COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 071280-01**

Kelly Smith	Employee
Charming Shoppes, Inc.	Employer
Royal Insurance Company of America	Insurer

REVIEWING BOARD DECISION
(Judges Horan, Fabricant and McCarthy)

APPEARANCES
Gregory J. Angelini, Esq., for the employee
Michael E. Kiernan, Esq., for the insurer at hearing and on appeal
Lauren M. Bergheimer, Esq., for the insurer on appeal

HORAN, J. The employee appeals from an administrative judge's decision denying her claim alleging an emotional injury arising out of a series of events over a three-day period at work. For the following reasons, we affirm the decision.

Kelly Smith, the employee, is a forty-year-old single mother with a high school education. Over the years, she has treated for a variety of emotional conditions including panic attacks, depression, anxiety, agoraphobia, and attention deficit hyperactivity disorder. (Dec. 5, 9; Ex. 1, Impartial report.) In April 2001, she began working for the employer as a head cashier. Until the work events in September of 2001, she was functioning reasonably well, with few symptoms related to her emotional problems. (Dec. 8.)

On September 25, 2001, the employee attempted to call her supervisor, Danielle Milone, to inform her that she would be late for work; unfortunately, the line was busy. When Ms. Smith arrived at work approximately a half-hour late, she discovered Ms. Milone had called in a replacement for her. When the employee tried to explain why she was late, Milone refused to listen. The employee became upset, and complained to the district manager, who advised her

to go home. The district manager promised to discuss the matter with Ms. Milone; however, she failed to do so. For the next two days, Ms. Milone gave the employee "the silent treatment" at work, and was generally less than amicable. On September 27, the employee again called the district manager who said she would try to visit the store. That morning, the employee had two panic attacks; she resigned from her job later that day. (Dec. 5-6, 8, 10-12.)

Following these work events, the employee experienced a "full recurrence of her panic attacks and depression." She resumed treatment with her therapist, who increased her medications. In July of 2002, she was able to perform part-time work at Mount Wachusett Community College. By August 2003, she was functioning quite well emotionally. (Dec. 5-6, 8-10.)

The employee's claim was denied at conference, and she appealed to an evidentiary hearing, claiming a closed period of § 34 benefits from September 27, 2001 to August 3, 2003, and § 35 benefits thereafter. Among the defenses raised by the insurer at the hearing were § 1(7A) and "Bona Fide Personnel Action."[1] The judge found that the report of the impartial physician, Dr. Bruce Goderez, was adequate, and denied the employee's motion for additional medical evidence. The parties later deposed Dr. Goderez. (Dec. 2-3.)

In his January 27, 2003 report, Dr. Goderez opined the employee was totally disabled due to a "major depressive disorder, recurrent, in partial remission, panic disorder with agoraphobia, generalized anxiety disorder, [and] attention-deficit hyperactivity disorder." (Dec. 6-7.) He wrote:

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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.

> The workplace injury consisted of conflict with an apparently abusive supervisor. In her account, she presents her attempts to deal with the situation reasonably and maturely by approaching the supervisor to try to discuss their differences. When this was not successful, she appealed to the district manager, who failed to respond within several days. She explained to me that the district manager was in close geographic proximity, and could easily have come in that amount of time. It is evident from her account that she felt quite betrayed at that point, and suddenly began to experience an extreme degree of panic symptoms. She subsequently decompensated completely, having a full recurrence of panic and depression which has only responded partially to vigorous pharmacological treatment and supportive psychotherapy.
>
> There seems to be no question that the recurrence of her long-standing anxiety and depressive symptoms were [sic] precipitated by the situation with her supervisor at work.

(Ex. 1, Impartial report, 3; see Dec. 8.)

At deposition, Dr. Goderez testified the "incident" at work "caused all her defenses to fall apart and after that all her psychopathology was full blown again and she was unable to function." (Dep. 50-51; Dec. 8.) He was asked if the incident at work was "a major but not necessarily predominant cause" of her disability, to which he replied "absolutely." (Dep. 14; Dec. 7.) He was never asked to opine whether the incident at work was "the predominant contributing cause" of the employee's disability, in accordance with the applicable standard for mental and emotional disabilities that do not result from a compensable physical injury. Cornetta's Case, Mass. App. Ct., No. 2006 – P – 9, slip. op. (January 25, 2007). Nor was he asked to specifically identify which work-related event, or combination of events, precipitated the employee's disability.

Acknowledging the lack of an explicit opinion regarding "the predominant contributing cause" of the employee's disability, the judge nevertheless found "the intent of [Dr. Goderez's] meaning does meet the heightened predominant standard." (Dec. 13.) However, the judge also found that some of the work events were bona fide personnel actions and, as such, any disability resulting from them

would not be compensable in the absence of the intentional infliction of emotional harm, which he did not find. (Dec. 14.) The events the judge deemed bona fide personnel actions were: Ms. Milone calling in a replacement for the employee when she was late; docking the employee a day's pay; and the failure of the district manager to intervene in the dispute, or to return the employee's call.[2] (Dec. 12.) The judge found Ms. Milone's "silent treatment and less than amicable attitude" toward the employee were *not* bona fide personnel actions. (Dec. 13.) The judge concluded:

> [A]s I find that some of the events at work were based on bona fide personnel actions and that the impartial physician does not differentiate among the various events that precipitated the recurrence of Ms. Smith's pre-existing symptoms, I determine that the employee has not met her difficult burden in this very complex case and I deny her claim.
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> Dr. Goderez does not report what specific events and incidents were the predominant cause of Kelly Smith's disability. There is no way of knowing whether such events or incidents are bona fide personnel actions. Consequently, there is no persuasive expert medical opinion that the work events, excluding bona fide personnel actions, are the predominant cause of the mental disability.

(Dec. 14.) Accordingly, he denied and dismissed the employee's claim. (Dec. 15.)

On appeal, the employee advances one argument. She maintains that because Dr. Goderez's causal relationship opinion was based on a description of incidents at work which did *not* include the events the judge designated as bona fide personnel actions, she carried her burden of proving compensability. Specifically, the employee avers it is clear Dr. Goderez opined that the incidents at work which caused the employee's disability were the "abusive style of the supervisor" and the fact that the supervisor kept "brushing her off," neither of which the judge found to be bona fide personnel actions. (Employee br. 8, quoting

[2] The employee does not challenge the judge's findings that these events were "bona fide" or that they were "personnel actions" as contemplated by the statute.

Imp. dep. 54.) We disagree. Dr. Goderez was aware of the district manager's involvement, and factored it into his causation analysis.[3] In his report, Dr. Goderez stated:

> The client reports that she tried several times to approach the supervisor to talk about the incident, and *when that was not successful, called the district manager who promised to come over and help mediate the situation. She failed to come within 2 days, at which point the client started suffering panic attacks*, and on the third day after the incident, she resigned from her job.

(Ex. 1, Impartial rep. 1; emphasis added.) At his deposition, Dr. Goderez iterated that, "there was an unpleasant situation and then she had to appeal to a higher authority who had not responded in a timely fashion. She evidently felt betrayed. . . ." (Dep. 9.) He further testified, "[s]he called the next one up the line who was supposed to mediate. Several days later she found herself with a full blown panic attack." (Dep. 54.)

Based on the foregoing medical evidence, the judge could reasonably conclude Dr. Goderez based his causation opinion, at least in part, on the failure of the district manager to intervene. Cf. Patterson v. Liberty Mutual Ins. Co., 48 Mass. App. Ct. 586, 597-598 (2000)(a medical opinion based on facts not found by the judge is entitled to no weight). Because the judge found that the district manager's failure to intervene constituted a bona fide personnel action, he properly denied the claim.[4] Descoteaux v. Raytheon Co., 19 Mass. Workers'

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[3] At the deposition, counsel did not ask the doctor to segregate the potentially bona fide personnel actions from other work events when addressing the causation issue. Nor did counsel request bifurcation of the case to seek a preliminary determination concerning which, if any, of the work events were bona fide personnel actions. In emotional disability cases involving more than one work-related event, it may be advisable for the moving party to ask the judge to issue a preliminary ruling, prior to the taking of medical deposition testimony, describing which events are bona fide personnel actions. This should enable the parties to better tailor their questioning of the medical experts regarding causation.

[4] Though the judge did not explicitly find the employee's disability arose "principally out of" the bona fide personnel actions, he need not go that far. Instead, he found the

Comp. Rep. 211, 214-215 (2005)(a disability is excluded from the definition of personal injury unless employment events, not deemed to be bona fide personnel actions, are its predominant contributing cause).

Thus, finding no merit to the only[5] argument advanced by the employee, we affirm the decision of the administrative judge.

So ordered.

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Mark D. Horan
Administrative Law Judge

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Bernard W. Fabricant
Administrative Law Judge

McCARTHY, J., (dissenting). I agree with the majority that Dr. Goderez factored into his causation opinion a bona fide personnel action. I further agree that, as a result, the judge was warranted in finding he was unable to determine whether work events, which were not bona fide personnel actions, were the predominant cause of the employee's emotional disability. However, I think that because Ms. Smith did not know, when she was developing the medical evidence, what events, if any, the judge would find were bona fide personnel actions, she has been deprived of a realistic opportunity to prove medical causation -- and perhaps

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employee failed to prove the work events, excluding those deemed to be bona fide personnel actions, were the predominant cause of her disability. Even if, arguably, the doctor's deposition testimony could be interpreted differently, it is the judge's interpretation, not counsel's, and not ours, which governs. G. L. c. 152, §§ 11, 11B, 11C.

[5] We note the employee has not claimed her due process rights were violated when the judge denied her motion to introduce additional medical evidence. Nor does the employee assert the judge had an obligation to advise her, prior to the doctor's deposition, which of the employment events were bona fide personnel actions. The dissent urges a recommital. We are empowered to recommit cases "when appropriate" . . . "for further findings of fact." G. L. c. 152, §11C. The employee had ample opportunity to pose a series of questions based on various combinations of events with

of her due process rights as well. See O'Brien's Case, 424 Mass. 16, 22-23 (1996). Therefore, I would recommit the case so, armed with this knowledge, she may appropriately develop the medical evidence.

Cases involving mental and emotional disabilities are often among the most complex compensation cases to analyze and prove. See Nason, Koziol and Wall, Workers' Compensation §§ 9.9, 9.10 (3d ed. 2003). The judge must first determine whether a work event or series of events, rather than non-work stressors or pre-existing psychiatric problems, are the predominant contributing cause of the employee's disability. If he finds in the affirmative on that issue, he must " 'go on to make findings on whether the "disability arose principally out of a bona fide, personnel action including a transfer, promotion, demotion or termination[.] § 1(7A)' " Caruso v. Hair Club for Men, 18 Mass. Workers' Comp. Rep. 249, 252 (2004), quoting Walczak v. Massachusetts Rehab. Comm'n, 10 Mass. Workers' Comp. Rep. 539, 549 (1996). Moreover, " '[w]here a case presents both stressful [work] events and bona fide employer actions, each must be assessed independently of the other under the statutory criteria' to determine whether the disability arose *principally* out of events that were bona fide personnel actions or out of another event or series of events occurring within the employment." Vining v. Walter E. Fernald State School, 11 Mass. Workers' Comp. Rep. 250, 252 (1997)(emphasis in original), quoting Beckett v. Cummings Alden, Inc., 10 Mass. Workers' Comp. Rep. 641, 644 (1996); see also Golec v. Chestnut Knoll Retirement Community, 12 Mass. Workers' Comp. Rep. 76, 82 (1998). There is no liability if the causative events are deemed bona fide personnel actions, in the absence of intentional infliction of emotional harm. Caruso, supra; Walczak, supra.

It is the rare claim for emotional disability where there is one clear-cut work event producing incapacity. In many, if not most, cases, there are a series of

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the proper causation standard in mind. Recommital is not appropriate here because it would be the equivalent of granting the employee a second bite at the apple.

events. And yet, as in this case, prior to the issuance of the judge's decision, the parties do not know what events the judge will deem bona fide personnel actions, or even, into how many events the judge will subdivide the events at work. Will there be two events or six? Which ones, if any, will be bona fide personnel actions? [6] Under such circumstances, it is virtually impossible for the parties to frame hypothetical questions reflecting the precise scenario ultimately found by the judge.

I agree with the majority's suggestion that it would be advisable for a judge to issue a preliminary ruling, prior to the taking of medical deposition testimony, setting forth which work events he considers are bona fide personnel actions. (See n.3.) Indeed in a complex emotional disability case like this one, such a preliminary ruling may be essential! I would recommit the instant case so the employee, equipped with knowledge of the judge's bona fide personnel action determinations, may have the "opportunity to present testimony necessary to present fairly the medical issues," O'Brien's Case, supra, through further questioning of the impartial physician or the admission of additional medical evidence. Without such knowledge, I do not think the employee has had a realistic opportunity to meet her burden of proof.

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William A. McCarthy
Administrative Law Judge

Filed: **March 8, 2007**

[6] In his decision, the judge subdivided the work "event" into five smaller events, three of which he found to be bona fide personnel actions. In his causation opinion, Dr. Goderez mentioned only three of the five events parsed out by the judge.