COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 028883-09**

Peter Svenson	Employee
General Electric Company	Employer
Electric Insurance Company	Insurer

REVIEWING BOARD DECISION
(Judges Horan, Fabricant and Koziol)

The case was heard by Administrative Judge Jacques.

APPEARANCES
Alan S. Pierce, Esq., for the employee
Thomas P. O'Reilly, Esq., for the insurer at hearing
Paul M. Moretti, Esq., for the insurer on appeal

HORAN, J. The insurer appeals from a decision ordering it to pay, inter alia,[1] double compensation benefits pursuant to G. L. c. 152, § 28. We affirm.

We recount the judge's factual findings pertinent to the arguments raised on appeal. These findings were made following four days of testimony[2] from several witnesses, including the employee.

At the time of his injury, the employee was a union employee working for the employer as a Level I, X-ray technician, also known as a "shooter." Shooters are at the bottom of a "technical hierarchy." The top position in the hierarchy is the Cell Leader, whose supervisory duties over Level I (shooters), Level II and Level III inspectors include the "setting of work schedule(s), approving/denying leave time requests, performance/discipline reviews, and approving promotions/demotions."

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[1] The decision also awarded the employee benefits under § 34 from June 10, 2009, and continuing, §§ 13 and 30 medical benefits, § 50 interest, and an enhanced attorney's fee pursuant to § 13A(5).

[2] The transcripts for each day of hearing are referenced in the judge's decision, and herein, as Tr. I, (September 26, 2011); Tr. II, (October 24, 2011); Tr. II of II, (October 24, 2011); Tr. III, (October 25, 2011); and Tr. IV, (February 3, 2012).

(Dec. 7.) Level III inspectors serve under Cell Leaders, and Level II inspectors serve under Level III inspectors. Level II inspectors are non-union employees who have the power to train, critique and correct the performance of shooters. Id. "The ultimate objective for the three technical level employees is to identify defects in the parts used to build jet engines to ensure the safety and performance of the engines." (Dec. 8.)

Shooters choose a pantrameter, or "penny," to X-ray engine parts. (Dec. 8.) The size of the penny used affects a Level II inspector's ability to identify defects in a part.[3] Level II inspectors are empowered to reject unsatisfactory radiographs. (Dec. 9.) The employer incorporated, "as part of its written policies and procedures," the American Society of Non Destructive Testing Manual. (Dec. 8; Ex. 4.) The Manual provides, inter alia, that shooters "receive the *necessary instruction and supervision* from a certified . . . Level II or Level III" inspector. (Dec. 8; Ex. 4; emphasis added.)

The employee worked regularly with Fred Hammond, a Level II inspector. Hammond could reject the employee's radiographs, and had the authority to exercise instruction and supervision over his work, and that of other shooters. (Dec. 7-10.) Based on the credible testimony and documentary evidence, the judge concluded that Hammond was the employee's immediate supervisor.[4] (Dec. 15-17.)

On June 10, 2009, Bob Hoffman, a Level III inspector, informed the employee that Hammond had lodged a complaint about the quality of one of the employee's

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[3] "The smaller the size of the penny, the better the sensitivity." (Dec. 8; Tr. I, 87.)

[4] "Hammond did not just accept or reject the employee's work as a quality control inspector might pluck defective soda cans from an assembly line. Hammond was not just a faceless, unknown entity who stood at the end of a long production line kicking out rejected work product. Rather, Hammond was somebody the employee worked under and was closely supervised by. Hammond was a 'higher authority' in 'the chain of command.' Hammond had a higher certification, a higher degree of knowledge, and a higher job title which empowered him with not just the authority to reject the employee's work, but also the authority to criticize the employee's work and to control the way he performed his work. Hammond had the ability to pass feedback on to those higher in the chain of command about the employee's work performance.[] Indeed Hammond's complaint to a Level III Supervisor carried such authority that the Level III Supervisor responded immediately and confronted the employee . . . before he had even begun his shift." (Dec. 16; footnote omitted.)

radiographs. The employee and Hoffman went to Hammond's office to identify the radiograph. When they arrived, Hoffman asked to see it. Upon viewing it, Hoffman gave it back to Hammond and said, "that's fine." (Dec. 10.) Later, the employee went to Hammond's office to discuss the matter. (Tr. I, 116-117.) The employee was angry at Hammond for finding fault with his work. "Hammond, who likely was humiliated by Hoffman's approval of the employee's [radiograph], was very angry that the employee would not "play ball." (Dec. 11; Tr. I, 100.)

> Hammond, 6 feet 2 inches tall, ended up standing "belly to belly" with the 5 foot 9 inch tall employee as the two argued and swore at each other. [Tr. I, pgs. 57, 119] Hammond then grabbed the employee's shirt and shoved him against the wall. Hammond "put all [his] weight on the [employee] and rode him right down to the ground" while throwing punches at his face and head. [Tr. I, pgs. 45, 46, 57, 120] Once on the ground, he 'got on top of [the employee], pinning his arms behind his back on the floor," and punched him repeatedly about the face. [Tr. I, pg. 58.] The employee was not able to "swing" or fight back because he was too busy trying to "fend off whatever was coming." [Tr. I, pgs. 59, 120]

(Dec. 11.) The employee went home and "called the Plant Manager to explain the incident and tell him he would not be at work the following morning." (Dec. 12.) "The employee has been unable to return to his position at General Electric." Id.

General Laws c. 152, § 28, provides, in pertinent part, that "[i]f 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." Based on the evidence credited, the judge found the employee was entitled to double compensation benefits because his injuries were caused by Hammond's assault. (Dec. 17-18.) Gleason's Case, 345 Mass. 759 (1962). She also concluded Hammond "regularly exercised supervisory control over the employee," and that Hammond's "attempt to exercise superintendence over how the employee performed his job duties" led to the assault. (Dec. 17.)

On appeal, the insurer argues the "judge's ruling that the employee was injured by reason of the serious and willful misconduct of a person regularly intrusted with and exercising the powers of superintendence is arbitrary, capricious, and contrary to law." (Ins. br. 14.) We disagree.

We begin by noting that the judge's findings on the issue of superintendence are not arbitrary or capricious because they are "reasonably deduced from the evidence and the rational inferences of which it was susceptible." Pilon's Case, 69 Mass. App. Ct. 167, 169 (2007), quoting Chapman's Case, 321 Mass. 705, 707 (1947). "Such credibility determinations are within the sole province of an administrative judge and are to be considered final by both the reviewing board and an appellate court." Carpenter's Case, 456 Mass. 436, 441 (2010). Ignoring, as we must, contentions which are based on evidence *not* credited by the judge,[5] we address the arguments advanced by the insurer in support of its claim that her decision is contrary to law.[6]

"In order to recover double compensation under § 28, the [employee has] the burden of establishing . . . that (1) an employer or supervisor (2) committed serious and wilful misconduct that (3) caused the employee's injury." Moss's Case, 451 Mass. 704, 711-712 (2008).[7] The insurer does not challenge the judge's finding on the second prong of this test, i.e., that Hammond's assault of the employee constituted serious and wilful misconduct. Rather, its arguments concern the first and third prongs.

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[5] We agree with the employee that much of the insurer's brief consists of a reargument of the factual issues before the judge. (Employee br. 2-3, 10.)

[6] As we reject the argument that the judge's findings lack evidentiary support, we address only whether the facts as found are legally sufficient to warrant a § 28 benefit award.

[7] In addressing the elements of § 28, this board, and our courts, have equated supervisors and foremen with superintendents. See Moss, supra; O'Leary's Case, 367 Mass. 108 (1975); Lynch's Case, 82 Mass.App.Ct. 1115 (2012)(Memorandum and Order Pursuant to Rule 1:28). The terms superintendent and supervisor are synonymous. See Webster's New World Roget's A-Z Thesaurus, 766 (1999).

First, the insurer contends the judge erred in concluding that Hammond was the employee's supervisor because Hammond did not set the employee's pay, work and vacation hours, or "evaluate [the employee's] performance for the purposes of promotion, demotion, salary increases, or the like." (Ins. br. 20.) In support of this proposition, the insurer cites no authority, and we find none. While such evidence is probative on the superintendence issue, it is not essential.

In O'Leary, supra, the court opined the phrase "regularly intrusted with and exercising the powers of superintendence" in § 28 should be understood, consistent with comparable language in the Employer's Liability Act (G. L. c. 153, § 1),[8] "as primarily intended to differentiate between a mere volunteer and one actually designated by the employer as a superintendent." 367 Mass. at 114 (1962). The judge's findings, supported by the record, demonstrate that Hammond was not exercising oversight of the employee's work as a "mere volunteer," but as a supervisor:

> The fact that Hammond did not have the more common supervisory duties of hiring, firing, scheduling, raises and performance reviews over the employee does not mean that Hammond didn't have "control" over the employee which could 'vary [the employee's] situation or actions because of his direction.' Thayer's Case. [] The employee was subordinate to Hammond in the chain of command and Hammond regularly exercised supervisory control over the employee. The employee was impacted by Hammond's opinion of how he performed his job and the actions Hammond took in directing the way the employee performed his job.

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[8] Cases decided under the Employer's Liability Act commonly address whether a worker charged with negligence "was a person whose sole or principal duty was that of superintendence, within the meaning of the statute." Mahoney v. New York & N.E.R. Co., 160 Mass. 573, 578 (1894)(section boss having immediate charge over five men held to exercise superintendence). Numerous other cases address whether a worker, at the time of his alleged act of negligence, acted in a supervisory capacity or merely as "a fellow workman." See Sarrasin v. S. Slater & Sons, Inc., 203 Mass. 258, 260 (1909). Under § 28, however, a putative supervisor need not have, as his sole or principal duty, superintendence; moreover, "[c]ontinuity of service in the capacity of superintendence is not required." O'Leary, supra at 115. It is sufficient that, on the date of injury, a co-worker be designated as an acting foreman. Id. at 114.

(Dec. 17.)

Recently, in Lynch's Case, supra, the court upheld a finding that one Macomber was the employee's supervisor, even though he "was not officially designated by the employer with powers of superintendence." The court noted several of Macomber's duties justified the factual finding that he was regularly entrusted with supervisory authority over the employee, including ensuring that his work, and the work of other employees, was done properly, serving as the employer's contact at the worksite, and having general supervisory authority over the workforce. While Macomber had authority to set the daily schedule, including times for lunches and breaks, there is no evidence that he was empowered to evaluate his workers for promotion, demotion or salary increases. We do not consider Macomber's authority over scheduling as a prerequisite to finding that he was a supervisor. See O'Leary, supra (no evidence foreman had power to schedule work); Thayer's Case, 345 Mass. 36 (1962)(same); Luis v. Merrimack Valley Roofing Co., 9 Mass. Workers' Comp. Rep. 784 (1995)(same), aff'd sub nom Luis's Case, Mass.App.Ct., No. 96-J-30 (July 28, 1998)(single justice), aff'd 46 Mass.App.Ct. 1121 (1999)(Memorandum and Order Pursuant to Rule 1:28). It was sufficient that he possessed the power of "direction or oversight, tending to control others and to vary their situation or action because of his direction." Thayer, supra at 40; see footnote 5, supra.

Here, there is ample evidence that Hammond was the employee's immediate supervisor in the employer's chain of command. Hammond, the employee, and a co-worker testified that Hammond possessed supervisory authority over the employee and other "shooters," and the judge expressly found that "the employer's own written policies and procedures define Hammond as having 'supervisory authority' over the employee." (Dec. 9-10, 15.) These facts are as, if not more, compelling than those in Lynch. Contrast Durgin's Case, 251 Mass. 427 (1925)(relationship between employee and co-worker "merely that of fellow employees"); Cleveland's Case, 79

Mass.App.Ct. 1128 (2011)(Memorandum and Order Pursuant to Rule 1:28) (insufficient evidence that co-worker was employee's supervisor at time of injury).

Next, the insurer posits that because the employee was supervised by Cell Leader McNeil, he could not be found to have been supervised by Hammond. (Ins. br. 17, 21.) Again, the insurer cites no authority, and we find none, to support the proposition that an employee cannot, under § 28, have more than one supervisor. We consider the legislature's use of the phrase, "an employer or any person regularly intrusted," as an acknowledgement of a workplace reality, to wit: employees, like Mr. Svenson, are oftentimes accountable to multiple supervisors.

Lastly, relying on Thayer's Case, supra, the insurer argues that even if Hammond was the employee's supervisor, there can be no § 28 liability because Hammond "was not exercising such powers at the time of the injury." (Ins. br. 16-18.) The insurer's reliance upon Thayer is misplaced. There, the employee was employed to operate a tournapull used to transport excavated material to a dumping area. "One Winslow was employed by [the employer] as a foreman who supervised the operations of the road equipment, including the tournapull." Id. at 37-38. Winslow observed the employee driving the tournapull with a full load, and believed it should be going faster. Irritated, he "told Taylor to push over," and took control of the vehicle. Id. at 38. When Taylor warned him repeatedly to slow down, Winslow ignored him. The tournapull "jackknifed," and Taylor was injured upon being thrown to the ground. Id. On appeal from a decision awarding § 28 benefits, the employer argued, inter alia, that "although Winslow was regularly intrusted with the powers of superintendence, the evidence does not support the board's finding that in causing the injury Winslow was 'exercising the powers of superintendence'. . . ." Id. at 39. The court disagreed, concluding that, "Winslow was exercising the powers of superintendence and that the exercise of the powers of superintendence could justifiably have been found to have contributed proximately to Thayer's injury." Id. at 40-41.

Here, the employee was no less at the mercy of his supervisor's aggression than the employee in Thayer. We do not comprehend Thayer to require that a supervisor's intentional assault of an employee must itself qualify as a legitimate act of superintendence. Indeed, the case law is otherwise. Gleason's Case, supra (kicking employee in ankle); Pizzano v. Suffolk County Court, 8 Mass. Workers' Comp. Rep. 25, 34 (1994)(bullying tactics "had no legitimate business purpose whatsoever"); see Moss, supra at 711-712 (describing elements of § 28 liability). In any event, the record supports the judge's finding that Hammond's decision to report the employee to a higher authority triggered the confrontation and the assault.[9] (Dec. 17.)

There was no error. Accordingly, the decision is affirmed. Pursuant to G. L. c. 152, § 13A(6), we order the insurer to pay employee's counsel an attorney's fee in the amount of $1,574.83.

So ordered.

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Mark D. Horan
Administrative Law Judge

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Bernard W. Fabricant
Administrative Law Judge

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Catherine Watson Koziol
Administrative Law Judge

Filed: **October 30, 2013**

[9] The insurer does not challenge the causal relationship between the assault and the employee's injury and incapacity.