

COMMONWEALTH OF MASSACHUSETTS

**DEPARTMENT OF
INDUSTRIAL ACCIDENTS**

BOARD NO. 028553-01

Robert M. Litchfield
Town of Westford
Legion Insurance Company c/o
Massachusetts Insurers Insolvency Fund

Employee
Employer
Insurer

REVIEWING BOARD DECISION
(Judges Harpin, Horan and Koziol)

The case was heard by Administrative Judge Bean.

APPEARANCES

Rickie T. Weiner, Esq., for the employee at hearing
James N. Ellis, Esq., for the employee on appeal
William M. Murphy, Esq. for the insurer at hearing
Paul M. Moretti, Esq., for the insurer on appeal

HARPIN, J. Both parties¹ appeal from a decision denying and dismissing the employee's claim for permanent loss of psychiatric function benefits brought pursuant to G. L. c. 152, § 36(1)(j).² We affirm the decision.

The employee injured his left shoulder and elbow at work in 2001. (Dec. 59.) Liability for the physical injuries and their emotional sequelae was

¹ The Massachusetts Insurers' Insolvency Fund (MIIF), for the insolvent Legion Insurance Company, filed a protective appeal. For ease of reference we will refer to the insurer on appeal as MIIF.

² G. L. c. 152, § 36(1)(j), provides:

For each loss of bodily function or sense, other than those specified in the preceding paragraphs of this section, the amount which, according to the determination of the member or the reviewing board, is a proper and equitable compensation, not to exceed the average weekly wage in the commonwealth at the date of injury multiplied by thirty-two; provided, however, that the total amount payable under this paragraph shall not exceed the average weekly wage in the commonwealth at the date of injury multiplied by eighty.

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established in three prior hearing decisions.³ On August 30, 2007, the employee filed a claim for § 36 loss of function benefits for his shoulder and elbow. No agreement to pay compensation appears within the Board file, but on October 17, 2007, at a conciliation, the § 36 claim was adjusted. See Rizzo, *supra*. The employee then filed a claim for permanent loss of *psychiatric* function, in the amount of \$5,317.70, pursuant to § 36(1)(j).⁴ The judge denied the claim at the § 10A conference, and the employee appealed. (Dec. 58.)

At the hearing, the report of the impartial medical examiner, Dr. Lawrence Hartmann, a psychiatrist, was admitted into evidence. (Ex. 3.) Because his report was deemed inadequate, the judge allowed the admission of additional medical evidence. (Dec. 58; Tr. 3.) Accordingly, Dr. Bennett Aspel's report dated October 21, 2010, his addendum dated November 8, 2010, and his deposition testimony, (Ex. 4), along with the report of Dr. Robert Weiner dated January 22, 2011, (Ex. 5), were admitted into evidence. (Dec. 58.)

³ In 2004, the employee was awarded § 35 partial incapacity benefits for his physical injuries. In a 2007 decision, the employee was awarded § 34 temporary total incapacity benefits based on his physical injuries and the psychiatric sequelae of those injuries. We summarily affirmed that decision, which was affirmed in turn by the Appeals Court. See Litchfield's Case, 74 Mass. App. Ct. 1115 (2009)(Memorandum and Order Pursuant to Rule 1:28)(no error in judge's determination the employee's depression was caused by workplace injury). In 2009, a third hearing decision awarded the employee § 34A benefits, again for incapacity due to his physical injuries and their psychiatric sequelae. (Dec. 58.) See Rizzo v. MBTA, 16 Mass. Workers' Comp. Rep. 160, 161 n.3 (2002)(permissible to take judicial notice of Board file).

⁴ The employee based this figure on Dr. Bennett Aspel's written evaluation of 40% loss of psychiatric function. (See claim form dated November 23, 2010, affidavit of attorney, and reports of Dr. Bennett Aspel dated October 21, 2010 and November 8, 2010 [also Ex. 4]). (The doctor, in his deposition, corrected this evaluation to a 20% loss of function. [Deposition, pg. 38.]) We note that § 36(1)(j) leaves it to the administrative judge or this board to determine "proper and equitable compensation," limiting loss of function benefits under that so-called "catchall" provision to the state average weekly wage in the Commonwealth multiplied by thirty-two. The employee chose a multiplier of "16" to arrive at the figure of \$5,317.70 (40% x 16 x \$830.89).

The employee argued that the award of § 36(1)(j) compensation for his loss of psychiatric function should be calculated using the ratings contained in the 6th edition of the AMA Guides to the Evaluation of Permanent Impairments (Guides), Chapter 14, entitled “Mental and Behavioral Disorders.” (Dec. 60-61.)⁵ MIIF denied the applicability of the 6th edition of the Guides; maintained that, in any event, the 6th edition did not provide for a separate rating of a permanent loss of psychiatric function in cases where that loss was due to pain from a physical impairment; and argued the employee’s entitlement to § 36 benefits was premature, as he was “not at maximum medical improvement.” (Dec. 60; Insurer’s Hearing Memorandum, Ex. 2, p. 3).

In accordance with law of the case, the judge found the employee’s “pain and inability to work, directly caused by the physical injuries, have caused his psychiatric conditions of depression and anxiety.” (Dec. 59.) The judge noted the employee sought § 36 benefits based on Chapter 14 of the 6th edition of the Guides, which “for the first time recognizes and quantifies psychiatric losses of function.” (Dec. 59-60.) However, the judge found Chapter 14 “expressly excludes loss of function ratings for psychiatric losses of function caused by physical injuries and the resulting sequelae of physical injuries.” (Dec. 61-62.) In making this finding, the judge relied on the following paragraph:

Disorders that are *not* ratable in this chapter include:

Psychiatric reactions to pain: It is inherent in the AMA Guides that the impairment rating for a physical condition provides for the pain associated with that impairment. *The psychological distress associated with a physical impairment is similarly included within the rating.*

(Dec. 61; Guides, 349;emphasis in original.)

⁵ The 5th edition of the Guides did not provide separate ratings for permanent impairment relating to mental and behavioral disorders. (See Ex. 6.)

The judge explained:

The employee suffered physical injuries to his elbow and shoulder. Those physical injuries caused his continuing pain, anxiety and depression, which continues to prevent him from returning to work. Chapter 14 of the 6th edition of the AMA Guidelines cited above states clearly and unambiguously that “the impairment rating for a physical condition provides for the pain associated with that impairment[.]” And the “psychological distress associated with a physical impairment is similarly included within the rating[.]” The 14th Chapter of the 6th edition of the AMA Guidelines does not provide the basis for the employee to receive section 36 loss of psychiatric function benefits.

(Dec. 60-61.) Accordingly, the judge denied and dismissed the employee’s claim.⁶ (Dec. 61-62.)

Both parties appeal. The employee contends the judge correctly relied on the 6th edition, published in 2008, but erred in finding the rating system of Chapter 14 was not applicable to the employee’s psychiatric sequelae of his physical injury. MIIF argues that Massachusetts has never adopted the 6th edition of the Guides, and that the Board has no authority to do so. However, even if the 6th edition was adopted, MIIF maintains the employee’s alleged psychiatric loss of function, stemming from his physical injury, was subsumed in the Guides under the calculated loss of function from his physical injury. It also argues that a

⁶ The judge also denied the employee’s request to depose Dr. Richard Katz, an editor of the 6th edition and the author of Chapter 14 on “Mental and Behavioral Disorders.” (Dec. 58, 60.) The judge reasoned that because the 6th edition of the Guides precludes using loss of function ratings for psychiatric conditions resulting from pain or physical impairment, Dr. Katz’s testimony would be irrelevant to this case. (Dec. 58.) The employee does not appeal this denial, but seeks on appeal, for the first time, an order requiring the judge to consider the report of Dr. Katz. (Employee’s br. 17.) As he did not seek the admission of the report at the hearing, we consider this issue waived on appeal. Blondin v. Blondin, 80 Mass. App. Ct. 1102 (2011))(Memorandum and Order Pursuant to Rule 1:28) We note that, even if Dr. Katz’s report had been admitted, it offers little insight into the interpretation of Chapter 14, concluding only that “if Massachusetts law allows separate compensability for mental and nervous impairment, it may be appropriate here.” Dr. Katz’ written opinion would thus have been an inadequate basis for supporting anything. Hachadourian’s Case, 340 Mass. 81, 86 (1959)(expert must give an opinion of a probability of a relationship, not a mere possibility.)

psychiatric loss of function is not compensable because it is not a “loss of bodily function or sense,” as required by § 36(1)(j), to qualify for a separate award of benefits.⁷

We recently rejected this last argument in holding that a permanent loss of psychiatric function is a “loss of bodily function or sense,” and compensable under § 36(1)(j). Yeshaiiau v. Mt. Auburn Hosp., 27 Mass. Workers’ Comp. Rep. ____ (February 6, 2013).⁸ In so doing, we specifically left open, as not properly raised or argued, two issues that are now presented here: (1) whether the 6th edition of the AMA Guides is applicable; and (2) if so, whether it allows a separate award for permanent loss of psychiatric function for the mental sequelae of a physical injury. We address those issues now.

With respect to the applicability of the 6th edition of the Guides, the employee acknowledges that the 5th edition “appears” to be utilized in Massachusetts, but urges the Board to adopt the 6th edition, published in 2008, at least for cases of psychiatric impairment. (Employee br. 10-11.) MIIF maintains it was error for the judge to assume the 6th edition applies because Massachusetts has not adopted that edition. MIIF cites Larson, Workers’ Compensation § 80.07[2], n. 8 (2011), which lists Massachusetts as one of twelve states requiring the use of the 5th Edition. (MIIF br. 11,16.) However, neither Larson nor MIIF cite any authority for placing Massachusetts among those states mandating the use

⁷ In addition, MIIF asserts that the judge failed to address whether the employee had reached maximum medical improvement; i.e. whether his loss of psychiatric function was permanent. Given our disposition of this case, this issue is moot. (See MIIF’s br. 14 n.2)

⁸ The decision under appeal and the parties’ briefs were filed prior to our decision in Yeshaiiau. In Yeshaiiau, we reasoned that “[t]he judge’s legal conclusion that § 36(1)(j) includes payment for loss of psychiatric function is consistent with the historic inclusion of psychiatric or psychological injuries within the personal injury law established long before there was any specific statutory reference to mental, emotional or psychological injuries in our Workers’ Compensation Act.” Id. at ____.

of the 5th edition. Moreover, MIIF fails to indicate how the 5th edition was supposedly “adopted.”⁹

Certainly, as Larson points out, some states have specified by regulation or statute which edition of the Guides is to be used, while others have indicated that the most current edition should apply. *Id.* at § 80.07[2]. However, Massachusetts is not among them. *Yeshiau*, *supra* at 5; Nason, Koziol and Wall, *Workers’ Compensation*, § 18.26 (3d ed. 2003). Chapter 152 provides only that: “Where applicable, losses under this section shall be determined in accordance with standards set forth in the American Medical Association Guides to the Evaluation of Permanent Impairments.” G.L. c. 152, § 36(2). The regulations are similarly silent:

All claims for functional loss under the provisions of M.G.L. c. 152, § 36 or § 36A shall include a physician’s report which indicates that a maximum medical improvement has been reached and which contains an opinion as to the percent of permanent functional loss according to the American Medical Association’s guide to physical [sic] impairment.

452 Code Mass. Regs. 1.07(2)(i)(1).

MIIF maintains we lack the authority to determine which edition of the Guides applies (MIIF br. 14), because we are an administrative tribunal which “ ‘possesses only such authority and powers as have been conferred upon it by the express grant or arise therefrom by implication as necessary and incidental to the full exercise of the granted powers.’ *Taylor’s Case*, 44 Mass. App. Ct. 495, 497 (1998), quoting *Levangie’s Case*, 228 Mass. 213, 217 (1917).” We disagree.

⁹ Larson merely places Massachusetts among those states that “require the use of the 5th edition,” without citation to any authority in the Commonwealth substantiating that claim. *Id.* “. . . saying something is so does not make it so. *Quia ego sic dico*, without a sound basis, is not an acceptable method of analysis, even for an expert.” *Reik v. Jansson*, 2007 WL 2949058, 7 (Mass. Land Ct. 2007); *Stabile v. Stabile*, 55 Mass. App. Ct. 724, 727 (2002)(calling a provision ‘ambiguous’ does not make it so).

Far from supporting MIF's position, the cited cases make it clear the Board has the authority to determine which edition of the Guides applies as "necessary and incidental" to the exercise of its powers under § 11C. See Nason, Koziol and Wall, supra (issue of applicable edition will likely be decided by Reviewing Board or by regulation); Perkins' Case, 278 Mass. 294, 299 (1932) (Board has powers which are a necessary implication from those expressly granted in the statute). Accordingly, we hold it is appropriate for administrative judges to utilize the edition of the Guides which reflects "the most current scientific and clinical knowledge," Larson, supra, at § 80.07[3], at the time the adopted medical opinion was given. This will ensure that an outdated methodology is not utilized to determine functional impairment ratings, or, in the case of mental and behavioral disorders, that there is a methodology for making that determination.¹⁰ Here, both physicians who offered impairment evaluations (Drs. Aspel and Weiner) did so after the publication of the 6th edition in 2008. Thus, the 6th edition, as the most up-to-date version, applies.¹¹

As the judge recognized, the 6th edition of the AMA Guides for the first time provides "ratings for permanent impairment relating to [mental and

¹⁰ Although the 5th edition of the Guides contemplates the existence of permanent psychiatric impairment, it provides "no numerical impairment rating." Ex. 8, Guides, Chapter 14, at 357 (5th ed. 2001).

¹¹ We note that the Supreme Judicial Court has cited with approval the 6th edition's definition of "impairment." See Commonwealth v. Scott, 464 Mass. 355, 358 (2013). In addition, prior to our decision in Yeshaiiau, supra, in which the parties did not challenge the judge's use of the 6th edition, this board has referenced the 6th edition regarding the definition of bodily disfigurement, Adam v. Harvard Univ., 24 Mass. Workers' Comp. Rep. 193, 197 (2010), and pages from the 6th edition have been admitted as evidence without comment. Evans v. Geneva Constr. Co., 25 Mass. Workers' Comp. Rep. 371, 373 n. 8 (2011). Although this Board cited the 5th edition of the Guides after the publication of the 6th edition, see Costa v. TGI Fridays, 24 Mass. Workers' Comp. Rep. 79, 82 (2010), aff'd Costa's Case, 79 Mass. App. Ct. 1122 (2011)(Memorandum and Order Pursuant to Rule 1:28), we expressed no opinion on which edition applied.

behavioral disorders].”¹² Guides, Chapter 14.1b, at 348. (Dec. 60.) The judge also recognized that psychiatric reaction to pain is *not* ratable under Chapter 14, because “the impairment rating for a physical condition provides for the pain associated with that impairment.” And “[t]he psychological distress associated with a physical impairment is similarly included within the rating.” Guides, at 349; (Dec. 61)(emphasis in original of Guides and in the decision). We agree.

Explanatory paragraphs stating the “rules” for using the mental and behavioral ratings in Chapter 14 are consistent with the language cited by the judge.

In the presence of a mental and behavioral disorder *without a physical impairment or pain impairment*, utilize the methodology outlined in this chapter.

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In most cases of a mental and behavioral disorder accompanying a physical impairment, the psychological issues are encompassed within the rating for the physical impairment, and the mental and behavioral disorder chapter should not be used.

Guides, at 349 (emphasis added).

The presence or absence of a “physical impairment” is the determinative factor in Chapter 14.1b and in the above-quoted “rules,” which address whether a psychological impairment can be rated under Chapter 14. Where there is a continuing physical impairment, the psychological impairment is encompassed within the rating for the physical impairment, and Chapter 14 does not apply. *Id.* at 349.

The employee maintains the judge misinterpreted Chapter 14’s limitation on psychiatric ratings because he did not consider the following sentence, which is

¹² Chapter 14 considers “Only impairments for selected, well-validated major mental illnesses. . . .” These include mood disorders, anxiety disorders, and psychotic disorders. Guides, *supra*, at 347, 349.

also part of the section of the “rules” for applying that chapter. He claims it modifies the meaning of the other quoted paragraphs:

In the event of a mental and behavioral disorder that is judged *independently compensable by the jurisdiction involved*, the mental and behavioral disorder impairment is combined with the physical impairment.

Id. at 349 (emphasis in original). The employee argues that, “[t]he plain understanding of that language . . . [is] that psychiatric losses of function are awarded independently if the jurisdiction where benefits are sought . . . allows for independent recovery of mental injuries Since Massachusetts allows for independent recovery of benefits for mental industrial injuries, the employee was entitled to recover for psychiatric loss of function in this case. . . .” (Employee br. 16.)

The Guides are an adjunct to the Workers Compensation statute, to be used “[w]here applicable” to flesh out the specific numbers attributable to a specific loss of function, and to calculate the amount of compensation due an employee under § 36. In this sense they are more akin to regulations, which are “promulgated pursuant to M.G.L. c. 152, § 5 for the purpose of carrying out the provisions of M.G.L. c. 152.” 452 Code Mass. Reg. § 1.01 (current through April 13, 2013). The similarity is supported by recalling that for most circumstances the purpose of § 36 is satisfied with reference to the Guides. Thus, bearing in mind that regulations are interpreted in the same manner as statutes, Ten Local Citizen Group v. New England Wind LLC, 457 Mass. 222, 229 (2010), we discern the meaning of the cited paragraph of Chapter 14 by giving the words of the sentence “their usual and ordinary meaning,” considering that the Act “is to be construed broadly, rather than narrowly, in the light of its purpose and, so far as reasonably may be, to promote the accomplishment of its beneficent design.” Higgins’s Case, 460 Mass. 50, 53 (2011), quoting Taylor’s Case, 44 Mass. App. Ct. 495, 499 (1998).

In the cited sentence the first clause refers to a disorder that is “*independently compensable by the jurisdiction involved.*” Mental and emotional disabilities are compensable in this Commonwealth, whether directly caused by an accident at work without a physical component, G. L. c. 152, §1(7A) (the so-called “pure” mental/emotional injuries), or as sequelae of a physical injury which causes a mentally disabling reaction. Cornetta’s Case, 69 Mass. App. Ct. 107, 108 (2007).¹³ To be “independently” compensable, however, the mental or behavioral disability would have to be unrelated to a physical injury and be caused by the industrial accident itself; in other words, a “pure” mental injury. See LaFlash, *supra*, at 264 (Horan, J., concurring). An example would be an employee suffering post-traumatic stress disorder stemming from an assault, regardless whether that assault caused a physical injury. However, a mental disability resulting from a physical injury is “dependently” compensable, and thus not within the compass of the cited sentence. Therefore, a psychological impairment derivative of a physical injury is not “independently compensable.”

We note that in very limited cases the Guides do allow for rating a psychological impairment that is the sequelae of a physical injury. Under the “rules” such a rating is barred “[i]n *most* cases of a mental and behavioral disorder accompanying a physical impairment . . .” Guides, 349 (emphasis added). Use of the word “most” implies that the rule is not absolute; that there are situations where a sequelae would be rated. However, the employee did not argue below and advances no argument here that this provision governs; thus, we do not address it.

The employee had previously claimed, and been compensated for, a permanent physical impairment, which would encompass his pain and psychological loss of function. Accordingly, applying the precepts contained in

¹³ Different causation standards apply, however. In a “pure” mental or emotional injury the employee must present evidence that the “predominant contributing cause . . . is an event or series of events occurring within any employment.” G. L. c. 152, §1(7A). When the mental or emotional disability is a sequelae of a physical injury, the employee need only prove “simple” causation, the so-called “but for” standard. Cornetta, *supra*; LaFlash v. Mount Wachusett Dairy, 18 Mass. Workers’ Comp. Rep. 254, 260 (2004).

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the 6th edition of the AMA guides, we affirm the judge's determination that § 36(1)(j) benefits for loss of psychiatric function are not available to the employee.

So ordered.

William C. Harpin
Administrative Law Judge

Mark D. Horan
Administrative Law Judge

Catherine Watson Koziol
Administrative Law Judge

Filed: **May 21, 2013**