COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS

BOARD NO. 039343-07

George Eterly	Employee
Nypro	Employer
American Home Assurance Co.	Insurer

REVIEWING BOARD DECISION
(Judges Koziol, Costigan and Horan)

The case was heard by Administrative Judge Rose.

APPEARANCES
Charles E. Berg, Esq., for the employee at hearing and on appeal
James N. Ellis, Esq., for the employee on appeal
Michael P. Mahany, Esq., for the insurer at hearing
William M. LeDoux, Esq., for the insurer on appeal

KOZIOL, J. The employee appeals from a decision denying and dismissing his claim for weekly incapacity and medical benefits based on a psychiatric injury he allegedly sustained as a result of being touched on the forehead by a supervisor at work. The employee argues the judge erred by substituting his judgment for the opinion of the impartial medical examiner, Dr. Zamir Nestelbaum, regarding whether the employee's "morbid emotional or psychological reaction to an admittedly inappropriate touching disabled him." Employee br. 2, 23-24, 28. For the reasons that follow, we affirm.

The incident occurred on July 13, 2007, when the employee and a coworker brought a part to a supervisor for her opinion. The judge credited the supervisor's testimony that while she was looking at the part, she "touched [the employee's] forehead with her fingertips to get his attention, and when she found him later in the lunch room, he was eating." (Dec. 4.) The judge also found "credible that along with other co-workers, the employee himself laughed at the incident, which I reasonably infer contradicts the employee's version." (Dec. 4.) The judge

expressly did not credit the employee's testimony that he developed an immediate severe headache after the incident, and other physical symptoms consisting of back and leg pains. (Dec. 3, 4-5.) The judge further found:

> I do not find credible that following the incident the employee felt 'scared to get along with people because they might hit him'. Transcript page 20. The employee alleges his co-workers and friends repeatedly called him and visited him to tease him regarding this incident. Transcript pages 22, 24 & 29. I find the employee's testimony as to his friends [sic] repeated teasing entirely not credible.

(Dec. 5.)

In contrast to the facts found by the judge, Dr. Nestelbaum's opinion was based on the following alleged facts. The employee's supervisor "slapped him quite hard on the forehead" with an "open hand," causing the employee to "immediately develop[] a headache that was quite severe on the top of his head in the vicinity of the assault." The employee then "went to the cafeteria to collect himself," and was "also taunted by his co-workers after he was hit and was observed crying."[1] (Ex. 4, 1, 2.) The doctor also reported, "[h]e states that he felt humiliated, embarrassed and depressed on the day of the assault." (Ex. 4, 2.)

On appeal, the employee asserts that by finding the employee's *response* to the event was not credible, the judge impermissibly substituted his judgment for that of the § 11A impartial medical examiner, Dr. Nestelbaum, who opined the employee's initial twelve month period of disability was causally related to the employee's emotional reaction to the workplace event. (Employee br. 2, 23-24, 28.) Although not cited by either party on appeal, the concept argued by the employee reflects the rule set forth in Payton v. Saint Gobain Norton Co., 21 Mass. Workers' Comp. Rep. 297 (2007). However, the present case materially differs from Payton.

[1] The record is devoid of any testimony that the employee "was observed crying" after the incident. Contrast, Ex. 4, 2.

In Payton, the judge did not discredit the employee's account of the occurrence of the work-related incidents, which the impartial physician found caused his psychiatric injury; rather, the judge relied instead on his opinion concerning the *effect* those incidents had on the employee's mental health. Id. at 306-307. We held the judge erred in rejecting the impartial medical examiner's uncontroverted opinion where "[t]here is no indication in the judge's findings that he discredited the employee's testimony describing numerous incidents of racial harrassment;" the judge impermissibly "applied an objective standard in determining whether the events were stressful;" and the judge relied on his own causation opinion finding other incidents "were far more upsetting [to the employee]," than the incidents of racial harrassment. Id.

Here, in contrast, the judge found the incident, and events occurring immediately after the incident, did not occur in the manner reported by the employee. "[T]he [impartial medical examiner]'s report is not entitled to any weight unless the fact finder believes the facts on which the report is based." Brommage's Case, 75 Mass. App. Ct. 825, 828 (2009); Tucker v. Stanley & Sons, Inc., 24 Mass. Workers' Comp. Rep. __ (October 5, 2010). Indeed, this was the reason the judge rejected the impartial physician's opinions.

> In conclusion, the employee has not presented a truthful factual basis upon which a medical opinion could be given. His testimony is replete with falsehoods, half-truths, gross exaggerations and evasion. That being said, I note that the 11A physcian had some doubts as to the employee's veracity. Deposition Dr. Nestelbaum page 15. I find the employee has failed his burden to show a credible psychiatric or physical personal injury under Chapter 152, arising out of the inappropriate touching incident of July 13, 2007. Therefore his claims are denied.

(Dec. 6-7.)

Although the judge found the supervisor had inappropriately touched the employee, it remained a medical question whether the incident, as the judge found it to have occurred, caused the employee's major depression. Dr. Nestelbaum testified his opinions were based on the history he obtained from the employee and

the history provided in the employee's medical records.[2] (Dep. 7-8, 9, 26, 27-28.) Despite the doctor's acknowledgement that the employee's credibility was an important factor in his ability to render an opinion, (Dep. 28), the doctor was not asked to render an opinion assuming the facts ulitmately found by the judge. As a result, the doctor did not provide any opinion based on those facts. It "is the long held rule that the employee has the burden of proving the essential facts necessary to establish a case warranting the payment of compensation." Viveiros's Case, 53 Mass. App. Ct. 296, 299 (2001), citing Sponatski's Case, 220 Mass. 526, 527-528 (1915) and Patterson v. Liberty Mut. Ins. Co., 48 Mass. App. Ct. 586, 592 (2000). Without a medical opinion based on the facts found by the judge, the employee cannot prevail.[3] Accordingly, the decision is affirmed.

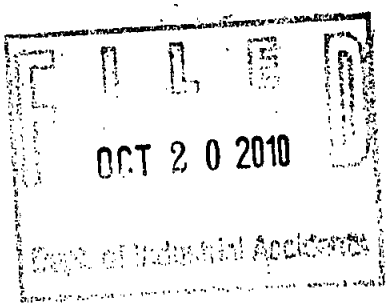
So ordered.

Catherine Watson Koziol
Administrative Law Judge

Patricia A. Costigan
Administrative Law Judge

Mark D. Horan
Administrative Law Judge

Filed:



[2] Indeed, Dr. Nestelbaum's report states, "[a]ccording to the Clinton Hospital records this slap was with an open hand." Ex. 4, 2.

[3] Neither party filed a motion requesting permission to submit additional medical evidence. "As the request was never made, it was not incumbent upon the administrative judge to order it sua sponte." Viveiros's Case, supra at 300.