COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 049917-01**

Robert Avola	Employee
American Airlines Co.	Employer
Insurance Company of the State of Pennsylvania	Insurer

REVIEWING BOARD DECISION
(Judges Horan, Carroll and Costigan)

APPEARANCES
Martin Kantrovitz, Esq., for the employee
Susan F. Kendall, Esq., for the insurer at hearing
John J. Canniff, Esq., for the insurer on appeal

HORAN, J. The insurer appeals from a decision awarding the employee § 34 benefits for a work-related psychiatric condition. We affirm the decision.

Robert Avola was an airline mechanic for the employer. In 1999, he was president of the Transport Workers' Union, Local 507. As the duly elected union president, he no longer worked as a mechanic. Instead, under the terms of the collective bargaining agreement, the employer provided him with an office and paid him for a forty-hour week. The union compensated the employee for any overtime hours worked. (Dec. 583-584.)

Trouble began for the employee in 2000. Two of the five groups of employees comprising Local 507, including the airline mechanics, broke away from the local. At the employee's urging, the local joined a lawsuit attempting to prevent the union's split. During this time, "the employee became the subject of disparaging and vicious graffiti, anonymously written in several places throughout

the facility." The graffiti included "Kill Avola." The employee became extremely upset, and feared for his life.[1] (Dec. 585-588.)

In November 2001, the employee ran for re-election as union president because:

> [h]e feared returning to his job as an airline mechanic, believing that he would be more vulnerable to attack. He also feared that a co-worker might sabotage one of his repairs and that he would be blamed for it. He saw the union presidency as some protection against violence.

(Dec. 589.) The employee lost the election. His petition for a new election, on the basis of fraud, was denied at a December 19, 2001 union meeting.[2] (Dec. 590.)

The employee complained to management about the graffiti on numerous occasions, and felt his employer failed to properly address his concerns. (Dec. 587-588.)[3] Twice, he drove himself to the hospital from work after experiencing heart palpitations. He required hospitalization on December 19, 2001, after becoming furious about the lack of notice regarding a safety committee meeting. On December 26, 2001, following an argument with a manager regarding the graffiti issue, he was again hospitalized overnight. He has not returned to work. (Dec. 589-591.) The employee's term as union president expired on December 31, 2001. (Dec. 591.)

The judge credited the employee's testimony that since his departure from work, he fears being attacked by American Airlines employees, and has nightmares about people sabotaging his work, and about plane crashes. He is

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[1] He analogized his situation to that of another airline employee at Logan International Airport who, several years before, had disappeared and never been found after complaining of harassment, which had included anonymous graffiti. (Dec. 587-588.)

[2] Once he lost this final appeal, the employee was aware he would have to return to the rank and file as an airline mechanic the following year. (Dec. 589-590;Tr. III, 107, 110.)

[3] He filed two grievances concerning management's handling of the graffiti, one on November 6, 2001, and another on December 19, 2001, after learning that a safety committee meeting had been scheduled without notice to the union. (Dec. 589-591.)

hyper-vigilant, checking doors and windows, and closely watching cars that stop near his house. He has trouble sleeping, hears voices, has trouble concentrating, and sometimes has great difficulty leaving his house. (Dec. 591, 593.)

The employee's emotional incapacity claim was denied at a § 10A conference, and the employee appealed. Medical evidence at the hearing included the report of the impartial examiner, Dr. Harry L. Senger, the report and deposition testimony of the insurer's examiner, Dr. Michael Rater, and the reports of a treating psychiatrist, Dr. Menekse Alpay. All three physicians opine the employee is totally disabled. (Dec. 593-595.) Dr. Senger diagnoses the employee with a major depressive disorder and post-traumatic stress disorder; he opines the "workplace stresses" [4] are the "direct cause" of these conditions. (Dec. 593; Ex. 3, report of Dr. Senger 6.) He describes the employee's re-election run as "a desperate attempt by a terrified man to reduce his vulnerability." (Dec. 594, quoting Ex. 3, report of Dr. Senger, 6.) The doctor opines the employee's election loss also caused his departure from work. Id. Dr. Rater diagnoses the employee with a major depressive disorder with psychotic features, opining that "the loss of his job as union president was the major predominant cause of the onset and need for treatment" of his disorder. (Ex. 42, p. 13.) Dr. Alpay opined the employee suffers from a major depression with psychotic features, but felt that the work stressors "might have contributed to his illness."[5] (Dec. 595; Ex. 49, report of Dr. Alpay.)

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[4] Dr. Senger described the workplace stresses as including the union split and the resulting graffiti, the employee's dissatisfaction with management's handling of the graffiti, and his loss of the protection provided by the union presidency. (Ex. 3, Report of Dr. Senger 2, 6.)

[5] The judge found that Dr. Alpay's April 26, 2002 report "causally related the diagnosis and disability to the stressors at work including the graffiti and the union court battle." (Dec. 595; Exhibit 46.) Dr. Alpay's testimony falls short of committing to such an opinion. Although the insurer alludes to this fact in the "Statement of the Facts" section of its brief, it does not list this as an issue, and offers no argument as to what effect, if any, this has on the ultimate outcome given the judge's adoption of the opinions of doctors Senger and Rater. See footnote 8, infra.

Relying on the employee's credible testimony and "the persuasive opinions of Doctors Senger, Alpay and Rater," the judge concluded the employee was totally disabled "by his loss of his job as union president and by the fear he experienced through the perceived threats made against him by anonymous graffiti writers over the course of many months." (Dec. 596.) The judge specifically adopted Dr. Senger's opinion that the employee was fearful and vulnerable prior to the loss of the union election, and that threats, in the form of graffiti, caused the employee's psychiatric disability. (Dec. 596.) He rejected Dr. Rater's opinion to the contrary. However, he found Dr. Rater's opinion that the employee's disability was caused by the loss of his job as union president established liability, in accordance with our decision in Handren v. Suffolk County Sheriff's Dept., 14 Mass. Workers' Comp. Rep. 318 (2000). There, we upheld an award of benefits for a psychological disability resulting from an employee's reaction to an election hand-out criticizing his competence as a union official. In this case, the judge found:

> [t]he election activity included allegations of fraud [in the election] and issues concerning the ongoing and increasingly expensive lawsuit against the airline mechanics and the hostility of many baggage handlers toward a candidate for the presidency who did not hold a job that was among those represented by the union. Relying on Dr. Senger's opinion that there is a causal relationship of the graffiti threats to the psychiatric disability, I find that those graffiti threats which were written in the weeks immediately preceding the election and during the post election period in which the employee initiated a challenge, like the critical handout in Handren were "election activity" or other harmful activity with a nexus to his employment. As much of the complained of graffiti was written many months before the election, not all of the graffiti can be tied to the election campaign, although the graffiti is tied to the employee's work as union president.

(Dec. 597-598.) Accordingly, he awarded the employee § 34 benefits from December 27, 2001 to date and continuing. (Dec. 598.)

The insurer first argues the judge erred by relying upon the impartial physician's opinion to find a causal relationship between the employee's work and his emotional incapacity. It maintains Dr. Senger's opinion fails to carry the

employee's burden of proving the events at work were the "predominant contributing cause" of his injuries. See G. L. c. 152, § 1(7A).[6] We disagree. Dr. Senger opines there was a "direct causal connection between this man's medical conditions and the history of injury." (Ex. 3, Senger report 6.) We note there is no evidence the employee suffered from a prior history of psychiatric problems, and there was no indication that events outside of work contributed to cause the employee's post-traumatic stress disorder, or his major depressive disorder. Id. Accordingly, Dr. Senger's opinion satisfies the "predominant contributing cause" standard because it amounts to an "only cause" opinion. Bouras v. Salem Five Cent Savings Bank, 18 Mass. Workers' Comp. Rep. 191, 193 (2004); Sawicka v. Archdiocese of Boston, 14 Mass. Workers' Comp. Rep. 362, 360 (2000).

The insurer's second argument is that the adopted opinion of the impartial medical examiner, Dr. Senger, fails to support the judge's finding of total incapacity from its claimed onset. Because Dr. Senger opined "[t]he onset and development of this man's symptoms are consistent with the workplace stresses described and correlated with them in time," and further that "I believe this man is totally medically disabled," we summarily reject this argument. (Ex. 3.)

The insurer next argues the employee's disability resulted from a "bona fide personnel action" under § 1(7A), which, it claims, was his "default demotion" to the rank of airline mechanic and the employee's resulting apprehension. (Ins. br. 11.) At the very least, the insurer argues, the case should be recommitted for the judge to make findings on whether the "demotion" was a bona fide personnel

[6] General Laws c. 152, § 1(7A), provides, in relevant 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.

action. See Walczak v. Massachusetts Rehab. Comm'n, 10 Mass. Workers' Comp. Rep. 539, 549 (1996)(upon finding a work event or series of events is a predominant contributing cause of mental or emotional impairment, the judge must then make findings on whether disability arose principally out of a bona fide personnel action; if it did, there is no liability in the absence of intentional infliction of emotional distress).

We disagree. Had the judge considered the issue, on this record he could not have properly concluded the employee's disability, caused in part by the loss of his job as union president, arose "principally out of a bona fide, personnel action . . . ." G. L. c. 152, § 1(7A). This is because it is undisputed that the employee's transfer[7] came about solely as a result of actions taken, not by the employer, but by co-employees—union members who did not re-elect him to his job as union president, and then denied his petition for a new election.[8] See Dunlevy v. Tewksbury Hosp., 17 Mass. Workers' Comp. Rep. 70, 74 (2003) (personnel actions are uniquely taken by employers); Beaudry v. Stop and Shop, 4 Mass. Workers' Comp. Rep. 239, 241 (1990)(actions by fellow employees as opposed to supervisors are probably not bona fide personnel actions). Where the evidence is "of such character that 'no reasonable inference could be drawn to the contrary,' " Judkins' Case, 315 Mass. 226, 227 (1943), quoting Craddock's Case, 310 Mass. 116, 125 (1941), we will affirm the decision of the judge, even in the absence of specific findings of fact.

[7] Under Article 17 of the collective bargaining agreement, Ex. 27, once the employee's term as an elected union officer ends, he is eligible to return to his former station (job) with full seniority and reinstatement rights.

[8] The insurer has argued on appeal, both in its brief and at oral argument, only that the employee's "default demotion" to airline mechanic was a bona fide personnel action. Therefore, we do not address whether the judge erred by not determining whether any other arguably "bona fide" personnel actions caused the employee's disability. 452 Code Mass. Regs. § 1.15(4)(a)(3)(reviewing board need not decide questions or issues not argued in the brief).

Finally, we reject the insurer's argument that the employee's incapacity cannot be said to arise out of and in the course of his employment because it also arose out of his union activity. We agree with the judge that the employee's union activity placed him well within the parameters of compensable work-related union activity as set forth in Handren, supra (union related activity conducted on employer's premises during normal work hours found incidental to employment; resulting emotional distress found compensable). Our holding in Labadie v. Raytheon Co., 17 Mass. Workers' Comp. Rep. 626 (2003), relied upon by the insurer, is inapposite. There, we held that an injury occurring during a union activity – picketing – away from the employer's premises and outside normal working hours, was not work-related.

Accordingly, we affirm the decision. Pursuant to § 13A(6), the insurer is directed to pay employee's counsel a fee of $1,357.64.

So ordered.

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Mark D. Horan
Administrative Law Judge

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Martine Carroll
Administrative Law Judge

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Patricia A. Costigan
Administrative Law Judge

Filed: August 16, 2006