COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS	**BOARD NO. 030300-03**
Cosmo Bisazza	Employee
MCI Concord	Employer
Commonwealth of Massachusetts	Self-insurer

REVIEWING BOARD DECISION
(Judges Horan, Carroll and Fabricant)

APPEARANCES
Louis C. de Benedictis, Esq., for the employee
Robin G. Borgestedt, Esq., for the self-insurer at hearing
Vincent F. Massey, Esq., for the self-insurer at hearing and on appeal

HORAN, J. The self-insurer appeals an administrative judge's decision finding that the employee, a corrections officer, suffered an emotional injury stemming, in part, from negative publicity about his job performance. We affirm the decision.

Cosmo Bisazza, age fifty-three at hearing, began working as a corrections officer in 1995. In 2000, he worked at MCI Concord's Special Housing Unit (SHU). The SHU houses inmates such as sex offenders, pedophiles, murderers and gang members; these inmates are segregated from the general prison population for their own safety. In February 2002, John Geoghan, a convicted pedophile, was assigned to the SHU. On March 23, 2002, the employee discovered feces in Geoghan's cell; Geoghan claimed Bisazza put it there. An internal investigation found Geoghan's allegations to be unsubstantiated, but criticized the employee for not filing a timely incident report. (Dec. 6-7.)

In April 2003, Geoghan was transferred to the maximum-security prison in Shirley, Massachusetts. On August 23, 2003, a fellow prisoner murdered him. (Dec. 7; Self-ins. Ex. 5.) After Geoghan's murder, inmates began taunting and threatening to "get" the employee. The inmates told the employee there was

nothing he could do to prevent newspapers from publishing their allegations that the employee had harassed Geoghan. Within a few days of the murder, newspaper articles reported that corrections officers had harassed and tortured Geoghan, and had thrown feces at him, during his incarceration at the SHU. These articles did not name the officers. The employee began to feel stressed and anxious. After the murder, he worked in the SHU on August 26, 29, and a half-day on August 30, leaving early due to stress. (Dec. 7.)

Beginning on September 4, 2003, and for several weeks thereafter, newspaper articles reported that Bisazza had put feces in Geoghan's cell, and had otherwise abused and harassed him. On September 5, 2003, the prison superintendent transferred the employee to a position with no inmate contact. Unfortunately, his anxiety worsened, he could not eat or sleep, and he experienced stomach cramps. As a result, he stopped working as a corrections officer on September 16, 2003. He commenced treatment with a psychiatrist, who prescribed medications to reduce his anxiety and help him sleep. (Dec. 7-8.)

The employee's claim for a mental or emotional disability resulted in a conference order for a closed period of § 35 partial incapacity benefits. Both parties appealed. The sole medical evidence at hearing was the January 18, 2005 § 11A report of Dr. Ronald Abramson, a board certified psychiatrist, and his subsequent deposition testimony. Dr. Abramson diagnosed the employee with post traumatic stress disorder (PTSD) as a direct result of trauma suffered at work. That trauma consisted of harassment and humiliation by the inmates, as well as the negative publicity the employee received. Dr. Abramson opined, "the public press problem is more important than the inmate allegations with respect to the stress disorder." Dr. Abramson also opined the employee was totally disabled from his job as a corrections officer. The judge adopted Dr. Abramson's opinions. (Dec. 1-2, 8-9.)

The judge found the employee had suffered a mental or emotional injury arising out of and in the course of his employment. He found the combination of

the negative newspaper articles, and the inmates' harassment of the employee in the two and a half days he worked immediately following inmate Geoghan's murder, caused the employee's disability. However, consistent with Dr. Abramson's opinion, the judge found the negative publicity, not the inmate harassment, was the predominant cause of the employee's disability under § 1(7A).[1] (Dec. 13-16.)

In making the predominant cause finding, the judge noted the employee had no past history of psychiatric treatment or problems, so the work events were *the* cause, and thus the predominant cause, of his disability. The judge found no evidence supporting the self-insurer's claim that a bona fide personnel action -- the employer's failure to publicly defend the employee against the newspaper allegations -- was the primary work-related cause of the employee's emotional disability. (Dec. 10-11.) Moreover, the judge found the employer's decision not to comment to the media regarding ongoing investigations, though bona fide in this instance, (Dec. 10), was not a "personnel action" within the meaning of the statute, but a "policy with regard to investigations 'to safeguard potential civil and/or criminal charges.' " (Dec. 12, quoting Self-ins. br. 10.)

Because the employee had substantial earnings from his martial arts business, he sought only partial incapacity benefits based on a stipulated average weekly corrections officer wage of $1,097.09.[2] Considering the employee's

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

> 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.

[2] The employee's earnings from his martial arts business were not claimed as concurrent earnings to enhance his average weekly wage.

actual earnings from his business, the judge awarded the employee § 35 benefits based on an earning capacity of $946.85 from September 16, 2003 until December 31, 2003. Finding that, in 2004, the employee's martial arts business lost a school contract as a result of the negative publicity the employee received, the judge found his earning capacity was $96.15 from January 1, 2004 until August 16, 2004. On August 16, 2004, the employee opened a second martial arts studio; consequently, the judge assigned him an earning capacity of $946.85 as of that date.[3] (Dec. 3, 15-16, 17, 18.)

The gist of the self-insurer's primary argument on appeal is that inasmuch as the judge found the employee's emotional injury was caused by negative media publicity, it did not occur "*within*" his employment or arise "*out of and in the course of his employment*." §§ 1(7A), 26.[4] To the extent the self-insurer argues that the § 1(7A) standard (an "event or series of events occurring *within* [the employee's] employment")(emphasis added) is stricter than the "*arising out of and in the course of employment*" standard in § 26, we disagree, as did the administrative judge. (Dec. 15, n.7, citing Nason, Koziol and Wall, Workers' Compensation, § 9.9, p. 246 (3rd ed. 2003). As the court in Cornetta's Case, 68 Mass. App. Ct. 107 (2007), stated:

> The various sentences of § 1(7A), were adopted piecemeal over time and are best understood not as an all-encompassing definition of compensable "personal injury," but, rather as a series of legislative responses to specific court decisions and perceived needs for targeted reform. As explained in Cirignano [v. Globe Nickel Plating, 11 Mass. Workers' Comp. Rep. 17, 19 (1997)], § 1(7A) did not exist when the worker's compensation statute first came into being in 1912. Then, *as now*, the *overarching test of compensability* was to be found in G.L. c. 152, § 26, which states that "[i]f

[3] At oral argument, the parties stipulated the employee is no longer receiving § 35 benefits as his actual earnings have now eclipsed his average weekly wage on the date of injury.

[4] The self-insurer also argues the administrative judge's decision is arbitrary, capricious and contrary to law. The arguments it advances under this heading are largely identical to the arguments we expressly have addressed; to the extent they are not, we reject them and summarily affirm the judge's decision.

> an employee . . . receives a personal injury arising out of and in the course of his employment, . . . he shall be paid compensation." (Emphasis added.)

Id. at 114.

Thus, we consider whether the employee's injury arose out of and in the course of his employment. "Arising out of" generally refers to the causal origin, while "in the course of" refers mainly to the time, place and circumstances of the injury. Aetna Life & Casualty Co. v. Commonwealth, 50 Mass. App. Ct. 373, 376 (2000), citing Larocque's Case, 31 Mass. App. Ct. 657, 658-659 (1991); see Haslam v. Modern Continental Constr. Co., 20 Mass. Workers' Comp. Rep. 41, 48 (2006). Generally, an "[i]njury 'arises out of employment' if it is attributable to the 'nature, conditions, obligations or incidents of the employment; in other words, [to] employment looked at in any of its aspects.' " Zerofski's Case, 385 Mass. 590, 592 (1982), quoting Caswell's Case, 305 Mass. 500, 502 (1940); see also Robinson's Case, 416 Mass. 454, 460 (1993). An injury occurs "in the course of" employment "[e]ven though [it] occurs off the employer's premises or outside normal working hours . . . if the employee at the time of the injury was engaged in the furtherance of his employer's business or in pursuit of some benefit to his employer." Larocque's Case, supra at 660; Canavan's Case, 364 Mass. 762, 765 (1974).

However, often the distinctions between the two requirements are not that clear-cut, and many cases do not deal with the elements separately. Nason, Koziol and Wall, supra at § 10.1; see, e.g., Robinson's Case, supra. In effect, the dual requirement, "arising out of and in the course of," "forms a single standard of compensability, best summarized as work-connection." Nason, Koziol and Wall, supra at § 12.1; see also Haslam, supra at 48. It is up to the administrative judge to determine, as a matter of fact, whether an employee's injury is sufficiently work-related. Zerofski's Case, supra. Where there is a "direct connection between the employee's work and the resulting harm," Haslam, supra at 58

(Horan, J., concurring), a judge's finding of compensability will be affirmed. Thus:

> "If a connection between an injury and the employment is firmly established by showing that the . . . cause of the injury and the activity in which the employee was engaged *arose out of* his employment, it will almost necessarily follow that the injury *arose in the course* of employment."

Haslam, supra, quoting Nason, Koziol and Wall, supra at § 12.1. (Emphasis added.) " 'Arising . . . in the course of employment' " means only that the injury has its source or origin within the time and place of employment. The statute does not require that the employee be in the course of the employment when the hurt is received, as long as the hurt has its origin in the course of, as well as out of, the employment." Nason, Koziol and Wall, supra; Haslam, supra; see also 2 A. Larson, Workers' Compensation Law, § 29.01 (2004).

This is a case of first impression in Massachusetts.[5] It is indisputable that had the employee's injury arisen predominately out of threats made by inmates in

[5] The self-insurer argues that cases from other jurisdictions support its position that the employee's injury is not compensable. We disagree. In the most recent Michigan case the self-insurer cites, Hawkins v. State of Michigan, Dept. of Social Services, 10 Michigan Workers' Compensation Reporter 1651 (LRP)(Workers' Compensation Appellate Comm'n, Dec. 30, 1997), the workers' compensation appellate commission held that a mental disability arising out of publicity from a newspaper article documenting the employee's undercover activities *did* arise out of and in the course of employment. The commission adopted the "more recent trend to avoid separate application of the 'arising out of' and 'course of employment' elements of the statute and look simply to whether there was a 'sufficient nexus with employment.' " Id. The fact that the employer was the source of the publicized information was merely an "additional connection to employment," and not an essential aspect of the decision. Id. The commission reversed the magistrate's finding that the employee's emotional injury did not arise out of and in the course of his employment. The Pennsylvania cases cited by the self-insurer are not instructive, because that commonwealth adheres to a much stricter standard of proof in mental disability cases. Pennsylvania employees must prove that such disabilities are caused by actual, objectively abnormal working conditions. Even under this strict standard, the court in City of Philadelphia v. Workers' Compensation Appeal Board (Brasten), 728 A.2d 938 (Pa. 1999), divided on the question of whether a police officer's mental disability, resulting from his indictment and ongoing adverse

the prison, his resulting incapacity would have been compensable. See, e.g., Fitzgibbons' Case, 374 Mass. 633, 635 (1977)(supervisory corrections officer who became obsessed with guilt after the death of an officer he had dispatched to quell a disturbance, suffered a personal injury). Does the fact that the predominant cause of the employee's incapacity was his reaction to newspaper articles, essentially carrying out the inmates' threats, mandate a different finding? We think not.

The judge made explicit findings that the employee's emotional disability, insofar as it *began* with the inmates' threats and *continued* with the newspaper articles containing the misconduct allegations, arose both out of and in the course of the employee's employment:

> [T]he employee's claim is for a mental or emotional disability which *began at the workplace* with the inmates' taunts that the employee would be identified in the newspaper and *continued with the newspaper articles* naming the employee as having allegedly abused inmate Geoghan. Although the predominant cause of the employee's emotional disability was the newspaper articles, the inmates' taunts that the employee would be named in the newspaper was [sic] *part of the continuous process* culminating in the articles naming the employee. Therefore, in these circumstances, unlike the circumstances in Collier['s Case, 331 Mass. 374 (1954)], I find that "there was one continuing event," id., and the employee's emotional disability occurred *in the course of his employment*; *the newspaper articles, as they were part of a process originating in the inmate conduct, were an inextricable part of a series of events occurring within the employment*.

(Dec. 14-15, footnotes omitted.) (Emphasis added.)

Here, the employee's emotional injury clearly originated with the inmates' taunts and threats at work.[6] The evidence supports the judge's finding that the

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media coverage following his fatal shooting of an unarmed suspect, resulted from "abnormal working conditions."

[6] Dr. Abramson agreed there was "a direct causal connection between the harassment and humiliation [the employee] suffered by the inmates in the special housing unit and the development of his symptoms. . . ." (Dep. 23.)

employee's emotional disability, insofar as it was triggered by his reaction to the newspaper articles, is compensable under our act because ". . . it can be seen that the whole affair had its origin in the nature and conditions of the employment, so that the employment bore to it the relation of cause to effect." [7] Dillon's Case, 324 Mass. 102, 107 (1949). As the court concluded in Zerofski:

> Drawing from the nature of the purposes of the act as we have described them, and from the pattern of our decisions over the years, we arrive at the following restatement of the range of harm covered by the act. To be compensable, the harm must arise either from a specific incident or series of incidents at work, or from an identifiable condition that is not common and necessary to all or a great many occupations. . . [The injury] must, in the sense we have described, be identified with the employment.

supra at 594-595 (footnotes omitted). Because the judge's findings concerning compensability are well supported by the evidence and the applicable law, we will not disturb them. G. L. c. 152, § 11C.

Finally, the self-insurer argues the judge's earning capacity analysis was flawed. We disagree. The judge based his $946.85 earning capacity finding for the initial incapacity period of September 16, 2003 through December 31, 2003, and for the last period from August 16, 2004 and continuing, on the employee's actual earnings from his martial arts business in 2003. For the middle period of

[7] Here, it is not, as the insurer posits, whether the employee read the newspaper articles at work, or whether it was part of his job to read the newspaper, but whether the articles were "an inextricable part of a series of events" related to his employment. (Dec. 15.) We agree with the judge that they were. The impartial physician was clear that negative work-related publicity was the "more important" cause of the employee's disability, (Dec 9; Dep. 41), and that the employee's symptoms and disability were a direct result of the trauma he suffered at work. (Dep. 17, 23.) See Bouras v. Salem Five-Cent Savings Bank, 18 Mass. Workers' Comp. Rep. 191, 193 (2004)(as the "only cause" of the employee's emotional disability, the work events are the predominant cause). The self-insurer's argument that the *only* work-related cause of the employee's disability was a bona fide personnel action, i.e., the employer's failure to publicly defend the employee, has no evidentiary support. (See Self-insurer br. 21 n. 4, 22-25). As the judge found, there is no medical evidence the employer's decision not to speak out publicly on behalf of the employee was the predominant cause of the employee's disability. (Dec. 10.)

incapacity from January 1, 2004 to August 16, 2004, the judge reduced the employee's earning capacity to $96.15 based on his actual earnings from that business. The judge attributed the reduction in earnings in the interim period to the employee's loss of a school contract, which resulted from the bad publicity the employee endured vis-a-vis his industrial accident.[8] (Dec. 15-16.) The judge acknowledged that under G. L. c. 152, § 35D, the employee's earning capacity "shall be the greatest of the following: '(1) [t]he actual earnings of the employee during each week. . . (4) [t]he earnings that the employee is capable of earning.' " (Dec. 16.) By using the employee's actual earnings, it is clear to us that the judge equated them with the highest amount(s) he believed the employee was capable of earning at the aforementioned times.[9] In making these findings, he also expressly considered "the employee's age, education, experience, the medical opinions I have adopted, and my observation of the employee." (Dec. 16.) There was no error; accordingly, we also affirm the judge's decision on the issue of the

[8] The self-insurer argues the judge improperly considered the loss of the contract as a factor in determining the employee's post injury earning capacity, and that "there is no evidence as to what percentage of Claimant's business this school contract accounted for." (Self-ins. br. 36.) We disagree. The judge was free to credit the employee's testimony that the bad publicity associated with his work as a corrections officer resulted in the loss of a contract, which in turn caused a precipitous decline in his early 2004 earnings. (See June 30, 2005 Tr. 80-82, 162-164.) Had the self-insurer questioned the employee on the lost contract's value, it may have enabled us to better scrutinize this aspect of the judge's earning capacity determination. It is clear enough to us the judge properly utilized the employee's testimony, and documentary evidence of the employee's actual earnings during the periods in question, to decide what the employee was capable of earning post injury. (Dec. 17.)

[9] The self-insurer maintains that, because the employee's gross receipts from his martial arts business increased from $116,168 in 2002 to $125,631 in 2003 to $153,135 in 2004, the employee's actual earnings were greater than the $946.85 found by the judge. (Self-ins. br. 37, 40.) We disagree that *gross* receipts from the employee's business or businesses (he opened a second martial arts studio later in 2004) necessarily reflect the employee's "actual earnings." See Rodgers v. Massachusetts Dept. of Public Works, 9 Mass. Workers' Comp. Rep. 539, 541-542 (1995).

employee's earning capacity.[10] See generally Mulcahey's Case, 26 Mass. App. Ct. 1 (1988).

Pursuant to the provisions of § 13A(6), the self-insurer is directed to pay employee's counsel a fee of $1,407.15.

So ordered.

Mark D. Horan
Administrative Law Judge

Martine Carroll
Administrative Law Judge

FABRICANT, J. (concurring in part and dissenting in part)

I concur with the majority's opinion that the employee's injury arose out of and in the course of his employment. However, I would recommit this case for further findings on the earning capacity of the employee from January 1, 2004 until August 16, 2004. It appears that the current calculation of the employee's earning capacity during this period has not been done pursuant to the method prescribed by §35D.

[10] We disagree with our dissenting colleague that the judge should be required to further explain why he equated the employee's actual earnings with what the employee was capable of earning for the period of January 1, 2004 to August 16, 2004. We can reasonably infer from the judge's findings that he concluded the employee's prospects for work in the open labor market were severely compromised by the widespread negative publicity associated with the *res gestae* of his injury. We also note that Eason v. Symmetricom Corp., 21 Mass. Workers' Comp. Rep. ___ (2007), cited by the dissent, is distinguishable. We recommitted Eason because the judge neglected to consider the employee's actual earnings for a significant period of time, and because it was unclear the judge had contemplated the interplay between §35D(1) and (4) – as the judge did in this case. While he *could* have assigned some value to the employee's efforts to open a second studio, we cannot say that as a matter of law the judge was obligated to do so. In any event, it is clear the self-insurer benefited from the employee's endeavors, as his success eventually produced earnings high enough to statutorily disqualify him from receiving weekly indemnity benefits. G. L. c. 152, §§ 29, 35, 35D.

Section 35D requires that the judge assign the *greatest* amount derived from the four methods set out within the statute. In this case, the judge clearly chose to accept the *actual* earning capacity for the time period in question. The judge's decision is, however, devoid of any findings illustrating that this amount is *greater than* that which the employee is otherwise *capable* of earning.

In fact, a review of the record and decision would suggest that the employee was capable of earning much more that the actual earnings assigned. The precipitous drop in earnings as of January 1, 2004 was found to be entirely due to the loss of a contract, and not due to any physical or mental incapacity.[11] In fact, the evidence suggests that the employee may have actually continued to work even harder during this period, so that he could eventually open up a second martial arts studio. The fact that he worked without remuneration to build his own business does not mean that the work had no value. Thus, findings on his earning *capacity* under these circumstances are required.

While it is, perhaps, fair to ascribe the loss of the contract to compensable work-related circumstances, this should not end the inquiry as to what the employee was *capable* of earning elsewhere. To the extent that those work-related circumstances restricted the value of the employee's work on the open market, findings supporting the reasons for this limited capacity must be enumerated.

Therefore, I would recommit this decision for further findings on the earning capacity of the employee from January 1, 2004 until August 16, 2004, and affirm on all other issues.

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Bernard W. Fabricant
Administrative Law Judge

Date: June 20, 2007

[11] This panel recently required specific subsidiary findings under similar circumstances in Eason v. Symmetricom Corp., 21 Mass. Workers' Comp. Rep. ___ (2007).