COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS	**BOARD NO. 046595-04**
Kenneth J. French	Employee
Export Enterprises, Inc.	Employer
American Home Assurance	Insurer

REVIEWING BOARD DECISION
(Judges Koziol, McCarthy and Costigan)

The case was heard by Administrative Judge Heffernan.

APPEARANCES
Barry C. Reed, Jr., Esq., for the employee
Diane Cole Laine, Esq., for the insurer

KOZIOL, J. The insurer appeals from a decision finding the employee sustained an emotional injury that arose out of and in the course of his employment and awarding the employee § 30 medical benefits, as well as a closed period of § 34 total incapacity benefits followed by ongoing § 35 partial incapacity benefits. The insurer advances two grounds for its appeal. First, it maintains the impartial medical opinion adopted by the judge did not satisfy the predominant contributing cause standard set forth in § 1(7A).[1] Second, it contends the judge impermissibly relied on so-called "gap" medical evidence to support his finding of predominant cause. For the following reasons, we affirm the decision.

We briefly summarize the judge's findings of fact, which provide the foundation for his decision in this unaccepted claim. On October 29, 2004, while

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

engaged in his regular duties as a Cares Van driver[2] for the employer, the employee received a call from his supervisor. At his supervisor's request, the employee then drove to the home of a coworker, with whom he occasionally worked and socialized outside of work, in order to determine why the coworker had not reported to work. Receiving no response after knocking on the coworker's door, the employee opened the door, which was unlocked, and saw him hanging by a rope in the doorway, the victim of an apparent suicide. The employee ran back to his truck and called 911 and his supervisor. He remained at the scene for several hours after the emergency vehicles arrived. (Dec. 4-5.)

The employee reported to work the following Monday and continued to perform his regular duties. However, within the first month following the incident, he began to keep to himself, to "space out," to become startled by doors opening and closing, and to be unable to enter certain rooms in his house. He had difficulty sleeping and experienced flashbacks to the work incident. He began to experience increasing anger and began to drink heavily and use drugs two or three times per month. (Dec. 5-6; 18-19.)

Following the work incident, the employee received no medical treatment for almost a year. His primary care physician referred him to Beth Israel Deaconess Medical Center (Beth Israel) where the employee received outpatient psychiatric treatment from September 21, 2005 through November 8, 2005. (Dec. 6, 19; Ins. Ex. 4.) On November 9, 2005, the employee was admitted to Whidden Memorial Hospital for a fourteen-day, inpatient mental health hospitalization. (Dec. 19; Tr. 29; Ins. Ex. 4.) The employee has not returned to his job with the employer since that hospitalization.[3] (Dec. 6.) The employee had another four-day inpatient mental health hospitalization in December of 2005, and was still

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[2] As a Cares Van driver, the employee patrolled Route 1 from Chelsea to Danvers, looking for breakdowns, accidents and road debris. (Dec. 4.)

[3] On October 5, 2007, two weeks before the hearing in this matter, the employee began working at a day care center for dogs, earning $9.00 per hour. (Dec. 19.)

receiving outpatient mental health treatment at the time of the hearing. (Dec. 6-7, 19.)

Following a denial of his claim at a § 10A conference, the employee appealed, claiming § 30 medical benefits, § 34 total incapacity benefits from November 9, 2005 to October 4, 2007, and ongoing § 35 partial incapacity benefits thereafter. (Dec. 2-3.) On May 8, 2007, Dr. Michael Marcus performed a psychiatric evaluation pursuant to § 11A. Dr. Marcus reported there was no family history of psychiatric problems and the employee "did not begin to drink in excess and feel angry much of the time until *after* his trauma at work, although he had gotten into fights before the trauma of the hanging." (Dec. 7; Stat. Ex. 1.)(Emphasis added.)[4] At the time of Dr. Marcus's evaluation, the employee had been sober for a year and no longer used drugs. Dr. Marcus found the employee to be anxious and depressed, with limited understanding of his problems. (Dec. 8.)

Dr. Marcus made the following diagnoses: 1) post traumatic stress disorder (PTSD) (Axis I), 2) alcoholism, in remission (Axis I), and 3) work trauma (Axis IV).[5] (Dec. 8; Stat. Ex. 1.) With respect to causation, he opined:

> Mr. French's symptoms were triggered by the trauma at work but greatly exacerbated by alcohol and drug abuse, so that his recovery has been delayed. He has a history of impulsive behavior and his drinking and drug abuse made his anger and acting out more evident.

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[4] Dr. Marcus reported, in pertinent part:

> [The employee] was very shaken by [finding his co-employee had hanged himself] but did return to work. He started, however, to drink heavily and abuse drugs. He was having nightmares about what he had seen and had visual hallucinations. He stopped working November 5, 2005, about a year later, because of his symptoms. He says he was committed twice to the Whidden Hospital because of his hallucinations and aggressive acting out.

(Stat. Ex. 1.)

[5] The Diagnostic and Statistical Manual of Mental Disorders, 4th ed. text revision, 2000 ("D.S.M.-IV") defines Axis I as clinical disorders, and Axis IV as psychosocial and environmental problems.

(Dec. 8.) Dr. Marcus did not believe the employee could perform a job which involved emergency situations, but thought he might be able to return to work at a less stressful driving job. Neither party sought to depose Dr. Marcus. (Dec. 9.)

The judge, sua sponte, found the impartial medical report inadequate with respect to the gap period from October 29, 2004 through May 9, 2007, and allowed the submission of additional medical evidence for that period.[6] (Dec. 9; Tr. 117.) The employee submitted the February 20, 2007, report of Dr. Sara Bolton, (Dec. 9), and the insurer submitted the July 7, 2006, report of Dr. Michael Rater, both psychiatrists. (Dec. 12.) In addition, the insurer submitted certified medical records from Beth Israel dated September 21, 2005 through August 7, 2006. (Dec. 2, 18; Ins. Ex. 4.)

The judge found the employee suffered a work-related psychiatric injury which resulted from the discovery of his coworker's body hanging in the doorway of his house. Under the heading, "Causal Relationship," he adopted in part, the opinions of Dr. Marcus and Dr. Bolton and found the work incident was the predominant cause of the employee's total and partial disability. (Dec. 20-21.) The judge awarded the employee § 34 benefits from November 9, 2005 to May 9, 2007, less any period he may have collected unemployment benefits,[7] and partial incapacity benefits thereafter, based on an assigned earning capacity of $300 per week. In addition, he ordered the insurer to pay reasonable and related medical expenses. (Dec. 21-22.)

On appeal, the insurer argues Dr. Marcus's opinion that the employee's "symptoms were triggered by the trauma at work," did not satisfy the predominant

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[6] The judge stated May 9th was the date of the employee's examination by Dr. Marcus. (Tr. 117.) However, the doctor's report, dated May 9, 2007, stated the examination took place on May 8, 2007. (Stat. Ex. 1.)

[7] The employee testified he had not collected any unemployment benefits, while an employer witness maintained he had. No other evidence was offered on this issue. (Dec. 19.)

contributing cause standard of § 1(7A), because a "trigger" is simply the last contributing factor, not necessarily the most significant one. (Ins. br. 14.) It also argues the decision cannot be upheld on the ground the work event is the "only cause," and thus the predominant cause, of the employee's PTSD, because Dr. Marcus elicited a history of the employee engaging in fights prior to the alleged trauma, and the Beth Israel records, admitted as gap medicals, contain a history of excessive alcohol consumption and illegal drug use for eighteen years prior to the date of injury. The insurer contends the evidence thus, "refers to the employee's history of impulsive behavior and drinking and drug abuse," requiring the judge to weigh the causative contribution of these alleged factors, as well as the work trauma, which he failed to do. (Ins. br. 16.)

Where an emotional injury is claimed, a medical opinion that a work event "triggers" the employee's disability may not always satisfy the employee's burden of proving the work injury is the "predominant contributing cause" of his disability. However, under the circumstances presented here, this language, as used by the impartial physician, satisfies the predominant contributing cause standard. A medical opinion need not be expressed in the precise words of the statute to satisfy the applicable causation standard. May's Case, 67 Mass. App. Ct. 209, 213 (2006), citing Robinson's Case, 416 Mass. 454, 460 (1993). To prove that work events are the "predominant contributing cause" of his emotional disability, the employee must show the emotional trauma at work was "the major," "the primary," May's Case, supra at 212-213, "the most significant," or "the main," cause of his emotional disability. Lawhorne v. Massachusetts Water Resource Auth., 22 Mass. Workers' Comp. Rep. 143, 146 (2008); Lesoine v. Corcoran Mgt. Co., Inc., 22 Mass. Workers' Comp. Rep. 153, 159 (2008). The employee need not prove the work cause is greater than the sum of all non-work-related causes. May's Case, supra at 211-213. Where there are no other causes of disability, or where potential contributing causes have been discounted, the work event, as the "only cause," is the predominant cause. Bouras v. Salem Five Cent

Savings Bank, 18 Mass. Workers' Comp. Rep. 191, 193 (2004)(adopted medical opinion which ruled out non-work factors as causes for employee's depression, satisfied predominant cause standard, since only work contributors remain as causes); Sawicka v. Archdiocese of Boston, 14 Mass. Workers' Comp. Rep. 362, 370 (2000)("only cause" must satisfy predominant contributing cause standard).

We have affirmed decisions finding the predominant cause standard was satisfied where the adopted medical evidence indicated a "clear" or "direct" causal connection between the employee's emotional disability and an event or series of events at work, and where the employee had no prior history of psychological treatment or problems. See, e.g., Bisazza v. MCI Concord, 21 Mass. Workers' Comp. Rep. 161, 164, 168 n.7 (2007), aff'd Bisazza's Case, 452 Mass. 593 (2008)(impartial physician's diagnosis of PTSD as a "direct result of trauma suffered at work," was only, and thus predominant, cause of disability where employee had no prior history of psychiatric treatment or problems); O'Neill v. MCI Cedar Junction, 23 Mass. Workers' Comp. Rep. 203 (2009)(impartial physician's opinion there was "clear causal relationship" between verbal threats at work and employee's emotional disability sufficient to meet predominant contributing cause standard, where impartial explained employee had no prior mental issues and employee's testimony refuted comments by his therapist that PTSD resulted from prior military service); Avola v. American Airlines Co., 20 Mass. Workers' Comp. Rep. 293 (2001)(no evidence employee suffered from prior history of psychiatric problems and no indication events outside of work contributed to PTSD or major depression, impartial physician's opinion of direct causal relationship satisfied predominant contributing cause standard because it is an only cause opinion). Cf. Descoteaux v. Raytheon Co., 19 Mass. Workers' Comp. Rep. 211 (2005)(where employee's history of pre-existing psychiatric problems was manifest throughout the medical evidence, work events were not the only cause of emotional disability).

Here, the impartial physician opined that the "trigger," or the "cause," of the employee's psychiatric problems was the work trauma of finding his co-worker hanging by a noose in his doorway. The insurer's contention to the contrary is based upon a factual history not found by the judge or relied on by Dr. Marcus. Specifically, the history relied on by Dr. Marcus did not include excessive drinking or drug use prior to the work event. Rather, Dr. Marcus reports that the employee's excessive drinking and anger came about *subsequent* to the work trauma. (Dec. 7.) Moreover, the employee testified that, although he drank prior to the work event of October 29, 2004, he coped with his anger, nightmares, flashbacks, difficulty sleeping during the year following the work trauma by increasing his alcohol consumption to "very high" levels and by using drugs two or three times a month.[8] (Tr. 22-25.) Also, Dr. Marcus offered no opinion that the employee's "history of impulsive behavior" was a condition which caused his PTSD, but merely stated his "drinking and drug abuse made his anger and acting out more evident." (Dec. 8.) Significantly, Dr. Marcus opined the employee's alcoholism was "in remission" at the time of his evaluation, a classification the doctor did not attribute to the employee's PTSD diagnosis. (Stat. Ex. 1.) As a result, the sole active diagnosis bearing on the issue of disability was the employee's PTSD. Dr. Marcus simply indicated the employee's "recovery has been delayed" due to alcohol and drug abuse, not that alcohol or drug abuse caused his injury.[9] (Dec. 8; Stat. Ex. 1.) The work trauma, as the only cause, was the predominant cause of the employee's emotional disability.

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[8] The employee specifically denied abusing alcohol for the previous eighteen years, and did not recall giving an eighteen-year history of heavy drinking to the medical providers at Beth Israel in the fall of 2005. (Dec. 18; Tr. 44-48.) The judge referred to the Beth Israel records finding the employee had stopped drinking approximately one month before his initial visit to the hospital in September of 2005, which is prior to his claimed dates of disability. (Dec. 18; Ins. Ex. 4.)

[9] Even assuming the judge properly could consider the Beth Israel records as substantive evidence bearing on the issue of causation, without exceeding the parameters of "gap" evidence admitted only for the issue of disability, those records simply do not require a

Lastly, because the impartial psychiatric opinion satisfies the predominant contributing cause standard, any error the judge made by adopting Dr. Bolton's opinion to support his finding of causal relationship is harmless. Cf. Serabian v. Herb Chambers Ford, 23 Mass. Workers' Comp. Rep. 57 (2009)(where additional medical evidence admitted solely for purpose of addressing disability during gap period prior to impartial examination, judge erred by rejecting impartial opinion in favor of additional medical evidence on causation).

Accordingly, the decision is affirmed. Pursuant to § 13A(6), the insurer is directed to pay employee's counsel a fee of $1,497.28.

So ordered.

Catherine Watson Koziol
Administrative Law Judge

William A. McCarthy
Administrative Law Judge

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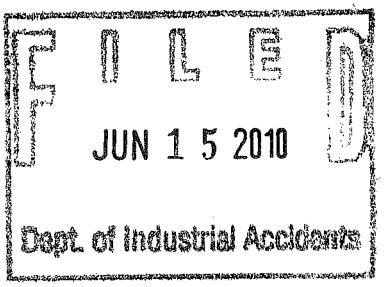

Patricia A. Costigan
Administrative Law Judge

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different result in this case. For example, on November 8, 2005, in referring the employee to the emergency room for a possible inpatient psychiatric hospitalization, Dr. S. Carolyn Acker specifically opined the employee had "probable PTSD, including intolerable anger, which has worsened as [the] anniversary of trauma approached." (Ins. Ex. 4.) In regard to substance abuse, Dr. Acker noted "[h]e had been drinking more in what sounds like self-medicating, prior to starting the Depakote," which was prescribed at the employee's visit on September 26, 2005. (Ins. Ex. 4.) Dr. Acker's opinion seems to imply the PTSD caused the alcoholism and not the other way around. Moreover, in her assessment of the employee's condition on November 8, 2005, emergency room physician Dr. Karina Weiss opined the employee had "no prior psychiatric history" and only a "possible history of alcoholism." (Ins. Ex. 4.)