COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO.:** 049129-03

Alan F. Cunha, Jr.	Employee
MCI Bridgewater	Employer
Commonwealth of Massachusetts	Insurer

REVIEWING BOARD DECISION
AMENDED
(Judges Koziol, Costigan and Fabricant)

The case was heard by Administrative Judge Chadinha.

APPEARANCES
William T. Salisbury, Esq., for the employee at hearing
Mary B. Klegman, Esq., for the employee on appeal
Patricia G. Noone, Esq., for the self-insurer

KOZIOL, J. The parties cross-appeal from a decision awarding the employee § 35 partial incapacity benefits from November 21, 2005, to date and continuing based on a mental stress injury he sustained as a result of a series of events arising out of and in the course of his employment as a correction officer. We affirm the decision in part and recommit the matter for further findings of fact.

This is not an accepted case. On April 21, 2005, the Department received the employee's claim, citing a date of injury of September 12, 2003, and seeking § 34A permanent and total incapacity benefits from May 7, 2004 to date and continuing. Rizzo v. M.B.T.A., 16 Mass. Workers' Comp. Rep. 160, 161 n.3 (2002)(reviewing board may take judicial notice of documents in board file). The employee's claim was denied at conference, he filed a timely appeal, and the matter proceeded to hearing.

The employee's theory of the case was that a series of events occurring at work had a cumulative emotional/mental impact on him, resulting in his alleged permanent and total incapacity from all

work as of May 7, 2004.[1] (Dec. 2.) The events at issue occurred from 1995 through 2003. Some of the events, such as the first event on September 25, 1995, involved physical altercations the employee had with inmates. Others, such as the events in July 1997 and February 2001, involved violent acts by inmates against other personnel that were witnessed by the employee. Still others, such as the events in September 2000 and March 2003, involved direct verbal threats to inflict bodily harm on the employee and/or his family, made by inmates whose release from the facility was imminent. (Dec. 4-6.)

In 2004, the employee began receiving accidental disability retirement benefits based on a mental stress or emotional disability.[2] (Dec. 14.) Unrelated to, but complicating matters, is the fact the employee last worked for the employer on September 13, 2003, when he sustained physical injuries to his back and knee as a result of an unwitnessed fall that occurred while he was responding to an emergency. Since September 13, 2003, the employee has been receiving § 35 benefits as a result of his incapacity caused by those physical injuries.

We begin by addressing the issues raised by the self-insurer on appeal.[3] The self-insurer argues that reversal is required for a number of reasons. First, it claims the judge's decision is without evidentiary support because the judge made a "material finding . . . that the employee suffered an industrial injury on 09/12/03 based on a combination of injury dates, including 09/13/03, which is subsequent to the date of injury claimed." (Self-ins. br. 4.) We note the self-insurer provides no citation to the record in support of this assertion. 452 Code Mass. Regs. § 1.15 (4)(a)(3). In any event, the argument lacks merit. The judge never made a finding that the accident or the physical injury of September 13, 2003, played any role whatsoever in the employee's mental stress injury. He merely found that "[w]hen [the employee] left work at that time [September 13,

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[1] The employee sought no weekly workers' compensation benefits for this injury for any date prior to May 7, 2004.

[2] The record does not provide the precise date the employee began receiving those benefits. Neither party challenges the judge's finding that, "he sought and was granted accidental disability retirement in 2004 based on an emotional disability," (Dec. 14), and at oral argument, neither party knew the effective date of the retirement or the date(s) of injury for which retirement benefits were awarded.

[3] The pages of the self-insurer's brief are not numbered. For ease of reference, we have supplied the numbering set forth in this decision.

2003] his emotional condition was such that he was experiencing daily migraines, nausea, vomiting, dizziness, chest pains and other symptoms including tremors in his arm, leg and jaw." (Dec. 7.)

Second, the self-insurer argues, again without citation to the record, that impartial medical examiner Dr. Marc Whaley and Drs. Michael Braverman and John Cowl, whose opinions on causation were adopted by the judge, also opined that the September 13, 2003, injury contributed to the employee's post traumatic stress disorder. (Self-ins. br. 5.) No depositions were taken in this case and none of these physicians' reports contains an opinion that the incident occurring on September 13, 2003, bore a causal relationship to the employee's mental stress injury. Dr. Whaley merely observed that the employee "stopped working after he injured himself when he was running to intervene in a fight and because his symptoms of Post Traumatic Stress Disorder were becoming more severe." (Stat. Ex. 1, 2.) Although Dr. Braverman opined the employee has been totally disabled since the day he last worked, September 13, 2003, he attributed the employee's psychiatric disability to multiple incidents where the employee was physically assaulted by inmates, and where the employee was the witness to inmate violence, and to direct inmate threats of violence against the employee and his family. (Employee Ex. 6, 5/07/04 Rep. 1, 3-4; 3/09/05 Rep. 1-2; 7/18/05 Rep. 1-2). Lastly, Dr. Cowl opined the employee had, "experienced repeated physical and verbal threats both directly and indirectly as well as toward his family members. Furthermore, he has witnessed others being threatened and/or attacked by violent inmates who represent real and credible threats." (Employee Ex. 6, 10/28/04 Rep. 1-2.) Dr. Cowl never mentioned or alluded to the incident of September 13, 2003, as a causal factor in this case.

The self-insurer's third argument asserts that the judge erred in failing to deny and dismiss the employee's claim because by filing his claim with a September 12, 2003, date of injury, the employee "mad[e] up" the date of injury in an attempt "to manipulate the workers' compensation system to gain more benefits than those to which he is entitled and has received, on the 9/13/03 date of injury." (Self-ins. br. 6.) This argument was not raised below. The self-insurer's hearing memorandum does not raise the issue of proper claim, nor does it contain any reference to § 44 as a defense in this case.[4] (Self-ins. Ex. 1.) Moreover, at no point during the hearing did the self-

[4] General Laws, c. 152, § 44, states:

> Such notice shall not be held invalid or insufficient by reason of any inaccuracy in stating the time, place or cause of the injury unless it is shown that it was the intention to mislead and that the insurer was in fact misled thereby. Want of notice shall not bar proceedings,

insurer raise an objection or otherwise advance such an argument to the administrative judge.[5] Because this argument was never raised below, it cannot be raised for the first time on appeal and is waived.[6] Green v. Town of Brookline, 53 Mass. App. Ct. 120, 128 (2001); Whittle v. Limoliner, Inc., 22 Mass. Workers' Comp. Rep. 51, 52 (2008).

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if it be shown that the insurer, insured or agent had knowledge of the injury, or if it is found that the insurer was not prejudiced by such want of notice.

[5] The self-insurer's issue sheet reflects the self-insurer raised the issues of § 41 and the statute of limitations as defenses in this case. (Self-ins. Ex.1.) To the extent that § 41 may be seen as a related counterpart of § 44, the self-insurer's hearing memorandum submitted to the administrative judge merely argued the claim should be denied under § 41 because the employee failed to provide timely notice of the 1997 incident, and his claim was barred by the statute of limitations because he made no claim for benefits based on the 1995 and 1997 incidents until 2005.

Any confusion surrounding the date of injury should have been addressed at hearing. The self-insurer had the right to have the claim clearly stated at the outset of the hearing, either at the time that the employee's claims were listed on the record or as part of an opening statement by employee's counsel. Instead, the hearing commenced without any discussion of the alleged factual basis for the claim, or description of the alleged incidents upon which it was based. Most importantly, however, the hearing proceeded without any objection being raised by the self-insurer once the employee began testifying about the incidents that formed the basis of his claim. Indeed, it was employee's counsel who, without any prompting, voluntarily attempted to clarify the issue about the claimed date of injury. (7/28/06 Tr. 67-68.) The self-insurer made no objection on the record in response to counsel's proffered clarification, the testimony concluded without objection, and the self-insurer did not argue the issue in its brief to the administrative judge.

[6] In any event, although the employee did not return to work following his physical injury of September 13, 2003, at all times he has claimed to have suffered a separate and distinct mental or emotional injury, resulting from cumulative mental stress based on a series of incidents that occurred within the employment that were unrelated to the accident or physical injury of September 13, 2003.

We also find no merit to the self-insurer's fourth claim of error asserting the judge erred in finding the employee credible where two other witnesses provided testimony contrary to the employee's. (Self-ins. br. 4, 7.) The judge was free to rely upon the testimony he found most credible. Because his credibility findings were neither arbitrary nor capricious, there was no error. Orlofski v. Town of Wales, 23 Mass. Workers' Comp. Rep. 175, 182 (2009), citing Lettich's Case, 402 Mass. 389, 394 (1998).

Lastly, the self-insurer argues the employee's claim is barred as a matter of law because the events causing disability in a mental stress claim, must occur over a "relatively brief period of time." (Self-ins. br. 7-8). We are aware of no legal rule conditioning compensability for a mental stress injury resulting from a series of specific events at work, upon a showing that the events occurred in close temporal proximity to one another. Unlike here, where the judge made findings of fact about the specific incidents that occurred within the employment, (Dec. 4-7), the case cited by the self-insurer as stating such a rule presented a situation where no specific identifiable events occurred within the employment but rather, a gradual wear and tear that acted upon the employee so as to cause injury. Weeks v. General Electric Co., 4 Mass. Workers' Comp. Rep. 322, 323 (1990)(employee made "[n]o attempt to isolate and identify specific stressful incidents.") To the extent the Weeks decision recites dicta from Albanese's Case, referencing the temporal proximity of the series of events that formed the basis of the employee's claim, that statement was not the holding in the case. Albanese's Case, 378 Mass. 314 (1979).[7] The court expressly stated, "[w]e hold that if an employee is incapacitated by a mental or emotional disorder causally related to a series of specific stressful work-related incidents, the employee is entitled to compensation." Id. at 314-315. Most importantly, Albanese's Case was decided before the legislature amended § 1(7A), to expressly provide for the award of benefits where the mental or emotional disability is caused by an event or a series of events occurring within the employment. St. 1985, c. 572, § 11. Section 1(7A) simply does not require that the events occur "over a relatively brief period of time."[8]

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[7] The court observed the specific events claimed by the employee occurred "over a relatively brief period of time compared with [the employee's] twenty-year employment," when distinguishing the case from those where "everyday stress or '(b)odily wear and tear result[s] from a long period of hard work.'" Id. at 18-19.

[8] General Laws, c. 152 § 1(7A), provides, in pertinent part:

We turn now to the issues raised by the employee on appeal. First, the employee argues the judge erred in failing to make findings of fact regarding all periods of disability claimed by the employee. We agree. The employee's claim sought payment of § 34A benefits from May 7, 2004, to date and continuing. Despite acknowledging the scope of the claim, the judge made no findings of fact regarding the employee's disability and incapacity from May 7, 2004 through November 20, 2005.[9] The lack of findings makes it impossible for us to determine "with reasonable certainty whether correct rules of law have been applied to facts that could properly be found." Praetz v. Factory Mut. Eng'g & Research, 7 Mass. Workers Comp. Rep. 45, 47 (1993). Accordingly, recommittal is required for the purpose of making findings of fact and rulings of law regarding the entire period of incapacity claimed by the employee.

Second, in regard to the issue of disability, the employee argues the judge erred in adopting medical opinions that are inconsistent with each other. We agree. The judge found, "Dr. Braverman opined that as a result of his psychiatric conditions, the employee was totally psychiatrically disabled from all employment. He further felt that the employee's disability was permanent with regard to his employment as a corrections officer." (Dec. 10-11.) The administrative judge then expressly accepted and adopted "the opinions of Dr. Braverman with regard to the employee's medical disability and [I] find accordingly." (Dec. 12.) The judge noted Dr. Whaley, "felt that the employee was totally disabled from ever returning to work as a corrections officer. He did, however, opine that the employee could return to some kind of gainful employment that did not stress his physical limitations and where he would not have to

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Personal injuries shall include mental or emotional disabilities only where the predominant contributing cause of such disability is an event or series of events occurring within any employment.

[9] The judge made only the following findings regarding this issue:

> The employee's claim is for benefits as of May 7, 2004 to date and continuing. However, after reviewing all the evidence, I find that he is entitled to benefits as of November 21, 2005, the date of his impartial medical examination. Although the impartial medical examiner's report was deemed inadequate, I accept and adopt his opinion that as of the date of the examination the employee was capable of returning to some kind of gainful employment.

(Dec. 16.)

deal with interpersonal conflict." (Dec. 12.) The judge went on to "further accept the opinions of . . . [Dr.] Whaley insofar as they are consistent with those of Dr. Braverman." (Dec. 12.) On the issue of the extent of the employee's disability, Dr. Whaley's opinion is inconsistent with Dr. Braverman's. The judge concluded however, expressly relying on Dr. Whaley's disability opinion, that the employee was capable of returning to "some kind of gainful employment." (Dec. 15-16.) He then ordered payment of § 35 benefits based on the employee's pre-injury average weekly wage of $1,184.27 and a $600.00 per week earning capacity, from the date of Dr. Whaley's examination, November 21, 2005, to date and continuing. Because the internal inconsistency created by the judge's adoption of conflicting disability opinions directly impacted his analysis of the employee's incapacity, the award of § 35 benefits cannot stand and the matter must be recommitted for further findings of fact. See Sourdiffe v. University of Mass./Amherst, 22 Mass. Workers' Comp. Rep. 319, 325 (2008)(internally inconsistent decision is arbitrary and capricious, requiring recommittal). In light of our disposition in this case there is no need to address the employee's last claim of error pertaining to the judge's assignment of a $600.00 per week earning capacity.

The matter is recommitted to the judge for further findings of fact regarding the employee's disability, and the extent thereof, for all time periods in dispute; specifically, May 7, 2004, to date and continuing. In all other aspects, the decision is affirmed. Because the employee has prevailed on the self-insurer's appeal, the self-insurer is ordered to pay employee's counsel a fee of $1,497.28 pursuant to § 13A(6).

So ordered.

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Katherin Watson Koziol
Administrative Law Judge

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Patricia A. Costigan
Administrative Law Judge

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Bernard W. Fabricant
Administrative Law Judge

Filed: November 3, 2009