COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 016890-05**

Shoshana Yeshaiau	Employee
Mt. Auburn Hospital	Employer
Caregroup, Inc.	Self-Insurer

REVIEWING BOARD DECISION
(Judges Koziol, Horan and Fabricant)

The case was heard by Administrative Judge Jacques.

APPEARANCES
Rickie T. Weiner, Esq., for the employee at hearing
James N. Ellis, Esq., for the employee at hearing and on appeal
Teresa Brooks Benoit, Esq., for the employee at oral argument
Salvatore J. Perra, Esq., for the self-insurer

KOZIOL, J. Both parties appeal from a decision concluding that although G. L. c. 152, § 36(1)(j)[1] permits an award for permanent loss of psychiatric function, the employee was not entitled to those benefits because she failed to prove she was permanently impaired. We affirm the judge's decision that psychiatric loss of function benefits are recoverable pursuant to § 36(1)(j). However, because the self-insurer did not raise the issue of permanency at hearing and stipulated to the amount due should § 36(1)(j) be found to contemplate an

[1] General Laws 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.

The decision erroneously refers to this provision as "§ 36(j)."

award of benefits for such a loss, we reverse the decision on that issue, and order payment of the stipulated amount.

The employee, a registered nurse, was injured on May 28, 2005, when a patient fell on her left minor hand. As a result of two prior hearing decisions issued by a different judge,[2] the employee has received § 34 benefits, and currently receives § 34A permanent and total incapacity benefits and § 30 medical benefits, for her work-related physical injuries and major depression. (Dec. III, 4-5.) Neither party appealed those decisions. (Dec. III, 2.)

Subsequently, the employee filed the present claim for permanent loss of psychiatric function pursuant to § 36(1)(j). The matter then was assigned to the judge, who denied the claim at conference. (Dec. III, 3.) The employee appealed, and at hearing, the parties agreed the case presented a single question of law and proceeded on stipulated facts.[3] (Tr. 3-4.) The parties stipulated to the admission of the board file and to the facts as found in the prior hearing decisions. They further stipulated "to the amount of $5,880.20 to be awarded to the employee if the Act is deemed to provide benefits for permanent loss of psychiatric function."[4] (Dec. III, 4.) The attorneys presented oral argument and each submitted two separate memoranda of law. Id. The single defense raised by the self-insurer was

[2] Hereinafter, the September 26, 2007 hearing decision is referred to as Dec. I; the October 7, 2010 decision is referred to as Dec. II; and the decision on appeal, filed November 22, 2011, is referred to as Dec. III.

[3] The parties agreed "*the very narrow and sole question*" was "*whether Chapter 152, § 36[1](j) provides compensation for psychiatric loss of function*." (Tr. 4; emphasis added.)

[4] At hearing the judge stated, "[t]he parties stipulate to the entire record and to the fact that if I am—if I were to find that the employee is entitled to § 36 benefits for psychiatric loss of function, the award would be in the amount of $5,880.20." (Tr. 3.)

that § 36(1)(j) does not permit an award for permanent loss of psychiatric function.[5] (Dec. III, 3.)

The judge found that the "specific injuries enumerated under § 36 are not meant to be an exclusive list of compensable injuries." (Dec. III, 6.) She reasoned that § 36(1)(j) is a "catchall provision" which includes "loss of bodily function or sense, *other than those specified in the preceding paragraphs*. . . ." (Dec. III, 6; emphasis in decision.) She also noted § 36(2) instructs that "[w]here 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 Impairment" (the AMA Guides). Id. The judge noted the 6th edition of the AMA Guides contains a chapter entitled "Mental and Behavioral Disorders," which "sets forth the medical framework and numeric rating system for a psychiatrist to rate permanent impairments relating to mental and behavioral disorders." (Dec. III, 6.) She concluded:

> G.L. c. 152, § 36[1](j) *does* establish that compensation be paid to an injured worker who has proven a permanent loss of psychological function. Given that the Act does not discriminate between physical and psychological injuries, that the Act encourages reliance on the AMA guidelines which recognize a permanent psychological loss of function and considering the beneficent intent of the Act, I find it would be an erroneous ruling to allow benefits for a permanent loss of physical function while denying benefits for a permanent psychological loss of function. See Conant's Case, 33 Mass. App. Ct. 695 (1992)[,] citing LaClair v. Silberline Mfg. Co., 379 Mass. 21, 27 (1979)(The statute has been described as a humanitarian measure designed to provide adequate financial protection to the victims of industrial accidents).

(Dec. III, 6-7; emphasis in original.) However, the judge went on to find that "the employee has failed to present any persuasive evidence that the psychological loss of function she suffers from is permanent." (Dec. III, 7.) Accordingly, she denied and dismissed the employee's claim. (Dec. III, 8.)

[5] In its hearing memoranda to the judge, the self-insurer defended only on this ground. (Ex. 2[a]-[b].)

Both parties appeal. The self-insurer first argues, without citation to any authority, that § 36(1)(j) does not allow for an award for permanent loss of psychiatric function. (Self-ins. br. 4.) It argues only that "[p]sychological function is neither a bodily function nor a sense," because "the injuries that can be attributed to this section comprise a physical aspect of an injury." (Self-ins. br. 4.) Thus, it contends, the AMA guidelines cannot bring permanent losses of psychiatric function within the ambit of the statute and that if the legislature had intended for § 36 to cover loss of psychiatric function, it would have so stated. We disagree.

The self-insurer's assertion that a permanent loss of psychiatric function is not a "loss of bodily function or sense," lacks support in the law.[6] The judge's legal conclusion that § 36(1)(j) includes payment for the loss of psychiatric function is consistent with the historic inclusion of psychiatric or psychological injuries within the meaning of "personal injury," law established long before there was any specific statutory reference to mental, emotional or psychological injuries in our Workers' Compensation Act. See Cornetta's Case, 68 Mass. App. Ct. 107, 115-116 (2007). Indeed, almost since the Act's inception, the term "personal injury," has been interpreted to include mental and psychological disorders arising out of work-related injuries resulting from physical trauma. See Hunnewell's Case, 220 Mass. 351, 355-356 (1915). Later, the court recognized that purely emotional injuries were also compensable if connected to mentally traumatic events arising out of the employment. Fitzgibbons's Case, 374 Mass. 633, 637-

[6] Here, there was no dispute about the medical aspects of the employee's claim. We note that it is a medical question whether, and to what extent, *any* particular personal injury results in a permanent "loss of bodily function or sense." The employee relied on the report of a psychiatrist, Dr. Steven Hoffman, who "opined that the employee's 'mental capacity has been reduced by her mental symptoms' " and "further opine[d] that the employee has 'lost 20% of her function' using the AMA Guidelines for Mental and Behavioral Disorders." (Dec. III, 5.) The self-insurer offered no medical evidence, and the judge acknowledged, "[t]he self-insurer does not dispute the validity of Dr. Hoffman's findings." (Dec. III, 5.)

638 (1978). "Personal injury has been broadly defined to include 'whatever lesion or change in any part of the system produces harm or pain or a lessened facility of the natural use of any bodily activity or capability.' " Id., at 637, quoting from Burns's Case, 218 Mass. 8, 12 (1914). It was not until the legislature acted to restrict the application of the holding in Kelly's Case, 394 Mass. 684, 689 (1985), that any statutory reference to "mental or emotional disabilities" appeared. See G. L. c. 152, § 1(7A), added by St. 1985, c. 527, § 11 and G. L. c. 152, § 29, as amended by St. 1985, c. 527, § 38. No other statutory or decisional authority supports treating mental and emotional injuries/disabilities any differently than physical injuries/disabilities.[7] Moreover, as the judge appropriately noted, the inclusion of awards for permanent loss of psychiatric function in § 36(1)(j)'s "catchall" provision is consistent with the humanitarian purpose of the Act. See Conant's Case, 33 Mass. App. Ct. 695 (1992), citing LaClair v. Silberline Mfg. Co., 379 Mass. 21, 27 (1979).

Lastly, § 36(2) directs the use of the American Medical Association Guides to the Evaluation of Permanent Impairment "where applicable." The AMA Guides provide standards for evaluating and rating permanent impairment resulting from "Mental and Behavioral Disorders,"[8] and the self-insurer articulated no reason why that authority could not be relied upon in the present case.[9] We

[7] In fact, the court specifically rejected any argument that the amendments to § 1(7A) impose a higher standard of proof in emotional incapacity claims than in claims for physical incapacity, or that an employee must prove her emotional disability resulted from ' "an unusual and objectively stressful or traumatic event.' " Robinson's Case, 416 Mass. 454, 459, 460 (1993), quoting Kelly's Case, supra at 687.

[8] See AMA Guides, Chapter 14, 6th ed. (2007). The statute makes no reference to which edition of the Guides should be used, and there is no regulatory guidance on the matter. In any event, the issue is not before us because the self-insurer has not challenged the judge's use of the sixth, and most recent, edition.

[9] The self-insurer also argues that the AMA Guides do not apply in the present case because they specifically prohibit awards for loss of psychiatric function caused by physical injuries, which, the self-insurer maintains, is the situation here. (Self-ins. br. 4-5.) At oral argument before the reviewing board, self-insurer's counsel conceded that the

hold the judge did not err in concluding that as a matter of law, § 36(1)(j) permits the award of benefits for permanent psychiatric loss of function.

In support of her appeal, the employee argues the judge erred by denying her claim on the ground that she failed to prove her psychiatric impairment was permanent. We agree, because the permanency of the employee's psychiatric impairment was stipulated to at hearing.[10] See supra. n.3; Tr. 4. It had been settled at hearing that the sole issue in dispute was the legal question whether § 36(1)(j) allowed for the award of benefits for loss of psychiatric function. The parties stipulated to the amount due the employee if that question was answered affirmatively. Inherent in this stipulation was the concession that the employee's psychological impairment was permanent. By ruling on the issue of permanency, the judge impermissibly disregarded the parties' stipulations and expanded the issues in dispute. See MacEachern v. Trace Construction Co., 21 Mass. Workers' Comp. Rep. 31, 37 (2007), citing Burgos v. Superior Abatement, Inc., 14 Mass. Workers' Comp. Rep. 183, 185 (2000), citing Ruiz v. Unique Applications, 11 Mass. Workers' Comp. Rep. 399 (1997)(parties framed boundaries of

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argument was not raised below, thus the administrative judge had no opportunity to consider it. (Oral Argument Tr., 19.) Accordingly, we deem the argument waived and express no opinion regarding its validity. Green v. Town of Brookline, 53 Mass. App. Ct. 120, 128 (2001)(issues and arguments not raised below are waived on appeal); Eastwood v. Willowood of Williamstown, 26 Mass. Workers' Comp. Rep. ___ and n. 6 (October 24, 2012)(where only rationale expressed at hearing to support finding impartial report inadequate was its failure to address necessity of surgery, employee waived right to argue additional grounds for inadequacy on appeal).

[10] Also at oral argument, self-insurer's counsel conceded that he did not question permanency at hearing, (Oral argument Tr., 16-17), but maintained the employee was required to prove every element of her case. However, the self-insurer's stipulation obviated the need for the employee to prove permanency. Ginley's Case, 244 Mass. 346, 348 (1923)(employee has burden to prove elements of claim not conceded by insurer); see Mason v. Bay State Cleaning, 26 Mass. Workers' Comp. Rep. ___ and n. 2 (July 31, 2012), and cases cited (insurer conceded employee's entitlement to § 36 benefits by stipulation, and need not introduce evidence on that issue). The self-insurer indicated it did "not quarrel" with Dr. Steven Hoffman's opinion that the employee had lost "20% of her function" as determined under the AMA Guides. (Dec. III, 5; see Self-ins. br. 7.)

disagreement when they set out specific claims and defenses raised). Because the judge found in the employee's favor on the only issue in dispute, she erred by not awarding the stipulated benefits of $5,880.20.[11]

Accordingly, we affirm the judge's determination that benefits for permanent loss of psychiatric function are recoverable under § 36(1)(j). We reverse the decision insofar as it holds the employee is not entitled to such benefits because she failed to prove permanency, and order the insurer to pay the employee § 36(1)(j) benefits in the stipulated amount of $5,880.20.

Because reversal is required as a matter of law, the employee prevailed at hearing on her appeal from the § 10A conference order. The self-insurer is ordered to pay employee's counsel an attorney's fee pursuant to § 13A(5), in the amount of $5,311.62, which was the standard base hearing fee on the date of the decision, November 22, 2011.[12] Buduo v. National Grange Mut. Ins. Co., 24 Mass. Workers' Comp. Rep. 101, 109 (2010). Pursuant to § 13A(6), the self-insurer shall pay the employee's counsel a fee of $1,563.91.

So ordered.

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Catherine Watson Koziol
Administrative Law Judge

[11] The self-insurer did not take issue with the amount of the stipulated benefits in its hearing memoranda (Ex 2[a]-[b]) or in its brief on appeal. Thus, although the judge questioned whether the stipulation was providently made, (Dec. III, 3); see Costa v. TGI Fridays, supra, at 83-84, citing Hill v. Dunhill Staffing Systems, Inc., 14 Mass. Workers' Comp. Rep. 350, 351 (2000), the issue was waived. See Green v. Town of Brookline, supra (issues and arguments not raised below are waived); and 452 Code Mass. Regs. 1.15(4)(a)(3)(reviewing board need not decide questions or issues not argued in the brief).

[12] Circular Letter 339, issued October 4, 2011 and applicable on the date this decision was filed, increased the legal fee due an employee's attorney to $5,311.62. 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).

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Mark D. Horan
Administrative Law Judge

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Bernard W. Fabricant
Administrative Law Judge

Filed: ***February 6, 2013***