COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS	**BOARD NO. 000449-13**
Raymond M. Tobin	Employee
Sheriff Department Essex County	Employer
Commonwealth of Massachusetts	Self-Insurer

REVIEWING BOARD DECISION
(Judges O'Leary, Long and Fabiszewski)

The case was heard by Administrative Judge Rosado

APPEARANCES
Daniel P. Napolitano Esq., for the employee at hearing and on brief
Susan G. McDonald, Esq., for the employee on brief
Arthur Jackson, Esq., for the self-insurer

O'LEARY, J. The self-insurer appeals from the administrative judge's decision awarding the employee § 34A permanent and total incapacity benefits.[1] On appeal, the self-insurer raises several arguments, one of which alleges that the administrative judge committed reversable error by failing to notify the parties prior to the issuance of the hearing decision that she had admitted medical evidence submitted by the employee after the close of the record, over the objection of the self-insurer. Because we cannot determine whether or not the administrative judge relied on this medical evidence in reaching her decision, we recommit the case for further findings on the issue consistent with this opinion. See, Praetz v. Factory Mut. Eng'g and Research, 7 Mass. Workers' Comp. Rep. 45, 47 (1993). The facts pertinent to the issues addressed on appeal follow.

[1] The administrative judge ordered the self-insurer to pay § 34A permanent and total incapacity benefits in the weekly amount of $921.24 from January 19, 2020, to date and continuing, based on the average weekly wage of $1,383.24. (Dec. 12.)

Raymond Tobin had been employed as a correctional officer for the Essex County Sheriff's Department since 1989 when he injured his left knee on January 13, 2013. (Dec. 5.) The employee had five knee surgeries leading to a total knee replacement on January 21, 2019. (Dec. 5.) There is no dispute that the employee's left knee condition is causally related to his work injury, and he has permanent functional restrictions, ongoing left knee instability, swelling, pain, stiffness, and balance issues. (Dec. 5-6.) He requires the use of a cane. (Dec. 6.) The employee's knee instability caused him to fall on stairs on September 24, 2021, injuring his right shoulder when he attempted to stop the fall by holding onto the railing with his right arm. (Dec. 6.) The right shoulder injury ultimately necessitated surgical repair of a massive rotator cuff tear and SLAP tear with biceps tendinopathy, which took place on January 25, 2022. (Dec. 6.)

The employee's claim for Section 34A benefits was filed on May 12, 2020. Rizzo v. M.B.T.A., 16 Mass. Workers' Comp. Rep. 160, 161 n.3 (2002)(reviewing board may take judicial notice of the board file). A conference under Section 10A was held on August 17, 2020, and an Order of Payment was filed August 18, 2020, ordering the self-insurer to pay the claimant permanent total incapacity compensation under M.G.L. c.152, §34A, at the rate of $921.24 per week, based on an average weekly wage of $1,383.24 from January 19, 2020 to date and continuing, plus medical benefits under the provisions of M.G.L. c.152, §30. Id. The self-insurer's appeal was timely filed. Pursuant to § 11A(2), the employee was examined on December 28, 2020, by Ralph Wolf, M.D. On January 12, 2022, the employee filed a Motion to Join a §§ 13 & 30 claim for right shoulder injuries, which was allowed. (Dec. 3.) A hearing was held on July 28, 2022, and the record closed on December 14, 2022. (Dec. 3.) On April 13, 2023, the employee submitted by email additional medical evidence, to which the self-insurer objected by reply email. Rizzo, supra. The administrative judge did not rule on the objection, even after further correspondence requesting confirmation of receipt of the objection. Rizzo, supra. On August 14, 2023, the Judge issued a hearing decision awarding the employee § 34A benefits from January 19, 2020, to date and continuing, as well as § 36 benefits in the amount of $11,437.34.

On appeal, the self-insurer raises an issue of due process, specifically, that its rights were violated by the administrative judge's acceptance of the employee's medical evidence four months after the record closed and not informing the parties of her decision on that evidence. At hearing, the judge allowed the parties to submit additional medical evidence, finding the report of the § 11A physician to be adequate, but stale, and the medical issues to be complex. (Dec. 6.) By email dated April 13, 2023, over three months after the date set by the judge for the close of the record, the employee submitted additional medical evidence. By email dated April 20, 2023, the self-insurer objected to the late submission. By reply email dated April 21, 2023, the employee argued in favor of the submission. Rizzo, supra. The objection of the self-insurer was never ruled upon by the administrative judge.

To the extent the administrative judge did not notify the self-insurer of her ruling on its objection or provide it with the opportunity to respond to the employee's evidence, she deprived the self-insurer of its constitutional due process right to know what evidence was presented against it and to rebut such evidence through cross examination. Fundamental requirements of due process entitle parties to a hearing at which they have an opportunity to present evidence, to examine their own witnesses, to cross-examine witnesses of other parties, to know what evidence is presented against them and to have an opportunity to rebut it, as well as to develop a record for meaningful appellate review. Casagrande v. Massachusetts Gen. Hosp., 15 Mass. Workers' Comp. Rep. 383, 386 (2001), citing Haley's Case, 356 Mass. 678 (1970). If the administrative judge decided to allow the additional medical evidence submitted after the close of the record, particularly considering the self-insurer's objection, this should have been communicated to all parties prior to the issuance of her decision. The self-insurer would have then been afforded a reasonable time to respond to the new evidence of record. We have previously held that a judge must be vigilant in assuring that the parties are timely apprised of all rulings to which they might respond, and a judge must consistently provide the parties with a reasonable opportunity to respond to any material change in the circumstances. When

such vigilance does not prevail, due process violations frequently - if not necessarily - result. Mayo v. Save On Wall Co., 19 Mass. Workers' Comp. Rep. 1 (2005).

Here, the additional medical record submitted by the employee after the close of the record was a disability note dated April 13, 2023, signed by both James O'Holleran, M.D. and Ira Evans, M.D., which the administrative judge included as part of exhibit 4. (Ex. 4; Dec. 2.) Relevant to our discussion, exhibit 4 also contained a narrative report and disability note by Dr. Evans, which were timely submitted prior to the close of the record. See, Rizzo, supra. In her decision, the administrative judge relied on certain opinions of Dr. Evans in reaching her conclusion that the employee was permanently and totally disabled. (Dec. 9.) However, it is unclear whether the opinions of Dr. Evans upon which the administrative judge relied included consideration of the additional medical evidence from April of 2023, submitted after the close of the record and subject to an unresolved objection by the self-insurer.

An administrative judge must "address the issues in a case in a manner enabling this board to determine with reasonable certainty whether correct rules of law have been applied to facts that could be properly found." Praetz at 47. If the record is insufficient to allow for appellate review, the case must be recommitted for further findings of fact and rulings of law necessary for the board to complete its duties. Id. Here, the administrative judge failed to respond to the objections of the self-insurer, and it is not clear whether the medical record objected to was relied upon by the administrative judge in reaching her conclusions. Without knowing whether the administrative judge relied upon the 2023 record, we cannot determine whether the due process violation affected the outcome of her decision, thus requiring reversal, or whether the error was harmless. See, Saia v. Grow Associates, Inc., 31 Mass. Workers' Comp. Rep. 45, 47 (2017) (administrative judge's written findings regarding his non-documented observations of the employee at hearing were harmless error where the observations were merely cumulative of the judge's numerous other proper findings.)

For this reason, we vacate the decision and recommit the case the matter for further findings of facts consistent with this opinion. In the interim, the underlying

conference order is reinstated. See, LaFleur v. Dept. of Corrections, 28 Mass. Workers' Comp. Rep. 179, 192 (2014).

So ordered.

Kevin B. O'Leary
Administrative Law Judge

Filed: **November 6, 2024**

Martin J. Long
Administrative Law Judge

Karen S. Fabiszewski
Administrative Law Judge