COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 028376-07**

Michael Lynch	Employee
Oak Roofing and Sheet Metal Works Co., Inc.	Employer
Continental Casualty Insurance Company	Insurer

REVIEWING BOARD DECISION
(Judges Costigan, Koziol and Levine)

The case was heard by Administrative Judge McDonald.

APPEARANCES
Bernard J. Mulholland, Esq., for the employee
Joseph Pisarri, Esq., for the employer at hearing
Gordon L. Sykes, Esq., for the insurer

COSTIGAN, J. The administrative judge found that the employee was injured in a work-related assault by a fellow employee acting in a supervisory capacity, and that such serious and wilful misconduct entitled the employee to payment of double compensation under § 28 of the act.[1] We have the insurer's appeal,[2] and affirm the decision.

The judge's pertinent findings of fact follow. In September 2007, the employee, a journeyman roofer for some five years, was assigned by his employer to work on a job at Massachusetts General Hospital (MGH); he was told to report to

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[1] General Laws c. 152, § 28, provides, in pertinent part:

> If the employee is injured by reason of the serious and wilful misconduct of an employer or any person regularly entrusted with and exercising the powers of superintendence, the amounts of compensation hereinafter provided shall be doubled. In case the employer is insured, he shall repay to the insurer the extra compensation paid to the employee. If a claim is made under this section, and the employer is insured, the employer may appear and defend against such claim only.

[2] Although the employer was represented at the evidentiary hearing by its own attorney, at oral argument insurer's counsel informed the board that the employer was out of business and not involved in the appellate proceedings.

Matthew Macomber, a twenty-two year journeyman roofer. The employee was joined at the MGH job by a friend, Christopher Heilig. (Dec. 4.) Macomber had begun working at the MGH job under Willy Hernandez, a foreman who later was transferred from that job. Although Macomber had not been designated by the employer as a foreman, was not paid as such, and did not have the authority to hire or fire employees, he had been issued a company cell phone to enable him to call in hours for payroll purposes, and to contact the employer as otherwise necessary. Macomber also set the schedule for the work day, and assigned tasks to the employee and Heilig. (Dec. 5.)

The MGH job entailed opening the roof of a building for installation of ductwork, and reinstalling flashing to reseal the roof when the sheet metal workers and carpenters were finished. On the day of the injury, September 24, 2007, the employee and Heilig arrived late, and Macomber called the employer to complain and request that a different employee be assigned to the project. (Dec. 5.) Later, Macomber, Heilig and the employee were all reflashing a curb.[3] The employee and Heilig were to reseal the roof by gluing rubber sheets, after which Macomber would finish the job by taping the sheets. Macomber taped some of the rubber flashing, unaware the employee had not yet glued it; this meant the taping he had done would have to be removed and redone after gluing. Expressing his displeasure with the employee's work, Macomber cursed at the employee. When the employee retorted that Macomber should call the union hall and hire someone else, Macomber charged at the employee and bumped him into a steel beam. The employee sustained injuries to his left shoulder, right knee and low back. (Dec. 7.)

The insurer declined to pay the employee's claim. In late October 2007, he filed a formal claim for benefits. Following a § 10A conference, the insurer was ordered to pay a closed period of § 34 total incapacity benefits, followed by ongoing

[3] A curb is a box-like structure approximately ten feet square and one foot tall, through which ventilation pipes and ductwork exited the building. (Dec. 6.)

weekly § 35 partial incapacity benefits of $408, based on a pre-injury average weekly wage of $1,000 and "a minimum wage earning capacity," from and after July 22, 2008.[4] Both parties appealed the conference order. (Dec. 2.) Thereafter, on March 27, 2009, the judge allowed the employee's motion to join a claim under § 28.

The evidentiary hearing took place on July 15, 2009 and September 16, 2009. Among other arguments, the insurer contended that Macomber was not the employee's supervisor and, therefore, the employee's assault-related injuries were not the result of "serious and wilful misconduct," as contemplated in § 28. The judge disagreed:

> Macomber was the employer's responsible representative on the job site to ensure that the job was done properly by whichever workers were assigned to the job. An example of Macomber's exercise of this responsibility occurred early on the day of the present injury when Macomber called [his boss] at the office to complain that the employee and Heilig were again late to work, and that he (Macomber) was requesting that Demoure be reassigned to the project.
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> I find that Macomber was a de facto supervisor at the time of the injury; that the altercation between him and the employee arose out of their employment and Macomber's supervisory capacity; that the [sic] Macomber's assault of the employee was wilful; and that he knew of the inherent danger of such an assault [citation omitted], and the likelihood that serious injury would result.

(Dec. 5, 8.) As Macomber had assumed the role of the employer's "contact person" on the MGH job site after the prior foreman had been transferred, and had been performing supervisory functions there for months prior to the September 24, 2007 industrial injury, the judge concluded that he was "regularly entrusted with . . . the powers of superintendence," and that his conduct was in wilful and reckless disregard for the substantial harm which could result from a fight in a construction area on a roof. (Dec. 17-18.)

On appeal, the insurer challenges § 28 liability only on the basis of whether Macomber was someone "regularly entrusted with . . . the powers of

[4] At hearing, the parties stipulated to an average weekly wage of $1,043.15. (Dec. 4.)

superintendence,"[5] within the meaning of the statute. The employee counters that the analysis of the issue should follow the court's approach in Hourigan v. Boston Elev. Ry., 193 Mass. 495 (1907), an employers' liability act case, which addressed the question of superintendence by one Mr. Porter:

> There was evidence that Porter [1] was paid more than the other men employed in unloading the schooner in question; [2] that he did manual work only when he felt like it; [3] that it was his duty to report how many men he wanted and to report them if they did not work properly; [4] that it was his duty to tell the men where to shovel the coal and to whistle and tell the engineer when to hoist and when to lower the coal scoop; [5] that it was also his duty to tell the men when to stop work[; and 6] [t]here was no other person in immediate charge of the work. This warranted the jury in finding that Porter was a superintendent within the employers' liability act.

Id. at 497.

We recently applied the Hourigan analysis in Cleveland v. Keating Materials Corp., 24 Mass. Workers' Comp. Rep. ___(July 15, 2010). We concluded that the sole factor of receipt of a foreman's pay rate could not support the judge's finding that one McKinnon was "regularly entrusted with and exercising the powers of superintendence," in the absence of any other indicia of superintendence. Id. The Appeals Court affirmed, holding that "the testimony and contractual language relied upon by the . . . judge is [sic] insufficient to provide an inference of supervision by McKinnon, even without reference to the overwhelming evidence in the record that McKinnon and Cleveland were working together as laborers to accomplish a shared task." Cleveland's Case, No. 10-P-1551, Memorandum and Order Pursuant to Rule 1:28 (July 1, 2011).

The converse is equally true. Here, the mere facts that Macomber was not being paid as a foreman or supervisor, and that he and the employee worked together performing manual labor, do not end the inquiry. Neither do the judge's findings that

[5] The insurer does not challenge the finding that the assault resulted from Macomber's "exercising the powers of superintendence," provided that such superintendence existed. See Gleason's Case, 345 Mass. 759 (1962)(assistant manager kicking waitress while chastising her performance constituted wilful misconduct under § 28).

the employer had not formally designated Macomber as a foreman, and that Macomber did not possess the power to hire and fire employees, or to make decisions regarding the MGH contract. (Dec. 5.) The judge, however, made other countervailing findings. Macomber handled the employer's supervisory needs at the MGH work site after another foreman had been transferred. The employer directed workers to report to Macomber, who set the daily schedule, including directions as to the sequence of completing tasks, taking breaks, and when to call it a day. The employer issued Macomber a cell phone for submitting workers' hours to payroll, and for contacting the employer as necessary. An example of that responsibility was the call Macomber made on the date of injury to report that the employee and his co-employee were again late to work. Macomber had the discretion to request that certain workers be assigned, or not assigned, to the work site. Macomber performed these functions for several months prior to the occurrence of the altercation. (Dec. 5, 17.) Having considered all of the above factors, the judge concluded that Macomber was a person regularly entrusted with the powers of superintendence. (Dec. 17.)

For the most part, the insurer does not challenge the judge's findings of fact, save to argue that the findings as to Macomber's responsibility for assigning the employees' daily tasks and work schedule are arbitrary and capricious because they were not supported by the testimony of the *employer's* witnesses. (Ins. br. 7-8.) Because this argument challenges the judge's credibility findings, we reject it. "Findings of fact, assessments of credibility, and determinations of the weight to be given the evidence are the exclusive function of the administrative judge." Pilon's Case, 69 Mass. App. Ct. 167, 169 (2007). Simply stated, the credited testimony of the employee and his co-employee, Heilig, support the challenged findings.[6]

[6] To the extent the testimony of the employer's witnesses established, at the very least, the employer's accession to, and effective ratification of, Macomber's open assumption of supervisory functions for several months, such evidence could satisfy the element of "regularly entrusted with . . . the powers of superintendence," as indicating that Macomber was "actually designated by the employer as a superintendent." O'Leary's Case, 367 Mass. 108, 114 (1975).

The judge's findings on superintendence otherwise evince no legal error. The majority of the Hourigan factors line up in favor of the employee's position. When the prior foreman left, Macomber took charge at the MGH site (factor 6, no other supervisor at site), where he dealt with the allocation, assignment and direction of the other workers (factors 4 and 5, performance of supervisory functions), and reported directly to the employer regarding personnel issues and payroll (factor 3, performance of contact responsibilities with employer). Moreover, the content of the argument leading up to the assault corroborates that Macomber was in charge of the work that all of them were performing. When Macomber expressed his disapproval of the employee's work, the employee turned around and suggested that Macomber find someone else from the union hall. (Dec. 7.)

As found by the judge, Macomber's conduct relative to the MGH job site, constituted acts of "direction or of oversight, tending to control others and to vary their situation or actions because of his direction." Thayer's Case, 345 Mass. 36, 40 (1962), quoting Cashman v. Chase, 156 Mass. 342, 344 (1892). As such, § 28 liability rightly attached when, as his final expression of criticism of the employee's work performance and attitude, Macomber assaulted the employee. See Gleason's Case, supra.

The decision is affirmed.[7] Pursuant to G L. c. 152, § 13A(6), the insurer is to pay employee's counsel a fee in the amount of $1,488.30.

So ordered.

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Patricia A. Costigan
Administrative Law Judge

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Catherine Watson Koziol
Administrative Law Judge

[7] We summarily affirm the judge's decision as to the insurer's argument concerning the sufficiency of the medical evidence adopted by the judge.

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Frederick E. Levine
Administrative Law Judge

Filed: **July 21, 2011**