COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 024288-09**

Eliezer Colon-Torres	Employee
Joseph's Pasta	Employer
ACE Indemnity Insurance Co.	Insurer

REVIEWING BOARD DECISION
(Judges Fabricant, Koziol and Levine)

The case was heard by Administrative Judge Maher.

APPEARANCES
Michael D. Kantrovitz, Esq., for the employee
Maryann Calnan, Esq., for the insurer at hearing
Mark H. Likoff, Esq., for the insurer on appeal

FABRICANT, J. The insurer appeals from a decision ordering it to pay the employee ongoing benefits pursuant to § 34 and § 30 for his physical injury and its emotional sequela.[1] We recommit the case for the following reasons.

The employee, age twenty-six at hearing, immigrated to the United States from Puerto Rico in 2005, with a limited secondary education and without English language skills. Since then, he has worked primarily in positions involving heavy, unskilled labor requiring repetitive lifting and use of both upper extremities. His job for the employer involved placing boxes on pallets and moving the pallets. (Dec. 5-6.)

On September 22, 2009, his left major hand became caught in a pasta machine while he was helping a co-worker unjam it. He suffered crush and laceration injuries to his fingers, and was immediately taken to the emergency

[1] The insurer also alleged the judge erred by ordering the insurer to reimburse the Commonwealth for unemployment compensation received during the period of disability. This issue was withdrawn by joint stipulation of the parties following oral argument. (See Joint Stipulation dated November 28, 2012.)

room. On October 2, 2009, he had surgery on his left third finger to repair the tendon and radial digital nerve. (Dec. 5-6.; Ex. 1.)

The insurer paid compensation on a without prejudice basis until December 16, 2009. (Insurer's Notification of Termination or Modification of Weekly Compensation During Payment Without Prejudice Period, dated 12/9/09.) [2] Although the employee was able to return to modified work at that time, he "did not feel right," and did not like what people said to him. (Dec. 6; Tr. 21-22.) In June 2010, the employer scheduled him to return to his regular job, which he did not feel he could do. He began to have emotional symptoms, and on the day he was to return to regular duty, he contemplated suicide. He was admitted to Merrimack Hospital for eight days, where he began seeing the social worker with whom he still treats. (Dec. 2, 7.)

The employee filed claims for the physical injury to his hand, and for the psychiatric sequela of that injury. The § 10A conference order, awarding compensation for the physical injury but denying the psychiatric claim, was appealed by both parties. (Dec. 3.)

Prior to the hearing, the employee was scheduled for both orthopedic and psychiatric impartial examinations. The employee missed two scheduled psychiatric impartial evaluations and, as a result, the insurer suspended benefits on March 14, 2011. (Insurer br. 1; Insurer's Notice of Termination, 3/14/11.) The orthopedic impartial examination scheduled with Dr. David Morley was completed on July 15, 2011. (Dec. 8-9.) However, on July 25, 2011, before he was able to complete the last scheduled psychiatric impartial evaluation, Dr. Lloyd Price referred the employee to Emerson Hospital on an emergency basis after an expressed intent to commit suicide. (Dec. 4, 7; Ex. 8, Emerson Hospital Emergency Room reports 7/25/11.) Instead of rescheduling the psychiatric impartial examination, the judge determined that there was an "urgency . . . to

[2] We take judicial notice of documents in the board file. Rizzo v. M.B.T.A., 16 Mass. Workers' Comp. Rep. 160, 161 n. 3 (2002).

proceed," with the hearing, and he instead allowed the parties to submit additional medical evidence due to the complexity of the medical issues. (Dec. 4, 8.) Both parties did so. (Dec. 7, 8.)

Adopting Dr. Morley's opinion, the judge found the employee's hand injury was causally related to the work incident. The judge also found the employee was unable to return to his prior work, with the possible exception of his accommodated work which was no longer available, and was thus totally physically incapacitated and entitled to § 34 benefits, beginning on June 23, 2010. (Dec. 9, 12-13.)

Applying the simple "but for" causation standard applicable to the psychological sequela of a physical injury, the judge found the employee's emotional condition causally related to his workplace injury. (Dec. 12, 14.) He further found that, despite periods of "overlapping" incapacity due to his psychiatric condition between June 2010 and July 25, 2011, when Dr. Michael J. Doyle opined he was depressed but medically stable, the employee failed to prove ongoing psychiatric incapacity. (Dec. 13.) Regardless, treatment for the psychological condition was found to be reasonable and appropriate, and medical benefits were awarded. (Dec. 14.)[3]

The insurer first argues that the medical opinions relied upon in determining causation of the emotional injury are inadequate, even under the simple "but for" causation standard. (Ins. br. 7-9.) Although the employee acknowledges the judge has not adopted a clear expert opinion on causal relationship, he contends the adopted medical evidence and lay testimony as a whole establish causation to the requisite degree of probability. We disagree.

[3] On appeal, the insurer did not contest the judge's order that the insurer take credit for benefits paid; recover overpayments pursuant to § 11D; or reimburse the Commonwealth for any Transitional Assistance benefits paid during the period of disability pursuant to § 46A. (Dec. 14-15.) As noted supra, n. 1, following oral argument, the insurer stipulated to withdrawal of its appeal of the judge's order that the insurer reimburse the Commonwealth for unemployment compensation received during his period of incapacity.

"[T]he determination of causation . . . in any case involving a complicated medical issue, must be grounded in competent expert medical evidence that satisfies the applicable standard." Stewart's Case, 74 Mass. App. Ct. 919, 939 (2009). Under the simple "but for" causation standard applicable in this alleged psychological sequela of a physical injury, Cornetta's Case, 68 Mass. App. Ct. 107, 108 (2007), "a personal injury, to be compensable, need not be wholly caused by the employment; it is enough if the employment was one of the contributing factors in causing the injury." Nason, Koziol and Wall, Workers' Compensation § 9.3 (3rd ed. 2003); see Figueroa v. Advocates, Inc., 25 Mass. Workers' Comp. Rep. 245, 247-248 (2011). The employee is correct that there need not be a "conventional incantation of causal relationship." O'Brien v. Gillette Co., 15 Mass. Workers' Comp. Rep. 289, 292 (2001). Nonetheless, the medical opinion must be expressed in terms of probability, not possibility. Patterson v. Liberty Mut. Ins. Co., 48 Mass. App. Ct. 586, 592 (2000).

The medical opinions adopted by the judge do not meet this standard. Though they all indicate the employee is depressed, none indicate, with any degree of clarity, that the employee's depression was caused, to any extent, by his hand injury at work. The judge adopted portions of the medical opinions of doctors Sandra Aung, James Gottschall, Jeff Palacios and Michael J. Doyle. (Dec. 9.) All of these physicians opined that the employee was suffering from depression. Dr. Gottschall opined "[t]hat clearly his hand injury . . . has had some effect on him, in terms of his confidence and ability to do some things." (Dec. 10). Dr. Doyle offered no opinion on causation. Both Dr. Aung and Dr. Palacios appear to have applied the multiaxial assessment methodology utilized in the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders (4th ed. 2000)(hereinafter "DSM-IV"), but did not state a causal relationship opinion within the body of their reports. (Dec. 10-11, Ex. 8.)

The employee argues that the juxtaposition of a diagnosis of depression, with a diagnosis of physical injury within the application of the DSM-IV, means

that there is a causal connection between the physical injury and the psychological condition. There are, however, a number of problems with reliance on the DSM-IV to establish causal relationship. First, although both Dr. Aung and Dr. Palacios gave diagnoses based on the strictures of the DSM-IV, neither stated that the diagnosis of a hand injury and a diagnosis of a psychological condition in this context mean that the physical injury caused, to any extent, the psychological condition. In fact, their reports contain no explanation at all of the meaning of the various DSM-IV diagnoses with respect to causation. Further, the relevant portions of the DSM-IV were not introduced as evidence at hearing, nor was any request made that the judge take judicial notice of them.[4] Because the rules of evidence apply at Board hearings, "[n]othing can be considered or treated as evidence which is not introduced as such." Haley's Case, 356 Mass. 678, 682 (1970); McGrath v. NSTAR Elec. and Gas, 26 Mass. Workers' Comp. Rep. 113 (2012). This includes medical and scientific books.[5] See McGrath, supra (judge

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[4] Even had the employee requested that the judge take judicial notice of the DSM-IV to establish causal relationship, we are doubtful that it is appropriate to utilize it for this purpose:

> Judicial notice of the DSM-IV is approached with caution. "The DSM-IV itself cautions against the use of its diagnostic criteria and descriptions by individuals who are not clinically trained or for purposes other than diagnosis" (footnote omitted). Doe, Sex Offender Registry Bd. No. 89230 v. Sex Offender Registry Bd., 452 Mass. 764, 766 & n.20 (2008).

Tartarini v. Department of Mental Retardation, 82 Mass. App. Ct. 217, 227 n. 9 (2012)(noting interpretive problems in application of DSM-IV criteria); cf. Commonwealth v. Deschane, 77 Mass. App. Ct. 506, 515-516 and n.4 (2010)(appeals court took judicial notice of DSM-IV regarding characteristics and diagnosis of intermittent explosive disorder, cautioning that manual itself warns against use of its diagnostic criteria and descriptions by persons not clinically trained or for purposes other than diagnosis).

[5] In McGrath, supra, we quoted the following from Percoco's Case, 273 Mass. 429, 430-431 (1930):

> [o]pinions on medical matters or any other subject are not admissible except by testimony under oath and from a person skilled in such subjects. Statements

erred by relying on a hearsay source [The Johns Hopkins Consumer Guide to Drugs] to gauge side effects of employee's use of medications, and thus possibly to determine his credibility). Thus, to the extent the judge relied on the DSM-IV to make the causal link between the employee's hand injury and his psychological injury (a link omitted from both Dr. Aung's and Dr. Palacios's reports), he erroneously relied on an extrajudicial source. Had this been the only evidence under consideration, a reversal of the findings on causation would be warranted. However, as in Stewart's Case, supra at 939, there may be other admitted medical evidence, which, if credited, would potentially support the judge's causation conclusion. We therefore recommit the case for further findings on this issue.

The insurer next argues that the judge's findings do not support his decision to reinstate the employee's benefits, which had been suspended on March 14, 2011, after two missed psychiatric impartial examinations. The insurer acknowledges that the employee attended a third psychiatric § 11A examination with Dr. Price, but maintains that the judge's finding that "Dr. Price . . . could not complete [the examination] through no fault of the employee," (Dec. 4), does not sufficiently address why benefits were restored and not forfeited, despite the two previously missed appointments. (Ins. br. 10.) The employee does not allege that the insurer wrongly suspended his benefits after the first two missed examinations, and instead maintains that his attendance at the third examination, and the reasons for missing the first two examinations, warrant reinstatement of benefits after March 14, 2011, and further, that the judge's findings are sufficient to support

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contained in medical or scientific books cannot be used in evidence and counsel cannot be allowed to read to the jury from such works. To permit such evidence is to admit in evidence the statement of one, made out of court, not subject to cross-examination. The rule is stated in Commonwealth v. Jordan, 207 Mass. 259 at 271: ". . . medical books are not admissible in evidence for the purpose of showing the views entertained by their authors in regard to the matters in dispute."

such an award.[6] We agree that the judge's findings are sufficient to support reinstatement, but for somewhat different reasons than those cited by the employee.

General Laws. c. 152, § 11A(2), provides, in relevant part:

> Failure of an employee to report to an impartial medical examiner agreed upon or appointed under this section or under section eight, after due notice and without cause, and failure to submit to such examiner all relevant medical records, medical reports, medical histories, and any other relevant information requested without good reason, shall constitute sufficient cause for *suspension of benefits* pursuant to section forty-five.

General Laws. c. 152, § 45, provides, in part:

> If the employee refuses to submit to the examination or in any way obstructs it, his right to compensation shall be suspended, and his *compensation during the period of suspension may be forfeited*.

The accompanying regulations, 452 Code Mass. Regs. § 1.06(1), provide:

> Whenever the insurer or insured deems the employee to have refused to submit to, or in some way to have obstructed, a medical examination scheduled pursuant to M.G.L. c. 152, §§ 45 or 11A, it shall be entitled to suspend weekly benefits without an agreement, order or decision. Such a suspension of weekly compensation shall take effect only after the Department is notified on a form prescribed by the Department and when the insurer sends a written notice of the suspension to the employee and the employee's legal counsel, if any, by certified mail with a copy of the notice also sent to the department. Suspension cannot be commenced until the date the notice is mailed. Such notice shall state the grounds for the suspension and, except as to suspensions pursuant to M.G.L. c. 152, § 11A, shall contain notification of the re-examination date. The re-examination shall be scheduled to occur not less than seven days nor more than 21 days from the date of notice of the suspension**.** *Such notice shall also instruct the employee that attendance at, and cooperation with, the re-examination*

[6] At oral argument, the employee argued that the issue of forfeiture of benefits was not before the judge. (Tr. of Oral Argument, 45-52.) We address it because the insurer challenged the judge's reinstatement of benefits after their suspension. (Dec. 3.) Cf. Brown v. Highland House Apartments, 12 Mass. Workers' Comp. Rep. 322, 323 n.1 (1998)(where claim before board was insurer's claim for recoupment, and employee had filed no claim for restoration of benefits, reviewing board did not address § 45 issues).

> *shall result in reinstatement of weekly benefits and payment of benefits withheld during the period of such suspension.*
>
> *Should the claimant fail to appear at the re-examination, or in any way obstruct, or fail to cooperate at such re-examination, the suspension shall continue until an administrative judge makes a determination whether benefits should be forfeited.*

(Emphasis added.)

Thus, the statute and regulations contemplate that an insurer may unilaterally suspend an employee's benefits if it believes the employee has failed to attend a § 11A medical examination without cause. However, once an employee whose benefits have been suspended does "appear at" a medical examination, the insurer "shall" reinstate his benefits. Contrary to the insurer's assertion, only if the employee fails to appear at and cooperate with the re-examination, shall the suspension continue "until the judge makes a determination whether benefits should be forfeited." 452 Code Mass. Regs. § 1.06(1). Thus, a condition precedent to the requirement that the judge consider forfeiture is that the employee fail to attend and/or cooperate with the re-examination.[7]

Here, the judge's findings clearly indicate that the employee attended the re-examination scheduled after his benefits were suspended. Moreover, Dr. Price's inability to complete the examination was "*through no fault of the employee."* (Dec. 4.) In other words, it was not due to the obstruction or lack of cooperation by the employee. The criteria for a continuation of the suspension or for consideration by the judge of forfeiture ("failure to appear at the re-examination, or in any way obstruct, or fail to cooperate at such re-examination")

[7] In Rodrigues v. Ames Dept. Stores, 13 Mass. Workers' Comp. Rep. 286, 289 (1999), where employee failed to attend two impartial examinations, and insurer filed a motion for relief pursuant to § 11A(2) and § 45 seeking suspension and forfeiture of the employee's compensation, the judge did not err in ordering suspension but not ruling on forfeiture until further proceedings initiated; language of § 45, that the employee's benefits "may be forfeited" if he fails to attend an impartial examination, is discretionary.

have not been met.[8] Accordingly, we leave undisturbed the judge's finding reinstating benefits during the suspension.

Because the employee was found to be totally physically incapacitated from June 23, 2010, and continuing, we leave the award of §34 benefits undisturbed. (Dec. 12-13.) The case is recommitted solely for further findings on causal relationship of the employee's psychological condition to his work-related physical injury.

So ordered.

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Bernard W. Fabricant
Administrative Law Judge

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Catherine W. Koziol
Administrative Law Judge

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Frederick E. Levine
Administrative Law Judge

Filed: **May 7, 2013**

[8] See Beatty v. Harvard Univ., 26 Mass. Workers' Comp. Rep. 181, 186-187 (2012) (deference accorded to properly promulgated regulations which have a rational relationship to the goal or policies of the agency's enabling statute).