

As of October 6, 2014, this decision is no longer considered by WCAT to be noteworthy.

WCAT Decision Number: WCAT-2006-02696
WCAT Decision Date: June 29, 2006
Panel: Sherryl Yeager, Vice Chair

Introduction

The worker was employed in a grocery store in December 2004 when a male co-worker made threatening gestures and comments to her. In February 2005 she applied to the Workers' Compensation Board (Board) for compensation for mental stress resulting from these incidents.

A Board officer advised the worker on April 13, 2005 that her claim would not be accepted. The Board officer determined the incidents and the worker's reaction did not meet the criteria set out in the *Workers Compensation Act* (Act) and Board policy for acceptance of a claim for mental stress.

The worker requested a review of this decision. A review officer confirmed the Board's decision on October 12, 2005 in *Review Decision #0052803*. The worker has appealed this decision.

Issue(s)

Did the worker sustain a personal injury, in particular mental stress, arising out of and in the course of her employment under section 5.1 of the Act?

Jurisdiction

This appeal was filed with the Workers' Compensation Appeal Tribunal (WCAT) under section 239(1) of the Act.

This is an appeal by way of rehearing, rather than a hearing *de novo* or an appeal on the record. WCAT has jurisdiction to consider new evidence, and to substitute its own decision for the decision under appeal.

Appeal Method

The worker requested this appeal be determined by review of the file material and written submissions. I have reviewed the file, submissions and law and policy applicable to this appeal. There is no question regarding the worker's credibility, and I am satisfied that an oral hearing is not required to fairly determine the issues before me.

Law and Policy

The law and policy regarding mental stress claims was amended significantly on June 30, 2002 and applies to all claims for mental stress after that date.

Section 5.1 of the Act now establishes that:

5.1 (1) Subject to subsection (2), a worker is entitled to compensation for mental stress that does not result from an injury for which the worker is otherwise entitled to compensation, only if the mental stress,

(a) is an acute reaction to a sudden and unexpected traumatic event arising out of and in the course of the worker's employment,

(b) is diagnosed by a physician or a psychologist as a mental or physical condition that is described in the most recent American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders (DSM) at the time of the diagnosis, and

(c) is not caused by a decision of the worker's employer relating to the worker's employment, including a decision to change the work to be performed or the working conditions, to discipline the worker or to terminate the worker's employment.

Policy #13.30 of the *Rehabilitation Services and Claims Manual, Volume II* (RSCM II) establishes that a worker may be entitled to compensation for mental stress due to an acute reaction to a sudden and unexpected traumatic event. The policy establishes that the term "mental stress" is intended to describe conditions such as post-traumatic stress disorder (PTSD) or other associated disorders. Mental stress does not include "chronic stress" which refers to a psychological impairment or condition caused by mental stressors acting over time. Workers who develop mental stress over the course of time due to general workplace conditions, including workload, are not entitled to compensation.

The policy provides examples of situations that meet the two-part test for an acute reaction to a sudden and unexpected traumatic event set out in the legislation. An "acute" reaction means "coming to crisis quickly" and is a circumstance of great tension, an extreme degree of stress. It is the opposite of chronic. The reaction is typically

immediate and identifiable. The response by the worker is usually one of severe emotional shock, helplessness and/or fear. It may be the result of:

- a direct personal observation of an actual or threatened death or serious injury;
- a threat to one's physical integrity;
- witnessing an event that involves death or injury; or,
- witnessing a personal assault or other violent criminal act.

For the purposes of this policy, a "traumatic" event is a severely emotionally disturbing event. It may include the following:

- a horrific accident;
- an armed robbery;
- a hostage-taking;
- an actual or threatened physical violence;
- an actual or threatened sexual assault; and,
- a death threat.

In most cases, the worker must experience or witness the traumatic event.

Mental stress caused by a labour relations issue such as a decision by the worker's employer relating to the worker's employment, including a decision to change the work to be performed or the working conditions, to discipline the worker or to terminate the worker's employment, is not compensable.

Evidence

The worker completed an injury report to her employer on January 31, 2005. She advised that between mid-November and the end of December, a co-worker had made a stabbing motion as if to mock stab her, stated he would "cut open your jugular just to see what will happen" and that "I would like to strangle the life out of you."

She had been unable to sleep at night, unable to function at home, did not want to leave the house or go to work because of fear of this co-worker. She had been having difficulty with personal relationships, was unable to focus on tasks, and had headaches and neck aches and was constantly tired.

With her application for compensation filed February 9, 2005, the worker included a written summary of the events that had been prepared by her at a manager's request. She advised that she had turned to look towards the co-worker's station and caught him stabbing the air with a knife in her direction. He laughed at being caught and went back to work. On December 14, 2004, he was checking something and asked if she had his knife again. She said no and jokingly asked him what he would do if she did and he

replied “cut open your jugular just to see what happens.” The worker advised that she looked at the co-worker and told him his past actions and these comments were disturbing to her. She then waited until a department manager was available and reported her concerns and was advised to document the incident.

The following day, she was in conversation with the co-worker and he looked at her and said he would like to strangle the life out of her. She said “excuse me?” and the co-worker replied that he would have his day soon. “I looked at him and told him that I thought he was the most miserable excuse of a human being I had ever met.” The department manager learned of this exchange and called the worker, the store manager and shop steward into his office. The worker was advised to write out the statement, which was enclosed with her application.

A first report from the worker’s physician dated February 9, 2005 indicated the worker had many things disrupting her life, and had recently been threatened with murder by a co-worker. The physician believed this additional stressor had been the final straw that rendered the worker unable to cope. She had insomnia, hypervigilance, shakiness, inability to concentrate and decreased ability to manage her everyday tasks of looking after her children and managing household schedules. She had been on time off for holidays, but as the time to return approached she was unable to manage. The physician noted the workplace seemed slow to deal with the worker’s complaints. The physician indicated the worker was disabled for over three weeks.

A progress report dated March 17, 2005 advised the worker was seen for work-related and medical issues. The co-worker had been asked to move to another store, but refused and the worker did not want to move as it involved too many hours being re-arranged. The worker had poor sleep and significant anxiety. She feared for her life and her children’s lives and did not trust the co-worker and worried he may harm her or her children.

A letter from the employer to the union representatives dated March 22, 2005 advised them that the allegations brought forward by the worker had been found inconclusive and unsubstantiated. In an effort to protect both employees, they would not be permitted to work in the same location.

The physician’s progress report of March 31, 2005 indicated the worker was pleased with the decision to relocate the co-worker, but was afraid to go back to work as she had been told not to talk about the situation and knew she would be asked by others what had happened. Overall her anxiety was much improved although she did get anxious when thinking about going back to work.

On April 8, the worker’s psychologist prepared a letter to the Board case manager and advised that she had been treating the worker prior to and after the workplace incidents. She added that the co-worker would walk towards the worker with a concealed knife

and then expose it to her repeatedly in mid-December. On January 24, 2004, her first day back after holidays, a manager came up behind her and made a joke about having a knife. The worker was unhappy about the lack of concern about her situation and consulted her union representative. It was learned that superior management had not been informed of the situation, which violated company policy and procedures on workplace violence. The union representative advised the worker not to continue working and requested an external investigation.

The psychologist noted the worker did not discuss the situation with her co-worker on December 13 or December 16. At that time she was focused on the family situation and doing well.

When next seen on January 14, 2005, the worker was highly distressed, spoke very quickly and appeared overwhelmed and reported she felt unsafe at work in November and December. She believed the co-worker held a particular grudge against her because of her role as shop steward and dealing with complaints against him.

The worker was very pre-occupied with the work situation when they met on February 18, 2005 and very distressed by the failure of her employer to respond to the situation appropriately. The worker continued to be distressed and anxious through March while awaiting the outcome of the investigation. She feared the worker would come to her home to seek retribution. She was also worried about the impact of the complaint on her future employment. Once the results of the investigation were announced, the worker planned to return to work gradually. The psychologist believed the worker had an acute adjustment disorder, and had developed a significant stress response after a colleague made threats to her life.

The Board officer advised the worker by letter on April 13, 2005 that her claim would not be accepted as the criteria set out in policy #13.30 of the RSCM II and section 5.1 of the Act were not met.

Submissions

The worker's representative relied on the prior submission to the Review Division dated August 24, 2005, and also provided a new submission dated January 30, 2006 in support of the worker's appeal. I have reviewed these documents thoroughly. In brief, the worker's representative submitted that the worker had an acute reaction to a traumatic event, and a diagnosis of a DSM-IV condition and therefore met the criteria for her claim to be accepted. She relied on prior *WCAT Decisions*, #2005-01912 and 2005-02403.

The worker's representative noted the worker is a shop steward and used to dealing with confrontations in the workplace. She had prior exposure to and dealings with the

co-worker and considered him to be an unstable individual with a temper. Although she had prior dealings with the worker, none of these were personal threats towards her safety.

She submitted it was the event of December 14, 2004 when the worker said he wanted to “cut open your jugular just to see what happens” when the worker began to experience the problems of being anxious and upset. The following day “put her over the edge” when he stated he would like to “strangle the life out of her” and that he “would have his day soon.” From that date forward she was afraid for her life and that of her family, and took steps to protect herself by reporting to management.

The worker’s representative submitted that she was able to continue working through the busy Christmas period, despite being jumpy, nervous and afraid the co-worker would appear because of her dedication to her employer and other co-workers. “There can be no doubt that someone threatening to take your life and appearing to enjoy doing it would be traumatic.”

The worker’s representative argued the fact pattern and the worker’s responses met the criteria set out in Board policy for an acute or immediate reaction.

A statement from the worker dated January 29, 2006 was attached.

In the statement, the worker described events in early December and then on December 14, 2004. She stated that she was alarmed by her co-worker’s comments and explained to him that his behaviour was upsetting and she wanted him to stop. She remained after work to advise her supervisor and seek advice. She was dissatisfied with the response, but was hopeful that because she confronted her co-worker, he would cease his behaviour and leave her alone.

The following day, December 15, began “rather guarded” and she was watching her co-worker all the time and having difficulty staying focused. He made the statement “I would like to strangle the life out of you” near the end of the shift, and at this point the worker was “...extremely concerned. Start to think. I need to do something but what. I told him just yesterday to stop and he is not going to do that. I feel nervous, scared, panic. I am going on three days off and then to midnight will have time to work through it get some help. My thoughts are running away with me. To many things to think about.” [reproduced as written]

The worker went on to state that over the next few weeks she was glad to not be working with this individual. She felt less guarded but was jumping at unexpected noise and watching the clock, wanting to leave work as quickly as possible. She began to talk to the store managers about the problem and at first was hopeful something would be

done regarding the worker's actions. She decided to take holidays as she was overwhelmed, guarded, tired and uncertain that this was the way she wanted to deal with the situation.

She found herself pacing the floor and not wanting to return to work because the co-worker would also be back and she may be exposed to him for three hours. When she did return to work on January 23, 2005 she was very anxious, worried and extremely guarded because management had spoken to the co-worker about his actions towards her. He had broken a piece of shelving and the knife that he threatened her with was missing. This combined with everything else that was going on was extremely distressing to her. She believed there was no protection for her and she could not work with him again. She spoke to her union representative that evening, and was advised that the representative would handle it. A formal investigation was started the following day, and she was taken off work by her doctor.

The employer participated in the appeal. The worker's submissions were disclosed for a response from the employer's representative, which was received on February 22, 2006.

In brief, the employer's representative submitted that there appeared to be a history between the worker and her co-worker, and only one side of the story was being presented. He queried why she would joke about the events if she found the first incident disturbing. The worker's representative submitted that the worker's ability to verbally respond to her co-worker's actions suggested a "more robust mental state" than the worker indicated she was experiencing. He suggested the worker's absence from work was related to the employer's response to the situation. The worker did not seek medical treatment for several weeks after she stopped working. The employer's representative also suggested that the worker's condition was more likely related to the other stressors in her life, referenced by the worker's physician on the original report to the Board. The company's investigation had determined the events to be unsubstantiated.

The worker's representative was provided a copy of these documents and prepared a rebuttal dated March 8, 2006. In brief, she clarified the disputed evidence and disagreed with the position put forward by the employer's representative.

The worker also provided a further statement, dated March 6, 2006. The worker advised that she had dealings with the worker in the past regarding his outbursts of anger and inappropriate behaviour towards other co-workers. The worker noted that her brother was terminally ill and she was separating from her common-law spouse at the time these events occurred in December 2005. When she spoke to her psychologist on December 16, 2005 she elected not to discuss the co-worker in detail

because he would be away until mid-January, and she was so overwhelmed by all that was going on, she decided to concentrate on the needs of her child as it was easier to handle just one thing at a time.

Following the company's investigation, she was not happy with the outcome, being that the accusations were inconclusive and unsubstantiated, with the proffered solution of the co-worker being moved to a new location. He then harassed her again on April 20, 2005 by showing up at the store and refusing to leave the area. The company would not put a ban on his presence in the store until an arbitration hearing was complete. The worker therefore stopped work and had been off since. The worker summarized with a number of comments regarding her workplace, the RCMP and the inability of various agencies to control the worker's behaviour. She wrote, "I was not afraid of (the co-worker) while I helped others in regards to his action to them. However when, (he) started acting this way towards me and I was off with time to think I did come to realized how unhealthy I was managing my work situation and sought the help I needed." [reproduced as written]

I did not provide this final statement from the worker to the employer's representative for response, as for reasons set out below I did not find it to be supportive of the worker's appeal. There was therefore no prejudice to the employer by not providing an opportunity for response to this additional information.

Findings and Reasons

I find the criteria for a mental stress claim as set out in section 5.1 of the Act and policy #13.30 of the RSCM II have not been met.

Although the actions of her co-worker, which I accept did occur as described, were undoubtedly distressing, I do not believe the test set out in Board policy for a traumatic event have been met. I accept that the events in December 2005 had the potential to be severely emotionally disturbing, as they were implied or implicit threats to the worker's physical well-being. Regardless of whether there was a sub-context or history between these two individuals, the described comments could reasonably be interpreted as a threat to do harm to the worker. I would consider this to be a sudden and unexpected event, even given the reported history of this co-worker for inappropriate behaviour and anger in the workplace. However, the worker's response was not one typical of coming to crisis quickly as set out in the policy.

After the incident in November or early December involving the stabbing motions made behind her back, the worker did nothing. She continued to come to work with this individual. She did not report having an immediate response of severe emotional shock, helplessness or fear.

In fact, at the time of the threats on December 14 and 15, 2005 the worker stood up to the co-worker and expressed her displeasure with his actions. In her submissions of January 29, 2006 she described that she considered what would be the appropriate way to deal with this individual and the situation. This does not imply a sensation of helplessness, rather it is a normal method of coping with an inappropriate and bullying co-worker. She described waiting until he had left to approach her manager and report the incident and seek advice. Again, this implied an ability to make rational and reasoned decisions and take appropriate action, not an immediate response of severe emotional shock, helplessness or fear.

The report of April 8, 2005 from the psychologist indicates that the worker went off work in January 2005 on the advice of her union and because her manager's response to the situation was inappropriate. She was stressed about the co-worker's actions, however, she was also stressed about the career implications of filing a complaint. Once the situation was resolved to her satisfaction, her anxiety levels declined rapidly and she returned to work. The psychologist's report is more supportive of a workplace or labour relations conflict occurring than an acute stress reaction to a life-threatening event. Indeed, the worker expressed more concern about how to handle the inevitable questions from colleagues upon her return to work than any fear of retribution from her co-worker when she saw her physician in late March, 2005.

The worker did not see her physician for nearly two weeks after she discontinued work. I therefore prefer the description of events as set out by the psychologist.

Policy #13.30 of the RSCM II establishes that mental stress does not include "chronic stress" resulting from mental stressors acting over time. It goes on to state that mental stress developed over the course of time due to general workplace conditions is not compensable.

The worker has provided evidence that there was significant stress in her life at the same time as these events. Her brother was terminally ill, her marital relationship was breaking down, she was attending court to deal with custody of her children, and it was the busiest time of year at her work. In addition, she had a bullying co-worker that management was not taking appropriate action to remove from the workplace.

I would note that there is a great deal of assumption and embellishment of the evidence by the worker's representative in her submissions. For example, she wrote: "What caused her breakdown were the direct threats against her person. It was the concern and fear that no one could protect her or her family from this "assailant" had he decided to carry out the physical action on her that he had verbally, maliciously and openly expressed." I therefore prefer the evidence provided by the worker and her caregivers in the time immediate to the events.

The worker's representative referenced two WCAT decisions. Decisions of other WCAT panels are not binding on me in this matter, although they provide useful guidance for consistency in application of law and policy where fact patterns are similar.

In *WCAT Decision #2005-01912* the fact pattern is slightly different in that the appellant worker had a four-day period between the incident and seeking treatment for her symptoms.

In *WCAT Decision #2005-02403*, the appellant worker felt immediately trapped, petrified and uncomfortable with her co-worker, who was much larger than her and was screaming at her and refusing to leave the office. She described having an "out of body" experience, wherein her heart was racing, her head pounding, and she felt nauseous, totally drained and sweaty immediately following the incident. There was then a period of maternity leave as the worker was pregnant. When she attempted to return to work, she could not due to an anxiety condition. The vice chair believed that although the reaction was delayed, it was typical of the mental stress the worker had experienced and allowed the appeal.

In the appeal before me, the worker did not seek treatment for her symptoms for an extended period of time after the incident. She also did not report immediately experiencing an acute reaction to the situation, as the worker in *WCAT Decision #2005-02403* described. As set out above, she rationally considered what the most appropriate course of action should be, and expressed her displeasure with the co-worker's conduct directly to him.

I do not intend to minimize the events or the worker's reaction to them in December 2005. I accept the diagnosis of an adjustment disorder. However, I do not consider the facts of her case meet the criteria in law and policy for the acceptance of a claim for mental stress under section 5.1 of the Act. The worker did not leave the workplace due to her symptoms; rather, she left because of the reaction from management to her complaints. Although she described herself as jumpy and anxious, she was able to continue working, then took pre-arranged holidays. When the situation was resolved to her satisfaction, she was able to return to work. To my mind, the fact pattern is more consistent with a labour relations dispute, albeit a serious one which had significant impact on the worker's state of mind.

I note that the changes to the legislation have set in place more stringent criteria for the acceptance of a claim for mental stress. The legislation and policy reflect a clear intention by the legislature to limit claims under sections 5.1 of the Act to where a worker has experienced an acute reaction to a sudden and unexpected severely emotionally disturbing event. The legislation clearly excludes disability resulting from regular, everyday stress from employment.

Sections 250(2) and 251(1) of the Act impose an obligation on WCAT to apply a policy of the board of directors that is applicable unless the policy is so patently unreasonable that it is not capable of being supported by the Act and its regulations. The worker and her representative have not questioned the viability of the policy but have directed their arguments to the correct application of the policy. I find that the policy was correctly applied by the Board officer and the review officer.

Conclusion

I confirm the decision of the Board set out in *Review Decision #0052803*, dated October 12, 2005.

No expenses were requested for participating in the appeal and none are identified.

Sherryl Yeager
Vice Chair

SY/mm/cd