COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 072355-87**

Steven M. Bisson	Employee
County Cab	Employer
Utica Mutual Insurance Co.	Insurer

REVIEWING BOARD DECISION

(Judges McCarthy, Horan and Fabricant)

APPEARANCES

John K. McGuire, Jr., Esq., for the employee
Martin J. Long, Esq., for the insurer

McCARTHY, J. The insurer appeals from the decision of an administrative judge denying and dismissing its complaint for discontinuance of the employee's § 34A permanent and total incapacity benefits. Both parties agree that the judge's failure to list the insurer's investigator as a witness and/or discuss that testimony requires recommittal as a matter of law. [1] "Not wanting to stand in the way of such a meeting of the minds, we add our voice to the consensus for recommittal." Leary v. M.B.T.A., 19 Mass. Workers' Comp. Rep. 66 (2005); quoting Beverly v. M.B.T.A., 17 Mass. Workers' Comp. Rep. 621, 622 (2003).

On October 21, 1984, Mr. Bisson was working as a school bus monitor when an unruly student stabbed him in the ear with a pencil. (Dec. 4.) The employee's initial treatment was at University of Massachusetts Medical Center with neurological follow-up from time to time to present. Id. In a hearing decision in 2001, the employee was determined to be permanently and totally incapacitated. (Dec. 8.) [2]

Thereafter, the insurer filed a complaint for discontinuance. After a § 10A conference, the complaint was denied and an appeal was filed. (Dec. 2.) Dr. James Lehrich examined the

[1] We take judicial notice of the contents of the board file. Rizzo v. M.B.T.A., 16 Mass. Workers' Comp. Rep. 160, 161 n.3 (2002).

[2] We need not recapitulate the lengthy procedural history associated with the employee's benefits prior to the § 34A award as its application is far removed from the sole issue raised on appeal.

employee pursuant to § 11A. (Dec. 5.) The parties' motion for the submission of additional medical evidence was authorized due to the inadequacy of Dr. Lehrich's report and the complexity of the medical issues involved. (Dec. 2.) [3]

The judge denied and dismissed the insurer's complaint for discontinuance. (Dec. 9.) In so doing, he adopted the medical opinion of Dr. Savla that the employee remains permanently and totally disabled and that his disability is related to the 1984 industrial injury. (Dec. 8.) The judge found that the employee had made no improvement in his medical condition or work capacity since his 2001 decision. Id. Neither the testimony offered by the insurer's investigator nor the video surveillance admitted into evidence was mentioned or referenced in the hearing decision.

The insurer argues error in the judge's failure to either list as a witness, or consider the testimony of, their investigator, Brian Davis. (Ins. br. 2.) Because the witness touched on several important issues, including the employee's physical activities, appearance and conversations regarding his disability, the insurer contends it is fundamental that a judge weigh and consider this admitted evidence. (Ins. br. 2-3.) [4] We agree.

"It is fundamental that a judge weigh and consider the evidence he has admitted." Larti v. Kennedy Die Castings, Inc., 19 Mass. Workers' Comp. Rep. 362, 366 (2005), quoting Warnke v. New England Insulation Co., 11 Mass. Workers' Comp. Rep. 678, 680 (1997). Where a judge neither lists a witness at the beginning of the decision, nor acknowledges that witness's testimony within the decision, we are unable to determine whether he has actually considered what that witness had to offer. Lockheart v. Wakefield Eng'g, 16

[3] The only additional medical evidence admitted and listed in the hearing decision was the deposition of Dr. Lalit Savla. (Dec. 1.) Dr. Savla evaluated the employee on three occasions: June 29, 2000, November 16, 2004 and August 23, 2005. (Dec. 6.)

[4] Relative to extent of disability, Brian Davis testified that at one point during his surveillance, the employee was observed standing in his front yard holding a shovel. (Tr. 17.) The employee was also observed using the shovel to dig dirt and debris from the ground into a wheelbarrow, as well as lifting several small rocks and placing them into the wheelbarrow. Id. Mr. Davis also testified that at one point the employee approached him and engaged in conversation. (Tr. 18.) He testified the employee told him that he was adding a bedroom or two to his house and that he and his friends were doing all the work themselves. Id. The employee indicated further "that he was concern(ed) that we might be there to watch him because he was on workers' compensation and was not supposed to be doing any strenuous activity." (Tr. 18-19.)

Mass. Workers' Comp. Rep. 302, 304 (2002); Keefe v. M.B.T.A., 15 Mass. Workers' Comp. Rep. 129, 133-134 (2001); Saccone v. Department of Pub. Health, 13 Mass. Workers' Comp. Rep. 280, 282-283 (1999).

We recommit this case for a hearing de novo on the insurer's complaint to terminate or modify weekly incapacity benefits.

As the administrative judge who wrote the decision no longer serves with the department, we forward the case to the senior judge for assignment to a different administrative judge.

So ordered.

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William A. McCarthy
Administrative Law Judge

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Mark D. Horan
Administrative Law Judge

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Bernard W. Fabricant
Administrative Law Judg

Filed: February 29, 2008