

COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF  
INDUSTRIAL ACCIDENTS

BOARD NO. 052057-98

Beshr Abdel-Azim  
Kidde Fenwal, Inc.  
Travelers Insurance Company

Employee  
Employer  
Insurer

**REVIEWING BOARD DECISION**  
(Judges Horan, Koziol and Fabricant)

The case was heard by Administrative Judge Hernandez.

**APPEARANCES**

John E. McCabe, Esq., for the employee  
Donna J. Gully-Brown, Esq., for the insurer

**HORAN, J.** The employee appeals from a decision denying and dismissing his claim for an alleged work related emotional injury.<sup>1</sup> Without conducting an evidentiary hearing, the judge concluded the employee's workers' compensation claim was barred due to the preclusive effect of findings made by a superior court judge, who dismissed the employee's wrongful termination claim.<sup>2</sup> (Dec. 6-7.) We vacate the decision, and recommit the case for a hearing and a decision consistent with this opinion.

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<sup>1</sup> General Laws c. 152, § 1(7A), provides, in pertinent part:

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. . . . No mental or emotional disability arising principally out of a bona fide, personnel action including a transfer, promotion, demotion, or termination except such action which is the intentional infliction of emotional harm shall be deemed to be a personal injury within the meaning of this chapter.

<sup>2</sup> The hearing decision lists the superior court judge's "Findings of Fact, Rulings of Law & Order of Judgment" as Exhibit 6.

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The employee's claim was received by the department on January 25, 1999.<sup>3</sup> In it, the employee claimed his work environment caused his "major depression." (Employee's Claim Form 110). The employee's injury date was September 2, 1998.<sup>4</sup> *Id.*

The employee's claim was denied at a § 10A conference, and he appealed. The board file reveals the parties then entered into an agreement to postpone the § 11 hearing pending resolution of the employee's wrongful termination lawsuit against the employer. On December 14, 2007, Superior Court Judge Francis Fecteau entered judgment for the employer in that action, and dismissed the employee's complaint. Judge Fecteau made numerous findings of fact, concluding:

The evidence thus clearly shows that [the employee's] termination was not in violation of public policy or in retaliation for his having made safety-related complaints. Rather, what the evidence proved was that his termination was for reasons consistent with the appropriate and lawful business judgment of the defendant in connection with the performance of its employees.

(Ex. 6, at 15.) Following receipt of Judge Fecteau's decision, a hearing on the employee's appeal of the conference order was scheduled.

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<sup>3</sup> 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).

<sup>4</sup> This date of injury was the only one claimed by the employee. Because he never testified before the administrative judge, the significance of this date is unclear. We are aware the superior court judge found the employee was terminated on August 26, 1998. (Ex. 6.) We also note the employee's appeal of the superior court judgment was dismissed by the appeals court on April 7, 2009, and the employee's attempts to remove the dismissal of his appeal were denied on March 19, 2010 and April 16, 2010. See [http://ma-appellatecourts.org/display\\_docket.php?dno=2008-P-1990](http://ma-appellatecourts.org/display_docket.php?dno=2008-P-1990).

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At the September 16, 2008 hearing,<sup>5</sup> the insurer filed a motion to dismiss. (Ex. 1.) The administrative judge heard oral argument on the motion. (Tr. 4-20.) Essentially, the insurer took the position that because Judge Fecteau had found, in effect, that the employer's termination of the employee was bona fide, the employee could neither re-litigate that issue, nor succeed in proving that his workers' compensation claim did not arise "principally out of" that bona fide personnel action.<sup>6</sup> The employee argued that he had "the right to proceed to hearing . . . [as] the elements are very different here in this case, and that he has not had an opportunity to fully litigate those issues in any other forum to date." (Tr. 16.) Rather than permit the employee to testify, the judge, citing the principles of collateral estoppel and res judicata, denied and dismissed the employee's claim. (Dec. 6-7.)

On appeal, the employee argues the judge's dismissal of his workers' compensation claim was contrary to law. We agree. Although principles of collateral estoppel do prevent the employee from re-litigating whether his termination was bona fide,<sup>7</sup> this established fact is not necessarily dispositive of his workers' compensation claim. Simply put, the elements of a wrongful

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<sup>5</sup> We note that on November 7, 1999, the employee was examined by Dr. Bennett D. Aspel pursuant to § 11A(2). Dr. Aspel opined the employee's "loss of faith in his employer due to unsafe released product, isolation, abuse, fears of contributing to people's injury resulted in a slide into a depressive state probably starting in 1993 and gradually progressing. His total loss of self-esteem resulted in a loss of confidence and loss of work performance. This appears directly related to his workplace." (Ex. 7, at 3.) The doctor fails to mention the employee's termination, ergo, he expressed no opinion whether the employee's disability arose principally from it.

<sup>6</sup> See footnote 1, supra.

<sup>7</sup> Green v. Town of Brookline, 53 Mass. App. Ct. 120 (2001). Because the employee never testified at the § 11 hearing, we cannot say to what extent, if any, Judge Fecteau's findings may prevent the re-litigation of issues affecting the employee's claim that his emotional distress is work related.

termination claim differ substantially from a claim for a work related emotional injury under § 1(7A).<sup>8</sup>

We also note Judge Fecteau considered the employee's subjective impressions of workplace events in denying his wrongful termination claim:

The plaintiff *believed* that the deadlines [his supervisor imposed upon him] were unnecessary and that [his supervisor] was creating issues with him unfairly about projects in which he was not involved, implying that he was on a campaign to terminate him.

[His superiors'] criticism and pressure to complete the final design steps coincided with a collapse by the [employee] at work when he had to be taken to a hospital and a claim by the [employee] that he was only then discovering that the "Code 05" products that he *believed* to have been discontinued because of the safety defect had not been but which continued to be marketed after the 1993 investigations. However, he was also under stress for his perceived failure in completing the preparations necessary for the availability of product samples of the Code 58 to one or more customers and/or design defects that he perceived would prevent this sample from operating properly.

(Ex. 6, at 12; emphases added.)

The employee's subjective responses are relevant to the determination of whether the employee suffered a compensable emotional injury. "[T]he court [has] rejected 'any contention that [the employee] is not entitled to workers' compensation unless [his] emotional disability resulted from an unusual and objectively stressful or traumatic event.'" Robinson's Case, 416 Mass. 454, 459 (1993), quoting Kelly's Case, 394 Mass. 684, 687 (1985). Whatever preclusive effect Judge Fecteau's findings may have, the compensability of the employee's workers' compensation claim must be analyzed under § 1(7A), and the relevant case law.

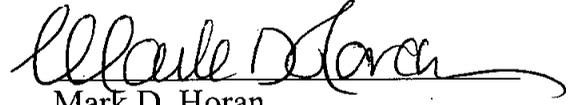
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<sup>8</sup> For a general discussion of the elements and burdens of proof in a mental or emotional injury claim, see Agosto v. M.B.T.A., 21 Mass. Workers' Comp. Rep. 281 (2007). The elements of a claim for wrongful termination of an at will employee on public policy grounds are addressed in Smith-Pfeffer v. Superintendent of the Walter E. Fernald State School, 404 Mass. 145 (1989).

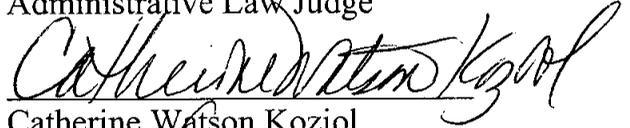
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Accordingly, we vacate the decision and recommit the case for a § 11 hearing and a decision consistent with this opinion.

So ordered.



Mark D. Horan  
Administrative Law Judge



Catherine Watson Koziol  
Administrative Law Judge



Bernard W. Fabricant  
Administrative Law Judge

Filed:

