[J-15-1998 MO: J. Zappala]
IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

JAMES H. DAVIS	:	No. 118 M.D. Appeal Docket 1997
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	:	Appeal from the Memorandum Opinion
	:	and Order of the Commonwealth Court
v.	:	dated December 26, 1996, 1413 C.D.
	:	1996 Reversing the Order of the Workers'
	:	Compensation Appeal Board
	:	
WORKMEN'S COMPENSATION APPEAL	:	
BOARD (SWARTHMORE BOROUGH)	:	
	:	ARGUED : February 2, 1998
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APPEAL OF: BOROUGH OF	:	
SWARTHMORE	:	
	:	

DISSENTING OPINION

MR. JUSTICE NIGRO **DECIDED: MAY 18, 2000**

I respectfully dissent from the majority's opinion to the extent it requires proof of abnormal working conditions when a claimant sustains physical injuries from a psychological stimulus.

First, I find that the majority, in weaving its way to its conclusion, makes ambiguous use of the term "injury." In workers' compensation claims, there are three cause and effect paradigms in which a psychological or "mental" component plays a role. The workers' compensation shorthand for these are known as 1) physical/mental (where a physical stimulus causes a psychic injury) 2) mental/mental (where a

psychological stimulus causes a psychic injury), and 3) mental/physical (where a psychological stimulus causes a physical injury). Volterano v. Workmen's Compensation Appeal Board (Traveler's Insurance Co.), 536 Pa. 335, 345, 639 A.2d 453, 457-57 (1994). Thus, in examining a claimant's petition, the element to the left of the slash mark indicates, very simply, what *happened* at the workplace; that is, what "befell" the employee such that he alleges he sustained a disability and cannot perform the job he was doing before something work-related happened. The effect on him, whether it be a disease, an affliction, a condition, a handicap, an illness, a death, (in other words, the harm done to his body) is expressed by the term following, or to the right of, the slash mark. In other words, what happened to him (left side of slash mark) made him *disabled* in either a physical or a psychological way (right side of slash mark).

The majority opinion urges that the problem with Davis's claim is that he confuses cause and effect. Yet, in the opinion itself, the word "injury" is used variously as the cause (left side) and as the result (right side), much to my confusion. When indicating the cause of a claimant's disability, the majority improperly uses "injury" to be synonymous with stimulus, accident, event; but when indicating the disability itself, "injury" is used properly, as synonymous with symptoms, manifestation, reaction, disability, disorder. While the majority sets out to address the confusion which reigns in analyzing the cause and effect in workers' compensation claims, I believe it is only adding to the confusion by not insisting that the word "injury" means the *result* or the harm alleged to an employee. Thus, the *cause* or the condition precipitating the harm is not ever an "injury," and I don't believe Davis is claiming it is.

Nonetheless, despite the instant shifting back and forth of the word injury as both cause and effect, I believe I understand the majority opinion to stand for the proposition that *whenever* the cause of an injury is something psychological at the workplace, be it a traumatic psychological event, (such as, by example, when bank employees are taken hostage by robbers) or an ongoing condition (such as, again by example, repeated sexual harassment), whether or not the resulting disability is psychological (such as a nervous breakdown) or physical (such as a heart attack), the claimant must prove that the disability was caused by the work incident or condition *and* must prove that that responsible incident or condition was *abnormal* to that workplace. To the extent the majority is requiring abnormal working conditions in mental/physical claims, I disagree, as that is not what case law has held.

The majority cites to Martin v. Ketchum, Inc., 523 Pa. 509, 568 A.2d 159 (1990) to require that Davis sustain the two-prong test stated therein. Specifically, Martin requires that a claimant prove that he suffered a psychic work-related injury and that such injury is other than a subjective reaction to normal working conditions. In Martin, the injured employee endured stress on the job and ultimately committed suicide. The claim was deemed "mental/mental," and the two-pronged test was therefore appropriate. Here, however, the WCJ found the testimony of Davis's medical expert to be "credible, and convincing" and furthermore found the testimony of the Borough's medical expert to be equivocal, unconvincing and not credible. The WCJ found that Davis suffered from "psychiatric illness" *as well as* "physical impairments . . . including a right-hand tremor" and "loss of sleep, shortness of breath, chest pressure and palpitations, muscle twitching, with aches and pains . . ." which directly affected his

ability to continue to perform his employment duties. The Workers' Compensation Appeal Board (Board) reversed, finding that Davis's claim should have been considered under the mental/mental paradigm requiring a showing of abnormal working conditions, and that the tremor was not sufficient as a physical injury to change the paradigm to mental/physical requiring a reduced burden of proof. Accepting the findings of the WCJ,[1] the Commonwealth Court characterized Davis's claim as mental/physical and reinstated the grant of benefits finding that Davis had met the mental/physical burden of proof regarding the hand tremors. Thus, as the instant case is properly characterized as mental/physical, Martin is eminently distinguishable. Instead, the facts and holding of Whiteside v. Workers' Compensation Appeal Board (Unisys), 650 A.2d 1202 (Pa. Commw. 1994), appeal denied, 544 Pa. 650, 664 A.2d 978 (1995), are on point.

In Whiteside, the claimant experienced workplace stress due to a corporate merger in which she was assigned a new boss, new duties, an increased workload and longer hours. She was diagnosed with anxiety neurosis, headaches, angina, gastrointestinal problems including diarrhea and persistent abdominal pain. The WCJ granted benefits. The Commonwealth Court agreed, finding that Whiteside's claim fit the "mental/physical" paradigm.[2] The burden of proof articulated in Whiteside for

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[1] Where, as here, the Board takes no additional evidence, an appellate court reviews the record in its entirety in order to determine whether the WCJ's factual findings are supported by substantial evidence. Ryan v. Workmen's Compensation Appeal Board (Community Health Svcs.), 550 Pa. 550, 707 A.2d 1130 (1998). Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. Id. Furthermore, the WCJ determines all issues of testimonial credibility and such determinations bind the parties on appeal unless made arbitrarily and capriciously. Id.

[2] Angina had previously been recognized as a compensable physical disability resulting from workplace stress. Borough of Media v. Workmen's Compensqtion Appeal Board (Dorsey), 134 Pa. Commw. 573, 580 A.2d 431 (1990).

mental/physical claims is that claimant must show distinct identifiable physical injuries and must present unequivocal medical testimony that causally connects the physical injury to the workplace. Id. at 494-95, 650 A.2d at 1205-06. Instantly, the majority rejected Whiteside, relying instead on Martin and, in doing so, ignored the findings of the WCJ [3] by deeming Davis's claim as purely mental/mental. The majority therefore recharacterized Davis's physical injuries as merely a physical "reaction" to his psychiatric illness.

I find that the majority's characterization, throughout its opinion, of a physical illness arising from a psychological stimulus as merely the "physical manifestation of psychic injury" to be so restrictive as to make recovery pursuant to the mental/physical paradigm nearly impossible under any circumstances. Based on the majority's present analysis, it in effect has eliminated the mental/physical paradigm. According to the majority's interpretation, despite case law to the contrary, a heart attack,[4] angina,

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[3] Davis presented unequivocal credible evidence that, inter alia, his hand tremors were related to his assumption of the stresses of the police chief's position following the sudden death of his longtime boss and co-worker, his added duties due to manpower shortages, his new responsibilities and longer hours.

[4] See, e.g., Washington Food Specialties, Inc. v. Workmen's Compensation Appeal Board (Britko), 144 Pa. Commw. 226, 601 A.2d 439 (1991), appeal denied, 533 Pa. 603, 617 A.2d 1277 (1922) (finding heart attack caused by work-related stress compensable).

colitis,[5] or an ischemic heart condition[6] would be merely "related physical complaints" attendant to the stress reaction a claimant would suffer from workplace trauma or pressures. Thus, wherever the cause is psychological, I read the majority opinion as re-labeling the physical injury as a psychological injury with "physical manifestations," instead of recognizing that physical illness may result directly from a psychological workplace stimulus. I contend that, merely because the cause (the event at the workplace) of certain physical ailments may have a psychological component, the physical injury (the effect on the employee) is *not* metamorphosed into a psychological injury with physical manifestations and the subsequent burden of proof is *not* the two pronged Martin test. Instead, where, as here, a physical injury results from a psychological stimulus, the proper burden of proof is that articulated for a mental/physical claim under Whiteside.

Finally, I find the majority's citing to Metropolitan Edison Co. v. Workmen's Compensation Appeal Board (Werner), 1998 WL 668323 (Pa.), misleading in the context of this case. The appellant in Metropolitan Edison claimed to be suffering from shift work maladaptation syndrome due to being rotated between day and night schedules for more than twenty years. This Court denied him disability benefits finding that the schedule rotations were a normal working condition of employment with

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[5] See, e.g., Breen v. Commonwealth, 52 Pa. Commw. 41, 415 A.2d 148 (1980) (workplace stress resulting in colitis is mental/physical and claimant need not establish abnormal working conditions).

[6] See, e.g., Steinle v. Workmen's Compensation Appeal Board, 38 Pa. Commw. 241, 393 A.2d 503 (1978) (holding work-stress caused ischemic heart condition to be compensable injury).

Metropolitan Edison. In other words, we found that there were certain conditions of being employed that were just unavoidable (like having to report to a place a business, having to work a certain number of hours, and having to do so within an employer's schedule) and cannot, alone, be considered triggers of either mental or physical work-related injury. The Metropolitan Edison Court merely considered the threshold question of whether work shifts, an ordinary element of the job, could, in and of themselves, be deemed the cause of any workplace injury. I joined the majority opinion as I believed that being scheduled on or rotated between day and night shifts was not a cause or stimulus which could result in a compensable injury -- mental or physical. It was not necessary, therefore, to determine whether shift work maladaptation syndrome was a physical or a mental condition as it was not compensable either way. We therefore did not assign a burden of proof to such a claim. Id. at *6 n.2. I therefore find the majority's reliance on Metropolitan Edison for anything but the threshold determination that shift work does not constitute a viable cause of injury under the Act, to be misplaced, unpersuasive, and having no bearing whatsoever on the instant case or the burden of proof required of Davis.

In conclusion, I find that the requirement of proving abnormal working conditions when a physical injury results from a psychological workplace cause is improper and instead would find that the proper burden of proof is the long-held requirement that a claimant must show distinct identifiable physical injuries which, through unequivocal medical testimony, are shown to be connected to the workplace. Whiteside, 650 A.2d at 1205. Furthermore, I would find that Davis met his burden and should receive

benefits for his physical disability. I would, therefore, affirm the decision of the Commonwealth Court.