COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NOS. 014335-08 020198-10**

Kujtime Uka	Employee
Westwood Lodge Hospital	Employer
Indemnity Insurance Co. of North America	Insurer

REVIEWING BOARD DECISION
(Judges Horan, Fabricant and Calliotte)

The case was heard by Administrative Judge Lewenberg.

APPEARANCES
Joyce E. Davis, Esq., for the employee
David G. Shay, Esq., for the insurer at hearing and on appeal
Christopher L. Maclachlan, Esq., for the insurer on appeal

HORAN, J. Once again, the employee appeals from a decision denying her claim for benefits owing to two separate incidents at work. In Uka v. Westwood Lodge Hosp., 28 Mass. Workers' Comp. Rep. 19 (2014), we recommitted this case for the judge to consider evidence, submitted by the employee, not listed or discussed in his first hearing decision. We also declined to address other issues raised by the employee. Id. at 20, n.1. In his decision post recommittal, the judge considered the employee's evidence, but again denied and dismissed her claim. The employee's appeal from that decision requires us to address the issues left unresolved in Uka, supra. We recommit the case for further findings of fact.

The employee worked as a Mental Health Associate for the employer. (Dec. 7.) The judge found the employee suffered physical injuries resulting from assaults by patients on two occasions,[1] and that she was incapacitated from work from July 1, 2010 to October 11, 2011. He also found the employee's treatment for headaches, and for her physical injuries, to be reasonable and compensable. However, adopting

[1] The judge found the employee was assaulted on October 20, 2006, and the parties stipulated the employee was assaulted again at work on May 26, 2008. (Dec. 8, 12.)

"portions of the medical opinions of Michael Rater, M.D.," the judge concluded the assaults suffered by the employee at work did not cause her "post traumatic stress disorder [PTSD] or other psychiatric condition." (Dec. 10-12.)

The two issues raised by the employee on appeal challenge the judge's conclusion that the employee did not suffer from PTSD, as Dr. Rater's opinion on that subject varied. Our review of the lengthy transcripts of Dr. Rater's testimony reveals that his causation opinion changed based on the different hypothetical questions posed by the litigants.[2] We agree with the employee that some of the judge's findings, addressing the material facts in dispute, appear to adopt the doctor's testimony endorsing a causal relationship between the employee's work and her PTSD. (See Dec. 9.) Consequently, there are insufficient factual findings to discern which of Dr. Rater's opinions should control. Moreover, the judge improperly relied upon the testimony of the employer's representative, Stephanie Eastwick, to conclude that the employee did not miss five days of work following the October, 2006 assault.[3] This issue is important because Dr. Rater's opinion rejecting causal relationship was premised, in part, on the assumption that the employee had returned to work two days after the 2006 assault. (Rater Dep. I at 13, 20-25, 35-38, 43-45; Rater Dep. II at 59-60, 72-73.)

It is axiomatic that the judge must find facts, and then adopt medical opinions consistent with them. See Brommage's Case, 75 Mass. App. Ct. 825, 828 (2009); Pilon Jr.'s Case, 69 Mass. App. Ct. 167, 169 (2007); Correia v. Advanced Heating and Hot

[2] In his May 8, 2012 report, Dr. Rater endorsed a causal relationship between the assault suffered by the employee in 2008, and her PTSD. (Ex. 40; Rater Dep. II, 11.) At his subsequent deposition, he initially recanted his opinion, but later conceded that the causal relationship between the employee's PTSD and the two work assaults would depend on the facts found. (Rater Dep. I, 35-38; Rater Dep. II, 55-56, 59, 76.)

[3] Ms. Eastwick testified the employment records showed only that the employee was paid following the October, 2006 assault. She conceded that she could not tell from her review of those records whether the employee actually worked for her wages during this period: "I would have no way of knowing that." (July 13, 2012 Tr. 88-89). The employee testified she missed one month of work following the 2006 assault. (June 11, 2012 Tr. 57.) The judge's decision is silent on whether the employee was credible on this point; he must address her testimony on recommittal.

Water Supply, 29 Mass. Workers' Comp. Rep. ___ (November 16, 2015); Maldonado v. Tubed Products, Inc., 19 Mass. Workers' Comp. Rep. 221, 224-225 (2005).

Accordingly, we vacate the decision and recommit the case for further findings of fact consistent with this opinion.

So ordered.

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Mark D. Horan
Administrative Law Judge

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Bernard W. Fabricant
Administrative Law Judge

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Carol Calliotte
Administrative Law Judge

Filed: **May 12, 2016**