COMMONWEALTH OF MASSACHUSETTS

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

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

REVIEWING BOARD DECISION
(Judges McCarthy, Maze-Rothstein and Carroll)

APPEARANCES
Karen S. Hambleton, Esq., for the employee at hearing
Joanne T. Gray, Esq., for the self-insurer

MCCARTHY, J. The self-insurer appeals an administrative judge's denial of its claim for § 14(2) penalties based on an allegation that the employee knowingly used perjured testimony in pursuit of his claim for compensation benefits. As we are satisfied that the judge properly weighed the evidence in concluding that there was no perjury, we affirm the decision.

John Keefe, who commenced work as a supervisor for the self-insurer in July 1984, suffered an emotional injury as a result of the death of a co-worker and friend, who was struck by a train in the course of his employment on January 31, 1997. (Dec. 8.) In an earlier hearing, Mr. Keefe's injury was adjudicated to be work related, under the applicable predominant contributing cause standard of § 1(7A). (Dec. 5.) During that proceeding, Mr. Keefe testified that he had never missed work because of drugs or alcohol; that he had never been treated by a physician relative to drugs or alcohol; and that he had not had psychiatric treatment from 1984 until his injury of 1997. The self-insurer contended in its § 14(2) claim that these statements were perjured testimony, because he admitted in the present hearing that he had been required to attend a two week program at Mt. Pleasant Hospital for his alcohol abuse in 1986; that he had undergone alcohol treatment in 1984-1986; and that he had undergone counseling for his alcohol

abuse while in the program at Mt. Pleasant Hospital. (Dec. 20-21.) The judge recounted the employee's testimony before her:

> When the employee was questioned as to his previous answer . . . [the employee explained that] he understood the question to be a request for information as to any problem the employee may have had "drinking on the job," or a question as to if he had missed time from work as a result of "drinking on the job." The employee explained that he never had any problem that involved his "drinking on the job."
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> When [the employee] was questioned as to why he had made the previous inconsistent statement [regarding alcohol treatment], the employee testified that at the first hearing "he had moved on with his life and blocked out the 84, 85 and 86 incidents." He described his personality back in 1985 and 1986 as being "hot headed," and that he had had many life changes since that time. He testified that in the course of the 1998 hearing that he was "down, depressed and emotionally disturbed." He indicated that the events that occurred twelve to fourteen years prior to the events of 1997 and the 1998 hearing were so remote that they did not cross his mind at the time of the initial hearing.
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> The employee explained at the hearing in 2002 that he does not consider his treatment at Mt. Pleasant or at any other facility for the alcohol offenses to be considered "psychiatric care" or the care of a "mental health professional." He felt that the care he received in the facility was very different than the care he received from Dr. Golden [his current treating psychiatrist]. Also, the employee did not recall that he ever met with an actual psychiatrist in connection with his alcohol treatment.

(Dec. 20-21.) The judge then found:

> I find that the employee was credible in his explanations regarding his prior inconsistent statements. I find that there was no intent on the employee's part to mislead the Court and that he acted in good faith. He misunderstood the questions as put to him and he adequately explains his misunderstanding. In addition, I find that the questions as asked have a subjective component, which requires some interpretation by the respondent. The questions should have been more specific.
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> Arguing in the alternative, even if one assumed that all of the facts that are now in evidence as to the employee's past alcohol use were put in evidence at the first hearing, the Insurer still has not shown that the information is material. The insurer has not shown how the employee's alcohol use ten years prior to an event has any impact on the emotional injury sustained on January 31, 1997. The fact that the employee had a past history of alcohol issues does not prove or disprove the question of whether the employee suffered an emotional injury ten years later

> and whether the predominant contributing cause of that injury was the death of his friend and his own previous near death experience. Nor has the Insurer illustrated how the employee's remote alcohol history is material to this proceeding, especially given the medical opinion testimony, which indicates that it is not.
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> As such I find that the Insurer's claim for § 14(2) penalties is without merit.

(Dec. 21-22.)

The decision is sound. The § 14(2) prohibition against "knowingly us[ing] perjured testimony" is obviously not invoked if there is no perjured testimony. This is the judge's call to make. As the judge pointed out, "Perjury in a judicial or adjudicatory proceeding occurs whenever one willfully and intentionally makes false statements while under oath or affirmation in a matter 'material to the issue or point in question,' and the false statement has a 'reasonable and natural tendency to influence the pertinent determination.' " Murphy v. Trans World Airlines, 11 Mass. Workers' Comp. Rep. 94, 100 (1997), citing Commonwealth v. Giles, 350 Mass. 102, 110-111 (1966), *aff'd* Murphy's Case, 53 Mass. App. Ct. 708 (2002). "If one believes his statement was true or was honestly mistaken, there is no perjury." Id. at 101. The judge answered these inquiries plainly in the employee's favor, with detailed subsidiary findings supporting her reasoned conclusion. (Dec. 19-22.) This case is distinguishable from Pirelli v. Caldor, Inc., 11 Mass. Workers' Comp. Rep. 380 (1997), in which the reviewing board reversed a denial of a § 14(2) penalty. In that case, the evidence was undisputed that the employee had "participated in the creation . . . of evidence which [s]he [knew] to be false" in contravention of § 14(2), to wit a false earning report, which evidence was introduced at the hearing. Pirelli, supra at 381-382.

The decision is affirmed.

So ordered.

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William A. McCarthy
Administrative Law Judge

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Susan Maze-Rothstein
Administrative Law Judge

Filed: **August 12, 2003**

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Martine Carroll
Administrative Law Judge