COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS	**BOARD NOS. 026109-07 022705-07**
Karen Cappello	Employee
DTR Advertising, Inc.	Employer
Hartford Insurance Co.	Insurer
Cricket Productions, Inc.	Employer
Workers' Compensation Trust Fund	Insurer

REVIEWING BOARD DECISION
(Judges Horan, Koziol and Fabricant)

The case was heard by Administrative Judge Lewenberg.

APPEARANCES
Michael F. Walsh, Esq., for the employee
Joseph W. Murphy, Esq., for Hartford Insurance Company at hearing
Christine M. Harding, Esq., for Hartford Insurance Company on appeal
Jennifer A. Korzeniowski, Esq., for the Workers' Compensation Trust Fund
Michael S. Bonner, Esq., for Cricket Productions, Inc.

HORAN, J. The insurer[1] and employee appeal from a decision awarding the employee benefits for a work-related emotional injury. The insurer avers the adopted medical evidence does not support the judge's conclusion that the work-related events experienced by the employee were the "predominant contributing cause of [her emotional] disability."[2] The employee argues the judge erred by

[1] We refer to Hartford Insurance Company as the insurer in this decision. Because the appellants do not challenge the judge's dismissal of the employee's claims against the Workers' Compensation Trust Fund, and in light of the issues raised on appeal, the Trust Fund is no longer a party to this case as of the filing date of our decision. See discussion, infra.

[2] 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,

failing to address her § 28 claim against the insurer.[3] Agreeing with the employee, we recommit the case for further findings of fact.

The Office

The judge found that on her date of injury, the employee worked full time for Cricket Productions, and that her "job was to save orders by processing returns." (Dec. 7, 11.) Believing that she was entitled to receive health insurance coverage owing to her full time work schedule, the employee asked her boss, Victor Grillo, Jr., for said coverage. The judge found as follows:

> Mr. Grillo agreed to provide the insurance if the employee would agree to wear the "chicken head." This was part of a costume consisting of a cloth depiction of a chicken that was worn over the head like a mask. The employee . . . was not in on the "joke" that someone had the chicken head in their office and on occasion it was brought out as a prank usually for being on the losing end of a bet. The workers at this office consider themselves to be quite a fun loving group and often socialize with each other after hours. There was a meeting at headquarters that the employee attended on February 27, 2007 with her young daughter. She was shown the chicken head at that time and declined to wear it. The employee was horrified at the possibility of wearing the chicken head and refused.

(Dec. 8.) Mr. Grillo then offered the employee two other "options" if she wanted to secure health insurance coverage: "e-mail all your friends that he [Grillo] is god. . . .[or] [c]ome in with bright red lipstick and kiss Mel's bald head all over." (Dec. 9; Ex. 7.) These last options were conveyed to the employee via e-mail on March 1, 2007, which is her injury date. (Dec. 8-9; Ex. 7.) In another e-mail, forwarded to the employee that day, Grillo wrote, "[n]o head[,] no payment." (Dec. 8; Ex. 9.) The employee became depressed and stopped working. She

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> demotion, or termination except such action which is the intentional infliction of emotional harm shall be deemed to be a personal injury with the meaning of this chapter.

[3] General Laws c. 152, § 28, provides, in pertinent part:

> If the employee is injured by reason of the serious and wilful misconduct of an employer . . . the amounts of compensation hereinafter provided shall be doubled.

sought and received medical attention, and "was able to return to work part-time in February 2008 and full time on October 1, 2008." (Dec. 9.)

The Injury

The judge adopted the opinions of the employee's psychiatrist, Dr. Mark Cutler, and concluded Mr. Grillo's harassment was the predominant contributing cause of the employee's adjustment disorder and, thereafter, her major depressive disorder. (Dec. 10.) Addressing the remaining elements applicable to "purely emotional" injuries, as set forth in the fifth sentence of c. 152, § 1(7A), the judge found that Mr. Grillo's conduct did not qualify as a "bona fide personnel action," and "constituted the intentional infliction of emotional distress." (Dec. 10-11.) The judge concluded that due to the harassment suffered at work, the employee was totally incapacitated from March 2, 2007 to January 11, 2008, and thereafter, partially incapacitated until October 1, 2008.

Section 18

The judge found that "the work being done by the employee for Cricket Productions, Inc. was part of the business of DTR." (Dec. 12.) Accordingly, because Cricket Productions, Inc., did not carry workers' compensation insurance, the judge held DTR's workers' compensation insurer, Hartford Insurance Company, liable for the payment of the employee's compensation under § 18.[4] The insurer does not challenge this finding on appeal.[5]

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[4] General Laws c. 152, § 18, provides, in pertinent part:

> [I]f . . . a contractor enters into a contract with a sub-contractor to do all or any part of the work comprised in such contract with the insured, and the insurer would, if such work were executed by employees immediately employed by the insured, be liable to pay compensation under this chapter to those employees, the insurer shall pay to such employees any compensation which would be payable to them under this chapter.

[5] Although this is the law of the case, it appears the judge's findings would support the conclusion that Cricket Productions, Inc., was in fact operating as the *alter ego* of DTR Advertising, Inc. See Lee v. International Data Group, 55 Mass. App. Ct. 110, 114

Section 28

The employee pursued a § 28 claim against the insurer. (Ex. 2.) The insurer denied liability for the claim. (Ex. 3.) The judge denied the employee's § 28 claim, because "the employer [Cricket Productions] was uninsured and . . . the trust fund is not liable for benefits pursuant to Section 28." (Dec. 12.) Accordingly, the judge refrained from addressing the elements of the employee's § 28 claim. Id.

Issues on Appeal

The insurer posits the adopted medical opinion of Dr. Cutler does not satisfy the employee's burden of proof under § 1(7A). We disagree. The doctor's causal relationship opinion, contained in his March 30, 2007 report, is as follows:

> [B]ecause of [the employee's] preoccupation with the perceived harassment at work and her disbelief that she was being asked to do what her employer asked her to do, which she perceived as very humiliating, she has been unable to return to any work for which she is reasonably trained by virtue of her education and job experience.
>
> . . .
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> There is a definite causality to [the employee's] current symptoms. While she has had previous psychiatric treatment addressing issues of a divorce and her husband who suffers from alcohol dependence, *she has never had the current symptoms in the past.*

(Ex. 16; emphasis added.) We think the judge was correct in finding that the adopted medical opinion of Dr. Cutler satisfies the "predominant contributing cause" standard of § 1(7A). May's Case, 67 Mass. App. Ct. 209, 212 (2006); see also Robinson's Case, 416 Mass. 454, 460 (1993)(establishing subjective standard for assessing "series of events at work"). Because the doctor's opinion effectively ruled out the previous stressors in the employee's life as causes of her emotional disability, his opinion can be understood to implicate the "events" at Cricket

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(2002). In any event, this does not change the nature of the insurer's c. 152, § 28 liability.

Productions as the *only* cause.[6] Bouras v. Salem Five Cents Savings Bank, 18 Mass. Workers' Comp. Rep. 191, 193 (2004)(opinion ruling out non-work factors as causes of emotional disability satisfies "predominant contributing cause" standard as an "only cause" opinion).

We agree with the employee that the judge erred when he failed to address the elements of her § 28 claim against the insurer, citing the Trust Fund's exemption from § 28 liability. While it is true § 65 specifically provides for that exemption, it does not follow the same holds true for § 18, which contains no such exemption.[7] Instead, the language of § 18 is broad enough to include the double compensation provided in § 28: "[T]he insurer shall pay to such employees *any* compensation which would be payable to them under this chapter if the independent or sub-contractors were insured persons." (Emphasis added.) Payments made under § 28 are "compensation," and thus are recoverable under § 18. See CNA Ins. Cos. v. Sliski, 433 Mass. 491, 493 (2001); Thayer's Case, 345 Mass. 36, 43 (1962).

Accordingly, we recommit the case for further findings respecting the employee's § 28 claim against the insurer. The decision is otherwise affirmed. Pursuant to § 13A(6), the employee's attorney is awarded a fee of $1,488.30.

So ordered.

Mark D. Horan
Administrative Law Judge

[6] The fact that Dr. Cutler's report mentions other incidents of harassment that the employee did not reveal at hearing goes to the weight, and not the admissibility, of the doctor's opinions contained therein. See MacKay v. Ratner, 353 Mass. 563, 566-568 (1968). Dr. Cutler did base his opinions, at least in part, on the events described, supra. We note Dr. Cutler was not deposed.

[7] We observe the legislature could have exempted general contractors from liability under § 28, as it did for the Trust Fund in § 65. The fact it did not, coupled with the plain meaning of § 18, and the case law defining compensation, does not permit us to insulate the insurer from § 28 liability.

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Catherine Watson Koziol
Administrative Law Judge

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Bernard W. Fabricant
Administrative Law Judge

Filed: **March 23, 2011**