COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 017079-03**

Michael T. Baker	Employee
Commonwealth of Massachusetts	Employer
Commonwealth of Massachusetts	Self-insurer

REVIEWING BOARD DECISION
(Judges Costigan, Horan and Levine)

The case was heard by Administrative Judge Murphy.

APPEARANCES
Thomas E. Casartello, Esq., for the employee
Thomas J. Murphy, Esq., for the self-insurer

COSTIGAN, J. The self-insurer appeals from a decision in which the administrative judge found that the employee had sustained a compensable emotional injury under § 1(7A),[1] and awarded him § 34 total incapacity benefits from May 21, 2003 to statutory exhaustion, and § 35 maximum partial incapacity benefits without prejudice thereafter.[2] For the reasons that follow, we affirm the decision.

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[1] General Laws c. 152, § 1(7A), provides, in pertinent part:

> 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.

The fifth sentence of G. L. c. 152, § 29, is identical to the second sentence quoted above.

[2] Although the 156-week § 34 maximum entitlement would have been reached in mid-2006, no anticipatory claim for § 34A permanent and total incapacity benefits was filed by the employee at or prior to the December 2005 hearing, or prior to the extended closing of the record in December 2008. (See Dec. 2 for the procedural history of the case.) With no § 34A claim before her, but based on her finding the employee continued to be totally incapacitated, the judge opted to award him maximum § 35 benefits without prejudice,

The employee worked as the director of maintenance at the Massachusetts Department of Youth Services in Westfield. His duties included ordering equipment and supplies, and obtaining bids from contractors to perform necessary services. In 2002, the employee started having problems obtaining the approvals from off-site superiors for contractor services, and the necessary equipment for work that needed to be done. There were incidents involving the procurement of mattresses, obtaining funds to have the kitchen grease traps pumped and cleaned, getting parts to repair lights at the ball field, and replacing a vacuum cleaner and the belts for all vacuums. Each of these incidents involved the employee's frequently repeated requests to his supervisor and off-site managers, which were largely ignored, with the result that he felt increased pressure from the facility to accomplish the required tasks. (Dec. 4-5.)

The difficulties and conflicts continued for several months. The employee's supervisor blamed the employee for overspending on bottled water, water coolers and cups, ignored the employee's suggestion to address the problem, and then took credit for the solution the employee had suggested. Due to lack of cooperation from his superiors, the employee was unable to procure and supply soap for the facility's washing machines. The employee's supervisor blamed him unfairly for matters over which he had no control, such as his inability to install wiring for computers when the walls were opened for remodeling, due to the failure of others to supply the wiring. The supervisor sent the employee faxes and e-mails which were sarcastic and belittling. In 2003, the employee was diagnosed with a major depressive disorder, due to the relentless and unfair criticism, and the utter lack of cooperation from his supervisor, facilities staff and off-site managers. He was hospitalized twice within the span of several months. (Dec. 6-7.)

The employee filed the present claim for § 34 benefits, which was denied at the § 10A conference. He appealed. (Dec. 2.) The employee underwent an impartial

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reserving to him the right to file a claim for § 34A benefits from and after the date of § 34 exhaustion. (Dec. 9.)

psychiatric examination on June 23, 2004. The § 11A examiner, Dr. Bruce Goderez, diagnosed a major depressive disorder predominantly caused by the work incidents recounted above, and resulting in the employee's total disability. (Dec. 7-8; Stat. Ex. 1.) In late 2008, due to the staleness of the § 11A report, the judge allowed additional medical evidence "to address ongoing disability." (Dec. 7.) The employee introduced the report and deposition testimony of his treating psychiatrist, Dr. Harold Jordan. The doctor diagnosed the employee as suffering from a combination of depression, anxiety and post-traumatic stress disorder, with the predominant cause being the series of events occurring in his employment. (Dec. 2, 7-8.) The judge adopted the opinions of these two doctors. (Dec. 9.)

The judge credited the employee's testimony about the nature of the stressful events at work and concluded that he had suffered a compensable emotional injury under § 1(7A). She did not credit the testimony of the self-insurer's witnesses to the contrary. "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). Based on the testimony she credited, the judge found the work incidents described by the employee were not, as the self-insurer maintained, bona fide personnel actions (BFPAs). (Dec. 9.)

> "Bona fide" translates as "good faith." Black's Law Dictionary 693 (6th ed., 1990). "Good faith" implies "an honest belief, an absence of malice, an absence of design to defraud or to seek an unconscionable advantage." Carey v. New England Organ Bank, 446 Mass. 270, 282 (2006), citing Hahn v. Planning Bd. of Stoughton, 403 Mass. 332, 337 (1988). A determination of good faith "involves a determination of state of mind." Carey, supra. Therefore, of necessity, the determination of whether someone has acted in good faith requires a subjective analysis.

Presto v. Bishop Connolly High School, 20 Mass. Workers' Comp. Rep. 157, 160-161 (2006).

The judge's findings on the nature of the events which caused the employee's emotional injury clearly address the BFPA issue argued by the self-insurer on appeal. First, she properly analyzed the sarcastic and belittling tone of the supervisor's e-

mails and directives to the employee as being outside of the scope of the BFPA exception. "The deliberate act of humiliating the employee is not a BFPA as a matter of law." Agosto v. M.B.T.A., 21 Mass. Workers' Comp. Rep. 281, 283 (2007); see also Capello v. DTR Advertising, Inc., 25 Mass. Workers' Comp. ___ (March 23, 2011)(supervisor's humiliating e-mails were § 1[7A] "events," not BFPAs, and were the predominant cause triggering mental injury). That a different recipient of such missives might have been better able than the employee to tolerate their demeaning offensiveness is irrelevant to the analysis. See Robinson's Case, 415 Mass. 454, 460 (1993)(establishing subjective standard for assessing emotional disabilities caused by events at work).

As to the employee's supervisor and his other superiors, the judge also found their overall behavior toward the employee -- such as ignoring his reasonable requests for supplies, equipment and necessary approvals, then denying he had even made such requests -- to constitute § 1(7A) "events" and not BFPAs. There is no error. The various acts of omission and commission were not "personnel actions." See Bisazza v. MCI Concord, 21 Mass. Workers' Comp. Rep. 162, 165 (2007), *aff'd* Bisazza's Case, 452 Mass. 593 (2008); Payton v. Saint Gobain Norton Co., 21 Mass. Workers' Comp. Rep. 297 (2007). See also, Agosto, supra.[3]

Accordingly, the decision is affirmed. Pursuant to G. L. c. 152, § 13A(6), we order the self-insurer to pay employee's counsel an attorney's fee of $1,488.30.

So ordered.

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Patricia A. Costigan
Administrative Law Judge

[3] Moreover, the judge specifically found that the employer's proffered excuse of "budgetary constraints and procurement requirements" for their failure to respond to the employee's reasonable requests, was just a "guise" for the superiors' bad behavior toward the employee. Thus, even if a personnel action were to have been taken, as discussed above, it was not found by the judge to be bona fide. (Dec. 8.)

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Mark D. Horan
Administrative Law Judge

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Frederick E. Levine
Administrative Law Judge

Filed: **July 20, 2011**