COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 028613-01**

Timothy Payton	Employee
Saint Gobain Norton Company	Employer
Pacific Employers Insurance	Insurer

REVIEWING BOARD DECISION
(Judges McCarthy, Costigan and Fabricant)

APPEARANCES
James N. Wittorff, Esq., for the employee
Sheila Annand Carey, Esq., for the insurer

McCARTHY, J. The employee appeals from an administrative judge's decision finding he failed to meet his burden of proving that racially harassing incidents at work were the predominant cause of his emotional disability. See G. L. c. 152, § 1(7A).[1] Because we agree with the employee that the judge erred by substituting his opinion on causation for the prima facie medical opinion of the § 11A examiner, we reverse the decision and recommit the case to the administrative judge for a determination of when the employee's permanent and total incapacity began.

Timothy Payton, age forty-four at hearing, worked for the employer between 1988 and 2001,[2] advancing from the position of carton maker to that of journeyman machinist.

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[1] G. L. 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.

[2] Mr. Payton was out from work from 1991 to 1995 due to a work-related back injury. (Dec. 3.)

(Dec. 2; Tr. I,[3] 9, 35-36.) Mr. Payton, who is black, alleges that, over the years, he experienced numerous incidents of racial harassment at work, which ultimately caused him to become totally disabled. (Dec. 5.) Those incidents, as described by the judge, included: racial comments made in 1989 by a supervisor, who was made to apologize and was eventually fired; racial comments made during the O.J. Simpson trial in 1995; a comment by his supervisor that he would not become a journeyman because it "was a white man's job"; a co-worker's display of a confederate flag decal on his tools, along with a noose around a bottle with steel wool on the bottle; a remark by an employee, in the context of a hazing when he became a journeyman, about "tarring and feathering"; a remark by a co-worker that "I don't like black people"; racial remarks after new African American workers were hired in June 2001; and remarks about his braided hair and wearing of a do-rag. (Dec. 5.) The employee also complained about job stress due to problems keeping the production line moving which, he felt, was made an issue because he was black; being shorted in the opportunity to work overtime; and being transferred to the "worst line." He admitted to being written up for poor job performance and for unsafe acts, and to having attendance problems. (Dec. 4-5.) The employee walked off the job in 1989 following racial comments by one supervisor, and returned a few days later. In 1998, he was out of work for a month and sought counseling, and again, in 2001, he took a leave of absence. (Dec. 4.) When he returned to work on June 28, 2001, he felt that everyone was mad at him. On July 1, 2001, during a power outage at the plant, Mr. Payton's heart began racing and he felt as if he would pass out. He was taken to the hospital, and has not returned to work since. (Dec. 5.)

At hearing, the two reports and deposition testimony of Dr. Kenneth Jaffe, the § 11A physician, were the only medical evidence. Dr. Jaffe opined the employee suffered from a major depressive disorder and an anxiety disorder, rendering him incapable of competitive employment, and his condition was likely to be permanent.

[3] The hearing took place over four days. The transcripts will be referred to as follows: January 5, 2004 – Tr. I; October 20, 2004 – Tr. II; January 19, 2005 – Tr. III; June 28, 2005 – Tr. IV.

(Dec. 7.) When presented with a hypothetical question outlining the incidents of racial harassment testified to by the employee and by other employees, Dr. Jaffe opined that "this series of harassing, intimidating, inappropriate events" was the predominant contributing cause of the employee's disability. (Dep. 89-90, 92-93.) Neither party moved to submit additional medical evidence on the ground that Dr. Jaffe's opinion was inadequate or the medical issues complex.

The judge found "little doubt" the employee was totally and permanently disabled due to depression and anxiety. The only question was causation. (Dec. 8.) On that issue, the judge found:

> There is no doubt that Mr. Payton did suffer several incidents over the years that were racial in nature and that should be regarded as unacceptable behavior in our society. However, while Mr. Payton complains of several continuing insults and slurs over the years, he only gives a few examples, and those examples, even if all true, while understandably upsetting, do not seem especially pervasive. . . . Those Mr. Payton now recalls are far fewer than the "dozens" that the impartial physician uses as a basis for his opinion of causality.
>
> Of even more concern, however, is Mr. Payton's insistence that his job performance issues, which are admitted to in some degree by Mr. Payton, and documented in his personnel file and by Mr. Pigaga, [the human resources manager], were a part of this overall picture of harassment. While I have no doubt that Mr. Payton interpreted these actions as such, based on the evidence and testimony presented, I firmly reject this view. I find that the various transfers, attendance reprimands, and apprenticeships and promotions were done in good faith by the company, and therefore fall firmly into the area of bona fide personnel actions. . . . Therefore, under the statute, these cannot form a basis for the cause of action.
>
> This has ramifications in sorting through the cause of Mr. Payton's present emotional disability. On the stand, Mr. Payton was somewhat upset by the incidents of racial jokes made by his co-workers and in one case, by his immediate supervisor. However, Mr. Payton's frustration and anger were much more marked when speaking [about] the job transfers and promotions he felt he was denied throughout the years.
>
> As upsetting as the racial incidents were, it is clear from his testimony that these job actions (which I find to be bona fide) were far more upsetting to Mr. Payton. Given his underlying anxiety, the stress of trying and failing to meet the

> standards of his job was especially troubling to Mr. Payton. Therefore, I do not find that the racial incidents, as troubling as they might be, were in fact the predominant cause of Mr. Payton's depression and anxiety, and his resulting disability from work.

(Dec. 9-10.) Accordingly, the judge denied and dismissed the employee's claim. (Dec. 11.)

On appeal, the employee argues, in essence, that the judge erred by rejecting Dr. Jaffe's prima facie opinion that incidents of racial harassment over many years were the predominant cause of the employee's disability. We agree.

Dr. Jaffe's opinion was the only medical opinion in evidence, and, as such it was entitled to prima facie weight. This means that, "in the absence of contradictory medical evidence, the administrative judge was required to accept the [impartial opinion] as true." Young's Case, 64 Mass. App. Ct. 903, 904 (2005); May's Case, 67 Mass. App. Ct. 209, 214 (2006); Scheffler's Case, 419 Mass. 251 (1994). Of course,

> [T]here are recognized exceptions to this rule. An IME opinion does not attain the status of prima facie evidence if it goes beyond the medical issues in the case, see Scheffler's Case, 419 Mass. at 259; if it is not expressed in terms of probability, see Patterson v. Liberty Mut. Ins. Co., 48 Mass. App. Ct. at 592; or if it is unsupported by admissible evidence in the record or any other proper basis, see id. at 597.

Young's Case, supra at 904. If a judge rejects an uncontroverted medical opinion he must clearly and sufficiently state the reasons for doing so in findings with adequate support in the record. Svonkin v. Falcon Hotel Corp., 20 Mass. Workers' Comp. Rep. 133, 137 (2006), citing Galloway's Case, 354 Mass. 427 (1968). A judge may not substitute his own lay opinion for that of the § 11A physician, where the doctor had the same facts before him as did the judge. Taylor v. USF Logistics, Inc., 17 Mass. Workers' Comp. Rep. 182, 185 (2003); Shand v. Lenox Hotel, 12 Mass. Workers' Comp. Rep. 365, 368 (1998).

Here, the judge rejected the opinion of the impartial examiner because the employee testified to only a "few examples" of racial harassment, and they were "not as numerous or pervasive as the impartial physician assumed." (Dec. 9, 10.) In addition,

he found that "the various transfers, attendance reprimands and apprenticeships and promotions" experienced by the employee over the years were bona fide personnel actions which "were far more upsetting" to him than the racial harassment. (Dec. 10.) Neither of the judge's reasons for rejecting Dr. Jaffe's opinion fits within the approved reasons cited in Young's Case, supra, nor do they state any other proper basis for rejecting his prima facie opinion.

First, the judge's finding that there was a discrepancy in the number and "pervasiveness" of incidents of racial harassment testified to by the employee and assumed by the impartial examiner, is not supported by the record. Dr. Jaffe stated that his causal relationship opinion was based on "long-standing multiple episodes of inappropriate racial slurs and harassment," (Dep. 52; Dec. 7), and it was his impression that there were "dozens of incidents over many years." (Dep. 80.) These assumptions are not inconsistent with the employee's testimony. The employee testified that various comments or activities which he found harassing occurred repeatedly, sometimes over a period of years. See, e.g., Tr. I, 11 (supervisor acted like he was dribbling a basketball every time he saw the employee); Tr. II, 18 (questioning from supervisor about how employee knew he was clean occurred on a daily basis); Tr. II, 47 (co-workers displaying nooses and confederate flags on their toolboxes, and pointing and laughing at employee, went on for years). Moreover, the employee, and in many instances one or more co-workers, testified to each of the numerous incidents of harassment in the detailed hypothetical given to the impartial examiner by employee's counsel. The hypothetical posed to the doctor, and his answers, are as follow, with the transcript citation supporting each assumption in brackets:

> Q: I'm going to ask you, Doctor, to assume that during the course of Mr. Payton's employment Mr. Payton was subject to many stressful events, including, but not limited to, the following—and I want you to assume that this is true, that these statements are true: When he first became employed at Foster Forbes or Saint Gobain he was one of a few black people working in an employment force of over 200 people [Tr I, 10; Tr. IV, 10]; that supervisors made reference to having picnics and told him to bring the fried chicken and they would bring the watermelon [Tr. I, 11; Tr. III, 7]; that supervisors would mimic people playing basketball when

they walked by him [Tr. I, 11; Tr. III, 6-7]; that when he was first employed he was referred to as Toby, not as Tim, and he testified that was in reference to the movie Roots that was on television at the time; that when people spoke with him they would make fun of his stuttering, that they would call him T-T-T-T-Toby or T-T-T-T-Tim [Tr. I, 12, 23; Tr. III, 8]; that he was told that he was dumber than a Puerto Rican [Tr. I, 44]; that references were made to his hair and to his hairstyle. [Tr. I, 46-47.]

When more blacks were hired one of his fellow employees said it's getting to be like a jungle around here. [Tr. I, 46.] The N word was used when describing Mr. Payton. [Tr. III, 18, 63]. When Mr. Payton took a shower he was asked by one of the employees how do you know that you're clean [Tr. I, 26]; references were made about tar and feathering [Tr. I, 36, 85]; references were made about lynches. [Tr. I, 12].

At least three fellow employees predominantly [sic] displayed Confederate flags on their tool boxes. On the tool boxes were also hangmen nooses hanging from these tool boxes in clear view of Mr. Payton and other fellow employees; within the hangmen nooses there was steel wool. [Tr. II, 63-64; Tr. III, 19-24 34-35, 42-43, 58-59, 63.]

Now, I want you also to assume, Doctor, that while Mr. Payton was working on a machine a fellow employee came behind him dressed in a white suit with a white hood and tapped Mr. Payton on the shoulder. When he turned around this employee, using two tools, made the sign of a cross. [Tr. I, 40-42; Tr. IV, 64-65.] I want you to further assume, Doctor, that following this Mr. Payton saw people laughing about this incident. [Tr. I, 41-42.]

I want you to further assume, Doctor, that on June 30th of '01, while working the night shift during an electrical storm the power in the plant went off. Mr. Payton had an anxiety attack, felt that he was—was going to be physically attacked by fellow employees and does not remember any incidents following that. [Tr. I, 47-48.]

Now, Doctor, assuming these events to be true, do you have an opinion based on reasonable medical certainty whether this series of events are [sic] the predominant contributing cause of Mr. Payton's psychiatric disability?

A: Yes.

Q: And what is that opinion?

A: That they are.

> Q: Now, Doctor, what's the basis for that opinion?
>
> A: The basis for that opinion is that although Mr. Payton, based on my history and review of his records and examination, appears to have had a preexisting condition of anxiety, this condition appears in my medical opinion to have been significantly aggravated by *this series of harassing, intimidating, inappropriate events during the course of his employment.*
>
> Q: And your opinion is that *these events would be the predominant contributing cause of his disability?*
>
> A: *Correct.*

(Dep. 86-90, emphases added.)

Insurer's counsel voiced no objection to this hypothetical question, and therefore, it is in evidence for all purposes on which it may be probative. Nancy P. v. D'Amato, 401 Mass. 516, 525 (1988). Moreover, insurer's counsel asked no follow-up questions after Dr. Jaffe offered his predominant cause opinion. The judge concluded: "There is no doubt that Mr. Payton did suffer several incidents over the years that were racial in nature and that should be regarded as unacceptable behavior in our society." (Dec. 9.) However, the judge continued, "even if all true, while understandably upsetting, [they] do not seem especially pervasive." Id. There is no indication in the judges's findings that he discredited the employee's testimony describing numerous incidents of racial harassment. See May's Case, supra (record did not support self-insurer's argument that judge discredited employee's testimony where judge did not find that events recounted by employee did not occur, and specifically credited evidence that employee caused two supervisors to be disciplined, nor did judge state he disbelieved impartial physician). Rather, the judge found that Dr. Jaffe assumed there were *more* incidents of racial harassment than the employee recalled at hearing. (Dec. 9.) This finding is not based on the testimony at hearing or any reasonable inference which can be drawn from it, and therefore cannot support the judge's rejection of Dr. Jaffe's uncontradicted opinion on

causation.[4] In addition, the judge's finding that the racial incidents were not "especially pervasive" suggests he applied an objective standard in determining whether events were stressful. This has been explicitly rejected by the courts and this board:

> The administrative judge's view of the severity of the stressful incidents at work is an impermissible consideration. "[T]here is nothing in the statute to suggest that emotional disability is compensable only if it resulted from 'an unusual and objectively stressful or traumatic event.'. . . The finding that the employee's disability was causally related to a series of events at work is sufficient as long as those events [meet the required causal standard] bringing about the employee's disability." Robinson's Case, 416 Mass. at 460.

May's Case, supra at 213.

The other reason the judge gave for rejecting the impartial physician's opinion is equally inappropriate to support his failure to adopt that opinion. The judge failed to adopt the prima facie medical evidence not because he found the racial harassment the doctor assumed as true did not happen, but because he believed, based on his observations at hearing, that the racial incidents were not as upsetting to the employee as other work events which the judge determined were bona fide personnel actions. (Dec. 10.) The judge found: "As upsetting as the racial incidents were, it is clear from his testimony that these job actions (which I find to be bona fide) were far more upsetting to Mr. Payton." Id. This finding is not a credibility determination, as the insurer argues, but a determination of causation, which the judge is not qualified to make. See Sevigny's Case, 337 Mass. 747, 749 (1958); Josi's Case, 324 Mass. 415, 417-418 (1949). There was no medical evidence that designated bona fide personnel action was the principal or predominant cause of the employee's disability. See Bisazza v. MCI Concord, 21 Mass. Workers' Comp. Rep. 161, 168-169 n.7 (2007)(no medical evidence a bona fide

[4] The judge also found that another piece of the employee's history given to Dr. Jaffe was "at odds with the evidence," i.e., that the employee made several complaints to his supervisors or boss about the harassment which weren't taken seriously. (Dec. 8.) However, Dr. Jaffe testified that the fact the human resource director found no record of complaints would not prove either that the complaints were made or were not. (Dep. 21-22.) Moreover, Dr. Jaffe stated it was his impression that Mr. Payton's "style was to absorb things and not really say very much about it." (Dep. 23.)

personnel action was predominant cause of the employee's disability). Though the employee's hypothetical question asked Dr. Jaffe to assume that "during the course of Mr. Payton's employment [he] was subject to many stressful events," (Dep. 86), thus inviting Dr. Jaffe to factor in other events of which he was aware, the doctor clearly opined that the specific incidents of harassment enumerated in the hypothetical -- "*this* series of harassing, intimidating, inappropriate events" - - was the predominant contributing cause of the employee's disability. (Dep. 90; emphasis added.) By finding the racial incidents were *not* the predominant cause of the employee's anxiety and depression, (Dec. 10),[5] the judge erroneously substituted his own opinion for that of the impartial examiner. In effect, the judge has made the medical determination, without any supporting medical evidence, that the employee's disability arose principally out of the "various transfers, attendance reprimands, and apprenticeships and promotions." (Dec. 9; Section 1(7A)). Such a determination is not within the judge's authority. See Young's Case, supra at 904 (it was not for administrative judge to substitute his view on medical questions for that of impartial examiner); Lorden's Case, 48 Mass. App. Ct. 274, 280 (1999)(administrative judge may not rely "upon his own knowledge of medical matters in order to form his judgment").

The insurer argues the judge's decision should be affirmed based on our holding in Smith v. Charming Shoppes, Inc., 21 Mass. Workers' Comp. Rep. 67 (2007). The two cases are distinguishable. In Smith, we held that the administrative judge did not err by denying the employee's claim for compensation for an emotional disability because the impartial examiner's causation opinion failed to separate events the judge designated as bona fide personnel actions from other stressful work events. Id. at 70-71. Thus, the judge in Smith permissibly found there was " 'no persuasive expert medical opinion that

[5] By relying on the definition of "predominant cause" approved in May v. MCI Framingham, 19 Mass. Workers' Comp. Rep. 187 (2005), the judge may also have imposed an erroneously high causation standard. (Dec. 10.) The Appeals Court reversed the reviewing board's decision, finding error in our holding that " 'the predominant contributing cause' means the work cause(s) must be greater than the sum of all non-work-related causes." Id. at 191. Instead, the court held "predominant" is substantially equivalent to "the primary" or "the major" cause. May's Case, supra at 213.

the work events, excluding bona fide personnel actions, are the predominant cause of the mental disability.' " Id. at 70.

By contrast, here the impartial examiner's final opinion on causation did not fail to differentiate between incidents of racial harassment and "transfers, attendance reprimands, apprenticeships and promotions," found by the judge to be bona fide personnel actions. Dr. Jaffe was clear that the racial incidents were the predominant cause of the employee's disability. Moreover, none of those clearly harassing incidents could, in any way, be construed as a personnel action, bona fide or otherwise. See Avola v. American Airlines Co., 20 Mass. Workers' Comp. Rep. 293, 298-299 (2006)(had judge considered issue, he could not have concluded employee's loss of his job as union president was bona fide personnel action since fellow employees, not employer, voted him out of office); 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).

Citing O'Brien's Case, 424 Mass. 16 (1996), the insurer further argues that its due process rights will be violated if the judge is required to adopt the impartial physician's opinion. The insurer contends it will have been prevented from presenting evidence to the impartial physician who, in reaching his predominant cause conclusion, relied solely upon the history given by the employee, which was provided "without any challenge or form of cross-examination." (Ins. br. 8.) The record does not support these assertions.

First, Dr. Jaffe did not rely solely upon the history provided by the employee. He stated at deposition that his causation opinion was based, "[n]ot entirely upon [the employee's] history, although his history is certainly an important factor. It's based upon his history, a review of the medical records which were sent . . . to me, and the examination that I performed, as well as the two rating scales that he filled out and gave me." (Dep. 59.) Second, the insurer had the opportunity to, and, in fact, did ask the impartial examiner to consider other events it alleged were causative of the employee's emotional disability. The insurer questioned the impartial examiner about the effects of the employee's pre-existing anxiety, his drug and alcohol problems, and his family

problems. (Dep. 27-30, 69-75.) The insurer asked the impartial examiner to assume that every time the employee was going to be disciplined, he would make a racial harassment complaint. (Dep. 64.) The insurer further asked the impartial physician to assume the employee was transferred from a machine in April 2001 due to production problems, after which he began going out from work; and that the employer had no other documented complaints from the employee about racial harassment after the 1988 incident involving his supervisor. (Dep. 65-66.)[6] Moreover, the employee's hypothetical question asked Dr. Jaffe to assume as true the incidents of racial harassment set forth infra, as well as other "stressful events" within his employment. Dr. Jaffe's opinion was that "this series of harassing, intimidating, inappropriate events during the course of his employment" was the predominant cause of Mr. Payton's emotional disability. (Dep. 90.)

We do not think Dr. Jaffe's opinion is vitiated by the fact that he had not been informed about every reprimand, transfer or delay in promotion. He knew enough about the employee's work and personal life to give an informed causation opinion. See Young's Case, supra at 905 (impartial physician's opinion "was not incompetent for lack of more detailed, particularized knowledge of the employee's workplace and duties"); see also Nason, Koziol and Wall, Workers' Compensation (3rd ed. 2003) § 17.18, and cases cited ("[S]light factual errors in a hypothetical question will not undermine an expert opinion"). Cf. Smith v. Bell Atlantic, 63 Mass. App. Ct. 702, 718-720 (2005)(judge permissibly excluded medical expert's testimony on grounds she knew too little about employee's life to opine on major cause of medical condition).

[6] The impartial examiner agreed that, barring any "credibility factors," "the harassment *and problems he faced at work* were the predominant contributing cause of his condition." (Dec. 78; emphasis added.) Were this, in fact, Dr. Jaffe's final opinion, it would be insufficient to sustain the employee's burden of proof because it did not differentiate between the degree to which the employee's disability was caused by inappropriate harassing incidents and bona fide personnel actions. See Smith, supra at 70-71. The hypothetical question asking the impartial doctor to assume both incidents of racial harassment and "other stressful events" occurring at work was asked later in the deposition. See Dep. 86-90.

To the extent Dr. Jaffe was unaware of any potentially bona fide personnel actions, we think it represents a failure of the insurer's burden of production. A single justice of the Appeals Court has held that predominant cause need not be raised as an affirmative defense: "Once the [insurer] contested liability and causal relationship . . . the employee had 'the burden of proving the essential facts necessary to establish a case warranting the payment of compensation.' " Jackson v. Roxbury Comm. College, Mass. App. Ct., No. 03 – J – 332, slip op. at 4 (June 1, 2005)(single justice), citing Viveiros's Case, 53 Mass. App. Ct. 296, 299 (2001). This board has tacitly approved that holding. See Descoteaux v. Raytheon Co., 19 Mass. Workers' Comp. Rep. 211, 215 n.7 (2005). However, we have not addressed which party bears the burden of producing evidence of bona fide personnel actions.[7] We do so here.

Once the employee has introduced prima facie medical evidence that his emotional disability was predominantly caused by events at work, we think it is the insurer's burden to produce evidence, including medical evidence, that the emotional disability arose "principally out of a bona fide personnel action." Production of evidence that a bona fide personnel action is the principal cause of the employee's emotional disability is in the nature of an affirmative defense. See Presto v. Bishop Connolly High School, 20 Mass. Workers' Comp. Rep. 157, 161 n.6 (2006). Once the insurer produces evidence, including medical evidence, that the employee's emotional disability arose "principally out of a bona fide personnel action," the employee's burden to produce further evidence to substantiate his claim is increased.

We think the burden shifting which occurs within employment discrimination cases is analogous to that in emotional disability compensation cases involving potentially bona fide personnel actions. In discrimination cases,

[7] In Smith, supra at 70 n.3, we noted the difficulty parties face in framing causation questions for the medical expert in the absence of any knowledge of which work events, if any, the judge will designate as bona fide personnel actions. Our decision today helps address that problem by placing the burden on the party with the knowledge and motive to question the impartial examiner about bona fide personnel actions.

> The employee is assigned the threshold burden of establishing a prima facie case, after which the burden of production shifts to the respondent to articulate a legitimate, nondiscriminatory reason for its action, and to "produce credible evidence to show that the reason or reasons advanced were the real reasons." The burden of proving that the asserted nondiscriminatory reason was a pretext rests upon the employee.

Sarni Original Dry Cleaners, Inc. v. Cooke, 388 Mass. 611, 614-615 (1983). (citation omitted.)

Similarly, in compensation cases, the employee bears the burden of proving the essential facts required to establish entitlement to benefits under chapter 152. Viveiros's Case, supra; Sponatski's Case, 220 Mass. 529 (1915). This does not mean, however, that the insurer never has the burden of producing evidence in defense of an employee's claim. As we stated in Fairfield v. Communities United, 14 Mass. Workers' Comp. Rep. 79, 82-83 (2000), with respect to the insurer's burden to produce evidence of a pre-existing condition:

> As a practical matter, the insurer has the burden of producing evidence against the claimant when it seeks to deny a claim by contending that the employee had deviated from the employment, that causal relation was interrupted by an independent intervening cause, and the like. In the absence of such evidence, the insurer runs the risk that the single member will accept the claimant's version of the case. But the effect of producing such evidence is to increase the claimant's burden of persuasion and require him to offer further evidence to substantiate his claim.

Id., quoting L. Locke, Workmen's Compensation, § 502, n.15 (2nd ed. 1981.) See also, Jobst v. Leonard T. Grybko, 16 Mass. Workers' Comp. Rep. 125, 130-131 (2004)(insurer has burden of production on factual predicates necessary to trigger application of § 1(7A)); Dupuis v. Phillip Beaulieu Home Improv., 19 Mass. Workers' Comp. Rep. 33, 33-34 n.1 (2005)(§ 27 is an affirmative defense and insurer carries burden of proving employee guilty of serious and willful misconduct); Garbarino v. Vining Disposal, Inc., 13 Mass. Workers' Comp. Rep. 173, 175 (1999)(§ 27A is an affirmative defense); Sicard v. General Electric, 20 Mass. Workers' Comp. Rep. 121, 123 (2006)(issue of short-term

disability benefits as bar to compensation is affirmative defense, and insurer must go forward with necessary evidence).[8]

The employee here was satisfied with Dr. Jaffe's opinion that the predominant contributing cause of his emotional disability was the racial harassment to which he had testified. It is neither realistic nor fair to expect the employee to place before the impartial examiner potential bona fide personnel actions which, in his mind, have no bearing on his claim and may, in fact, defeat it. Not only is it in the insurer's interest to do so, but whether an employer action is a bona fide personnel action is uniquely within the employer's knowledge. See Commonwealth v. Farley, 64 Mass. App. Ct. 854, 861 (2005)("an affirmative defense 'involves a matter of . . . justification peculiarly within the knowledge of the defendant on which he can fairly be required to adduce supporting evidence.' Model Penal Code § 1.12(3)(c) (1985)").

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[8] We see no merit in the insurer's argument that it did not have the opportunity to cross-examine the impartial physician on particular events found by the judge to be bona fide personnel actions because the judge based his findings on the testimony of John Pigaga, the employer's human resource manager, who testified after the impartial deposition was taken. If the insurer knew, as presumably it did, the evidence which would be presented by Mr. Pigaga, its own witness, it could have asked the impartial physician to assume Pigaga's expected testimony as true. See Liacos, § 7.7.3, 410(hypothetical questions can be posed based on evidence parties expect will be introduced). Barring that, the insurer could have requested the opportunity to further depose the impartial examiner after Mr. Pigaga's testimony. See Ortiz v. Boston Bagel Co., 17 Mass. Workers' Comp. Rep. 579 (2003). Alternatively or in addition, the insurer could have requested the opportunity to submit additional medical evidence. The insurer took none of these actions, nor did it even pose a further question to the impartial physician after the employee had elicited a predominant contributing cause opinion from him. It clearly had the opportunity to examine Dr. Jaffe to;

> inquire into the basis of the examiner's report, whether he considered the medical records and reports submitted to him by that party, how the examiner was able to reach an unfavorable conclusion in the light of such records and reports, and in this way bring these materials to the administrative judge's attention in the stage three hearing and perhaps argue on their strength that the judge should authorize additional medical testimony.

O'Brien's Case, supra at 23.

Here, the insurer has failed to produce evidence to rebut the prima facie opinion of Dr. Jaffe that the employee is totally and permanently disabled as a result of incidents of racial harassment at work. Therefore, we reverse the judge's decision denying and dismissing the employee's claim, and recommit the case to the judge for the limited purpose of determining when the employee's permanent and total incapacity for work began.[9]

So ordered.

_____
William A. McCarthy
Administrative Law Judge

Filed:

_____
Patricia A. Costigan
Administrative Law Judge

_____
Bernard W. Fabricant
Administrative Law Judge

[9] The impartial physician opined in his first report of May 9, 2002, that the employee was temporarily totally disabled, and in his second report of October 12, 2003, that the employee's disability was most likely permanent. (Stat. Exs.1 and 2.) The judge found that "[b]y 2004, three years after leaving work, the employee's symptoms had worsened," (Dec. 6), and, there is "little doubt" the employee is permanently and totally disabled. (Dec. 8.)