COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 023982-14**

Lei Yin	Employee
Integrated Resources, Inc.	Employer
Hartford Underwriters Insurance Company	Insurer

REVIEWING BOARD DECISION
(Judges Harpin, Fabricant and Long)

The case was heard by Administrative Judge Bean.

APPEARANCES
Robert H. Barry, Esq., for the employee
Donna J. Gully, Esq. for the insurer at hearing
John J. Canniff, Esq., for the insurer on appeal

HARPIN, J. The employee appeals from a decision in which the judge denied his claim for benefits based on res judicata. We reverse and recommit the case for a full hearing.

The employee, who obtained a medical degree in his native China, worked as a clinical researcher in the U.S. from 1988, the year he immigrated, to 2011. (Dec. 204.) In 2011, he began working for the employer, Integrated Resources, Inc. (IRI), a staffing company, which sent him to work at Biogen-Idec, Inc. (Biogen). Id. His job at Biogen was to test new medications, for which he was assigned to work under the supervision of Dr. Susan Kalled. Id. She told the employee to perform some tests that she had already performed, with the expectation that he would duplicate her results. Id. Unfortunately, the employee's test results differed from those of Dr. Kalled, which he attributed to her use of a methodology that omitted several operations, violated accepted protocols, and produced invalid results. (Dec. 205.) The employee charged that he was pressured by Dr. Kalled to use her methodology, which he refused to do. Id. Ultimately, Dr. Kalled's results were discarded, which the employee felt changed

his relationship with her. Id. He claimed that he was then assigned meaningless work, and was subject to the ridicule of his co-workers, until he was fired on July 6, 2011. Id. He alleges he suffered an emotional injury from "a professional disagreement between the employee and his immediate supervisor over the correct way to perform the flow symmetry tests [which] was not a personnel action." (Employee's br. 4; Dec. 205).[1]

The employee did not seek any psychiatric treatment for his alleged emotional injury until June 2, 2014, after having been referred by his primary care physician. (Employee's br. 4.) The psychiatrist, Dr. Sharon Jacques, diagnosed a "severe, single episode depression." Id. The impartial physician assigned pursuant to § 11A, Dr. Lloyd Price, diagnosed a schizoaffective disorder, which he felt existed independently of the employee's workplace events, but which was exacerbated by those events. (Impartial's March 16, 2016 report, 10.)[2] He found the employee to be totally disabled, and that "significantly improved functional capacity is unlikely." Id. at 11.

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[1] The judge wrote:

> The employee charges that he was pressured by Kalled to use her methodology, which he insists violate (sic) accepted protocols and produce (sic) invalid results. Ultimately Kalled's results were discarded. The employee charges that *this incident* changed his relationship with Kalled and thereafter, he was assigned meaningless tasks, subjecting him to the ridicule of co-workers. He was fired on July 6, 2011. He alleges that he suffered an emotional injury arising out of *this incident*. See employee's memorandum, exhibit F.

(Dec. 205, emphasis added). It is apparent that the judge was referring to the employee's dispute with his supervisor, not his termination, when he used the words "this incident."

[2] The judge did not admit any medical records into evidence, as the case was decided on the insurer's Motion in Limine, prior to the taking of any testimony. We have reviewed the medical records in the department's file to obtain a more complete view of the case. See Rizzo v. MBTA, 16 Mass. Workers' Comp. Rep. 160, 161 n.3 (2002)(permissible to take judicial notice of Board file).

After the employee was terminated on July 6, 2011, he filed a Demand for Arbitration, as required by his employment contract, alleging wrongful termination, discrimination on the basis of race or color, and breach of contract. (Dec. 205; Ex. A [Arbitration Award, August 5, 2013],) The arbitrator denied the claims of wrongful termination and discrimination, noting that the credible evidence showed the employer terminated the employee "solely because Biogen expressed dissatisfaction with Yin and elected to cancel the position," and that "[t]here was absolutely no evidence presented which demonstrated any discriminatory conduct or intent by IRI or the IRI Employees, or even their awareness of the work conditions at Biogen of which Yin later complained." (Ex. A, 3; Dec. 205.) The Arbitrator found, however, that the employment Agreement between the employer and the employee was ambiguous as to the notice required prior to termination, and therefore awarded the employee $5,040.00, which amounted to fifteen days of severance pay. (Dec. 205; Ex. A, 4-5.)

The following year the employee filed *pro se* complaints against Biogen and the employer in the Massachusetts Superior Court, which were then removed to the Federal District Court in Boston upon a joint motion of the defendants. (Dec. 205; Ex. C, 1 [Memorandum of Decision of Judge William G. Young] .) On September 19, 2014, the court dismissed all claims against the employer, on the grounds that the claims were barred by the arbitration award. (Ex. C, 3.) The claims against Biogen of breach of contract, breach of the implied covenant of good faith and fair dealing, quantum meruit, promissory estoppel, wrongful termination, and defamation remained for decision. (Ex. C, 3-4.) On November 4, 2015, Judge Young granted Biogen's Motion for Summary Judgment and dismissed all the remaining claims against it. (Dec. 205; Ex. G [Order of Judge Young] .) On December 4, 2015, Judge Young issued a Memorandum of Decision setting out his reasoning in dismissing the remaining claims. (Dec. 205; Ex. C.)

The employee then brought a claim at the DIA, seeking weekly compensation and medical benefits for an emotional injury suffered while employed by the employer, but working at Biogen. (Dec. 205.)[3] The claims were denied after a conference on June 4, 2015, which the employee timely appealed. (Dec. 204.) At the scheduled date of the hearing, on September 22, 2016, the insurer presented a Motion in Limine, in which it argued that the principles of res judicata barred the employee from re-litigating his case, due to, (1) the prior Arbitration Decision; and, (2) the dismissal of his federal court action by Judge Young. The judge agreed, allowed the insurer's Motion, and denied and dismissed the employee's claims for compensation. (Dec. 207.)

The employee appeals, arguing that res judicata was improperly invoked in this case, and should not have barred, as a matter of law, the further litigation of his workers' compensation action. He asserts his claim must be reinstated and remanded to the judge for a full adjudication. We agree.

In order to prevail on the defense of issue preclusion[4] a party must prove four elements: 1) a final judgment was reached in the prior litigation on the merits; 2) the party against whom the defense is asserted was either the party in the prior

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[3] The employee's claim was brought pursuant to G. l. c. 152, § 1(7A), sentences three and five, which state:

> 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.

[4] The parties and the judge have styled this a case about "res judicata," which is a generic term comprising "claim preclusion" and "issue preclusion. This case is more accurately one raising the defensive use of issue preclusion, Laroche v. G&F Industries, Inc., 27 Mass. Workers' Comp. Rep. 53 (2013), otherwise known as collateral estoppel. Martin v. Ring, 401 Mass. 59, 61 (1987)

litigation or was in privity with that party; 3) the issue in the prior litigation is identical to the issue raised in the current claim; and 4) the issue decided in the prior litigation was essential to the judgment. Green v. Town of Brookline, 53 Mass.App.Ct. 120, 123 (2001); Laroche, supra.

The arbitrator's award satisfied the first two elements, as there was a final judgment, and two of the parties were the same as in this compensation action: the employee and the employer. The third element was not satisfied, however. At issue in the arbitration was whether the termination of employment was wrongful, whether the employee was subject to discrimination on the basis of race or color, and whether the employment contract had been breached. (Ex. A, 1-2.) In dismissing the wrongful termination and discrimination claims the arbitrator specifically noted that "[u]ltimately, however, Yin's claims against IRI do not turn on the actual quality of his work at Biogen," and he found "no evidence . . . which demonstrated any discriminatory conduct or intent by IRI or the IRI Employees, or even their awareness of the work conditions at Biogen of which Yin later complained." (Ex. A, 3.) In a footnote he stated: "I make no findings with respect to Yin's experiments at Biogen. The quality of Yin's work, as reflected in the lab notebook, has no bearing on his claim against IRI or the IRI Employees for the reasons explained in the text." (Ex. A, 3, note 4.) The arbitrator concluded that, "The credible evidence indicates that IRI terminated the Agreement solely because Biogen expressed dissatisfaction with Yin and elected to cancel the position." (Ex. A., 3.)

In contrast, the employee brought his claim for compensation based on his allegation that he suffered an emotional injury due to "[t]he dispute over testing procedures, the insults and mistreatment of Mr. Yin following this disagreement, and all of the stress and concern surrounding the issue," which he asserts were not the result of any personnel action, but were: "stressors which occurred within the scope of the employment or which arose out of the work place." (Ex. F, Employee's Memorandum, 5.) This was specifically *not* the issue decided by the

arbitrator, who determined only that the termination was not "wrongful," as related to the power of the employer to end the employee's employment under the Agreement. He made no rulings on whether the employee suffered any sort of emotional injury while working at the Biogen location. Because the issues decided in the arbitration are not those raised before the DIA, issue preclusion will not operate to bar the employee's claims, unless the federal court action bars them.

The judge, in finding that issue preclusion operates as a bar, made the conclusory findings that the parties in the federal case and at the DIA are the same, and "[t]he issues are the same." (Dec, 206.) In regard to the identity, or privity, of parties, we note that the parties to the portion of the federal case that reached a final judgment were the employee and Biogen, as the claims against the employer had been dismissed as barred by the arbitration award. (Ex. C, 2, 3.) Biogen was in the position of a "special employer" under G. L. c. 152, § 1(5), as it was the lessee of the employee, whose "general employer" was Integrated Resources Inc., the named employer in this case. Under § 1(5), the word "employer," as it is used throughout Chapter 152, "shall include both the general employer and the special employer in any case in which both relationships exist with respect to an employee." The liability for the payment of compensation lies with the general employer and its insurer, however, unless a different agreement is reached with the special employer. G. L. c. 152, § 18, 2d paragraph. Barring such an agreement, only the general employer enjoys the immunity from tort liability set out in § 24. Molina v. State Garden, Inc., 88 Mass.App.Ct. 173, 180 (2014). Given this close relationship between IRI and Biogen, the question is whether they are in sufficient privity to satisfy the second element of issue preclusion.

The employee, in his brief, states, "we can concede that the first two of the requirements [of issue preclusion – final judgment and identity/privity of parties] have been established," (Employee's br. 5), exactly the same concession that he made in his memorandum in opposition to the insurer's motion in limine. (Ex. F, 4.) At the oral argument in this matter his counsel stated he wished to rescind the

concession on identity of parties, given that Biogen, the remaining party in the federal court matter, is not a party to this DIA claim. (O.A. Tr. 6, 13-14.) While the insurer argued that the employee should not be allowed to back away from a concession made in his brief, (O.A. Tr. 29), a concession made by a party in a brief or at oral argument is not binding on an appellate body. Commonwealth v. Brown, 81 Mass.App.Ct. 1108 (Memorandum and Order pursuant to Rule 1:28, 2012). See also, Commonwealth v. Rivera, 74 Mass.App.Ct. 1122 (Memorandum and Order pursuant to Rule 1:28)(2009)(appellate court need not address issue conceded in brief even when retraction of concession sought at oral argument, but may do so in exercise of discretion).

Privity "exists between two parties where the party in the present action . . . 'exercised substantial control' over the party in the earlier action . . . ; in other words, the evidence must show that [the insurer] had effective control over the [employer's] conduct of the earlier litigation." Yahoub v. Town of Milton, 31 Mass. Workers' Comp. Rep. 35, 42 (2017). Despite the seemingly close relationship of the employer and Biogen, there is no evidence that the employer had any control of Biogen's conduct of its defense in the federal court litigation. We therefore find that privity between the employer and Biogen does not exist, thus precluding the use of the bar of issue preclusion on that ground alone. In the event that a further appeal reverses that finding, we address the employee's additional argument.

The employee further asserts the issues in the workers' compensation case and the federal decision are not the same. As we have noted, *infra*, the employee in this compensation claim seeks weekly and medical benefits for an emotional injury caused by events he allegedly suffered while working at Biogen under lease from the employer. (Ex. F, 5.) The issues in the federal decision were: breach of contract, breach of the implied covenant of good faith and fair dealing, quantum meruit, promissory estoppel, wrongful termination, and defamation. (Ex. C.) The first four of the issues decided in the federal action concerned the employee's

allegations he had a contract of hire with Biogen, either express or implied, and was entitled to wages and overtime pay from that entity. (Ex. C, 9.) As Judge Young noted, the employee's Agreement with the employer "specified that any compensation due from the work at Biogen would be paid by Integrated, . . . and that he would be paid only for hours approved by Biogen. . . . There was no evidence that Yin could reasonably have expected to receive any compensation from Biogen." Id. These issues thus concerned the employee's alleged employment relationship with Biogen, something that is not relevant to the workers' compensation claim.

The defamation issue concerned whether Biogen published defamatory statements about the employee's work performance to a third party. Judge Young held that any such statements, if made, were privileged and not actionable. (Ex. C, 15.) This is a completely different issue from that before the department, as here the issue is not whether Biogen had a right to make such statements, but what their effect was on the employee and whether they were bona fide personnel actions.

The issue of wrongful termination is a closer question, in that the employee alleged in the federal action that "he was terminated due to his refusal to follow a certain testing methodology, and that this is turn violated public policy." (Ex. C, 12.) Judge Young found there was no violation of a "clearly established public policy," id., as "the practices with which Yin took issue related to Biogen's internal decisions about how to carry out its research initiatives," and "[t]hat pointing out the tendency for Kalled's methodology to produce false-positives may have been the 'right' thing to do does not grant Yin, as an at-will employee, protection under the narrow public policy exception." (Ex. C, 13-14.) While the workers' compensation claim does concern itself with the employee's reaction to his interaction with his supervisor and her experimental methodology, it does not concern the lawfulness of the termination by the employer. Instead, the employee asserts his claim concerned actions that were not personnel actions at all, but involved "dispute[s] over the testing procedures, the insults and mistreatment of

Mr. Yin following this disagreement, and all of the stress and concern surrounding the issue." (Ex. F, 5.) The administrative judge in the case before the board wrote that the arbitrator and the federal judge "found that these alleged bad acts [of the employer] were *bona fide* personnel actions," even though that term was not used in either decision. (Dec. 206.) He found further that "their findings rest on the appropriateness of the employer actions, the definition of '*bona fide*' personnel action. Without a finding that the employer actions were not *bona fide* personnel actions, the employee cannot win his case here at the DIA."[5] Id.

The judge has focused his analysis solely on the termination and whether it was "bona fide," without considering any of the interactions the employee asserts occurred prior to that event which the employee claims were the cause of his emotional injury, and whether they were bona fide personnel actions.[6] The issues resolved by the federal court are thus not the same as those presented at the DIA, nor are Biogen and the employer in privity, making the bar of issue preclusion inapplicable to this current proceeding. See Abdel-Azim v. Kidde Fenwall, Inc., 24 Mass. Workers' Comp. Rep 135, 138 (2010)(elements of wrongful termination case differ substantially from §1(7A) claim, thus finding of no wrongful termination not a bar to claim for emotional work-related injury).

[5] The judge equated the "appropriateness of the employer actions" with bona fide personnel actions, an unexplained, and unjustified, leap of faith. As we noted in Wicklow v. Fresenius Medical Care Holdings, Inc., 28 Mass. Workers' Comp Rep. 41, 45 (2014), aff'd Wicklow's Case, 87 Mass.App.Ct. 1130 (Memorandum and Order Pursuant to Rule 1:28)(2015), a personnel action must also be bona fide, which we defined as "one that is done in 'good faith,' which implies 'an honest belief, an absence of malice, an absence of design to defraud or to seek an unconscionable advantage.' " In the federal case the judge looked at whether the termination was within legally recognized employment boundaries, not whether it was done in good faith. This determination must still be made on recommittal.

[6] The employee does argue, in part, that the federal court never determined whether the termination was a bona fide personnel action, (Ex. F, 5), but he does not rest his entire claim on it.

We therefore reverse the decision and recommit this case to the judge, for a hearing *de novo* on the employee's claims. In that hearing the judge must make findings of fact on all relevant issues, consider whether the termination was a bona fide personnel action, and even if so, make findings on whether the actions prior to the termination constituted a compensable event, followed by findings on the extent of the employee's disability, if warranted.

Because the employee appealed the hearing decision and prevailed, an attorney's fee may be appropriate under §13A(7). If such fee is sought, employee's counsel is directed to submit to this board, for review, a duly executed fee agreement between counsel and the employee. No fee shall be due and collected from the employee unless and until that fee agreement is reviewed and approved by this board.

So ordered.

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William C. Harpin
Administrative Law Judge

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Bernard W. Fabricant
Administrative Law Judge

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Martin J. Long
Administrative Law Judge

Filed: **January 26, 2018**