COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS	**BOARD NO. 54777-94**
Robert F. Bracey	Employee
Hogan Regional Center	Employer
Commonwealth of Massachusetts	Self-Insurer

REVIEWING BOARD DECISION
(Judges McCarthy, Wilson & Smith)

APPEARANCES
Mitchell J. Wallman, Esq., for the employee
Michele C. Lareau, Esq., for the self-insurer and
Terrence H. Buckley, Esq., for the self-insurer

MCCARTHY, J. Robert Bracey appeals from a decision of an administrative judge denying his claim and assessing § 14(2) penalties against him. Finding no error, we affirm the decision.

Mr. Bracey was twenty-eight years of age at the time of the hearing. A graduate of Salem State College, he began working as a mental health counselor for the Massachusetts Department of Mental Health in March 1993. He was assigned to a residential facility as a counselor on the evening shift. He was responsible for direct client care, including overseeing client activities and dinner and assisting them at bedtime. (Dec. 4, 5.)

On December 4, 1994, the employee was helping another counselor escort an agitated client up stairs to his room. While climbing the stairs, the client suddenly lashed out with his hand striking the employee and causing him to fall backwards down three or four stairs, breaking a door window with his elbow and landing on the floor. (Dec. 7.) The following day the employee sought treatment at the Salem Hospital where x-rays of the lumbar spine were taken. He was given a prescription for medication and told to rest

for five days. (Dec. 7.) Bracey resigned from his job in February 1995 and started a different position with a new employer in June 1995. (Dec. 5.)

The employee filed a claim for benefits which the self-insurer denied. In defending the claim, the self-insurer does not dispute that an injury as described by the employee was reported on December 4, 1994 or that he sought medical treatment for his alleged injuries the following day. Rather, the self-insurer asserts that the employee intentionally contrived the accident for the purpose of receiving workers' compensation. (Dec. 7.) Following a § 10A conference denial of his claim, the employee appealed to a hearing de novo. The parties agreed that, as initial liability had not been established, a § 11A impartial medical examination was not required. See 452 Code Mass. Regs. § 1.10(7). The employee submitted records from the Salem Hospital as well as a physician's notes. The self-insurer did not submit medical evidence. No depositions were taken. (Dec. 3.)

After hearing the testimony of Mr. Bracey and seven co-employees, the administrative judge found the employee "generally not credible." (Dec. 8.) She determined that his injury arose out of but not in the course of his employment because he intentionally provoked an already agitated client, an action not within his contract of hire. (Dec. 10.) The judge further found that Bracey knowingly made false statements in the course of his hearing testimony. (Dec. 11.) The judge denied the employee's claim and assessed the costs of the proceeding, an attorneys' fee of $3000 and § 14(2) penalties in the amount of $3513.96 against the employee. (Dec. 11, 12, Addendum 1[1].)

In his appeal the employee raises three evidentiary issues.[2] First he argues that he was prejudiced by the judge's allowance of hearsay testimony. Specifically, the

[1] The judge's original decision, issued November 28, 1997, did not specify the dollar amounts to be paid. The judge thereafter issued an Addendum setting forth the amounts.

[2] "[A] decree in a workmen's compensation case will not be reversed for error in the admission or exclusion of evidence, unless substantial justice requires reversal." Indrisano's Case, 307 Mass. 520, 523 (1940).

employee objects to the judge's permitting the testimony of two co-workers, Joy Jones and James Byrne. Ms. Jones testified about a conversation she had with Mr. Bracey in which he disclosed detailed plans to stage an event with a specific client, designated "X", by teasing him with a cup of coffee, a substance known to agitate "X"[3]. (Tr. II[4], 68-72.)

Although the employee objected to an earlier part of Jones' testimony, (Tr. II, 68), he did not object to this particular portion. (Tr. II, 69.) Having failed to object at the hearing, the employee is foreclosed from raising the issue now for the first time. Phillips' Case, 278 Mass. 194, 196 (1932). Moreover, had an objection been taken it would have been groundless. "The hearsay rule forbids the admission in evidence of extrajudicial statements offered to prove the truth of the matters asserted in the statements." Liacos, Handbook of Massachusetts Evidence, § 8.1 (6th ed. 1994). The rationale for the rule is that extrajudicial statements are not immediately tested by cross-examination. However, an admission by a party while not on the witness stand is admissible. The admission may be in the form of an act, a failure to act or a statement. Id. at § 8.81. Here, Ms. Jones testified as to a conversation she had with the employee on December 4, 1994. This extrajudicial statement by the employee constitutes an admission and Jones may testify about it.

Mr. James Byrne testified that he and Ms. Jones had a conversation relative to Mr. Bracey. (Tr. II, 91.) Counsel for the self-insurer then asked Byrne what Ms. Jones had told him in that conversation. Employee counsel objected.[5] Counsel for the self-insurer

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[3] "X" was a male resident known to demonstrate aggressive behavior toward counselors. A known trigger for his aggressive behavior was the sight or even the mention of coffee. (Dec. 5-6.)

[4] Testimony was taken on three different days. Day one of the testimony, December 13, 1995, is referred to as Tr. I; day two, February 23, 1996, is designated Tr. II; day three, August 28, 1996, is ascribed Tr. III.

[5] The exchange went as follows:

Q. Now, on [sic] the van, did you have a conversation with Joy Jones relative to Robert Bracey?
A. Yes.
Q. And what did Miss Jones tell you?

responded that Byrne's testimony was not offered for the truth of the matter therein. (Tr. II, 92). As the out of court statement was offered to confirm Ms. Jones' testimony, arguably, it was offered for the truth of the matter stated. However, if it was error to admit the statement, the error was harmless because the evidence was merely cumulative.

Next the employee argues that the judge erred by not allowing him to put in evidence of Ms. Jones' general reputation for truthfulness and veracity. The employee sought to elicit testimony from James O'Haire, a co-employee of both Mr. Bracey and Ms. Jones. In attempting to elicit testimony regarding Ms. Jones' reputation employee counsel posed the question "Do you have an opinion as to her character…?" The self-insurer objected on the grounds that character evidence is not permissible and the judge, following a colloquy, sustained the objection. (Tr. III, 29-33.) The employee now argues that the judge's ruling on the self-insurer's objection was wrong. We do not agree. The employee's question attempted to get in evidence the personal belief and opinion of the impeaching witness, not the general reputation of Ms. Jones. The personal belief or opinion of an impeaching witness is not admissible. See K. Hughes, Evidence § 239 at 281 (1961).

Finally, the employee argues that the judge's findings regarding the issue of fraud are contradictory.[6] On the issue of fraud, the judge stated, "I find that there is insufficient

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> [Employee counsel]: Objection, Judge. It's a conversation he had with Miss Jones.
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> The Court: She's already testified.
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> [Employee counsel]: Well, he can't tell us as to the actual conversation, Judge. She's not the issue here. He can certainly testify as to what he learned, but as to the exact conversation, it would be hearsay.
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> [Self-Insurer counsel]: It is not being offered for the truth of the statements. It's being offered as confirmations to the conversation between Joy Jones and the employee, which was then reported to this witness. It is not being offered to prove . . . .

(Tr. II, 91-92.)

[6] The employee moved to stay the order of penalties. His request exceeds our authority under the Act. Because the parties have maintained the status quo as to the penalties even in the absence of an agreement, we assume that agreement will continue during the pendency of any appeal from this decision.

evidence to show that this proceeding was brought without reasonable grounds, but that the employee made false statements of fact in the proceedings in front of me." (Dec. 11.)

The judge's general finding that the employee "knowingly made false statements of fact in the proceeding before [her]" finds support in the evidence.

Section 14(2) of the Act states in pertinent part:

> If it is determined that in any proceeding within the division of dispute resolution, a party, including an attorney or expert medical witness acting on behalf of an employee or insurer, concealed or knowingly failed to disclose that which is required by law to be revealed, knowingly used perjured testimony or false evidence, knowingly made a false statement of fact or law, participated in the creation or presentation of evidence which he knows to be false, or otherwise engaged in conduct that such party knew to be illegal or fraudulent, the party's conduct shall be reported to the general counsel of the insurance fraud bureau. Notwithstanding any action the insurance fraud bureau may take, the party shall be assessed, in addition to the whole costs of such proceedings and attorneys' fees, a penalty payable to the aggrieved insurer or employee, in an amount not less than the average weekly wage in the commonwealth multiplied by six.

In her subsidiary findings, the judge found the employee to be generally not credible and his testimony untruthful at least in part. (Dec. 8.) Knowingly making a false statement of fact while testifying under oath in the course of a hearing triggers the sanctions imposed by the judge under § 14(2). See Williams v. Evans Transportation, 12 Mass. Workers' Comp. Rep. 162 (1998); Pirelli v. Caldor, Inc., 11 Mass. Workers' Comp. Rep. 380 (1997).

The finding that "there is insufficient evidence to show that this proceeding was brought without reasonable grounds" is not necessarily inconsistent with the finding of a violation of § 14(2) if the judge was making a distinction between the actions of employee's attorney and the employee. We construe the judge's wording as a finding that counsel for the employee was not culpable in believing his client's version of the disputed accident or at fault for bringing an unreasonable claim. Thus construed, there is no inconsistency. By a copy of this decision directed to the general counsel of the insurance fraud bureau, we make the report called for by § 14(2).

The decision the administrative judge is affirmed.

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William A. McCarthy
Administrative Law Judge

Filed: May 20, 1999

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Sara Holmes Wilson
Administrative Law Judge

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Suzanne E.K. Smith
Administrative Law Judge