COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDDENTS **BOARD NO. 010581-12**

Konstandinos Sokos	Employee
MCI Concord	Employer
Commonwealth of Massachusetts	Self-insurer

REVIEWING BOARD DECISION
(Judges Calliotte, Fabricant and Koziol)

The case was heard by Administrative Judge Benoit.

APPEARANCES
Mark R. Joubert, Esq., for the employee
Patricia G. Noone, Esq., for the self-insurer

CALLIOTTE, J. The self-insurer appeals from a decision awarding the employee a closed period of § 34 and ongoing § 35 benefits, as well as §§ 13 and 30 benefits for treatment of the employee's depression. The employee, a corrections officer, alleged he suffered a psychiatric disability caused by an inmate threat and by his heavy workload. Although not crediting the employee's testimony that any threat was made, the judge found the employee's overall workload, including answering calls to assist in other areas of the prison and working forced overtime, was the predominant contributing cause of his disability. Further, he found the actions taken by the employer were not "a personnel action" and thus could not be a "bona fide personnel action" immunizing the employer from liability.[1] The self-insurer maintains the judge erred by: 1) determining

[1] General Laws c. 152, § 1(7A), provides, in relevant part:

> 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.

that the assignment and scheduling of the employee's work was not a bona fide personnel action; and 2) relying on the impartial examiner's report, after rejecting a portion of the history on which it was based. We hold the second issue requires reversal of the decision.

The employee, forty-four years old at the time of hearing, was employed at MCI Concord as a corrections officer from February 2010 until March 20, 2012. Initially, he worked in the facility's kitchen, monitoring inmate behavior. However, in March of 2011, he obtained a new position with the Inner Perimeter Security (IPS) team, a specialized unit of approximately six officers. The employee was responsible for testing inmates for drugs, which required the collection of urine and hair samples. In addition, he was assigned other duties, as necessary. (Dec. 3; Tr. I,[2] 14-15.)

In October 2011, Sergeant William A. Maloney became the employee's supervisor. (Dec. 3.) The employee testified that, unlike his previous supervisor, Sergeant Maloney would never refuse a request for a member of the IPS unit to provide assistance in other areas of the prison. The employee claimed that, due to additional overtime, some of which was "forced" by Sergeant Maloney, he was unable to keep up with his quotas for drug testing, and that he felt increasing pressure as an audit approached. At times, he said, Sergeant Maloney would require him to work two overtime shifts after a regular shift. Although he was eventually offered assistance in fulfilling his drug testing duties, the employee felt it was "too little, too late." (Dec. 7.) Moreover, although the employer offered to reassign him to the food preparation area, the employee testified he did not feel it was possible for him to leave the IPS unit and return to work with the general inmate population. (Dec. 8.)

In addition to testifying about stress caused by his workload, the employee testified that he received a threat from an inmate whom he had cultivated as an informant. The inmate, who had tested positive for drugs, volunteered to become an informant to

[2] The hearing was conducted over two days: March 18, 2014, and April 18, 2014. The transcripts will be referred to as "Tr. I" and "Tr. II," respectively.

avoid sanctions. The employee testified that part of his agreement with the inmate was that his cell would not be raided while he was serving as an informant. According to the employee, the inmate threatened that if the employee ever went back on their agreement the inmate "would tell that on the street," (Tr. I, 25; see Dec. 5), which the employee understood to mean the inmate would have him killed. (Tr. I, 59-61; Ex. 5. [3]) At some point, Sergeant Maloney ordered the employee to conduct a raid of the inmate/informant's cell, and drugs were found. The employee felt his credibility was ruined, (Tr. I, 26), and, since then, he has been living in "constant fear someone will come and harm me or someone in my family." (Ex. 5; Dec. 3-4.) The employee testified that he reported the threat to Sergeant Maloney, who told him not to worry about it. (Tr. I, 27, 59.) However, he admitted he could not recall whether he ever filed either a confidential report of a threat to the Superintendent or a written report to anyone alleging a threat. (Dec. 6.)

Sergeant Maloney testified on behalf of the self-insurer. He described the employee's job as being very busy, requiring urine testing of between 300 and 400 inmates each month. (Dec. 4.) With respect to overtime, Sergeant Maloney testified that it was offered to all IPS members initially, and that often an officer would volunteer. If no one volunteered, he would assign it to the lowest-ranking member of the unit, which was the employee. However, he denied any officer would be required to work two overtime shifts after a regular shift. (Dec. 7.) Moreover, he denied that the employee ever reported to him that he was overwhelmed with the amount of work he was assigned. Sergeant Maloney also testified that it was common for officers to leave the IPS unit and subsequently rejoin it later in their careers, as he had done. (Dec. 4.)

With respect to the alleged threat, Sergeant Maloney stated that he was aware of the situation in which a particular inmate had notified the employee he wished to be an informant. (Dec. 4.) However, the employee never reported to him that this inmate had threatened him. If the employee had made such a report, the sergeant would have placed

[3] In addition to his testimony at hearing, the employee submitted an affidavit signed August 26, 2012, which alleged both inmate threats and increased workload. (Ex. 5.)

the inmate in the segregation unit and issued a disciplinary report. Sergeant Maloney testified that the inmate's later transfer to a maximum security facility was not the result of any threat made to the employee, but to an increase in his "point base" due to multiple, drug-related infractions. (Dec. 4-5, 6; Tr. II, 57.)

The judge credited Sergeant Maloney's testimony in almost every way in which it differed from the employee's. He found Sergeant Maloney did not require officers to work two overtime shifts in a row, and credited Sergeant Maloney's testimony the employee never told him he was overwhelmed with work. (Dec. 4-5, 7.) He found the employee did not report an inmate threat to Sergeant Maloney. (Dec. 4-5.) He found there was no understanding between the IPS unit and the inmate/informant that his cell would not be raided while the inmate was operating as an informant. (Dec. 5-6.) He found that the employee's informant was not transferred to a maximum security facility as a result of his interactions with the employee. (Dec. 6.) And he found it was not true that the employee could not leave the IPS unit and return to general correction officer duties, as the employee's own testimony and that of Sergeant Maloney indicated that officers did just that. (Dec. 6.) In addition, the judge noted multiple internal inconsistencies in the dates of events described in the employee's affidavit, as well as inconsistencies between the affidavit and the employee's testimony. (Dec. 6-7.) The judge concluded the employee's testimony that he was threatened by an inmate was not credible, and found the employee had failed to prove any such threat. (Dec. 5-6.)

Pursuant to § 11A, Dr. Zamir Nestelbaum, a board-certified psychiatrist, examined the employee on August 15, 2013. The judge found the doctor's report adequate. (Dec. 3; Tr. I, 8.) Although the employee expressed an intent to depose the impartial examiner, and the judge set a due date for the receipt of the transcript and any motions concerning the impartial testimony, (Tr. 8), the employee neither conducted a deposition nor submitted any motions alleging inadequacy of the medical opinion or complexity of the medical issues. See G. L. c. 152, § 11A(2).

The judge adopted Dr. Nestelbaum's opinion that "[t]he Employee's job working as a corrections officer for the state included a series of incidents that were the major and predominant cause of his Major Depressive Disorder and subsequent disability." (Dec. 9.) Dr. Nestelbaum did not specify what the "series of incidents" leading to the employee's depression was; however, the history on which he based his opinion contained an extensive history of threats by inmates.[4] Dr. Nestelbaum's "impression" was that the employee suffered from post traumatic stress disorder (PTSD) as well as a major depressive disorder. (Ex. 1, p. 5.) His symptoms of PTSD were,

> initiated by threats to his life and to his children, by his description, and by inmates who were and have been capable of violence toward others. He reports that he was threatened many times for calling back on his word in terms of the sanctions that were imposed on these inmates.

[4] Dr. Nestelbaum's report included the following narrative:

> Mr. Sokos had informants as part of that job, which involved inmates who were caught with dirty urines who traded information about other inmates in return for continuation of their privileges. Mr. Sokos described having a number of informants who were at risk if this were [found] out in the general community but were an important part of his job. Mr. Sokos reports that he did reasonably well under the person who was his initial boss until he retired in 10/2011. However the officer that replaced him as his new boss was very unrealistic and demanding and did not understand the nature of his work. As an example, the new boss sent him to raid an inmate that was Mr. Sokos's personal informant and he found Suboxone. His boss only noted that the inmate was "moving $5000 on the street". Mr. Sokos reports that he was pushed by this boss at doing more urine testing and that he was overwhelmed in preparing for an audit. The inmates became furious about the increasing urine tests and began threatening Mr. Sokos. He reports that the workload became insurmountable and that he had little help. In addition an inmate that had been his informant who Mr. Sokos had to sanction became furious with him due to the loss of his privileges and also being sent from MCI Concord to a maximum security prison in Shirley, where he was in solitary confinement for 23 hours a day. According to Mr. Sokos this inmate "ran the prison at Concord". . . Mr. Sokos reports that he was made to search all of his informants by his new boss and that he became overwhelmed with the fear and anxiety of the threats to his life and to his children's lives that he received. Mr. Sokos states that he took these threats very seriously while his boss said "don't worry about it".

(Ex. 1, p. 2.)

Id. Dr. Nestelbaum then recounted the employee's anxiety at seeing anyone who reminds him of an inmate, and his decision to carry a gun for self-protection. Id. Without mentioning the employee's workload or assignments, Dr. Nestelbaum concluded that the employee also meets the "criteria for a Major Depressive Disorder beginning in February and March 2012," from which he had "marginally improved." Id.

The judge found that Dr. Nestelbaum based his conclusions on "the history and characterization of events" the employee provided, but that:

> [m]any of the statements made to Dr. Nestelbaum go far beyond any statements made either in his Affidavit or his Hearing testimony, and are suspect and/or untrue. I find that the proven facts differ in many respects from the history relied upon by Dr. Nestelbaum. *I reject the uncontroverted medical opinion to the extent that the opinion was based on unproven "facts[.]"*

(Dec. 8-9; emphasis added.) These "unproven 'facts' " necessarily included the employee's failure "to prove to a preponderance of the evidence that . . . a threat was made." (Dec. 6.)

Unable to rely on the discredited history of threats as a basis for a predominant cause finding, the judge instead found:

> [T]he *overall workload*, including the large number of urine and hair testing, the calls to assist in other areas of the institution as needed, and the forced overtime, was the *predominant contributing cause* of the stress that the Employee experienced while in the IPS unit. As such, the overall workload did constitute a "personal injury" as defined in M.G.L. c.152, § 1(7A).

(Dec. 8; emphasis added.) The judge went on to find that "[t]he Employer did not take a personnel action," and thus the employee's emotional disability could not be principally the result of a "bona fide personnel action" under § 1(7A), which would immunize the self-insurer from the employee's claim. (Dec. 8.) Accordingly, finding the employee psychologically disabled by workplace stress caused by his "overall workload," the judge ordered the self-insurer to pay § 34 benefits from March 21, 2012 to August 15, 2013, except for any period for which he received unemployment compensation benefits, and

§35 benefits thereafter, with credit allowed for unemployment benefits paid for the same time period. (Dec. 10-11.)

We find dispositive the self-insurer's argument that the judge erred by relying on the impartial report even though he had rejected significant aspects of the factual basis on which it was founded. It is well-established that an impartial examiner's report is not entitled to any weight if the fact finder does not believe the facts on which it is based. Brommage's Case, 75 Mass. App. Ct. 825 (2009), rev, den. 456 Mass. 1101 (2010). See also Patterson v. Liberty Mutual Ins. Co., 48 Mass. App. Ct. 586, 596 (2000)(where impartial report was based on evidence that was not admissible or admitted, it was not entitled to any evidential weight, much less the status of prima facie evidence); Walsh v. Courier Corp., 29 Mass. Workers' Comp. Rep. 61, 63-64 (2015)(where facts forming basis of medical opinion were not found by judge, he could not have adopted that medical opinion on causal relationship).

The judge relied on Dr. Nestelbaum's opinion that the predominant contributing cause of the employee psychological disability was "a series of incidents" at work, to find that the employee's "overall workload" was the predominant cause of his depression and subsequent disability. However, Dr. Nestelbaum's opinion was based on a history, specifically rejected by the judge, that the employee received multiple threats from inmates. Although Dr. Nestelbaum mentioned that the employee was "overwhelmed" and that his "workload became insurmountable," the workload issues were not the focus of his report. His discussion centered mainly on the employee's fear and anxiety that inmates were going to "come after him" and his family. (Ex. 1, p. 2.) Moreover, while Dr. Nestelbaum specifically linked the PTSD diagnosis to the inmate threats, he did not link the diagnosis of depression, which was the condition for which the judge prescribed treatment, to stress caused by the employee's heavy workload. In fact, the depression diagnosis follows the discussion only of alleged threats and the employee's reaction to those threats. Id. at 5. Dr. Nestelbaum's report cannot be read to support the judge's finding that the employee's overall workload, excluding the discredited allegations of

inmate threats, was the predominant contributing cause of his psychological disability. Cf. Brommage, supra at 828 (since impartial physician's conclusions were based on same facts judge discredited, he properly declined to adopt those conclusions). The judge erred by construing the impartial report in that manner. See LaGrasso v. Olympic Delivery Serv., Inc., 18 Mass. Workers' Comp. Rep. 48, 58 (2004)(judge may not mischaracterize expert medical opinion).

Because the employee failed to depose the impartial physician or to move for the admission of additional medical evidence, there was no other medical evidence on which the judge could rely. In a complex psychological case such as this, the judge was not competent to determine causation without a medical opinion. See Lovely's Case, 336 Mass. 512, 515 (1957) (medical testimony is necessary except in cases where lay person, as a matter of general human knowledge, can determine causal relationship). Thus, the employee has failed to meet his burden of proof. As we explained in Orlofski v. Town of Wales, 23 Mass. Workers' Comp. Rep. 175 (2009):

> It is axiomatic that the employee bore the burden of proving all elements of his claim. Sponatski's Case, 220 Mass. 526, 527-528 (1915); Patterson, [supra at] 592. Here, as in Viveiros['s Case, 53 Mass. App. Ct. 296 (2001)], the employee did not move for the submission of additional medical evidence . . . . In the absence of such a motion, the administrative judge's failure to act on his own did not result in reversible error. Viveiros, supra. Rather, we have a simple failure of proof by the employee.

Id. at 180-181 (footnote omitted), aff'd, Orlofski's Case, 76 Mass. App. Ct. 1133 (2010)(Memorandum and Order Pursuant to Rule 1:28)(upholding reviewing board's reversal of judge's award of benefits based on internally inconsistent impartial opinion, which was only medical evidence offered or admitted).

Accordingly, we reverse the decision.[5]

So ordered.

[5] We need not reach the insurer's argument that the judge erred by finding the employer's actions in scheduling and assigning work were not bona fide personnel actions, as our holding that the employee has failed in his burden of proof is dispositive.

Carol Calliotte
Administrative Law Judge

Bernard W. Fabricant
Administrative Law Judge

Catherine Watson Koziol
Administrative Law Judge

Filed: **July 8, 2016**