BRITISH COLUMBIA WCAT *Workers' Compensation Appeal Tribunal*

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WCAT Decision Number: **WCAT-2008-02103**
WCAT Decision Date: **July 15, 2008**

Panel: Marguerite Mousseau, Vice Chair

WCAT Reference Number: **062254-A**

Section 257 Determination
In the Provincial Court of British Columbia
(Small Claims Court)
Vancouver Registry No. 0610963
Robert Kelly v. City of Vancouver

Applicant: City of Vancouver
(the "defendant")

Respondent: Robert Kelly
(the "claimant")

Representatives:

For Applicant: Tom Zworski
LAW DEPARTMENT
CITY OF VANCOUVER

For Respondent: Robert Kelly

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As of January 1st, 2013, this decision is no longer considered by WCAT to be noteworthy.

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Introduction

The plaintiff, Robert Kelly, was employed by the defendant, the City of Vancouver, as a health attendant in a community centre called The Gathering Place. In July and August 2004 there were several verbal altercations between Mr. Kelly and a patron of the community centre. He stopped working after the third incident and did not return to work until December 2004. He worked intermittently between January 2005 and July 2005 and he stopped working again in or around July 2005. During this period he also found employment of a similar nature but with a different clientele, at the Kerrisdale Community Centre. He stopped working at this job, as well, in or around July 2005. He attributed his inability to continue working at both places to a fear of confrontation that he had developed as a result of working in an unsafe environment.

On September 27, 2004, Mr. Kelly submitted an application for compensation to the Workers' Compensation Board, operating as WorkSafeBC (Board), in relation to the incidents of July and August of that year. His claim for compensation was denied on the basis that he did not meet the requirements for compensation for mental stress under section 5.1 of the *Workers Compensation Act* (Act). Mr. Kelly then initiated an action in Small Claims Court against the City of Vancouver.

By letter dated August 11, 2006, counsel for the defendant requested determinations pursuant to section 257 of the Act. Section 257 of the Act provides that the Workers' Compensation Appeal Tribunal (WCAT) may be asked by a party or the court to make determinations and certify to the court with respect to actions based on a disability caused by occupational disease, a personal injury or death. Subsection 257(3) provides that Part 4 of the Act applies to proceedings under section 257 save for subsection 253(4) which imposes a statutory due date for decisions.

Under Part 4 of the Act, WCAT has exclusive jurisdiction to inquire into, hear and determine all those matters and questions of fact, law or discretion arising or required to be determined under that part (section 254). WCAT is not bound by legal precedent (subsection 250(1)). WCAT must make its decision on the merits and justice of the case, but in so doing, must apply a policy of the board of directors of the Board that is applicable in the case (subsection 250(2)).

An oral hearing was held on January 15, 2008 which was attended by Mr. Kelly, acting on his own behalf, and Mr. Zworski, acting on behalf of the City of Vancouver.

Issue(s)

The primary issues on this application are whether Mr. Kelly was a worker at the time the cause of action arose; and, if yes, whether he sustained a personal injury arising out of and in the course of his employment.

There is a preliminary issue as to whether WCAT has jurisdiction to issue a certificate under section 257 of the Act with respect to the matters set out in Mr. Kelly's notice of claim.

Jurisdiction

Applicable Law

The jurisdiction of WCAT to make determinations for the purpose of section 10(1) of the Act is set out in section 257 of the Act. It provides, in part:

> 257 (1) Where an action is commenced based on
>
> (a) a disability caused by occupational disease,
>
> (b) a personal injury, or
>
> (c) death,
>
> the court or a party to the action may request the appeal tribunal to make a determination under subsection (2) and to certify that determination to the court.
>
> (2) For the purposes of subsection (1), the appeal tribunal may determine any matter that is relevant to the action and within the Board's jurisdiction under this Act, including determining whether

> (a) a person was, at the time the cause of action arose, a worker,
>
> (b) the injury, disability or death of a worker arose out of, and in the course of, the worker's employment,
>
> (c) an employer or the employer's servant or agent was, at the time the cause of action arose, employed by another employer, or
>
> (d) an employer was, at the time the cause of action arose, engaged in an industry within the meaning of Part 1.

The jurisdiction of the Board is set out in section 96(1) of the Act. It includes "the exclusive jurisdiction to inquire into, hear and determine (a) the question whether an injury has arisen out of or in the course of an employment within the scope of this Part."

Section 10(1) of the Act sets out the "historic compromise" underlying the workers' compensation regime whereby workers gave up the right to certain legal actions against employers in exchange for a statutory compensation scheme funded by employers. It states:

> **10** (1) **The provisions of this Part are in lieu of any right and rights of action**, statutory or otherwise, founded on a breach of duty of care or any other cause of action, whether that duty or cause of action is imposed by or arises by reason of law or contract, express or implied, **to which a worker**, dependant or member of the family of the worker is or **may be entitled against the employer of the worker, or against any employer within the scope of this Part, or against any worker, in respect of any personal injury, disablement or death arising out of and in the course of employment and no action in respect of it lies.** This provision applies only when the action or conduct of the employer, the employer's servant or agent, or the worker, which caused the breach of duty arose out of and in the course of employment within the scope of this Part.

Notice of Claim

The notice of claim in this case raises a question as to whether the action or claim is based on a type of harm that may be characterized as a personal injury (or disability caused by occupational disease). The notice of claim describes three matters and describes the amount that Mr. Kelly is seeking in damages with respect to each of them.

The first matter is an alleged threat of physical violence that was made against Mr. Kelly by M, a patron of The Gathering Place. The threat occurred at The Gathering Place. Mr. Kelly states that he found himself unable to work for four months after that. He requests damages or compensation in an amount equivalent to his pay for 30 shifts in relation to that incident.

The second matter described is that Mr. Kelly returned to work after assurances that security issues had been addressed; however, after more confrontations, he could not perform his duties without fear. He found it necessary to quit his job because of these issues of fear. He seeks compensation equivalent to his pay for 75 shifts in relation to the loss of his job.

The third matter described by Mr. Kelly is that he found it necessary to quit his job at the Kerrisdale Community Centre because of the same issues of fear of confrontation and discomfort on having to approach people and question them on their right to be in particular areas. He seeks compensation equivalent to pay for 50 shifts for the loss of this job. The total amount of compensation sought is $24,887.00.

Submissions

Mr. Kelly submitted that his legal action is not related specifically to the incidents in July and August 2004 but to his having been left to work in an unsafe environment generally. It is based on his employer's alleged failure to keep promises that were made regarding safety procedures. Mr. Kelly submitted that he was unable to continue working in this environment because it was unsafe, not because he suffered a personal injury. In addition, he submitted that he developed fears of confrontation to a degree that he was unable to work in the Kerrisdale Community Centre, which was, in fact, a very safe environment. Mr. Kelly submitted that his claim relates to these matters and he did not consider that a personal injury was involved. He submitted that fear is not a personal injury.

Counsel for the City of Vancouver submitted that WCAT has jurisdiction to issue a certificate in that Mr. Kelly was a worker at the relevant time, the City of Vancouver was an employer and the incidents that gave rise to the legal action arose out of and in the course of Mr. Kelly's employment. He submitted that it is not necessary to establish that an injury actually occurred, although there are documents indicating that Mr. Kelly developed post-traumatic stress disorder (PTSD). So long as there is an allegation of personal injury, WCAT has jurisdiction to make a determination under section 257 of the Act. He submits that all of the matters for which Mr. Kelly has claimed damages flow from the events at The Gathering Place in July and August 2004 and that Mr. Kelly's claim is entirely based on psychological injury caused by those events. These events and the condition they caused are at the heart of the legal action.

In the alternative, counsel submitted that Mr. Kelly's claim could be separated into three different matters: the four months absence from work between August and December 2004, the termination of his employment at The Gathering Place and the termination of his employment at the Kerrisdale Community Centre. He submitted that the first and third of these were based on personal injury; that is, the condition caused by the events of July and August 2004. The second, the termination of employment at The Gathering Place, could, arguably, be viewed as an action for damages for breach of the employment contract.

Counsel for the City also submitted that it was not necessary to determine (for the purposes of jurisdiction) whether Mr. Kelly had actually sustained a personal injury; so long as the action is "based on" personal injury, WCAT has the jurisdiction to issue a certificate. Counsel relied on the reasoning in *WCAT Decision #2007-01219* in support of this position. In that case, the plaintiff's statement of claim alleged sexual assault and battery by his manager. The panel determined that these allegations constituted an action "based on" personal injury and that WCAT had the jurisdiction to issue a certificate. It was not necessary for the purposes of jurisdiction to decide whether the worker had sustained a personal injury. In that case, it was also not necessary to determine whether a personal injury had occurred. The panel concluded that it was appropriate to determine that any injury or disablement allegedly sustained by the plaintiff arose out of and in the course of employment.

Counsel submitted that Mr. Kelly's claim is based on stress, trauma and personal injury and Mr. Kelly did, in fact, suffer a personal injury arising out of and in the course of his employment. He submits that the Board decision was wrong on that point.

Analysis and Decision on Jurisdiction

I have considered several decisions which addressed the question of jurisdiction to issue a certificate under the provisions that grant this authority. In this regard, I note that decisions of the Appeal Division and WCAT do not make policy nor is WCAT bound by legal precedent (section 250(1)). However, WCAT does strive for consistency in decision-making in the interests of fairness. In *Appeal Division Decision #97-0829* the panel questioned whether the tribunal had jurisdiction to issue a certificate pursuant to what was then section 11 of the Act. The provisions of that section were very similar to the provisions of section 257 under the current legislation. That case involved a plaintiff, who was a registered nurse, suing his employer for defamation in relation to a comment written in the communications log book at the hospital in which he was working. The plaintiff alleged that the publication resulted in physical and emotional stress and injury. The panel concluded that the action was based on defamation. The injury was damage to reputation and any alleged personal injury was incidental to that. Accordingly, the panel concluded that the plaintiff's action was not based on "personal injury, death, or a disability caused by occupational disease." Since the pre-conditions

for making determinations under section 11 had not been met, the panel concluded it did not have the authority to proceed with the section 11 determination.

The preliminary issue of whether the Appeal Division had jurisdiction to provide a certificate also arose in *Appeal Division Decision #00-1944*. That case involved an allegation that the plaintiff suffered psychological damages as a result of his employer having lied to the Royal Canadian Mounted Police (RCMP) about a small explosion outside the plaintiff's office door. This information resulted in a decision by the RCMP not to pursue a criminal investigation. In that decision the panel stated:

> (18) For the purposes of this decision, it is only necessary that I consider whether the cause of action is one which is "based on a disability caused by occupational disease, personal injury or death" within the meaning of section 11 of the Act.
>
> (19) In considering all of the above, I find that this is not a legal action in which the claimant is alleging that he suffered a personal injury which arose out of and in the course of his employment. Rather, it is one in which the claimant's alleged psychological injury and financial losses are ascribed to the employer's actions in not supporting the pursuit of a criminal investigation and possible charges (which, in any event, concern events subsequent to the termination of the claimant's employment). I find that any such cause of action is not "based on a disability caused by occupational disease, personal injury or death" within the meaning of section 11 of the Act.
>
> (20) I find, therefore, that the Appeal Division has no jurisdiction to issue a certificate under section 11 in this legal action.

I agree with the reasoning in these decisions and consider that, for the purposes of deciding whether WCAT has jurisdiction to issue a certificate, it is necessary to determine whether the notice of claim discloses a cause of action that fits within the categories set out in section 257(1); that is, a disability caused by occupational disease, personal injury or death. It may not be necessary, however, to determine whether the personal injury occurred.

According to the documents on Mr. Kelly's compensation file, his physician diagnosed a condition of PTSD subsequent to the incidents in July and August 2004. Mr. Kelly has not referred to this condition in his notice of claim and he submits that his reason for not working was simply fearfulness. Even if Mr. Kelly's condition is characterized simply as fearfulness, all of his evidence indicates that he was sufficiently distressed by this emotional state to stop working in July 2004 and to make an application for compensation.

When a worker makes a compensation claim for debilitating psychological symptoms, which are unrelated to a compensable injury or occupational disease, the claim is adjudicated under section 5.1 of the Act. This section states:

> 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 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.

Mr. Kelly's notice of claim opens with the words "On July 28 and Aug 13th and 14th 2004 was threatened with physical violence by patron [name of patron] at The Gathering Place Comm. Ctr. I found myself unable to work for 4 months…." [reproduced as written, except for change noted]. I consider that this describes an event and a psychological reaction that are potentially within the parameters of section 5.1 of the Act. As a result, I am satisfied that the action is at least partially based on "mental stress," a condition which is recognized as compensable under the circumstances prescribed in section 5.1 of the Act.

This raises the question of whether an action based on "mental stress" constitutes "an action… based on (a) a disability caused by occupational disease, (b) a personal injury, or (c) death" under section 257 of the Act. In other words, is a "mental stress" injury under section 5.1 a personal injury for the purposes of sections 5(1) and 10(1) of the Act?

The Act does not provide definitions for the terms "mental stress" and "personal injury" nor does it delineate the relationship between mental stress under section 5.1 and a personal injury under sections 5(1) and 10(1). Prior to June 30, 2002 the Act did not differentiate between a personal injury and mental stress. Claims for physical injuries and psychological (mental stress) injuries were adjudicated under section 5(1) of the Act. This section states, "Where… personal injury or death arising out of and in the

course of the employment is caused to a worker, compensation as provided by this Part must be paid…." In June 2002 the Act was amended to incorporate section 5.1, which deals specifically with mental stress injuries and establishes the criteria for compensation for mental stress.

When a worker makes a compensation claim for a personal injury under section 5(1) or a plaintiff initiates a civil action for personal injury, the congruency of the language between section 5(1) and section 10(1) gives clear effect to the "historic compromise." Under section 5(1) of the Act, a worker who sustains "a personal injury arising out of and in the course of the employment" is entitled to compensation under Part 1 of the Act and section 10(1) provides that the compensation under Part 1 is in lieu of any rights of action against an employer "in respect of any personal injury…arising out of and in the course of employment." There is no reference, however, to mental stress in either section 5(1) or section 10(1) of the Act.

There is a definition of "personal injury" in the policies and it refers only to physical harms. On the other hand, other policies state that "personal injury" includes psychological impairment.

Policy item #13.00 of the RSCM II, "Personal Injury," states:

> "Personal injury" is defined as any physiological change arising from some cause, for example, a limitation in movement of the back or restriction in the use of a limb. It is not confined to injuries which are readily and objectively verifiable by their outward signs, e.g. breaks in the skin, swelling, discolouration, deformity, etc. It includes, for example, strains and sprains.

On the other hand, policy #13.20 of the RSCM II, "Psychological Impairment," states:

> **"Personal injury" includes psychological impairment** as well as physical injury. **A claim for traumatically induced psychological impairment could be accepted even if unaccompanied by any physical impairment**. Psychological impairment has not been deemed to be an occupational disease. Conditions of this type however may be accepted if they are a sequela to an accepted personal injury or occupational disease.

In addition, policy #32.10, "Psychological/Emotional Conditions," states, in part:

> The Board does accept claims for **personal injury where the injury consists of a psychological condition** or where the psychological

> condition is a consequence of a compensable personal injury or occupational disease.
>
> [emphasis added]

Finally, policy item #13.30, “Mental Stress,” provides the following definition:

> "Mental stress" is intended to describe conditions such as post-traumatic stress disorder 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 policies that include psychological impairment as a form of personal injury and the grouping together of the provision respecting mental stress with the provision on personal injury in the Act, suggest the term “personal injury” in sections 5(1), 10(1) and 257(1) may be taken to include a mental stress injury under section 5.1 of the Act.

In addition, a review of the whole of the Act indicates that the terms injury and personal injury are used interchangeably. The term “mental stress,” however, does not occur in any provision other than section 5.1 of the Act. As an example, section 96(1) of the Act, which defines the jurisdiction of the Board, does not refer to mental stress. Rather, it states that the Board has jurisdiction to “inquire into, hear and determine … whether an injury has arisen out of or in the course of employment.” It seems reasonable to interpret the power to make determinations as to whether an injury arose out of and in the course of employment includes the power to determine whether a worker has developed mental stress that satisfies the criteria in section 5.1.

In the same vein, sections 29 and 30 of the Act, which establish the rate of compensation payable to injured workers, do not refer to either “personal injury” or “mental stress.” Section 29(1) provides “if a temporary total disability results from a worker’s injury, the Board must pay the worker compensation that is a periodic payment that equals 90% of the worker’s average net earnings.” Since this is the only provision in the Act which establishes the rate of compensation for temporary total disability, the term “injury” must be taken to include mental stress that satisfies the criteria under section 5.1 of the Act. If the term injury or personal injury were to be interpreted narrowly, so that they did not include mental stress that meets the criteria under section 5.1, there would be no capacity to give effect to the obligation to pay compensation under section 5.1 of the Act.

In view of all of the above, I am satisfied that the term personal injury in sections 10(1) and 257(1) of the Act should be interpreted as including mental stress that meets the criteria under section 5.1. Accordingly, I consider that WCAT has jurisdiction to issue a certificate with respect to a claim "based on" mental stress as though it were a claim based on personal injury. Counsel submits that the term personal injury under section 5(1) includes all psychological injuries and that section 5.1 merely defines the circumstances in which compensation is paid for psychological injury. I do not consider it necessary to address that submission for the purposes of determining whether WCAT has jurisdiction to issue a certificate; I will address it, however, in dealing with the substantive issue of whether the claimant sustained a personal injury arising out of and in the course of employment.

I also agree with counsel that it is not necessary to determine whether the claimant satisfies the criteria under section 5.1 in order for WCAT to have the jurisdiction to make determinations under section 257 of the Act. It is sufficient if the claim is "based on" a mental stress injury. Once it has been established that the claim is based on a mental stress injury, WCAT has the jurisdiction to issue a certificate under section 257 of the Act.

Mental Stress and Determinations Under Section 257 of the Act

In addressing the question of jurisdiction, I have concluded that the term "personal injury" in section 5(1) includes a mental stress injury that satisfies the criteria under section 5.1 of the Act. It also includes psychological impairment that develops as a result of a compensable injury or disease. Counsel, however, submits that the term personal injury in section 5(1) is not limited to psychological impairment that results from a compensable injury or disease and mental stress that meets the criteria in section 5.1 of the Act.

Counsel submits that section 5(1) of the Act is the general provision for entitlement to compensation under the Act and that section 5.1 is a gloss on section 5(1) which restricts the compensation payable in cases of mental stress. Therefore, when considering a claim for psychological impairment, the first question asked is whether the worker sustained a personal injury arising out of and in the course of employment. If the answer is yes, then consideration is given to whether the worker is entitled to compensation for that personal injury. Only at that stage is consideration given to whether the worker's circumstances satisfy the criteria in section 5.1 of the Act. If they do, the worker is entitled to compensation. If the worker's circumstances do not meet the criteria in section 5.1 of the Act, there is no entitlement to compensation. According to this analysis, a worker could develop a psychological problem that satisfies the test for compensation under section 5(1) of the Act in that it is a personal injury that arises out of and in the course of the employment but have no entitlement to compensation if the mental stress does not meet the criteria in section 5.1 of the Act.

Counsel submits that, in such a case, the worker has suffered a personal injury arising out of and in the course of employment for the purposes of section 10(1) of the Act. Accordingly, any civil action against the employer would be statute barred even though the worker may not be entitled to compensation. In other words, where certain types of mental stress injuries are concerned, the worker is not entitled to compensation for personal injury arising out of and in the course of employment and the worker has no civil right of action. On this point, I note that although WCAT does not have the jurisdiction to determine whether a claim is statute barred, I do consider it appropriate to address an interpretation of the Act that appears to be inconsistent with the purposes of the Act. (See *WCAT Decision #2007-02502* regarding the jurisdiction of WCAT and the effect of a certificate.)

There are two significant difficulties with the approach suggested by counsel. The first is that the threshold test in section 5(1) is a test for compensation. Counsel's interpretation of section 5(1) and 5.1 leads to a result that is contradictory with the most fundamental aspect of section 5(1), the entitlement to compensation. Under section 5(1) of the Act, if a worker sustains a personal injury arising out of and in the course of employment, there is entitlement to compensation. There is no reason to embark on an enquiry into whether a worker sustained a personal injury arising out of and in the course of employment under section 5(1) other than to determine whether a worker is entitled to compensation under that section. The other problem with counsel's interpretation is that it is fundamentally inconsistent with the "historic compromise" in which workers gave up their cause of action against employers in exchange for a no-fault compulsory system of compensation for work-related injuries. Consistency with this principle would dictate that a worker retains a civil right of action with respect to injuries that do not come within the scope of the Act. (See *Pasiechnyk v. Saskatchewan (Workers' Compensation Board)* [1997] 2 S.C.R. 890 regarding the purposes of workers' compensation legislation.)

Prior to the enactment of section 5.1 of the Act, the public policy considerations related to workers' compensation coverage for psychological impairment were canvassed in the March 11, 2002, "Core Services Review of the Workers' Compensation Board" (Core Review)[1]. The Core Review devotes a chapter specifically to the issue of compensation for "chronic stress," which the core reviewer defined as "claims for psychological impairment caused by mental stimuli acting over time (ie: where no traumatic workplace event has occurred)." He provided a number of reasons for and against the acceptance of claims for chronic stress. The reasons against recognition of chronic stress injuries related predominately to the difficulties in adjudicating these types of claims. Ultimately, he recommended that chronic stress be recognized under the Act as a compensable injury. One of his reasons for arriving at this conclusion was the prospect of workers initiating civil suits against employers for chronic stress, if these

[1] Accessible at http://www.labour.gov.bc.ca/ wcbreform/WinterReport-Complete.pdf.

types of claims were automatically excluded from coverage. In this regard he stated, at page 181:

> Section 10 of the Act precludes a worker from bringing a legal action against his/her employer and/or a co-worker in respect of any personal injury, disablement or death arising out of and in the course of employment. In lieu of such right of action, a worker is entitled to the compensation benefits provided in Part 1 of the Act.
>
> If chronic stress claims are excluded from coverage under the Act, it is certainly arguable that the worker would be entitled to sue his/her employer if the worker's chronic stress arose out of and in the course of his/her employment (since the worker would not otherwise be entitled to receive any compensation benefits under the Act). Such a legal action would significantly undermine one of the foundations of the "historic compromise" – that employers would be protected from legal actions brought by their employers collectively funding the workers' compensation system".

The *Workers Compensation Amendment Act, 2002* (Bill 49), which was enacted subsequent to the Core Review, established the current regime for compensation for mental stress under section 5.1 of the Act. The purpose of section 5.1 of the Act was specifically referenced in the Hansard debates during which Bill 49 was introduced to the legislature. On May 13, 2002 the Honourable Graham Bruce stated, in this regard:

> I'm pleased to introduce Bill 49, the Workers Compensation Amendment Act, 2002.This bill amends the Workers Compensation Act to introduce a number of changes to workers compensation benefits and establish a new board-of-directors structure for the WCB.
>
> …
>
> This bill clarifies coverage for mental stress, explicitly stating that coverage will only be provided for mental stress when it is an acute reaction to a sudden and unexpected traumatic event or the result of an injury or disease for which the worker is entitled to compensation.

Although the core reviewer contemplated the possibility of coverage for mental stress conditions that were not caused by trauma yet were "truly work-caused," the legislation that was subsequently enacted did not provide for this possibility.

The policies reflect this legislative intention by indicating that sections 5(1) and 5.1, taken together, define the scope of psychological conditions that are recognized as personal injuries arising out of and in the course of employment. As previously noted, the policy at item #13.20 of the RSCM II, "Psychological Impairment," states that: "personal injury" includes "traumatically induced psychological impairment" and psychological impairment that is "a sequela to an accepted personal injury or occupational disease."

In light of this history and the policy interpretations of when psychological impairment constitutes a personal injury, there is no foundation for considering whether Mr. Kelly sustained a personal injury outside of the parameters of section 5.1 of the Act. Under the Act, psychological impairment is recognized as a personal injury arising out of and in the course of employment when it is a consequence of a compensable injury or disease or it satisfies the employment connection test in section 5.1 of the Act.

Mr. Kelly's condition does not result from a compensable physical injury or disease. Accordingly, a determination of whether he sustained a personal injury arising out of and in the course of employment, which is the terminology of sections 96(1), 10(1) and 257(1), rests on the determination of whether his circumstances satisfy the criteria in section 5.1 of the Act.

Finally, counsel submits that it is not necessary to determine whether Mr. Kelly actually sustained an injury; it is sufficient to determine whether the alleged incidents arose out of and in the course of employment. Generally speaking, WCAT does not make determinations as to whether a specific injury arose out of and in the course of employment in the context of section 257 of the Act. For the most part, certificates under section 257 are issued in relation to motor vehicle accidents and the primary issue is whether the accident arose out of and in the course of employment. Once that has been determined, a certificate is issued stating that any injuries sustained in the accident either arose out of and in the course of the employment or did not arise out of and in the course of employment. Evidence regarding the nature of the specific injuries sustained is very seldom, if ever, submitted to WCAT nor do the specific injuries become a matter for determination. The inquiry into the nature of the injuries sustained in the accident becomes the subject of the court action where the accident did not arise out of and in the course of employment. Where it is found that the accident arose out of and in the course of employment, the Board determines the nature of the injuries sustained if statutory time limits have been met.

WCAT Decision #2007-01219, *supra*, which was noted by counsel, also involved a request for a certificate under section 257 of the Act. The plaintiff's claim was based on a personal injury consisting of depression and other psychological impairment allegedly related to sexual assault and battery by the plaintiff's manager. The panel noted that the applicable law was the law in effect prior to 2002. As a result, section 5.1

of the Act did not apply to the plaintiff's circumstances. The panel also noted that no medical evidence had been submitted to WCAT and the panel did not consider it necessary to obtain and evaluate medical evidence in order to make a determination regarding the plaintiff's status at the time the cause of action arose. The panel went on to determine that the plaintiff was a worker at the relevant time. The panel also determined that "any injury or disablement by occupational disease alleged to have been suffered by the plaintiff, if such occurred, arose out of and in the course of his employment."

I agree with the approach taken by the panel in that decision but I do not consider that this approach is appropriate when an action is based on a mental stress injury under the current provisions of the Act. This is because a mental stress injury must be adjudicated under section 5.1 of the Act and the test of employment connection under section 5.1 is not "arising out of and in the course of employment."

Under section 5.1 the determination that must be made is whether the worker sustained "an acute reaction to a sudden and unexpected traumatic event arising out of and in the course of the employment." In this regard, it may be said that section 5.1 of the Act establishes a separate test of employment connection for mental stress injuries.

Mr. Justice Butler touched on this issue in *Hill v. Workers' Compensation Board*, 2007 BCSC 1187 when considering the requirements in policy item #13.30 that a traumatic event be "clearly and objectively identifiable," "sudden and unexpected in the course of the worker's employment" and "generally accepted as traumatic". He stated, at page 11:

> This test is somewhat akin to a causation theory because it sets the criteria that must be established before a worker may be entitled to compensation. As noted by Mr. Justice Donald in **Kovach**, *supra*, at para. [paragraph] 28, "No single theory of causation can be said to be infallible or universally applicable. What works for a tort based system may be unsuitable for a no fault scheme. It all depends on the policy goals of the system."
>
> [emphasis in original]

The determination that must be made, therefore, as previously stated, is whether Mr. Kelly's circumstances satisfy the criteria under section 5.1 of the Act. Only if his circumstances meet the criteria in section 5.1 can it be said that any injury he sustained arose out of and in the course of employment for the purposes of section 257 of the Act.

Status of the Plaintiff, Robert Kelly

Evidence

Mr. Kelly submitted an application for compensation with respect to three incidents in the workplace in July/August 2004. The application was dated October 27, 2004. Along with his application for compensation, he provided two incident reports and three entries from his journal in which he described the incidents. He also discussed them with a Board officer who recorded the information in a decision letter dated December 15, 2004.

According to this information, Mr. Kelly had a confrontation with a patron of The Gathering Place, called M, on July 28, 2004. M had requested a pair of socks which Mr. Kelly obtained for him. After taking the socks, M started searching through a basket of clothing that belonged to another patron and became involved in a verbal altercation with the other patron. Mr. Kelly intervened and consequently was also subjected to verbal abuse, including threats, from M. The security guard, Gord, arrived and escorted M out of the building. The police were then called to escort M away from the front of the building. As a result of this incident, M was barred from The Gathering Place for ten days.

The next incident occurred on August 13, 2004. At that time, M had appeared at The Gathering Place and started going through a hamper that contained donated clothing that had not yet been washed. Mr. Kelly asked M to stop but M continued to rummage in the hamper. Mr. Kelly called the security guard, Gord. When the security guard arrived, M started verbally insulting and threatening Mr. Kelly. Mr. Kelly left the area, leaving the security guard to deal with the problem. Mr. Kelly requested that M be barred from The Gathering Place.

The following day, on August 14, 2004, Mr. Kelly left the Health Centre area, where he works, to go for lunch. M and a friend were in the reception area and, as Mr. Kelly passed through that area, he was subjected to verbal abuse, which he initially ignored. However, every time he left the Health Centre area, he was insulted and taunted by M and his friend. The two then went into the Health Centre area and they continued to taunt and insult him there, as well.

Mr. Kelly went to the security staff in charge, Gord, who was the same staff person who had previously intervened in the incidents with M. Mr. Kelly reported what was going on to Gord and he was told that “boys will be boys.” As Mr. Kelly returned to the front desk, he saw that M was being escorted out of the building by the security guard for calling someone else names.

In the journal entry for that date, Mr. Kelly states that, later in the day and on the days that followed, he started to realize that the threats uttered by M could be carried out and if certain security staff thought that it was unnecessary to follow their own guidelines, then The Gathering Place was not a safe place for him to work. Mr. Kelly did not return to work after that day. He advised personnel at The Gathering Place that he would not be returning to work. He contacted the Employee Assistance Program (EAP) and started to attend counselling sessions. Six weeks later, he submitted an application for compensation to the Board.

In the decision letter of December 15, 2004, the Board officer noted that Mr. Kelly had said that he could potentially be subjected to abusive behaviour by patrons in his work at The Gathering Place and that he was well accustomed to the workplace conditions. In discussing the events at work, Mr. Kelly had said that he could handle people like M but what had caused him mental distress was the lack of staff support. He said that policies and guidelines had not been followed by management staff. The decision letter refers to a report from Mr. Kelly's physician for treatment on September 30, 2004. The physician had provided a diagnosis of PTSD, indicating that Mr. Kelly had been physically and verbally threatened by a client at the workplace. Mr. Kelly, however, had confirmed to the Board officer that he had not been physically assaulted.

The Board officer went on to state that the information provided by Mr. Kelly indicated that the psychological condition that had caused him to be off work stemmed from his strong opinion that there had been a lack of internal staff support relating to the three incidents involving the same patron. This evidence did not satisfy the requirements for compensation for mental stress under section 5.1 of the Act and the policy at item #13.30 of the RSCM II.

At the oral hearing, Mr. Kelly provided more background with respect to the incidents that he described in his application for compensation. He stated that he started working at The Gathering Place, which is a community centre, in 1995 as a volunteer. In April 1997 he was hired as an auxiliary to work in the kitchen, in the cafeteria. At that time, the attitude and the approach regarding the community centre was that it was community based. Because of the economics and the community in that area, the dynamics in the community centre changed. "Things happened and events occurred and it totally changed"; it became more violent and security became more of an issue than when the community centre had first opened. Originally, there were a lot of seniors, a lot of people using the cafeteria for their lunch. That all changed and, with the change, Mr. Kelly and the staff became responsible for "policing the actions of people." Mr. Kelly stated that this was not his temperament to start with and he ended up suffering and not knowing how to explain what he was going through.

Mr. Kelly said that he would take leaves of absence, suddenly feeling that he could not take this anymore. Every time he went back to work, he would tell himself that it was "okay," that "things would change." He did not understand why he felt this need to take leaves of absence. He said that he would "vacate" his workplace completely and not be heard or seen for months and he did not understand why he was doing this. He said that he had not grown up in an environment like the one he encountered at The Gathering Place.

Eventually, Mr. Kelly was asked to work more in the Health Centre which is a responsibility all of its own. He was responsible for dealing with volunteers and patrons with needs and he stated that he enjoyed the work and found it rewarding for a long time. However, he stated that, early in 2004, he was assaulted and that was when things really started to "click" for him. Before then, there had not been many incident reports because no one considered them necessary unless there was something major. So, on a daily basis there would be a lot of incidents that were just brushed off. It was easier to just tell the patron to "sit down" or he would be asked to leave. But, things got worse. In 2004 he was physically assaulted. He said that he "took off again." He said that he still did not understand what was going on with him, that, indeed, he was not able to take the abuse and the fact that he was not feeling safe.

On July 28, 2004 he was in the Health Centre and an altercation occurred, an incident report was written up, and the police were called. This is the first incident described in the claim file documents. As far as Mr. Kelly was concerned, the situation was handled properly at that time. The head of security dealt with it properly by barring the patron (M) for ten days. Mr. Kelly felt this was fair.

On August 13, 2004 M came back in and the whole thing started over again. Mr. Kelly said he had been assured that M was on a "short leash" which, in his view, meant "if you screw up, you're gone." The threats started again and Mr. Kelly asked the security person who had been involved in the first incident to take M out and to bar him again. According to the procedures, this was what should have occurred.

The next day, however, M was allowed back in; he was not barred. He came in and started taunting Mr. Kelly again. This went on for a couple of hours. When Mr. Kelly went to the head of security, who had also dealt with M on the two previous occasions, he said to Mr. Kelly, "boys will be boys, get over it Robert."

Mr. Kelly summarized his situation by stating that he had been repeatedly threatened and verbally assaulted and yet, when he approached the staff-in-charge, he was told "boys will be boys." It was not until M had started threatening another patron that he had been thrown out. Mr. Kelly said that it was at that point that he realized this was not a safe place to work. He stated: "If you don't follow your own guidelines … then what's to be expected." At that point, he refused to go back into the community centre.

He described this as a "snowball thing." Things were supposed to be handled in an appropriate way. He assumed he worked in an environment where rules were supposed to be set in place and people were supposed to follow them. They were just basic safety rules. That there was a problem with safety issues was apparent from looking at the sign on the wall that said: "hand weapons over to security." He said that it had evolved into that sort of an environment and he realized, at that point, that if things did not change, he could not stay there.

Mr. Kelly attended a meeting on October 22, 2004 with the head of security, his supervisor and the acting director of The Gathering Place. A copy of a report of this meeting, signed by the acting director, was submitted by the City of Vancouver. This letter sets out a number of actions which had been agreed upon, including the permanent banning of M from The Gathering Place, and follow-up actions regarding the role of security while the laundry list was being filled and a further follow-up by the head of security with Mr. Kelly regarding the incidents of August 13 and 14, 2004. In addition, Mr. Kelly was to complete an incident report regarding a prior incident at a bus stop where a threat had been made against him.

Mr. Kelly said that these and other things had been promised to him in the meeting of October 22, 2004 and a subsequent meeting. The employer's Occupational Health and Safety Committee had also become involved and had raised the issue of workplace safety in its November meeting. In addition, Mr. Kelly's physician had said that he could not work there any longer because of his concerns about safety; he was frightened to work at The Gathering Place.

Mr. Kelly stated: "All I requested was that they just find me another job somewhere" but he was told that this was not going to happen. He said that he understood this was because he was an auxiliary employee without much seniority and he accepted that.

Having received assurances that things would change, he returned to work in December 2004. He was still feeling uncomfortable but things went relatively smoothly. He asked for a few things to be changed and he was promised that there would be change and that a booklet would come out describing the responsibilities of employees. He never did see the booklet before he finally left in July 2005.

He stated that he worked "off and on" between December 2004 and July 2005. During that time, he had another altercation in the community centre and he was assaulted again on the street. He kept going to supervisory personnel or his union representative to say that things were not being done properly. As an example of the problems he faced, he said that the staff person in charge at the Health Centre is supposed to open the doors at 9:30 in the morning. Mr. Kelly would carry a pen and paper and he would start getting people on the laundry list for the four washers and dryers. Because of all the violence that had occurred, there was a policy that a security person was supposed

to be there at that time while this transfer of information and membership cards occurred. He said that the security guard's presence was only effective if the security guard was available and visible and not behind a locked metal door having a cup of coffee. He had raised this issue a number of times and the security guard was still late in arriving to provide a visual presence. He recorded this information and reported it and went to the union and various supervisory personnel. The "excuse" he was given was that the security guard did not start working until 9:30 a.m. As a result, patrons were not let in until the security guard arrived. He stated that the things he had been guaranteed were not done.

Evidence of other problems is found in email correspondence between the acting director and Mr. Kelly in late January/early February 2005, which was submitted by the City of Vancouver. In an email dated February 12, 2005, Mr. Kelly identified three incidents which had caused him to absent himself from the workplace again. On January 8, 2005 a patron, who had previously assaulted him at the bottom of the stairs, walked into the Health Centre. When he saw Mr. Kelly, he turned around and left but Mr. Kelly said that the incident had put him "on edge." He described another incident that occurred on January 10, 2005 while he was working an overnight shift. A person who had come in looking for a place to stay for the night had tried to take a handful of hot chocolate packages. Mr. Kelly had stopped him and had not thought anything more of the matter. On January 12, 2005 Mr. Kelly was accosted, on the street, by the person who had tried to take the hot chocolate. The patron and a friend started to threaten and verbally abuse him. Mr. Kelly, who had been on his way to The Gathering Place to start a work shift, turned around and returned to his home. In his email, he stated that all the "c…" he had dealt with from last August had come back. When questioned about what he meant by this, Mr. Kelly stated that he was referring to the same old problem of inadequate security. He felt unsafe because of security issues and lack of procedures.

Mr. Kelly stated that he lost weight and became afraid to go to work at The Gathering Place. In the meantime, he obtained a "one-day comfortable job" working with the elderly and seniors at a community centre. He held that job for four or five months. One of his duties was to go down every half-hour to record the number of people who were there and to make sure they had the right to be there. His anxiety level reached the point that he had to ask the director of that centre to perform that task for him because he was no longer able to do it. His inability to do it was in direct response to fear. He said that it could be said that this was due to PTSD but, in his view, it was all about fear because of the way the City had approached the problems at The Gathering Place. He stated that he should have been able to comfortably work at both The Gathering Place and the Kerrisdale Centre.

Mr. Kelly stopped working at The Gathering Place and the Kerrisdale Centre in July 2005. Copies of two handwritten notes from his physician, dated August 17, 2005 and August 25, 2005, were submitted by the defendant. The first note requests that Robert Kelly be excused from work due to his illness; in the second note, the physician recommends that Robert Kelly leave his present jobs due to health reasons. Mr. Kelly stated that when he stopped working in July 2005, it was due to sheer fear; he said that he was not able to get on the bus anymore to go to work. He said that he was seeing a counsellor at the time and he is still in counselling. He started seeing a counsellor in October 2004, through his employer's Employee Assistance Program, and he has gone on to see another counsellor.

The City of Vancouver submitted a copy of a report of injury or occupational disease to employer that was signed by Mr. Kelly, regarding the incident in March 20, 2004. This report is dated October 12, 2004 and Mr. Kelly stated that he completed this report at the request of his employer in order to satisfy their procedures. On the date of the incident, March 20, 2004, Mr. Kelly had refused service to a patron and the patron had confronted Mr. Kelly in the stairwell. He had pushed Mr. Kelly up against a wall, raising his fists. This had occurred twice in one day. Mr. Kelly indicated in the report that, after this incident, he felt emotional anxiety, had problems sleeping, and eating and he had lost weight. He was also fearful of returning to an unsafe environment. Mr. Kelly did not submit an application for compensation with regard to that incident, although he did miss some time from work following the incident. He did not recall seeing his family doctor.

He agreed that he had found this incident "unexpected and traumatic." Mr. Kelly would not agree, however, that this was an unusual event in The Gathering Place. He said that it was a constant occurrence in that community centre. The only thing that made it different was that it had happened to him. He had frequently been threatened and the fists being shoved into his face had happened on many, many occasions. This time there had been a physical aspect.

Applicable Law and Policy

Section 5.1 of the Act, as has been previously noted, establishes three requirements for compensation for mental stress. The mental stress must be "an acute reaction to a sudden and unexpected traumatic event arising out of and in the course of the worker's employment"; the worker must have been diagnosed, by a psychologist or physician, with a condition described in the DSM; and, the mental stress cannot be a caused by a decision of the employer related to the worker's employment.

The policy at item #13.30 of the RSCM II provides direction on the interpretation of the criteria in section 5.1 of the Act. It states, in part:

> An "acute" reaction means – "coming to crisis quickly", it 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 have suffered or witnessed the traumatic event first hand.
>
> In all cases, the traumatic event must be
>
> - clearly and objectively identifiable; and
> - sudden and unexpected in the course of the worker's employment.

> This means that the event can be established by the Board through information or knowledge of the event provided by co-workers, supervisory staff, or others, and is generally accepted as being traumatic. The "arising out of" determination is discussed in policy item #14.00.

The policy also provides examples of workers in situations where there would likely be entitlement to compensation. These include a bus driver where a person commits suicide by jumping in front of a bus, a worker who witnesses a very serious accident to a co-worker, a prison guard who is taken hostage and a worker who is sexually assaulted by a supervisor.

Submissions

Mr. Kelly submitted that there was a breach of his employment contract in that people were not trained to do their job and he was the one who ended up “getting the kick for it.” He stated that his sense of direction had been based on trying to help and that he valued himself based on what he could do in the community. He submitted that both of these were taken away. He submitted that his training had been inadequate and that he ended up being afraid to go to work because of the work environment. He stated that he wants the City of Vancouver to assume responsibility for its lack of action, for failing to meet the commitments made to him regarding improved security procedures.

Mr. Kelly submitted that he did not sustain a personal injury, although he was intimidated and frightened because the City breached its obligations to provide a safe environment. He submitted that fear is not an injury and the evidence does not support a conclusion that he sustained a personal injury. Having been advised by the Board that these types of matters are not addressed under the compensation system, the only other forum available to him is the court.

The City of Vancouver submitted that, although the notice of claim was based on the events of July and August 2004, the preceding incident of March 2004 was also significant. Specifically, with respect to section 5.1 of the Act, counsel submitted that Mr. Kelly’s circumstances satisfied the requirements under that section. Mr. Kelly was diagnosed by a physician as having PTSD, as required under section 5.1. His psychological condition was not caused by a decision made by his employer regarding Mr. Kelly’s employment; rather, Mr. Kelly had alleged that it was the employer’s inaction that had made the threats possible. This is different from an employer’s actions causing mental stress to an employee.

Counsel submitted that Mr. Kelly was employed in a difficult environment with difficult patrons and his work involved the potential and reality of physical threats and violence. Mr. Kelly was threatened with physical violence in March 2004 and there had been a reasonable apprehension of physical injury in that incident. He submitted that the

incident in March 2004 had caused a personal injury which was likely aggravated by the subsequent incidents in July and August 2004. Mr. Kelly had an acute reaction to the incident in March 2004 in that he stopped working and withdrew to the point where he would not even answer the telephone.

He submitted that the subsequent incidents of July and August 2004 constituted sudden and unexpected traumatic events in that they involved actual or threatened physical violence. Notwithstanding the type of patrons at The Gathering Place, a personal physical assault was not expected. In this regard, he referred to the reasoning in *WCAT Decision #2004-05648*. This was also a case which involved a claim for compensation for mental stress based on repeated threats of violence. The vice chair found that, although the worker was frequently exposed to negative responses to his decisions, the threats upon which his claim was based did constitute "a sudden and unexpected traumatic event." Similarly, Mr. Kelly also met the criteria under section 5.1 for compensation for personal injury.

Reasons and Decision

Mr. Kelly was an employee of the City of Vancouver when the incidents occurred in July and August 2004 and had been an employee for a number of years prior to that time. Accordingly, he was a worker at the time the cause of action arose.

The next question is whether his circumstances meet the criteria under section 5.1 of the Act. The first criterion is set out in section 5.1(1)(a), which states that the mental stress must be "an acute reaction to a sudden and unexpected traumatic event arising out of and in the course of employment."

I note the submission by counsel that Mr. Kelly's psychological issues stem from an incident in March 2004. This submission was not supported by any medical opinion evidence. In addition, Mr. Kelly did not make a claim for compensation for that incident, did not refer to it in his notice of claim and stated that he does not recall seeing a physician after that incident – although he did stop working for awhile. Accordingly, there is no evidence before me that would permit me to make a finding that the condition Mr. Kelly developed in July and August 2004 is related to an incident that occurred in March 2004.

There were three incidents identified by Mr. Kelly in both his claim for compensation and the notice of claim as leading to his absence from work between August 2004 to December 2004. The Act specifies that compensation may be paid where there is an acute reaction to "a… traumatic event." The policy at item #13.30, in describing the types of situations which may satisfy the requirement under section 5.1(1)(a), does not contemplate the characterization of a series of a events as "a… traumatic event." Even in those cases involving workers who are frequently exposed to traumatic events, such

as emergency workers, compensation may be only be provided for an acute reaction to a sudden and unexpected traumatic event as opposed to the cumulative effects of exposure to traumatic events. I have also considered *WCAT Decision #2006-02777* in which the panel reviewed the history of section 5.1 and concluded that the intention of section 5.1 was to exclude compensation coverage for the cumulative effects of trauma. I agree with that analysis. As a result, I consider that each incident that preceded Mr. Kelly's absence from work must be considered separately to determine whether it may be characterized as a traumatic event and whether Mr. Kelly's reaction may be characterized as an acute reaction to that event.

Turning to the first incident, which occurred on July 28, 2004, I do not consider this meets the test of a "traumatic event." Mr. Kelly was subjected to verbal abuse from a patron when he asked that patron not to rummage through a basket of clothing that belonged to another patron. Mr. Kelly did not claim that this was a traumatic event nor can it reasonably be described as "a severely emotionally disturbing event." Mr. Kelly continued to work after this incident and he stated at the oral hearing that he was quite satisfied with the way it had been addressed. Accordingly, this event does not satisfy the criterion in section 5.1(1) and policy item #13.30 for a "traumatic event."

The second event, which occurred on August 13, 2004, was of a similar nature. Mr. Kelly was subjected to verbal abuse from the same patron and for essentially the same reason. Mr. Kelly had told him to stop rummaging through a basket of clothing. Again, I do not consider that this event constitutes a traumatic event for the purposes of section 5.1 of the Act. It could not even be considered sudden and unexpected since it involved essentially the same pattern of interaction as had occurred on July 28, 2004 with the same patron. Therefore, I do not consider that this event meets the criterion in section 5.1 for entitlement to compensation for mental stress.

The third and final incident occurred on August 14, 2004. Again, Mr. Kelly was subjected to verbal abuse by the same patron. Again, I do not find that this can be characterized as a traumatic event and certainly not a sudden and unexpected traumatic event, given that Mr. Kelly was dealing with the same patron who was exhibiting the same verbal behaviour as on previous occasions. In addition, Mr. Kelly's evidence at the oral hearing was that he frequently dealt with verbal abuse. It was the nature of the clientele and it had become a regular part of his employment. He did not like it and he did not consider that it was appropriately addressed by his employer, but this cannot be characterized as a traumatic event. It simply is not of a severity that would satisfy the policy interpretation of that term.

Beyond that, I also do not consider that Mr. Kelly's reaction to this incident was an acute reaction as this term is interpreted by the policies. The policy at item #13.30 of the RSCM II states: "An "acute" reaction means – "coming to crisis quickly", it 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."

Mr. Kelly's evidence suggests that he was more concerned by the security guard's response than by the verbal abuse directed towards him by the patron. Had the patron been evicted and barred from the centre on August 14, 2004, as he had been on July 28, 2004, it seems unlikely that Mr. Kelly would have stopped working. The decision letter of December 15, 2004 states that Mr. Kelly's mental distress was caused by the lack of staff support. Mr. Kelly's evidence at the oral hearing supported this conclusion. It is clear that Mr. Kelly was very unhappy with the security guard's comments which trivialized the verbal abuse that had been directed towards him. He came to the conclusion that the Gathering Place was not a safe place to work if the security staff did not follow their own procedures.

In terms of Mr. Kelly's reaction and whether it can be characterized as an "acute reaction," it does not appear to have been one that was immediate and identifiable or that it involved "severe emotional shock, helplessness and/or fear." Mr. Kelly's evidence suggested that he thought about the security guard's reaction for the remainder of the day on August 14, 2004 and in the days following, and concluded that he was not safe because of the guard's attitude and behaviour. This does not suggest a reaction that is similar to that described in policy. Mr. Kelly did remove himself from the workplace, but this also does not go far in terms of establishing an acute reaction since he had a history of taking time away from work when he felt that he could not take it anymore. This behaviour preceded the events of July and August.

Given all of the above, I find that the events in Mr. Kelly's workplace and his reaction to them do not satisfy the requirement under section 5.1(1)(a) for compensation for mental stress. Mr. Kelly's distress and mental stress were not "an acute reaction to a sudden and unexpected traumatic event arising out of and in the course of" his employment. Although the events to which he attributes his distress are employment related, these events and his reaction to them do not satisfy the criteria under section 5.1 of the Act.

Mr. Kelly's condition is not a consequence of compensable injury or disease nor do his circumstances meet the criteria under section 5.1 of the Act. Accordingly, I find that Mr. Kelly did not sustain a personal injury arising out of and in the course of his employment.

Status of the Defendant, the City of Vancouver

There is no dispute that the City of Vancouver is an employer. It is registered with the Board as an employer and it is a matter of general knowledge that it has employees.

Conclusion

I find that, at the time the cause of action arose, in July and August 2004, the claimant, Robert Kelly, was a worker within the meaning of Part 1 of the Act; any personal injury sustained by the claimant did not arise out of and in the course of his employment. The City of Vancouver was an employer within the meaning of Part 1 of the Act.

Marguerite Mousseau
Vice Chair

MM:gw

NO. 0610963
VANCOUVER REGISTRY

IN THE PROVINCIAL COURT OF BRITISH COLUMBIA
(SMALL CLAIMS COURT)

IN THE MATTER OF THE WORKERS COMPENSATION ACT
REVISED STATUTES OF BRITISH COLUMBIA 1996, CHAPTER 492, AS AMENDED

BETWEEN:

ROBERT KELLY

CLAIMANT

AND:

CITY OF VANCOUVER

DEFENDANT

C E R T I F I C A T E

UPON APPLICATION of the Defendant, City of Vancouver, in this action for a determination pursuant to section 257 of the *Workers Compensation Act*;

AND UPON NOTICE having been given to the parties to this action and other interested persons of the matters relevant to this action and within the jurisdiction of the Workers' Compensation Appeal Tribunal;

AND AFTER an opportunity having been provided to all parties and other interested persons to submit evidence and argument;

AND UPON READING the pleadings in this action, and the submissions and material filed by the parties;

AND UPON HEARING the evidence and argument of the parties in an oral hearing on January 15, 2008;

AND HAVING CONSIDERED the evidence and submissions;

THE WORKERS' COMPENSATION APPEAL TRIBUNAL DETERMINES THAT at the time the cause of the action arose, in or around July and August 2004:

1. The Claimant, ROBERT KELLY, was a worker within the meaning of Part 1 of the *Workers Compensation Act*.

2. The Claimant, ROBERT KELLY, did not sustain a personal injury arising out of and in the course of his employment within the scope of Part 1 of the *Workers Compensation Act*.

3. The Defendant, the CITY OF VANCOUVER, was an employer engaged in an industry within the meaning of Part 1 of the *Workers Compensation Act*.

CERTIFIED this day of July, 2008.

_____

MARGUERITE MOUSSEAU
VICE CHAIR

NO. 0610963
VANCOUVER REGISTRY

IN THE PROVINCIAL COURT OF BRITISH COLUMBIA
(SMALL CLAIMS COURT)

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BETWEEN:

ROBERT KELLY

CLAIMANT

AND:

CITY OF VANCOUVER

DEFENDANT

SECTION 257 CERTIFICATE

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