COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 041343-04**

Thomas A. Yahoub	Employee
Town of Milton	Employer
MIIA	Insurer

REVIEWING BOARD DECISION
(Judges Calliotte, Harpin, and Long)

This case was heard by Administrative Judge Heffernan.

APPEARANCES
Leonard Y. Nason, Esq., for the employee
Susan Kendall, Esq., for the insurer at hearing
John J. Canniff, Esq., for the insurer on appeal
Robert S. Martin, Esq., for the insurer on appeal

CALLIOTTE, J. The employee appeals from a decision denying and dismissing his claim for weekly and medical benefits. The employee maintains the judge erred by denying his request to introduce into evidence the record of his hearing before the Massachusetts Division[1] of Unemployment Assistance (DUA), and then re-litigating final findings of fact made in that DUA hearing. We affirm the decision.

The employee, sixty-two years old at the time of hearing, began working as a custodian for the employer in the public schools in 1999. (Dec. 5.) On December 28, 2004, he was involved in a verbal and physical altercation at work with William Ritchie, the Director of Facilities for the Milton Public Schools. (Dec. 7-8.) Following the incident, the employer conducted an investigation, and terminated the employee. (Dec. 12.) On or about, August 7, 2008, the employee filed a claim for weekly and medical

[1] General Laws c. 151A, § 1(g) was amended by St. 2011, c. 3, § 146, to substitute "department of unemployment assistance" for "division of unemployment assistance within the department of workforce development."

benefits, alleging severe emotional distress as a result of the December 28, 2004 incident. (Dec. 4.)

Following a conference order denying the claim, the case was tried over four days.[2] (Dec. 4.) In defense of the claim, the insurer raised liability, disability and extent of incapacity, and causal relationship, including § 1(7A)'s pre-existing condition provision. In addition, the insurer alleged the employee was not entitled to compensation due to his serious and willful misconduct pursuant to § 27.[3] The insurer also alleged the employee's termination was a bona fide personnel action, under § 1(7A), which, if applicable, would preclude him from receiving compensation. (Dec. 4.)[4]

At hearing, the parties stipulated that the employee received unemployment compensation benefits from February 19, 2005, until August 15, 2005. (Dec. 5.) In addition, although not stipulated, it is undisputed that the employee was awarded unemployment benefits following a hearing before the Board of Review of the DUA, and that the Quincy District Court affirmed the DUA's decision. (Insurer br. 10 n.2; Employee br. 4.) After the first day of the workers' compensation hearing, the employee filed a motion to preclude relitigation of the issues determined in the unemployment hearing on res judicata grounds, and to require the judge to adopt the facts found in the DUA hearing. (See "Employee's Motion to Preclude Self-insured from Re-litigating Issues Concerning Liability and Compensability for Injuries Sustained on December 28, 2004," dated January 30, 2009.). The insurer opposed the motion, and, on May 6, 2009,

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[2] Hearing transcripts will be referred to as: "Tr. I" (December 16, 2008); "Tr. II" (August 6, 2009); "Tr. III" (December 18, 2009); and "Tr. IV" (March 11, 2010).

[3] General Laws c. 152, § 27, provides: "If the employee is injured by reason of his serious and willful misconduct, he shall not receive compensation but this provision shall not bar compensation to his dependents if the injury results in death."

[4] At some point, the employee filed a motion, which the judge allowed, to join a claim for benefits under § 28, alleging employer serious and willful misconduct. (Employee br. 2.) However, the judge did not address that issue, given his determination that the employee was guilty of serious and willful misconduct.

the judge denied it.[5] (Dec. 5.) On April 8, 2010, the insurer filed a motion to bifurcate the hearing to decide, first, the issues of whether the employee's actions constituted serious and willful misconduct under § 27, and, second, whether the employee's termination was a bona fide personnel action pursuant to § 1(7A). The judge denied the motion, but, in his decision, allowed the insurer's renewed motion of July 1, 2013. (Dec. 5, 11.)

At hearing, three witnesses testified regarding the events of December 28, 2004: William Ritchie, Thomas Malloy, and the employee. The employee testified that Mr. Ritchie, the Director of Facilities, approached him at work and began screaming at him about leaving school property during working hours. He alleged that Mr. Ritchie then pushed him against the wall and struck him in the face. (Dec. 7-8.) Mr. Ritchie testified that he and the employee got into a verbal altercation over the employee allegedly leaving the building, and that the employee attacked him, knocked him to the floor, and then jumped on him. (Dec. 8-9.) Thomas Malloy, the supervisor of custodians, corroborated Mr. Ritchie's testimony that the employee attacked Mr. Ritchie, and that he (Mr. Malloy) separated them. Mr. Malloy testified that both the employee and Mr. Ritchie called the police. (Dec. 10.)

In his decision, the judge denied the employee's motion to consider the unemployment hearing results res judicata as to the insurer's defenses, finding that there was no privity between the parties in the unemployment and workers' compensation proceedings. (Dec. 5.) He then made factual findings regarding the events of December 28, 2004, crediting the testimony of Mr. Ritchie and Mr. Malloy:

> [T]he employee was the aggressor of the physical altercation. I find Ritchie and the Employee were engaged in a loud verbal altercation regarding the Employee's work performance, which escalated to a physical confrontation when the Employee intentionally and physically attacked Mr. Ritchie. I find that the Employee hit Mr. Ritchie, knocking him to the floor. I find that the Employee was

[5] On the second day of hearing, (August 6, 2009), the employee attempted again to have documents from the unemployment hearing admitted into evidence; however, the judge denied his request. (Tr. II, 5-7; see Tr. III, 48-49.).

> on top of Mr. Ritchie while Mr. Ritchie was face first on the floor. I find that the Employee continued attacking Mr. Ritchie while the two men struggled on the floor, and did not cease the attack until Mr. Malloy was able to grab and separate the two men.

(Dec. 11.) Based on these findings, the judge concluded:

> [T]he Employee's actions in assaulting William Ritchie constitute an act that he, or a reasonable person, would know or have reason to know will create an unreasonably high risk of bodily harm that involves a high degree of probability that substantial harm will result. The Employee's attack on William Ritchie occurred outside any incidents of custodial employment. Although he may not have been criminally charged or convicted for this attack, his actions constitute, at the very least, quasi-criminal conduct.

(Dec. 11-12.) The judge further found that the employee's termination following the assault was a bona fide personnel action "in the nature of a disciplinary response to the assault of a supervisor," and that the employee's alleged mental or emotional injury was thus not a personal injury. (Dec. 12.) Accordingly, he found that any alleged physical or emotional injuries suffered by the employee were not compensable pursuant to § 27 or § 1(7A).[6] Id.

The employee appeals, arguing the judge erred "when he denied the employee's introduction into evidence [of] the DUA Hearing Record on August 9, 2009, and allowed the self-insured employer to re-litigate final findings of fact made in the hearings before the Massachusetts Department of Unemployment Assistance." (Employee br. iv, 7.) The employee maintains that principles of res judicata, specifically issue preclusion, apply to

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

> No mental or emotional disability arising principally out of a bona fide, personnel action including a transfer, promotion, demotion, or termination except such action which is the intentional infliction of emotional harm shall be deemed to be a personal injury within the meaning of this chapter.

The employee's claim did not allege he suffered a mental and emotional disability as a result of his termination. See Rizzo v. M.B.T.A., 16 Mass. Workers' Comp. Rep. 160, 161 n. 3 (2002)(reviewing board may take judicial notice of documents in the Board file). Nor did he try the case on that ground. Therefore, we need not address the judge's findings or the insurer's arguments that the employee's termination was a bona fide personnel action.

the DUA hearing decision, which was affirmed by the District Court, and not appealed. Finding no error, we affirm the judge's decision.

It is well-established that principles of res judicata apply to workers' compensation proceedings. Martin v. Ring, 401 Mass. 59, 61-62 (1987)(approving defensive use of workers' compensation decisions for collateral estoppel purposes); Green v. Town of Brookline, 53 Mass. App. Ct. 120 (2001)(approving defensive use of civil service decision in workers' compensation proceeding). The defense is comprised of two doctrines – claim preclusion and issue preclusion. Heacock v. Heacock, 402 Mass. 21, 23 n. 2 (1988). Here, the employee seeks to use issue preclusion (otherwise known as collateral estoppel) *offensively* to establish, in the workers' compensation forum, the facts found in the unemployment hearing decision. The employee misapprehends the use of collateral estoppel in these circumstances.

In Tuper v. North Adams Ambulance Serv., Inc., 428 Mass. 132 (1998), the court addressed the use of issue preclusion in a situation very similar to that presented here. There, the issue was whether principles of collateral estoppel "permit a discharged employee, who was awarded unemployment compensation benefits in an administrative decision . . . to use that decision offensively against his former employer in a subsequent civil action for wrongful termination." Id. at 132. The court explained that:

> Before a party will be precluded from relitigating an issue, a court must determine that (1) there was a final judgment on the merits in the prior adjudication; (2) the party against whom preclusion is asserted was a party (or in privity with a party) to the prior adjudication; and (3) the issue in the prior adjudication was identical to the issue in the current adjudication. Additionally, the issue decided in the prior adjudication must have been essential to the earlier judgment.

Tuper, supra at 134-135. Noting that "cases in which the prior adjudication was before an administrative agency have all involved the *defensive* use of collateral estoppel," Tuper, supra, at 135 (emphasis added), citing Martin, supra at 62-64, the court held that issue preclusion could not be used *offensively* in the situation before it, because the issues

in the unemployment hearing and in the civil action were not identical.[7] Moreover, the court held that its conclusion "comports with over-all considerations of fairness," in that "the proceedings before the unemployment board were relatively informal and the defendant's stake in the adjudication was relatively small," in contrast to the more substantial recovery available in the civil action. Id. at 136. Furthermore, prohibiting the use of unemployment decisions to collaterally estop an employer from relitigating issues in a civil action "comports with the broad policy considerations underlying G.L. c. 151A, § 25(e)(2)," id., which,

> [c]ontemplates the prompt adjudication of claims for unemployment benefits in response to the need to alleviate quickly the harsh financial consequences of unemployment. If successful claimants before the department are allowed to use collateral estoppel offensively in a subsequent civil action, employers will be forced to litigate unemployment compensation claims to the hilt, with full appeals, because of the substantially greater variety and extent of civil claims which might then follow. Such a result would be directly contrary to the objective, and even the Federal mandate, of promptly resolving such claims.

Id. at 136; citations omitted. Finally, the court in Tuper, supra, held there was no error in precluding reference to the unemployment proceedings and decision in the civil action, because, G.L. c. 151A, § 46, governing unemployment insurance, provides that, "with certain exceptions not relevant here, information secured pursuant to this chapter is confidential, is for the exclusive use and information of the department in the discharge of its duties, is not a public record, and *may not be used in any action or proceeding*." Id.; emphasis added.

[7] The court held that the unemployment decision finding the plaintiff/employee was not insubordinate and did not act "with deliberate misconduct in willful disregard of the [defendant's] interest, c. 151A, § 25(e)(2), was based on subjective knowledge and state of mind of the plaintiff/employee. Tuper, supra at 133-134. By contrast, in the civil action, the question of whether the employee was terminated for just cause was based, in part, "on the objective reasonableness of the defendant's (employer's) state of mind." Id. at 135. Accordingly, the unemployment decision had no preclusive effect on the civil action. Id. at 136. Cf. Commissioner of the Dep't of Employment and Training v. Dugan,, 428 Mass. 138 (1998)(*court's* factual findings regarding employee's termination may be used *defensively* to collaterally estop her from contesting whether she engaged in deliberate misconduct in willful disregard of the employer's interest in subsequent unemployment hearing).

We find the court's reasoning in Tuper, supra, applicable here. First, the statutory ban on the use of information secured pursuant to chapter 151A applies to proceedings before the DIA. General Laws c. 151A, § 46(a) provides "Such information [secured pursuant to this chapter] is not . . . admissible in any action or proceeding, except as provided in this section." Section 46(b)(1-4), provides: "Such information may be admissible only in the following actions or proceedings." The list includes specific types of civil and criminal cases, but does not include hearings at the DIA. The judge did not err by refusing to admit or reference the DUA hearing decision or other DUA records.[8]

Even assuming, arguendo, the DUA hearing and/or Quincy District Court decisions were admissible, they could not be used offensively to collaterally estop the insurer from defending against the employee's claims before the DIA, because the employee failed to prove all three elements of issue preclusion. See Tuper, supra, at 134-135. The only element clearly satisfied is that there was a final judgment on the merits in the unappealed District Court decision. However, as the judge here found, the unemployment and workers' compensation actions did not involve the same parties or their privies. The employee does not dispute that the Town of Milton was the party in the unemployment hearing, while Massachusetts Interlocal Insurance Association (MIIA) is the party in the workers' compensation case. In fact, the employee states, "there is little doubt that MIIA would have no standing to be a party in the unemployment action, which involved the Town of Milton . . . . " (Employee br. 8.)[9]

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[8] Although it is unclear the extent to which the employee argues the District Court decision is admissible, we find persuasive the court's holding in Beaubrun v. Family & Cosmetic Dentistry of North Andover, LLC, 85 Mass. App. Ct. 1104 (2014)(Memorandum and Order pursuant to Rule 1:28), that an employee's appeal of his unemployment decision to the District Court does not thereby make that information admissible at the DIA, as "the substantive details of the District Court proceeding, which . . . was instituted by the authority of G.L. c. 151A and was adjudicated under its standards, logically also fall within the protected category of "information secured pursuant to [c. 151A].' " It is thus "not a public record nor admissible" except in specifically excepted proceedings, which do not include workers' compensation proceedings. Id.

[9] Nonetheless, the employee argues that, because the Town is a "member" of a "Public Employer Workers' Compensation Self-Insurance Group" (MIIA), (Employee response br. 4), the Town is essentially a self-insurer, and is thus the actual party in the workers' compensation

Nor did the judge err in finding that the employer and MIIA are not in privity. (Dec. 5.) Privity exists between two parties where the party in the present action (MIIA) "exercised 'substantial control' " over the party in the earlier action (the Town); in other words, the evidence must show that MIIA had effective control over the Town's conduct of the earlier litigation. Bourque v. Cape Southport Assoc., LLC, 60 Mass. App. Ct. 271, 274-75 (2004). The employee has offered no evidence suggesting MIIA exercised any control, much less substantial control, over the Town of Milton in the unemployment proceedings.[10] (Ins. br. 6-7.) Because there was no privity between the Town and MIIA, issue preclusion does not bar litigation of all issues in the workers' compensation case.[11]

The remainder of the employee's arguments must fail, as they center on his position that the judge should have made different credibility findings, based on the unemployment decisions. The judge's findings crediting the testimony of Mr. Ritchie and Mr. Malloy are based on evidence in the record, and we will not disturb them. Pilon's Case, 69 Mass. App. Ct. 167, 169 (2007). Whether the employee was guilty of serious and willful misconduct is a question of fact. Tripp's Case, 355 Mass. 515, 518 (1969). The judge applied the appropriate legal standard in finding the employee's attack

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case. However, as the insurer points out, that argument ignores the statutory distinction between a self -insurer and a self-insurance group. General Laws c. 152, § 25A requires every employer to provide for payment of compensation to his employees in one of three ways: insurance with an insurer; membership in a workers compensation self-insurance group; or by obtaining a license as a self-insurer. Self-insurers are governed by G.L. c. 152, § 25A. Self-insurance groups are defined and governed by G.L. c. 152, §§ 25E-25U. The employer cannot be both a member of a self-insurance group and a self-insurer.

[10] In addition, as discussed in Tuper, supra, at 136-137, fairness and broad policy considerations underlying chapter 151A, militate against allowing unemployment decisions to have preclusive effect at workers' compensation hearings. Id. at 136. The "relatively informal" nature of unemployment proceedings, Dugan, supra at 145, in contrast to the "quasi judicial" nature of the DIA proceedings, Martin, supra at 61, as well as the potentially greater recovery for the employee under chapter 152, as compared to the limited recovery under chapter 151A, support the holding that the offensive use of collateral estoppel is inappropriate in this situation.

[11] Since we hold the judge did not err in finding the parties were not in privity, we need not address the employee's argument that the issues in both hearings were identical. We note that the judge made no findings on whether that aspect of issue preclusion was satisfied.

of Mr. Ritchie was "quasi-criminal" conduct which a "reasonable person would know or have reason to know will create an unreasonably high risk of bodily harm that involves a high degree of probability that substantial harm will result." (Dec. 11-12.) See Dillon's Case, supra at 110 (serious and willful misconduct implies " 'reckless disregard of safety,' " involving "not only the intentional doing of the act charged, but also an easily perceptible danger of substantial bodily harm or death and a great chance that such harm will result"). See also Jones v. Southeastern Mechanical Servs., 24 Mass. Workers' Comp. Rep. 323, 327 (2010), aff'd Case of Jones, 81 Mass. App. Ct. 1102 (2011)(Memorandum and Order Pursuant to Rule 1:28), review denied, 461 Mass. 1107 (2012)(proof of serious and willful misconduct requires showing of quasi-criminal conduct). We cannot say that the judge's finding of serious and willful misconduct was unwarranted by the evidence or vitiated by error of law. [12] See Tripp's Case, supra, at 518, citing McCarthy's Case, 314 Mass. 610, 612 (1943).

Accordingly, we affirm the decision.

So ordered.

Carol Calliotte
Administrative Law Judge

William C. Harpin
Administrative Law Judge

[12] Section 27 is an affirmative defense, as to which the insurer bears the burden of proof. Yassin v. Gennaro's Eatery, 18 Mass. Workers' Comp. Rep. 237, 239 (2004). For the judge to reach the question of whether the employee was barred from compensation by virtue of his serious and willful misconduct, the employee's injury must arise in the course of his employment. Jones, supra, at 331, and cases cited. Here, the judge found "Mr. Ritchie and the Employee were engaged in a loud verbal altercation *regarding the Employee's work performance*, which escalated to a physical confrontation . . . " (Dec. 11). We understand this to mean the altercation arose out of the employment. See Jones, supra at 331-332. See also Tripp's Case, supra (fact that employee strikes first blow does not break causal connection between employment and injury if findings were warranted that both the quarrel and the ensuing injury arose out of the employment'"); Yassin, supra (same). We do not understand the judge's finding that "[t]he employee's attack on William Ritchie occurred outside any incidents of custodial employment," (Dec. 12), to negate this conclusion, given the undisputed work-related origin of the altercation.

Martin J. Long
Administrative Law Judge

Filed: ***March 24, 2017***