COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 018204-12**

David Root	Employee
G. Lopes Construction, Inc.	Employer
Old Republic Insurance Company	Insurer

REVIEWING BOARD DECISION
(Judges Horan, Fabricant and Calliotte)

The case was heard by Administrative Judge Vendetti.

APPEARANCES
Nicole M. McDonald, Esq., for the employee
David M. O'Connor, Esq. for the insurer at hearing

HORAN, J. The employee, a self-described laborer and heavy equipment operator, appeals from a decision denying and dismissing his § 28 claim.[1] We affirm.

The insurer accepted liability for the employee's burn injuries, suffered at work on July 26, 2012. He claimed his employer's serious and willful misconduct caused his injuries; the insurer[2] denied the claim. (Dec. 3, 6.)

The judge found that prior to the accident the employee had, 1) experience conducting safety meetings;[3] 2) received fire prevention training and; 3) "scrapped a lot of automobiles with gasoline tanks." (Dec. 4-5.) Two months prior to his

[1] General Laws c. 152, § 28, provides, in pertinent part,

> If the employee is injured by reason of the serious and wilful misconduct of an employer or of any person regularly intrusted with and exercising the powers of superintendence, the amounts of compensation hereinafter provided shall be doubled.

[2] Under § 28, the insurer pays the doubled compensation awarded; it then may seek reimbursement from its insured. The employer chose not be independently represented in this case.

[3] A January 17, 2011 fire prevention meeting, run by the employee, included the topic "fire and explosion risks." (Dec. 4-5.)

accident, the employee attended a fire safety refresher course, which "included [instruction] that water should not be used to extinguish chemical fires and that the fire department should be called in the event of a chemical fire." (Dec. 5.) The employee acknowledged this training. Id. He also "described himself as [his employer's] most experienced cutter." (Dec. 5-6.)

Based on the employee's testimony, the judge found the following facts. At 7:00 a.m. on July 26, 2012, the employee began scrapping a diesel fuel tank. "According to the employee's credible testimony, even though he knew there was some fuel in the tank he felt that the scrapping job was not especially hazardous." (Dec. 6.) Around 1:00 p.m., a fire broke out in the tank. Rather than call the fire department, the employee attempted to douse the flames with a fire extinguisher, to no avail. Contrary to his fire safety training, the employee then poured water into the flaming tank. This caused water and flames to splash out, severely burning him. (Dec. 6-7.)

The judge found the employer was not responsible for the employee's injury. Rather, she concluded that: 1) "on his own initiative and in contravention of his training, [the employee] threw water [on the tank] in the hopes of dousing the flames;" 2) the employer was not involved in the "decision to douse the diesel fire with water;" 3) the employer had trained the employee not to extinguish a diesel fire with water; 4) the employee had a manager available to him but did not ask for assistance from him; and 5) "but for the act of throwing water on the fire, the employee would have entirely escaped injury." (Dec. 8-9.) Accordingly, she denied and dismissed the employee's § 28 claim.

On appeal, the employee advances two arguments. We address them in turn.

The employee contends the "decision is arbitrary, capricious and or contrary to law" because the judge "focused on the actions of the Employee rather than assessing the actions of the Employer. . . ." (Employee br. 1.) We disagree. The judge's findings reveal she considered: 1) the safety training provided by the employer to the employee; 2) that a manager was available to the employee on the date of the

accident; and 3) that the employee neglected to seek his assistance or otherwise inform him about the fire. (Dec. 5-6, 8-9.) Her scrutiny of the employee's conduct, as well as the employer's, was entirely proper. To qualify for double compensation under the act, the employee's injury must be "by reason of" the employer's serious and willful misconduct. G. L. c. 152, § 28; Thayer's Case, 345 Mass. 36 (1962). The judge's findings make clear that in this case, the employee's injury was caused by his failure to follow the safety training provided by the employer. See Silver's Case, 260 Mass. 222 (1927)(§ 28 award reversed as employee's injury resulted from his own misconduct). The judge did not credit any evidence supporting a causal relationship between the employer's (or a supervisor's) conduct and the employee's injury. There was no error.

Lastly, the employee argues the judge failed to analyze the OSHA and other safety code violations that were admitted into evidence. (Employee Exs. 7-9, 11.) Because the judge duly listed these exhibits, and took judicial notice of federal and state fire prevention regulations, (Dec. 4.), we assume this evidence was considered. Tracy v. City of Pittsfield, 29 Mass. Workers' Comp. Rep. 9 (2015); Keane v. McLean Hosp., 27 Mass. Workers' Comp. Rep. 9, 11 (2013). Moreover, evidence of safety code violations does not mandate a finding of serious and willful misconduct. Armstrong's Case, 19 Mass. App. Ct. 147, 150 (1984); Petit v. Westvaco Corp., 8 Mass. Workers' Comp. Rep. 288 (1994); Gilcoine v. C.N. Flagg & Co., Inc., 2 Mass. Workers' Comp. Rep. 293 (1988).

The decision is affirmed.

So ordered.

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Mark D. Horan
Administrative Law Judge

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Bernard W. Fabricant
Administrative Law Judge

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Carol Calliotte
Administrative Law Judge

Filed: **December 21, 2015**