COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 020639-11**

Scott Sheehan	Employee
New England Renovations Inc.	Employer
American Zurich Insurance	Insurer

REVIEWING BOARD DECISION
(Judges Horan, Koziol and Calliotte)

The case was heard by Administrative Judge Preston.

APPEARANCES
J. Channing Migner, Esq., for the employee at hearing
John A. Smillie, Esq., for the employee on appeal
Mark J. Kelly, Esq., for the insurer at hearing
John J. Canniff, Esq., for the insurer on appeal

HORAN, J. The employee appeals from a decision denying and dismissing his claim for §§ 13, 30 and 34 benefits. We affirm.

The judge found the employee established, and worked for, New England Renovations, Inc., (N.E.R.), "primarily constructing high-end residential homes, renovations and additions in Essex County." (Dec. 4.) On May 27, 2011, "in furtherance of [a] purchase and sale agreement to convey [his] home in June 2011," the employee was injured while installing a cupola on a barn at his residence. (Dec. 5.) The insurer denied the claim by asserting, inter alia, that at the time of his injury, Mr. Sheehan was not working as an employee of N.E.R. (Dec. 3-4.)

At the hearing, numerous witnesses testified and several exhibits, including the purchase and sale agreement, were admitted into evidence. (Dec. 1-2; Ex. 12.) In his decision, the judge discredited the employee's testimony that he was working for N.E.R. when he was injured. (Dec. 5, 7.) The judge also credited the testimony of Glen Ricciardelli, "a qualified forensic certified public accountant," that, inter alia, the corporate ledgers of N.E.R. did not evince payment by it "for materials for the construction of, or receipt of payment for" the cupola, and that examination of

relevant corporate and personal tax filings led him to conclude "Mr. Sheehan was not an Employee of [N.E.R.] when he had his May 27, 2011 accident."[1] (Dec. 6.) The judge also agreed with Mr. Ricciardelli's assessment that the purchase and sale agreement "contains nothing about [N.E.R.] performing any construction work." Id. Finally, in denying and dismissing the claim, the judge found

> that when Mr. Sheehan after his accident paid Mr. Kelleher to finish the cupola and for a crane to hoist the "cupola" onto the barn from the NER, Inc. account, he was putting his "personal expenses" into a tax deductible "business expense" posture. Those expenses in actuality were his personal expenses and had nothing to do with any work done by NER, Inc.

(Dec. 7.)

The employee raises four issues on appeal. We address two, and otherwise summarily affirm the decision.

First, the employee argues the judge erred by sustaining the insurer's objections to questions posed to the real estate brokers who were privy to the negotiation of the purchase and sale agreement. The employee maintains his due process rights were denied when the judge prevented the brokers from testifying that "the offering price of the property was at one time $850,000.00 and then increased by exactly $4,400.00 to $854,400 to cover the cost to the Sheehan's [sic] of paying [N.E.R.] to fabricate and install the cupola." (Employee br. 5.) We disagree.

"[I]n accordance with general equity practice, a decree in a work[ers'] compensation case will not be reversed for error in the . . . exclusion of evidence, unless substantial justice requires reversal." Indrisano's Case, 307 Mass. 520, 523 (1940)(and cases cited); Moss's Case, 451 Mass. 704, 714 (2008). Here, the insurer stipulated the final $854,400 purchase price "included the punch list, the cupola, the

[1] In Mr. Ricciardelli's opinion, the tax returns also failed to corroborate Mr. Sheehan's testimony regarding his average weekly wage. (Dec. 6.) The judge found that an alternate average weekly wage schedule, prepared and signed by the employee, was "likely an attempt to fabricate a misleading document to ramp-up his average weekly wage in the event that I might find Mr. Sheehan an Employee of the NER Inc. when he was injured." (Dec. 4-5.)

railing and other items," (Tr. 100), and the employee testified that the aforementioned increase in the purchase price, negotiated through the brokers, was meant to compensate his work on the cupola as an N.E.R. employee. (Tr. 9-13.) Both brokers testified, consistent with the purchase and sale agreement, that the completion of the cupola was a condition of the sale. (Tr. 97-98, 100-101.) But at the hearing the employee failed to make an offer of proof that the brokers would have corroborated his testimony that he constructed the cupola *as an N.E.R. employee*.[2] Therefore, we do not reach the merits of the employee's first appellate argument. E.g., Mazzaro v. Paull, 372 Mass. 645, 652-653 (1977)(offer of proof respecting excluded evidence essential to preserve issue for appellate review).

The employee also argues the judge erred by adopting Mr. Ricciardelli's opinion that the employee was not working for N.E.R. at the time of his accident. We begin with the fact that the judge initially did not find the employee to be a credible witness. (Dec. 5.) Later in his decision, the judge noted:

> My finding that Mr. Sheehan's [sic] was not an Employee of NER, Inc. at the time of his accident *is further supported by the dispositive credible opinion testimony* of Mr. Glen Ricciardelli, a qualified forensic certified public accountant.

(Dec. 6; emphasis added.) Mr. Ricciardelli testified extensively, without objection, concerning N.E.R.'s corporate, and the employee's personal, tax returns and records. He found no record of any payment by N.E.R. for anything associated with the fabrication or construction of the cupola. At the conclusion of Mr. Ricciardelli's testimony the employee requested, and was granted, the option of presenting additional documentary evidence to Mr. Ricciardelli for consideration; the employee did not avail himself of that opportunity, and the record closed. (Tr. 172-173.) We are confident the judge made his credibility determinations based on all the evidence,

[2] Indeed, on the record the employee offered their testimony only to show the sale price was adjusted upward to reflect the cupola's cost. (Tr. 100, 102.) As noted, the insurer stipulated to this fact. (Tr. 100.)

and find no error. The employee simply failed to carry his burden of proof on the elements necessary to entitle him to an award of compensation. Sponatski's Case, 220 Mass. 526, 527-528 (1915).

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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Carol Calliotte
Administrative Law Judge

Dated: **September 12, 2014**