COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 046830-03**

Steven Vallee	Employee
Brockton Housing Authority	Employer
NAHIRO Insurance Group Trust	Insurer

REVIEWING BOARD DECISION
(Judges Harpin, Fabricant and Calliotte)

The case was heard by Administrative Judge Maher

APPEARANCES
Robert Noa, Esq., for the employee at hearing
James N. Ellis, Esq., for the employee on appeal
J. Stephen Ladas, Esq., for the insurer

HARPIN, J. The employee appeals from a decision denying his claim for further weekly and medical benefits after March 30, 2012. We affirm the decision.

The employee's case has been the subject of three prior hearing decisions, two reviewing board decisions, and two Appeals Court Rule 1:28 dispositions, stretching back to 2005.[1] The initial claim stemmed from an alleged psychiatric injury sustained while the employee was working as a maintenance mechanic aide for the employer. (Dec. IV, 5; Vallee v. Brockton Housing Authority, 24 Mass. Workers' Comp. Rep. 249 [2010]). The first decision, issued on April 11, 2006, found that while the employee was disabled due to work-related anxiety, he was not disabled from working in a similar position for other employers. The employee's claim for § 34 benefits, or in the alternative, for § 35 benefits, from September 23, 2003 (the day after his last day of work) and continuing, was therefore denied. The reviewing board summarily affirmed the decision, but the Appeals Court reversed,

[1] The administrative judge decisions will be referred to sequentially, by date. The decision of April 11, 2006 will be "Dec. I," the decision of March 18, 2009, will be "Dec. II," the decision of December 4, 2009, will be "Dec. III," and the decision currently under review, that of August 4, 2014, will be referred to as "Dec. IV."

holding that the finding of disability from his prior work meant the employee had an "initial period of total incapacity," followed by a "reasonable time to find a job, and his compensation should not be reduced to partial until he has found suitable work or it appears that his failure to do so is due to causes other than the injury." The court then remanded the case for a finding regarding when the period of disability ended. Case of Vallee, 72 Mass. App. Ct. 1117 (2008)(Memorandum and Order Pursuant to Rule 1:28). Following recommittal, the administrative judge filed a new decision, in which he found the employee was totally disabled from September 23, 2003, to December 12, 2003. The judge found the employee's stated reasons for remaining out of work, after December 12, 2003, were due to continuing issues with his foreman and with confidentiality, not to his disability. (Dec. II, 10). The employee appealed. The reviewing board affirmed, holding that the employee provided no medical evidence or reason why he could not work at some other employment after December 12, 2003. Vallee v. Brockton Housing Authority, supra, at 251. The employee appealed to the Appeals Court, which held the judge's finding of the end date of disability was not arbitrary and capricious, and was supported by the evidence and the judge's rational inferences from that evidence. Vallee's Case, 80 Mass.App.Ct. 1117 (2011)(Memorandum and Order Pursuant to Rule 1:28).

While the appeal process was pending, the employee filed another claim, seeking § 34 or § 35 benefits from April 12, 2006, and continuing. In his decision the present administrative judge ordered § 35 benefits at a rate of $129.12, based on an earning capacity of $600.00, from April 12, 2006, and continuing. (Dec. III, 11). The insurer appealed this decision, which the reviewing board summarily affirmed on November 23, 2010.

The employee then filed the present claim for § 34 or, in the alternative, § 34A benefits, from March 30, 2012, and continuing. This claim was conferenced before a different judge, who denied it. After a hearing, the present judge adopted the findings of the previous three decisions and denied the claim. Although finding

the employee was "totally incapacitated from performing any work where he could earn a wage at this time," (Dec. IV, 10), the judge concluded that any incapacity the employee suffered after March 30, 2012, was not causally related to the industrial accident of June 23, 2003, but was instead due to "many non-work related issues that could not be considered activities of daily living." (Dec. IV, 11-12.) The employee appeals.

The employee began working for the employer in 1990 as a member of a renovation team preparing apartments for new tenants, as well as performing landscaping and building maintenance. (Dec. IV, 5.) His last position for the employer was as a maintenance mechanic aide, where he did housekeeping, general maintenance, painting, maintaining common areas, picking up trash, weeding, and mowing. Id.

In 2002 the employee was directed by his supervisor to enforce a non-smoking policy applicable to the tenants of the employer. (Dec. IV, 6.) The employee testified that he was the subject of verbal harassment by some of the tenants because of this policy. He further alleged that his car's tires had been slashed while he was at work.[2] In June, 2003 the employee had an "outburst" with his supervisor and left work, but returned the following day, after consulting with his treating physician. He worked until September 22, 2003, at which time he began to have flu-like symptoms, such as dizziness, nausea, diarrhea, sweats, and significant weight loss. After meeting with Michael Weiner, a licensed social worker, he was diagnosed with anxiety. Id.

The employee attempted to return to work in October, 2003, but was unable to finish out the day, due to the same symptoms as before. (Dec. IV, 6.) The employee continued under the care of Mr. Weiner, as well as seeing Dr. Westfall,

[2] This allegation was unproven. The employee testified he did not report this alleged vandalism to the police. (Dec. IV, 6.) The judge at the first hearing made the specific finding that "I do not find employee's testimony credible concerning the alleged vandalism at the workplace." (Dec. I, 9.) Such credibility findings are final. Pilon's Case, 69 Mass. App. Ct. 167, 169 (2007).

who prescribed anti-depressant medicine, and Margaret LeBlanc, a counselor at Arbour Care Senior Care and Counseling Services. (Dec. IV, 7.) During this time the employee began to work independently as a handyman in his own business, Steve's Handyman Services, (Dec. III, 7), but that business ultimately failed. (Dec. IV, 7.)

Following the failure of his business, the employee separated from his wife and was in the process of getting divorced at the time of the hearing. (Dec. IV, 7.) He moved out of the family home, but retained joint custody of his two children on weekdays, with his wife seeing them on weekends. Id. He took less interest in housekeeping or his own personal hygiene, often failing to bathe or shave. Id. He spent hours each day playing video games, drinking six beers a day and smoking heavily. Id.

The employee did not socialize, had no friends, and did not go to church. He has had a history of panic attacks, one of which occurred when he woke up from a nap and found his autistic seven-year old son was missing from his house. When he later found out the boy was with his mother, an argument ensued, during which the mother threatened to take the children back to her home country. The employee had to go to Brockton Hospital for treatment after this event. At the time of the hearing, the employee was taking Prozac and Klonopin. (Dec. IV, 7.)

The judge adopted the opinion, in part, of the impartial physician, Dr. Michael Kahn, who diagnosed the employee with chronic depression, and opined that he did not believe there was a causal connection between the 2003 injury and that condition.[3] (Dec. IV, 8-9.) Specifically, the doctor was of the opinion, which

[3] In his January 12, 2009, report, Dr. Kahn opined that the employee's major depression, in remission, was causally related to his work injury. (Dec. III, 8.) The judge found the employee was unable to return to his former employer, but able to work in the maintenance field for other employers. He assigned a $600 earning capacity, and awarded ongoing § 35 benefits. (Dec. III, 11-12.) Because the employee had received § 35 benefits pursuant to a hearing decision, he was required to show a medical or vocational worsening in order to be entitled to § 34 or § 34A benefits. Glowinkowski v. KLP Genlyte, 18 Mass. Workers' Comp. Rep. 203 (2004). The judge here found the employee was totally disabled at the

the judge adopted, that the employee's causally related major depression, which had been in remission in 2009, had been triggered from remission to non-remission because of non-work related events. (Dec. IV, 9.) Those events were: his divorce, his continuing financial difficulties, his unemployment, his feeling of abandonment by his family and friends, his lack of social contacts, and the general deterioration of his life. Dr. Kahn's position on the cause of the employee's depression has changed since 2009, based on the non-work-related events in his life. (Dec. IV, 9-10.) Based on the employee's testimony and Dr. Kahn's opinion, the judge found "that many non-work-related issues that could not be considered activities of daily living have entered into this man's life." (Dec. IV, 11.) He then concluded: "I find that there is no causal connection between his current condition and the history of the injury." Id.

On appeal, the employee raises one issue, with two parts. First, he suggests the judge failed to consider the medical and lay evidence causally relating his 2003 industrial injury to his life activities occurring after the 2009 hearing decision. In other words, he contends that his divorce, financial difficulties, abandonment, etc., were caused by his work injury. Second, he argues that, in any event, those activities were not superseding causes, but were "normal and foreseeable everyday stresses of everyday life that resulted in a re-awakening or regression of the compensable injury." (Employee br., 20).

With respect to the first issue, the employee has acknowledged there was no evidence, nor were there any findings, that his life activities after 2009 were caused by the employee's 2003 injury. (O.A. 8-9.) Dr. Kahn specifically disagreed with the employee's perception that his financial difficulties were related to his work injury. (Dec. 9.) When asked to give an opinion on causation, assuming that the employee's divorce and financial difficulties in between his first examination of the

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time of hearing. (Dec. IV, 10.) The issue here is whether that worsening was causally related to the 2003 work injury.

employee in 2009 and his second in 2013, "were the result, directly or indirectly, of his inability to work," Dr. Kahn testified:

> A: If I understand you, you're asking me to assume that the divorce and so forth was due only to his lack of employment?
>
> Q: Not only, but that it was a contributing cause.
>
> A: Okay. And the question is whether that would change my view of the causal nature of his depression?
>
> Q: Yes.
>
> A: I don't think I can say.

(Dep. Dr. Kahn, at 18.) At oral argument, the employee's counsel acknowledged the absence of the required causal relationship opinion from the impartial physician:

> And my question to Dr. Kahn is, well, what if the financial problems and the deterioration of the marriage had their genesis in the industrial injury and the inability to work? *And Kahn didn't come around.* But he did say that would be a tough question.

(O. A. 3; emphasis added.) Thus, Dr. Kahn did not opine that the major life events after 2009 were causally related to the work events of 2003, and when asked to assume they were, he did not change his causation opinion.

The employee's second and primary argument is that the "life changes" referred to after 2009 were "in the nature of ordinary life events for which the employee's industrially-related psychiatric condition left him peculiarly susceptible for progression from 'remission' to 'non-remission.' " (Employee br. 23.)

The employee's argument puts the cart before the horse. The question whether the events occurring after the 2009 decision that led up to his incapacity on March 30, 2012 are "ordinary life events" is not the first step in the causation analysis involving a non-work related increase in symptoms following a work related incident. The first step, in physical disability cases, is to determine, through expert medical evidence, whether there is <u>any</u> causal relationship between the

industrial accident and the disability that follows from the non-work related event. Kashian v. Wang Laboratories, 11 Mass. Workers' Comp. Rep. 72, 74 (1997). It is only where the judge finds some causal relationship that the next step is required, that of determining whether the later event or events constitute an intervening cause. See Bemis v. Raytheon Corp., 15 Mass. Workers' Comp. Rep. 408, 412 (2001), quoting Twomey v. Greater Lawrence Visiting Nurses Assoc., 5 Mass. Workers' Comp. Rep. 165, 158 (1991) ("causal chain is not broken if intervening activity 'is a normal and reasonable one and not performed negligently' "). See also Nason, Koziol & Wall, supra at § 10.14 ("if the employee engages in reasonable and normal movements or activities and thereby reactivates or aggravates a compensable injury, the insurer will be obliged to pay compensation for the consequences").

The employee argues that the judge's adoption of Dr. Kahn's opinion that events in the employee's life after 2009—divorce, financial difficulties, unemployment, feelings of abandonment, etc.—"triggered" the employee's work-related major depression from remission into non-remission implies that "the industrially-related condition was present and was acted upon by the subsequent life events encountered by the employee." (Employee br. 23.) In other words, the employee argues that the harassment at work continued to play a role, however small, in the employee's depression after March 30, 2012. See Drumond v. Boston Healthcare for the Homeless, 22 Mass. Workers' Comp. Rep. 343, 345-346 (2008)(where subsequent non-work-related injury intervenes, industrial injury remains compensable if employee can prove any continuing causal connection between the work and the resultant incapacity), and cases cited. This is not the standard where, as here, the employee's disability is caused by verbal harassment alone. Cornetta's Case, 68 Mass. App. Ct. 107, 117-118 (2007). In a claim for an emotional disability not caused by a physical injury, the employee has a higher burden. The employee conceded at oral argument that the standard of proof for this "pure mental" claim is whether his total disability has, as its predominant

contributing cause, the events at work in 2003. (O.A. 15; G. L. c. 152, § 1[7A][4].) The only question before us is thus whether the predominant contributing cause of his present disability, since 2012, is his 2003 industrial accident. The employee makes no argument to this effect, nor does Dr. Kahn's adopted opinion support this standard of proof. Based on Dr. Kahn's opinion, the judge found, not merely that work events were not the predominant cause of the employee's disability, but there was no continuing causal relationship between the work events and the employee's current disability. The impartial physician stated clearly, in his report:

> I do not believe there is a causal connection between his condition and the history of injury provided to me. The reason for my believing this is his clear paranoia from early on in the job, as well as with the lack of any progress, which is much out of keeping with the nature of the alleged injury sustained.

(Report of Dr. Kahn, 3.)[5] The doctor, in his deposition, expanded on this opinion, but did not back off from it. When asked whether the employee's work incidents in 2003 played a continuing role in the employee's disability or need for treatment, the

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[4] The third sentence of G.L. c. 152, § 1(7A), provides:

> 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.

[5] The self-insurer for the first time raised § 1(7A)'s "a major cause provision, which requires the insurer to produce evidence of a combining, pre-existing condition. The judge found that the self-insurer failed:

> to prove the factual predicates . . . to put [§1(7A)] into play. Although Dr. Kahn had a sense that the Employee had a paranoid personality disorder or even a possible mild paranoid schizophrenia that might be construed as pre-existing, he goes on to opine, "what is more difficult to clarify is the etiology of the paranoid strain in his thinking." He certainly equivocates on what a possible pre-existing condition could be, if any. I do not find there was a pre-existing condition.

(Dec. IV, 11.) The self-insurer has not appealed. Therefore we do not address this finding.

doctor stated: "Not for a continuing. I don't think for a continuing need for treatment." (Dep. of Dr. Kahn, 12-13.)

> Q: Again, if I understood you, your answer earlier, you can't say when those events from 2003[6] ceased to play a causative role in his mental health problems?
>
> A: No, I can't.

Id, at 14. Despite his use of the word "trigger," (Dec. IV, 9), Dr. Kahn's opinion, when read as a whole, adequately supports the judge's finding that the employee's psychological disability, beginning in March 2012, had ceased to be causally related to the work events of 2003. Stawiecki v. DPW Highway Dep't, 26 Mass. Workers' Comp. Rep. 31, 33 (2012)(testimony of medical expert should be considered as a whole). Certainly, Dr. Kahn's opinion would not support a finding the employee's current psychological disability was predominantly caused by work events ten years prior.

Accordingly, we need not address the employee's argument that the life events which Dr. Kahn felt intervened to cause the employee's disability at the time of his examination in 2013, were ordinary life events which did not break the causal chain. (O.A. 11.)[7]

The burden is on the employee to provide expert medical evidence that his psychological disability from and after March 30, 2012, was causally

[6] The transcript has this date as "2013," which is clearly a scrivener's error.

[7] We make the following observation regarding the judge's finding that those events "could not be considered activities of daily living." (Dec. 11.) Although the judge could have expressed his finding in terms more appropriate for a psychological disability claim, we understand him to mean that the employee's divorce, his financial situation, and his abandonment by his family and friends, are major superseding events which would, in this mental disability case, break the causal chain. We think this finding would be sufficient to support his conclusion that "something else besides his situation at work had kept him from returning to the work force." (Dec. IV, 11.)

related to the 2003 industrial accident. Georgian v. Windham Group, 30 Mass. Workers' Comp. Rep. 189, 194-195 (2016). This he failed to do.

We therefore affirm the decision.

So ordered.

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William C. Harpin
Administrative Law Judge

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Bernard F. Fabricant
Administrative Law Judge

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Carol Calliotte
Administrative Law Judge

Filed: **March 15, 2017**