COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 807696-85**

Stephen O'Brien	Employee
Gillette Company	Employer
Gillette Company	Self-insurer

REVIEWING BOARD DECISION
(Judges Carroll, Levine and Wilson)

APPEARANCES
Michael F. Walsh, Esq., for the employee
Paul Goodrich, Esq., for the self-insurer at hearing
Joyce E. Davis, Esq., for the self-insurer on brief

CARROLL, J. The employee appeals from a decision in which an administrative judge denied his claim for benefits as a result of an emotional injury attributable to a series of work events in the early 1980's. In 1997, the reviewing board affirmed a former administrative judge's decision, insofar as he concluded that the employee was not fired, but had voluntarily left his employment. O'Brien v. Gillette, 11 Mass. Workers' Comp. Rep. 207 (1997). However, the case was recommitted for further findings of fact and conclusions of law regarding work events – other than the termination – that the employee had also alleged as causes for his emotional disability. That recommittal went to a different administrative judge, and it is the decision after recommittal that we now have before us. Finding error, we recommit the case once again.

We need not recount the facts, except to note that the employee alleged that he experienced various instances of mistreatment and harassment on the part of his co-workers and supervisors while working for the employer. O'Brien, supra at 208. The recommittal hearing was to determine whether these events occurred and, if so, whether they caused the alleged emotional impairment. The new

administrative judge stated his understanding of the precepts for the recommittal hearing, as set out by the reviewing board in O'Brien, supra:

> In it's [sic] decision, the Reviewing Board upheld the Administrative Judge's decision that the employee voluntarily left his employment. It then recommitted the case for further findings of fact and conclusions of law, "with respect to the remaining factual disputes". [sic] The Reviewing Board further instructed, "the judge to focus on each alleged specific event and then decide whether that "event" occurred in the manor [sic] described by the employee and whether it, as a matter of medical science, was the cause of the mental disability." Pursuant to the Reviewing Board's directive, these will be the soul [sic] issues considered on recommittal. In accordance with the standards set forth in Albanese's Case, 378 Mass. 14, 18-19 (1979), i.e. whether the employee "is incapacitated by a mental or emotional disorder causally related [sic] a series of specific stressful work-related incidents". [sic]
>
> Another preliminary matter concerns the need to open the records for additional evidence. The Reviewing Board suggested that, "In the interest of judicial economy and efficiency the case be decided insofar as practical on the evidence presented to the former judge". [sic] At the same time, the Reviewing Board recommended that the lay testimony of currently available witnesses be retaken after reviewing the record of the previous hearing, [sic] I have determined that further testimony is unwarranted. At this point, the event in question will have taken place more than a decade ago. Thus, there would be a real question as to the accuracy of the witnesses' recollection. [sic] In addition, the original record is fairly voluminous consisting of three days of hearing, transcripts, and numerous documentary exhibits. The original records and exhibits provide a sufficient basis on which to base a decision on recommittal.

(Dec. 2-3.)

As intimated in our 1997 recommittal, we do not think that "[t]he original records and exhibits provide a sufficient basis on which to base a decision on recommittal." (Dec. 3.) The judge's fundamental misunderstanding of the recommittal is indicated in his statement concerning "the need to open the record for *additional* evidence." (Dec. 2; emphasis added.) As to any credibility findings, this judge – before whom no witness appeared in person – needed to take new, live evidence, not "additional" evidence. "If any rulings based on credibility are

essential to the adjudication of the case, the judge must conduct a de novo hearing on the relevant issue." Antoine v. Pyrotector, 7 Mass. Workers' Comp. Rep. 337, 342 (1993). "[I]t is arbitrary, capricious and contrary to law for a judge to make findings based on the credibility or demeanor of witnesses whom the judge did not have an opportunity to observe." Antoine, supra at 339. See Yates v. ASCAP, 13 Mass. Workers' Comp. Rep. 95, 97 (1999). Indeed, the judge omitted this one critical piece of the reviewing board's decision in his summary of the prior proceedings: "*[A]s there are key issues of witness credibility,* we recommend that the lay testimony of currently available witnesses be retaken." O'Brien, supra at 210 (emphasis added).

Credibility findings are vital to the disposition of this case. If the employee's testimony regarding stressful work events were to be credited, the claim for emotional injury could be compensable. This result arguably would flow from the report of one of the employee's medical experts, Lacy Corbett, Ph.D. (Dr. Corbett 1/15/85 Psychological Evaluation.)[1] Although the judge's finding that Dr. Corbett "did not make any *express* findings regarding the cause of the employee's disability," (Dec. 8; emphasis added), is technically correct, it misses the mark. Dr. Corbett's opinions on diagnosis and disability appear to relate to the employee's work at Gillette, his only employment at the time: "Diagnosis: Axis I., 309.23 Adjustment Disorder – work inhibition[;] Axis V., 62.20 Occupational Problem[.]"[2] (Dr. Corbett 1/15/85 Psychological Evaluation, 3.) The lack of conventional incantation of causal relationship in the doctor's opinion is not

[1] We note that the judge failed to identify any exhibits in his decision.

[2] The employee's other medical expert was Dr. Jonathan Schwartz, a psychiatrist. Although of dubious value, due to his reliance on events which the employee did not describe in his testimony, Dr. Schwartz's opinion was also that events at Gillette caused the employee's emotional disability and diagnosis of Axis 309.23. Dr. Schwartz also pointed out that there was no evidence of circumstances, other than those at Gillette, which contributed to the employee's disability. (Dr. Schwartz 11/20/87 Psychiatric Evaluation.)

necessarily fatal in this case. See L. Locke, Workman's Compensation § 522, p. 647 (2d ed. 1981) (testimony of a medical expert should be considered as a whole to determine whether he is expressing an opinion of causal relationship).

After finding no "express" causal relationship opinion, (Dec. 5), the judge appears to have considered Dr. Corbett's report "as a whole," Locke, supra, to include a "causation opinion." He then discounted it due to issues regarding the employee's history:

> While Dr. Corbett did remark upon the employee's fear concerning his treatment within the workplace, his causation opinion is based upon both the employee's perception of a threat to his well being and on his eventual termination. It has previously been determined that the employee voluntarily left Gillette. Thus, it is difficult to discern, in Dr. Corbett's view; [sic] the incidents recounted by the employee were sufficient to cause his symptoms. [sic]

(Dec. 9.) A fair reading of Dr. Corbett's report calls into question the judge's determination that the doctor relied on the termination for his opinion. See Dr. Corbett's Psychological Evaluation, supra at 2. In any event, as we stated in our previous decision in this case, O'Brien, supra, this 1985 alleged emotional injury should be subject only to the simple contributing cause standard of proof, since it occurred prior to the amendments to § 1(7A) affecting such mental or emotional injuries. See present and preceding versions of § 1(7A) (respective additions of "predominant" and "significant" contributing cause to requirement for proving emotional claims). O'Brien, supra at 210-212. Given all of these factors, well-grounded credibility findings are necessary. The error in the judge's failure to take live testimony was not harmless. Another recommittal for a de novo hearing is required.

The judge's arbitrary credibility findings are notable not only for the fact that they were made on the written transcript, but also for the capricious reasoning used in reaching, and drawing conclusions from, some of them.

> I credit Mr. Selander's testimony over that of the employee with regard to the specific incident and the employee's request to take military leave in

> general. I base this finding, in large part, upon the fact that the employee also testified that he was terminated by Gillette, while all of the Gillette witnesses, including Mr. Selander, testified that he quit. According to Mr. Selander, Thomas Turbide, and Claude Langhoff, the employee told them that he was leaving Gillette to take a position with Lockheed.

(Dec. 5.) The judge's reference to finding Mr. Selander more credible than the employee on specific events is a reference to the reviewing board having affirmed the first judge's credibility finding against the employee as to the termination event. Are we to understand the judge to be saying that a credibility finding as to one fact *made by a different judge* dictates this judge's credibility findings as to other facts? Once again, the judge misapprehended his duties at the recommittal hearing. See O'Brien, supra at 209 ("The judge should focus on each alleged specific event and then decide whether that 'event' occurred in the manner described by the employee, and whether it, as a matter of medical science, was a cause of the mental disability"). In essence, the judge failed to make an independent assessment of the evidence, and abdicated his role as fact-finder. The judge also "credit[ed] the employee's testimony that he smelled alcohol on the breathe [sic] of his co-workers because his statements were supported by Gillette witnesses." (Dec. 5.) The judge continued: "I do not, however, find that his co-workers [sic] abuse of alcohol or drugs was casually related to the employee's disability. I base this finding on the employee's own testimony that he himself had a problem with alcohol for a period when he worked in the sharpening department." (Dec. 5-6.) There is no evidence in the record that the employee's drinking problem was characterized by his drinking *at work,* which was the issue with regard to his co-workers' drinking. (11/2/93 Tr. 65-67.) As such, the judge's conclusion drawn from this evidence is either based on speculation as to the employee's drinking at work, or is simply without meaning. Co-workers' drinking in a dangerous job could have upset the employee, even though he drank too much

outside the workplace.[3] Such erroneous reasoning as is exhibited in these findings further supports the need for this case to be recommitted. See Fantasia v. Northeast Mfg. Co., Inc., 14 Mass. Workers' Comp. Rep. 200, 204-205 (2000).

Accordingly, it is appropriate to recommit the case, Donahue v. Petrillo, 8 Mass. Workers' Comp. Rep. 36, 43 (1994), once again, for a new hearing on "whether the claimed emotional injury 'resulted from a series of identifiable stressful work related incidents occurring over a relatively brief period of time . . . .' " O'Brien, supra at 212, quoting Albanese's Case, 378 Mass. 14, 18-19 (1979).

We transfer the case to the senior judge for assignment as appropriate to an administrative judge for further proceedings consistent with this opinion.

So ordered.

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Martine Carroll
Administrative Law Judge

_____
Sara Holmes Wilson
Administrative Law Judge

_____
Frederick E. Levine
Administrative Law Judge

Filed: **July 30, 2001**
MC/jdm

[3] The judge made other arbitrary credibility findings on the written record, as well:

> Given this confusion about the warnings, I cannot credit the employee's testimony. Since the employee was not deemed credible with regard to his departure from Gillette, I discern no reason for crediting his testimony over that of Mr. Selander in this instance of the exit interview.

(Dec. 4-5.)