COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 022563-02**

Richard Cleveland	Employee
Keatings Materials Corp.	Employer
Liberty Mutual Fire Insurance Co.	Insurer

REVIEWING BOARD DECISION
(Judges Horan, Costigan and Fabricant)

The case was heard by Administrative Judge Koziol.[1]

APPEARANCES

Steven M. Buckley, Esq., for the employee
Joseph B. Bertrand, Esq., for the employer and insurer

HORAN, J. Both parties appeal from a decision awarding the employee benefits pursuant to G. L. c. 152, § 28.[2] The employee claims the judge erred in denying him an enhanced attorney's fee.[3] On multiple grounds, the employer argues the evidence is insufficient as a matter of law to support the § 28 award. Finding one issue dispositive, we reverse the decision and vacate the § 28 benefit award.

The employee worked as a laborer for the employer. In the days preceding his July 15, 2002 industrial accident, the employee's regular supervisor, foreman

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[1] The hearing lasted five days: May 30, 2007, August 10, 2007, October 15, 2007, October 16, 2007 and November 28, 2007; accordingly, references to the transcript in this decision shall be from Tr. I to Tr. V, respectively.

[2] General Laws c. 152, § 28, provides, in pertinent part:

> If the employee is injured by reason of the serious and willful misconduct of an employer or any person regularly intrusted with and exercising the powers of superintendence, the amounts of compensation hereinafter provided shall be doubled.

[3] See General Laws c. 152, § 13A(5). In light of our decision, we do not address the employee's claim for an enhanced attorney's fee.

Robert Sanderson, had begun to direct the employee and a co-worker, Francis McKinnon, on the construction of a twenty foot long chute to be used with a leased portable stone crusher. (Dec. 7; Tr. I, 84; Tr. II, 119-120.) On the employee's date of injury, Sanderson called in sick, and the employee continued to work with McKinnon to complete the chute's fabrication. (Dec. 7; Tr. II, 119.) Because the chute's bottom required welding, it needed to be inverted. This was done by attaching a chain to a backhoe's bucket, enabling it to lift and invert the chute. (Dec. 8.) Hand signals and eye contact between the employee and the backhoe operator were used as a standard safety practice to guard against injury. (Dec. 8-9.) McKinnon operated the backhoe as the employee approached the chute to attach the chain. The judge found:

> [T]he employee and McKinnon made eye contact; Mr. McKinnon showed the employee his hands by moving them away from the controls of the backhoe so that the employee could see them . . . communicating to the employee that it was safe to approach the equipment. Having received this signal, the employee approached the equipment and was in the process of hooking the chain to the bottom of the bucket of the backhoe when the accident happened. . . . McKinnon operated the bucket of the backhoe trapping the employee's left arm in the area of the hinge between the blade or top portion of the backhoe bucket and the boom. Thus, despite giving the employee the signal that it was safe to approach the equipment, Mr. McKinnon proceeded to operate this large piece of equipment with no explanation other than that he had some vague notion or understanding that it was safe to do so.

(Dec. 9-10.) The employee's left minor arm was crushed and partially amputated. (Dec. 7.) Although emergency surgery rejoined it, the employee's arm remains non-functional. Id.

We need not reach the issues raised by the employer concerning the facts of the accident itself, and whether the judge erred by failing to exclude certain evidence from the record. Instead, we address the employer's argument the evidence of record, even when viewed in the light most favorable to the employee,

fails to support a finding that the employer "intrusted" McKinnon with "powers of superintendence" over the employee on the date of his tragic accident.[4]

The employee testified as follows. In 1988, when he began work as a laborer on the night shift at the employer's stone crushing plant in Lunenberg, Massachusetts, Francis McKinnon was his foreman; at that time, McKinnon supervised four or five laborers. (Tr. I, 48-49; Tr. II, 74-75.) When the employee transferred to the day shift in 1992, McKinnon was no longer his foreman. (Tr. I, 54-55.) McKinnon left the Lunenberg facility to work at the employer's Watertown, Massachusetts plant in 2000 or 2001.[5] (Tr. I, 58-59; Tr. II, 21-22.) Prior to the employee's industrial accident, McKinnon returned to the employer's Lunenberg facility to work the day shift with the employee and seven or eight other laborers. (Tr. I, 60, 69; Tr. II, 85-86.) Prior to and on the employee's date of injury, Brian Slack was the general manager at the Lunenberg plant, William Thompson, the assistant superintendent, was under Slack in the chain of command, and Robert Sanderson worked under Thompson as a foreman. (Tr. I,

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[4] Given our disposition, we also do not address the issue of whether McKinnon (assuming he had powers of superintendence) could have been found to have been exercising them insofar as his operation of the backhoe is concerned. The following cases, decided under the Employer's Liability Act which predated our workers' compensation statute, are instructive. See Coates v. Soley, 194 Mass. 386 (1907) (supervisor's decision to start a team of horses which caused employee to become trapped between timbers could be found to be an act of superintendence under the act) and McPhee v. New England Structural Co., 188 Mass. 141 (1905)(act of supervisor in deciding to start an engine when employee in harm's way was an act of superintendence under the act). Compare with Buckley v. Dow Portable Electric Co., 209 Mass. 152 (1911)(manner in which superintendent drove car not an act of superintendence under the act); Sarrisin v. Slater and Sons, 203 Mass. 258 (1909)(the manner in which a supervisor pulled plank which injured employee not an act of superintendence under the act).

[5] Testimony from other witnesses makes it clear McKinnon continued to work as a foreman or supervisor at the Watertown facility prior to his return to work at the Lunenberg site. (Tr. IV, 28, 80, 154-156.) However, there was no testimony McKinnon worked as a foreman or supervisor at the Lunenberg plant upon his return from Watertown.

114-115; Tr. II, 65, 80.) Sanderson was the employee's foreman. (Tr. I, 84; Tr. II, 65, 119.)

We note the employee never testified McKinnon was his supervisor or foreman after the employee transferred to the day shift in 1992. No other witness identified McKinnon as ever being designated by the employer as a person "intrusted with . . . powers of superintendence" for the relevant time period after he returned to the Lunenberg plant. This being so, the judge relied upon her interpretation of the collective bargaining agreement, (Ex. #12, hereinafter the "CBA"), and on the level of pay McKinnon was receiving at the time of the employee's industrial accident, to conclude McKinnon "had a supervisory role over the employee." (Dec. 8.)

Respecting the issue of wages payable at the time in question, Article III, § 1 of the CBA provides, in pertinent part:

> The hourly rates of pay for all employees covered by this Agreement shall be as follows:
> Working Foreman (supervising two (2) or more employees)[6] $19.01

(Ex. 12, 4.) McKinnon acknowledged he continued to receive foreman's pay when he returned to Lunenberg to work as a laborer, because the union contract provided that upon transfer between jobs, employees received the greater rate of pay as between them. (Tr. IV, 80-81.) Article IX, § 1 of the CBA provides, in pertinent part:

> The Company may transfer or promote an employee from one job to another. In the event of a transfer from one job to another where the rate of pay on the transferred job is greater, the employee shall receive the greater pay.

(Ex. 12, 11.) Rather than credit McKinnon's unrebutted explanation of why he continued to be paid foreman's wages upon his return to Lunenberg to work as a

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[6] There is no evidence that McKinnon was given the authority by the employer to supervise two or more employees upon his return to Lunenberg. See discussion, infra.

laborer, or the testimony of others corroborating his understanding of the CBA on this point,[7] the judge found:

> [T]hat on July 15, 2002, Mr. McKinnon was being paid working foreman wages, the union contract submitted into evidence does not provide for the payment of foreman wages to individuals who are transferred back to the company in a capacity below that of foreman, and that on the date of the accident, Mr. McKinnon was a foreman for the employer. See, Exhibit #12. I also find that because the employee's regular supervisor, Mr. Sanderson, was not at work on July 15, 2002, as a foreman, Mr. McKinnon had a supervisory role over the employee, Richard Cleveland . . . at the time of the accident.

(Dec. 8.)

We agree with the employer there is insufficient evidence to support the judge's implied[8] conclusion that McKinnon was "a person regularly intrusted with" the "powers of superintendence" pursuant to § 28. The case law is distinctly sparse regarding the quantum of evidence necessary to warrant a finding of "superintendence" under the statute. In O'Leary's Case, the court noted "[c]omparable language in the Employer's Liability Act, G. L. c. 153, § 1, has been interpreted by this court as primarily intended to differentiate between a mere volunteer and one actually designated by the employer as a superintendent." 367 Mass. 108, 114 (1962). In Hourigan v. Boston Elevated Railway, 193 Mass. 495 (1907), the court concluded the plaintiff proved "superintendence" under the Employer's Liability Act by a consideration of several factors:

> There was evidence that Porter was paid more than the other men employed in unloading the schooner in question; that he did manual work only when he felt like it; that it was his duty to report how many men he wanted and to report them if they did not work properly; that it was his duty to tell the men where to shovel the coal and to whistle and tell the engineer when to hoist and when to lower the coal scoop; and that it was also his duty to tell

[7] See the testimony of William Thompson (Tr. IV, 26-27) and Brian Slack (Tr. IV, 155-157). Robert Sanderson testified he was unaware of what the CBA provided respecting this issue. (Tr. III, 100, 102-103.)

[8] The judge found only that McKinnon had a "supervisory role over the employee . . . at the time of the accident." (Dec. 8.)

> the men when to stop work. There was no other person in immediate charge of the work. This warranted the jury in finding that Porter was a superintendent within the employers' liability act.

Id. at 497; see also Robertson v. Hersey, 198 Mass. 528, 531-532 (1908)(applying Hourigan factors to find "superintendence").

In this case, only one Hourigan factor exists, namely, that McKinnon received a foreman's level of pay, consistent with the applicable CBA, which was higher than the employee's pay grade. There is no other evidence the employer entrusted any supervisory duties to McKinnon upon his return to the Lunenburg site, and there is no evidence McKinnon was designated by the employer as the *employee's* supervisor, or his working foreman, after 1992.[9] In fact, the employee's testimony not only failed to identify McKinnon as his supervisor on the date of the accident, it disproved that fact. See Hourigan, supra. Upon questioning by the judge, the employee testified as follows:

> Q: Now, that day [the date of injury] was Mr. Sanderson [the employee's foreman] working that day?
> A: He was absent that day.
> Q: Was Mr. Thompson [the assistant superintendent] there?

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[9] Analogously, we note that, in the realm of employment discrimination, (G. L. c. 151B), vicarious liability of the employer attaches with the malfeasance of one of its supervisors. In the absence of case law in the Commonwealth courts, the United States District Court has concluded that such a supervisory role is not established by the mere fact that the tortfeasor was a supervisor in some other area of the company, unrelated to the plaintiff:

> Plaintiff suggests that even though [the alleged tortfeasor, Kaletta] was not *his* supervisor, the fact that Kaletta was *a* supervisor subjects Defendant [Employer] to *per se* liability under chapter 151 B for any harassment Kaletta may have created. The court disagrees. Simply put, there is no Massachusetts decision which even attempts to stretch the language of chapter 151 B that far. . . .
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> Accordingly, this court is of the opinion that, as with Title VII, Defendant may not be held *per se* liable under chapter 151 B for any harassment which may have been created by Kaletta, notwithstanding the fact that he may have possessed some supervisory powers in other contexts.

Rosemund v. Stop & Shop Supermarket Co., 456 F.Supp.2d 204, 215-217 (D. Mass. 2006)(emphasis in original).

A: He was the first one on the scene after the accident.
Q: *And who had given you your assignment that day?*
A: *We knew it. Nobody. Mr. Sanderson was our foreman. He was out sick. We just automatically knew.*

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Q: So you had been trying to fabricate this thing for three to four days?
A: Yes.
Q: And did you work every day with McKinnon doing that?
A: Mr. McKinnon and Mr. Sanderson, yes.
Q: The two of them?
A: Yes.
Q: Together or separate times?
A: Mostly together.
Q: Was Mr. McKinnon the person who was always operating the backhoe?
A: No.
Q: Who usually did that?
A. Mr. Sanderson.
Q: Had you ever seen Mr. McKinnon operate a backhoe in the past?
A: Yes.
Q: Do you know how to operate a backhoe?
A: Yes.
Q: *Why is it that you weren't operating it as opposed to Mr. McKinnon?*
A: *Just the luck of the draw, I guess.*
Q: *So it wasn't - - you hadn't been given an order that Mr. McKinnon was to operate that?*
A: *No.*

(Tr. II, 119-120; emphasis added.) Thus, apart from Mr. McKinnon's rate of pay, the employee's testimony and the remaining evidence of record fail to support the finding that McKinnon was "designated by the employer" as the employee's superintendent on or about July 15, 2002. O'Leary, supra at 114; contrast Bankowski's Case, 77 Mass. App. Ct. ___, n.3 (July 7, 2010)(memorandum and order pursuant to rule 1:28)(sufficient evidentiary support for findings that supervisors in question were the employee's supervisors at the time incidents occurred).

Finally, we note the CBA excludes McKinnon as a supervisor ("working foreman") in another respect. A working foreman under the CBA is defined as one who supervises "two (2) or more employees." (Ex. 12.) There is no evidence McKinnon was designated by the employer to supervise two or more employees upon his return to the Lunenberg site, or at any time thereafter. Moreover, employees who were not working foremen could be designated as "operators," which duties included operating backhoes. (Ex. 12.) There was nothing inherently supervisory in the operation of the backhoe, as opposed to working on the ground. That McKinnon, and not the employee, operated the backhoe was, as the employee testified, "[j]ust the luck of the draw." (Tr. II, 120.)

On this record, we conclude the evidence is insufficient as a matter of law to support the finding of superintendence necessary to establish the employer's liability under § 28. G. L. c. 152, § 11C. Accordingly, we reverse the decision, and vacate the award of double compensation.

So ordered.

Mark D. Horan
Administrative Law Judge

Patricia A. Costigan
Administrative Law Judge

Bernard W. Fabricant
Administrative Law Judge

Filed: FILED JUL 9 - 2010 Dept. of Industrial Accidents

The Commonwealth of Massachusetts

Department of Industrial Accidents

600 Washington Street, 7th Floor
Boston, Massachusetts 02111

DEVAL L. PATRICK
Governor

TIMOTHY P. MURRAY
Lieutenant Governor

PAUL V. BUCKLEY
Commissioner

July 9, 2010

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RE: Employee: Richard Cleveland
Employer: Keatings Materials Corp.
Insurer: Liberty Mutual Fire Insurance Co.
Date of Injury: July 15, 2002
Board No. 022563-02

Dear Counsellors:

Enclosed is the decision of the Reviewing Board in the above-captioned case. The filing date of this decision is **July 9, 2010**.

Your right of appeal from this decision is governed by M. G. L. c. 152, § 12(2), and Rules 3, 4 and 10 of the Massachusetts Rules of Appellate Procedure. Notwithstanding the provisions of § 12(2), the Appeals Court requires that you file your notice of appeal with the Reviewing Board within thirty (30) days of the filing date of the board's decision. Please send your notice of appeal to:

The Commonwealth of Massachusetts
Department of Industrial Accidents
Attention: Fred Capone, Reviewing Board Counsel
600 Washington Street
Boston, MA 02111-1704

Preparation of briefs and record appendices is also governed by the Massachusetts Rules of Appellate Procedure.

Very truly yours,

Mark D. Horan
Administrative Law Judge
for the Reviewing Board

MDH/lj
Enclosure

COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS

BOARD NO. 022563-02

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Keatings Materials Corp.	Employer
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> Plaintiff suggests that even though [the alleged tortfeasor, Kaletta] was not *his* supervisor, the fact that Kaletta was *a* supervisor subjects Defendant [Employer] to *per se* liability under chapter 151 B for any harassment Kaletta may have created. The court disagrees. Simply put, there is no Massachusetts decision which even attempts to stretch the language of chapter 151 B that far. . . .
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> Accordingly, this court is of the opinion that, as with Title VII, Defendant may not be held *per se* liable under chapter 151 B for any harassment which may have been created by Kaletta, notwithstanding the fact that he may have possessed some supervisory powers in other contexts.

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A: *No.*

(Tr. II, 119-120; emphasis added.) Thus, apart from Mr. McKinnon's rate of pay, the employee's testimony and the remaining evidence of record fail to support the finding that McKinnon was "designated by the employer" as the employee's superintendent on or about July 15, 2002. O'Leary, supra at 114; contrast Bankowski's Case, 77 Mass. App. Ct. ___, n.3 (July 7, 2010)(memorandum and order pursuant to rule 1:28)(sufficient evidentiary support for findings that supervisors in question were the employee's supervisors at the time incidents occurred).

Finally, we note the CBA excludes McKinnon as a supervisor ("working foreman") in another respect. A working foreman under the CBA is defined as one who supervises "two (2) or more employees." (Ex. 12.) There is no evidence McKinnon was designated by the employer to supervise two or more employees upon his return to the Lunenberg site, or at any time thereafter. Moreover, employees who were not working foremen could be designated as "operators," which duties included operating backhoes. (Ex. 12.) There was nothing inherently supervisory in the operation of the backhoe, as opposed to working on the ground. That McKinnon, and not the employee, operated the backhoe was, as the employee testified, "[j]ust the luck of the draw." (Tr. II, 120.)

On this record, we conclude the evidence is insufficient as a matter of law to support the finding of superintendence necessary to establish the employer's liability under § 28. G. L. c. 152, § 11C. Accordingly, we reverse the decision, and vacate the award of double compensation.

So ordered.

Mark D. Horan
Administrative Law Judge

Patricia A. Costigan
Administrative Law Judge

Bernard W. Fabricant
Administrative Law Judge

Filed: FILED JUL 9 - 2010 Dept. of Industrial Accidents