COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 046806-96**

Mabel Cannon	Employee
M.B.T.A.	Employer
M.B.T.A.	Self-Insurer

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

APPEARANCES
Michael J. Powell, Jr., Esq., for the Employee at hearing and on brief
Kerri A. Morrissey, Esq., for the Self-Insurer at hearing
Morgan J. Gray, Esq., and Michael E. Scott, Esq., for the Self-Insurer on brief

LEVINE, J. The self-insurer appeals the decision of an administrative judge in which the employee was awarded § 34 and § 35 benefits, medical and psychological expenses and legal fees and expenses. We affirm the administrative judge's decision.

Mabel Cannon, the employee, was fifty-two years old at the time of the hearing. She is a single mother of five and has a ninth-grade education. Her prior work experience consists of employment as a nurse's aide, a homemaker and an inspector of various camera parts. (Dec. 4.) In 1988, she commenced employment as a bus driver for the M.B.T.A. Years prior to her M.B.T.A. employment, the employee began a long-term, live-in relationship with James Ingram, who, coincidentally, was also an M.B.T.A. employee. The relationship with Mr. Ingram terminated in 1996. Id. Due to threatening telephone calls in October 1996, the employee obtained a restraining order against Mr. Ingram. (Dec. 4-5.)

On Thanksgiving Day, 1996, Mr. Ingram, who was off-duty at the time, boarded an M.B.T.A. bus operated by the employee. The employee proceeded on

her usual route with Mr. Ingram as a passenger. (Dec. 5.) At some point during the trip, Mr. Ingram asked the employee to reconcile. When the employee declined, Mr. Ingram attacked the employee with a knife. The employee was stabbed in the neck and the chest. In addition, the employee sustained a laceration to her right hand. (Dec. 5.)

The employee was hospitalized at Beth Israel Hospital for six days. The employee has residual physical problems, and at the time of the hearing, was scheduled for restorative surgery. She receives on-going psychiatric care. (Dec. 6.)

Initially, the self-insurer paid the employee § 34 benefits, without prejudice. These benefits were terminated in May 1997 after a light-duty job was offered. The employee filed a claim for further benefits and the matter was conferenced before an administrative judge. Following the conference, an order was issued denying the employee's claim. The employee then appealed to a hearing de novo before the same administrative judge. (Dec. 1-2.)

On November 5, 1997, the employee was examined by the § 11A impartial examiner, Dr. Harry L. Senger, a psychiatrist. (Dec. 7.) The impartial examiner's report was entered into evidence. (Dec. 1.) Doctor Senger opined that the employee suffered from "Post Traumatic Stress Disorder" causally related to the November 1996 incident. (Dec. 7.) He also opined that the employee was totally and temporarily disabled from returning to her former job or to related employment. Id. The administrative judge adopted the impartial examiner's opinion regarding the extent of the employee's disability and her inability to return to work for the M.B.T.A. (Dec. 8.)

The administrative judge determined that the M.B.T.A. job offers were bona fide offers, but that the employee's then existing condition precluded her from returning to the M.B.T.A. However, the administrative judge found that the employee was capable of returning to occupations she had had prior to her employment with the M.B.T.A., and he assigned an earning capacity of $320.00

per week. (Dec. 8, 9.) Applying G. L. c. 152, § 26, the administrative judge concluded that the injury was "compensable under the Statute," (Dec. 11), and ordered the self-insurer to pay benefits under c. 152. (Dec. 14.)

We reject the self-insurer's argument that the administrative judge erroneously applied G.L. c. 152 § 26. The relevant portion of § 26 reads as follows:

> [I]f an employee while acting in the course of his employment is injured by reason of the physical activities of fellow employees in which he does not participate, whether or not such activities are associated with the employment, such injury shall be conclusively presumed to have arisen out of the employment.

The self-insurer argues that it is not liable for the employee's injuries under § 26 because the employee's relationship with Mr. Ingram preceded the employment, and it cannot be said that the employment put the employee in connection with a risk which materialized into the injury; it argues that the assault was the result of an inherently private affair for which it should not be held liable. Without more, the self-insurer's argument appears to have merit. See McLean - Jenner v. Beverly Manor of Plymouth Nursing Home, 12 Mass. Workers' Comp. Rep. 513, 516 (1998) (the employee was killed at work by her estranged husband; the reviewing board held that the assault did not arise out of the employee's employment; "[a]n assault that occurs in the course of employment, with nothing more, is not within the Act").

But there is more in this case; namely, the portion of § 26 quoted above. The administrative judge reasoned that in light of the findings he made, the quoted statutory language mandated a finding in favor of the employee:

> Having already found that Ms. Cannon was in the course of her employment when attacked, that Mr. Ingram was indeed a fellow employee, and that Ms. Cannon was not participating in Mr. Ingram's activities, the clear and unequivocal language of the Legislature in crafting § 26 precludes analysis or inquiry. I therefore find that the assault of November 28, 1996 arose out of and in the

> course of Ms. Cannon's employment with the M.B.T.A. and is thus compensable under the Statute.

(Dec. 11.) We agree with the judge. All the requirements necessary to come within the purview of the statute were found by the judge: the employee was acting in the course of her employment (driving the bus), when she was injured by reason of the physical activities of her fellow employee (assaulted by co-employee Ingram), in which the employee did not participate, whether or not such activities are associated with the employment.[1] The plain language of the statute does not require that the injured employee be acquainted with the fellow employee by reason of the employment, nor that the fellow employee be acting in the course of his employment at the time of the injury.

"If the language of a statute is clear and unambiguous it must be given its ordinary meaning." Jinwala v. Bizzaro, 24 Mass. App. Ct. 1, 4 (1987). "[T]he statutory language itself is the principal source of insight into the legislative purpose. . . . Also, where the language of the statute is plain and unambiguous, as here, legislative history is not ordinarily a proper source of construction." Hoffman v. Howmedica, Inc., 373 Mass. 32, 37 (1977) (court rejected defendant's contention that the legislative history of the statute in issue indicated that the strict, literal reading of the statute would result in applications beyond the Legislature's intent).

In the circumstances, § 26 conclusively presumes, see Liacos, Mass. Evidence § 5.8.1 (6th ed. 1994), that the employee's injury arose out of the employment. The decision of the administrative judge is affirmed. Pursuant to § 13A(6), the self-insurer is ordered to pay the employee's attorney a fee of $1,193.20, plus necessary expenses.

So ordered.

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[1] Mr. Ingram used his employee status to ride the bus without having to pay a fare. (Dec. 9.)

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Frederick E. Levine
Administrative Law Judge

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Martine Carroll
Administrative Law Judge

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Susan Maze-Rothstein
Administrative Law Judge

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Filed: September 9, 1999