COMMONWEALTH OF MASSACHUSETTS

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

Steven Vallee	Employee
Brockton Housing Authority	Employer
MA NAHRO Ins. Group Trust	Insurer

REVIEWING BOARD DECISION
(Judges Koziol, Costigan and Fabricant)

The case was heard by Administrative Judge Hernández.

APPEARANCES
John F. Trefethen, Esq., for the employee at hearing
James N. Ellis, Esq., for the employee on appeal
Elizabeth Ladas, Esq., for the insurer at hearing
J. Stephen Ladas, Esq., for the insurer on appeal

KOZIOL, J. The employee appeals from the judge's decision issued on recommittal,[1] awarding him a closed period of § 34 total incapacity benefits from September 23, 2003 through December 12, 2003. The employee argues the judge erred by failing to make adequate findings supporting the discontinuance of his benefits on December 12, 2003, and failing to perform an adequate vocational analysis. We affirm the decision.

We briefly recount the procedural history. This was not an accepted case. As a result of an alleged psychiatric injury sustained while working as a maintenance mechanic aide for the employer,[2] the employee sought payment of

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[1] References herein to the original decision filed on April 11, 2006 are designated, "Dec. I," and to the decision on recommittal filed on March 18, 2009, "Dec. II."

[2] As a maintenance mechanic aide, the employee performed "housekeeping, general maintenance, painting, maintaining common areas, picking up trash, weeding, and mowing." (Dec. I, 4; Dec. II, 5.)

medical benefits and a closed period of § 34 total incapacity benefits, from September 23, 2003 through March 31, 2005, followed by ongoing § 35 partial incapacity benefits, commencing April 1, 2005. (Dec. I, 2-3.) After conducting a *de novo* hearing, the judge issued his first hearing decision, finding the employee sustained a work-related psychiatric injury and ordering the insurer to pay his reasonable medical expenses.[3] (Dec. I, 7, 11.) The judge adopted the opinion of the § 11A impartial physician, Dr. Alan Pollack, that the employee was able to work but his injury prevented him "from returning to the same work situation with Brockton Housing Authority." (Dec. I, 6-7, 9, 10.) The judge found, "the employee offered no medical evidence to suggest that his anxiety symptoms prevented him from returning to his usual occupational activities as a maintenance laborer in the open labor market since September 2003," and he "has no physical or vocational limitations that prevented him from performing and sustaining full-time employment since September 2003." (Dec. I, 6, 7, 9.) Based on these findings, the judge concluded the employee failed to show he was incapacitated from earning his pre-injury average weekly wage at any time after the date of injury, September 22, 2003, and denied the employee's claim for weekly incapacity benefits. (Dec. I, 9-11.) We summarily affirmed that decision and the employee appealed.

The Appeals Court noted the case presented an unusual situation where the injury was not shown to have restricted the employee's ability to perform specific job tasks but rather "was specific to the employer," in that the employee was restricted "from working only at his former job." Vallee's Case, 72 Mass. App. Ct. 1117 (2008)(Memorandum and Order Pursuant to Rule 1:28). The court further observed, "there was an initial period here before it was clear the employee would not recover and be able to return to work," and that the employee was

[3] The employee suffered from adjustment disorder with anxiety causally related to harassment he sustained at work from the employer's tenants. (Dec. I, 5, 7, 11; Dec. II, 5, 7, 9.)

"entitled to a reasonable time to find a job, and his compensation should not be reduced ... until he has found suitable work or it appears that his failure to do so is due to causes other than the injury." Id. The court concluded the judge erred in failing to award a period of temporary total incapacity benefits, because his "finding that the employee was totally, 'disabled from returning to work at Brockton Housing Authority' means that during this healing period, the employee was temporarily totally disabled." Id. Observing this presented a question of fact, the court ordered the administrative judge to make a "determination of when that period ended. . . ." Id. This, we conclude, is precisely what the judge did.

On remand the judge again adopted Dr. Pollack's opinion that the employee "would not be able to return to his work at the Brockton Housing Authority without suffering disabling degrees of anxiety but is able to work otherwise." (Dec. II, 7.) The judge also found the employee acknowledged he could return to work if issues with his supervisor were settled. (Dec. II, 8.) Specifically, the judge adopted a December 12, 2003, office note from one of the employee's treating medical providers who recounted that, "[t]he employee reported an inability to return to work 'until issues settled with foreman and issues of confidentiality.' " (Dec. II, 10; Ex. 7b, 4.) The employee advanced no reason why he could not, in fact, work at some other employment as of December 12, 2003, and the judge found there was no medical evidence offering an opinion on disability that was distinct from that offered by Dr. Pollack. (Dec. II, 8.) We see no error in the judge's drawing the reasonable inference that the employee was no longer incapacitated on December 12, 2003, particularly where the medical notes of that date address labor issues with the employee's supervisor, not the employee's inability to work due to symptoms stemming from the industrial injury. See generally Lark v. General Electric Co., 9 Mass. Workers' Comp. Rep. 700, 702 (1995)(absent medical disability, there can be no compensable incapacity). See and compare Corbett v. The Druker Co., 14 Mass. Workers' Comp. Rep. 276, 278 (2000)(where employee is medically able to return to pre-

injury job, no compensable incapacity results if he is then terminated for lack of performance).

We do not consider the employee's second argument regarding the judge's vocational analysis. The Appeals Court already concluded the employee's argument was not meritorious, stating, "[the employee] introduced no evidence that, assuming he could engage in the same type of work he did at [the employer], his earning capacity was anything other than what it had been in his previous job." Vallee's Case, supra. In addition, the employee cites to no legal authority, nor are we aware of any, requiring or allowing us to reconsider this argument merely because a different administrative judge issued a subsequent hearing decision, on December 4, 2009, concluding the employee was entitled to § 35 partial incapacity benefits commencing after the time frame encompassed by the judge's opinion in the present appeal.[4] The decision is affirmed.

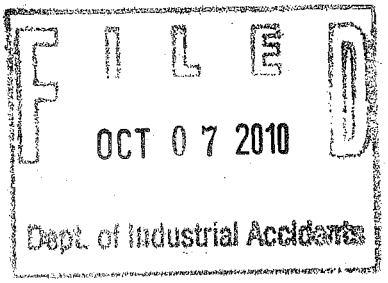
So ordered.

Catherine Watson Koziol
Administrative Law Judge

Patricia A. Costigan
Patricia A. Costigan
Administrative Law Judge

Bernard W. Fabricant
Administrative Law Judge

Filed:



[4] We observe that an appeal is pending regarding the December 4, 2009 decision. Rizzo v. M.B.T.A., 16 Mass. Workers' Comp. Rep. 160, 161 n.3 (2002)(we take judicial notice of documents in the board file).