COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO.:** 051880-01

Stewart McMiller	Employee
MCI Shirley	Employer
Commonwealth of Massachusetts	Self-Insurer

REVIEWING BOARD DECISION
(Judges Horan, Costigan and Fabricant)

APPEARANCES
James M. Galliher, Esq., for the employee
Patricia G. Noone, Esq., for the self-insurer

HORAN, J. The employee appeals an administrative judge's decision denying and dismissing his claim for § 35 partial incapacity benefits. The employee alleged he was injured in a work-related altercation. He argues, *inter alia*, the judge erred by excluding the employer's internal investigative report of the incident. Finding no error, we affirm the decision.

Stewart McMiller, a corrections officer at MCI Shirley since 1983, alleged that on May 10, 2001, he was lunged at and choked by a fellow corrections officer, Richard Coggins. The alleged attack followed comments broadcast over the institution's radio by McMiller, and another corrections officer; Coggins perceived the comments to be racially insensitive and inappropriate. (Dec. 4; Tr. 101.) Although the employee was not physically injured, he filed an internal complaint with the Department of Corrections. The employee claims his depression resulted from the incident, and from his employer's poor response to it.[1]

---

[1] The employee began seeing a psychologist in August 2001, and a psychiatrist in April 2002. On January 28, 2002, he left work voluntarily to avoid contact with Coggins. While out of work, the employee collected unemployment benefits, and coached a high school basketball team. He claimed § 35 partial incapacity compensation for a psychological disability from January 28, 2002 to July 28, 2002. (Dec. 4.)

The employee's claim was denied at conference, and he appealed. Dr. Bennett Aspel, a psychiatrist, examined the employee pursuant to § 11A; his report and deposition were admitted into evidence. (Dec. 1, 5.) The judge accepted additional medical evidence on the ground of medical complexity. (Dec. 2.)

At hearing, the employee attempted to admit into evidence the investigative report of the alleged incident issued by the Department of Corrections. Captain Donna Driscoll, of the Office of Investigative Services, authored the report. It consisted of summaries of interviews she and her boss, Mark Riley, conducted with a number of employees, including McMiller and Coggins. It also contained Driscoll's findings and conclusions. (Tr. 61-65; Ex. ID 20.) The self-insurer objected to the report's admission on hearsay grounds, and the judge excluded it. (Tr. 63-67; Dec. 2.)

In his decision, the judge adopted Coggins's version of the events in question, and discredited the employee's testimony. (Dec. 5.) The judge found the employee did broadcast "disparaging, inappropriate, unprofessional and racially insensitive language over the institution radio," that Officer Coggins voiced his displeasure about it to McMiller, who then struck Coggins in the face, injuring him, and that, other than attempting to protect himself by putting up his hands, Coggins did not escalate the incident or have *any* physical contact with the employee. (Dec. 3-4.)

Since Dr. Aspel, the § 11A examiner, based his opinion on discredited facts, i.e., that Coggins lunged at and choked the employee without provocation, the judge rejected the doctor's medical opinion that the employee's claimed psychiatric disability was causally related to the incident at work.[2] (Dec. 5.) The judge also found the employer's actions in response to the incident constituted bona fide personnel actions. (Dec. 6.) See G. L. c. 152, § 1(7A). Accordingly, he denied and dismissed the employee's claim. (Dec. 7.)

---

[2] Given the judge's finding, which we affirm, that the employee was not disabled, it is unnecessary for us to address which causation standard applies, the predominant contributing cause standard, or the simple causation standard. (Dec. 5.); see Cornetta v. Nashoba Valley Tech. High School, 19 Mass. Workers' Comp. Rep. (November 8, 2005); Cirignano v. Gl obe Nickel Plating, 11 Mass. Workers' Comp. Rep. 17 (1997); Lagos v. Mary A. Jennings, Inc., 11 Mass. Workers' Comp. Rep. 109, 111 (1997).

The employee appeals, alleging the judge committed prejudicial error by excluding the internal investigative report. The employee notes the report supported the conclusion that Coggins assaulted him. He maintains the judge could not have rejected his testimony, and the opinion of Dr. Aspel, if the report had been admitted. (Employee br. 9, 10-11.) This, of course, is not necessarily so. Even if the report had been admitted, the judge would not have been bound to accept its findings.

The employee argues the report was admissible under both the statutory business records exception to the hearsay rule, G. L. c. 233, § 78, and the common law official, or public records, exception to the hearsay rule. He also claims the report's conclusions are independently admissible under G. L. c. 30A, § 11(4). See n.5, infra. Finally, the employee claims the report should have been admitted at least to impeach Coggins's testimony. The judge did not err in excluding the report.

We first address the employee's contention concerning the report's admissibility under the common law official records exception,[3] and the statutory business records exception, to the hearsay rule. G. L. c. 233, § 78.[4] The law is well settled: statements of opinions or conclusions, and the results of investigations, do not fall within either exception to the

[3] The common law official records exception to the hearsay rule was stated in Commonwealth v. Slavski, 245 Mass. 405 (1923), in which the court recognized "that a record of a primary fact, made by a public officer in the performance of official duty is or may be made by legislation competent prima facie evidence as to the existence of that fact, but that records of investigations and inquiries conducted, either voluntarily or pursuant to requirement of law, by public officers concerning causes and effects involving the exercise of judgment and discretion, expressions of opinion, and making conclusions are not admissible in evidence as public records." Id. at 417. See P.J. Liacos, Massachusetts Evidence § 8.13.1 (7th ed. 1999).

[4] G. L. c. 233, § 78, provides for the admissibility of ordinary business records upon the judge making four preliminary findings: (1) the entry was made in good faith; (2) in the regular course of business; (3) before the action was begun; and (4) it was the usual course of business to make the entry at the time of the event recorded or within a reasonable time thereafter.

hearsay rule. Julian v. Randazzo, 380 Mass. 391, 393 (1980); Herson v. New Boston Garden Corp., 40 Mass. App. Ct. 779, 792 (1995); Liacos, supra at § 8.11.1. Since the report contains the findings and opinion of the report's author, Captain Driscoll, it was properly excluded.

The employee next contends the report is admissible under G. L. c. 30A, § 11(4).[5] That section permits an agency to utilize its own investigative reports when adjudicating disputes. The proffered report was not such a document. In any event, G. L. c. 30A § 1(2) specifically excludes "the division of dispute resolution of the division of industrial accidents" from the definition of "Agency."

Next, the employee contends the report should have been admitted to impeach Coggins's testimony. While it is true that documents which would otherwise be excluded as hearsay may be admitted if offered for a non-hearsay purpose, such as impeachment, see Liacos, supra, §§ 6.9.2, 8.2, neither the report, nor specific statements within it, were offered for such a purpose. After insurer's counsel objected to the report's admission on hearsay grounds, and it was excluded, employee's counsel responded:

> Well, I will make an offer of proof. If it was admitted, Your Honor, there are several specific conclusions that Officer Driscoll comes to in her report that indicate that more likely than not Corrections Officer Coggins had a prior history of workplace violence in Shirley minimum prison, in addition to which he initiated the confrontation between my client himself [sic] on duty on May the 10th of 2001; and confirms as an official report of the Department of Corrections that this incident did in fact take place, which is part and parcel of the employee's burden de novo at the hearing stage, to prove a psychological injury stemming from a specific incident that took place in the workplace.

(Tr. 66-67.) The only potential purpose, other than to prove that the altercation occurred in the manner described by Coggins, (i.e., the truth of the matter asserted) was to prove

---

[5] G. L. c. 30A, § 11(4), provides, in relevant part:

> All evidence, including any records, investigation reports and documents in the possession of the agency of which it desires to avail itself as evidence in making a decision, shall be offered and made a part of the records in the proceeding . . . .

that Coggins had a history of prior workplace violence. However, Massachusetts does not allow impeachment of a witness's credibility by evidence of prior bad acts. Liacos, supra § 6.10.3, and cases cited. The employee at hearing cited no other potential non-hearsay grounds for admission of the report. Accordingly, the judge properly excluded it.[6]

Ultimately, credibility determinations are the sole province of the hearing judge, and will not be disturbed on appeal if based on evidence of record. See Lettich's Case, 403 Mass. 389, 394 (1988); Pinhancos v. St. Luke's Hosp., 17 Mass. Workers' Comp. Rep. 412, 419 (2003). The judge heard testimony from the employee, Coggins, Driscoll, and Dennis Cullen, the Deputy Director of Employee Relations for the Department of Corrections. All of these witnesses were cross-examined. In addition, the judge received into evidence, by agreement of the parties, the incident reports of three other officers. (Dec. 1; Tr. 5.) The judge was free to discredit the employee's testimony, and the medical opinions based upon it. There was also ample evidence to permit the judge to conclude the employer's actions constituted bona fide personnel actions, as contemplated by the last sentence of G. L. c. 152, § 1(7A). This finding is unchallenged on appeal.

The decision is affirmed.[7]

So ordered.

_____

Mark D. Horan
Administrative Law Judge

[6] The employee states that at a status conference on April 30, 2003, the administrative judge observed the investigative report would be admissible as an admission by a party opponent. (Employee br. 12-13 n.1.) (See Affidavit of James M. Galliher, dated January 27, 2005.) Insurer counsel represents, by affidavit, the judge did not so state. Since the status conference was not transcribed, we cannot determine whether the employee's contentions on this issue are correct. We note, however, that even if the judge made such a statement, he was free to change his mind when faced with a proper objection at trial.

[7] We summarily affirm the decision as to all other issues raised by the employee.

_____
Patricia A. Costigan
Administrative Law Judge

_____
Bernard W. Fabricant
Administrative Law Judge

Filed: December 9, 2005