of the withdrawal of its appeal, the judge did not address § 1(7A), or causation generally. In its closing argument to the judge, the insurer noted that it "withdrew its appeal of the Conference Order . . . essentially agreeing that the employee has a limp. . . . The sole issue in this case is whether or not the employee's limp equates to an award of $10,940.70." (Employee's closing argument, 9.)

[3] The judge's use of the word "regulations" is actually a reference to section 36 *guidelines* promulgated on April 24, 1992, by the Commissioner of the Department of Industrial Accidents. That letter specifies the guidelines "supercede (sic) those distributed in Circular Letter No. 263 on February 7, 1992." The insurer does not contest the judge's use of the guidelines to arrive at the $10,940.70 amount awarded.

Once the insurer withdrew its appeal of the conference order, there was no longer a medical issue sub judice. The only issue remaining, as the insurer conceded in its closing argument, was the amount due the employee for his work-related limp. This did not require expert medical testimony; the judge was free to assess the severity of the employee's limp by observing it at hearing. Juozapaitis's Case, 335 Mass. 137, 139 (1956); Adam v. Harvard Univ., 24 Mass. Workers' Comp. Rep. 193, 197 (2010); Magalhaes v. Modern Continental Constr., 8 Mass. Workers' Comp. Rep. 199, 202 (1994). Further, the judge's characterization of the employee's limp did not differ materially from the adopted opinion of the insurer's own witness. (Dec. 4-6.) Lastly, the judge's conclusion that the employee had a "slight limp" is not necessarily at odds with Dr. Bono's assessment that the employee ambulated "without an obvious limp." (Ex. 1.)

The decision is affirmed. Pursuant to G. L. c. 152, § 13A(6), the insurer shall pay an attorney's fee of $1,618.19 to employee's counsel.

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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Carol Calliotte
Administrative Law Judge

Filed: **June 14, 2016**