COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS

BOARD NO.: 022795-06

Sean O'Neil	**Employee**
MCI Cedar Junction	**Employer**
Commonwealth of Massachusetts	**Self-Insurer**

REVIEWING BOARD DECISION

(Judges Fabricant, McCarthy and Koziol)
The case was heard by Administrative Judge Dike.

APPEARANCES

Deborah G. Kohl, Esq., for the employee at hearing and on brief
Ryan L. Benharris, Esq., for the employee at oral argument
Robin Borgestedt, Esq., for the self-insurer

FABRICANT, J. The self-insurer appeals an award of a closed period of § 34 total incapacity benefits and continuing medical benefits. Recommital is required only for the determination of the proper date for the termination of weekly benefits. Regarding all other issues raised by the self-insurer, we affirm the judge's decision for the following reasons.

The employee has been employed as a corrections officer since 1999. On July 27, 2006, he was threatened on two separate occasions by an inmate who was free from his cell. In both instances, the inmate verbally threatened the employee, and then moved towards him as if he were going to carry out that threat. (Dec. 4.) Following the second threat, the inmate was restrained and removed by other officers before he could act upon his threat. (Dec. 5.) The employee alleges that as a result of these incidents, he was depressed, angry and, at one point, contemplating suicide. He sought and received counseling, and testified that he started to feel better in November, 2006, although he remained fearful of returning to the correctional facility. (Dec. 6.)

The employee's claim for benefits, allegedly stemming from a mental or emotional injury, was denied at the § 10A conference, and proceeded to a hearing *de novo* pursuant to § 11, following the employee's timely appeal. (Dec. 2.) The administrative judge found a compensable work injury and ordered a closed period of § 34 benefits, as well as ongoing psychiatric counseling and treatment. (Dec. 9.)

On appeal, the self-insurer raises three issues. First, it argues that the administrative judge failed to utilize the proper causation standard pursuant to G. L. c. 152, § 1(7A).[1] (Self-ins. br. 1, 6-10.) Dr. Michael W. Khan, the § 11A impartial physician, opined that there was a "clear causal relationship" between the employee's emotional state and his altercation with the inmate.[2] (Ex. 2, 2; Dec. 7.) The self-insurer takes issue with the fact that the judge found a "direct" causal relationship between the work incident and the employee's depression rather than citing the § 11A impartial physician's opinion of a "clear" causal relationship. (Self-ins. br. 6.) Despite substituting the word "direct" for "clear" when referring to the impartial physician's medical opinion, (Dec. 8), earlier in his decision the judge did accurately utilize the word "clear." (Dec. 7.) Given the context of usage by the judge, we view the two words as having a similar and, in the circumstances of this case, interchangeable meaning.

The § 11A impartial physician further opined that the employee had not yet reached a medical end point and that additional treatment would be helpful. (Ex. 2.) Because the § 11A impartial examination occurred after the employee had returned to work, the judge authorized the submission of additional medical evidence for the prior period of disability.[3] (Dec. 7.) The self-

---

[1] General Laws c. 152, § 1 (7A), provides, in pertinent part:

> 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.

[2] The impartial physician's report was admitted into evidence as Exhibit 2. Neither party opted to depose the physician. (Dec. 1.)

[3] Documentation submitted on behalf of the employee includes two brief letters from the employee's therapist, Damon Blank (only one of which mentions post traumatic stress disorder from prior military service), several medical notes of the employee's primary care physician, Dr. Sung K. Anderson, and the results of an upper GI endoscopy conducted on September 22, 2006. (Dec. 1, 8; Tr. 5.)

insurer argues that the employee failed to meet his burden of proof because the employee's own psychotherapist, Damon Blank, opined that his disability resulted from both previous military experiences and from the work incident, while additional "gap" medical evidence reports from Dr. Sung K. Anderson did not address the required predominant contributing cause standard. (Self-ins. br. 9-10.)

Despite the self-insurer's assertion to the contrary, we conclude that the impartial physician's opinion of a "clear" causal relationship was sufficient to establish the requisite level of causation pursuant to § 1(7A). May's Case, 67 Mass. App. Ct. 209 (2006). All medical records submitted in this case were reviewed by Dr. Khan, who nevertheless opined the work incident was *the* cause of the employee's injury.[4] (Ex. 2.) Moreover, the employee's testimony at hearing refuted any commentary provided by his therapist with regard to post traumatic stress disorder resulting from his prior military service. When specifically asked about prior post traumatic stress disorder, the employee testified that he did not have that condition before the work incidents. (Tr. 41, 58.) When presented with a letter he had sent to the associate commissioner claiming that he had previously endured post traumatic stress disorder, the employee testified he had exaggerated his condition in that letter in a "desperate [failed] attempt to get out of the institution."[5] (Tr. 59). Additionally, there was discussion of ulcers that had since been treated and resolved. (Tr. 15, 59-61.)

Evaluating all the evidence, once ulcers and prior post traumatic stress disorder are removed from the causal relation equation, all that is left is the work incident. No other causes being present, the sole cause must logically be the predominant cause. See Sawicka v. Archdiocese of Boston, 14 Mass. Workers' Comp. Rep. 362, 370 (2000). Weighing these factors and the impartial examiner's opinion that there was a clear causal relationship between the employee's

---

[4] The doctor explained, "[m]y reason for this is the fact that he had not had mental issues before, had prided himself on being a good worker (which in fact led to his being promoted in both the Marine Corps and in the Department of Corrections), and the fact that he liked and still likes his job and would be glad to do it at a facility where he felt better supported in times of danger." (Ex. 2.)

[5] We find no subsidiary finding by the judge addressing whether the employee had, in fact suffered from post traumatic stress disorder, or whether it continued to affect him.

emotional state and the workplace incident under the guidance provided in May's Case, supra, we find that the employee has met his burden as to causal relationship.

Next, the self-insurer contends that the end date for compensation lacks a proper evidentiary foundation. (Self-ins. br. 1, 10-13.) We agree. Due to the employee's inability to identify a specific date in November 2006 when his disability subsided, the judge chose the midpoint of the month -- November 15, 2006 -- as an apparent compromise. This finding cannot stand as it is clearly an arbitrary date not grounded in the evidence. See MacEachern v. Trace Constr. Co., 21 Mass. Workers' Comp. Rep. 31, 36 (2007)(factual findings as to when incapacity begins or ends must be grounded in the evidence), and cases cited therein.

The employee testified that he registered with the Army National Guard in November 2006 because he felt better. (Tr. 14, 39.) He also testified that he returned to work in December 2006. (Tr. 45.) We note that the specific date of either event would have provided a proper evidentiary basis to terminate § 34 benefits. The case must be recommitted for further findings to determine a proper evidentiary date for the termination of § 34 benefits.

Finally, the self-insurer argues that certain facts found by the administrative judge have no evidentiary foundation, and are, instead, based upon medical evidence contrary to the facts in this case. (Self-ins. br. 1-2, 13-24.) This argument is without merit as the judge's core findings were quite clear. Despite acknowledging some exaggeration on the part of the employee, the judge determined that, "[b]ased on the evidence as a whole I find that the employee was threatened by an inmate while performing his normal duties as a correctional officer . . . on July 27, 2006."[6] [6] (Dec. 7.) The judge credited the employee's testimony regarding the workplace events of July 27, 2006 and the impact of those incidents upon him. (Dec. 4-6.) We do not disturb these credibility findings. See Lefebvre v. Sandelswood, Inc., d/b/a The Maids, 21 Mass. Workers' Comp. Rep. 135, 140 (2007), citing Lettich's Case, 402 Mass. 389, 394 (1988), Larti v. Kennedy Die Castings, Inc., 19 Mass. Workers' Comp. Rep. 362 (2005) and Truong v.

[6] The judge acknowledged the employee may have exaggerated the level of chaos present during the July 27, 2006 event. However, in no uncertain terms, the judge found that it "is clear [] that at least one inmate threatened the employee verbally and then moved towards him in such a fashion as to carry out that threat." (Dec. 4.) The judge also determined that, "[a]while later the inmate threatened the employee again and then moved towards the employee in a fashion that the employee took to be an effort to carry out this threat." (Id.)

Chesterton, 15 Mass. Workers' Comp. Rep. 247, 249 (2001)(credibility findings are the sole province of the hearing judge and will not be disturbed unless arbitrary and capricious or derived from inferences which are not reasonably drawn from the evidence). Likewise, we see no error in the judge's adoption of the § 11A medical opinion establishing causal relationship and the need for ongoing psychiatric treatment, where there is no other competent medical opinion to the contrary. (Dec. 8-9.)

We affirm the decision in all aspects with the exception of the benefit termination date ordered. The case is recommitted for further findings limited to the determination of the proper date on which to terminate § 34 benefits, consistent with the proffered evidence.[7] [7]

So ordered.

_____
Bernard W. Fabricant
Administrative Law Judge

_____
William A. McCarthy
Administrative Law Judge

_____
Catherine Watson Koziol
Administrative Law Judge

Filed: June 16, 2009

[7] The administrative judge no longer serves on the industrial accident board. Accordingly, the case is forwarded to the senior judge for reassignment to a different administrative judge for the sole purpose stated herein.