COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS

BOARD NO. 030256-99

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| Richard T. King | Employee |
| APA Transport Inc. | Employer |
| Utica Mutual Insurance Co. | Insurer |

REVIEWING BOARD DECISION
(Judges Koziol, Horan, and Calliotte)

The case was heard by Administrative Judge Poulter.

APPEARANCES
Thomas J. Donoghue, Esq., for the employee at hearing
Peter J. Moran, Esq., for the employee on appeal
Martin J. Long, Esq., for the insurer

**KOZIOL, J.** The insurer appeals from a decision ordering it to pay the employee §§ 13 and 30 medical benefits from May 26, 1999, and continuing, including reimbursement of co-payments, totaling $5,931.15, paid by the employee for medical treatment related to his industrial injury. The insurer raises three issues on appeal. First, the insurer claims the judge erred by ordering it to reimburse the employee for co-payments made for work-related medical treatment, including prescription medications. Second, the insurer argues the judge violated the insurer's due process rights by admitting certain exhibits in evidence. Lastly, the insurer claims the employee failed to satisfy his burden of proof regarding the amount of the co-payments owed. We affirm.

The employee receives § 34A benefits for a back injury he sustained on May 26, 1999. King v. APA Transport, 22 Mass. Workers' Comp. Rep. 179 (2008). He filed the present claim for §§ 13 and 30 benefits, seeking payment of medical benefits related to that injury. Included in his claim was a specific request for reimbursement of co-payments he paid for office visits with a psychiatrist, Dr.

Qayyum, who began treating him for depression in 2003, and co-payments made for Paxil and Valium, prescribed for that condition. (Tr. 4.) The employee also sought reimbursement of co-payments made for office visits to his primary care physician, Dr. Matin, who, in 2005, began treating him for his accepted back injury. (Tr. 31.) Dr. Matin prescribes Hydrocodone, Soma and Vicodin as treatment for the employee's injury, and the employee additionally sought reimbursement of the co-payments made for those prescription medications. (Dec. 5.)

The insurer denied "liability for any psychiatric condition and related medications and any medical co-payments regardless of origin."[1] (Dec. 2; Tr. 4-5.) At conference, the judge ordered the insurer to pay for the employee's medical treatment, including his prescriptions for Paxil and Valium, from the date of the conference, December 30, 2011, and continuing. (Dec. 2.) The insurer appealed. As a result, pursuant to § 11A(2), the employee was examined by a psychiatrist,

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[1] In 2008, the employee filed a claim for an adjustment to his average weekly wage pursuant to § 51, and payment of § 30 benefits for prescription medications purchased during the time period of December 25, 2007, through June 19, 2008. The prescription medications were the same medications that are at issue in the present case and included Dr. Qayyum's prescriptions for Valium and Paxil. By conference order dated December 8, 2008, a different administrative judge denied the employee's § 51 claim but expressly ordered the insurer "to pay for the prescriptions at applicable rates." Rizzo v. M.B.T.A., 16 Mass. Workers' Comp. Rep. 160, 161 n.3 (2002). The insurer did not appeal from the 2008 conference order. Although the employee's present claim seeks payment over a longer time period, and for additional services from those at issue in the prior proceeding, it includes a request for reimbursement of co-payments for the same prescriptions previously ordered to be paid by the prior judge. Notwithstanding the prior proceeding, the insurer did not raise prior payment as a defense to any aspect of the present claim. Nor did the employee seek a penalty under §§ 8(1) or 8(5). Diaz v. Western Bronze Co., 9 Mass. Workers' Comp. Rep. 528, 533 n.4 (1995)(§ 8[1] penalty may issue if employee paid for the ordered medical treatment). In addition, he did not raise issue preclusion as a bar to the insurer's defense contesting liability for the psychiatric condition. Accordingly, all of these issues have been waived. See 47 Am. Jur. 2d Judgments, § 637 (2015)(failure to raise issues calling for application of res judicata or collateral estoppel constitutes waiver); Methuen Retirement Bd. v. Contributory Retirement Appeal Bd., 384 Mass. 797, 798-799 (1981)(court cannot take judicial notice of the collateral estoppel defense).

Dr. Bruce Goderez, who provided the only medical opinion in evidence at the hearing. (Dec. 2, 3.)

The judge adopted Dr. Goderez's opinions that the employee "developed a [m]ajor [d]epressive [d]isorder in reaction to the losses he suffered as a result of his work injury," and that, as a result of receiving the medication prescribed by Dr. Qayyum, the employee "is in partial remission." (Dec. 4.) The judge credited the employee's testimony regarding the frequency and amount of the co-payments the employee made for his doctors' visits and prescription medications and ordered, in pertinent part, that: "Utica Mutual Insurance Co. . . . pay the employee benefits under § 13 and § 30 of M.G.L. Chapter 152, including psychiatric care from May 26, 1999 to date and continuing including reimbursement for unpaid medical bills and co-payments in the amount of $5931.15." (Dec. 5.)

The insurer argues the judge erred as a matter of law by ordering it to reimburse the employee for any of his co-payments because this board's decision in Estey v. Burns Int'l Sec., 17 Mass. Workers' Comp. Rep. 53 (2003), prohibits an award for reimbursement of co-payments.[2] The judge's order did not violate our holding in Estey.

In Estey, the insurer required the employee to pay for her prescription medications and later reimbursed her for those payments. When those payments became a financial strain for the employee, she applied for coverage through her health insurer, which took over payment for the prescriptions, but required her to make co-payments. The employee then submitted the co-payments to the workers' compensation insurer, which reimbursed her for those co-payments. The insurer "maintained . . . that its method of reimbursing the employee for her prescription costs satisfied its statutory obligation," id. at 55, to " 'furnish to an injured employee adequate and reasonable health care services, and medicines if

[2] On appeal, the insurer does not take issue with the judge's determination that the psychiatric injury was a sequela of the employee's back injury and that Dr. Qayyum's treatment and the prescription medications, Paxil and Valium, were reasonable treatment for which it is responsible under § 30.

needed, together with the expenses necessarily incidental to such services.' " Id., quoting from G.L. c. 152, § 30. We held that,

> the insurer's payment, by way of reimbursement to the employee, of only a fraction of her total prescription costs, [i.e., the employee's co-payments] does not satisfy its statutory obligation under § 30 to not only 'furnish . . . adequate and reasonable health care services, and medicines if needed . . .' but also pay 'the reasonable and necessary cost of such services . . . .'

Id. at 62. Thus, we did not hold that reimbursement to the employee is prohibited, just that the insurer failed to satisfy its obligations under the Act by paying "only a fraction" of the medical expenses related to the injury. Id.

Here, by making his co-payments, the employee personally shouldered some of the responsibility of paying for treatment of both his accepted back injury and his psychiatric condition, with the remainder of the charges being paid by his health insurance.[3] The insurer's assertion that Estey somehow prohibits the judge from ordering *any* reimbursement to the employee for co-payments made for reasonable, causally related medical treatment, distorts the holding in that case, yielding a result that is plainly contrary to § 30's legislative mandate that the workers' compensation insurer, not the injured employee and third parties, is solely responsible for making payments for such medical treatment. G. L. c. 152, § 30 ("Where services are provided to employees under this section, the

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[3] In regard to the employee's accepted back injury, the insurer did not contend that it paid for any portion of the employee's office visits to Dr. Matin or the prescriptions ordered by Dr. Matin for treatment of his chronic pain related to that injury. Indeed, the employee testified, without objection, that in 2008, the workers' compensation insurer issued a prescription card for his use, but, when he tried to use it to pay for his prescriptions, payment was declined. (Tr. 22.) In addition, because the insurer asserted it had "no liability" to pay for treatment related to the employee's psychiatric condition, it simply denied any responsibility for that treatment. Until the issue regarding the legal responsibility for the employee's psychiatric condition was resolved, the employee was left with no option but to pay for the treatment through his health insurance. Once the judge adopted Dr. Goderez's opinions and found the office visits to Dr. Qayyum and the medications prescribed by Dr. Qayyum - - Valium and Paxil - - were reasonable treatment causally related to the industrial injury, (Dec. 4), the insurer became responsible to "furnish" or pay for that treatment.

reasonable and necessary cost of such services shall be paid by the insurer"). Moreover, unlike the decision under review in Estey, here the judge's order made clear that the insurer is responsible to pay the employee's medical benefits from May 26, 1999, and continuing, pursuant to §§ 13 and 30, not just the co-payments made by the employee.[4] Thus, there is nothing in the judge's decision and order that is contrary to the result reached in Estey.

The insurer also takes issue with the judge's rulings admitting Exhibit 5, the certified billing record from Hampden County Physician Associates, LLC's billing department, and Exhibit 7, the employee's "calculation of out of pocket expenses (admitted July 30, 2012 at status conference)." (Dec. 1-2.) The insurer argues the judge erred in admitting both exhibits over its timely objections.

Exhibit 5 was certified by the keeper of the records of Hampden County Physician Associates, LLC, as representing medical bills incurred by the employee for treatment with Dr. Matin. However, in objecting to Exhibit 5's admission in evidence, the insurer argued it had not received any notice of the employee's intent to offer the record and had not been provided copies of the material in advance. (Tr. 33-39.) The employee did not contest these allegations. Because the employee did not comply with G. L. c. 233, § 79G (certification and service requirements apply to itemized medical bills), Exhibit 5 was inadmissible hearsay. See also Massachusetts Guide to Evidence § 803(6)(C)(ii)(a-b)(2015)(requiring advance notice of intent to offer itemized medical bill and proof of service).

In regard to Exhibit 7, described as "calculation of out of pocket expenses (admitted July 30, 2012 at status conference)," (Dec. 2), the insurer again argues

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[4] As we pointed out in Estey, the health insurer may have a lien against the workers' compensation case under § 46A. Estey, supra, at 61. We also note that § 13(1) provides the statutory mechanism for setting the rates of payment for medical treatment, commonly referred to as "board rates." Pursuant to § 13(1), the insurer's responsibility to pay for medical treatment is capped at those established rates, although the insurer may voluntarily agree to pay more for any treatment. By referencing both § 13 and § 30 of the Act, we presume the judge has signaled that her ruling is consistent with the payment at board rates, and cannot be construed as requiring the insurer to pay in excess of those rates for the treatment it has been ordered to pay.

the exhibit contains inadmissible hearsay. We agree. Exhibit 7 consists of a variety of documents including cancelled checks, papers purporting to be "explanation of benefits" statements from Blue Cross Blue Shield, Walgreen's prescription receipts purporting to show co-payments made by the employee, and adding machine tapes with hand-written notations on them. (Ex. 7.) There is nothing authenticating the documents, which appear to have been offered for the truth of the matters asserted therein. The insurer also contends that its due process rights were violated because Exhibit 7 was admitted over its objection, at an unrecorded status conference, over a month after the close of the lay testimony. Thus, the insurer asserts it was deprived of its right to cross-examine the employee regarding the exhibit. It is clear the insurer did not have the benefit of cross-examining the employee regarding Exhibit 7, as the lay testimony was not reopened. Moreover, "[w]e have repeatedly stressed that all significant proceedings be transcribed for the purpose of assuring the record is adequate for addressing the issues raised on appeal." LaFleur v. M.C.I. Shirley, 25 Mass. Workers' Comp. Rep. 393, 397 (2011), and cases cited.

The judge's decision shows, however, that the admission of Exhibits 5 and 7 was harmless error because the judge did not rely on either exhibit in reaching her conclusions in this case. The judge's findings expressly cited the specific pages of the transcript where the employee testified about the co-payments he made: 1) to Dr. Matin for treatment related to his back injury; 2) to Dr. Qayyum for treatment of his psychiatric condition; and, 3) for the medications those doctors prescribed to treat both conditions.[5] (Dec. 4.)

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[5] Indeed, the judge's calculation that the employee incurred out-of-pocket co-payments totaling $420.00 for seven years of office visits with Dr. Matin was based solely on the employee's credited testimony that he made a co-payment of $15.00 per visit to see Dr. Matin every three months, resulting in four visits per year for a total of $60.00 per year. (Dec. 4.) Although we note that the judge erroneously stated that the employee testified that his co-payments for *medications* for his back condition totaled $420.00, (Dec. 4), that particular finding has not been challenged on appeal. In any event, on its face, that finding appears to be a scrivener's error because it is contained in the paragraph

Because the employee made the payments himself, he could testify from his own personal knowledge how frequently he saw each doctor for treatment of his work-related conditions, and the amount he paid as co-payments for his medical treatment and prescription medications. Here, the employee did so without objection. The judge, as fact-finder, was free to credit the employee's testimony, which she did. Thus, there is no showing that substantial justice requires reversal of the decision. Indrisano's Case, 307 Mass. 520, 523 (1940)("a decree in a workmen's compensation case will not be reversed for error in the admission or exclusion of evidence unless substantial justice requires reversal"); cf. Pinhancos v. St. Luke's Hosp., 17 Mass. Workers' Comp. Rep. 412, 419-420 (2003)(reversal required where judge based critical credibility findings on improperly admitted hospital records).

Lastly, the insurer argues the employee has failed to satisfy his burden of proving his claim because he testified that his figures owed were "averages" and, therefore, speculative. The insurer did not object to the employee's testimony about the amount of the payments he made for office visits and for the prescriptions. The judge, as finder of fact, could reasonably infer that the figures given by the employee were definite enough to rely upon. See Sawyer's Case, 315 Mass. 75, 76 (1943)(judge is permitted to draw reasonable inferences from facts shown to exist). We will not disturb her credibility findings.

The decision is affirmed. Pursuant to G. L. c. 152, § 13A(6), the insurer shall pay employee's counsel an attorney's fee in the amount of $1,596.24.

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describing the employee's treatment with Dr. Matin and refers to the portion of the employee's testimony about the co-payments he made for those office visits. (Tr. 32.) Once Exhibit 5 was admitted, the insurer cross-examined the employee extensively about its contents, and, in arguing about the exhibit's deficiencies, the insurer cites the employee's inability to state with certainty what type of treatment was associated with a particular $62.00 charge. (Ins. br. 7-9.) That particular charge illustrates that the judge did not rely on Exhibit 5's contents because the $62.00 charge exceeds the amount the judge determined the employee paid in yearly co-payments for treatment with Dr. Matin. (Dec. 4.)

**Richard King**
**Board No. 030256-99**

So ordered.

Catherine Watson Koziol
Administrative Law Judge

Mark D. Horan
Administrative Law Judge

Carol Calliotte
Administrative Law Judge

Filed: