COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 031144-99**

Barbara Holt	Employee
City of Boston – School Department	Employer
City of Boston	Self-insurer

REVIEWING BOARD DECISION
(Judges Carroll, Levine and McCarthy)

APPEARANCES
Donald E. Wallace, Esq., for the employee
Danna M. Crowley, Esq., for the self-insurer

CARROLL, J. Both parties appeal the decision of an administrative judge in which the employee was awarded ongoing § 35 partial incapacity benefits for a psychiatric injury, but denied her claim for a low back injury. The self-insurer contends that the administrative judge improperly calculated the employee's average weekly wage. The employee claims that the administrative judge did not consider certain additional medical evidence misinterpreted other medical records and did not explain why he was not adopting uncontradicted medical reports supporting total disability for an early period of incapacity. After a review of the record, we recommit the decision to the administrative judge for additional findings consistent with this opinion. G. L. c. 152, § 11C.

The employee, Barbara Holt, a widowed mother of four adult children, was 68 years old at the time of the hearing. Ms. Holt earned a college degree in 1993 from the Massachusetts College of Art. From 1994 to 1999, she was employed by the City of Boston School Department as an art and art history teacher at the McKay School. The employee taught five to six classes per day to students ranging from kindergarten age through sixth graders. During the course of a typical workday, the employee was required to move from room to room and would ascend and descend several flights of stairs. (Dec. 860.)

On May 10, 1999, several days after the Columbine High School tragedy, there was a bomb scare at the employee's place of employment. After successfully evacuating the building, the employee and her students were permitted to reenter. Ten minutes later, a bag was found in the school and a second evacuation was called. The employee found this to be unsettling. Id. Two days later, following a shooting that occurred near the school, an intercom message ordered teachers to keep all students in their classrooms. (Dec. 861.) The employee felt "very unsafe" and was unable to discuss the events during a group counseling session held the following day at the workplace. Id.

In 1995, while working at a different school, the employee had experienced a similar situation where someone was shot outside her workplace during school hours. Although she had considered the 1995 event to be an isolated incident, following Columbine and the more recent events at her school, by May 1999 the employee no longer felt that these occurrences were isolated. She began to feel angry, anxious, shaky and unsafe amidst persistent rumors that there would be another shooting. The employee began "holding her body tight" due to anxiety. Id.

Ms. Holt alleges that, on May 21, 1999, she injured her back while lifting school materials in the course of her employment. (Dec. 861-862.) She sought acupuncture treatment to relieve her pain. Shortly thereafter, on May 26, 1999, the employee woke from sleep with groin pain and felt anxious, unsafe, "speeded up" and unable to move. She has been unable to return to work since that day. (Dec. 862.)

The employee was treated by the following practitioners: Dr. Fouad Hamawy, an internist and her primary care physician; Judith Music, an acupuncturist; Dr. Thomas Mercurio, a chiropractor; Dr. Dorothy Holinger, a psychologist; Susan Ritter, a licensed social worker and Dr. Kerry Bloomingdale, a psychiatrist with whom she continues to treat for her psychiatric injury. Id.

Following a § 10A conference on the employee's claim for compensation, the administrative judge ordered the self-insurer to pay § 34 temporary total incapacity

benefits. At the conference, pursuant to 452 Code Mass. Regs. § 1.02[1] the parties waived the impartial medical examination provided in G.L. c. 152, § 11A. (Dec. 859.) The self-insurer appealed to a hearing de novo and at that hearing, reports and records of the many treating specialists listed above, as well as medical reports of psychiatrists, Dr. Michael Hirsh and Dr. Robert Weiner, were offered into evidence. (Dec. 858.)[2]

Saying he was relying on the medical opinions of Drs. Hamawy, Bloomingdale and Hirsch, as well as the employee's credible testimony, the administrative judge determined that the employee was partially incapacitated due to her psychiatric injury suffered at work on May 10 and May 12, 1999. (Dec. 870.)[3] The judge found partial incapacity despite the fact that Dr. Hamawy opined that the employee's disability was total and permanent. (Dec. 864, 870.) The judge explained his rejection of Dr. Hamawy's disability opinion by saying he was relying on Dr. Bloomingdale's opinion which he "read to say that the employee was disabled from teaching positions but can perform other types of employment." (Dec. 870.)

The judge held that there was insufficient evidence in this case to establish a work related back injury. (Dec. 871.) On this point, the judge stated that the employee failed to enter any medical evidence to support her claim. Id.

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[1] 452 Code Mass. Regs. § 1.02 reads in pertinent part:

> Disputes Over Medical Issues as used in M.G.L. c.152, § 11A(2), shall not include any case in which the parties:
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> (b) disagree regarding the liability of the named insurer for any claimed injury; provided, however, that the parties agree that no impartial physician's report is required[.]

[2] Doctor Weiner's medical opinion was rejected as not credible. (Dec. 870-871.)

[3] The three doctors relied upon by the judge diagnosed posttraumatic stress disorder causally related to the May 1999 work incidents. (Dec. 865, 866, 870.) Additionally, the judge stated that although the opinions of Dr. Holinger and Susan Ritter (both of whom concurred with regard to the diagnosis of post traumatic stress disorder, (Dec. 866)) were helpful in that they supported the opinions of Drs. Bloomingdale, Hamawy and Hirsch, he did not rely on them in the first instance, as the two are not medical doctors. (Dec. 871.) We note that a judge may rely on a psychologist and/or social worker when the testimony is within the parameters of their areas of expertise.

In establishing the employee's average weekly wage, the judge relied on the employee's credible testimony that she had been paid at a lower step than that to which she was entitled.[4] (Dec. 869.) He further relied on a letter from the teachers union stating that the employee was underpaid by $6,034.62 "for the school year 1999-2000." (Dec. 869, Ex. 17.) Although the judge indicated that the parties failed to provide definitive evidence as to the weekly wage matter, he determined that the employee's annual compensation should be that established by step 7 which resulted in an average weekly wage of $957.58. (Dec. 870.)

The judge ordered the self-insurer to pay § 35 partial disability compensation for the psychiatric injury based on an assigned earning capacity of $457.58 per week, together with all reasonable and necessary medical treatments related to the psychiatric injury. (Dec. 872.) The employee's claim regarding a low back injury was denied and dismissed. Id. Both parties have appealed the judge's decision.

We first address the self-insurer's sole issue on appeal. The self-insurer argues that the judge erred in his computation of the employee's average weekly wage which is to be determined by averaging the fifty-two weeks of compensation received prior to the alleged injury date. Based on its calculations, the employee earned $39,664.05, which resulted in an average weekly wage of $762.77. The self-insurer maintains that this figure is borne out by the computer printout submitted into evidence.

Although a judge may rely, as he did here, on the employee's testimony of what her wages were for the time in question, he may not support his finding with documentation which covers a time period following the work injury. General Laws c. 152, § 1, requires that the employee's weekly wage be determined by averaging the fifty-two week period preceding the date of injury. The document relied on by the judge was for the 1999-2000 school year which would have commenced after May 1999.

[4] The employee stated that she was paid $39,664.05 annually, which reflected compensation for a step 3 worker, but contends that she is a step 7 worker and should have been compensated in the amount of $49,794.00 annually. (Dec. 869.)

Accordingly, we recommit this issue to the judge for further findings on the employee's average wage on the date of her injury.[5]

We now turn to the employee's appeal. First, the employee argues that the judge erred in not awarding total incapacity benefits during the initial acute phase of the employee's treatment provided by Dr. Hamawy. During that time Dr. Hamawy's opinion of total medical disability stood uncontradicted by other medical opinions. Further, the employee points out that the judge failed to consider certain medical reports of Dr. Bloomingdale.[6]

We agree that the judge erred when he found that Dr. Hamawy opined that the employee's disability was total and permanent and yet rejected that opinion based on an opinion by another doctor, whose opinion does not cover the earlier period in question.

The finding of partial incapacity from the date of the incident is flawed. The judge found that Dr. Hamawy expressed an opinion that the employee was totally disabled (Dec. 870, Ex. 2); there was no medical evidence to contradict that opinion. The judge cannot, as he did here, utilize Dr. Bloomingdale's medical opinion from a later date (April 3, 2001) to override the uncontradicted medical opinion rendered by Dr. Hamawy, (Dec. 870), in June 1999 for the time period preceding the date of Dr. Bloomingdale's medical opinion regarding the employee's level of incapacity. The expert opinions cover two different time periods. Any attempt by the judge to utilize Dr. Bloomingdale's April 3, 2001 medical opinion for the period prior to its date was error.[7]

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[5] The judge is authorized to take additional evidence on the issue, including evidence of step 7 salary for the year prior to May 1999.

[6] In addition to the "Statement of Applicant's Physician In Connection with Application for Disability Retirement" and the April 3, 2001 report to the Retirement Board, (Ex. 8), two reports were prepared by Dr. Bloomingdale, one on May 23, 2001 and a second on June 5, 2001.

[7] Doctor Bloomingdale's April 3, 2001 letter says that the employee has been his patient since February 2000, but does not make his disability statement retroactive. (Ex. 8.)

Next, the employee contends that the judge misinterpreted Dr. Bloomingdale's opinion, when he used it to support his finding of an earning capacity. A review of the medical evidence reveals the following. Dr. Hamawy opined as early as June 1999 that the employee was totally and permanently disabled due to mental trauma at work. (Dec. 870, Ex. 2.) The next medical opinion rendered with regard to the extent of the employee's incapacity resulting from the psychiatric injury was that of Dr. Bloomingdale dated April 3, 2001. (Ex. 8.)[8] It is this April 3, 2001 letter to the retirement board on which the judge based his finding of partial incapacity. (Dec. 868.) The judge quoted the letter in his decision: "Barbara Holt has been my patient since 2/2000, for depression and post traumatic stress disorder since a violent incident at the school where she taught in 5/99. She would appear disabled from work as a teacher, on a long-term basis." (Dec. 866, quoting April 3, 2001 letter of Dr. Bloomingdale.) The judge interpreted this opinion to mean that the employee was merely unable to teach and was not totally disabled. (Dec. 868.) However, the judge did not consider the May 23, 2001 report of Dr. Bloomingdale which states that "[the employee's] disability is continuing on a total basis, as of her 4/24/01 visit." (Note of Dr. Bloomingdale, dated May 23, 2001.) (emphasis added.) The self-insurer agrees that the May 23, 2001 and June 5, 2001 reports of Dr. Bloomingdale are in evidence[9]

[8] Exhibit 8 includes Dr. Bloomingdale's April 3, 2001 letter directed to the Retirement Board's Representative and an undated "Statement of Applicant's Physician In Connection with Application for Disability Retirement" signed by Dr. Bloomingdale, so it would seem likely that these two documents were generated around the same time.

[9] On May 24, 2001, the employee submitted a request to allow further medical evidence. (See Addendum to Employee's Br.) Around the same time as the employee's request it seems that the self-insurer was allowed to submit late evidence on the average weekly wage issue. Id. In his August 14, 2001 decision, the administrative judge stated that the evidentiary record closed on May 25, 2001. (Dec. 859.) It would appear that the May 23, 2001 report was timely in evidence. The need for the judge to review and consider this report of Dr. Bloomingdale in making findings on disability is made evident when one reviews the documents marked as Exhibit "8. The reports of Dr. Kerry Bloomingdale." They include a "Statement of Applicant's Physician In Connection with Application for Disability Retirement" (hereinafter Bloomingdale Physician's Statement) and the April 3, 2001 letter of Dr. Bloomingdale to the Retirement Board. Since the Physician's Statement asks if the applicant for disability retirement is "Substantially Unable to Perform the Duties of Her

but contends that they either support partial disability or add nothing. (Self-insurer Br. 2-3.) However, the judge does not seem to have considered them. We recommit this matter to the judge to reconsider the employee's medical disability and incapacity in light of all of the medical evidence before him.

The employee next contends that the judge erred in denying her claim for a low back injury. At the outset, we note that the parties have stipulated to an industrial injury which occurred on May 26, 1999. (Dec. 858; Tr. 3.) It is unclear from the record as to what type of injury the parties had stipulated. If the parties had in fact stipulated to a low back injury, it was improper for the judge to deny the employee's claim. We recommit this issue for clarification of the nature of the injury stipulated to by the parties. See Bolton v. Charles P. Blouin, Inc., 14 Mass. Workers' Comp. Rep. 71 (2000)(Board should be able to review judge's findings and clearly understand the rationale of the ultimate conclusion). Callender Hansel v. City of Boston, 15 Mass Workers' Comp. Rep. 360 (2001)(It is the duty of the hearing judge to make such specific and definite findings based upon the evidence as will enable the reviewing board to determine with reasonable certainty whether correct rules of law have been applied), citing Crowell v. New Penn Motor Express, 7 Mass. Workers' Comp. Rep. 3 (1993).

If it is determined that the parties intended to stipulate solely to the psychiatric injury, the employee's low back claim still requires additional findings. The administrative judge stated that Dr. Mercurio was the only medical expert who had "offered an opinion on the employee's back condition." (Dec. 868.) This statement is not accurate. First, there is in evidence a history of back injury at work. Records from

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Particular Job," it would appear Dr. Bloomingdale was answering that question in his letter as well, not whether the employee can do any remunerative work. Therefore, the opinion that the employee is unable to teach is not inconsistent with a further opinion that the employee is, in fact, totally disabled.

As to the June 5, 2001 report of Dr. Bloomingdale, the judge should rule on the motion. Kulisich v. Greater Lowell Family YMCA, 16 Mass. Workers' Comp. Rep. ____ (2002), citing Howard v. Beacon Constr., 11 Mass. Workers' Comp. Rep. 290 (1997). We note that the June 5, 2001 opinion of Dr. Bloomingdale does not refer to the employee's level of medical disability.

Tam Medical Associates refer to treatment on May 21, 1999, for back strain/pain with a history of lifting art supplies at the school. (Ex. 1.)[10]

However, more than a history from the employee is needed. Causal relationship, as the administrative judge notes, is necessary to attribute the low back injury to the work incident. See Galloway's Case, 354 Mass. 427, 431 (1968)(expert medical opinion required for issues of causation and extent of medical disability). The administrative judge stated that although Dr. Mercurio found the employee totally disabled for a time and later partially disabled, Dr. Mercurio "offered no opinion on the issue of causal relationship." (Dec. 868.) However, this statement is incorrect. In his reports, Dr. Mercurio consistently diagnosed acute lumbar spinal sprain associated with intervertebral nerve outlet syndrome. (Ex. 3.) In his report dated October 3, 2000, the doctor states that the employee attributes the back pain to trauma incurred in the spring of 1999. He states that her "history was otherwise non-contributory." (Ex. 3, note dated October 3, 2000.) In his January 16, 2001 report, Dr. Mercurio notes that the employee first sought treatment for injuries sustained while at work on May 26, 1999. (Ex. 3.) Dr. Mercurio further opined that disability was the proximate result of a personal injury sustained in the performance of the employee's work-related duties. (Ex. 3 "Statement of Applicant's Physician in Connection With Application for Disability Retirement.") This alone covers the causal relationship aspect especially in light of the fact that there was no medical evidence to the contrary. Furthermore, Dr. Hamawy also causally relates the employee's acute low back strain to work. (Ex. 2, "Statement of Applicant's Physician in Connection with Application for Disability Retirement" - signed by Dr. Hamawy.)

As to disability from the back injury, Dr. Mercurio opined that the employee was totally disabled from July 2, 1999 to September 29, 1999 and partially disabled

[10] Additionally, notes from Dr. Hamawy dated August 24, 1999, November 8, 1999, December 3, 1999 and April 19, 2000, reference back pain and Dr. Hamawy's "Statement from Applicant's Physician in Connection with Disability Retirement" form, dated March 8, 2000, indicates that part of the nature of the employee's disability is acute low back sprain. (Ex. 2.) Furthermore, a medical note from Judith Music, a licensed acupuncturist, dated July 27, 1999, states that the employee has treated for acute back pain. (Ex. 4.)

thereafter. (Dec. 865.) Doctor Mercurio restricted the employee from repetitive lifting, bending and from prolonged sitting or standing.

Accordingly, we recommit the case for further findings and correction consistent with this opinion.

So ordered.

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Martine Carroll
Administrative Law Judge

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Frederick E. Levine
Administrative Law Judge

Filed: **September 26, 2002**
MC/jdm

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William A. McCarthy
Administrative Law Judge