COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 035885-10**

Robert Coogan	Employee
Gene Costa and Sons	Employer[1]
Workers' Compensation Trust Fund	Insurer[2]

REVIEWING BOARD DECISION
(Judges Horan, Koziol and Harpin)

The case was heard by Administrative Judge Sullivan.

APPEARANCES
Leonard Schneider, Esq., for the employee
Thomas P. Gay, Esq., for the employer
Mary C. Garippo, Esq., for the Workers' Compensation Trust Fund

HORAN, J. The employer appeals from a decision awarding the employee §§ 13, 13A, 30 and 34 benefits.[3] We affirm.

The judge found the employee had been employed as a tractor-trailer driver by the employer since 1988. (Dec. 4-6, 13.) On October 26, 2010, the employee drove the employer's tractor-trailer to Portland, Maine, to pick up a load. (Dec. 4, 7.) After the trailer was loaded, the employee "inspect[ed] the security of the load." (Dec. 7.) His right foot "caught the dock plate . . . that was in a standing position." Id. He slid downward, injuring his left shin. He stood, determined that his leg was not broken, and

[1] At hearing the employer denied, inter alia, the existence of an employee-employer relationship with Mr. Coogan. (Ex. 4.) That issue is not before us.

[2] The employer was uninsured on the employee's date of injury. We refer to the Workers' Compensation Trust Fund as the insurer although, pursuant to General Laws c. 152, § 1(7), it is not so defined. See 452 Code Mass. Regs. § 3.04(1)("The Fund shall not be deemed to be an insurer except as expressly provided by M.G.L. c. 152 and 452 CMR 3.00.") The nature and obligations of the Fund are set forth in General Laws c. 152, § 65(2, 4-10, 13).

[3] The Workers' Compensation Trust Fund withdrew its appeal of the judge's decision on September 10, 2013. We take judicial notice of the board file. Rizzo v. M.B.T.A., 16 Mass. Workers' Comp. Rep. 160, 161 n.3 (2002).

drove away without informing anyone about the incident. (Dec. 7-8.) He stopped in Portsmouth, New Hampshire, to purchase ointment and gauze to treat his injured leg. He telephoned his wife and informed her of the injury. (Dec. 8.)

The employee continued driving for the employer over the next few weeks. His leg remained symptomatic and he continued self-treatment of the wound. (Dec. 8-9.) Finally, on November 15, 2010, the employee was evaluated at the Somerset Walk-in Clinic, and "learned that he suffered from a 'very bad infection'." (Dec. 10.) It was only then that he informed his employer about the circumstances surrounding his injury. Id.

> Eventually Mr. Coogan was admitted to St. Anne's Hospital, from November 30 to December 12, 2010, for a poly-microbial wound infection. Following discharge he followed again on multiple occasions with the Wound Clinic. His care involved a total of 26 debridements over eight and one-half months. On September 30, 2011 Mr. Coogan received his final skin graft. . . .
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> Mr. Coogan required an extensive period of convalescence waiting for his infection to heal and was still not completely healed at the time of the Impartial exam.

Id.

Dr. William J. Swiggard served as the § 11A(2) impartial medical examiner. His report comprised the only medical evidence at the hearing. (Ex. 1.) The judge adopted Dr. Swiggard's opinions to conclude the employee was not at a medical end result from his work-related injury and was unable to work as a truck driver. (Dec. 11-12, 15; Ex. 1.) Accordingly, the judge awarded the employee, inter alia, § 34 benefits from November 14, 2010, to date and continuing.

The employer raises four issues on appeal. We address two, and otherwise summarily affirm the decision.[4]

First, the employer argues the employee's claim should be barred by his failure to provide it with timely notice of his injury. (Employee br. 1, 8.) We disagree. General Laws c. 152, § 41, provides, in pertinent part:

[4] The issues we summarily affirm concern the employee's credibility as a hearing witness.

> No proceedings for compensation payable under this chapter shall be maintained unless a notice thereof shall have been given to the insurer or insured as soon as practicable after the happening thereof. . . .

Section 1(6) of c. 152 defines "insured" as *"an employer who has provided by insurance* for the payment to his employees *by an insurer* of the compensation provided for by this chapter. . . ." (emphases added.) The plain and unambiguous language of the act operates to deny uninsured employers the defense of late notice. "[A] statute must be interpreted according to the intent of the Legislature ascertained from all its words construed by the ordinary and approved usage of the language, considered in connection with the cause of its enactment, the mischief or imperfection to be remedied and the main object to be accomplished, to the end that the purpose of its framers may be effectuated." Hanlon v. Rollins, 286 Mass. 444, 447 (1934).[5] We conclude the employee was under no obligation to provide timely notice of his October 26, 2010 injury to the employer because it was uninsured on that date.

The employer also argues the judge erred by declining to draw an adverse inference from the failure of the employee's wife to testify. (Employee br. 1, 13-15.) At the commencement of the hearing, employee's counsel indicated the employee's wife would testify. (Dec. 14; Ex. 2.) Employee's counsel later changed his mind, and so informed the judge and the parties. (Dec. 14.) Employer's counsel voiced no objection to her failure to testify, and made no attempt to call her to the stand.[6] Id. Instead, in his Memorandum of Law submitted after the hearing, employer's counsel requested the judge draw an adverse inference from her failure to testify. There was no error.

When a party fails to call a witness who is available and who would be expected to give testimony favorable to that party, a fact-finder *may* draw an inference adverse to

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[5] The judge reasoned the defense of late notice is premised "upon the existence of an . . . employer/employee relationship," which the employer denied. (Dec. 14; footnote 1, supra.)

[6] The employee's wife was present when the employer's counsel was advised she would not testify. (Dec. 14.)

that party's interest. See Grady v. The Collins Transp. Co., Inc., 341 Mass. 502, 510 (1960)("the issue lies in the discretion of the judge. . . ."). Thus, the judge did not err by choosing *not* to do so. In fact,

> [b]ecause the inference, when it is made, can have a seriously adverse effect on the noncalling party -- suggesting, as it does, that the party has wilfully attempted to withhold or conceal significant evidence -- it should be invited only in clear cases, and with caution.

Commonwealth v. Schatvet, 23 Mass.App.Ct. 130, 134 (1986)(and cases cited).

The decision is affirmed.

So ordered.

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Mark D. Horan
Administrative Law Judge

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Catherine Watson Koziol
Administrative Law Judge

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William C. Harpin
Administrative Law Judge

Filed: **December 10, 2013**