COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 051390-97**

Lena B. Freeman	Employee
University of Massachusetts, Boston	Employer
Commonwealth of Massachusetts	Self-insurer

REVIEWING BOARD DECISION
(Judges Levine, Carroll and McCarthy)

APPEARANCES
John L. Whitehouse, Esq., for the employee
Arthur Jackson, Esq., for the self-insurer

LEVINE, J. The self-insurer appeals from a decision in which an administrative judge awarded the employee total incapacity benefits under §§ 34 and 34A for work related myocardial infarction and coronary artery spasm. But for the award of two closed periods in which total incapacity benefits were not due, the decision is affirmed.

Beginning in 1990, the employee (57 years old at the time of the hearing) worked in an office performing clerical and supervisory duties for the employer. (Dec. 2.) In 1995, the employee was undergoing a stressful time at work, including coming to work early in hopes of a promotion and having to deal with two troublesome work study students. The judge found that, in the evening after a stressful day at work in December 1995, the employee felt abdominal discomfort which later developed into chest pain. She was hospitalized with a heart attack; she stayed out of work for about four months before returning to a less stressful position and working half days. In 1996, the employee underwent coronary angiography which showed spasm of the coronary arteries. (Dec. 3-4, 6.)

On November 17, 1997, the employee's supervisor commented on the manner in which she had answered the telephone. The employee heard the comment, which had been made in the presence of six or seven other employees, including the troublesome work study students. The employee felt demeaned and degraded. She developed chest discomfort shortly after this incident. She was taken by EMTs to Boston Medical Center, where she

was admitted for six days in the cardiac unit; she underwent a cardiac catheterization which showed coronary spasms. (Dec. 3-4).

After the 1997 incident, the employee was able to work for a brief time (four hours per day, four days per week) in a low stress environment as a paid intern for a state senator. She has not otherwise returned to work. (Dec. 5, 7). In addition, the parties agree that the employee received unemployment benefits from August 23, 1998 until November 21, 1998. (Employee brief, 12; self-insurer brief, 13.)

The employee filed a claim for workers' compensation benefits commencing with the November 17, 1997 incident; the judge denied the claim at the § 10A conference. (Dec. 2.) The employee appealed and underwent an impartial medical examination pursuant to § 11A(2). According to the decision, the impartial doctor causally related the employee's 1995 myocardial infarction ("MI") to her stressful workday in December 1995. He also causally related the November 17, 1997, coronary spasm to stress at work. The impartial physician further opined that the employee was completely impaired from participating in any activity that would involve physical or emotional stress. The doctor considered it unreasonable for the employee to do anything that would trigger her symptoms of coronary artery spasm, as they caused pain and could lead to another MI. (Dec. 4-5.)

The judge credited the employee's account of her work environment in December 1995, and of the incident on November 17, 1997, and concluded that she had suffered work injuries on both occasions. These injuries resulted in a MI and recurrent coronary artery spasms, in accordance with the opinions of the impartial physician. (Dec. 7-9.)

Based on the doctor's opinion as to the employee's severe medical restrictions on all stressful activities, and the employee's vocational profile, the judge concluded that the employee was permanently and totally incapacitated due to her heart condition. Id. The judge rejected the self-insurer's argument that the employee's claim was barred by the bona fide personnel action exception to workers' compensation claims for emotional injuries. See § 1(7A). (Dec. 7.)

The self-insurer argues that the judge erred by deciding an issue not in controversy; namely, the occurrence of an industrial injury in 1995. We agree that the employee did not initially claim an injury under the act for the 1995 MI. Had the selfinsurer objected to the employee's examination of the impartial physician regarding the causal relationship between the workplace and the employee's 1995 incident, its argument might have

weight. However, not only is any such objection absent from the record, but the self-insurer actually engaged in extensive cross-examination of the impartial physician regarding the 1995 MI. (Dep. 7-24; 53-56.) Under such circumstances, we have concluded that the issue was tried by consent of the parties, the failure to raise the issue notwithstanding. See Lazarou v. City of Peabody, 13 Mass. Workers' Comp. Rep. 386, 390-391 (1999)(appellant attorney's questions to expert on causal relationship defeated the argument that the issue had not been litigated); Bernardo v. Hallsmith Sysco, 12 Mass. Workers' Comp. Rep. 397, 402 n.5 (1998)(while amendment of claim under 452 Code Mass. Regs. §1.23 is better practice, cumulative work trauma theory tried by parties' consent, based on insurer's failure to object to deposition questions addressing that theory); Debrosky v. Oxford Manor Nursing Home, 11 Mass. Workers' Comp. Rep. 243, 244-245 (1997).

The self-insurer on appeal has not challenged the merits of the judge's finding of a work-related MI in 1995. (Dec. 6, 9.) We need not and we decline to decide an issue that has not been argued. 452 Code Mass. Regs. § 1.15(4)(a)3. See Gookin v. M.J. Daly & Sons, Inc., 17 Mass. Workers' Comp. Rep. 480 (2003); Andrews v. Southern Berkshire Janitorial Serv., 16 Mass. Workers' Comp. Rep. 439, 445 n.3 (2002); Reardon v. Boston Elevated Ry., 242 Mass. 383, 384 (1922)("In the absence of any argument that the evidence did not warrant a finding of negligence on the part of the motorman, that question is not considered").

The self-insurer's argument, that the impartial physician did not render an opinion that the 1997 incident resulted in any disability, is beside the point. The impartial physician's opinion causally relates the employee's permanent and total incapacity to the combined effects of the 1995 and 1997 incidents. (Dep. 50-52.) This is what the judge concluded to be the case. (Dec. 8-9.)

The self-insurer argues that the employee's claim is barred by the bona fide personnel action exception for work-related emotional claims, pursuant to G. L. c. 152, § 1(7A). This argument fails because the employee's claim was for a physical injury, myocardial infarction, as distinct from an emotional injury claim. The bona fide personnel action exception has no bearing on physical injuries. Compare Lipson v. Raytheon Co., 6 Mass. Workers' Comp. Rep. 157, 158 (1992)(language in § 1(7A) regarding emotional disability does not apply to stress-related physical disability).

There is merit in the self-insurer's argument that the judge erred by awarding § 34 total incapacity benefits for weeks in which the employee apparently received $450.00 per week for working at an internship, (Employee Ex. 3), and in which she received unemployment benefits. The employee acknowledges that she should not have received § 34 benefits while she received unemployment compensation. (Employee brief, 12.) Section 36B(1) expressly prohibits receipt of § 34 benefits when the employee is receiving unemployment benefits. Furthermore, § 35D(1) mandates that the employee's earning capacity account for the receipt of actual earnings. The self-insurer is entitled to recoup its payments for those limited periods. See § 11D.

In all other respects, the decision is affirmed. Pursuant to § 13A(6), the self-insurer is ordered to pay the employee's attorney a fee of $1,276.27.

So ordered.

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Frederick E. Levine
Administrative Law Judge

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Martine Carroll
Administrative Law Judge

MCCARTHY, J. dissenting Chapter 152 and its accompanying regulations do not require that insurers go around looking for claims for benefits by the worker community. The dispute resolution process at the Department begins when the insurer receives either an employer's First Report of Injury, or, " . . . an initial written claim for weekly benefits on a form prescribed by the Department . . .." See § 7(1). When the insurer receives the report or written claim, it has fourteen (14) days within which tobegin payment of weekly benefits or give notice of its refusal to pay. The notice is supposed to specify the grounds and factual basis for the refusal to pay. "Any grounds and basis for noncompensablity specified by the insurer shall, unless based upon newly discovered evidence, be the sole basis of the insurer's defense on the issue of compensability in any subsequent proceeding." See § 7(1).

A review of the record and the board file in this case indicates that the only claim made here was for an injury said to have occurred on November 17, 1997. The judge said as

much when she wrote that, "[t]his claim is based upon a coronary injury that occurred on November 17, 1997." (Dec. 2.)

The first suggestion that a December 1995 heart attack might be work related appears in the § 11A impartial examination report of Doctor L. Howard Hartley dated January 10, 2002. Even after receiving this report, the employee chose not to file a new claim or amend the existing claim under 452 Code Mass. Regs. § 1.23. In my view then, the 1995 heart attack was not properly before the hearing judge. That being so, there is nothing to which the self-insurer could consent. I therefore agree with the self-insurer when it argues that it was contrary to law for the judge to find that an industrial injury had occurred in 1995 when the employee never claimed such an injury. (Self-insurer brief 1.)

Even if the 1995 heart attack was properly before the hearing judge, her finding that it was work-related is without support in the record and is therefore in error. The judge found that,

> The employee had her first heart attack in 1995, when, in the evening after a stressful day, she had a feeling of discomfort in her abdomen which later developed into chest pain. She was hospitalized at the Brockton Hospital, diagnosed with heart disease, and given thrombolytics with resolution of her symptoms. She was out of work about four months and returned to a less stressful position in the admissions office working half days performing data entry.

(Dec. 3.) And later the judge found that,

> His [the impartial medical examiner's] opinion that the employee had a work-related myocardial infarction in 1995 was to a reasonable degree of medical certainty because it occurred after an extremely stressful work day which led to the coronary artery spasm and resulting damage to her heart.

(Dec. 4.) Finally, the judge wrote, "I find the employee a truthful witness who sustained an injury while in the course of her employment in December 1995 and again on November 17, 1997." The difficulty with this finding is that the employee, "a truthful witness," did not work on the date on which she suffered a heart attack. She testified that she was going to do some housework that day because there had been a storm and school was closed. (May 30, 2002 Tr., 3.) She did have a phone conversation with her supervisor that morning. She testified that she could not finish her housework because she wasn't

feeling well. She couldn't do her vacuuming and she further testified that she was watching television in her bedroom that evening when she had the onset of symptoms which eventuated in her being taken from her home to the Brockton Hospital. (May 30, 2002 Tr., 4 and 5.)

The employee's testimony about the date that she suffered a heart attack is not challenged. Given the critical variance between the judge's finding that the employee worked on the date of the heart attack and the employee's testimony that she was at home, the finding that it was work-related is flawed.

For the reasons set out above, I would reverse the judge's finding and recommit for hearing de novo before a different judge.[1]

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William A. McCarthy
Administrative Law Judge

Filed: June 23, 2004

[1] The judge who heard and decided this case no longer serves as such.