

COMMONWEALTH OF MASSACHUSETTS

**DEPARTMENT OF
INDUSTRIAL ACCIDENTS**

BOARD NO. 023276-08

John Creamer
Suffolk County House of Correction
City of Boston

Employee
Employer
Self-insurer

REVIEWING BOARD DECISION
(Judges Horan, Costigan and Koziol)

The case was heard by Administrative Judge Tirrell.

APPEARANCES

Louis deBenedictis, Esq., for the employee
Thomas J. Murphy, Esq., for the self-insurer

HORAN, J. The employee appeals from a decision denying his claim for benefits owing to an alleged psychiatric injury, a panic disorder.¹ Because we agree with the employee that the judge's credibility findings are based, in large part, on a misreading of the evidence, we reverse the decision and recommit the case for a hearing de novo before a different administrative judge.

The employee alleged his psychiatric injury arose out of a series of stressful events surrounding his employer's investigation of a sexual harassment complaint made by a female co-worker. While on vacation, the employee first learned of the

¹ The employee's psychiatric injury was not the result of a physical injury. Accordingly, the standard for its compensability is found in the third and fifth sentences of G. L. c. 152, § 1(7A), which provide:

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. . . . 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.

complaint in a phone conversation with a co-worker. (Tr. 14.)² The employee was then informed there was “an investigation going on over in Building 3 where I . . . allegedly[] made a rude gesture to a female teacher.”³ Id. When he returned to work on August 26, 2008, he learned that he had been transferred to a unit housing female inmates only. (Tr. 18, 63-64.) The employee testified as follows:

Q: And when you took in that roster change, how did that make you feel physically and mentally that morning?

A: I had an instant headache. I didn’t feel good. My stomach was bothering me. *It was bothering me before I went back to work because of the investigation that was going on anyway.* I just didn’t feel good at all.

Q: A combination of nausea and headaches, is that correct?

A: Yes.

(Tr. 19.)(Emphasis added.) The employee then reported to the infirmary, where he complained of a headache and nausea; the company nurse told him that his blood pressure was high, and advised him to go to an emergency room. After reporting to his captain, the employee sought care at the Compass Medical Urgent Care Center in East Bridgewater (Compass). (Tr. 21-22.)

The charge against the employee surfaced as part of an investigation into the conduct of another officer, Michael Gannon. (Dec. 5.) The investigation into Gannon’s conduct was also commenced while the employee was on vacation. As part of that inquiry, a memorandum was sent to the employee by his supervisor. (Employee Ex. 8.) That document, dated August 25, 2008, was directed “[t]o Officer John Creamer,” and stated, “[y]ou are ordered to answer the following questions in a written report today.” Id. Most of the questions asked the employee what he knew about allegations concerning Gannon’s conduct toward

² All transcript references in this decision are to the testimony taken on August 13, 2010.

³ Lay teachers were hired by the employer to educate inmates. (Tr. 15.)

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Judith Kelly, a teacher at the facility. Id. However, several of the questions were posed directly to the employee, and requested information concerning his conduct toward Kelly and another co-worker, Meghan Doran.⁴ Id. Twelve people were interviewed in connection with the investigation, (Tr. 164), and on November 3, 2008, the employee was notified “that the allegations made against you cannot be substantiated.” (Employee Ex. 10.) Accordingly, he was cleared of all charges. (Dec. 7, 10.)

The employee filed a claim seeking § 34 total incapacity benefits from August 26, 2008 through November 17, 2008, and the judge awarded those benefits at conference. (Dec. 3.) The self-insurer appealed. In his hearing decision, the judge found that the employee was not a credible witness. (Dec. 13.) In particular, the judge found:

Mr. Creamer understood that someone was alleging problems with Corrections Officer Gannon, a fellow member of the emergency response team. While on vacation Mr. Creamer also became aware that the Department was circulating a questionnaire to about seventeen Corrections Officers as part of the investigation. Mr. Creamer testified that several of the questions referred specifically to him. The questionnaire, however, entered as Employee’s exhibit 8, does not support such an assertion. Several of the seventeen questions referred to Officer Michael Gannon but no other officer was specifically named. Despite his assertions to the contrary none of the questions refers specifically to Officer Creamer.

(Dec. 5.) The judge also found that upon being transferred, the employee “testified that he instead went to [the] infirmary complaining of headaches and nausea. The only complaint recorded in the nurse’s memo concerning that visit is one of headaches.” Id.

We agree with the employee that the judge’s credibility findings are based on a misreading of the evidence. First, several of the questions in the

⁴ The self-insurer called its investigator, Paul Vozzella, as a witness. Mr. Vozzella testified, without contradiction, that his investigation of Gannon commenced on August 22, 2008, and that, shortly thereafter, the employee became part of the investigation when he was implicated by Doran. (Tr. 163-164.)

questionnaire concerned the employee's conduct, and one required him to respond specifically to a charge lodged against him by Ms. Doran.⁵ It is undisputed that the employee was a target of a sexual harassment investigation. See footnote 4, *supra*. If this were not so, there would have been no need to inform him, at the conclusion of the investigation, that the charges against him were unsubstantiated. (Dec. 10; Employee Ex. 10.) Second, the judge misread the nurse's memo from the employee's visit to the infirmary on August 26, 2008. That note clearly shows the employee complained of a headache *and* nausea. (Employee Ex. 2.)

In denying and dismissing the claim, the judge wrote that the employee was basing it "upon an alleged psychiatric illness related to his transfer, an unnecessary [sic] long investigation of harassment charges, and [his employer's] wrongful withholding of wages and other payments to which he was rightfully entitled." (Dec. 8.) The judge found these events were bona fide personnel actions, and that the employer did not intentionally inflict any emotional distress upon the employee. Therefore, he concluded the claim was not compensable. (Dec. 14.)

However, the judge failed to mention that the employee's initial symptoms were experienced while on vacation, when he was first informed by a co-worker that his conduct was the subject of a sexual harassment investigation. (Tr. 19.) See Bisazza's Case, 452 Mass. 593 (2008). That event was not a "personnel action" as contemplated by § 1(7A). A co-worker, not the employer, accused the employee of sexual harassment; another co-worker communicated this fact to the employee. See Avola v. American Airlines Co., 20 Mass. Workers' Comp. Rep. 293, 298-299 (2006)(personnel actions taken by employers, not co-workers); Dunleavy v. Tewksbury Hosp., 17 Mass. Workers' Comp. Rep. 70, 74 (2003)(same). The employee alleged that his transfer, whether bona fide or not,

⁵ The questionnaire contained eight questions related to the employee's conduct, e.g., "During the calendar year 2008, have you made comments about Teacher Judith Kelly's physical appearance or body?"; and, "In July 2008, did you stand outside of classroom 10 and make a rude gesture in view of the inmates that resulted them laughing during Teacher Meghan Doran's class while her back was to you?"

exacerbated his psychiatric condition and caused him to seek medical treatment at work, and at Compass. (Tr. 19-22.) This allegation begs the compensability question: was the harassment charge, and its sequela, the predominant contributing cause of the employee's disability, or did the disability arise "principally out of a bona fide, personnel action including a transfer . . . except such action which is the intentional infliction of emotional harm"?⁶ However, having found the employee not credible, the judge avoided addressing that precise issue.

Where a factual finding on a pivotal issue is based on a mischaracterization of the evidence, reversal is required. Candito v. Browning Ferris Indus., 15 Mass. Workers' Comp. Rep. 119, 122 (2001)(erroneous finding regarding contact with raw sewage required reversal and rehearing in claim for industrial hepatitis C claim); See Barradas v. Cliftex Corp., 10 Mass. Workers' Comp. Rep. 386, 388-389 (1996)(recommittal required where two critical factual determinations based on misreading of evidence). Because the employee's credibility concerning his reaction to the news that he was the target of a sexual harassment allegation is central to his claim, the judge's errors cannot be fairly characterized as harmless. See Whalen v. Resource Mgt., 9 Mass. Workers' Comp. Rep. 689, 691 (1995). Accordingly, we reverse the decision and refer the matter to the senior judge for assignment to a different administrative judge for a hearing de novo.

So ordered.

Mark D. Horan
Administrative Law Judge

⁶ In light of our decision, we express no opinion respecting whether the judge properly characterized the employer's investigatory techniques, and its handling of the payroll issue, as personnel actions. See Upton v. Suffolk County House of Correction, 25 Mass. Workers' Comp. Rep. ____ (December 21, 2011); Agosto v. M.B.T.A., 20 Mass. Workers' Comp. Rep. 281 (2007).

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Patricia A. Costigan
Administrative Law Judge

Filed: **January 10, 2012**

Catherine Watson Koziol
Administrative Law Judge