COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 005770-97**

Douglas J. Sowle	Employee
Department of Wildlife and Fisheries	Employer
Commonwealth of Massachusetts	Self-Insurer

REVIEWING BOARD DECISION
(Judges Horan, Costigan and Carroll)

APPEARANCES
Philip F. Mulvey, Jr., Esq., for the employee
Arthur S. Jackson, Esq., for the self-insurer

HORAN, J. The employee appeals from a decision denying his claim for weekly incapacity, medical and § 28 benefits. We affirm the decision.

Douglas Sowle began working for the Department of Wildlife and Fisheries in May of 1996. On ten occasions that year, while spraying vegetation at work, he was exposed to Pathway, a chemical pesticide. As a result, he became dizzy and disoriented, and experienced burning on his skin, in his throat, and in his mucous membranes. He stopped working in December of 1997, when he began to experience additional symptoms.[1] (Dec. 9, 12-13.)

On June 15, 2001, the employee filed a claim alleging incapacity, as a result of his exposure to Pathway, from December 9, 1997 and continuing. His claim was denied at conference, and he appealed.

At hearing, the employee also claimed entitlement to double compensation pursuant to § 28.[2] The judge found the July 7, 2002 report of the § 11A physician,

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[1] The new symptoms included right-sided facial numbness, mood changes, right-sided paralysis and a right foot drop. (Dec. 13.)

[2] 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

Dr. Thomas Winters, adequate, but found the medical issues complex. Both parties submitted additional medical evidence. (Dec. 3, 7-8, 15.)

The judge adopted the opinion of Dr. Winters that only the symptoms the employee experienced in the summer of 1996 were causally related to Pathway exposure. Thus, the judge found the employee had sustained a personal injury within the meaning of § 26. However, she further found the employee's symptoms resulted in no medical treatment or incapacity.[3] The judge also found that none of the employee's symptoms and physical complaints after 1996 were causally related to the employee's Pathway exposure. Finally, the judge denied the employee's § 28 claim, concluding the self-insurer's conduct did not rise to the level of serious and wilful misconduct. (Dec. 18-19, 21-23.)

The employee advances a number of arguments on appeal. We address two, and summarily affirm the decision on all other issues.

The employee contends the judge erred by failing to find that his work-related injury was the result of the self-insurer's serious and wilful misconduct.[4] The employee's argument centers on the self-insurer's admitted violation of G. L. c. 132B, § 6A, and 333 Code Mass. Regs. §§ 10.02, 10.04, and 13.03; these provisions require pesticides, such as Pathway, to be used only by licensed and certified applicators. The employee maintains the self-insurer's failure to take

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> superintendence, the amounts of compensation hereinafter provided shall be doubled.

[3] The judge expressly found the employee's medical condition, whether causally related to work or not, failed to incapacitate him. In conducting her vocational analysis, the judge noted the employee was articulate, had an associate's degree from Northeastern University, and had many transferable skills from working as a x-ray technologist, nuclear technologist and emergency medical technician. (Dec. 17-20.)

[4] Although we affirm the judge's denial of the employee's claims for compensation, we address the judge's § 28 finding, since the employee has successfully proven a personal injury and, theoretically, at some future point, could succeed on a claim for compensation based on his Pathway exposure.

appropriate steps to safeguard employees against the risk of injury associated with Pathway constitutes a violation of § 28. The judge did find the self-insurer had "failed to provide and mandate the wearing of protective clothing, footwear, eye protection, mouth protection, and nose protection." (Dec. 22.) However, based on the testimony offered on behalf of the self-insurer, she also found that it:

> was unaware of the Statute that required applicators to be certified and/or licensed until after the investigation by the Pesticide Bureau in 1997. Upon finding out about the statutory change, the [self-insurer] was in full compliance with the Statute and remains in full compliance to date. The [self-insurer] did not deliberately fail to follow the regulation once [it was] aware of it.

Id. The judge found the self-insurer's statutory violation was some evidence of serious and wilful misconduct, but that it was not dispositive. (Dec. 23.) We agree. Armstrong's Case, 19 Mass. App. Ct. 147, 150 (1984); Smith v. Raytheon, 9 Mass. Workers' Comp. Rep. 477, 482 (1995); Cf. O'Leary's Case, 367 Mass. 108, 117 (1975)(foreman's action in deliberately ordering workmen "to disregard an important contractual safety provision, after the danger is called to his attention and when the means for complying with that safety provision are at hand," warrants finding of serious and wilful misconduct). Based on all the evidence, the judge concluded the self-insurer was negligent, but not guilty of serious and wilful misconduct.

We find no error in the judge's analysis, or in her well-supported subsidiary findings. The judge accurately analyzed the law,[5] and reached the permissible conclusion that the self-insurer did not violate the § 28 standard because:

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[5] The judge wrote:

> To satisfy MG.L. c. 152 Section 28 the employer's conduct must be shown to be "much more than mere negligence, or even than gross or culpable negligence. It involves conduct of a quasi-criminal nature, the intentional doing of something either with the knowledge that it is likely to result in serious injury or with a wanton and reckless disregard of its probable consequences." Burns's Case, 218 Mass. 8, 10 (1914); O'Leary's Case, 367 Mass. 108, 115 (1975). Serious and willful misconduct and conduct of a quasi-criminal nature may be satisfied, under

> The [self-insurer] did not appreciate the full extent of the hazards of Pathway. In fact, Steve Hurley [the Southeastern District Fisheries Manager and acting director of the Massachusetts Division of the Department] told the employee that "the material was totally safe and similar to what other people would normally use on their lawns." Not only did the [self-insurer] not fully comprehend the hazards of Pathway, I further find that [it] did not appreciate that there was a high risk of bodily harm involved if . . . Pathway was used without the proper safety information and/or wearing protective gear.

(Dec. 22.) The employee avers it is impossible to believe the self-insurer was unaware of the dangers of Pathway prior to the investigation conducted by Pesticide Control in 1997. However, the administrative judge as factfinder, not the reviewing board, determines the credibility of witnesses and the weight given

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> certain circumstances by an employer's failure to act. Hanson v. L.G. Balfour Co., 6 Mass. Workers' Comp. Rep. 56 (1992). To support a finding of Section 28 willful and serious misconduct or reckless conduct, there must be a known or reasonably knowable "high degree of likelihood that substantial harm will result to another.["] Smith v. Raytheon, 9 Mass. Workers' Com. Rep. 477 (1995) . . . The conduct for a Section 28 finding is met when an employer or superintending individual does or fails to do an act that he, or a reasonable person would know or have reason to know will create an unreasonably high risk of bodily harm that involves a high degree of probability that substantial harm will result. [Id. at 481.]
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> The Restatement (Second) of Torts [comment a] notes that "Recklessness may consist of either two types of conduct. In one the actor knows, or has reason to know . . . of facts which create a high degree of risk of physical harm to another, and deliberately proceeds to act, or fail to act, in conscious disregard of, or indifference to, that risk. In the other the actor has such knowledge or reason to know, of the facts, but does not realize or appreciate the high degree of risk involved, although a reasonable man in his position would do so . . . For either type of reckless conduct, the actor must know, or have reason to know, the facts which create the risk. For either type of conduct . . . it must involve an easily perceptible danger of death, or substantial physical harm, and the probability that it will so result must be substantially greater than is required for ordinary negligence.["]

(Dec. 20-21.) See Drumm v. Viale Florist, 19 Mass. Workers' Comp. Rep. 206, 209 (2005).

to their testimony. G. L. c. 152, § 11C; Murphy v. Star Contractors, Inc., 17 Mass. Workers' Comp. Rep. 653, 656 (2003). The judge's credibility findings here are " 'factually warranted and not "arbitrary and capricious," in the sense of having adequate evidentiary and factual support and disclosing reasoned decision-making.' " Id. at 656-657, quoting Scheffler's Case, 419 Mass. 251, 258 (1994).

The employee argues that a § 28 violation can be found even if the self-insurer was unaware its conduct posed a high degree of substantial harm, if a reasonable person in its position should have appreciated the risk. The judge specifically cited that portion of the Restatement relied on by the employee, and found no violation. (Dec. 21.) Even if it was unreasonable and negligent for the self-insurer not to have been aware of the information in the Material Safety Data Sheets, and the licensing statute, we cannot say the judge's decision was incorrect as a matter of law. The judge found that, prior to the issuance of the Pesticide Bureau's report, the self-insurer performed some safety training regarding the handling of hazardous chemicals, and advised employees to bring cleaning materials to the field when using such chemicals. After the Pesticide Bureau's finding and warning letter issued, the self-insurer fully complied with the statute and regulations, even going so far as to stop using the chemical. We cannot say such conduct mandates a finding of the "reckless disregard of safety" necessary to prove a § 28 violation. See Thayer's Case, 345 Mass. 36, 40 (1962)(question of whether employee's injury caused by employer's serious and wilful misconduct is one of fact).

Next, the employee argues the § 11A report of Dr. Winters, relied upon by the judge, was erroneously admitted into evidence because it was not provided to the employee, the self-insurer and the Department within fourteen days of completion of the examination, as required by § 30A.[6] Our review of the record

[6] General Laws c. 152, § 30A, provides, in pertinent part:

reveals the employee voiced no objection to the report's admission. Accordingly, the issue has not been properly preserved for our consideration.[7] See Conrad v. McLean Hosp., 19 Mass. Workers Comp. Rep. 292, 293 (2006) and cases cited.

Accordingly, we affirm the decision.

So ordered.

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Mark D. Horan
Administrative Law Judge

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Patricia A. Costigan
Administrative Law Judge

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Martine Carroll
Administrative Law Judge

Filed: December 11, 2006

> Any medical report pertaining to an injury which appears to be compensable shall be furnished by the physician or other medical provider to the employee, the insurer and the department within fourteen days of completion of the examination of the employee. Each failure to comply with such reporting requirement shall be punishable by a civil fine to be determined by the director of administration, of not less than twenty-five nor greater than one thousand dollars.

[7] If it could be demonstrated that such an objection was made, we note that § 30A does not purport to govern the admission of medical evidence. Moreover, § 11A specifically provides, in pertinent part, that "[t]he report of the impartial medical examiner shall be admitted into evidence at the hearing." Even if it were posited that these statutes are in conflict, it is a well-established principle of statutory construction that:

> "Where there is one statute dealing with a subject in general and comprehensive terms, and another dealing with a part of the same subject in a more minute and definite way, the two should be read together and harmonized, if possible, with a view to giving effect to a consistent legislative policy; but to the extent of any necessary repugnancy, between them, the special statute, or the one dealing with common subject matter in a minute way, will prevail over the general statute."

Archer v. Turner Trucking & Salvage, 10 Mass. Workers' Comp. Rep. 166, 176 (1996), quoting 82 C.J.S. Statutes § 369 (§ 355 in 1999 ed.).