

COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS

BOARD NO.: 030458-02

Robin May
MCI Framingham
Commonwealth of Massachusetts

Employee
Employer
Self-insurer

REVIEWING BOARD DECISION

(Judges Horan, Costigan and McCarthy)

APPEARANCES

Teresa Brooks Benoit, Esq., for the employee
Patricia G. Noone, Esq., for the self-insurer

HORAN, J. The employee appeals from a decision denying her claim for a work-related emotional injury. Because the medical evidence does not satisfy the employee's burden of proof under G. L. c. 152, § 1(7A),¹ we affirm the decision.

The employee, a corrections officer, claimed her injury and incapacity resulted from incidents of harassment at work.² (Dec. 2.) At hearing, the only medical evidence before the judge was the report and deposition of the § 11A impartial psychiatrist, Dr. Zamir Nestlebaum.³ (Dec. 1.) Dr. Nestlebaum opined the employee suffered from a major depressive episode, which disabled her from work. He accepted the employee's history of work-related harassment, and opined the hostile work environment "was the major factor in the direct causality of her depressive episode." (Statutory Ex. 1 at 6.) At his deposition,

¹ 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.

² The specific allegations are impertinent to our disposition of the appeal.

³ The employee made no attempt to introduce additional medical evidence at hearing, nor did the judge act, sua sponte, to require such evidence. See G. L. c. 152, § 11A(2). The judge was not required to do so. Viveiros's Case, 53 Mass. App. Ct. 296 (2001).

the doctor also described the work incidents as "the primary cause" of the employee's depression. (Dep. 20.) However, Dr. Nestlebaum found other important stressors contributed to the employee's depressive episode: her mother's Alzheimer's disease and death, the building of a house, and the apparent reliving of her father's experience at being hounded out of jobs through no fault of his own. (Dec. 4; Statutory Ex. 1; Dep. 11-12, 14-15.)

The judge concluded the employee had failed to meet the requisite burden of proving the work events were "the predominant contributing cause" of her emotional disability. "While Dr. Nestlebaum suggests that [the] hostile work environment is a major cause of the emotional disability, he also identifies at least three other factors adding to the level of stress."⁴ (Dec. 5.) The judge therefore denied the employee's claim. (Dec. 6.)

The employee raises two issues; we address only one.⁵ The employee argues the judge erred by *disregarding* the prima facie weight afforded to Dr. Nestlebaum's opinion as a § 11A psychiatrist. (Employee br. 1.) The judge did not disregard or mischaracterize Dr. Nestlebaum's opinion, nor did he impermissibly substitute his own lay opinion for it. The judge simply found, *inter alia*,⁶ the doctor's opinion failed to qualify the employee's emotional injury as compensable under c. 152, as the doctor never characterized the work events as "the predominant contributing cause" of the disability. G. L. c. 152, § 1(7A). At the deposition, employee's counsel did not ask the doctor whether the employment events were the predominant contributing cause of her client's emotional disability.⁷ On appeal,

⁴ Given the analysis that follows, we place no stock in the judge's erroneous reference to the doctor's causation opinion as "a major," rather than "the major," which the doctor clearly stated in his report. (Statutory Ex. 1.) We use the actual opinion of Dr. Nestlebaum for our analysis.

⁵ The employee's second stated issue asks us to determine "[w]hether the Employee's hostile work environment was the major and predominant cause of her disability." We are not empowered to make findings of fact; we only review findings under applicable law. See G. L. c. 152, § 11C.

⁶ The judge found the employee's departure from the workplace, several years after the alleged harassment at work, was occasioned by a job transfer which he found was "a bona fide personnel action." (Dec. 6.) The employee does not challenge this finding on appeal.

⁷ See Bourassa v. D.J. Reardon Co., 10 Mass. Workers' Comp. Rep. 213, 218 at n.4. (1996)("at any deposition of the § 11A examiner, the attorneys must gear their questions to the applicable definition of personal injury.")

the employee argues the doctor's causation opinion, which utilized the words "major" and "primary," was, as a matter of law, the expression of an opinion legally synonymous with "the predominant contributing cause" standard. We disagree.

The judge found and reasoned as follows:

Even if the employee's testimony is accepted in full, as it was by the impartial physician, this would be a case where the employee would fall just short of the standard. While Dr. Nestlebaum suggests that [the] hostile work environment is a major cause of the emotional disability, he also identifies at least three other factors adding to the level of stress. They include the building of a house, the deterioration and death of the employee's mother, and the identification of the employee's situation with similar situations that had apparently arisen in her father's life.

As outlined . . . in Siano. . . 16 Mass. Workers' Comp. Rep. 237, (2002), while it is possible that there can be multiple "major" causes of medical disability, there can be by definition but one "predominant" cause.

(Dec. 5.)

It was not error for the judge to deny and dismiss the claim on this record. "Major" does not necessarily mean "the predominant." The major cause could be greater than any other cause, but not greater than the sum of all other causes. A synonym for "predominance" is "preponderance." The American Heritage Dictionary, Second College Edition, pp. 976, 978 (1985). As we understand in legal practice, the "preponderance of the evidence" designates an amount that constitutes more than half, "evidence which is of greater weight . . . than the evidence which is offered in opposition to it." Black's Law Dictionary, Sixth Edition, p. 1182 (1990). Preponderance "denotes a superiority of weight." Id.

We conclude that under the § 1(7A) standard for emotional work injuries, "the predominant contributing cause" means the work cause(s) *must be greater than the sum of all non-work-related causes.*⁸

⁸ Practitioners and jurists alike are advised not to confuse our rationale here with the discussion of the *standard of proof* necessary in an "as is" causation case. See Valachovic

We therefore reject the employee's argument that medical testimony establishing the work incidents as "the major" or "the primary" satisfied, as a matter of law, the "predominant contributing cause" standard for emotional injuries, where, as here, the employment was only one of several acknowledged contributing causes. We have interpreted "major," in the context of the fourth sentence of § 1(7A) addressing "combination" injuries, as meaning "significant." "By definition there can be but one "predominant" cause and it is the single most important, influential or forceful cause of medical disability. There may, however, be multiple 'major' causes . *A major cause is an important, a serious, a moderately significant cause.*" Siano v. Specialty Screw & Bolt, Inc., 16 Mass. Workers' Comp. Rep. 237, 240 (2002)(emphasis added). See also Myers v. M.B.T.A., 19 Mass. Workers' Comp. Rep. ____ (January 28, 2005)("the significant" cause easily satisfies "a major cause" standard under § 1(7A)). "Primary" means "first in a list, series or sequence." The American Heritage Dictionary, supra at 983. Because we have held the words "primary"⁹ and "significant"¹⁰ are synonymous with "major" under the fourth sentence of § 1(7A),¹¹ equating those terms with "predominant" would, in effect, negate the last statutory amendment to the third sentence, and provide no meaningful distinction between the statute's divergent causation schemes. We therefore conclude, on the facts found, the judge was not required to interpret the doctor's use of the word "primary" as meaning "predominant."

We are mindful that in 1991, when the legislature amended the § 1(7A) emotional injury provision from "significant contributing cause" to "predominant contributing cause," it intended a higher and stricter causation standard apply to purely mental or emotional

v. Big Y Foods, 19 Mass. Workers' Comp. Rep. ____ (May 26, 2005)(a doctor's opinion that there is only a fifty percent chance the work contributed at all to the incapacity is legally insufficient proof of causation in an "as is" case). In this case, it is acknowledged the employee's work was one of several causes of her emotional injury. Our focus here is on the higher *standard of causation* required in an emotional injury claim where many causes, including the employment, contribute to cause the injury.

⁹ Wall v. Lepages, Inc., 11 Mass. Worker's Comp. Rep. 359 (1997).

¹⁰ Siano, supra at 240.

¹¹ The fourth sentence of the statute concerns itself with "combination" injuries, "major but not necessarily predominant" causation, and is not limited to mental or emotional disabilities. Here, we address the standard contained in the third sentence of § 1(7A).

claims. See Cirignano v. Globe Nickel Plating, 11 Mass. Workers' Comp. Rep. 17, 21 n.2 (1997).

Accordingly, we affirm the administrative judge's decision.

So ordered.

Mark D. Horan
Administrative Law Judge

Patricia A. Costigan
Administrative Law Judge

William A. McCarthy
Administrative Law Judge

Filed: July 8, 2005