COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 001985-99**

Gail Dunlevy Employee
Tewksbury Hospital Employer
Commonwealth of Massachusetts Self-insurer

REVIEWING BOARD DECISION
(Judges McCarthy, Wilson and Maze-Rothstein)

APPEARANCES
Martin J. Long, Esq., for the employee
Omar Hernandez, Esq., for the self-insurer

MCCARTHY, J. The self-insurer appeals a hearing decision awarding the employee G. L. c. 152, § 34 weekly total incapacity benefits for an emotional injury found by the judge to be causally related to a compensable back injury. The self-insurer argues that 1) its termination of weekly benefits during the payment without prejudice period amounts to a bona fide personnel action pursuant to G. L. c. 152, § 1(7A),[1] and 2) that the evidence is insufficient to establish causal relationship between the industrial back injury and the claimed psychiatric injury. We affirm the decision.

Gail Dunlevy sustained an injury to her back on January 14, 1999 while lifting a patient in the course of her employment as a registered nurse with the Tewksbury Hospital where she had worked since 1996. (Dec. 5.) She made a brief, unsuccessful attempt to return to her nursing work but stopped later that same month. She has not worked since. Id.

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[1] General Laws c. 152, § 1 (7A), amended by St. 1991, c. 398, §§ 13 to 15, provides in pertinent part:

> 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.

The self-insurer began payment without prejudice of weekly incapacity and medical benefits, and then, on May 4, 1999, discontinued all benefits after giving the employee the required notice under § 8(1). (Dec. 5.) A claim was filed and by conference order, the self-insurer was directed to begin payment of medical benefits for treatment of the back injury. Id. The employee appealed and later a motion by the employee to join a claim for psychiatric injury was allowed. Id. The self-insurer did not appeal the order but did move for a finding of medical complexity. This motion was allowed as well.

At hearing, the employee testified that following her industrial accident, she became increasingly depressed due to her inability to do any of her regular activities. (Dec. 16.) She described herself as doing very well emotionally prior to her back injury. Id. Eventually, she began training to run in the Boston Marathon, believing the enormous physical effort involved would help her to better cope with her depression. (Dec. 16.) Ms. Dunlevy successfully completed the marathon. Days later, the self-insurer notified her that her workers' compensation benefits would be terminated; she started going downhill emotionally. Id. She was admitted to the psychiatric unit of the Emerson Hospital and then the McLean Hospital from May 6, 1999 through sometime in October of 1999; there was a second admission to Emerson on August 13, 2000 through September 6, 2000. (Dec. 8.) She was readmitted to the Emerson psychiatric unit on September 13, 2000 and remained there through October 3, 2000. (Dec. 9.)

Doctor Stuart Grassian, a psychiatrist, examined the employee on June 19, 2000, pursuant to G. L. c. 152, § 11A. He noted that the employee has a history of compulsive exercising and was driven to be active and productive. (Statutory Exhibit #1.) The § 11A physician further indicated that the employee has a history of prior psychiatric difficulties which she coped with through compulsive activity and productivity. According to Dr. Grassian, the notification of termination of her benefits plunged Ms. Dunlevy into a deeper despair and she became acutely suicidal. Id. He diagnosed the

employee's condition as severe major depression with severe suicidality causally connected to Ms. Dunlevy's work injury of January 1999. Id.[2]

In response to the judge's allowance of the motion for submission of additional medical evidence due to complexity, the employee submitted the report of Dr. Robert Stern, a board certified psychiatrist who began treating the employee during her May 6, 1999 stay at the Emerson psychiatric unit. (Dec. 14.)[3] He diagnosed her as suffering from major depression, indicating that the back injury prevented her from doing the work she loved, interfered with her compulsive exercising, and added to her sense that life was boring and empty, which later appeared at the core of her suicidal preoccupation. (Employee Exhibit #2.) Doctor Stern further opined that rather than viewing her orthopedic injuries as warnings to slow down and recuperate, the employee saw them as examples of her growing emptiness and helplessness, which led to her subsequent behaviors. Id.

The judge then made the following general findings:

LIABILITY

> I find that the Employee sustained a work-related back injury on January 14, 1999. I further find and adopt the opinion of Dr. Grassian, that the Employee was not psychiatrically ill with major depression at the time of that injury. I further find and adopt Dr. Grassian's opinion that as a result of that back injury on January 14, 1999 the Employee subsequently became psychiatrically ill with major depression. With the termination of her §34 benefits the Employee's condition worsened and eventually led to several hospitalizations some of which followed attempts at suicide.

DISABILITY AND INCAPACITY

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[2] The judge found the § 11A physician's report inadequate for the "gap period" commencing from the claimed date of injury until the time of his examination (January 14, 1999 through June 19, 2000). (Dec. 14.) See Jenkins v. Nauset, Inc., 15 Mass. Workers' Comp. Rep. 187 (2001)(judge may require additional medical evidence for the "gap period" prior to the date of the § 11A examination).

[3] The self-insurer did not submit any additional medical evidence.

> I find and adopt in part the opinions of Dr. Grassian and Dr. Stern and find that the Employee continues to be totally disabled and incapacitated from meaningful work, at this time, due to her diagnosed Major Depression condition.

CAUSAL RELATIONSHIP

> I find and adopt the opinions of Dr. Grassian and Dr. Stern that the Employee's diagnosed psychiatric illness is causally related to her work injury of January 14, 1999.

SECTION 13 & 30 BENEFITS

> I find the Employee's orthopedic and psychiatric treatment to be reasonable and necessary as related to the industrial injury of January 14, 1999.

(Dec. 18 -19.)

The judge then concluded his decision by awarding weekly temporary total incapacity compensation under § 34, reasonable and related medical expenses under § 30 and attorney's fees and expenses pursuant to § 13A(5). (Dec. 19-20.)

On appeal, the self-insurer first contends that the termination of benefits by the self-insurer amounted to a bona fide personnel action and that any emotional disability deriving therefrom is, by definition, not a personal injury and thus not compensable under § 1(7A).[4] We disagree.

Various definitions found in G. L. c. 152, § 1, satisfy us that this argument is unavailing. Section 1(4) defines an employee as "every person in the service of another under any contract of hire, express or implied, oral or written . . . ." The word "employer" is defined in § 1(5) as "an individual, partnership, association, corporation or other legal entity, . . . employing employees subject to this chapter . . . ."

> Section 1(7) describes an "Insurer" as "any insurance company . . . which has contracted with an employer to pay the compensation provided for by this chapter. The term 'insurer' within this definition shall include,

[4] The self-insurer does not argue and therefore we do not consider it whether as a matter of law, an insurer exercising its rights under c. 152 cannot be liable for an employee's adverse reaction thereto.

> wherever applicable, a self-insurer, the commonwealth and any county, city, town, or district which has accepted the provisions of section sixty-nine of this chapter . . . ."

No issue has been raised with respect to the status of Ms. Dunlevy and Tewksbury Hospital. Ms. Dunlevy is the "employee" and the hospital is the "employer." The decision identifies the "Commonwealth of Massachusetts" as the self-insurer of the hospital; neither party disagrees.

Nothing in the above cited definitions authorize an insurer (or self-insurer) to take a bona fide personnel action with respect to an employee of an employer insured by that insurer. The insurer contracts to pay c. 152 benefits to entitled employees. The insurer has no statutory authority to take personnel actions such as transferring, promoting, demoting or terminating its insured's employees. The word "personnel" is defined as the body of persons employed by or active in an organization or business. The American Heritage Dictionary (2nd college ed. 1999). It is employers, not insurers, who engage in personnel actions.

The self-insurer here was free at the outset of this claim to accept liability and pay Ms. Dunlevy or to deny her claim, or, as it did here, pay her benefits without prejudice. [5] To characterize a payment without prejudice as a bona fide personnel action is inconsistent with G. L. c. 152, § 1. It is, of course, the exclusive prerogative of the legislature to amend § 1. Accordingly, we reject the self-insurer's argument as we are satisfied that bona fide personnel events are actions uniquely taken by an employer, not an insurer or self-insurer.

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[5] General Laws c. 152, § 8(1), as amended by St. 1991, c. 398, §§ 23 to 25, provides in pertinent part:

> An insurer which makes timely payments pursuant to subsection one of section seven, may make such payments for a period of one hundred eighty calendar days from the commencement of disability without affecting its right to contest any issue arising under this chapter. An insurer may terminate or modify payments at any time within such one hundred eighty day period without penalty if such change is based on the actual income of the employee or if it gives the employee and the division of administration at least seven days written notice of its intent to stop or modify payments and contest any claim filed . . . .

The other argument of the self-insurer is that the evidence is insufficient to support the finding of causal relationship between the industrial injury and the psychological disability. In 1991 the compensability threshold for mental or emotional injuries was raised legislatively.[6]

Whether the heightened causal relationship standard set out in § 1(7A) might have applied in the case at hand is academic. Since the self-insurer did not raise § 1(7A) at hearing it may not now raise the issue on appeal. Objections, issues or claims - - however meritorious - - that have not been raised below, are waived on appeal. Phillips' Case, 278 Mass. 194, 196 (1932). Taylor v. Morton Hosp. and Medical Ctr. Inc., 16 Mass. Workers' Comp. Rep. 30, 33 (2002); Green v. Town of Brookline, 53 Mass. App. Ct. 120, 128 (2001), citing Wynn & Wynn, P.C., v. Mass. Comm. Against Discrimination, 431 Mass. 655, 674 (2000). This rule applies to arguments that could have been raised before an administrative agency but were not. Green, supra. See also Dudley v. Yellow Freight Sys., Inc., 15 Mass. Workers' Comp. Rep. 204 (2001)(issues not raised below cannot properly be raised for the first time on appeal). See also Fairfield v. Communities United, 14 Mass. Workers' Comp. Rep. 79 (2000) (insurer's burden of production under § 1(7A)). If the self-insurer wanted to take advantage of the heightened standard of causation, it had the burden of raising § 1(7A) prior to this appeal and producing evidence at hearing that the employee came within the terms of the statute.

We note in passing that even if § 1(7A) had been put in issue, the outcome would not be different. An earlier version of § 1(7A),[7] which set forth the standard as "a

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[6] General Laws c. 152, § 1(7A), provides in part as follows:

> 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.

[7] As of January 1, 1986, G. L. c. 152, § 1(7A), as amended by St. 1986, c. 662, § 5 provided in pertinent part:

> Personal injuries shall include mental or emotional disabilities only where a significant contributing cause of such disability is an event or series of events occurring within the employment.

significant contributing cause," has been interpreted by the reviewing board as not applying to mental or emotional disabilities which arise as sequelae to physical workplace injuries. Cirignano v. Globe Nickel Plating, 11 Mass. Workers' Comp. Rep. 17 (1997). A mental disability that is a direct consequence of a physical work injury is a link in an uninterrupted chain of causation, and must be evaluated under causal chain standards. Id at 23. The judge must ask, "but for" the physical injury would the psychiatric condition have occurred? Where evidence reveals no explanation or intervening cause beyond the industrial injury, it follows that the condition is yet another link extending the causal chain. Id., citing L. Locke, Workmen's Compensation, § 222 (1984).

The medical evidence adopted, including the § 11A opinion, that the employee, prior to her back injury, had been able to manage her life without manifesting much in the way of underlying depression and that the experience of not being able to be productive was "catastrophic," adequately supports the judge's conclusion that the employee was not psychiatrically ill with major depression at the time of the orthopedic injury and that as a result of that injury she subsequently became emotionally disabled.[8] (Dec. 12; see also Grassian Dep. 16-18, 21-22.) Given these facts found by the judge, a finding of psychiatric illness with major depression subsequent to the employee's back injury with a worsening upon termination of benefits is not arbitrary, capricious or wrong as a matter of law.[9]

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[8] The self-insurer in this appeal does not contest the judge's finding as to the extent or duration of the employee's incapacity.

[9] The employee suffered from depression prior to injuring her back on January 14, 1999. This pre-existing non-work related condition would put into play yet another standard of causation. That standard appears in the fourth sentence of § 1 (7A).

> If a compensable injury or disease combines with a pre-existing condition, which resulted from an injury or disease not compensable under this chapter, to cause or prolong disability or a need for treatment, the resultant condition shall be compensable only to the extent such compensable injury or disease remains a major but not necessarily predominant cause of disability or need for treatment.

Because the judge's findings are sufficiently supported by the record and the applicable law properly applied, we affirm.

The self-insurer is directed to pay employee counsel a fee of $1,321.63, plus necessary expenses pursuant to § 13A(6).

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William A. McCarthy
Administrative Law Judge

Filed: **March 3, 2003**

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Sara Holmes Wilson
Administrative Law Judge

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Susan Maze-Rothstein
Administrative Law Judge

If § 1 (7A) had been raised, the judge would have been required to make a finding as to whether or not the compensable depression which followed the back injury remained a major but not necessarily predominant cause of disability. See Lagos v. Jennings, Inc., 11 Mass. Workers' Comp. Rep. 109 (1997). The opinion of Dr. Grassian adopted by the judge meets this elevated standard.