COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 015020-00**

Jose Agosto	Employee
M.B.T.A.	Employer
M.B.T.A.	Self-insurer

REVIEWING BOARD DECISION
(Judges McCarthy, Horan and Fabricant)

APPEARANCES
Padraic P. Lydon, Esq., for the employee
John C. White, Esq., for the self-insurer
Richard W. Jensen, Esq., for the self-insurer on appeal

McCARTHY, J. The employee and self-insurer cross-appeal from a decision in which an administrative judge awarded the employee temporary total incapacity benefits for a work-related emotional disability. The self-insurer argues that the medical evidence does not support the judge's award, because it was based on a foundation of work events that included bona fide personnel actions that are statutorily excluded as qualifying causes for emotional disabilities. See G. L. c. 152, § 1(7A).[1] The employee seeks recommittal, because the judge erred by failing to address his properly joined claim for permanent and total incapacity benefits. We disagree with the self-insurer, and affirm the decision with respect to its arguments. We agree with the employee. However, we consider recommittal unnecessary, in the light of the undisputed prima facie medical evidence of the impartial psychiatrist. See G. L. c. 152, § 11A(2).

[1] General Laws c. 152, § 1(7A), 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.

The employee, an M.B.T.A. police officer and detective since 1983, suffered a psychiatric injury as the result of a series of events at work. (Dec. 429, 435.) The employee was rendered totally incapacitated as of April 26, 2000 due to the diagnosed post-traumatic stress disorder, panic attacks, anxiety, depression and related physical symptoms, such as insomnia and shortness of breath. (Dec. 434.) The judge found, based on the employee's testimony and the opinions of the impartial psychiatrist, that six of the eight described workplace events constituted the "predominant contributing cause" of the employee's emotional disability. See n.1, supra. The judge left out two of the events, concluding that they were bona fide personnel actions ("BFPA") not cognizable as causes for a work-related emotional disability claim. See Id.

The self-insurer argues on appeal that the judge erred by adopting the psychiatric opinion of the § 11A examiner, which was based on a foundation of all eight of the events, not just the six the judge found to be cognizable under the Act. The argument fails for the following reasons:

> We turn to the first of the two BFPA's the judge found.
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> > On March 15, 2000 the employee was sent to investigate a shooting at the Massachusetts Avenue Station. Witnesses informed him that two suspects had fled the scene and were hiding in a nearby building. The employee was given photographs of the suspects and sent to the place they were thought to be hiding. He arrived at the scene and asked Deputy Chief John Mahoney where the command post was. Mahoney relied "If it was up your ass you'd know." Several police officers laughed at the response. The employee felt embarrassed and humiliated. Soon he was experiencing nausea and chest pain and felt sweaty.

(Dec. 432.) The judge concluded that this incident was a BFPA: "The superior's answer was both harsh and crude, but answered the question asked. Such statements are not uncommon in male dominated workplaces such as police departments." (Dec. 435.)

The deliberate act of humiliating the employee is not a BFPA as a matter of law. See Bouras v. Salem Five Cent Savings Bank, 18 Mass. Workers' Comp. Rep. 191, 192-193 (2004). We disagree with the judge's conclusion, that the superior's humiliating comment "answered the question asked." We fail to see how the "male-dominated" atmosphere of the workplace bears on the question of whether such a comment is to be

regarded as a BFPA. The comment was simply not a personnel action by any stretch of the imagination. We reverse that finding.

The second BFPA found by the judge regarded the superior's prohibiting the employee's usage of a mobile command post on April 25, 2000, which action brought on the same type of symptoms as described above. (Dec. 432-433.) The impartial psychiatrist explicitly opined that this event, though the last of the eight, was *not* the principal cause of the employee's emotional disability. (Dep. 62-63.) Thus, the self-insurer's assertion that the employee's emotional disability claim is not compensable, based on the inclusion of this BFPA in the doctor's opinion, does not advance the self-insurer's cause. By the terms of the § 1(7A) provision covering BFPA's, this particular act cannot stand as a bar to compensation. See n.1, supra.

As a result, the self-insurer's assertion that the decision cannot stand, due to the medical evidence being tainted by the inclusion of the BFPAs, is without merit.

As to the employee's argument on appeal that the judge failed to address his properly joined claim for permanent and total incapacity benefits, we agree. Although not listed as part of the claim, § 34A was an issue in controversy, as stated by the judge at the beginning of the hearing. (Tr. I, 6.) The judge erred in the omission. See G. L. c. 152, § 11B ("Decisions of members of the board shall set forth the issues in controversy, the decision on each and a brief statement of the grounds for each such decision.")

In the absence of contrary expert medical opinion, " . . . the impartial physician's report shall constitute prima facie evidence of the matter contained therein." Section 11A. The judge sets out the impartial doctor's opinion as follows:

> He [the impartial examiner] reviewed the medical documents provided to him each time and detailed his physical examinations. In the first report he offered a diagnosis of post traumatic stress disorder, panic attacks, anxiety, and nightmares, shortness of breath, and feelings of embarrassment, shame and humiliation. First report, page 7. In the second he added insomnia, significant depression and social isolation. Second report, page 5, see also the deposition, page 50, line 12, page 53, line 19. He noted that the employee's condition has deteriorated since the first examination. Second report, page 5. He causally related these diagnoses to the incidents at work. First report, page 8, second report, page 5, deposition, page 57, line 3, page 58, line 13, page 59, lines 4, 14 and 21. He found the employee to be totally disabled due to the industrial injury. First report, page 9, second report,

> page 6. He concluded the second report writing "A medical end point has been reached. There is no evidence that the claimant will be able to recover from his severe symptoms of Post-Traumatic-Stress Disorder." Second report, page 6. He is totally and permanently disabled. Deposition, page 58, line 16. He could not perform any job in the open labor market for the MBTA or for any other employer. Deposition, page 46, line 17.

(Dec. 434-435.)

Given the exclusive and uncontested medical opinion of the impartial psychiatrist, that the employee's total disability was indeed permanent in nature (Dep. 58), recommittal is unnecessary as the hearing record admits of but one outcome on this issue. We order the self-insurer to pay the employee the § 34A benefits sought as of the exhaustion of his § 34 benefits, on April 23, 2003, to date and continuing. (Dec. 436.)

The decision is affirmed. The self-insurer shall pay employee's counsel an attorney's fee under the provisions of § 13A(6) in the amount of $ 1,407.15.

So ordered.

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William A. McCarthy
Administrative Law Judge

Filed: ***December 14, 2007***

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Bernard W. Fabricant
Administrative Law Judge

HORAN, J., concurring.

I agree the decision should be affirmed. I write separately to address how the majority's opinion clarifies the burden of proof contained in the third and fifth sentences of § 1(7A),[2] and in so doing, rejects a common interpretation of the dicta contained in our prior decisions concerning purely emotional disability claims.[3] I also address the issue of what constitutes a "personnel action" under § 1(7A).

[2] The fifth sentence of § 1(7A) is also repeated in G. L. c. 152, § 29.

[3] As distinguished from emotional disability claims resulting from compensable physical injuries. E.g., Cornetta's Case, 68 Mass. App. Ct. 107 (2007).

Our courts have acknowledged the 1986 amendment[4] to § 1(7A)'s definition of "personal injury" was enacted in response to the holding in Kelly's Case, 394 Mass. 684 (1984).[5] The Kelly court, by a slim majority, upheld an award of compensation for an emotional disability arising *solely* out of Ms. Kelly's reaction to being informed she would be laid off from one department, and transferred to another. Id. at 685-686. Ms. Kelly did not experience any other qualifying stressful event at work; her disability was directly caused by her reaction to a job reclassification.

In view of the facts in Kelly, and the plain meaning of the third and fifth sentences of § 1(7A), I believe the legislature did not intend to exclude from consideration BFPAs as part of a series of otherwise qualifying events occurring within the employment. The statute only provides that mental or emotional disabilities cannot arise *principally* from bona fide, personnel actions. If the legislature wanted to disqualify employees from receiving compensation in "mixed" scenarios such as presented here, they would have used appropriate language to express that intent. Thus, as here, where there is a combination of work-related events, including a BFPA or two, the employee's initial burden of proof is met by demonstrating, via medical evidence, that his disability is predominately caused by the work events, as opposed to events occurring outside of work. Of course, the employee's claim fails as a matter of law if *all* of the causative events are "bona fide, personnel actions."

In this case, the majority affirms the BFPA finding as to the last employment event (the deputy chief's refusal to permit the employee to operate the mobile command post), but nevertheless affirms the decision even though the § 11A psychiatrist, in part, relies on that event:

> Q. The principal cause, the principal incident which resulted in his leaving work was the incident involving being denied

[4] St. 1986, c. 662, § 6.

[5] E.g., Green v. Wyman-Gordon Co., 422 Mass. 551, 559 (1996); Robinson's Case, 416 Mass. 454, 458-459 (1993); Cornetta's Case, supra at 117; Catalano v. First Essex Sav. Bank, 37 Mass. App. Ct. 377, 379 (1994).

permission to use the command post; correct?

A. To put it that simply is psychologically untrue. He had a number of traumatic experiences and that was the last straw.

Q. That was the last straw; correct?

A. Correct.

(Dep. 63.) I agree with the majority's approach, and not the one mentioned in cases such as Beckett v. Cummings Alden, Inc., 10 Mass. Workers' Comp. Rep. 641, 644 (1996) ("Where a case presents both stressful events and bona fide employer actions, each must be assessed independently of the other under the statutory criteria") and Smith v. Charming Shoppes, 21 Mass. Workers' Comp. Rep. 67 (2007).[6] These cases suggest that BFPAs must be segregated from non-BFPAs to properly pose hypothetical questions to medical experts on the "predominant contributing cause" issue. We no longer require this approach.[7]

[6] At first reading, the Smith case would appear to support the argument that a doctor must segregate employment events from BFPAs, and base her "predominant cause" opinion solely on the former. (See also, the opinion of McCarthy, J., dissenting.) However, the administrative judge in Smith, cognizant of the employee's prior non-work related psychiatric history, found "the employee failed to prove the work events, excluding those deemed to be bona fide personnel actions, were the predominant cause of her disability." Smith, supra at 71, footnote 4. Thus, Smith is a "failure of proof" case. Because we are not at liberty to disturb factual findings that have a basis in the record, see G. L. c. 152, § 11C, the majority of the board affirmed the denial of benefits. The employee in Smith advanced only one argument on appeal, based on a misreading of the only medical evidence in the case. See Smith, supra at 70-71.

[7] In a pure emotional disability claim, the employee's burden of proof is contained in the third sentence of § 1(7A). Accordingly, once the employee proves the predominant contributing cause of her emotional disability flows from a work-related event, or series of events (unless the sole event, or *all* events, are BFPAs), it is incumbent on the insurer to produce credible medical evidence that the disability arises principally out of a personnel action made in good faith. If it does so, the employee loses unless she carries the further burden of proving that, although the personnel action was made in good faith, it was communicated with the intent to inflict the resultant emotional harm. See Kelly, supra at 691 ("There was no evidence . . . that the information [regarding the layoff] was given to the employee in a particularly stressful manner.")(Hennessey, dissenting.)

I would also affirm the decision because the BFPAs found by the judge in this case are not "personnel actions" as contemplated by the statute. The relevant portion of § 1(7A) provides: "No mental or emotional disability arising principally out of a bona fide, personnel action including a *transfer, promotion, demotion, or termination* except such action . . . shall be deemed to be a personal injury. . . ." (Emphasis added.) What do these four personnel actions have in common? They are all actions taken by employers, and each one fundamentally alters the nature of the employment relationship for the foreseeable future. See Avola v. American Airlines, 20 Mass. Workers' Comp. Rep. 293 (2006)(personnel actions unique to employers); Dunlevy v. Tewksbury Hosp., 17 Mass. Workers' Comp. Rep. 70 (2003)(same). I believe the word "including", as used in this context, was meant to include those personnel actions taken by employers that are substantially equivalent to the four mentioned in the statute.[8] Why? I offer three reasons.

First, we must keep in mind this part of the statute was inserted in response to Kelly's Case, where the emotional breakdown resulted from the communication of a decision to transfer the employee. Thus, where the *decision* by the employer is the principal cause of the employee's emotional disability, there can be no finding of "personal injury" under the act. The statute certainly cannot mean that once the transfer, demotion, etc., occurs, that any subsequent employment events are disqualified from consideration in emotional disability claims (in other words, but for the transfer, the employee would not have suffered from the ensuing stressful events). Nor can the phrase be reasonably construed to mean "actions" taken by *any* "personnel," such as co-employees. This interpretation would yield no meaningful distinction, in most cases, between "personnel actions" and those "events or series of events occurring within any employment." G. L. c. 152, § 1(7A)(third sentence). The most reasonable interpretation,

[8] In Beaudry v. Stop and Shop, 4 Mass. Workers' Comp. Rep. 239 (1990), we noted the word "including" suggested the legislature did not intend to limit "personnel actions" to only the four expressly contained in the statute. I agree. However, an administrative judge's finding on the question of what constitutes a "personnel action" must be subject to meaningful review under G. L. c. 152, § 11C. In making their determination to disqualify one of the personnel actions in this case, the majority provides no standard.

therefore, is in keeping with the legislative intent to overrule Kelly, and to afford employers immunity, under G. L. c. 152, from claims arising from an employee's emotional reaction to employment decisions sufficiently akin to those enumerated in the statute.

Second, this part of the statute, the fifth sentence, unlike the second sentence (added in 1985 to render non-compensable injuries resulting from an employee's purely voluntary participation in employer sponsored recreational activities) does not contain the phrase "but not limited to" after the word "including." It is fair to assume this was not an oversight by the legislature. In light of this language, the list of recreational activities in the second sentence cannot be exhaustive. However, one year after it used the phrase "but not limited to" following the word "including" in the second sentence, the legislature, in amending the fifth sentence *of the same statute*, failed to replicate the phrase. It can fairly be inferred, therefore, that the general court did not intend the phrase "personnel action" to be interpreted as broadly as the phrase "recreational activity."

Third, review of the general laws reveals the legislature has employed the phrase "personnel action" on four occasions. In two instances, use of the phrase clearly contemplates employer decisions such as transfers, promotions, demotions or terminations; it is reasonable to assume the legislature intended a similar meaning to the phrase as used in G. L. c. 152. See G. L. c. 73, § 16 (trustees of state colleges must file notices of personnel actions such as appointments to professional staff "including terms, conditions and periods of employment, compensation, promotion, classification and reclassification, transfer, demotion and dismissal. . . ."); G. L. c. 74, § 42O (same language used for duties of vocational school trustees). The other two instances the phrase is used provide no relevant guidance. See G. L. c. 12A, § 14 and G. L. c. 15A, § 9.

Therefore, in this case, neither event found by the judge qualifies as a "personnel action" under § 1(7A), because neither action was taken by the employer, and neither action is arguably in the nature of a "transfer, promotion, demotion, or termination." In fact, with respect to the second event (denial of use of command post vehicle) the judge

found that while the deputy chief barred the employee from using the vehicle, the chief had previously given the employee express permission to use it. (Dec. 433.) To allow such actions, as found by the judge here, to qualify as personnel actions under § 1(7A) unnecessarily blurs the distinction between the types of employment decisions expressly contemplated by the statute, and those actions taken which may otherwise qualify as stressful employment events.

I do agree with the majority that the evidence and findings require a § 34A benefit award; this is an instance where recommittal is unnecessary.

Filed: December 14, 2007

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Mark D. Horan
Administrative Law Judge