COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO.:** 046542-04

Richard Hart	Employee
G.V.W. Inc.	Employer
Commerce & Industry Ins. Co.	Insurer

REVIEWING BOARD DECISION

(Judges Horan, Costigan and McCarthy)

The case was heard by Administrative Judge Bean.

APPEARANCES

Stephen M. Forlizzi, Esq., for the employee
Catherine M. Doherty, Esq., for the insurer at hearing
Michael P. Mahany, Esq., for the insurer on appeal

HORAN, J. The insurer appeals from a decision ordering it to pay the employee ongoing total incapacity benefits and §§ 13 and 30 benefits for reasonable and necessary medical treatment for cardiac and psychiatric conditions. Because the judge erred in the manner he considered and adopted the medical evidence, we vacate the decision,[1] and recommit the case to a different administrative judge for a hearing de novo.

Richard Hart, fifty-four years old at hearing, had worked as a construction project manager for the employer since 2003. He routinely toiled between fifty and sixty hours per week, often bringing paperwork home. His job was especially stressful by virtue of his difficult relationship with the president of the company, George Wattendorf, whom the employee viewed as demanding and critical. The employee felt Wattendorf damaged the employee's relationships and reputation with his professional colleagues by forcing him to renege on promises, taking unfair advantage of subcontractors, forcing subcontractors to pay for the mistakes of others, and otherwise micromanaging him and countermanding his orders. (Dec. 119-121, 127.)

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[1] We let stand, however, the judge's finding of a causal relationship between the employee's work and his stroke. See footnote 2, infra.

On December 8, 2004, after being chastised at a meeting for being behind on his paperwork, and then unexpectedly encountering Wattendorf when he returned to his office, the employee suffered a myocardial infarction (MI). (Dec. 122-123.) He returned to work part-time on January 13, 2005, but by the spring, he was working his pre-injury hours and falling behind in his paperwork. On Saturday, May 13, 2005, while working on paperwork at his cabin in Maine, he felt uneasy and became unable to speak coherently. He drove himself to the hospital, and was diagnosed as having suffered a stroke; he has not returned to work. (Dec. 123.)

In his workers' compensation claim dated March 3, 2006, the employee described his injury as a heart attack from job stress.[2] The insurer denied payment and, following a § 10A conference, the judge awarded the employee § 34 benefits from May 14, 2005, until the date of the conference, July 18, 2006. Both parties appealed. Two impartial examinations were scheduled: one with Dr. B. D. Gupta, a cardiologist, and the other with Dr. Arnold Robbins, a psychiatrist. (Dec. 119.) Due to the complexity of the medical issues, the parties were allowed to supplement the medical evidence. (May 8, 2007 Tr. 3-4.) The employee submitted a report from his treating psychiatrist, Dr. George Freedman. (Dec. 119, 126.)

Dr. Gupta examined the employee on November 23, 2006, and opined the employee suffered an acute inferior wall MI in December 2004, and a left parietal stroke in May 2005. Noting a number of risk factors, he did not causally relate the MI to the employee's employment, but to

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[2] We take judicial notice of documents in the board file. Rizzo v. M.B.T.A., 16 Mass. Workers' Comp. Rep. 160, 161 n.3 (2002). The employee's claim subsequently morphed to include a mental/emotional stress claim, based on a series of stressful events at work, including, apparently, the alleged myocardial infarction and/or stroke. Though the stress claim was never filed with the board, we view it as being tried by consent. Similarly, the employee never filed a claim for a work-related stroke, but it is apparent the parties also tried that claim by consent. On appeal, the insurer does not challenge the judge's finding that the employee's stroke was causally related to work. (Dec. 127.) However, for the first time, it raises a Lanigan challenge with respect to the opinion of Dr. Freedman. See Commonwealth v. Lanigan, 419 Mass. 15 (1994). However, as the insurer failed to raise a Lanigan challenge below, we consider the issue waived. See Canavan's Case, 432 Mass. 304, 309 (2000)(objections at hearing by insurer's counsel, citing Lanigan, sufficient to preserve the issue of the admissibility of doctor's medical opinion for review on appeal); see generally Green v. Town of Brookline, 53 Mass. App. Ct. 120, 128 (2001).

underlying, though undiagnosed, coronary artery disease. He further opined the employee was not disabled from his cardiac condition. He suggested if the employee does return to work, he should limit his lifting and avoid extremes in temperature. (Dec. 124-125.)

Dr. Robbins examined the employee on December 5, 2006, and was deposed on July 17, 2007. He diagnosed the employee as suffering from a "conversion reaction, that is a conversion of psychological stressors to physical complaints and depression." (Dec. 125; Robbins Dep. 11, 13.) He opined it was likely the employee's " 'myocardial infarction was the immediate precipitant for his fear, anxiety, depression and conversion.' " (Dec. 126; Ex. 4, Robbins report.) In his report, Dr. Robbins opined, "[i]t is beyond my expertise to say if work stress contributed to his MI, but it could have been a factor." (Ex. 4.) He did not alter this opinion at deposition. (Robbins Dep. 37.) While he did opine that the demands and pressures of the employee's job, along with the fear of future medical problems *after* his heart attack, combined to form an "important" contributing cause of his psychiatric disability, he declined to say these factors were the predominant cause. (Robbins Dep. 22.) But see May's Case, 67 Mass. App. Ct. 209 (2006)(doctor's use of term "primary" sufficient to support finding of "predominant" cause under § 1[7A]).

In his May 7, 2007 report, Dr. Freedman diagnosed the employee with major depression. He described the employee's history as consistent with "increasing stress in the context of a very demanding work environment which led to a myocardial inf[ar]ction on 12/8/04 followed by a left parietal lobe CVA[3] on 5/13/05." (Ex. 5; Dec. 127.) Regarding causation, Dr. Freedman opined the employee "had been a hard working individual in the past in a difficult work environment which must have contributed in large measure to his myocardial inf[ar]ction and the stroke that followed." (Ex. 5; Dec. 127.) He opined the employee was totally disabled "due to his present physical condition." Id.

Adopting the opinions of Doctors Robbins[4] and Freedman, the judge concluded the employee suffered a MI on December 8, 2004, and a left parietal lobe CVA on May 14, 2005, both caused by "stress at work." (Dec. 127.) He also found that "[t]he workplace stress and the resulting injuries of December 8, 2004 and May 14, 2005 caused the employee to incur the psychiatric

[3] A cerebrovascular accident, commonly known as a stroke.

[4] Dr. Robbins's report and testimony do not support a finding of a causal relationship between the employee's work and his MI, as the doctor himself stated he was not qualified to opine on the issue. See discussion supra, p. 3.

injuries of Major Depression and conversion reaction." Id. The judge awarded the employee § 34 benefits, basing his incapacity finding on the opinions of Doctors Robbins and Freedman. (Dec. 129.)

We address two related issues raised by the insurer, which are dispositive. We agree the judge erred by relying on his own understanding of medicine to reject Dr. Gupta's opinion,[5] [5] and erred by adopting Dr. Freedman's opinion on the causal relationship between the employee's work and his MI. The judge wrote:

> It is *my understanding* from having read the opinions of many cardiologists before deciding several previous cardiology cases, that the generally accepted position of the medical experts in the field of cardiology *is that acute stress can cause myocardial infarctions*. There is no generally accepted position on the effects of chronic stress. . . .
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> I rely, in part, on *my understanding of the generally accepted position on acute stress* in rejecting Dr. Gupta's opinion. But I do not rely upon it to find in favor of the employee. I do not have the medical credentials to make such a finding. I rely on the medical opinion of Dr. Freedman *who did make such a finding*.

(Dec. 128; emphasis added.)

Ordinarily, a judge is free to adopt the opinion of one medical expert over another without explanation. Fitzgibbons's Case, 374 Mass. 633, 636 (1978), Thompson v. Berkshire County Assoc. for Retarded Citizens, 20 Mass. Workers' Comp. Rep. 247, 251 (2006). However, when a judge *does* give reasons for rejecting a medical opinion, they must be grounded in the evidence of record, and not on a judge's extra-evidentiary understanding. See 452 Code Mass. Regs. § 1.11(5)("The decision of the administrative judge shall be based solely on the evidence introduced at the hearing"). Here, the judge confessed his reliance upon his "own understanding" of the effects of acute stress on the heart, gleaned from the opinions of cardiologists in other cases, to find a causal relationship between the employee's work and his MI. (Dec. 128.) However, the medical evidence, including Dr. Freedman's opinion, contains nothing supportive of the judge's understanding, nor a discussion of what constitutes acute stress, nor an opinion

[5] The judge did adopt Dr. Gupta's opinion that the employee was no longer disabled as a result of his cardiac condition. (Dec. 128.)

disclosing that the employee suffered from it. Compare Wirtz v. Barry Wehmiller Group, 19 Mass. Workers' Comp. Rep. 171 (2005).[6]

A judge may adopt some physicians' opinions and reject others only where "the reasons given by the judge . . . [are] . . . not arbitrary or capricious or contrary to law." Murmes v. Gambro Health Care, 14 Mass. Workers' Comp. Rep. 13, 17-18 (2000); See also Thompson, supra at 251 (judge's failure to make specific findings regarding reasons for rejecting § 11A opinion in favor of that of treating physician not error, where judge performed "reasoned fact-finding"). Here, the judge did not perform "reasoned fact-finding" in rejecting Dr. Gupta's opinion, instead relying upon his own understanding,[7] unsupported by the medical evidence of record, of the generally accepted position in the medical community regarding the relationship between stress and MI, and what type of stress (acute or chronic) the employee experienced. This was error, as was the judge's finding that Dr. Freedman opined that acute stress caused the employee's MI. Doctor

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[6] In Wirtz, two medical experts testified it was generally accepted in the scientific community that acute, but not chronic, stress could cause a myocardial infarction. However, the experts disagreed on the *definition* of acute stress, with Dr. Aroesty saying acute stress occurred within an hour of the infarction, and Dr. Lutch testifying there need not be such close temporal proximity for stress to be acute. The judge adopted Dr. Lutch's opinion, and found the employee's heart attack was causally related to work stress experienced over several days, which could be considered acute. The insurer challenged the admissibility of Dr. Lutch's opinion on the ground it was not generally accepted in the scientific community that stress occurring over several days could cause a myocardial infarction. Id. at 177.

[7] The Appeals Court, in three recent decisions, has held that judges may not, in determining the amount of an employee's earning capacity, choose an amount that has no factual basis or reasoned explanation in the record. Eady's Case, 72 Mass. App. Ct. 724 (2008); Dalbec's Case, 69 Mass. App. Ct. 306 (2007); Thompson's Case, 2008−P−1537, Rule 1:28 Memorandum and Order (April 15, 2009). In Thompson's Case, the court reversed a judge's stated reliance upon her "expert knowledge of the local job market coupled with more than 12 years of adjudicating workers' compensation claims" as a legitimate basis for the assignment of an employee's earning capacity. Accordingly, we fail to see how a judge would be permitted to ground a finding of medical causal relationship on his own expertise, except in the most obvious of circumstances, see Lovely's Case, 336 Mass. 512 (1957), in the absence of supportive medical evidence of record. Josi's Case, 324 Mass. 415 (1949).

Freedman never said that.[8] Accordingly, we vacate the decision insofar as it finds a causal relationship between the employee's work and his MI, and insofar as it awards §§ 13 and 30 benefits for reasonable and necessary medical treatment of that condition.

The insurer next argues the judge failed to adequately address its § 1(7A)[9] defense in two respects. First, it argues that, with respect to the employee's MI, there is no discussion of whether, and to what extent, the statute's fourth sentence applies to that injury. We agree. Second, it remains unclear whether the employee's burden of proof under the third sentence of § 1(7A) has been met with respect to his psychiatric claim, as the medical opinions of Drs. Freedman and Robbins both rest, at least in part, on the MI as being one of the work-related events causative of the employee's psychiatric disability. Because the judge's unsupported understandings of stress and myocardial infarction affected his adoption of Dr. Freedman's opinion, and because the opinions of Drs. Freedman and Robbins both cite to the MI as a work-related event, we vacate the decision insofar as it awards benefits for the employee's psychiatric injury. We cannot envision how the judge below, under the circumstances, could approach this case anew; therefore, we recommit the case for a new hearing before a different administrative judge.[10]

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[8] Doctor Freedman used the word "stress" only once in his report, in the following context: "Mr. Hart's history is certainly consistent with increasing stress in the context of a very demanding work environment. . . ." (Ex. 5, p. 1.) The report is void of any definition or discussion of acute versus chronic stress.

[9] General Laws c. 152, § 1(7A), provides, in sentences three and four:

> 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. If a compensable injury or disease combines with a pre-existing condition, which resulted from an injury or disease not compensable under this chapter, to cause or prolong disability or a need for treatment, the resultant condition shall be compensable only to the extent such compensable injury or disease remains a major but not necessarily predominant cause of disability or need for treatment.

[10] We are mindful that the success of the employee's psychiatric claim may also turn on whether the work-related stroke, *ipso facto*, caused the employee's mental/emotional injury. The same

So ordered.

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Mark D. Horan
Administrative Law Judge

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Patricia A. Costigan
Administrative Law Judge

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William A. McCarthy
Administrative Law Judge

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may prove true with respect to the alleged work-related MI. See Cornetta's Case, 68 Mass. App. Ct. 107 (2007).