COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 034574-97**

John J. Keefe	Employee
M.B.T.A.	Employer
M.B.T.A.	Self-insurer

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

APPEARANCES
George Keches, Esq., for the employee at hearing
Karen S. Hambleton, Esq., for the employee on brief
H. Charles Hambelton, Esq., for the self-insurer at hearing
Daniel P. Gibson, Esq., H. Charles Hambelton, Esq., and Joanne T. Gray, Esq., for the self-insurer on brief

WILSON, J. John Keefe was thirty-eight years old at the hearing in this matter. A high school graduate, he began working for the M.B.T.A. in 1984 as a laborer. In 1995 he was promoted to a supervisory position where he oversaw the work of one hundred laborers. (Dec. 4; September 28, 1998 Tr. 10, 58.)

On January 31, 1997, a friend and fellow employee was struck and killed by a train while working. This event was very similar to an event in 1984 in which Keefe had nearly been struck by a train while working near a track. Upon hearing that his friend was killed, Keefe began crying and became sick, depressed and confused. (Dec. 4-5.)

On the morning of February 5, 1997, he attended his friend's funeral, which for him "was emotionally very difficult." (Dec. 5.) Afterwards, Keefe returned to work for the balance of the workday. He and some of the employees then went to a restaurant where they discussed Mr. Powers' death. "Mr. Keefe stayed at the restaurant for about an hour or more and may have had a beer or two." (Dec. 5.) From there he was driven back to the work site where he retrieved an M.B.T.A. vehicle. He then drove to his mother-in-law's house in Somerville, where he had nothing to drink. After leaving Somerville he

felt ill. The last thing he remembers was being at the Lechmere M.B.T.A. station. His travels ended at Boston College where he had an accident with the M.B.T.A. vehicle. The police arrived and drove him to his father's nearby home. Keefe apparently has no recollection of driving to Boston College. (Dec. 4, 5; September 28, 1998 Tr. 23, 27, 82.)

The record reflects the folllowing sequence of events. The M.B.T.A. unsuccessfully attempted to speak directly with Keefe. Because Keefe did not appear for drug and alcohol testing within eight hours of an accident involving an M.B.T.A. vehicle as required by M.B.T.A. policy, he was suspended pending an investigation. Keefe was given notice of the suspension on February 6, 1997 and was later terminated. (February 9, 1999 Tr. 51-55; September 28, 1998 Tr. 97; Self-insurer brief 3.)

Mr. Keefe filed a claim for benefits alleging that the emotional impact of the January 31, 1997 death of his friend caused an emotional injury. The self-insurer resisted the claim and at a conference held pursuant to § 10A, the claim was denied. The employee appealed giving rise to a full evidentiary hearing. (Dec. 2.)

Mr. Keefe and his wife testified, as well as seven witnesses called by the self-insurer. (Dec. 1; February 9, 1999 Tr. 2; September 28, 1998 Tr. 2.) Pursuant to § 11A, Keefe was examined by Dr. Malcolm L. Rosenblatt, a board certified psychiatrist. Doctor Rosenblatt diagnosed Keefe as suffering from major depression, moderately severe. He stated that Keefe's anxiety and depression had been present for some months prior to the motor vehicle accident and were related to Keefe's difficulties handling the responsibilities and stresses of his job. Doctor Rosenblatt stated further that death of his friend and the motor vehicle accident exacerbated Keefe's depression. He opined that Keefe was temporarily and totally incapacitated from his supervisory job but had no physical limitations. (Dec. 6-7.)

The administrative judge adopted the opinions of Dr. Rosenblatt and awarded ongoing weekly § 34 benefits from February 7, 1997. (Dec. 8, 9.) The self-insurer has appealed, raising four arguments. We address each in turn.

First, the self-insurer asserts that the administrative judge failed to apply the correct § 1(7A) standard. Section 1(7A) states, in pertinent part, that "[n]o 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 contends that it was the suspension and termination from his job after the motor vehicle accident that caused Keefe's emotional incapacity. The self-insurer's focus is misplaced. The precipitating events relied on by the employee and the § 11A medical expert all preceded the firing.

The impartial examiner, whose opinion the judge adopted, acknowledged that Keefe was suffering from depression and anxiety, related to his difficulties handling the stresses and responsibilities of his job, for some months prior to the motor vehicle accident. However, Dr. Rosenblatt opined that it was the death of his friend and the accident that caused Keefe's emotional incapacity. Doctor Rosenblatt further opined that his friend's death, with its similarity to his own 1984 near death experience, was "the major cause of the employee's depression" and "the predominant contributing cause of the employee's . . . inability to work." (Dec. 7-8; Dep. 78.) The self-insurer's personnel actions, whether bona fide or not, occurred after the death of his friend, which was the incapacitating event. While the decision would have been clearer had the judge set forth the timeline of the events, his failure to do so is not error.

Next, the self-insurer argues that the judge erred in denying its motion for additional medical evidence. In support of this argument the self-insurer states that the impartial examiner never opined that the predominant contributing cause of Mr. Keefe's incapacity was the death of his friend. The deposition transcript does not support the self-insurer's position. Doctor Rosenblatt stated that Keefe's 1984 near death experience coupled with the 1997 death of his friend was "the predominant contributing cause of the employee's symptomatology and inability to work." (Dep. 78.)

The self-insurer also contends that additional medical evidence should have been allowed to cover the so-called "gap" period. While it is true that Mr. Keefe's January 31, 1997 industrial injury predated the impartial medical examination on June 24, 1998 by almost seventeen months, this is not a case in which the lack of medical evidence during

that "gap" period necessitates a recommittal for additional medical evidence. The § 11A psychiatrist, Dr. Rosenblatt, opined that the employee's mental disability was total, and that he was not at a medical end result. Doctor Rosenblatt noted the consistency in the employee's symptomatology of anxiety and depression as evidenced in the office notes of Dr. Golden, the employee's treating psychiatrist. Those records spanned the period between the industrial injury and the date of Dr. Rosenblatt's examination, and indicate no notable change in the employee's medical condition throughout the period. (Dep. 40-49.) The doctor explicitly opined that the employee continued to be disabled by the same symptoms as of the date of his examination, which symptoms still had as their predominant contributing cause the death of the employee's co-worker on January 31, 1997. (Dep. 75-80.) As we stated in Hernandez v. Crest Hood Foam Co., Inc., 13 Mass. Workers' Comp. Rep. 445, 449 (1999), where we rejected an employee's argument that a "gap" period warranted recommittal for the introduction of additional medical evidence:

> The doctor did not say that his opinions only addressed medical disability as of the date of the exam . . . . Significantly, the impartial opinion was consistent with the reports sent to the doctor for review. Those reports did not indicate any change in condition . . . . Nor did [the employee] testify to any such change. . . . [T]he judge could rationally conclude that the impartial physician's opinion adequately covered the time period prior to the date of the impartial examination.

We think the Hernandez analysis applies to the present case. See also DiRusso v. M.B.T.A., 11 Mass. Workers' Comp. Rep. 217, 220 (1997)(rejecting self insurer's "gap" argument where judge relied on impartial opinion establishing causal relation and total disability in original liability claim). There was no error in the judge's adoption of the impartial medical opinion and his decision not to allow additional medical evidence.

The self-insurer argues as well that the judge erred in precluding certain evidence of the finding of an arbitrator. Testimony was presented that Mr. Keefe was suspended and subsequently terminated from his job. Mr. Keefe appealed and the termination was upheld by an arbitrator as being for just cause. (September 28, 1998 Tr. 97-98.) The self-insurer sought to have the arbitrator's decision admitted into evidence. The employee's counsel successfully objected, arguing that the issues before the arbitrator were

substantially different than those before the administrative judge. (September 28, 1998 Tr. 98-101.) We see no error. The arbitrator's jurisdiction was limited to whether the termination of Keefe was for just cause. The issue before the administrative judge was whether or not Keefe suffered a compensable injury arising out of and in the course of his employment.

Lastly, the self-insurer argues that the administrative judge failed to make the necessary findings in a form adequate for appellate review to support his conclusion that the employee had a compensable injury. We agree. The self-insurer called seven witnesses who testified relative to Keefe's credibility and the existence of bona fide personnel issues. The judge neither acknowledged their testimony, nor listed three of those witnesses in his decision. Normally, a decision sets forth both a list of the witnesses who testified and the exhibits admitted into evidence. Failure to follow this routine practice is not ipso facto conclusive that the hearing judge did not consider the evidence in reaching his ultimate conclusions. Here, however, the failure to list three of the witnesses was compounded by the absence of any discussion of the testimony of the self-insurer's witnesses within the text of the decision. As a result, we are unable to determine if the judge's ultimate conclusions have an adequate foundation. The case is recommitted to the judge to list all witnesses and make such additional findings as will assure that the judge considered the testimony. Saccone v. Department of Public Health, 13 Mass. Workers' Comp. Rep. 280, 282-283 (1999).

So ordered.

Sara Holmes Wilson
Administrative Law Judge

Filed: **April 6, 2001**

William A. McCarthy
Administrative Law Judge

Susan Maze-Rothstein
Administrative Law Judge