COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 039688-20**

Francine M. Kapinos	Employee
HSH Soldiers Home Holyoke	Employer
Commonwealth of Massachusetts	Self-Insurer

REVIEWING BOARD DECISION
(Judges Koziol, Fabricant and Long)

This case was heard by Administrative Judge Daniels.

APPEARANCES
Charles E. Dolan, Esq., for the employee
Joseph A. Clark, Esq., for the self-insurer

KOZIOL, J. The parties cross-appeal from a decision ordering the self-insurer to pay the employee a closed period of § 34 temporary total incapacity benefits from November 13, 2020, to November 29, 2022, along with §§ 13 and 30 medical benefits, and double compensation under § 28. Finding merit in the self-insurer's arguments, we vacate the decision and recommit the matter for further specific findings of fact and rulings of law regarding both the alleged series of events claimed by the employee as the cause of her alleged mental stress injury, and whether those events amounted to serious and willful misconduct on the part of the employer.

The undisputed facts are as follows. The employee, now 59 years old, began working as an LPN for the employer, in October of 1999. Immediately prior to the COVID-19 outbreak in March of 2020, the employee worked on the employer's end-of-life hospice unit rendering direct patient care to the Veteran residents in that unit, as well

as interacting with their family members. (Dec. 5.) The employee reported she had no difficulty doing her work until the arrival of COVID-19.[1]

In March of 2020, when the employer encountered its first suspected Veteran patient with COVID-19, the employer closed the hospice unit, which at the time had five patients and staff, and moved the patients and staff to 1 and 2 North. (Dec. 5-6.) After the closure of the hospice unit, the employee became the "go-between" nurse who floated between 1 and 2 North. (Dec. 7.) At the time of this move, the employee had no knowledge of any Veterans' deaths due to COVID-19, at the Holyoke Soldiers' Home (hereinafter, "HSH"). (Dec. 6.)

The employee testified in detail about events that happened on March 24, 2020, which was her last shift worked before she tested positive for COVID-19. That day, she provided direct patient care to a Veteran on 1 North who was suspected, and later confirmed, to have COVID-19. That same shift, she also provided direct patient care to two other Veterans on 2 North, both of whom had fevers with vomiting and diarrhea: one of whom had been her patient on the hospice unit. (Dec. 5-9.)

After completing her shift on March 24, 2020, the employee became ill with COVID-19, and was out of work through April 11, 2020, due to her own illness. While the employee was absent from work, the National Guard was called to the employer's facility and by April 2, 2020, there were 185 guardsmen on site. (Dec. 23.) Additionally, on March 30, 2020, again while the employee was out of work, Lynne Gidarakos began working at HSH as one of the employee's supervisors. (Dec. 22.) After her return to work on April 12, 2020, the employee testified to a series of additional incidents, culminating in an encounter with the new Director of Nursing on November 13, 2020. (Dec. 9-12.) Thereafter, the employee went out of work completely, using her sick and

[1] The employee had a medical history of depression, and took 5 mg. of Paxil or Paroxetine daily, "which allowed her to maintain full function of her duties and responsibilities" in this "high stress job." (Dec. 5.)

vacation time, and eventually FMLA. (Dec. 12.) In June of 2022, she submitted her retirement paperwork. (Dec. 12.)

The employee filed a claim for § 34 benefits on May 19, 2021, citing a date of injury of November 13, 2020, and alleging depression and anxiety from "COVID exposure, caring and watching COVID patients die." Rizzo v. M.B.T.A., 16 Mass. Workers' Comp. Rep. 160, 161 n.3 (2002)(reviewing board may take judicial notice of board file). The employee filed a second claim on September 2, 2021, seeking § 28 benefits.[2] Both claims were heard by the judge at a § 10A conference, and on September 7, 2021, the judge issued an order requiring the self-insurer to pay the employee § 34 benefits from May 17, 2021, to date and continuing, as well as § 13/30 medical benefits. The order was silent on the issue of § 28.[3] Rizzo, supra. The parties filed cross-appeals from the conference order, and on January 4, 2022, the employee was examined by an impartial medical examiner, psychiatrist Mark O. Cutler, M.D. Dr. Cutler's report of the same date was the subject of the self-insurer's motion for a finding of medical

[2] The attachments filed in support of the Employee's Claim, Form 110, consisted of a copy of a complaint for a class action lawsuit filed in Federal District Court on August 13, 2021, by employees of the HSH against former named managers and supervisors at HSH, alleging civil rights violations based on decisions the named defendants made from February 1, 2020, through April 1, 2020, a New York Times article, and transcripts from two different television news stations, "WCVB5abc" and "WWLP." Rizzo., supra.

[3] However, the judge's hearing decision states, and the parties do not disagree, that the judge allowed the employee's motion to join the claim for § 28 benefits at the conference, but he denied the § 28 claim at that time. (Dec. 2.)

G.L. c. 152, § 28 reads, in pertinent part:

> If the employee is injured by reason of the serious and wilful misconduct of an employer or any person regularly intrusted with and exercising the powers of superintendence, the amounts of compensation hereinafter provided shall be doubled. In case the employer is insured, he shall repay to the insurer the extra compensation paid to the employee. If a claim is made under this section, and the employer is insured, the employer may appear and defend against such claim only.

complexity, which the judge allowed, thereby permitting the parties to submit additional medical evidence. (Dec. 2, 14-21.)

The hearing took place over the course of two days, August 22, 2023, and August 23, 2023. (Dec. 2.) On April 26, 2024, the judge issued his hearing decision ordering the self-insurer to pay the employee § 34 benefits and §§ 13 and 30 medical benefits, from November 13, 2020, through November 29, 2022, as well as awarding § 28 benefits finding "the employee was injured by reason of the serious and willful misconduct of the employer." (Dec. 38.)

The self-insurer raised three issues on appeal, and the employee raised one issue on appeal. We address two of the arguments raised by the self-insurer because these claims of error require us to vacate the decision and recommit the matter for further findings of fact.

First, the self-insurer argues the judge erred in adopting the opinion of the impartial medical examiner, Dr. Cutler, to find the employee proved her entitlement to weekly benefits because his opinion was "premised on an inaccurate and false set of facts." (Self-insurer br. 21-23.) Dr. Cutler opined, "there is a definite causal relationship from the patient's post-traumatic stress disorder secondary to what she witnessed at the Holyoke Soldiers' Home and her perception of not having the emotional support," stating specifically, that she was a "witness of many soldiers' deaths who she had worked with for many years," and that was "a direct contributor to her post-traumatic stress disorder." (Ex. 1.) However, the evidence in the record regarding the employee witnessing patient deaths from COVID-19 is internally inconsistent, and the judge, who documented the conflicts in the evidence on this issue, as well as other alleged causative events, did not resolve those conflicts in his decision. Indeed, with the exception of the events that occurred on her last day worked in November of 2020,[4] we cannot tell from this decision

[4] The judge made express findings of fact and rulings of law regarding an incident that occurred on the employee's last day of work in November 2020, when she had a panic attack after an encounter with the new Director of Nursing. The judge found that the Director of Nursing's

what facts the judge found about this incident, or about the other specific incidents the employee alleged. The judge described the employee's claim as:

> a pure psychological injury culminating in her last day of work on November 13, 2020. The employee alleged that she was forced to return to work despite having symptoms of Covid-19, she was forced to watch as inadequate staffing, mismanagement and poor decision making of upper management caused several of her patients to die from preventable deaths [sic]. Moreover, she was not always afforded proper equipment to care for Covid-19 Veteran patients.

(Dec. 2.)

Brevity, usually the culprit in such circumstances, is not an issue here. Instead, the judge's single-spaced decision provides a recitation of the employee's testimony, (Dec. 5-12), an itemization of her own conflicting testimony on cross-examination, conflicting documentary evidence in the record, (Dec. 12-13), as well as recitations of testimony of other witnesses that also conflicted with her claims, (Dec. 22-23). Yet, the decision fails to state what facts the judge found regarding each alleged incident, inferences the judge

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remarks to the employee that day, in front of other staff, were humiliating and belittling and did not constitute a bona fide personnel action. (Dec. 12, 37-38.) The judge's decision states this incident occurred on November 12, 2020, (Dec. 12), and elsewhere states it occurred on November 13, 2020. (Dec. 34.) In any event, that particular incident was not separately discussed by Dr. Cutler who, without recounting any of the events of that day, mentioned only that the employee had a panic attack on her last day worked. (Exhibit 1.)

We observe that none of the employee's filings prior to her brief on appeal, cited the encounter with the new Director of Nursing on the employee's last workday, as part of the series of events causing her injury. The employee's claim spoke about COVID-19 exposure and witnessing deaths due to COVID-19. Rizzo, supra. The parties' joint pretrial memorandum acknowledged the employee alleged a psychological injury and stated the employee:

> was not only exposed to COVID-19, but tested positive approximately 3 times. Was made to work despite having several symptoms of the disease. Was forced to watch several of her patients die. Was not afforded proper equipment to care for COVID-19 patient. Suffers depression, PTSD, panic attacks due to environment. Was denied WC benefits forcing her to use her personal/sick/vacation and FMLA benefits.

Rizzo, supra. Her written closing argument and its accompanying proposed findings of fact also fail to mention this event or cite it as a causative factor in her case. (Employee's Closing Argument), Rizzo, supra.

drew from those facts, or how he resolved the conflicts in the evidence, if indeed he did. The judge stated only, "[o]verall, I find the employee's above testimony to be credible, including her ongoing complaints of pain and symptoms, and so adopt and find." (Dec. 14.) His conclusions regarding the employee's claim are similarly vague, "I find that the employee suffered an industrial accident arising out of and in the course of her employment with the date of injury being her last day worked on November 13, 2020."[5] (Dec. 34.)

The dearth of findings by the judge about the events alleged by the employee as the cause of her injury, presents us with a situation where we cannot "determine with reasonable certainty whether correct rules of law have been applied to facts that could be properly found." Praetz v. Factory Mut. Eng'g & Research, 7 Mass. Workers' Comp. Rep. 45, 46-47 (1993). We have no option but to vacate the decision and recommit the matter to the judge to find specific facts about the specific events claimed, and to then analyze the medical evidence in consideration of the facts found.

Although the issue of § 28 liability necessarily depends on the employee proving her underlying claim, we address the issue because the judge's decision supporting the claim is based on an error of law. The judge based the § 28 violation on a verbatim recitation of statements made, opinions, credibility findings and conclusions drawn in a document titled, "**The COVID-19 Outbreak at the Soldiers' Home in Holyoke**: An Independent Investigation Conducted for the Governor of Massachusetts, June 23, 2020,"

[5] The judge's failure to require the claim to be stated with particularity, on the record, at the start of the hearing may have led to his failure to address the issues in dispute. By failing to get a clear picture of the employee's claim at the start of the hearing, it was unclear from the outset precisely what events were at issue in this case. As shown by the employee's filings discussed supra. n. 4, her claim continued to morph during her testimony to include specific incidents on July 13, 2020, October 11, 2020, and November 13, 2020, all of which went beyond, and were far more specific, than the claim stated by the judge in his decision. The self-insurer did not take issue with this expansion of the dispute during the hearing and the parties clearly tried the additional encounters by consent. However, the result was that the judge failed to make findings, not only on the original claim he set forth in his decision, (Dec. 2), but also on each of the specific incidents discussed during the hearing. G.L. c. 152, § 11B.

(hereinafter referred to as the "Pearlstein report"; emphasis original). (Dec. 26-34, 35-37; Exhibit #7.)

On July 31, 2023, the self-insurer filed a motion seeking to exclude the report from evidence, asserting the document was not properly authenticated, it was hearsay, and it contained multi-level hearsay. Rizzo, supra. A motion hearing was held on the record on August 4, 2023. On August 10, 2023, the employee submitted a memorandum in support of the report's admission in evidence asserting, as she did during the motion hearing, that the report is admissible under Mass. G. Evid. § 801(d)(2)[6] as an admission of a party opponent. The following day, August 11, 2023, the judge issued his ruling, denying the self-insurer's motion to exclude the report "for the reasons stated in the Employee's 8-10-23 Memo of Law." Rizzo, supra. The self-insurer filed a motion for reconsideration with a memorandum in support thereof on August 16, 2023. The judge issued the following ruling on August 17, 2023:

> After reviewing the prior Motion and pleadings, the "Pearlstein" report (which is 174 pages long including a Table of Interviews and 932 References or Footnotes) and the Self-Insurer's thoughtful Motion for Reconsideration, I again deny the Motion to exclude this report. This is based upon the arguments and supports thereof by the Employee in the oral and written pleadings and under the auspices

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[6] Mass. G. Evid. § 801 states in pertinent part:

> **(d) Statements that are not hearsay**
> A statement that meets the following conditions is not hearsay:
>
> **(2) An opposing party's statement**
> The statement is offered against an opposing party and
> - **(A)** was made by the party;
> - **(B)** is one the party manifested that it adopted or believed to be true;
> - **(C)** was made by a person whom the party authorized to make a statement on the subject, or who was authorized to make true statements on the party's behalf concerning the subject matter;
> - **(D)** was made by the party's agent or employee on a matter within the scope of that relationship while it existed;

Mass. G. Evid. § 801(d)(2)(emphasis original).

> of Section 11 of the statute. I will allow additional Hearing dates if the Self-Insurer needs them to submit additional evidence or testimony.

Motion Ruling August 17, 2023; Rizzo, supra.

It is important to note that the employee provided no alternative ground for the report's admission other than as substantive evidence of the truth of the matters asserted therein. The employee argued:

> The report was created at the direction of the chief executive of the Executive Branch who directly oversees, manages, and controls the Department and the Soldiers' Home, as such, it is a statement that is made by a party to this action and is being offered against the party. *See, Section 801(d)(2)(A).* It is a statement that the opposing party has manifested that is [sic] has adopted and believes it to be true. *See, Section 801(d)(2)(B).* This would include admissions by silence. It must be apparent that the party heard and understood the statements, had an opportunity to respond, and the context was one in which the party would have been expected to respond. The Report was made by a person whom the party authorized to make a statement on the subject or who was authorized to make true statements on the party's behalf concerning the subject matter. *See, Section 801(d)(2)(C).* The report was made by the agent or employee on a matter within the scope of that relationship while it existed. *See Section 801(d)(2)(D).*

Employee's 8-10-23 Memorandum of Law (case citations omitted, emphasis original); Rizzo, supra. The judge's ruling fails to state which ground he found to be applicable but, regardless of which one he found persuasive, we disagree.

By virtue of the employee's § 28 claim, the parties to this action consist of the employer (HSH), the self-insurer, and the employee. G.L. c. 152, § 28. The Governor is not the employee's employer, nor is the Governor a party to this workers' compensation action, and as such the results of any independent investigation conducted for the Governor cannot be considered an admission of a party opponent. To allow the report to be used in the manner suggested by, and in fact used by, the judge would create a chilling effect on the executive branch of government's voluntary conduct of investigations where such investigations are vital, not only to identify problems, but also to offer solutions to allow for better delivery of services to the citizens of the Commonwealth and, in this

particular case, to the Veterans who reside in HSH and the staff and professionals who care for them.

We also agree with the self-insurer that the report, by its own terms shows that it more aptly fits in the category of a record of an "evaluative report" conducted on behalf of a public official, "concerning causes and effects involving the exercise of judgement and discretion, expressions of opinions, and making conclusions."[7] Herson v. New Boston Garden Corp., 40 Mass. App. Ct. 779, 792 (1996); Mass. G. Evid. § 803(8)(C).[8] But there is no hearsay exception permitting the admission of, " 'evaluative reports' or

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[7] The Pearlstein report states in pertinent part:

> On April 1, 2020, Governor Baker retained Mark W. Pearlstein of McDermott Will & Emery LLP ("McDermott") to investigate the COVID-19 outbreak at the Soldiers' Home. We have been tasked with answering three questions.
>
> - First, what caused and contributed to the COVID-19 outbreak at the Soldiers' Home?
> - Second, did the Soldiers' Home leadership comply with applicable requirements to provide timely and accurate counts of the number of infected patients and staff, and the number of deaths associated with COVID-19?
> - Third, what if anything can be done in the future to prevent or reduce the likelihood of a similar outbreak?

(Pearlstein report, 18-19; Ex. 7.)

[8] Mass. G. Evid. § 803 "Hearsay exceptions; availability of declarant immaterial" states in pertinent part:

> The following are not excluded by the hearsay rule, even though the declarant is available as a witness:
>
> **(8) Official/public records and reports**
>
> **(C) Record of investigations**
> Record of investigations and inquiries conducted, either voluntary or pursuant to requirement of law, by public officers concerning causes and effects involving the exercise of judgment and discretion, expressions of opinion, and making conclusions are not admissible in evidence as public records, unless specifically authorized by statute.

Mass. G. Evid. § 803(8)(C)(emphasis original).

the opinions or conclusions in government reports." Id.; Mattoon v. City of Pittsfield, 56 Mass. App. Ct. 124, 135 (2002). Accordingly, based on the sole ground advanced by the employee for its admission, we believe that the judge erred in admitting the Pearlstein report over the self-insurer's objections.

Even if we are incorrect, and Mr. Pearlstein may be considered an agent of the Governor and the Governor may be considered the employer, and all the material sought to be admitted could be considered for the truth of the matter asserted, the judge did not appear to make any findings under Mass. G. Evid. § 403.[9] Ruszcyk v. Secretary of Pub. Safety, 401 Mass. 418, 420-423 (1988)(even if admissible under Mass. G. Evid. 801(d)(2), judge must next "determine whether the probative value of the evidence is substantially outweighed by its potential for unfair prejudice to the opponent of its admissibility").

Despite the employee's assertion that, "[w]hile not every detail of the report might apply to the issues of the employee's claim this Court has both the sophistication and discretion to ferret out those portions it might find as not material or relevant," the record proves otherwise. Employee's Memorandum of Law 8/10/23; Rizzo, supra. The dangers inherent in admitting such a report without conducting this portion of the analysis become readily apparent when viewed in light of what the judge did with the material contained in the report. Specifically, the decision discusses in considerable detail, the events that occurred at the HSH between March 27 and March 30, 2020, which was the date the Commonwealth's emergency response team arrived at the HSH. Yet, the

[9] Mass. G. Evid. § 403. "Excluding relevant evidence for prejudice, confusion, waste of time or other reasons" states:

> The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence. However, prior bad act evidence should be excluded if the court finds that its probative value is outweighed by the risk of unfair prejudice to the defendant, even if not substantially outweighed by that risk.

employee was not reporting to work during that timeframe as she was, herself, quite ill from Covid-19, and she remained out of work through April 11, 2020.

The judge quoted extensively from the report concerning, "the worst decision made . . . [which] occurred on the afternoon of March 27, 2020," when management made the decision, due to "staffing shortage," to combine two locked dementia units, and discussing the fallout from that decision; specifically, the events that occurred through March 30, 2020, and the conditions found by the emergency response team members when they arrived on March 30th. (Dec. 29-32, 33.) He also stated, "I credit and adopt the investigation's findings of fact." (Dec. 34.) In his analysis, he reiterated the report's opinions, credibility assessments, findings and conclusions regarding the "catastrophic decision" of March 27, 2020, summarizing it, in boldface type, and used that information as the basis for his ruling supporting the employee's § 28 claim. (Dec. 35-37.) Although the judge acknowledged that the employee was not at work during those events, he concluded those events, nonetheless, caused her injury and that "the leadership team knew or should have known their erroneous decisions were likely to create an unreasonably high risk of bodily harm that involves a high degree of probability that substantial harm would result . . . to not only the veterans but also to the HSH staff, including the employee." (Dec. 37.) Neither the employee nor the judge cites any case where events occurring at a place of employment when an employee is not present at work, which events did not directly implicate the employee, or require the employee's participation, can serve as the basis for a § 28 violation, let alone as the basis of an underlying workers' compensation claim. We do not agree that the law may be stretched that far.

Accordingly, we also vacate the decision of the administrative judge on the issue of § 28. In light of our exclusion of the Pearlstein report, the judge on recommittal may allow the employee to produce additional witnesses to support her § 28 claim, and her underlying claim. In any event, the judge must make his own findings of fact and

conclusions of law on this and the other issues at hearing, based solely on the evidence before him.

So ordered.

Catherine Watson Koziol
Administrative Law Judge

Bernard W. Fabricant
Administrative Law Judge

Martin J. Long
Administrative Law Judge

Filed: **November 13, 2024**