COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 026602-94**

Cynthia Joyce	Employee
City of Westfield	Employer
City of Westfield	Self-Insurer

REVIEWING BOARD DECISION
(Judges McCarthy, Wilson and Smith[1])

APPEARANCES
Frank E. Antonucci, Esq., for the employee
Joseph P. Minardi, Esq., for the self-insurer at hearing
Donald E. Wallace, Esq., for the self-insurer on brief

MCCARTHY, J. Cynthia Joyce (the employee) suffered an incapacitating emotional injury in 1994, while working as the Special Education Director of the Westfield School Department (the employer). The claim was not accepted and, after a § 10A conference, an order of payment favorable to the employee was issued. An appeal was taken by the employer and later withdrawn. Ms. Joyce returned to her director's position and worked until May 7, 1996.

Claiming that she suffered a second disabling emotional injury on that May date, the employee filed a claim seeking temporary total incapacity benefits from June 7, 1996 to September 4, 1996, followed by partial incapacity benefits under § 35 from September 5, 1996 and continuing. Ms. Joyce also sought payment of medical expenses under § 30 and payment of her attorney's fee under § 13A. The self-insurer resisted and, after a conference, an administrative judge issued an order of payment of weekly § 34 benefits from June 7, 1996 to September 4, 1996, together with medical benefits under

[1] Judge Smith no longer serves as a member of the reviewing board.

§ 30. The claim for ongoing § 35 benefits was denied. Cross appeals were taken from this order and the case came on before the same administrative judge for a hearing de novo. Following the hearing, at which seven lay witnesses and the § 11A physician gave testimony, the administrative judge filed his decision. It directed payment of temporary total incapacity benefits for nine and one half weeks beginning July 1, 1996 until September 4, 1996, followed by partial incapacity benefits from September 5, 1996 and continuing at the weekly rate of $116.05, based on an earning capacity of $965.00. The self-insurer appeals.

The hearing judge relied on the § 11A physician's medical opinion to support his finding of causal relationship between events at work and the emotional disability. But that opinion is inadequate because it does not apply the § 1(7A) predominant contributing cause standard and it takes into account facts not in evidence. We also determine that the judge's conclusion that the action taken by the Westfield School Department in putting the employee on administrative non-disciplinary leave, with pay, was not a bona fide personnel action is not supported by the subsidiary findings. We therefore reverse the decision and deny and dismiss the claim.

Following her 1994 emotional injury, Ms. Joyce treated with Dr. Mitchell Clionsky, a neuropsychologist, until January 1996. She had no treatment with Dr. Clionsky between January 1996 and May 7, 1996 while working full-time as Special Education Director for the City of Westfield. Ms. Joyce was not a union member, (Dec. 23), and at all times pertinent to this claim was working under a contract with the Westfield School Department. The contract provided that Ms. Joyce was to serve as Special Education Director until June 30, 1996. (Dec. 5, 24.)

Complaints about Ms. Joyce's job performance were lodged by a special education supervisor working under Ms. Joyce. The complaint was reduced to writing and delivered to Mayor Richard Sullivan, Jr. on March 4, 1996. As a result of the complaint, the school committee, in executive session, decided to appoint a special investigator to review the allegations and report back. An assistant city solicitor was appointed to conduct the investigation and, at an executive session of the school committee on May 6,

1996, the investigator recommended that Ms. Joyce be placed on administrative leave, non-disciplinary, with pay. (Dec. 19.) The school committee voted to accept this recommendation.

The following day, May 7, 1996, the employee was preparing to leave her home for work at the usual time of 6:30 am when she received a phone call from the Superintendent of Schools. As a result of that phone call, Ms. Joyce delayed her departure and met with the superintendent at 9:00 a.m. in his office. She was given a letter signed by the Mayor notifying her that she was being placed on non-disciplinary leave with pay and without specifying what the charges were against her. (Dec. 6, 11, 21.) As directed, she gave her school security card and office key to the superintendent who then escorted her to her office in order to retrieve photographs and personal effects. She was then ushered from the building by the superintendent and instructed not to return to school property.

As Ms. Joyce drove home, she felt upset and sick. She testified that she experienced the same feelings she had in 1994 just before her hospitalization. (Dec. 6, 22.) Later that day, she resumed treatment with Dr. Clionsky, who diagnosed her as suffering from post traumatic stress disorder (PTSD), major depressive disorder and anxiety disorder, the same conditions that incapacitated her in 1994. (Dec. 25.)

On June 30, 1996, Ms. Joyce's contract with the Westfield School Department ended by its own terms. Ms. Joyce never received notification that her contract had ended, nor was she notified that it would not be renewed. At a meeting of the school committee on January 13, 1997, all actions taken by the committee in executive session, including the appointment of an investigator and the placing of Ms. Joyce on administrative leave, were ratified. The employee returned to work on a part-time basis in September 1996 and in February 1997, she began working full-time for The Center for School Crisis and Intervention, developing educational plans and services for autistic and behaviorally disturbed students. Ms. Joyce's salary in this position was $50,000.00 per year.

Ms. Joyce was examined under the provisions of § 11A by a board-certified psychiatrist, Dr. Newton Bowdan, on February 19, 1997. Doctor Bowdan opined, to a reasonable degree of medical certainty, that Ms. Joyce suffered from PTSD, major depression and social phobia, which he related to her exposure to stressors. (Dep. of Dr. Bowdan, 12.) The doctor dated the beginnings of "her problems" to 1994 when she was treated with disrespect and harassment by people at work. (Rep. of Dr. Bowdan, 2.) Doctor Bowdan found Ms. Joyce to be partially medically disabled on the date of his examination and opined that there was a causal connection between Ms. Joyce's psychiatric condition and the history of injury obtained by him. The issue of causation arose but once in Dr. Bowdan's deposition.[2]

An employee seeking compensation for emotional incapacity must meet a high standard. This standard is set out in two sections of c. 152 as follows:

> 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, or

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[2] The colloquy between employee's attorney and Dr. Bowdan on that issue went as follows:

> Q. And on page 3 of Doctor Jaffe's report, number six, you agree with me that Doctor Jaffe finds the predominant contributory event or event which led to Mrs. Joyce's disability was the manner in which she was placed on administrative leave, is that correct?
>
> A. In the manner which she has been treated subsequently by the school system.
>
> Q. Yes. Does it appear to say he draw [sic] a causal relationship as you did taking into consideration not only her history but the four-page history as viewed through the eyes of the employer?
>
> A. You're talking about Doctor Jaffe's conclusions?
>
> Q. Yes.
>
> A. Yes.

(Dep. of Dr. Bowdan, 34.)

> 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.

G.L. c. 152, § 1(7A), 3d and 5th sentences.

> 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.

G.L. c. 152, § 29, 5th sentence.

The administrative judge disposed of the critical issue of causal relationship in the following sentences: "I find the Employee sustained a work-related emotional disability on May 7, 1996 when the Employer placed her on administrative leave with pay," (Dec. 26-27), and "I find and adopt the opinion of Dr. Bowdan that the Employee's disability and incapacity are causally related to her work-related emotional distress injury of May 7, 1996." (Dec. 28.) These findings are clearly inadequate when measured against the standard for the determination of emotional disability set out in §§ 1(7A) and 29. The administrative judge had to determine if the event or events at work were the predominant cause of Ms. Joyce's medical disability. Walczak v. Mass Rehab. Comm'n, 10 Mass Workers' Comp. Rep. 539, 541-542 (1996).[3] But the judge fails to find that any events at work were the "predominant" cause of the employee's emotional disability. And that is understandable because Dr. Bowdan did not express an opinion based on that standard when he offered his opinion on causal relationship.[4]

There is a further problem with the causal relationship opinion. In his § 11A report, Dr. Bowdan recounted several incidents that occurred in 1994 which he referred

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3 The use of "predominant" in this context is a change from the pre-1991 statute, which required only a "significant" contributing cause. This change to a higher standard narrows the range of liability for emotional injuries. Tardo v. City of Taunton, 10 Mass. Workers' Comp. Rep. 873, 875 (1996).

4 It must be noted again that although the § 11A examiner took note of the use of the "predominant" standard by Dr. Jaffe, an attending physician, Dr. Bowdan, the § 11A examiner, did not adopt that standard in rendering his own opinion.

to as the start of the employee's "problems." (Rep. of Dr. Bowdan, 2.) These incidents, namely the treatment of Ms. Joyce with disrespect and harassment by working colleagues, are not part of the record in this case as they were never testified to by anyone. Ms. Joyce testified simply that she suffered a work-related injury in 1994. The events of 1994 thus cannot be used as one of the bases for the medical expert's opinion. Patterson v. Liberty Mut. Ins. Co., 48 Mass. App. Ct. 586, 592 (2000). See also 452 Code Mass. Regs. § 1.11(5): "The decision of the administrative judge shall be based solely on the evidence introduced at the hearing."

As what we have said above is dispositive of this appeal, we comment only briefly on the second issue raised by the self-insurer. The administrative judge found that placing the employee on administrative leave was not a bona fide personnel action. The self-insurer contends that this finding is not supported by the evidence and impermissibly shifted the burden of proof to the self-insurer.

Immediately prior to his finding that the placement of Ms. Joyce on administrative leave did not constitute a bona fide personnel action, the judge found that "the employer has offered no evidence that Ms. Kane's letter of complaint followed her compliance with the provisions of the collective bargaining agreement grievance procedure." (Dec. 27.) The employer did not have the burden of producing evidence that the terms of the collective bargaining agreement had been followed. Indeed, as the employee was not a union member, there is no reason to think that union grievance procedures were relevant. If the collective bargaining agreement provisions were somehow applicable, it was the employee's burden to prove it. To hold, as the judge does, that the self-insurer's failure to prove compliance with the agreement must result in a finding that the later action of the school committee was not a bona fide personnel action impermissibly shifted the burden of proof.

In summary, the employee has failed to establish that her medical incapacity has as its predominant contributing cause an event or series of events at work. The hearing judge improperly relied for his finding of causal relationship on an expert opinion that did not address the predominant contributing cause standard and which took into account

facts not in evidence. The judge's finding that the acts of the school committee were not bona fide is based in large part on a finding of failure to follow a union grievance procedure. There is no evidence that union grievance procedure applies to this employee. For these reasons, we reverse the administrative judge's decision and deny and dismiss the claim.

So ordered.

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William A. McCarthy
Administrative Law Judge

Filed: **March 15, 2001**

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Sara Holmes Wilson
Administrative Law Judge