**COMMONWEALTH OF MASSACHUSETTS**

**DEPARTMENT OF INDUSTRIAL ACCIDENTS** **BOARD NO. 016411-20**

| | |
|---|---|
| Noemi Pena | Employee |
| Massachusetts Bay Transportation Authority (MBTA) | Employer |
| Massachusetts Bay Transportation Authority (MBTA) | Self-Insurer |

## REVIEWING BOARD DECISION

(Judges Fabricant, Koziol and Long)

The case was heard by Administrative Judge Dooling.

## APPEARANCES

John B. Koury, Esq., for the employee at hearing
Todd D. Beauregard, Esq., for the employee on post hearing brief and appeal
Thomas A. Richard, Esq. for the self-insurer

**FABRICANT, J.** The parties cross-appeal from a hearing decision ordering payment of weekly benefits pursuant to § 34, from April 6, 2020, and continuing, medical benefits pursuant to §§ 13 and 30, and § 36(1)(k)[1] benefits, all resulting from an alleged work-related exposure to COVID-19. Specifically, the employee appeals the denial of benefits pursuant to § 34A and § 36(1)(j), while the self-insurer argues the judge exceeded the scope of his authority by finding COVID-19 was an inherent risk of employment qualifying the employee's illness as a work-related injury. For the following reasons, we recommit the case for further consideration of the § 34A claim and otherwise affirm the decision.

[1] General Laws c. 152 § 36(1)(k) provides additional compensation:

> 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. No amount shall be payable under this section for disfigurement that is purely scar-based, unless such disfigurement is on the face, neck or hands.

The employee was 53 years old at the time of the hearing. She graduated from Charlestown High School in 1990 and went on to earn a certificate in criminal justice from Newbury College. (Ex. 3; Dec. 4.) The employee first began working at the MBTA in February 2014, as a fueler, and her job duties included bus maintenance. Beginning in 2017, the employee became a train conductor and was assigned to work on the Green Line where her duties included operating Green Line trains, assisting passengers entering and exiting the train, and maintaining communication with the MBTA central office. (Dec. 4-5.) The judge credited the employee's testimony that Green Line trains have a 300-person capacity, and, unlike other MBTA lines, do not have a partition between the train operator and where the passengers entered, exited, and sat on the train. Further, upon entering a Green Line train, passengers must present their "Charlie Card" to a card reader approximately two feet from where she sat. If the card had insufficient funds or other issues, the employee would spend an additional three to four minutes assisting those passengers. (Dec. 5.) The employee's typical route was from the Boston College stop to Park Street and back again, which she performed approximately six times per shift. Each leg of the trip typically lasted 35 to 45 minutes, and there were several hospitals along this route. (Ex. 10; Dec. 5.)

We first address the issue of whether the judge erred by finding that contracting COVID-19 was an inherent risk of the employee's employment, thus qualifying as a work injury pursuant to the statute. The self-insurer argues that a "personal injury" as defined by G. L c. 152, § 1(7A) only includes contracting infectious or contagious diseases if the hazard of contracting such diseases is inherent in the employment.[2] It further argues that the relevant precedent, notably Perron's Case, 325 Mass. 6 (1949), suggests that a clear connection to the employment might require that the employment

[2] General Laws c. 152, § 1(7A) states, in relevant part:

> "Personal injury" includes infectious or contagious diseases if the nature of the employment is such that the hazard of contracting such diseases by an employee is inherent in the employment.

somehow be tied to the medical profession, working with, or near, infected patients. (Self-Ins. br. 7 et. seq.)

While it is true that a train conductor might otherwise contract a contagious disease or illness as the result of merely being in a public space, the employee here was obligated to be in a confined area of enhanced exposure to COVID-19. However, unlike other contagious illnesses, the employee's risk of contracting COVID-19 was considered to be so dire that then-Governor Baker issued a series of Orders specifically recognizing this risk. (Exs. 5, 6, 7 and 9.)[3] The Governor's Orders designated the employee's job as "essential," thus mandating that she should remain on the job despite that enhanced risk.[4]

The judge found that the employee was ordered back to work as an "essential employee," and was upset and scared for her own health and safety as a result. (Dec. 6.) She continued to work her usual shifts and was given limited personal protective equipment (PPE) during March and April 2020, consisting of one pair of rubber gloves every two weeks, and a small bottle of hand sanitizer. (Dec. 6.) During this time, the employee was not issued a protective mask by the employer, and passengers were not required to wear masks. (Dec. 6.) The employee's onset of symptoms, as well as positive test results for COVID-19, all occurred within the time frame addressed by Governor Baker's order designating her as an "essential" worker.

The judge specifically adopted the following opinions of Larry Weinrauch, M.D. the § 11A impartial examiner, based upon his June 22, 2021, examination of the employee:

---

[3] The following COVID-19 Orders of Governor Charles D. Baker are exhibits in evidence: Exhibit 5 - Order No. 13, dated March 23, 2020; Exhibit 6 - Order No. 13, Exhibit A, dated March 23, 2020; Exhibit 7 - Order No. 21 dated March 31, 2020; and Exhibit 9 - Order No. 30, dated April 28, 2020.

[4] Governor Baker originally declared a state of emergency due to COVID-19 on March 10, 2020. The related order declaring "transportation and logistics" employees (among others) to be essential was made on March 23, 2020, with an "Exhibit A" detailing the workplace specifics. (Exs. 5 and 6.)

- The Employee's COVID-19 related symptoms began on March 31, 2020, with positive COVID-19 tests on April 9, 2020, April 11, 2020, and May 15, 2020.
- At the time of her positive COVID-19 diagnosis, the Employee's prior medical history included hypertension, prediabetes, asthma, stage 3 chronic kidney disease and idiopathic intracranial hypertension.
- The employee sustained a COVID-19 infection that was likely related to her exposure as an employee of the MBTA.
- The Employee's several pre-existing conditions likely contributed to the severity of her COVID-19 related illness.
- It is clear that the Employee's "COVID-19 infection in some ways destroyed the remainder of her previously adequate renal function."
- The Employee is totally and permanently disabled from performance of her former occupation.

(Dec. 7-8; Ex. 1.)

Additional medical evidence allowed due to the complexity of the issues and adopted by the judge does not significantly contradict Dr. Weinrauch. On May 12, 2020, Mark Weinfeld, M.D., examined the employee and the judge adopted the following portions of his report:

- On March 31, 2020, the Employee developed fever, malaise, and cough
- On April 9, 2020, the Employee had a syncopal event and tested positive for COVID-19 which was complicated by acute kidney injury or chronic kidney disease.

(Dec. 9; Ex. 11.) Likewise, portions of an August 19, 2022, independent medical record review report by Michael Ginsburg, M.D., were adopted by the judge as follows:

- The Employee suffered a significant exacerbation of her kidney failure as a result of her COVID-19 infection.
- "It would certainly appear that" the Employee's "COVID-19 was a trigger of her deterioration kidney function."

(Dec. 9; Ex. 15.)

Given the circumstances of her employment at the time of the alleged injury, as well as corroborating medical evidence and expert opinion as to the time, place and

method of exposure and resulting illness, the judge did not err in finding that "the hazard of the Employee contracting COVID-19 in March and April 2020 while employed as an MBTA train operator was clearly inherent in her employment."[5] Stacy's Case, 495 Mass. 674 (2025).

We next turn to the employee's argument that the denial of § 34A is contrary to law. The employee accurately recounts the judge's specific findings adopting medical evidence concluding that the employee is "totally and permanently disabled" from performing her job, as well as crediting the employee's testimony that she would be unable to perform any job "as a result of her injuries." (Dec. 8-9; Employee br. 13.) Taken together, these elements satisfy the employee's burden under the plain reading of the statute.[6] Contrary to the self-insurer's argument, it is not required that the medical opinion go so far as to find a total and permanent disability from all occupations. It is only required that the totality of the evidence, including lay testimony, where appropriate, provides the basis for such a finding.[7]

---

[5] Stacy's Case, 495 Mass. 674 (2025), presents the nearly identical issue of an employee contracting COVID-19 during the period in which he was deemed an "essential worker" by Order of Governor Baker. The Supreme Judicial Court found that "the board reasonably considered that [the employee's] job was one of the few 'essential services' urged by the Governor to continue at a time when the risk of infection through close contact with others was high," and that "at the time [the employee] contracted COVID-19, the nature of [the employee's] employment - - as . . . an essential services provider urged to remain on the job – exposed [her] to a risk of contracting the infectious disease not shared by most occupations in the Commonwealth." Id., at 680.

[6] General Laws c. 152, § 34A states:

> While the incapacity for work resulting from the injury is both permanent and total, the insurer shall pay to the injured employee, following payment of compensation provided in sections thirty-four and thirty-five, a weekly compensation equal to two-thirds of his average weekly wage before the injury, but not more than the maximum weekly compensation rate nor less than the minimum weekly compensation rate."

[7] We note that although the judge addressed the self-insurer's causation defenses pursuant to G.L. c. § 1(7A) (Dec. 11), these issues are not raised on appeal.

The self-insurer inaccurately asserts that the § 34A benefits may only be paid following the exhaustion of § 34 benefits. Slater's Case, 55 Mass. App. Ct. 326 (2002)(no requirement for exhaustion of § 34 benefits prior to claim for § 34A benefits.) Because the judge has found the requisite elements of § 34A have been established, it is internally inconsistent that the claim for benefits under this section be denied outright.[8]

Finally, regarding the denial of the claimed benefits pursuant to G.L. c. 152 § 36 (1)(j),[9] we are in agreement with the self-insurer that the evidentiary predicates of 452 Code Mass. Regs. § 1.07(2)(i) 1,[10] (Self-Ins. br. 21) have not been met. Although the

[8] The addition of the § 34A claim to this action was the result of the allowance of the employee's Motion to Join, which was vigorously contested by the self-insurer. Rizzo v. MBTA, 16 Mass. Workers' Comp. Rep. 160, 161 n.3 (2002)(reviewing board may take judicial notice of the board file.) Having allowed the motion, the judge has accepted the claim for adjudication and is thus required to render a decision consistent with the accepted credible evidence.

[9] General Laws c. 152, § 36 (1)(j) states:

> For each loss of bodily function or sense, other than those specified in preceding paragraphs of this section, the amount which, according to the determination of the member or reviewing board, is a proper and equitable compensation, not to exceed the average weekly wage in the commonwealth at the date of injury multiplied by thirty-two; provided, however, that the total amount payable under this paragraph shall not exceed the average weekly wage in the commonwealth at the date of injury multiplied by eighty.

[10] 452 Code Mass. Regs. § 1.07(2)(i)(1) states:

> (i) All claims for functional loss under the provisions of G.L. c. 152, § 36 or § 36A shall be accompanied by the following:
>
> 1. Claims for functional loss 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.
>
> There shall also be a statement from the claimant, or the claimant's attorney or other authorized representative indicating the specific monetary value of the benefit award being sought as reflected by the opinion of the physician's accompanying report. No claim for functional loss may be filed sooner than six months following an injury or the latest surgery resulting from the injury."

employee argues that there is some evidence of loss of function, the statute requires that such a claim be made with specificity and supported by a physician's report. There is no evidence in the record upon which the judge could make such an award.

We therefore recommit the case for further consideration of the § 34A claim consistent with this decision and otherwise affirm the decision of the administrative judge. Because the employee prevailed against the self-insurer's appeal, the self-insurer is ordered to pay employee's counsel an attorney's fee pursuant to § 13A(6) in the amount of $1,900.55, plus necessary expenses.

So ordered.

Bernard F. Fabricant
Administrative Law Judge

Catherine Watson Koziol
Administrative Law Judge

Martin J. Long
Administrative Law Judge

Filed: **May 7, 2025**