

COMMONWEALTH OF MASSACHUSETTS

**DEPARTMENT OF
INDUSTRIAL ACCIDENTS**

BOARD NO.: 024357-04

Patricia E. Lyman
Northampton Nursing Home
A.I.M. Mutual Insurance Co.

Employee
Employer
Insurer

REVIEWING BOARD DECISION

(Judges McCarthy, Costigan and Horan)

The case was heard by Administrative Judge Chivers.

APPEARANCES

Paul G. LaLonde, Esq., for the employee
Ronald C. Kidd, Esq., for the insurer

McCARTHY, J. The insurer appeals from a decision awarding the employee § 34A permanent and total incapacity benefits for a work-related rotator cuff injury. The insurer argues that the judge erred by failing to admit into evidence two documents which, it contends, contained both the employee's admission of her capacity to work, and evidence of double recovery.¹ The two documents were, 1) the employee's complaint in the superior court against the employer for employment discrimination, and 2) a settlement agreement regarding Americans with Disabilities Act charges brought by the employee at the Equal Employment Opportunity Commission (EEOC). We see no error in the judge's decision to exclude the documents from the record in this case. For the reasons that follow, we affirm the decision.

The employee injured her left shoulder while working as a licensed practical nurse at the employer nursing home on August 2, 2004. She underwent unsuccessful surgery, leaving her with unremitting pain. (Dec. 2.) The nursing home changed ownership, and when the employee was released to perform restricted sedentary work in May 2005, no offer of such work was forthcoming. (Dec. 3.) The judge concluded that the employee was permanently and totally incapacitated, given the practically total loss of use of her left arm, her age of fifty-six and her long background in the labor force doing strictly hands-on patient care. (Dec. 5.)

¹ We summarily affirm the decision as to the two other issues argued by the insurer.

The insurer argues on appeal that the judge should have allowed into evidence the two documents which stemmed from actions alleging employment discrimination due to the employer's refusal to offer the employee work within her medical restrictions. The superior court complaint contained two counts: 1) for lost wages and equitable relief due to the employer's alleged violation of G. L. c. 152, § 75B,² and 2) for emotional distress due to the employer's discrimination against the employee in refusing to rehire her with reasonable accommodations. The insurer argues that the complaint in the superior court constituted an admission by the employee that she could work. We disagree. The complaint provided by the insurer as its offer of proof is not verified by the employee, and therefore cannot stand as an admission of any of its contents. See Godbout v. Cousens, 396 Mass. 254, 262-263 (1985)(unverified complaint cannot be accorded any evidentiary weight, as it does not stand as a sworn affidavit as to the facts contained therein). Moreover, the complaint sought damages for the infliction of emotional distress, which recovery would not be available under G. L. c. 152, in any event.

The second document the insurer avers as prejudicial in its exclusion is an EEOC settlement agreement which provided for the employer to pay the employee \$20,000 for her claim under the Americans with Disabilities Act. The insurer argues that this represents a "double recovery"

² General Laws c. 152, § 75B, provides, in pertinent part:

(1) Any employee who has sustained a work-related injury and is capable of performing the essential functions of a particular job, or who would be capable of performing the essential functions of such job with reasonable accommodations, shall be deemed to be a qualified handicapped person under the provisions of chapter one hundred and fifty-one B.

(2) No employer . . . shall discharge, refuse to hire or in any manner discriminate against an employee because the employee has exercised a right afforded by this chapter. . . . Any person claiming to be aggrieved by a violation of this section may initiate proceedings in the superior court department of the trial court for the county in which the alleged violation occurred. An employer found to have violated this paragraph shall be exclusively liable to pay to the employee lost wages, shall grant the employee suitable employment, and shall reimburse such reasonable attorney fees incurred in the protection of rights granted as shall be determined by the court. The court may grant whatever equitable relief it deems necessary to protect rights granted by this section.

under the principles of Mizrahi's Case, 320 Mass. 733 (1947). We see nothing in the document which allows for the speculation that the \$20,000 represented lost wages, which would be necessary to entertain a "double recovery" argument. A settlement amount takes into consideration any number of factors. See Stillman v. General Dynamics, 23 Mass. Workers' Comp. Rep. ____ (April 1, 2009)(considerations that enter into decision to settle include matters such as likelihood of success or failure, the cost, uncertainty, delay, and inconvenience of trial). It certainly cannot be assumed that the settlement amount covered exactly the same weekly incapacity for which the insurer pays benefits in this workers' compensation case, particularly as the parties were settling a federal discrimination claim for which emotional distress damages were recoverable.³

Finally, we note that the insurer cross-examined the employee at length using the two documents at issue. (Tr. 34-41, 47-49.) It is axiomatic that a document need not be admissible in order to use it for impeachment. "A witness may be impeached on cross-examination by reference to prior inconsistent statements which are not admissible substantively." Commonwealth v. Domaingue, 397 Mass. 693, 702 (1986).

Accordingly, the decision is affirmed. Pursuant to § 13A(6), the insurer is directed to pay employee's counsel a fee in the amount of \$1,495.34.

So ordered.

William A. McCarthy
Administrative Law Judge

Patricia A. Costigan
Administrative Law Judge

³ See 42 U.S.C. § 12112, incorporated by reference into 42 U.S.C. § 1981a(a)(2) and § 1981a(b)(3)(compensatory damages in reasonable accommodation claim under A.D.A. include "emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other non-pecuniary losses," as well as punitive damages).

Patricia E. Lyman
DIA Board No.: 024357-04

Mark D. Horan
Administrative Law Judge

Filed: August 27, 2009