COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO.:** 030458-02

Robin May	Employee
MCI Framingham	Employer
Commonwealth of Massachusetts	Insurer

REVIEWING BOARD DECISION

(Judges Koziol, Costigan and Fabricant)

The case was heard by Administrative Judge Chivers.

APPEARANCES

Teresa Brooks Benoit, Esq., for the employee
Patricia G. Noone, Esq., for the self-insurer at hearing
Robin Borgestedt, Esq., for the self-insurer on appeal

KOZIOL, J. The self-insurer appeals from a decision awarding the employee § 34 total incapacity benefits from June 21, 2002, through the date of exhaustion of those benefits. The self-insurer challenges a number of the judge's rulings, arguing some are unsupported by sufficient subsidiary findings of fact, requiring recommittal for further findings, while others require reversal. We affirm the decision, with the exception of the judge's awards of § 13A(6) attorney's fees and § 50 interest, which we reverse and vacate.

The underlying salient facts and procedural history are as follow. The employee stopped working as a correction officer for the self-insured employer on June 21, 2002. May's Case, 67 Mass. App. Ct. 209, 210 (2006). She alleged that she suffered a mental or emotional injury as a result of being subjected to verbal abuse, harassment, and threats from co-workers, and that these events caused her major depression, and totally incapacitated her. The only medical opinion in evidence was that of the impartial medical examiner, Dr. Zamir Nestlebaum, a psychiatrist who examined the employee pursuant to § 11A(2) of the act. (Stat. Ex. 1.) The judge denied and dismissed the employee's claim, concluding that she failed to meet her burden of proving that the work events were "the predominant contributing cause" of her disability under G. L. c. 152, § 1(7A), and the reviewing board affirmed his decision. May v. MCI Framingham, 19 Mass. Workers' Comp. Rep. 187, 191-192 (2005). The Appeals Court reversed the decision, holding: 1)

the impartial medical examiner's opinion met the "predominant contributing cause" standard set forth in § 1(7A); and, 2) the judge improperly applied an objective standard in determining whether the work events were stressful by impermissibly considering his own view of the severity of those events. May's Case, supra at 213, citing Robinson's Case, 416 Mass. 454, 460 (1993). The court remanded the case for further proceedings.

On recommittal, the judge ordered the self-insurer to pay the employee § 34 benefits after making the following findings:

> After review of the Decision of the Massachusetts Appeals Court, it appears that this requires a finding that the employee's depression was as a result of the work related activities. Given that finding, the finding of the impartial physician that, as a result of this depression, the employee was temporarily **and** permanently **disabled** must be accepted.[1]

(Emphasis original.) (Dec. 2.)

The self-insurer argues that the recommittal decision contains inadequate subsidiary findings of fact to support the award of § 34 temporary total incapacity benefits. Although the judge's findings are sparse, under the circumstances they are "adequate to reveal the basis for the [administrative judge's] ultimate finding, and to enable the reviewing [board] to determine whether correct principles of law ha[ve] been applied." McElroy's Case, 397 Mass. 743, 746 (1986). The judge's first decision contained sufficient findings of fact about the causative events at work, and the exclusive medical opinion in evidence supported total incapacity based on those same events. On recommittal, the judge made no additional subsidiary findings of fact regarding the claimed incidents, nor did he modify his earlier findings. The judge then summarized and applied the Appeals Court's ruling, which not only noted that the judge had credited the employee's account of the causative incidents but stated: "[I]n the absence of contradictory medical evidence, the impartial physician's determination whether an employee's disability has as its predominant contributing cause an injury arising out of the course of the employee's employment must be accepted as true." May, supra at 214.

We note that the self-insurer's generalized argument under the heading, "Inadequate Decision and Lack Foundation," does not attack the decision based on vocational factors. See Svonkin v.

[1] There was no claim for § 34A permanent and total incapacity benefits before the judge and the judge did not order such benefits. Accordingly, the reference to permanency is harmless error.

Falcon Hotel Corp., 20 Mass. Workers' Comp. Rep. 133, 138 (2006)(lack of argument on why insufficiency of disability findings prejudices appellant constitutes waiver of argument); Mancuso v. MIAA, 453 Mass. 116, 128 n.26 (2009)(lack of reasoned argument and analysis in appellate brief renders issue waived). Regardless, Dr. Nestlebaum opined that as a result of the work related injury, the employee was not only totally disabled from her work as a correction officer, but also "likely totally disabled from any work." (Stat. Ex. 1.) Pursuant to § 11A(2), Dr. Nestlebaum's opinions regarding causal relationship and the extent of disability were entitled to prima facie weight and where that medical evidence points conclusively to the employee's inability to maintain remunerative employment, we see the judge's omission of the vocational analysis as harmless. See Sheehan v. Town of Randolph, 19 Mass. Workers' Comp. Rep. 201, 203 (2005)(total mental or emotional disability opinion of impartial psychiatrist adopted by judge could yield only award of total incapacity.) Because there is no ambiguity as to the foundation of the award of § 34 benefits, we affirm that award.

We find no merit in the self-insurer's argument that the judge lacked authority to correct an error, made in his first decision (5/04/04 Dec. 2) and repeated in his initial remand decision of June 13, 2008, dating his award from June 21, *2003,* (6/13/08 Dec. 2) instead of the date claimed by the employee - her last day of work, June 21, *2002*. The June 21, 2003 date first appeared in the judge's decision when he stated, "[s]he is claiming disability from June 21, 2003, forward. . . ." (5/4/04 Dec. 2.) The self-insurer argues that the employee lost the opportunity to challenge the incorrect date because she did not raise the judge's initial error as an issue in her appeal to the reviewing board. See May, supra at 190 and n.5. We disagree. In his first decision, the judge never reached any conclusions regarding the date of the commencement of the employee's incapacity because he denied and dismissed the employee's claim on the ground that she failed to prove she received a personal injury under the act. (5/04/04 Dec. 5-6.) As a result, his incorrect statement of the date from which the employee sought benefits was completely immaterial to the decision, and by itself, provided no ground for appeal.

It is clear that June 21, 2002 was the date claimed by the employee as the onset of her incapacity from work. The board file contains the Form 161, Employee's Hearing Memorandum, attached to her Biographical Data Sheet, (Employee Ex. 1); the Form 140, Temporary Conference Memorandum, signed by counsel for the employee and the self-insurer, and filed April 1, 2003; and the Form 110, Employee's Claim filed September 17, 2002, all of which reflect that the employee sought total incapacity benefits under § 34 or, in the alternative, partial incapacity benefits under § 35, from June 21, 2002, to date and continuing. Rizzo v. M.B.T.A., 16 Mass.

Workers' Comp. Rep. 160, 161 n.3 (2002) (reviewing board may take judicial notice of documents in the board file).

It is equally clear that the judge committed nothing more than a scrivener's error when he initially recorded the date of the claimed commencement of the employee's incapacity in his first hearing decision. On recommittal, incapacity benefits were ordered for the first time but were ordered based on the incorrect date of June 21, 2003, a date, we observe, with no anchor in the evidence. At that time, the employee seasonably sought to correct the record and the judge had authority to make the correction. See Gillard's Case, 244 Mass. 47, 55-56 (1923)(steps to correct mistakes in record should be taken seasonably).

On recommittal, the judge also made the following findings and orders regarding the award of attorney's fees:

> Due to the complexity of the matter in initially trying the case, and then pursuing the appeal through two levels of review, an increased attorney's fee is awarded under Section 13A(6) as provided below.
>
> . . .
>
> 3. That the self-insurer pays an attorney's fee in the amount of $5,103.04, plus reasonable costs and expenses to the trial attorney of record, Teresa Brooks Benoit, Esq.
>
> 4. That the self-insurer pays a further attorney's fee in the amount of $5,103.04, plus reasonable costs and expenses to the appellate attorney of record, William C. Harpin, Esq.

(Dec. 2, 3.)

The self-insurer correctly argues - and the employee does not dispute - that the judge's awards of attorney's fees under the provisions of § 13A(6), governing reviewing board fee awards, are erroneous.[2] The employee argues however, that the judge's fee awards should be upheld because

---

[2] As a threshold matter, § 13A(6) is operative only when the employee prevails at the reviewing board on an appeal advanced by an insurer or self-insurer.

General Laws c. 152, §13A(6) provides:

they represent *enhanced* fees under § 13A(5). We agree that the July 1, 2008, decision established that the employee prevailed at the hearing level and, as a matter of law, her trial counsel was entitled to an attorney's fee and necessary expenses under § 13A(5). We note that the fee awarded to the employee's trial counsel, $5,103.04, was the standard base fee for such services under § 13A(5), on July 1, 2008, the date of the decision,[3] and we affirm the judge's award of that attorney's fee.

Nonetheless, the administrative judge simply lacked authority to order attorney's fees or costs associated with the prior appellate proceedings. Awards of costs and attorney's fees for prevailing at the Appeals Court or the Supreme Judicial Court are governed by § 12A of the Act, which vests those courts with authority to determine the amount of such awards. See Fabre v. Walton, 441 Mass. 9, 10-11 (2004)(establishing procedure for claiming costs and attorney's fees for appellate counsel); Murphy's Case, 63 Mass. App. Ct. 774, 779 (2005). Therefore, we reverse and vacate the award of an attorney's fee and costs to the employee's counsel who appeared on her behalf at the Appeals Court. (7/01/08 Dec. 3.)

The self-insurer further argues that the judge erred in ordering it to pay § 50 interest. The employee agrees with the self-insurer (Employee br. 13), conceding that no interest is due in this case. Russo's Case, 46 Mass. App. Ct. 923 (1999). Accordingly, insofar as the judge's decision may be construed as ordering such interest, that order is vacated.[4] Lastly, because the matter

---

> (6) Whenever an insurer appeals a decision of an administrative judge and the employee prevails in the decision of the reviewing board, the insurer shall pay a fee to the employee's attorney in the amount of one thousand dollars, plus necessary expenses. An administrative judge may increase or decrease such fee based on the complexity of the dispute or the effort expended by the attorney.

While not relevant to our discussion, we construe the reference to an "administrative judge," appearing in the second sentence of §13A(6), to mean the administrative law judges on the reviewing board.

[3] Circular Letter 323, issued October 1, 2007, and applicable on the date this decision was filed, increased the legal fee due an employee's attorney to $5,103.04. General Laws c. 152, § 13A(10)(providing for the yearly adjustment of attorney's fees payable under § 13A(1)-(6) on October first of each year).

[4] The order states: "[a]ny interest due under Section 50 should also be paid." (7/01/08 Dec. 2.)

does not require recommittal, we need not address the self-insurer's judicial bias argument, which is based solely on events that occurred after the judge issued his corrected decision on remand.[5] Because the employee has prevailed on the self-insurer's appeal, the self-insurer is ordered to pay employee's counsel a fee of $1,495.34 pursuant to § 13A(6).

So ordered.

_____
Catherine Watson Koziol
Administrative Law Judge

_____
Patricia A. Costigan
Administrative Law Judge

_____
Bernard W. Fabricant
Administrative Law Judge

Filed: September 1, 2009

[5] In any event, we note that the subsequent proceedings in this case have been assigned to a different administrative judge.