COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO.:** 035861-02

Carolyn Lawhorne	Employee
Massachusetts Water Resource Authority	Employer
Massachusetts Water Resource Authority	Self-Insurer

REVIEWING BOARD DECISION

(Judges Costigan, McCarthy and Horan)

APPEARANCES

Gerald J. McTernan, Esq., for the employee
Susan F. Kendall, Esq., for the self-insurer at hearing
John J. Canniff, Esq., for the self-insurer on appeal

COSTIGAN, J. The self-insurer appeals from an administrative judge's decision awarding the employee benefits under the provisions of G. L. c. 152, § 1(7A),[1] for her work-related emotional disability. For the reasons that follow, we affirm the decision.

The employee had worked for the MWRA since 1987. She suffered from a pre-existing bipolar disorder, and found the public contact required by her first position as a public outreach coordinator difficult. Therefore, in 1998, the employer accommodated her need for a more quiet work setting, and she was assigned the position of public information technician in the library. (Dec. 3.)

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[1] The statute 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.

When a new supervisor took over in 2001, the employee experienced a series of incidents at work that led to a deterioration of her mental state to the point of disability. (Id.) We need not describe the events in detail, as the adopted medical opinion of the § 11A impartial physician, Dr. Harry L. Senger, was that the work events were "the main" cause of the employee's emotional disability. (Dep. 18.) The doctor also testified, however, that he could not establish the work events were the predominant cause of the employee's emotional disability, which he understood to mean a cause that contributed "more than 50 percent" to the disability.[2]

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[2] The doctor testified thusly:

> **Q:** Doctor, in order for any mental condition to be considered covered under Worker's Compensation under the current law in Massachusetts, according to the Statue [sic] . . . the standard is a predominating [sic], contributing cause standard today which changed in 1991.
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> And my question to you is, based upon all of the information that you considered in reaching your opinion, your own examination, your mental status evaluation, your review of all the doctors' reports, the medical reports, and your own expertise as a psychiatrist with a longstanding practice, do you have an opinion as to whether the series of events that were described to you by Carolyn Lawhorne, and including in your report that occurred during the course of her employment, was within a reasonable medical certainty the predominating [sic], contributing cause of the aggravation of her bipolar disorder to the point where she became disabled?
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> **A:** *I felt that it was a significant factor* contributing to the woman's symptomatology. I don't believe I can say that this was the more than 50 percent causal, I don't know . . . There would be opinions all over the place, but *I don't believe I can say this was the predominant, more than 50 percent of the cause. It was certainly a significant, contributing factor.* Whether it was more than 50 percent or less than 50 percent, I don't know.
>
> **Q:** In your opinion, Doctor, were those workplace events described to you *the most significant, contributing factors* of all the others that you considered?
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> . . .

The judge determined the employee experienced a series of events at work that caused her humiliation and emotional distress. (Dec. 9.) He found:

> All in all, the series of events the employee complained had exacerbated her underlying bipolar disorder were, by and large, innocuous. It was only her perception of these actions that caused a negative impact. It is clear that the work incidents impacted on the employee's ability to function in the work setting. The standard to be applied in this case is a subjective one to the employee's genuine perception of the events and I find that her testimony was generally credible. However, her ability to perceive events occurring to and around her is part of the dynamic of her underlying bipolar disease process and the question becomes whether these incidents were the predominant cause of the employee's degeneration, and if so do they remain so?

(Dec. 5-6.) The judge further found that while her bipolar disorder was already worsening before the first complained of work place incident, "the employee then suffered a severe humiliation at the awards ceremony when she did not receive an award that she had expected." (Dec. 10.) He wrote:

> This incident was a major blow to her self-esteem and increased the rapidity of her depressive phase of the bipolar disorder. She focused on this and the negative aspects of the subsequent events, further exacerbating her condition. These events culminated in the "phone snatching" episode and led to her inability to continue to function in the workplace by March 26, 2002.

(Id.) The judge adopted the impartial physician's opinion that the work events were "the most significant causes of [the employee's] rapid debilitation even though they were not the predominate [sic] cause of her impairment should the predominate [sic] mean more than 50%." (Dec. 10-11.) Following the Appeals Court's holding in May's Case, 67 Mass. App. Ct. 209, 212-213 (2006), the judge determined the impartial physician's opinion satisfied the § 1(7A) "predominant contributing cause" standard. (Dec. 11.)

> **A:** I would think that it's likely that that *was the main thing*. . . .

(Dep. 16-18; emphases added.)

In May, supra, the Appeals Court rejected the "more than fifty percent" definition of "predominant," holding that a doctor's references to "the primary" and "the major" were "substantially equivalent" to the § 1(7A) "predominant" standard as a matter of law. Id. As a result, the court reversed the administrative judge's denial of benefits, which decision this board had affirmed. Id. at 209-210.

The self-insurer characterizes the Appeals Court's holding in May as a "lexical bootstrap." (Self-ins. br. 10.) Nevertheless, we are bound by that holding and therefore affirm the judge's conclusion that "the most significant" or "the main" is "substantially equivalent" to "the major" and, therefore, "the predominant" cause -- Dr. Senger's interpretation of "the predominant" notwithstanding. As the "more than fifty percent" standard is incorrect as a matter of law, May, supra at 212, it could not be accorded any evidentiary weight. The judge properly ignored it to conclude the employee had met her burden of proof under § 1(7A)'s "the predominant" cause standard. We see no error.

There is likewise no merit in the self-insurer's second argument -- that the judge failed to distinguish between those work events which were, and were not, bona fide personnel actions. In this regard, the judge wrote:

> I find that the employee experienced a series of events at work that caused her distress and discomfort. Some of these were clearly Bona Fide personnel actions which, despite the stress they caused, are not compensable for this type of claim. Some, however, were not. While I credit the testimony of Ms. Kennedy [sic] and Ms. Lydon that they were not done with bad intent I also credit the employee's testimony that she felt humiliated, harassed and suffered emotional distress as a result of them. As such I find that a series of compensable events occurred at the work place.

(Dec. 9.) We infer from the judge's extensive factual findings concerning the work events, (Dec. 3-5), that, at the very least, he considered the final two incidents closest in time to the employee leaving work -- the last minute decision not to present her with an award at the awards ceremony, and her supervisor snatching a telephone from her hand while she was speaking with a customer -- as falling far outside the category of bona fide personnel actions. We agree.

We recently clarified our approach to litigating issues surrounding bona fide personnel actions in § 1(7A) predominant cause cases. In Payton v. Saint Gobain Norton Co., 21 Mass. Workers' Comp. Rep. 297 (2007), we concluded:

> Once the employee has introduced prima facie evidence that his emotional disability was predominantly caused by events at work, we think it is the insurer's burden to produce evidence, including medical evidence, that the emotional disability arose "principally out of a bona fide personnel action." Production of evidence that a bona fide personnel action is the principal cause of the employee's emotional disability is in the nature of an affirmative defense. See Presto v. Bishop Connolly High School, 20 Mass. Workers' Comp. Rep. 157, 161 n.6 (2006). Once the insurer produces evidence, including medical evidence, that the the employee's emotional disability arose "principally out of a bona fide personnel action," the employee's burden to produce further evidence to substantiate his claim is increased.

Id. at 310. See also, Agosto v. M.B.T.A., 21 Mass. Workers' Comp. Rep. 281 (2007). Because the self-insurer here adduced no evidence meeting that burden of production, its argument that the judge did not exclude such allegedly bona fide personnel actions from his causation analysis is without avail.

The decision is affirmed. Pursuant to G. L. c. 152, § 13A(6), the self-insurer is ordered to pay employee's counsel a fee of $1,458.01.

So ordered.

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Patricia A. Costigan
Administrative Law Judge

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William A. McCarthy
Administrative Law Judge

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Mark D. Horan
Administrative Law Judge

Filed: **June 24, 2008**