COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 035336-00**

Carl T. Brewer	Employee
Bardon Trimount, Inc.	Employer
Travelers Indemnity Co. of Illinois	Insurer

REVIEWING BOARD DECISION
(Judges Wilson, Levine and Carroll)

APPEARANCES
Maurice F. Cunningham, Esq., for the employee
James A. Garretson, Esq., for the insurer

WILSON, J. The employee appeals from a decision in which an administrative judge denied and dismissed his claim for a psychological work injury. Because the exclusive medical evidence provided by the impartial psychiatric examiner does not establish that the work incident was the predominant cause of the employee's psychological disability, we affirm the decision.

The employee is a truck driver, whose duties with the employer were to drive large trucks carrying readi-mix concrete for construction sites throughout eastern Massachusetts. On August 9, 2000, after delivering his fourth load of concrete of the day, the employee called his dispatcher to tell him he would be ending his shift for that day, instead of returning to headquarters for another delivery. The dispatcher broadcast over the radio to all of the drivers that he needed someone to do another delivery, and stated, "Carl, starting with you and everyone else that is tired, that wants to go home, you start making my job difficult, and unable to do my job, then your job is gonna be a lot more difficult." (Dec. 4.) The employee reported to his union representative that he had been threatened by the dispatcher, and stated that he would make everybody's job tough by reporting excessive hours of driving to the Department of Transportation, state police and municipalities. (Id.)

The employee met with representatives from the union and the employer, who agreed that no disciplinary action would be taken against the employee for not taking the extra delivery. The employee volunteered to take a few days off, but ended up not returning to work, as he was unable to sleep, lost weight and he felt like he was going to lose control. He saw his primary care physician, who recommended that he see a psychiatrist or psychologist. The employee underwent psychiatric care on an outpatient basis, and was confined briefly as an inpatient at Bayridge Hospital following an incident at a state Senate hearing. In April 2001, the employee sought to return to work light duty, but the employer refused. The employee received union disability benefits for six months and subsequently was denied unemployment compensation benefits. (Dec. 5.)

The employee claimed workers' compensation benefits on the basis of a psychological injury arising from the August 9, 2000 incident. The claim was denied at conference and the employee appealed to a full evidentiary hearing. (Dec. 2.)

The employee underwent an impartial psychiatric examination on June 1, 2001. (Dec. 5.) The psychiatrist diagnosed the employee with Panic Disorder with Agoraphobia, Panic Disorder with Agitation, and Major Depression Disorder Single Episode, causally related to the August 9, 2000 incident at work, which totally disabled the employee. The doctor's opinion of causal relationship was based on the foundation of the employee's attachments and separations, whether involving his deceased parents or his employers, having profound significance for him. Thus, the employee's hypersensitivity to rejection could be seen as the basis for his vulnerability to the dispatcher's comments to the employee. The doctor reiterated his opinions in his deposition. (Dec. 6-7.) When asked at his deposition as to whether the work incident was the predominant cause of the employee's disability, the doctor did not so opine. (Dep. 11-14.) Although the judge deemed the impartial medical report and deposition testimony adequate, and denied the parties' post-deposition joint motion to submit additional medical evidence due to medical complexity, he did not adopt the opinion. The judge explained: "[I]t is based on a history provided by the employee which is not supported by the facts found at Hearing." (Dec. 2, 7.) The judge explained at length that

the doctor based his opinion on an inaccurate history of excessive work hours. Furthermore, the judge perceived that the alleged threat could not to be considered as such in the context of a truck driving culture, and denied the employee's claim for an emotional, work-related injury primarily on these bases. (Dec. 9-11.)

We agree with employee that the judge's reasons for rejecting the impartial medical opinion, stated above, are erroneous. The employee's emotional claim was partly for Panic Disorder, which was caused in part by the employee's *fear* of falling asleep at the wheel. Whether the employee actually drove excessive hours was irrelevant to the analysis. Likewise, it was the employee's *reaction* to the dispatcher's comment that was at issue here, not whether the comment actually constituted a threat in any objective sense. As the court held in Robinson's Case, 416 Mass. 454 (1993), it is not whether the causative events were "significant," (the § 1(7A) standard applicable for that 1987 emotional injury), it is the employee's response, and the quantum of causal relationship between the work events and that response, that determine compensability:

> [Section] 1(7A), as then amended, provided that, to recover for mental or emotional disability, the employee must demonstrate that a significant contributing cause of the disability was an event or events occurring within the employment. The insurer interprets the amendments to § 1(7A) as requiring the employee to prove by clear and objective evidence that she was subjected to specific, identifiable, and significant events resulting in her mental disability. We do not read the statute in this manner.
>
> What is now required is that the employee establish that a work-related event was a "significant" as opposed to a minor cause of the employee's emotional distress.

Id. at 459.

Nonetheless, the judge's errors here are harmless. The impartial doctor never opined that the work incidents were "the predominant" cause of the employee's

disability, the required causal standard to be met for this 2000 incident.[1] When counsel for the employee specifically asked about the predominant cause at the deposition, the doctor launched into a discussion of the employee's extensive, pre-existing, psychological vulnerabilities and dynamics. (Dep. 11-14.) In the absence of an affirmative answer to the predominant cause question, the employee did not meet his burden of proving his emotional claim for compensation under § 1(7A). See Joyce v. City of Westfield, 15 Mass. Workers' Comp. Rep. 101, 106-107 (2001). Where the employee comes to the workplace with such a pronounced, pre-existing substrate of emotional issues as is presented in this case, the doctor's mere statement in his report, (Statutory Exhibit), that the work incident caused his disability, is not sufficient to satisfy the heightened "predominant contributing cause" standard. See St. 1991, c. 398, § 14, as set forth in n.1 supra.

We affirm the decision.

So ordered.

_____
Sara Holmes Wilson
Administrative Law Judge

Filed: **March 19, 2003**

_____
Frederick E. Levine
Administrative Law Judge

_____
Martine Carroll
Administrative Law Judge

[1] General Laws c. 152, § 1(7A), as amended by St. 1991, c. 398, § 14, 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.