COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 036064-13**

Jane Sgouros	Employee
Department of Transitional Assistance	Employer
Commonwealth of Massachusetts	Self-Insurer

REVIEWING BOARD DECISION
(Judges Horan, Koziol and Harpin)

The case was heard by Administrative Judge Preston.

APPEARANCES
Daniel C. Finbury, Esq., for the employee at hearing
Daniel P. LePage, Esq., for the self-insurer

HORAN, J. The self-insurer appeals from a decision awarding the employee §§ 13, 30, and 34 benefits for "psychiatric injuries" caused by events at work. (Dec. 8-9.)[1] Because the employee failed to introduce medical evidence sufficient to establish that the events she experienced at work were "the predominant contributing cause" of her disability, we conclude she did not suffer a compensable personal injury,[2] and reverse the decision.

The employee claimed she suffered from a variety of mental and emotional conditions relating to her job as a case manager for the self-insurer.[3] Specifically, she claimed that on December 23, 2013, she was verbally abused by a client. (Tr.

[1] The self-insurer defended the employee's claims, inter alia, on the grounds of liability, causal relationship, and extent of disability/incapacity. (Dec. 3.)

[2] See General Laws, c. 152, § 1(7A)(third sentence), which provides:

> 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.

[3] The employee worked for the self-insurer for thirty years, beginning as a clerk. (Tr. 10.)

20.) She further testified that for ten years prior to that incident she was verbally abused by clients, bullied by her supervisors, and that her requests for assistance from management were ignored. (Tr. 9-12, 15-24.) Importantly, she also testified she had been treating with a psychiatrist, and a psychiatric nurse, for ten years or more prior to December 23, 2013. (Tr. 6-7.) When asked why she was treating with them, she replied, "[b]asically I was dealing with anxiety problems from what my mother did to me, and just everyday life . . . [a]nd I was bullied by managers and superviors." (Tr. 7.)

On December 3, 2014, the employee was examined by Dr. Mark O. Cutler, a psychiatrist and the impartial medical examiner. G. L. c. 152, § 11A(2). Dr. Cutler's report was introduced into evidence, but he was not deposed. (Ex. 1.) Neither party moved to admit additional medical evidence. Thus, Dr. Cutler's opinion, as expressed in his report, was the only medical opinion in evidence.

Dr. Cutler documented the employee's traumatic childhood, noting that she "was consistently physically and emotionally abused by her mother." (Ex. 1, p. 1.) Dr. Cutler also chronicled the employee's difficulty with her supervisors at work, and reported that on December 23, 2013, "a claimant was abusive to the [employee]." (Ex. 1, p. 2.) Dr. Cutler's diagnoses included, "Posttraumatic stress disorder, Major depressive disorder, Panic disorder, Generalized anxiety disorder, Personality disorder . . . Work-related events culminating in trauma of 12/23/13; growing up with a chronically psychiatrically impaired mother; emotion (sic) and physical abuse growing up." Id. On the subject of causation, Dr. Cutler wrote that it was "complicated to explain." Id. He cited the employee's history of family trauma, but noted that she had managed to work in spite of it until December 23, 2013, when "the patient had 'the proverbial straw that broke the camel's back.' " Id. Thereafter, Dr. Cutler opined, the employee "was unable to overcome her symptoms. . . ." Id. at 3. He also opined she was "currently medically disabled." Id.

The judge credited the employee's testimony, and adopted the opinion of Dr. Cutler, to "find a causal relationship between the events referred to at the workplace and the resulting personal injury that continues to prevent the Employee from performing any work since December 23, 2013." (Dec. 8.) Accordingly, the judge awarded the employee § 34 benefits from January 6, 2014, to date and continuing, along with §§ 13, 13A and 30 benefits.

On appeal, the self-insurer argues the decision is contrary to law because there is no medical evidence that "the predominant contributing cause" of the employee's disability was an "event or a series of events occurring within" her employment. See footnote 2, supra. We begin by noting that "the predominant contributing cause" standard applicable to this "purely" mental or emotional injury claim[4] is a higher standard than the "a major" causation standard applicable to so-called "combination injury" claims.[5] With that in mind, the precise question before us is whether Dr. Cutler's opinion, that the employee's December 23, 2013 work event was "the proverbial straw that broke the camel's back," can be viewed as an opinion "substantially equivalent to the statutory" standard applicable here. May's Case, 67 Mass. App. Ct. 209, 213 (2006); See Stewart's Case, 74 Mass. App. Ct. 919, 920 (2009). We think not.

[4] As noted in Cornetta's Case, 68 Mass. App. Ct. 107, 115 (2007), in 1985, the Legislature inserted the original version of the standard into the third sentence of § 1(7A), to require only that an event or series of work-related events be "a contributing cause" of an employee's mental or emotional disability to establish compensability. A year later, the standard was amended to "a significant contributing cause," and finally, in 1991, the Legislature inserted the word "predominant" in place of "significant." Cornetta, supra at 116-117. It is obvious that, with each successive amendment, the Legislature intended a higher threshold of proof apply to mental or emotional disabilities which were not caused by compensable work-related physical injuries. See Cornetta, supra.

[5] In order for a "combination" injury to be, or remain, compensable, the work component must constitute "a major *but not necessarily predominant* cause" of the employee's disability or need for treatment. G. L. c. 152, § 1(7A)(fourth sentence)(emphasis added).

As the court in Stewart, supra, held, "a finding of heightened causation under § 1(7A) must be supported by medical opinion that addresses – in meaningful terms, if not the statutory language itself – the relative degree to which compensable and noncompensable causes have brought about the employee's disability." Id. at 920. While Stewart involved a "combination injury" claim, it instructs here as well, given that, as we have noted, the "predominant contributing cause" standard is higher than the "a major" cause standard. We conclude that Dr. Cutler's opinion fails to address, in a meaningful way, "the relative degree to which" the employee's work-related stressors, as opposed to her contributory non-industrial, pre-existing emotional problems, caused her emotional disability.[6] That the work event, or events, were the final straw, or straws, causative of her emotional disability amounts to nothing more than a "but for" causation opinion.[7] See Castillo v. Cavicchio Greenhouses, Inc., 66 Mass. App. Ct. 218 (2006); Compare Larkin v. Feeney's Fence, 19 Mass. Workers' Comp. Rep. 78 (2005)("straw that broke the camel's back" medical opinion insufficient to carry employee's burden that accepted industrial injury *remained* a major cause of his disability). The employee in Castillo suffered a "combination injury." He argued the fact that his industrial accident "aggravated" his non-industrial, pre-existing condition was sufficient proof that he suffered a compensable injury. In other words, his work injury was "a major" cause of his disability because "but for" the injury, he would not have become disabled. The court reasoned:

> While having some surface appeal, this argument fails for the simple reason that if the standard were as simple as the employee suggests, it would

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[6] This case is distinguishable from cases where it has been held that the predominant contributing cause standard was met because the industrial injury was the only cause of the employee's disability. See French v. Export Enterprises, Inc., 24 Mass. Workers' Comp. Rep. 165, 170 (2010)(and cases cited).

[7] We take judicial notice that the ordinary lexical meaning of "straw" is that of a light object, or "something of minimal value or importance." The American Heritage Dictionary, 2nd College Ed., p. 1204.

> render the statute meaningless, as a new disabling injury is always the cause of one's absence from work, notwithstanding a pre-existing injury.

Castillo, supra at 221. In other words, that the work injury was the *final* cause is insufficient, without more, to conclude it was also "a major" cause. That being so, it follows that a similar opinion, (the last straw), cannot satisfy the higher "the predominant contributing cause" standard. See footnote 4, supra.

While we acknowledge Dr. Cutler's opinion was sufficient to support *a* causal link between the employee's work and her disability, his opinion cannot carry the employee's burden of proving her claim under the third sentence of § 1(7A). The employee could have deposed Dr. Cutler, or moved to introduce additional medical evidence, in an attempt to prove her case.[8] She did not do so. As in Castillo, there was a failure of proof.[9] See also Descoteaux v. Raytheon Co., 19 Mass. Workers' Comp. Rep. 211 (2005)(affirming denial of emotional injury claim unrelated to physical injury).

Accordingly, we reverse the decision, and vacate the benefit and attorney's fee awards.

So ordered.

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Mark D. Horan
Administrative Law Judge

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Catherine Watson Koziol
Administrative Law Judge

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William C. Harpin
Administrative Law Judge

Filed: April 11, 2016

[8] Had Dr. Cutler explained that he considered the work event, or events, to be "the major" or "the primary" cause of the employee's disability, a different result would obtain. May, supra at 213.

[9] The court in Stewart, noting that there was additional evidence on the record which could be considered to support an award of benefits, recommitted that case for further findings. Because there is no other evidence to be considered here, recommittal is inappropriate.