COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 008294-10**

George Modica	Employee
Suffolk County Sheriff's Department	Employer
Commonwealth of Massachusetts	Self-Insurer

REVIEWING BOARD DECISION
(Judges Horan, Levine and Calliotte)

The case was heard by Administrative Judge Preston.

APPEARANCES
Michael C. Akashian, Esq. for the employee
Arthur Jackson, Esq., for the self-insurer

HORAN, J. The self-insurer appeals from a decision awarding the employee §§ 34 and 35 incapacity benefits. We affirm the judge's rejection of the self-insurer's § 1(7A) defense, but vacate the award of § 34 benefits and recommit the case for further findings of fact on the issue of the employee's earning capacity.

The employee worked for the self-insurer as a corrections officer. In March and April of 2010, the employee was called upon to break up fights between inmates. Though not physically injured, the employee experienced symptoms consistent with an anxiety disorder, and left work.[1] (Dec. 4-5.) The self-insurer voluntarily paid § 34 benefits to the employee from April 8, 2010, to July 10, 2010. When it terminated benefits effective July 20, 2010, the self-insurer raised the defenses of disability and causal relationship only. (Form 106, July 1, 2010.) The employee filed a claim for further benefits, which the self-insurer denied, relying on the defenses it raised previously. (Form 110, July 15, 2010; Form 104, July 19, 2010.)

[1] The employee reportedly experienced shortness of breath, an elevated heart rate, and high blood pressure. (Employer's First Report of Injury, April 23, 2010.) We take judicial notice of the board file. Rizzo v. M.B.T.A., 16 Mass. Workers' Comp. Rep. 160, 161 n.3 (2002).

At the § 10A conference on the employee's claim, the self-insurer raised the defenses of liability, disability and the extent thereof, causal relationship, and § 1(7A). (Form 140, December 13, 2010.) The judge issued a conference order awarding the employee § 34 benefits from July 20, 2010, to date and continuing. The self-insurer appealed and, pursuant to § 11A, the employee was examined on March 14, 2011, by Dr. B. D. Gupta. Based on the opinions expressed in Dr. Gupta's report, in combination with its offer of suitable work, the self-insurer terminated the employee's benefits effective May 31, 2011.[2] (Form 107, May 24, 2011.) The self-insurer then withdrew its appeal of the conference order. (Form 109, June 30, 2011.)

The employee filed a second claim for additional incapacity and medical benefits, and sought penalties under §§ 8 and 14. At the following conference, the self-insurer raised the defenses of disability and the extent thereof, and causal relationship; it also denied the employee's §§ 8 and 14 claims. (Form 140, August 29, 2011.) On August 30, 2011, the judge ordered the self-insurer to pay the employee § 34 benefits ongoing from June 1, 2011, but denied the employee's §§ 8 and 14 claims. Only the self-insurer appealed the conference order and, on November 21, 2011, the employee was examined by impartial medical examiner Dr. L. Howard Hartley.

At the hearing, the employee claimed § 34 benefits from June 1, 2011, to March 8, 2012, and § 35 benefits from March 9, 2012, and continuing. In defense of these claims, the self-insurer raised, inter alia, the defenses of disability and the extent thereof, causal relationship, and § 1(7A)(pre-existing condition); it did not raise liability. (Dec. 3; Ex. 3; Tr. 5.) In light of the self-insurer's "§ 1(7A), pre-existing condition" defense, and "the complexity of the medical issues involved," the judge, sua sponte, authorized the parties to submit additional medical evidence. (Dec. 3; Tr. 37.) Both parties offered medical reports into evidence. (Exs. 8, 9.) Because the

[2] See General Laws c. 152, § 8(2)(d).

self-insurer had paid the employee § 34 benefits up to June 1, 2011, the judge framed the "Issues in Controversy" as:

1. What is the Employee's capacity for work after June 1, 2011.
2. Is his claimed incapacity causally related to his industrial accident.
3. Are penalties due and owing pursuant to Section 8 and/or 14.[3]

(Dec. 4.)[4]

The judge credited the employee's testimony, and adopted portions of the medical opinions of Dr. Hartley and Dr. Michael Yoon, to conclude, inter alia, that:

1. the employee did not have a prior medical condition "of anxiety nor any cardiac dysfunction;"
2. he "carries a diagnosis of inappropriate tachycardia with presyncopal symptoms which produce an inappropriate heart rate response to stress and strenuous activity" which is not "a cardiac diagnosis;"
3. "the employee is unable to work in a stressful situation and cannot return to work as a corrections officer;"
4. "the anxiety reaction he sustained was caused by work place events" and that the employee's "physiological reaction was precipitated by work;" and
5. that "the employee can likely perform other work not involving such stressors as experienced by" a corrections officer.

---

[3] Because the employee did not appeal the conference order, the issue of penalties was not properly before the judge at hearing. (G. L. c. 152, § 10A[3]; Tr. 7.) In any event, the judge dismissed the penalty claims. (Dec. 10.)

[4] The self-insurer claims no error respecting the judge's characterization of the issues at hearing. Nor does it question the judge's view that its § 1(7A) defense was an affirmative defense alleging a "combination" injury under the fourth sentence of that statute. (Tr. 5-6, 37.) In any event, the procedural history of this case, and the record, make clear that the self-insurer's § 1(7A) defense was not raised to contest *liability* under the third sentence of that statute, which qualifies "pure" emotional disabilities (*not* stemming from a compensable physical injury, see Cornetta's Case, 68 Mass. App. Ct. 107 [2007]), as compensable "only where the predominant contributing cause of such disability is an event or series of events occurring within any employment." General Laws c. 152, § 1(7A). The "predominant contributing cause" standard is higher than the one applicable to combination injuries. Id. In any event, the judge adopted medical opinions to support his findings that the employee had not suffered from a prior medical condition, and that the work events were the direct cause of his anxiety disorder. (Dec. 5-6.) See Bisazza's Case, 452 Mass. 593 (2008)(where the industrial accident is the direct cause of the employee's emotional disability, "predominant cause" standard satisfied); Avola v. American Airlines Co., 20 Mass. Workers' Comp. Rep. 293, 297-298 (2006)(same); Bouras v. Salem Five Cent Sav. Bank, 18 Mass. Workers' Comp. Rep. 191, 193 (2004)(same).

(Dec. 5-7.) In light of his finding that the employee did not suffer from a prior non-industrial medical condition, the judge dismissed the self-insurer's § 1(7A) defense. (Dec. 9.) He then turned his attention to the subject of the employee's earning capacity in an appropriate (less stressful) environment. Noting that in March, 2012, the "[e]mployee began working part-time as a clerk/cashier/manager trainee" at a children's recreational facility earning $13 an hour for twenty hours per week, the judge ordered the self-insurer to pay the employee § 35 benefits ongoing from March 9, 2012, at $586.14 per week.[5] (Dec. 10.) He also ordered the self-insurer to pay the employee § 34 benefits from June 1, 2011 to March 8, 2012. Id.

The self-insurer raises two issues on appeal. First, it argues the judge erred by not finding that the employee suffered from a pre-existing non-industrial medical condition (generalized anxiety disorder), which combined with his work injuries to cause his disability. See G. L. c. 152, § 1(7A)(fourth sentence). There was no error. The medical evidence does not compel such a finding. Kelly v. Boston Univ., 26 Mass. Workers' Comp. Rep. 27, 29 n.2 (2012). The judge was free to reject the self-insurer's § 1(7A) defense based on the medical opinions he adopted, which indicated the employee had no relevant pre-existing conditions. Id. at 29 n.3 (and cases cited); see n.4, supra.

Second, the self-insurer argues the judge erred by awarding the employee § 34 benefits from June 1, 2011, to March 8, 2012, and § 35 benefits thereafter based on a twenty-hour work week. (Self-ins. br. 9-10.) We agree.

There is no evidence sufficient to support a finding of total incapacity for the period in question. The doctors agreed, and the judge found, that the employee could

[5] The employee's average weekly wage on the date of injury was $1,302.53, giving him a § 34 rate of $781.52 weekly. His maximum partial benefit, by statute, is $586.14 (75% of his § 34 rate). Thus, his weekly assigned earning capacity computes to no more than $325.63 ($1,302.53 - $325.63 = 976.90 X 60%). See General Laws c. 152, § 35.

not return to work as a corrections officer, or work in an environment with similar stressors. But the doctors also agreed the employee could perform less strenuous work in the open labor market. (Dec. 5-7; Ex. 1, 8.) The decision, and the evidence of record, fail to support an award of § 34 benefits in the circumstances of this case. Accordingly, the § 34 award cannot stand.[6]

This leaves the question of the employee's earning capacity on and after June 1, 2011. While, as a matter of law, an employee's earning capacity cannot be less than his "actual earnings . . . during each week," it can be more. Perez v. Work Inc., 20 Mass. Workers' Comp. Rep. 117, 118 (2006)("Actual earnings are but one factor in assessing earning capacity under § 35D and may establish the floor - not the ceiling - for the assignment of that figure."); see G. L. c. 152, § 35D(4)("[t]he earnings that the employee is capable of earning"). The judge assigned the employee an earning capacity based on the employee's actual twenty-hour work week as of March 9, 2012. This finding does not address what the employee was capable of earning in the open labor market on or after June 1, 2011. "The judge should have considered whether the employee is capable of earning more than his actual post-injury wages." Hartnett v. Hogan Regional Ctr., 23 Mass. Workers' Comp. Rep. 49, 50 (2009). We also note the absence of a medical opinion restricting the employee to a twenty-hour work week. Anzalone v. Massachusetts Water Resource Authy., 22 Mass. Workers' Comp. Rep. 291, 293 (2008). Therefore, we vacate the § 34 award and recommit the case for the judge to make further findings addressing the employee's earning capacity, under § 35D(4), from June 1, 2011, to date and continuing.

Because the employee has prevailed on the § 1(7A) issue, the self-insurer is ordered to pay his counsel $1,563.91 in attorney's fees pursuant to G. L. c. 152, § 13A(6).

[6] This issue has been largely conceded by the employee. (Employee br. 4.)

So ordered.

_____
Mark D. Horan
Administrative Law Judge

_____
Frederick E. Levine
Administrative Law Judge

_____
Carol Calliotte
Administrative Law Judge

Filed: **August 21, 2013**