COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS	**BOARD NO. 11415-12**

James McDonald	Employee
Brand Energy Services, Inc.	Employer
ACS American Insurance Company	Insurer

REVIEWING BOARD DECISION
(Judges Harpin, Horan and Koziol)

The case was heard by Administrative Judge Bean.

APPEARANCES
Michael C. Akashian, Esq., for the employee
William R. Maher, Esq., for the insurer at hearing
James W. Stone, Esq., for the insurer on appeal

HARPIN, J. The insurer appeals from a decision awarding the employee § 34 benefits, asserting that the judge failed to conduct a proper § 27[1] analysis. We affirm the decision.

The employee's claim for initial liability and weekly benefits was conferenced before the judge on October 31, 2013, after which he awarded the employee § 34 benefits. The insurer appealed the order, and a hearing was held on January 14, 2014, and February 24, 2014. On March 25, 2014, the judge filed a decision awarding the employee § 34 benefits.

The employee, a union laborer, injured various body parts in a number of industrial accidents over the years. (Dec. 524.) The prior back injuries that form the crux of this appeal resulted from work-related accidents in 1991, 1995, 1996, and 2001. The insurer for each of those accidents accepted liability and paid the

[1] General Laws c. 152, § 27 provides:

> If the employee is injured by reason of his serious and willful misconduct, he shall not receive compensation; but this provision shall not bar compensation to his dependents if the injury results in death.

employee varying amounts of weekly compensation, with lump sum settlements approved in each case. (Dec. 524-525.) The employee returned to work as a laborer in 2004, despite the advice of several doctors that he avoid the heavy work that such position might entail. The employee worked with moderate back pain, taking methadone every day to control it, with Percocet taken for breakthrough pain. (Dec. 525.) He refused the heaviest jobs, however, such as jackhammering and bricklaying. (Dec. 525.)

The employee sustained another back injury on April 12, 2012, when he was struck on the back by a piece of staging dropped by a fellow employee while they were stacking the staging in the back of a truck. The employee left work and has not returned, despite being given a light duty clearance by his treating doctors. (Dec. 525.)

At the hearing the insurer raised the defense of § 27, alleging that the employee was injured by his serious and willful misconduct. Specifically, the insurer asserted the employee had actual knowledge that his back condition, after the four prior injuries, was so severe and permanent that his return to the heavy work as a laborer created a substantial probability he would suffer a further disabling back injury. The judge found that, because of advice given him by his doctors, the employee had actual knowledge he would probably suffer another back injury if he returned to work as a laborer, and that he unreasonably believed he could return to the heavy-lifting position with the aid of narcotic medications. However, the judge found the employee did not engage in serious and willful misconduct. (Dec. 529, 530.)[2]

[2] The judge analyzed the issue in terms of § 27A; he found that the employee did not misrepresent his condition to his employer and, by stating that he refused the heavier jobs such as jackhammering, gave notice, at least to his union, that he had a health issue with that work. The judge also found the employee was able to work for eight years after his return to work as a laborer, with the aid of the narcotic medication. (Dec. 529-531). Of course, this analysis had nothing to do with the issue before him, as the insurer did not raise § 27A, nor does that section have anything to do with the issue that was raised. Nevertheless, we hold, infra, that the judge was correct in rejecting the § 27 defense.

On appeal, the insurer raises one issue: the judge erred in failing to properly apply § 27 to the facts of this case. It correctly notes the "serious and willful misconduct" called for in § 27 is to be analyzed with reference to the interpretation of that same language in § 28.[3] Under that standard, the insurer argues the employee's conduct, in unreasonably returning to heavy work after his four prior back injuries, constituted a bar, pursuant to § 27, to his receipt of compensation. (Insurer br. 7-9.) However, the insurer has misapplied the causation aspect of § 27 in its argument.

Section 27 bars compensation to an employee who is "injured by reason of his serious and willful misconduct . . . ." A plain reading of that language requires that the alleged misconduct must be the cause of the injury. Hashimi v. Kalil, 388 Mass. 607, 609 (1983)(when interpreting a statute the plain meaning of the words used is to be given effect, as far as is possible). This interpretation is borne out by reference to § 28, which has similar language: "If the employee is injured by reason of the serious and wilful misconduct of an employer . . . ." This language has been specifically held to mean that the misconduct must cause the injury. DiGloria, supra. The same interpretation must therefore hold true for § 27.

Here, the employee's injury was caused by a fellow employee dropping a piece of staging onto his back. It had nothing to do with the employee's prior back problems, or with his eight year history of working against the advice of his doctors. He was merely at the wrong place at the wrong time. Where the employee's serious and willful misconduct at the time of the injury is the crucial element of causation under § 27, an injury that is not proximately caused by his alleged misconduct does not operate to bar the employee's claim.

Panu v. Chrysler Motors Corp., 28 Mass. Workers' Comp Rep. __ (June 24, 2014); McCambly v. M.B.T.A., 21 Mass. Workers' Comp. Rep. 57, 61 (2007)(reviewing board will affirm decision with right result, even if judge gave wrong reason).

[3] DiGloria v. Chief of Police of Methuen, 8 Mass.App.Ct. 506, 513 n.6 (1979)(same phrase in both sections requires the same interpretation).

The decision is affirmed. Pursuant to G. L. c. 152, § 13A(6), the insurer is directed to pay the employee's counsel a fee of $1,596.24.

So ordered.

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William C. Harpin
Administrative Law Judge

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Mark D. Horan
Administrative Law Judge

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Catherine W. Koziol
Administrative Law Judge

Filed: **January 5, 2015**