COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS	**BOARD NOS. 036153-14 013146-17**
Jane Doe[1]	Employee
The Walker Home & School for Children	Employer
Massachusetts Healthcare SIG	Insurer
Department of Transitional Assistance	Employer
Commonwealth of Massachusetts	Self-Insurer

REVIEWING BOARD DECISION
(Judges Koziol, Calliotte and Long)

This case was heard by Administrative Judge McNamara.

APPEARANCES
Michael F. Walsh, Esq., for the employee[2]
Richard N. Curtin, Esq., for the insurer at hearing
Paul M. Moretti, Esq., for the insurer on appeal
Daniel P. LePage, Esq., for the self-insurer

KOZIOL, J. In this case of first impression, we discuss the applicable legal standard where an employee, partially incapacitated as a result of a psychiatric sequela of a physical injury at her first employment, returns to work and then alleges a work-related worsening of the psychiatric condition to the point of total incapacity.

The first insurer, Massachusetts Healthcare SIG, (Massachusetts Healthcare), and the employee appeal from a decision finding Massachusetts Healthcare responsible for

[1] We allowed the employee's assented to motion ordering a pseudonym to be used for the employee.

[2] The employee did not file a brief in this case. Instead, in correspondence filed with the reviewing board, the employee stated that she concurred with the brief filed by Massachusetts Healthcare SIG. Rizzo v. M.B.T.A., 16 Mass. Workers' Comp. Rep. 160, 161 n.3 (2002), (reviewing board may take judicial notice of contents of board file).

paying the employee's medical benefits pursuant to §§ 13 and 30 and denying and dismissing the employee's claim for incapacity and medical benefits against the second insurer, the Commonwealth of Massachusetts, (Commonwealth). They argue the successive insurer rule applies to this case such that the employee need only prove that her psychiatric condition worsened "to the slightest extent" as a result of the alleged events at her subsequent employment at the Department of Transitional Assistance (DTA). However, the judge's decision shows that she required the employee to prove that the complained-of events at DTA were the predominant contributing cause of her disability and need for treatment, pursuant to the third sentence of G. L. c. 152, § 1(7A).[3] The Commonwealth advances no argument rebutting Massachusetts Healthcare's assertions that the judge erred by failing to apply the successive insurer rule. We agree that the successive insurer rule should have been applied to resolve this dispute.

Massachusetts Healthcare and the employee also argue that the judge adopted conflicting medical opinions that cannot be reconciled, and that her findings of fact regarding the alleged events at DTA, as well as her credibility determinations, are not specific enough for us to determine whether correct rules of law have been applied. The Commonwealth disagrees on both points. It asserts that the judge's decision must be affirmed because the judge adopted a medical opinion stating that no injury occurred at DTA, and the judge's credibility determinations prohibit any finding against the Commonwealth. For the reasons set forth herein, we agree with Massachusetts Healthcare. We vacate the decision and recommit the matter. On recommittal, the judge must: 1) make new findings of fact regarding the medical evidence; 2) make additional findings of fact regarding the underlying facts and her credibility determinations; and, 3) if her findings require it, apply the successive insurer rule.

[3] The third sentence of G. L. c. 152, §1(7A) states:

> 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.

We summarize the undisputed background facts for contextual purposes. The employee was concurrently employed by the Walker Home & School for Children (Walker Home) and DTA. On October 1, 2014, the employee was sexually assaulted by her supervisor at the Walker Home. She sought medical treatment for her injury and was diagnosed with resultant post-traumatic stress disorder. The employee left work at the Walker Home in April of 2015, but returned to work for DTA in August of 2015. (Dec. 6.) The employee filed a claim against the Walker Home's insurer, Massachusetts Healthcare, seeking a closed period of § 34 benefits immediately followed by ongoing § 35 partial incapacity benefits, alleging that post-traumatic stress disorder incapacitated her from returning to work at the Walker Home. That claim was the subject of a § 10A conference held before a different administrative judge who ordered Massachusetts Healthcare to pay the employee ongoing partial incapacity benefits commencing on the date of conference, October 20, 2015. Both parties appealed. Pursuant to § 11A, the employee was examined by psychiatrist Dr. Ronald Abramson on January 23, 2016. On August 19, 2016, prior to a hearing, the judge approved the parties' lump sum settlement agreement wherein Massachusetts Healthcare accepted liability for the injury and the resulting diagnosis of post-traumatic stress disorder.

Meanwhile, the employee continued to work for DTA, eventually ceasing work on March 30, 2017. The employee alleged that, as a result of a series of incidents at DTA, her post-traumatic stress disorder was aggravated, rendering her totally incapacitated from work. She filed the present claims against both insurers. The employee sought payment of medical treatment pursuant to §§ 13 and 30, from Massachusetts Healthcare. She also sought payment of §§ 13 and 30 medical treatment and § 34 temporary total incapacity benefits from March 30, 2017, and continuing, from the Commonwealth. On October 19, 2017, the joined claims were the subject of a § 10A conference held by the original judge. The judge denied the claim against the Commonwealth and ordered Massachusetts Healthcare to pay the employee medical benefits for treatment of her post-traumatic stress disorder, including payment for a prescribed service dog pursuant to §§ 13 and 30. (Dec. 2-3.) Massachusetts Healthcare and the employee appealed. On

January 13, 2018, the employee was examined for a second time by Dr. Abramson pursuant to § 11A. Because the original judge retired from the Department, the case was reassigned to the present judge for a de novo hearing.

At the hearing, the judge found that the medical issues were complex and opened the record for submission of additional medical evidence pursuant to § 11A(2). (Tr. 8.) In defending against the employee's claim, Massachusetts Healthcare raised the successive insurer rule and denied entitlement to §§ 13 and 30 benefits. The Commonwealth defended, raising, among other things,[4] its defense that § 1(7A)'s heightened predominant contributing cause standard for mental or emotional disabilities applied; it also raised the defense of bona fide personnel action.[5] (Dec. 3-4.)

In her decision, the judge recited Dr. Abramson's opinions expressed in both of his impartial medical reports, the opinions of the employee's treating nurse practitioner, Robin E. Porges, APRN-BC, and the opinions of the Commonwealth's independent medical examiner, Dr. Jean Dalpe. (Dec. 10-13.) In her general findings, the judge cited the third sentence of § 1(7A) and stated, as follows:

> In the case at hand, both the impartial physician and the treating nurse practitioner found that the employee's underlying pre-existing Post Traumatic Stress disorder causally related to the work injury of October 1, 2014, was exacerbated by events while at work with DTA; however neither of their opinions meet the legal standard that the claimed events were the predominant contributing cause of the employee's claimed disability.

(Dec. 13). The judge adopted Dr. Abramson's opinion that the employee is presently disabled as a result of her PTSD. She also adopted Ms. Porges' opinions that the

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[4] The Commonwealth also contested liability, disability and the extent thereof, and causal relationship. In addition, it denied entitlement to §§ 13 and 30 benefits. (Dec. 3.)

[5] The fifth sentence of G. L., c. 152, § 1(7A) states:

> 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.

employee's ongoing need for medical treatment and the service dog were causally related to the accepted work injury at the Walker Home. (Dec. 13-14). In doing so, the judge stated that Dr. Abramson "has not provided an opinion that the work events at DTA were the predominant cause of her disability." (Dec. 14.) Regarding Ms. Porges' opinions the judge stated:

> I do not adopt her opinion that her disability is related to any incidents during her employment with the DTA as she has not provided an opinion that those work events were the predominant cause of her disability. In fact, she has consistently opined that she continues to have symptoms of PTSD and anxiety because of the sexual assault. (Depo. 28)

(Dec. 14.) Ultimately, the judge denied and dismissed the claim against the Commonwealth and ordered Massachusetts Healthcare to pay the employee's medical benefits, "includ[ing] a service dog and reasonable and related training of said dog." (Dec. 14.)

Massachusetts Healthcare argues the judge erred by failing to follow the successive insurer rule, causing the employee to prove instead that the "event or series of events" at DTA were "the predominant contributing cause" of her disability and need for treatment. (Massachusetts Healthcare br. at 13-20.) We agree.

"The Massachusetts policy of nonapportionment," known as "the successive insurer rule," is "long and well established," and "it is now 'settled that on a series of injuries contributing to an existing condition of disability the insurer covering the risk at the time of the last injury is responsible for all disability payments.' " Sliski's Case, 424 Mass. 126, 131 (1997), quoting from Evans's Case, 299 Mass. 435, 436-437 (1938). The successive insurer rule places liability for the total amount of incapacity and medical benefits upon the subsequent insurer, even where that injury "contributed 'even to the slightest extent,' to the employee's disability or need for treatment," Wambugu v. Radius Healthcare Center at Millbury, 33 Mass. Workers' Comp. Rep. __ (12/04/19), quoting from Rock's Case, 323 Mass. 428, 429 (1948), or is but a minor cause of the incapacity or need for treatment. Morin's Case, 321 Mass. 310, 312 (1947)("insurer on the risk at the time of the second injury must be held liable to pay compensation for an incapacity

following that injury where there is a causal connection between that injury and the incapacity although the earlier injury may have been a contributing cause or even the major contributing cause"); Pilon's Case, 69 Mass. App. Ct. 167, 169 (2007)("subsequent injury need not be a significant contributing cause to the incapacity. So long as it is to the 'slightest extent' a contributing cause, the insurer at the time of the recent injury will be held liable to cover the entire incapacity").

The successive insurer rule requires, however, that there be a successive "injury" or "injuries" occurring within the employment. This is where the tension lies in the present case. "First, it is clear that physical and emotional injuries resulting from rape and other forms of sexual assault are compensable under the workers' compensation act." Doe v. Purity Supreme, 422 Mass. 563, 565 (1996). Massachusetts Healthcare asserts that the employee's first injury was a physical assault, the sequela of which was a mental or emotional injury. (Massachusetts Healthcare br. 18.) In Cornetta's Case, the Massachusetts Appeals Court held that "the third sentence [of § 1(7A)] applies only to those mental or emotional disabilities that are not consequential to work-related physical injury." Cornetta's Case, 68 Mass. App. Ct. 107, 118 (2007).[6] Thus, "where a physical

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[6] In Cornetta, supra, the Appeals Court analyzed the development of the law pertaining to mental or emotional injuries. It noted, "by providing in the new third sentence of § 1(7A) that 'a contributing cause' of the mental or emotional disability had to be 'an event or series of events in the workplace,' St. 1985, c. 572, § 11, the Legislature [required that proof of one or more specific stressful incidents was always essential to recovery]" in cases of mental or emotional disabilities unrelated to physical injury. Id., at 116. The court continued,

> Thus, we can infer, as did the board, that 'the reference to "an event or series of events" at work, is indicative of the Legislature's intent to set the ground rules and standard for *purely mental* injuries produced *directly* from work place circumstances' (emphasis in original)." Id. at 116, quoting from Cirignano, 11 Mass. Workers' Comp. Rep. at 22.
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> Later amendments to G.L. c. 152, § 1(7A), are consistent with this interpretation. In 1986, the Legislature inserted the word "significant" in the third sentence, so that it then read: "Personal injuries shall include mental and emotional disabilities only where a significant contributing cause of such disability [is] an event or series of events occurring within the employment." See St. 1986, c. 662, § 6. While this amendment raised the standard of causation in cases governed by the third sentence, there is nothing to suggest that the Legislature intended to expand the sentence to include mental and emotional disabilities consequential to physical injuries.

injury results in a mental or emotional disability, as here, the standard is one of simple causation." Caslin v. NStar Electric and Gas Co., 32 Mass. Workers' Comp. Rep. 285, 291 (2018).

The employee also claimed a worsening of her post-traumatic stress disorder as a result of a series of events at DTA. The judge correctly recognized that the employee had to prove the existence of a work-related injury at DTA. However, the judge analyzed that injury standing alone, as a purely mental or emotional injury, requiring a separate analysis under the third sentence of § 1(7A). The judge's analysis required the employee to prove her injury at the DTA using a higher causation standard than she was required to use to prove her initial injury at the Walker Home. This was the result even though the nature of the claimed disability was the same, (post-traumatic stress disorder), and the employee alleged two industrial causes of her single ongoing psychiatric disability. Requiring the events at DTA to be "the predominant contributing cause of the employee's disability" meant that the second injury had to be *the more important cause* of the employee's disability, than the original injury. May's Case, 67 Mass. App. Ct.

> To the contrary, the 1986 legislation remained focused upon mental and emotional disabilities that were directly attributable to work-related circumstances but not associated with physical trauma. The same chapter and section that amended the third sentence to include the word "significant" also added what is now the fifth (but then fourth) sentence of G.L. c. 152, § 1(7A), providing: "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." St. 1986, c. 662, § 6. As the effect of this new sentence was to overrule Kelly's Case, supra, it is again evident that the Legislature's objective in 1986 was to rein in compensation for work-related mental and emotional disabilities unassociated with physical injury.
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> In the next wave of workers' compensation reform that occurred in 1991, the third sentence was amended to further heighten the standard of causation by replacing the word "significant" with "predominant." St. 1991, c. 398, § 14. This amendment resulted in the provision as we now know it. . . .

Cornetta, supra at 116-117.

209, 211-212 (2006). This analysis provides no room for the concept of an "exacerbation" or "aggravation" of disability to the slightest extent, which is the foundation upon which successive insurer liability is based. The result is a complete break from longstanding principles of the successive insurer rule and the creation of an entirely new analysis where a worsening of a mental or emotional disability is at play.

The abandonment of longstanding principles of the successive insurer rule in such cases discourages workers like the employee from settling any case where they are partially disabled as a result of the mental or emotional sequela of a physical injury. Moreover, it discourages those employees who have already settled such a case, from attempting to return to the workforce, as any lost ability to earn wages resulting from a work-related aggravation of that disability by a new injury would be uncompensated.[7] Neither result advances the workers' compensation act's primary public policy of relieving injured workers from the deprivation of wages resulting from work-related injuries. Donovan v. Donovan, 15 Mass. App. Ct. 61, 64 (1982).

Viewed in its entirety, the employee's claimed total mental or emotional disability does not fit neatly within one box as either the sequela of a physical injury, or a pure mental or emotional injury stemming from a series of events. Rather, it is a hybrid. Once a mental and emotional disability associated with a work-related physical injury has been established, it makes little sense, to require a more "exacting" causation standard for a subsequent injury where the employee claims a worsening of that same disability. Guided by the Court's ruling in Cornetta's Case, supra, we believe the third sentence of

[7] Such a result would be inconsistent with the act's vocational rehabilitation provisions, which are designed to provide injured workers with services in order to facilitate their return to suitable gainful employment. See e.g. G. L. c. 152, § 30E ("It shall be the policy of the department to encourage and assist in the development of voluntary agreements between injured employees and insurers to provide and utilize vocational rehabilitation services when necessary to return such employees to suitable gainful employment"), and § 30I ("The department shall assist and cooperate with the department of unemployment assistance and the United States Department of Labor, and any other appropriate state or federal agency, in attempting to make available to disabled employees eligible to receive compensation benefits, new jobs and job training programs. . .").

§ 1(7A) cannot be used to analyze this case because it does not concern a "pure" mental injury but the worsening of an established mental or emotional disability consequential to the employee's original physical injury. Id. at 117-118. Accordingly, we agree with Massachusetts Healthcare that in analyzing the employee's hybrid injury, the judge must rely on established principles of the successive insurer rule and employ a simple "but for" causation analysis.[8] Of course, the employee still must establish that the alleged events at DTA occurred and provide medical opinions causally relating those events to the worsening of her condition.

Massachusetts Healthcare further argues the judge erred by adopting the opinions of Dr. Abramson and Ms. Porges, both of whom opined the employee has post-traumatic stress disorder, while also adopting the opinion of Dr. Dalpe, who opined that the employee does not have post-traumatic stress disorder. (Massachusetts Healthcare's br. 21-22; Dec. 14.) Regarding Dr. Dalpe's opinions, the judge found:

> It was his opinion that the claimant did not have post-traumatic stress disorder, and that she had no psychiatric mental illness that is causally related to, or exacerbated

[8] We believe our analysis is further bolstered by the 1991 Legislative amendments to the third sentence of § 1(7A), which appear to require application of the successive insurer rule in those cases involving purely mental or emotional injuries not associated with physical trauma. In 1991, § 1(7A) was "hereby amended by striking out the third sentence and inserting in place thereof the following . . . '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.' " 1991 Mass. Acts. c. 398, § 14; G. L. c. 152, § 1(7A), as amended by St. 1991, c. 398, § 14 (emphasis added). In doing so, the Legislature struck the prior version of the third sentence of § 1(7A) which read, "Personal injuries shall include mental or emotional disabilities only where a significant contributing cause of such disability is an event or series of events occurring within *the* employment." G.L. c. 152, § 1(7A), as amended by St. 1986, c. 662, §6 (emphasis added). The words "within any employment" appearing in the newest version of § 1(7A), have not been interpreted by the courts. However, "words and phrases shall be construed according to the common and approved usage of the language." G.L. c. 4, § 6 Third. The Legislature's use of the words "any employment," rather than "the employment" allows for application of the successive insurer rule, by requiring consideration of the disability as a whole, resulting from the work-related events at both the first and second employer, not just consideration of the series of events that are alleged to have occurred during coverage of the second insurer. This more expansive reading of § 1(7A) is required by the statutory language itself, promotes the intended benefit of the successive insurer rule, and signals a legislative intent to endorse application of the successive insurer rule.

> by the claimed injury; therefore it was not medically necessary for the claimant to have a therapy dog.

(Dec. 13.) Dr. Dalpe's opinion that the employee did not have post-traumatic stress disorder is in direct conflict with the adopted opinions of Dr. Abramson and Ms. Porges, as well as with the judge's orders for payment of medical benefits, including the service dog, for that diagnosis. (Dec. 14, 15.) The adoption of conflicting medical opinions renders the decision arbitrary and capricious and requires recommittal for further findings of fact. Sourdiffe v. U. of Mass/Amherst, 22 Mass. Workers' Comp. Rep. 319, 325 (2008)(adoption of expert opinions that cannot be reconciled renders decision internally inconsistent and therefore arbitrary and capricious).

Finally, Massachusetts Healthcare argues that the judge's findings regarding alleged events at DTA, and her credibility findings, are confusing and insufficiently specific. (Massachusetts Healthcare br. 23-25.) We agree. The employee testified to a number of events occurring at DTA, alleging she was subjected to a hostile work environment and verbal abuse both at the hands of coworkers and management. (Dec. 7.) In her decision, the judge recited both the employee's testimony regarding these alleged events and the testimony of the person who served as Director at the final DTA office where the employee worked.[9] The judge found:

> When the Employee returned to work with DTA in August 2015, she was still experiencing symptoms of PTSD, including her mistrust and suspicion that others were out to hurt her. While I am persuaded that the Employee believes that she was a victim of harassment upon her return to work with DTA, I do not find those claims to be credible.

[9] Following the sexual assault at the Walker Home, the employee returned to work for the DTA in August of 2015. She alleged that upon her return to DTA, she was subjected to a hostile work environment at the hands of coworkers, who she alleged called her "crazy" and "bipolar," and management, including an alleged incident of being grabbed and forced to sit in a meeting where she was berated and yelled at. (Dec. 7.) "At some point after this meeting, she was granted a transfer" to a different DTA office. Id. The Commonwealth's witness was the director of that second DTA office.

(Dec. 14.) Without further findings of fact, we cannot say with certainty that correct rules of law have been applied in this case. Praetz v. Factory Mut. Eng'g & Research, 7 Mass. Workers' Comp. Rep. 45 (1993). This is particularly true here because the judge made no subsidiary findings of fact regarding any of the alleged incidents. Rather, the judge recited portions of the lay witnesses' testimony, and those recitations of testimony were not inconsistent on their face. (Dec. 6-9.) Without findings of fact about the alleged incidents, we cannot discern whether the judge believed that some of the events did not occur, or whether she believed some events did occur, but she did not credit the employee's claimed reaction to the incidents. See Payton v. Saint Gobain Norton Co., 21 Mass. Workers' Comp. Rep. 297, 306-307 (2007)(subjective standard applies to emotional injuries).

Accordingly, we vacate the decision and recommit the matter for the judge to make further findings of fact concerning both the medical and lay evidence, as well as credibility findings, and to conduct the legal analysis set forth in this decision when evaluating those additional findings of fact.

Because the employee appealed the hearing decision and prevailed, an attorney's fee may be appropriate under § 13A(7). Employee's counsel must submit to this board, for review, a duly executed fee agreement between the employee and counsel. No fee shall be due and collected from the employee unless and until the fee agreement is reviewed and approved by this board.

So ordered.

Catherine Watson Koziol
Administrative Law Judge

Carol Calliotte
Administrative Law Judge

Martin J. Long
Administrative Law Judge

Filed: ***February 11, 2020***