COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO.:** 005494-08

Quisquella Castillo	**EMPLOYEE**
Massachusetts Bay Transportation Authority	**EMPLOYER**
Massachusetts Bay Transportation Authority	**SELF-INSURER**

REVIEWING BOARD DECISION

(Judges Costigan, Horan and Fabricant)

The case was heard by Administrative Judge Hernández.

APPEARANCES

Michael J. Powell, Jr., Esq., for the employee
Laura E. Caron, Esq., for the self-insurer

COSTIGAN, J. The employee appeals from a decision awarding her only two weeks of § 34 total incapacity benefits for an emotional injury caused by a verbal assault at work. The employee argues that neither the lay testimony nor the medical evidence supported the judge's finding she could return to work on February 14 or 15, 2008. See footnote 7, infra. We agree, reverse the judge's finding terminating the employee's benefits on that date, and order the self-insurer to pay additional § 34 benefits from February 14, 2008 to April 3, 2008, the date on which the medical evidence established she was able to return to work.

Quisquella Castillo, fifty-two years old at hearing, is a native of the Dominican Republic. In 1990, she was hired as a bus driver by the Massachusetts Bay Transportation Authority (MBTA). Following a 2001 shooting on her bus, she transferred to the position of flag person. As a flag person, she was responsible for ensuring the safety of employees, contractors and other persons on or near the MBTA rails during repairs, by setting up safety cones, lanterns, flags, etc., and communicating with personnel when a vehicle approached. (Dec. 3-4.)

On January 31, 2008, the employee was working with an electrician at the Kenmore Square station when Carl Medeiro, a foreman for a construction

contractor, approached her and stated he needed a flagger. When she told him she could not leave her assigned area, he became furious, and made threatening and demeaning comments.[1] She reported the incident to an on-site inspector, and then left a voicemail message for her supervisor, Stephen McKeon. An hour and a half later, when Mr. McKeon had not arrived at the job site, the employee left work.[2] (Dec. 4-5.)

Later that day, the employee saw her primary care physician, Dr. Mary Linda Brown. The following week, on February 6, 2008, she saw Dr. James Walton, a psychiatrist with whom she had treated sporadically for several years. She continued to see Dr. Walton weekly throughout the period of time she was out of work. (Dec. 5-6; Tr. 29-32.)

The self-insurer denied the employee's claim, but following a § 10A conference, the administrative judge ordered the self-insurer to pay her a closed period of § 34 benefits and medical benefits from February 1, 2008 through February 14, 2008. The employee appealed to a de novo hearing, claiming § 34 benefits through April 13, 2008. Prior to hearing, the parties opted out of the § 11A impartial medical examination process.[3] (Dec. 2.)

At hearing, the employee submitted the records of her treatment with Dr. Walton for the period from February 6, 2008 through April 4, 2008.[4] At the first

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[1] The employee alleged that Medeiro told her he did not need to be respectful of her, and berated her with comments such as, "You're nobody here," "You're not my wife," "I will have [you] lose your job," and, "You can't speak English." (Dec. 4.)

[2] Mr. McKeon testified he did speak with the employee who said that, although there was a minor problem with the foreman, everything was fine. (Dec. 8.) The judge did not resolve the discrepancies in the testimony on this issue.

[3] See 452 Code Mass. Regs. §§ 1.02 and 1.11(c).

[4] The decision indicates Dr. Walton's records date from January 31, 2008. However, the exhibits reveal that only Dr. Brown saw the employee that day. (Ex.

office visit on February 6 th, the doctor noted she was experiencing recurrent and intrusive recollections of the foreman's threatening behavior, and was depressed, hypervigilant, irritable and had difficulty concentrating. He diagnosed the employee as having an acute anxiety reaction with symptoms of post traumatic stress disorder (PTSD), and opined she had not been able to work since the incident because she felt unsafe with Mr. Medeiro still there. On March 5, 2008, Dr. Walton completed a MBTA "Physician's Treatment Form," in which he gave the same diagnosis and opined the employee remained unable to return to work due to safety concerns. In response to the question, "[w]hat is the major but not necessarily predominant cause of the patient's disability?," Dr. Walton answered, "[v]erbal attacks & threat." On March 12 and 21, 2008, Dr. Walton again noted the employee reported intense fear of returning to work while the construction foreman who verbally attacked her was still on the job site. On March 26, 2008, Dr. Walton cleared the employee to return to work without restriction as of April 3, 2008, noting that the employee's union representative had advised her she could go back to work at a site other than the Kenmore Square station.[5] (Dec. 5-6.)

The self-insurer's medical evidence consisted of the employee's medical records from Brigham and Women's Hospital for the period May 19, 2003 through January 31, 2008. (Dec. 2.) Those records indicated the employee had a past history of anxiety and depression, for which she had been prescribed various medications.[6] The only medical record created after the incident at work was the

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8.) Dr. Walton did not see the employee after the incident until February 6, 2008. (Ex. 4.)

[5] On March 26, 2008, Dr. Walton also noted, "the employee continues to be very anxious, but she is willing to try to return to work. She wants to feel safe in returning to work." (Ex. 4.)

[6] On November 5, 2007, Dr. Brown, the employee's primary care physician, indicated her anxiety and depression had worsened. Dr. Brown mentioned the employee's daughter had been in a "horrible" motor vehicle accident over the summer. Dr. Brown planned to refer the employee to Dr. Walton for treatment, and to start additional medications for anxiety and depression. (Ex. 8.) The only

January 31, 2008, office note of Dr. Brown, in which the doctor recounted a history of the verbal attack and assessed the employee with an acute attack of anxiety, "related to [a] difficult and demeaning work situation," depression, and "h/o panic attacks." (Ex. 8.) The judge found that the employee was verbally assaulted at work on January 31, 2008. (Dec. 12.) He further found she was totally incapacitated, and that such incapacity was causally related to the work event, but only until February 14, 2008, the date on which the employee supposedly testified she could have returned to work. The judge wrote:

> I find that the Employee conceded at hearing that she could have return [sic] to work on February 14, 2008 when the construction foreman, Carl Mediero [sic], was removed from the job site. I do not credit the Employee's testimony as to her incapacity to work beyond February 14, 2008 and find that there is no causal relationship between the Employee's January 31, 2008 work injury and her psychiatric condition beyond February 14, 2008. I find that the Employee had pre-existing conditions of depression and anxiety that were present and active at the time of her injury. . . .
>
> I find that the Employee has not met her burden as to causal relationship, i.e., there is causal relationship between the verbal assault on January 31, 2008 and the Employee's psychiatric condition beyond February 14, 2008. I find that the Employee has a significant past psychological history.
>
> I find that after the construction foreman was removed from the job site, the Employee failed to show that the job site remained an unsafe work environment. Consequently, after February 14, 2008, I find that the Employee was no longer disabled from work due to a psychiatric condition that was causally related to the January 31, 2008 verbal assault. I find that after February 14, 2008, the Employee's complaints and symptoms are

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medical evidence contained in the self-insurer's exhibit which covered the period between November 5, 2007 and January 31, 2008, were the records of a chiropractor, Dr. Tabor, with whom the employee treated for muscular tension in her back, neck and shoulders. (Id.)

> consistent with a continuation of his [sic] pre-existing issues rather than a newly created psychological problem.

(Dec. 11-12.)

On appeal, the employee contends there was no evidentiary basis for terminating her benefits as of February 15, 2008.[7] She argues the judge disregarded, without explanation, the only medical evidence addressing causal relationship and disability, and instead substituted his own lay opinion. She also maintains the judge mischaracterized the lay testimony, particularly her own, as to when she could return to work. We agree on all counts.

It is fundamental that when medical issues of causation and disability are beyond the common knowledge and experience of a lay person, expert medical opinion is necessary. Josi's Case, 324 Mass. 415, 417-418 (1949). Here, the judge found "the medical testimony" sufficient to satisfy the employee's burden of proof as to causation from February 1, 2008 through February 14, 2008.[8] [8] (Dec. 10-

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[7] Throughout his decision, the judge used the dates of February 14 and February 15, 2008 inconsistently. For example, he found the employee testified she could have returned to work *on* February 14 th, (Dec. 8, 11), but also found the employee's work-related psychiatric condition prevented her from returning to work from February 1, 2008 *through* February 14, 2008. (Dec. 13.) Nevertheless, he awarded total incapacity benefits *to* February 14, 2008, while awarding medical benefits *through* February 14, 2008. (Dec. 14.)

[8] As the employee claimed emotional injury, and the self-insurer asserted the provisions of G. L. c. 152, § 1(7A), as an affirmative defense, (Dec. 6), see MacDonald's Case, 73 Mass. App. Ct., 657 (2009), the pertinent standard of causation was whether the January 31, 2008 incident was "the predominant contributing cause" of her disability, as provided in the third sentence of § 1(7A). See Cornetta's Case, 68 Mass. App. Ct. 107, 117-118 (2007). Neither of the employee's medical experts expressly gave that opinion. The judge, however, found the employee's medical evidence satisfied the heightened "a major cause" standard under the fourth sentence of § 1(7A), through February 14, 2008. (Dec. 10.) Although the self-insurer mentions "the predominant contributing cause"

11.) As the only medical opinions on causal relationship in evidence were Dr. Brown's -- for the first week of claimed disability -- and Dr. Walton's thereafter, it is evident the judge relied on them. Therein lies the rub.

From February 6, 2008, until he cleared her for work on April 3, 2008, Dr. Walton consistently causally related the employee's acute anxiety reaction, with symptoms of PTSD, to the verbal assault at work. (Dec. 10; Ex. 4.) After February 14, 2008, Dr. Walton did not change his opinion that the employee's disability remained causally related to the work incident. Indeed, the doctor opined the work incident was "the major" cause of her disability. (Ex. 4.) See May's Case, 67 Mass. App. Ct. 209, 213 (2006)(a medical opinion that work injury is "the major cause" is substantially equivalent to statutory term "predominant cause"). The judge, however, inserted his own lay opinion into the analysis, finding that the employee's ongoing emotional symptoms and complaints were due to "pre-existing issues." (Dec. 12.) This was " 'a determination of causation, which [he] is not qualified to make.' " Patrinos v. Kindred Nursing Ctr., 24 Mass. Workers' Comp. Rep. 59, 66 (2010), quoting Payton v. Saint Gobain Norton Co., 21 Mass. Workers' Comp. Rep. 297, 307 (2007). The mere existence of a pre-existing psychiatric condition, or the presence of other emotional stressors in the employee's life, did not allow the judge to conclude, absent a supporting medical opinion, that those factors were the cause of the employee's ongoing disability. Accordingly, we vacate the judge's

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standard in its brief, (Self-ins. br. 11, 12), and even states the judge "appropriately determined that the 1/31/2008 event did not remain the predominant source of the employee's psychological issues beyond 2/14/2008," (id. at 12-13), it also acknowledges that the judge conducted "a thorough § 1(7A) analysis which further bolsters his chosen end date." Id. at 11. As the self-insurer did not appeal the judge's decision, we will not disturb the judge's finding that the employee met her burden on causal relationship through February 14, 2008. See 452 Code Mass. Regs. § 1.15 (4)(a)(3)("The Reviewing Board need not decide questions or issues not argued in the brief"). See also Adam v. Harvard Univ., 24 Mass. Workers' Comp. Rep. ___ n.8 (August 6, 2010), citing Rezendes v. City of New Bedford Water Dep't., 21 Mass. Workers' Comp. Rep. 47, 50-51 n.2 (2007)(issue not appealed is deemed waived).

finding that the employee's incapacity after February 14, 2008, was not causally related to the verbal threats made at work.[9]

In addition, we agree the judge erroneously disregarded Dr. Walton's opinion on disability, and instead based his finding that the employee could return to work on February 14, 2008, on a mischaracterization of the lay testimony. The judge noted, "[t]he employee testified she could return to work on February 14, 2008, when the construction foreman, Carl Medeiro, was removed from the job site." (Dec. 8, 11.) No rational reading of the employee's testimony supports the judge's conclusion:

> Q: Now, your issue at work was with this one particular construction foreman, right?
>
> A: Yes.
>
> Q: And so, assuming that you did not have to work with him, do you feel that you could have returned to work?
>
> A: Yes.
>
> Q: And did you request that he be moved so that you could return to work?
>
> A: Yes.
>
> Q: And does it sound familiar to you at all that he was removed from the site on February 14 th?
>
> A: Yes, now that you say it.
>
> Q: Do you know how you became aware of that?
>
> A: No, I don't recall that.

[9] Although the judge's initial causation analysis was erroneously based on the "a major cause" standard, see footnote 8, supra, this unappealed error cannot rationally be used to defeat the employee's claim after February 14, 2008.

Q: *So we can agree that he was removed on February 14 th. Do you feel that you could have gone back to work at that time?*

A: *No.*

. . .

Q: So assuming he is the issue and he is no longer there, do you feel now, thinking about it, that you could have worked on February 15 th?

A: Well, I didn't hear about it right away.

Q: But if you had known?

A: Yes.

Q: *Do you recall on March 5 th telling Dr. Walton that you were upset and that you couldn't return to work because you felt the foreman was still there?*

A: *Yes.*

Q: *So at that time you still thought that he was on the job site?*

A: *Yes.*

(Tr. 50-52; emphases added.) Although the employee first testified she could have returned to work at some *unspecified* time *if* she did not have to work with Medeiro, she clarified that she was not informed he had been removed until well after February 14 th. In fact, as of March 5 th, she still thought he was at the Kenmore Square job site, and told Dr. Walton she still could not return to work. Id. Moreover, the self-insurer's witness, Mr. McKeon, never testified as to when the employee was notified of the construction foreman's removal.[10] [10]

[10] McKeon stated in an affidavit that he "asked that the construction foreman be removed from the job site on 2/14/2008. He was in fact removed, and Ms. Castillo was informed of this." (Ex. 5.) The affidavit does not indicate *when* she was informed. McKeon also testified that he did not know when he and a union official negotiated the accommodations whereby the employee could return to work at a

Consistent with her testimony, Dr. Walton's reports of March 5, March 12, and March 21, 2008, reflect the employee continued to be intensely afraid of returning to work while the construction foreman was still on the job. Dr. Walton did not release her for work until April 3, 2008, and then with the explicit understanding that she would not have to work with the foreman who threatened her or at the location where the incident occurred. (Ex. 4.) The judge mischaracterized the employee's testimony and compounded the error by using that mischaracterization to trump the only expert medical opinion on disability after February 14, 2008. (Dec. 11.)

A judge's findings -- including credibility findings -- which are unsupported by the evidence, as they are here, are arbitrary and capricious and cannot stand. Leary v. M.B.T.A., 24 Mass. Workers' Comp. Rep. 73, 78 (2010); LaGrasso v. Olympic Delivery Serv., Inc., 18 Mass. Workers' Comp. Rep. 48, 52 (2004); Pittsley v. Kingston Propane, Inc., 16 Mass. Workers' Comp. Rep. 349, 351 (2002); Truong v. Chesterton, 15 Mass. Workers' Comp. Rep. 247, 249-250 (2001)(we will not defer to judge's credibility determinations where his reasons for not crediting employee are derived from inferences not reasonably drawn from medical evidence). In addition, a judge may not reject an uncontradicted medical opinion unless he states adequate reasons for doing so. Borawski v. Gencor Indus., Inc., 17 Mass. Workers' Comp. Rep. 542, 546 (2003); Rowe v. Lilly Indus. Coatings, Inc., 9 Mass. Workers' Comp. Rep. 50, 52 (1995).

The judge found causal relationship and total incapacity until February 14, 2008, and the self-insurer has failed to challenge his causation analysis. The only medical evidence regarding causation and ongoing disability thereafter -- the opinions of Dr. Walton -- remained unchanged after February 14, 2008, and the judge's reason for rejecting those medical opinions is tainted by his mischaracterization of the employee's testimony. There can be but one result. See Ortiz-Sanchez v. Inter-Connection Tech., 17 Mass. Workers' Comp. Rep. 151, 156 (2008)(where adopted expert opinion supports only one result, finding of no causation reversed); Medeiros v. San Toro Mfg., 7 Mass. Workers' Comp. Rep. 66, 68 (1993)(reversal appropriate where evidence and all rational inferences can

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location other than Kenmore Square and would not have to work at any location where Medeiro was working. (Tr. 85.)

support only one result).[11] Accordingly, we reverse the judge's finding that the employee could have returned to work after February 14, 2008, and we vacate the termination of incapacity benefits as of that date. The self-insurer is ordered to pay the employee additional § 34 benefits from February 14, 2008 to April 3, 2008, when Dr. Walton opined the employee was able to return to work. The self-insurer shall pay reasonable and related medical benefits for the same time period.

So ordered.

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Patricia A. Costigan
Administrative Law Judge

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Mark D. Horan
Administrative Law Judge

_____
Bernard W. Fabricant
Administrative Law Judge

Filed: **December 30, 2010**

[11] Cf. Vallee v. Brockton Hous. Auth., 24 Mass. Workers' Comp. Rep. ___ (October 7, 2010)(where adopted medical opinion was that employee with psychiatric injury could not return to work for the employer, but was "able to work otherwise," no error in judge's finding employee could return to work on date employee acknowledged he could, if issues with his supervisor were settled). Here, although he noted the employee feared working with the foreman who had harassed her, Dr. Walton did not opine she could return to work for another employer, nor did he opine to any date other than April 3, 2008, when the employee could have resumed working.