COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS	**BOARD NO. 020182-15**
Timothy J. Connerty	Employee
MCI Bridgewater	Employer
Commonwealth of Massachusetts	Self-Insurer

REVIEWING BOARD DECISION
(Judges Koziol, Harpin and Calliotte)

The case was heard by Administrative Judge Sullivan.

APPEARANCES
Joseph M. Burke, Esq., for the employee
Robin G. Borgestedt, Esq., for the insurer

KOZIOL, J. The self-insurer appeals from a decision finding it liable for a July 28, 2015, industrial injury and ordering it to pay the employee § 34 total incapacity benefits from July 28, 2015, and continuing. The self-insurer argues that multiple errors in the decision require its reversal, with dismissal of the employee's claim. We agree that several errors require the decision to be vacated, but the highly factual nature of this dispute requires recommittal for further findings of fact. In this case, the matter must be reassigned to a different judge for a hearing de novo.[1]

In order to discuss the self-insurer's claims of error in context, we recount the relevant facts found by the judge, cognizant that the judge who conducts the hearing de novo is not bound by the original judge's findings of fact and rulings of law and will make his or her own determinations regarding all of the issues in this case. On July 28, 2015, the employee, a long-term employee at the Department of Correction, was working as a chaplain at the Bridgewater State Hospital. (Dec. 3.) That evening, he conducted a service in the hospital's chapel "for a group of about 20 to 30 residents." (Dec. 8.) As

[1] Because the administrative judge no longer serves at the department of industrial accidents, an order of recommittal requires us to refer the case to the senior judge for assignment to a different judge for the hearing de novo.

the residents were leaving the chapel, several of them engaged in conversation with the employee. A resident in a wheelchair approached the group and, "from his seated position, suddenly lunged and swung his right hand, striking [the employee's] face." (Dec. 9.) The employee then pushed over the wheelchair, and the seated resident fell out of the chair onto the floor. The incident spurred an investigation of the employee's conduct and resulted in disciplinary action being taken against him. (Dec. 9-14; Exs. 5-7, 12, 15.).

For purposes of our review, it is sufficient to note that the judge viewed the case as involving a physical injury resulting in an emotional sequela. This occurred to an individual with pre-existing mental health issues that combined with the injury, thus triggering application of the fourth sentence of § 1(7A).[2] (Dec. 20.) As a threshold matter, the self-insurer argues the claim was solely for benefits resulting from a pure mental or emotional injury, implicating application of the third and final sentences of § 1(7A).[3] As a result, it asserts it was deprived of due process of law by the judge's determination that the nature of the injury was otherwise, particularly where the judge noted at the outset of the hearing, and the employee stipulated, that the predominant

[2] The fourth sentence of G. L. c. 152, § 1(7A), states:

> If a compensable injury or disease combines with a pre-existing condition, which resulted from an injury or disease not compensable under this chapter, to cause or prolong disability or a need for treatment, the resultant condition shall be compensable only to the extent such compensable injury or disease remains a major but not necessarily predominant cause of disability or the need for treatment.

[3] The third and final sentences of G.L. c. 152, § 1(7A), state:

> 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. . . .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.

contributing cause standard of causation was the one at play.[4] (Self-ins. br. 12-13.) The employee argues, however, "there was no stipulation regarding the heightened standard of medical proof with respect to causation." (Employee br. 3.)

The record does little to clarify the precise nature of the claim that was pending before the judge. The self-insurer asserts that "there was extensive discussion on this issue off the record, and the Administrative Judge questioned the employee's attorney repeatedly about this determination." (Self-ins. br. 13.) We have often warned against the use of "off-the-record" discussions, as they deprive the parties of a transcript of statements made and impair our ability to review the decision. Richardson v. Chapin Center Genesis Health, 23 Mass. Workers' Comp. Rep. 233, 235 (2009). This is particularly evident here, where the discussion that took place on the record is less than clear. The judge stated the employee was seeking § 34 benefits "for temporary total incapacity" and §§ 13 and 30 medical benefits "for psychiatric injury." (Tr. I, 4.) The judge then moved on, without indicating whether the employee claimed a physical injury with a disabling psychiatric sequela and need for psychiatric treatment, a pure mental or emotional stress injury, or whether the employee sought relief in the alternative. The judge stated the self-insurer's defenses as follows:

> The self-insurer denies disability and extent of incapacity; denies causal relationship between any industrial injury and any disability; denies entitlement to Sections 13 and 30 medical benefits; and seeks the application of Section 1(7A) a [sic] preexisting condition; also raises the issues of bona fide personnel action; and under Section 27 asserts there was a willful misconduct by Mr. Connerty.
>
> So given the fact that the self-insurer has raised the issue of preexisting injury under Section 1(7A), I would ask Attorney Borgestedt to make an offer of proof on that source.

Id. at 4-5. The self-insurer cited the report of the impartial medical examiner, Dr. Michael Kahn, who noted that the employee had been treating with psychiatrist, Dr.

[4] The hearing was conducted on April 14, 2016, and May 3, 2016. Hereinafter, we refer to the transcript of the first day of hearing April 14, 2016, as "Tr. I," and the transcript from the second day of hearing, May 3, 2016 as "Tr. II."

Richard Netsky, for conditions of depression and anxiety for "roughly 20 years." The employee agreed he had been treating for those problems prior to July 28, 2015. (Tr. I. 5-6.) The following exchange then took place:

The Judge:	So it's not unfair to have the 1(7A) defense raised in this case?
Mr. Burke:	Right. They satisfied their burden. Nevertheless, the impartial report is adequate.
The Judge:	We'll take that one step at a time. I heard from both parties and I've ruled 1(7A) is appropriate. So in this case, the standard of proof would be predominant cause; is that correct, Attorney Borgestedt?
Ms. Borgestedt:	Because we have a psychiatric injury anyway, it's a heightened causation so, yes.
The Judge:	Attorney Burke?
Mr. Burke:	I think it's accurate; but the impartial report - -
The Judge:	I understand, but we'll set the stage procedurally. So the predominant standard is in effect.
Stipulations:	There are several. Do the parties agree to the procedural history that I've recited?
Mr. Burke:	Yes.
Ms. Borgestedt:	Yes.

(Tr. I, 8-9.) This was the extent of the recorded discussion about the nature of the claim being brought by the employee.

Only pure emotional or mental stress injuries carry the heightened "predominant contributing cause" standard set forth in the third sentence of § 1(7A). Cornetta's Case, 68 Mass. App. Ct. 107, 118-119 (2007). The lower "a major cause" standard of causation, set forth in the fourth sentence of § 1(7A), applies when an employee suffers a physical injury that results in a mental or emotional injury, which combines with a pre-

existing mental or emotional condition, to cause or prolong disability or the need for treatment. Id. By raising this standard as a defense, the self-insurer must have contemplated the possibility that the judge would view the nature of the employee's injury as a physical injury with a psychiatric sequela. There is no indication in the record that the self-insurer objected to the admission of Exhibit 16C, which contains the notes of the employee's primary care physician Dr. Nabil Harati, detailing the physical symptoms the employee experienced following the incident. (Dec. 19-20.) In addition, in its written closing argument, the self-insurer contended that the case could not be viewed as involving a physical injury with a mental or emotional sequela. Rizzo v. M.B.T.A., 16 Mass. Workers' Comp. Rep. 160, 161 n.3 (2002)(judicial notice taken of contents of board file). While we are troubled by the employee's agreement that the predominant contributing cause standard of causation applied, we cannot say the insurer was deprived of its right to due process of law by the judge's determination that the injury was not a pure mental or emotional stress injury.

The self-insurer also makes several arguments regarding the judge's treatment of the medical evidence. The self-insurer begins by taking issue with the judge's adoption of Dr. Netsky's opinion that the blow to the employee's face was " 'the causal event', having 'the predominant effect' of making Mr. Connerty feel so emotionally upset." (Dec. 21.) It argues that Dr. Netsky's opinion was unclear and legally insufficient to support a conclusion that the physical injury resulted in a compensable psychiatric sequela. It also points out that Dr. Netsky was the only medical expert to offer the opinion that the physical assault alone caused the psychiatric disability and need for treatment. (Self-ins. br. 16.) Despite being styled as a legal argument, the self-insurer's contentions ignore the judge's other findings concerning Dr. Netsky's opinions, (Dec. 15-17), and, at bottom, are an argument regarding the weight to be given to this evidence. Pilon's Case, 69 Mass. App. Ct. 167, 169 (2007)("Findings of fact, assessments of credibility, and determinations of the weight to be given the evidence are the exclusive function of the administrative judge"). Therefore, we reject its contention.

The self-insurer next argues that the judge's decision is internally inconsistent because he mischaracterized certain medical evidence. The judge adopted the mischaracterized evidence to support his findings and conclusions, despite the fact the adopted evidence is inconsistent and cannot be reconciled with other adopted evidence. We agree.

The judge first mischaracterized the causation opinion of Meredyth Feldman, Psy.D. While Dr. Netsky and Dr. Feldman agree that the employee's diagnosis is posttraumatic stress disorder, (Netsky Dep. 27, 44 ; Feldman Dep. 19), the judge characterized Dr. Feldman's causation opinion as being consistent with Dr. Netsky's, which it was not. (Dec. 17-18, 24.) Dr. Netsky opined that the assault by the resident caused the employee's psychiatric injury, whereas Dr. Feldman opined the "incident" that caused the employee's injury was "the entire incident. It is being hit and the response and then the response from the State." (Dep. 52.) Dr. Feldman further clarified her response:

> Q: And so when you answered Mr. Burke's questions earlier about causal relationship, you are referring to the entire event from start to finish; is that fair to say?
>
> A: Yes.

(Dep. 52-53.) The judge also expressly adopted the following portions of Dr. Michael Rater's opinion:

> It was his opinion that Mr. Connerty had been surprised by the unexpected assault which caused him to become agitated and to overact on impulse to push back at the resident, causing him to fall over in his wheelchair. Dr. Rater opined that the interaction had caused Mr. Connerty to feel continuing responsibility for his actions by the time of the physician's exam. As of October 30, 2015, Dr. Rater opined that, as a result of his incident, there was a need for a course of psychotherapy to allow Mr. Connerty to regain his perspective. Finally, the physician opined that Mr. Connerty would do well to work in an alternative environment. I adopt the above-referenced medical opinions offered by Dr. Rater, and I so find.

(Dec. 19.) Yet Dr. Rater did not opine that the employee suffered a work injury of post-traumatic stress disorder, as Drs. Netsky and Feldman did, or that his work capacity was impaired by the incident of July 28, 2015.[5] The medical opinions of Drs. Netsky, Feldman and Rater cannot be reconciled, and, by mischaracterizing and adopting irreconcilable opinions, the judge produced a decision that is internally inconsistent. When a judge adopts "parts of two expert medical opinions which cannot be reconciled" the resulting decision is internally inconsistent and "arbitrary and capricious," requiring recommittal for further findings of fact. Sourdiffe v. University of Mass./Amherst, 22 Mass. Workers' Comp. Rep. 319, 325 (2008); see King v. City of Newton, 29 Mass.

[5] The parties did not take Dr. Rater's deposition. After noting the employee's pre-existing mental health history, discussing in detail the employee's statements made during his examination, and describing the employee's actions as shown on the videotape, (Ex. 5), Dr. Rater's October 30, 2015, report states the following under the heading "Diagnosis and Causality:"

> Mr. Connerty did not sustain an injury at work. He experienced a startle reaction to the inmate's physical blow. He responded with significantly greater force than the action appears to have required. His symptoms following the incident with his primary care physician are not well explained by posttraumatic stress disorder. Mr. Connerty never experienced a threat to his life or physical injury. The symptoms are more reasonably explained by his concern that he would be terminated because of his actions.

(Ex. 17C, at 8.) Under the heading "Work Capacity," Dr. Rater offered the following opinion:

> The concern for Mr. Connerty is his report about ongoing conflict and lack of job satisfaction; feeling more detached and less a part of the overall operations in prison. This perception would make it harder for Mr. Connerty to adapt to return to work, although it is unrelated to the work incident.
>
> Based on the work incident, Mr. Connerty has a full-time work capacity with no restrictions. Based on the factors referenced above, unrelated to the work incident, it would be best for him to work in an alternative environment. He reports previous conflict with his coworkers that would put him in a vulnerable position regarding adapting to that work environment and would cause him to have significant challenges in terms of persisting at work tasks and focusing on sustaining his work activities and maintaining appropriate relations with his coworkers and with the inmates, again unrelated to the work incident of July 28, 2015.

Id. at 8-9.

Workers' Comp. Rep. 13, 17, 19 (2015)(adoption of inconsistent medical opinions which go to the heart of the issue presented is not harmless as a matter of law).

The self-insurer also argues that the judge's findings pertaining to its § 1(7A) defense for a pure mental injury were inadequate and internally inconsistent. We address only the inconsistency as the entire matter will be revisited on recommittal. Regarding the inconsistency, the judge made the following findings of fact:

> I have found that there was a mixture of scenarios in this case. Mr. Connerty was struck in the face which caused him emotional injury supported by the medical evidence which I have adopted. I have also found that the DOC followed established protocol with its investigation and personnel process. *I do not credit the medical opinion offered by the self-insurer in support of this defense.* Ultimately, I find that this defense failed.

(Dec. 21-22; emphasis added.) As the self-insurer points out, it offered Dr. Rater's opinion, which the judge indicated that he *did* adopt, creating another inconsistency requiring us to vacate the decision. (Dec. 19.)

Lastly, the self-insurer takes issue with the judge's failure to make findings of fact and rulings of law regarding its § 27 defense. "Decisions of members of the board shall set forth the issues in controversy, the decision on each and a brief statement of the grounds for each such decision." G.L. c. 152, § 11B. On recommittal, the judge who conducts the de novo hearing must make express findings of fact and rulings law on all of the issues presented, including the self-insurer's § 27 defense.

The self-insurer urges us to reverse the decision and not recommit the matter for a hearing de novo. It is clear however, that the judge was operating under the misconception that Dr. Feldman's and Dr. Netsky's causation opinions were consistent with each other and that Dr. Rater's opinion was also consistent with those of Dr. Feldman and Dr. Netsky. Moreover, whether the self-insurer's § 27 defense is applicable or not requires findings of fact which we do not make. Because we vacate the hearing decision, ordinarily we would reinstate the conference order until the filing of a hearing decision after recommittal for the hearing de novo. The conference order, however, was for a closed period of benefits that expired October 16, 2015, months prior to the original

hearing in this case. Rizzo, supra. Consequently, there is nothing for us to reinstate. Accordingly, we refer the matter to the senior judge for reassignment to a new judge for a hearing de novo.

So ordered.

_____
Catherine Watson Koziol
Administrative Law Judge

_____
William C. Harpin
Administrative Law Judge

_____
Carol Calliotte
Administrative Law Judge

Filed: ***August 23, 2017***