**COMMONWEALTH OF MASSACHUSETTS**

**DEPARTMENT OF INDUSTRIAL ACCIDENTS** **BOARD NO. 25614-98**

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| Michael Murphy | Employee |
| Team Star Contractors, Inc. | Employer |
| Ace American Ins. Co. | Insurer |

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

**APPEARANCES**
Kevin F. O'Donnell, Esq., for the employee
Sheila Annand Carey, Esq., for the insurer
Marc J. Shepcaro, Esq. for the employer at hearing

**MCCARTHY, J.** Having introduced no evidence at a hearing in which the employee alleged that he suffered an industrial injury as a result of an assault and battery at the hands of "Teddy," the president of the employer – which evidence the administrative judge credited, and upon which he based the doubling of compensation under G. L. c. 152, § 28[1] – the insurer argues on appeal that the employee started the fight and that Teddy's actions were "not of a quasi-criminal nature." (Insurer's Brief, 6.) We affirm the decision, and order that the insurer be sanctioned under § 14(1)(a)[2] for having brought this appeal without reasonable grounds.

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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 of any person regularly intrusted with and exercising the powers of superintendence, the amounts of compensation hereinafter provided shall be doubled.

[2] General Laws c. 152, § 14(1), provides, in pertinent part:

> [I]f any administrative judge or administrative law judge determines that any proceedings have been brought, prosecuted, or defended by an insurer without reasonable grounds:
>
> (a) the whole cost of the proceeding shall be assessed upon the insurer . . . .

Michael Murphy ("Mike") worked as a union painter for the employer, and was setting up a compressor for the purpose of sandblasting the interior walls of a building at the Fore River Shipyard on July 14, 1998 when a fitting on the compressor hose line broke as the employee tightened it with a wrench. (Dec. 5.) Mr. Murphy informed his supervisor, "Jimmy," who immediately began to shout in Greek, with occasional lapses into profane and insulting English. Jimmy pushed Mike; Mike pushed Jimmy. A co-employee tried to calm everyone down, and Jimmy left the area. (Dec. 5.)

But not everyone had indeed calmed down. Soon thereafter,

> . . . [A] red jeep drove up "fast" to the work area and the driver "Teddy" Ikonomidis the President of the company (Employer) got out and moved rapidly towards where the Employee was standing. "Teddy" asked "who hit my brother?"
>
> The Employee answered that he had and "Teddy" proceeded to strike the Employee. The Employee struck him back and the battle was joined.
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> "Teddy" once again struck the Employee and the Employee attempted to restrain him by getting "Teddy" in a headlock and they both fell to the ground. The Employee described "Teddy" as being in a "rage" and was "screaming." Eventually the pair separated and "Teddy" announced that "they were all fired."

(Dec. 6.) As the employee's medical disability is not relevant to the issue on appeal, suffice it to say that the judge found him to be temporarily and totally incapacitated until July 14, 2001, and thereafter permanently and totally incapacitated, due to the injuries he sustained on July 14, 1998. (Dec. 16, 18.)

Pertinent to the employee's claim for double compensation due to the alleged serious and wilful misconduct of the employer under § 28 – the only issue on appeal – the judge further found:

> Richard Cabrall was called and questioned by the Employee. He has been employed as a union journeyman painter for 20 years. He was working with the Employee on July 14, 1998 at the Fore River Shipyard site.
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> He was present when the fitting for the compressor broke.
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> Mr. Cabral testified that "Jimmy" was his supervisor. He also observed that at the work site "Jimmy" walked around a lot and did not engage in much manual labor.

> He confirmed that "Jimmy" was shouting louder and louder at the Employee after the fitting had broken calling him "stupid."
>
> He witnessed "Jimmy" "charge" toward the Employee and then "throw punches," and the Employee "defended" himself. When the Employee and "Jimmy" were separated Mr. Cabral did not observe any blood on either of the individuals.
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> Mr. Cabral then, to his surprise, observed "Jimmy" leave the area after he and the Employee were separated.
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> Mr. Cabral corroborated the Employee's description of the arrival of "Teddy" Ikonomidis in his vehicle and then a light [sic] from that vehicle.
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> He described "Teddy" as advancing on the group at a pace "faster than a walk."
>
> Mr. Cabral confirmed that after inquiring who had hit his brother and the Employee replied that he had, "Teddy" then struck the Employee and "threw punches everyway."
>
> Mr. Cabral observed the Employee then grapple with "Teddy" and eventually place "Teddy" in a "headlock." Both went to the ground. Following that "Teddy" said "that's enough" and got up from the ground where they had fallen. He then informed the assembled gathering that they were "all fired."

(Dec. 12-13.) The judge found Mr. Cabral "to be a most candid and credible witness." (Dec. 13.) Neither of the Ikonomidis brothers testified at the hearing. (Dec. 13.) The president of the employer company, Teddy Ikonomidis, filed a criminal complaint against the employee in Quincy District Court. This complaint was dismissed some time later. (Tr. II, 17-18.)

The judge concluded, with reference to § 28:

> I find that on July 14, 1998 "Jimmy" Ikonomidis was a person who was regularly entrusted with the power of superintendence for the Employer. I further find that his actions on that date can be fairly described as grossly negligent. I do not find that his actions rose to the level of serious and willful misconduct.
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> I further find that on July 14, 1998 "Teddy" Ikonomidis was the Employee's employer on that date. I further find that on July 14, 1998 "Teddy" Ikonomidis engaged in serious and willful misconduct when he assaulted the Employee. By coming to the Employee's work location in an agitated state and

> then attacking the Employee in the manner that he did "Teddy" Ikonomidis did so with reckless disregard of the probable consequences of his assault on the Employee. This assault did not take place in some grass-covered field but rather in a building that held numerous tools and equipment. As the subsequent events in this matter have borne out, I further find that "Teddy" Ikonomidis's actions on July 14, 1998 created an unreasonably high risk of bodily harm to the Employee.

(Dec. 17.) The judge awarded double compensation under § 28 in accordance with the general findings above. (Dec. 18.)

The insurer on appeal would first have us retry the case. Despite the judge's findings of fact that clearly and cogently set out the scenario as described by the employee and the co-employee – that Teddy "threw a nutty" and attacked the employee without provocation – the insurer insists that facts actually "appear to illustrate that the employee, not Teddy, was the aggressor in the altercation." (Insurer's Brief, 6.) The credibility of witnesses and the weight to be given their testimony are for the administrative judge as factfinder, not the reviewing board. Collins v. Leaseway Deliveries, Inc., 9 Mass. Workers' Comp. Rep. 211, 212 (1995); Griffin's Case, 315 Mass. 71, 73 (1943). See G. L. c. 152, § 11C. While we have discussed in recent cases that not all credibility findings merit our deference, see, e.g., Frey v. Mulligan Inc., 16 Mass. Workers' Comp. Rep. 364, 366 (2002), that formulation has no bearing on the present case. Here the judge's credibility findings are, without a doubt, "factually warranted and not 'arbitrary and capricious,' in the sense of having adequate evidentiary and factual support and disclosing reasoned decision-making within the particular requirements governing a workers' compensation dispute."[3] Scheffler's Case, 419 Mass. 251, 258 (1994).

The insurer's other argument is that the district court's dismissal of *Teddy's* complaint against the employee for assault and battery somehow rules out the proper characterization of the assault on the employee as "quasi-criminal" for the purposes of

[3] Although not dispositive, we note that the insurer cannot even point to a factual dispute as to the nature of the fight, because Teddy and Jimmy apparently were of parts unknown at the time of the hearing.

§ 28. The insurer is at least arguing the correct standard under § 28. In its most recent analysis of the "serious and willful misconduct" language of § 28, our Supreme Judicial Court wrote:

> In Scaia's Case, 320 Mass. 432, 433-434 (1946), we said: "The 'serious and wilful misconduct' which lays the foundation for double compensation under § 28 of the act 'is much more than mere negligence, or even than gross or culpable negligence. It involves conduct of a quasi criminal nature, the intentional doing of something either with the knowledge that it is likely to result in serious injury or with a wanton and reckless disregard of its probable consequences.' " (Citations omitted). In Scaia's Case, supra, at 434, we also referred to Restatement: Torts, § 500 (1934), which we construed as requiring that "not only must the actor intentionally do the act upon which he is sought to be charged, but also he must know or have reason to know . . . facts 'which would lead a reasonable man to realize that the actor's conduct not only creates an unreasonable risk of bodily harm to the other but also involves a high degree of probability that substantial harm will result to him.' " This principle of the original Restatement has been reaffirmed and clarified in Restatement 2d: Torts, § 500 (1965).
>
> It is our opinion that under the foregoing principles the board was warranted in concluding that the foreman's actions amounted to serious and wilful misconduct.

O'Leary's Case, 367 Mass. 108, 115 (1975), quoting Scaia's Case, 320 Mass. 432, 433-434 (1946). To state the obvious, an assault and battery is not just "quasi-criminal" behavior, it is a crime! That a criminal complaint did not issue on behalf of the *perpetrator* does not advance the analysis.

The insurer's arguments are less than non-persuasive; they are frivolous. The decision is unassailable in that its subsidiary findings explicitly support its conclusions which, in turn, apply sound principles of law.

The decision is affirmed. The insurer shall pay an attorney's fee under §13A(6) in the amount of $1,276.27. In addition, we assess a penalty against the insurer under the provisions of G. L. c. 152, § 14(1)(a), for this frivolous appeal. The insurer shall accordingly pay employee's counsel for the whole cost of this proceeding. See Wheeler v. Yellow Freight Sys., Inc., 17 Mass. Workers' Comp. Rep. 194, 201 (2003).

So ordered.

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William A. McCarthy
Administrative Law Judge

Filed: **December 31, 2003**

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Martine Carroll
Administrative Law Judge

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Susan Maze-Rothstein
Administrative Law Judge