



State of New Hampshire

COMPENSATION APPEALS BOARD

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December 10, 2020

Brian Shaughnessy, Esq.
Shaughnessy Raiche
24 Eastman Ave. Suite C3
Bedford NH 03110



Re: Deborah Banaian V Merrimack Valley School District
Docket # 2021-L-0018

Dear Attorney Shaughnessy:

Enclosed is a copy of the decision rendered by the Compensation Appeals Board in the above-captioned matter.

Any party to the proceeding aggrieved by an order or decision of the Panel may appeal same to the Supreme Court pursuant to RSA 541:6 Appeal. - *Within thirty days after the application for a rehearing is denied, or, if the application is granted, then within thirty days after the decision on such rehearing, the applicant may appeal the petition to the Supreme Court.*

Should either party wish to utilize an audio recording of the hearing, it will be held for six months from the date of the decision. After that time, it will be destroyed in accordance with our retention policy. The digital recording is available through the Department of Labor for a fee of \$20.00.

Respectfully submitted,

Christopher T. Regan, Esq., Panel Chair
Compensation Appeals Board

Cc: Charles Giacomelli, Esq.



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December 10, 2020

DECISION OF THE COMPENSATION APPEALS BOARD

Docket Number 2021-L-18

DEBORAH BANAIA

v.

MERRIMACK VALLEY SCHOOL DISTRICT
(SAU 46)

APPEARANCES:

The interests of the claimant were represented by Brian C. Shaughnessy, Esquire.

The interests of the employer, Merrimack Valley School District, and its insurer, Primex3, were represented by its attorney, Charles T. Giacomelli, Esquire.

DATE OF INJURY:

May 17, 2016.

ISSUES:

RSA 281-A:2, XI & XIII - Causal Relationship of Injury
RSA 281-A:23 - Medical, Hospital and Remedial Care
RSA 281-A:48 - Review of Eligibility for Compensation;
Extent of Disability

WITNESSES:

The claimant, Deborah Banaian.
Brian Lynch, the current principal of the Merrimack Valley Middle School.

HEARING:

A *de novo* appeal hearing was held via WebEx at the New Hampshire Department of Labor, Concord, New Hampshire on November 9, 2020, with the claimant and the attorneys appearing remotely.

PANEL:

The panel was comprised of Christopher T. Regan, Esquire (Chair), Daniel Manning and Brent Lemire.

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BACKGROUND

The claimant had been the target of a malignant and sexually-degrading hack to her school district's website that she learned about on May 17, 2016. The claimant suffered psychological injuries described as a mental stress injury, which was determined to be work related by a decision by a hearing officer at the Department of Labor on January 9, 2018. She was out of work for a period of time, but returned on January 3, 2017.

The claimant instituted a subsequent claim that alleged that she suffered a recurrence of the mental stress injury as a result of certain situations and actions that occurred in late 2019.

At issue are various counseling and medical bills incurred between December 31, 2019 and April 8, 2020. Also at issue was the claimant's request for reinstatement of indemnity benefits.

The Department of Labor held a hearing on July 1, 2020. Following that hearing, a hearing officer ruled that the claimant had failed to prove that the treatment at issue was reasonable, necessary and causally related to her prior work injury of May 17, 2016, and denied her request for payment of her medical and therapy bills. In addition, the hearing officer ruled that she had failed to demonstrate that there was a change on her condition justifying resumption of indemnity benefits and denied that request.

The claimant appealed.

FINDINGS OF FACT

The claimant was 56 years old at the time of the CAB hearing (DOB: 04/19/1964). She has a Master's Degree in Education. The claimant has been a teacher for 22 years, the last 17 with the Merrimack Valley School District. She has been teaching 8th grade science and reading systems at the Merrimack Valley Middle School for a number of years. As a part of her responsibilities as a teacher, she was expected to assume "extra duties" which would include supervising the lunchroom, the halls between class periods, and outside before and after the beginning and end of the day.

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Outside of school, the claimant is a professional arm wrestler at the international level. She has won 14 National Championships and two World Championships, the later in 2015 and 2017.

On May 17, 2016, she learned that someone had accessed and changed the school website to target her with vulgar and sexually derogatory and abusive statements, some involving other students and parents. She later found out that it was likely a student who was in her class three years previously. At the time, they were unaware who did it. Over the course of a short period of time, other students took screen shots of the altered website targeting her and forwarded those on. It went viral, with many students and others viewing and sharing it.

The claimant became quite upset and distressed because of the number of people who were exposed to and shared the information. It was even more difficult because the high school and the middle school were situated right next to each other.

The claimant testified that she was not experiencing any mental health issues, including depression or anxiety, prior to the day that she learned of the changes to the school website. She did have a difficult childhood in a home with substance abuse and mental illness where she and her siblings suffering significant abuse and neglect. Her brother had died in a car accident at age 18. Her sister had subsequently died from breast cancer while still in her twenties and the claimant had engaged in some therapy because of her death. She had engaged in marriage counseling at the beginning of her marriage quite some time previously, although she has continued with that marriage.

The claimant's initial reaction to the website incident was feeling nervous, nauseous and that she couldn't breathe. As a result of her reaction, she engaged in therapy. Reference is made to the summary of treatment and findings in the Decision from the January 9, 2018, Department hearing. She was unable to teach during that time and did not return until January 2017. By her records, she last saw her therapist on October 10, 2017, after she had returned to teaching, reporting that she was having a good year.

The claimant testified that when she returned to work there were some informal accommodations made so that she could stay in her room and not have to be in the hallways when

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the students were changing classes, and she also didn't have to perform the usual duties. She was still subject to some panic attacks so that someone would need to cover her teaching responsibilities for her. Her daughter had been employed at the school as a computer teacher beginning in September 2017. She felt a lot more comfortable because she believed that her daughter "had her back." Eventually, she would still have some anxiety attacks but they were getting less over time. During the busy times between classes, she stayed in her room; when there is a fire drill, she left behind everyone else. She testified that she had some other strategies that helped her.

She did feel, however, that nothing had really changed as far as how she was treated by the school district and how the offending students were dealt with. She felt that the district didn't appropriately handle the situation and that the school, despite some accommodation, wasn't really supporting her through this period of time.

In December 2017, she also diagnosed as suffering from pericarditis (this condition was unrelated to the Workers Compensation claim). The claimant had to hospitalized ten times over the next year and sometimes was out of work. She had surgery for the condition and was again out of work for a period of time because of that.

In the fall of 2019, she had decided that she was going to bring a defamation case against those involved in the website incident, including students in the school system. She described having the sheriff bring "letters" to various individuals notifying them of the claim. She was concerned because some of the students had siblings in her school and or were related to staff in the school system.

There were concerns because parents had made complaints about her. She had previous complaints claiming that she was not being fair or making students feel bad. Because a student said she wasn't being fair, she had been "written up" in January 2018 and put on a correction plan. She testified that she and the prior Principal did not have a good relationship. She did say that she had a number of in-class observations by an administrator over four weeks, and she says that reports back indicated that she had done very well during those observations. Nevertheless, there continued to be complaints from parents about her.

Brian Lynch had started as the Assistant Principal at Merrimack Valley Middle School in August 2017 (after the website incident) and continued in that position through March 2020, when he became Principal. He also served as acting Principal between January and March, 2020, when the prior Principal had left. He testified that had been a total of 14 parental complaints during that period of time he was there, usually that the students believed that the claimant made them feel bad or that she was unpredictable how she would treat them. He stated that was an unusual number of complaints for a teacher to receive.

One complaint during the Fall 2019 was because a parent wrote that they were afraid about their child being sued. Other complaints did not raise her lawsuit. A particular complaint was because the parents were taking their child on a cruise and wanted her to post the assignments online for him. She said that attempted to work with the student, unsuccessfully, to get them to make up the work. She did not think that the student had ever made up the work.

Based on the parental complaints, there was a pre-meeting on December 13, 2019 between the claimant and the school administration. A full meeting was scheduled to be held on December 19, 2019, but it had to be rescheduled because someone was out, and it was rescheduled for February 5, 2020. The purpose was to make the claimant aware of the complaints and likely to come up with a performance plan or an assistance plan.

The claimant testified that she was a tough teacher and tough teachers were liable to get complaints. In fact, it seemed that she prided herself on being tough, although she believed it was to the students' benefit to be held to higher standards.

She also testified that she felt that the school administration, especially the prior Principal, was not supportive of her. She didn't feel that the school was acting appropriately about the website-hacking incident and her reaction to it. In addition, she didn't feel that the school was supporting her concerning the parents' complaints.

She did testify that she had a much better relationship with Brian Lynch than with his predecessor. She felt that when issues came up, that he would go to her right away to get her side.

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In late December, 2019, the claimant, who had a diagnosis of post traumatic stress disorder, as well as depression and anxiety, believed that filing the notice of the lawsuit and some of the school actions were re-triggering her mental health condition. She began talking and thinking about the 2016 events again.

On December 31, 2019, she returned to see the counselor that she had seen previously, James J. Foster, LISCW, because of an increased level of anxiety. She was saying she felt the school was harassing her unfairly and putting her on probation when she believed she was enforcing reasonable standards of performance for her students.

On January 2, 2020, the claimant went to see her primary care physician, Reiko K. Johnson, M.D., who noted that her anxiety symptoms had worsened over the last several weeks because of some issues with a particular student and feeling that her school wanted her to resign. The doctor noted that the stress from the school situation and the lack of support and the "perception that administration wants her gone makes it difficult for her to be there and to do her job." The doctor filled out a workers' compensation medical form and took her out of work through January 17, 2020.

On January 10, 2020, Dr. Johnson filled out a Family Medical Leave form stating that the claimant did not feel safe at school and that her mental health had deteriorated and was affecting her ability to teach. She stated that "this patient has had recurrence of this issue at her current school due to traumatic initial event ^ 2016 + lack of support from institution + pt does not feel like she can continue to be there due to constant stress. Exacerbation/flare up of PTSD is leading to inability to carry out her duty as teacher."

Dr. Johnson saw the claimant again on January 17, 2020, and noted that she was in therapy twice a week and taking a prescription of Ativan, and exercising regularly. She again kept her out of work through January 31, 2020.

When Dr. Johnson saw the claimant again on January 30, 2020, she noted that she was taking fluoxetine and that her overall anxiety had improved, but it was activated the night before she had to see her counselor or to see the doctor. Dr. Johnson released the claimant to work 2 to 3 days per week.

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According to a letter from the school district, they accommodated the claimant for the week of February 3rd, where they arranged for her to work Tuesday, Wednesday and Thursday and be absent the rest of the week. For the week of February 10th, they had agreed that the claimant could work Tuesday and Wednesday.

On Wednesday, February 12, 2020, the claimant came in at the beginning of the morning to Assistant [Acting] Principal Lynch's office visibly shaken, upset and crying. The claimant told Mr. Lynch that she couldn't do the morning duty supervising students in the gymnasium and again stated that she couldn't be around large groups or in the hallway because it increased her anxiety. There is some disagreement about exactly whether the claimant had requested that she be allowed or was asked to leave, but the result was that she went home for the rest of the day. The school district then placed her on paid administrative leave.

The claimant saw Dr. Johnson again on February 14, 2020. The claimant told Dr. Johnson that she had a lot anxiety the night before going in when she had her additional duty with large number of children surrounding her in crowds. Dr. Johnson released her to working 2 to 3 days a week but indicated that the claimant should not do the non-teaching duties during the morning or afternoon where she had to be in large crowds. When asked at the CAB hearing how she reacted when she arm-wrestled in front of a large audience, she said that she had always been a ham and had no problems doing that. She had problems in the school situation because she was afraid that the students were thinking of the website and judging her.

During this time period, there was an incident where she received a link where a student posted a video on Tic-Toc of a group of people dancing and saying: "I am going to kill you." She believed that they hated her and that was directed at her because of the lawsuit. Another incident occurred where a student was watching anime about a school shooting and playing a school shooting game. The child was in the at-risk program and she brought the incident to the principal and the school resource officer who said that they were going to "talk to him."

The claimant was seen by Dr. Johnson's associate, Khalil Shahin, M.D., on March 13, 2020 for a follow up visit. Dr. Johnson noted that the claimant cried during the visit when talking about

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the 2016 incident. The claimant described having flash backs of what she believed the students had done. The claimant stated she still fearful about being surrounded by people. Based on that, the doctor filled out FMLA form indicating that the claimant was unable to perform her job functions citing that she was “fearful, claustrophobic, anxiety, flash backs, palpitations, shortness of breath, crying, distractibility.” Based on the patient’s medical history, the doctor indicated that flare ups could be expected at least 3 times per month, lasting one to two days per episode. The doctor continued to see the claimant and continued her out-of-work at least through May 18, 2020.

The claimant had not gone back to the teaching at least to the date of the Department of Labor hearing on July 1, 2020.

The panel found the testimony of the claimant to be credible.

DISCUSSION

The claimant, being the moving party, has the burden of proof in this matter. *Appeal of Elliott*, 140 N.H. 607, 610 (1995). To sustain that burden of demonstrating that she is entitled to reinstatement of her indemnity benefits, the moving party (here, the claimant) must show that there has been a change in the claimant’s condition (physical or otherwise) and also that the change has affected the claimant's earning capacity. *See, Appeal of Carnahan*, 160 N.H. 73, 79 (2010) (citing *Appeal of Jackson*, 142 N.H. 204, 206 (1997)).

The first issue is whether the claimant can sustain her burden of demonstrating that there was a substantial change in circumstances in her condition. The weight of the evidence, both from her treating physician and her therapist, the other documents from the school district, and the testimony demonstrate that there was a deterioration in the claimant’s mental health in the Fall/Winter of 2019, leading her first to go back and see her therapist to resume therapy on December 31, 2019, and then to see her primary care physician about her problems on January 2, 2020. Dr. Johnson’s records indicate that the claimant had suffered a recurrence of her PTSD and anxiety from the 2016 incident and indicated that she should not work for a period of time. When the claimant, at her doctor’s recommendation, went back to work again on a reduced schedule, the prospect of facing her students

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in a large situation increased her anxiety to the degree that either she requested or Acting Principal Lynch suggested that she needed to go home and not teach that day. Thereafter, the school district placed her on paid administrative leave.

There is a suggestion from Eric Mart, Ph.D., that the claimant's condition was not as severe when he saw the claimant for a psychological evaluation, for an Independent Medical Examination, on June 4, 2020. Dr. Mart's evaluation was much more present focused and did not attempt to evaluate her condition in the Winter 2020. The panel finds that there was a substantial change in the claimant's condition around December 31, 2019.

The employee/carrier claims precipitating the claimant's mental health crisis were from stress without any physical manifestations of injury that resulted from a job action of some form, taken in good faith by the employer, and therefore she fell under the set of circumstances carved out from the statutory definition of a compensable injury. See, RSA 281-A: 2, XI; *see also, Appeal of Letellier*, 163 N.H. 24 (2011). The carrier points to a number of parent complaints coming in throughout the period the claimant resumed teaching from 2017 onward and especially during the Fall 2020. The claimant had previously been on a performance plan, which, given that she was still teaching, she had met. The claimant was scheduled in December, 2019 for another conference probably leading to another performance plan, but that was postponed until February 5, 2020. While the claimant told her doctor that the school administration was trying to fire her, this was likely an overinterpretation of the situation, although it demonstrates the degree of the claimant's preexisting anxiety.

The claimant testified that while her anxiety attacks, taking her out of the classroom and having someone cover for her (which embarrassed her), had lessened for a period of time after she had resumed teaching in 2017, she also said that they had never gone away. The claimant saw this as a part of a pattern where she perceived that the school administration (and the police) had failed to take her concerns about the actions of the students hacking and subsequently sharing the contents of the school website back in 2016 seriously enough. Her testimony about her views is substantiated by her treating physician's and therapist's records and her belief is also referenced in Dr. Mart's report. Throughout the records there are indications as to her feeling that there was not sufficient support

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from the school administration, relating back to the 2016 incident, which heightened the claimant's anxiety and PTSD. In addition, in the background was the claimant's actions involving preparing to bring her defamation claim and then the notification of a number of students and former students of that action against them, with the consequential reactions that would probably increasing the claimant's anxiety, bringing her back to the 2016 experience, heightening her PTSD and anxiety.

Although it is a close case, the panel finds that the non-employment-action factors, more probably than not, were a more substantial contributing factor to the exacerbation of the claimant's preexisting work-related anxiety and PTSD. The panel finds that those factors contributed to a greater degree to her mental health condition than any work evaluation or potential disciplinary action by the school district. *See, RSA 281-A:2, XI; see also, Appeal of Letellier*, 163 N.H. 24 (2011). Consequently, the panel finds that the medical bills at issue are compensable.

With the finding that the claimant had experienced was a recurrence of the prior work-related mental health difficulties, the issue then becomes if and to what extent the claimant is entitled to indemnity benefits.

The claimant, who continues to have the burden of proving her entitlement to the resumption of weekly payments, relies on the opinion of her primary care physician, Dr. Johnson, who saw her regularly in this period. Dr. Johnson took the claimant out of work from January 2 through January 30, 2020, and then, after that, released the claimant to work 2 or 3 days per week up through March 13, 2020. Thereafter, she continued to be held out-of-work with the last date being May 18, 2020, based on Drs. Johnson's and Shahin's opinions. The opinions of the claimant's mental status are supplemented by those of James J. Foster, LICSW. Those being opinions of treating providers, the panel usually gives substantial weight to their opinions. *See, Appeal of Kehoe* 141 N.H. 412, 416 (1996).

The employer/carrier relies on Dr. Mart's IME report and opinion. Based on the psychological evaluation he performed, he found that the claimant did not meet any of the DSM-5 criteria for a diagnosable psychiatric disorder. He believed the claimant had only transient symptoms of anxiety and depression. He did not believe that she met the DSM-5 criteria for Post

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Traumatic Stress Disorder, although she may have met the ICD-10 criteria in 2016 and 2017. He did not believe that the claimant was currently disabled from her employment as a teacher. His belief was based in part on the fact that the claimant was able to return to work in January 2017 and was able to work through December 2019. He deferred any determination as to the cause of the claimant's current difficulties as within the realm of a decision by the trier-of-fact.

There are limits to Dr. Mart's opinion. First, he does not refer to and thus appears not to have been able to review the notes of the Family Physicians of Manchester, particularly Dr. Johnson, the claimant's treating physician. In addition, while he summarizes the psychiatric evaluation performed by Jayakumar Patil, M.D., performed back on September 19, 2016, he does not address Dr. Patil's two diagnoses of Post-Traumatic Stress Disorder, chronic, and Major Depressive Disorder, recurrent, unspecified. This is especially unusual in light of his conclusion that he could not find that the claimant was currently suffering from PTSD, although the diagnosis, by definition, addresses a condition that continues after the underlying triggering traumatic. Finally, Dr. Mart focuses his evaluation of the claimant's condition at the time of June 4, 2020, and not her condition in the months preceding the evaluation.

Based in the foregoing, the panel adopts the disability determinations made by the Family Physicians of Manchester, particularly Dr. Johnson. Dr. Johnson took the claimant out-of-work beginning January 2 through January 30, 2020. Thereafter, she stated that the claimant could work 2 to 3 days per week beginning February 1 and continuing through March 13, 2020. After that, she found the claimant again to be completely disabled through May 18, 2020. The claimant presented no further medical opinion regarding her disability after that date. In light of Dr. Mart's un rebutted opinion, the panel finds that the claimant was no longer entitled to indemnity benefits as of May 18, 2020.

The claimant received payments when she was placed on paid administrative leave. She may have also received other benefits that the parties chose not to present to the panel. The panel is unaware of the extent to which other benefits may have been received and, more importantly, how those benefits might relate to an offset from or replacement to workers' compensation indemnity

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benefits. The panel leaves that to the parties to sort out the appropriate payments and, if applicable, they should file an appropriate agreement with the Department of Labor. If they are unable to agree, they can make their arguments to the panel when filing a motion for rehearing.

DECISION

Based on the foregoing, the panel finds that the claimant suffered a recurrence or exacerbation of her work-related PTSD and anxiety at the end of 2019. The medical and therapy bills at issue, dating from December 31, 2019 through April 8, 2020, are compensable and to be paid by the Primex3.

The claimant is entitled to temporary total indemnity benefits from January 2 through January 30, 202 and from March 14 through May 18, 2020; she is also entitled to temporary partial disability benefits from February 1 through March 13, 2020. The obligation to payment of indemnity benefits is subject to any offsets for other payments received that might supersede those benefits.

Payment of weekly compensation by Primex3 to comply with this decision shall be made as soon as possible after this decision's effective date, but no later than five work days thereafter. A Memo of Payment and the check shall be issued *simultaneously*.

Upon failure to comply with this decision, the Commissioner shall assess a penalty not to exceed one hundred dollars (\$100.00) for each day of non-compliance. This letter will serve as notification of this assessment commencing on the seventh day following the date of this decision.

Pursuant to the provisions of RSA 281-A:43, II, a timely appeal of this decision shall stay any payment of medical and vocational benefits until a decision is rendered by the Supreme Court.

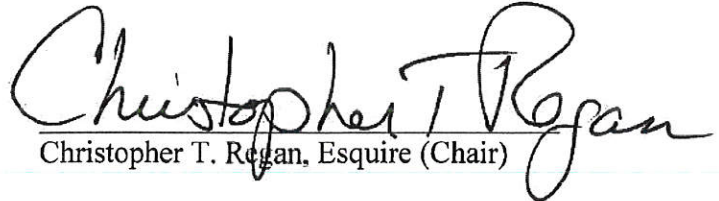
Legal counsel for claimant shall, within sixty days (60) days of the date of this decision, submit for approval all fees charged for professional legal services rendered in this matter pursuant to RSA 281-A:44.

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This is a unanimous decision of the panel.


Christopher T. Regan, Esquire (Chair)