WCAT Decision Number: WCAT-2011-00740
WCAT Decision Date: March 21, 2011
Panel: Allan Tuokko, Vice Chair

Introduction

[1] In a decision letter dated December 18, 2009, the Workers' Compensation Board, operating as WorkSafeBC (Board), allowed the worker's claim for mental stress under section 5.1 of the *Workers Compensation Act* (Act) in relation to an incident on November 17, 2009.

[2] The employer requested a review of this decision.

[3] In *Review Reference #R0112544* dated April 22, 2010, a review officer confirmed the Board's decision to accept the worker's claim.

[4] The worker now appeals *Review Reference #R0112544* to the Workers' Compensation Appeal Tribunal (WCAT).

[5] The employer filed a notice of appeal dated May 25, 2010, and a submission dated August 3, 2010. Counsel for the worker then filed a submission in reply dated August 26, 2010, and the employer filed a rebuttal submission dated September 16, 2010.

[6] I have read the submissions in full, but will recite them only to the extent I consider necessary to give context to this decision.

Issue(s)

[7] The matter at issue is whether the worker is entitled under section 5.1 of the Act to compensation for mental stress from an incident on November 17, 2009.

Jurisdiction

[8] This appeal is brought under subsection 239(1) of the Act, which permits appeals of Review Division findings to WCAT.

[9] Section 254 of the Act gives WCAT exclusive jurisdiction to inquire into, hear and determine all those matters and questions of fact, law, and discretion arising or required to be determined in an appeal before it.

[10] This is a rehearing by WCAT. WCAT reviews the record from previous proceedings and can hear new evidence. WCAT has inquiry power and the discretion to seek further

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evidence, although it is not obliged to do so. WCAT exercises an independent adjudicative function and has full substitutional authority. WCAT may reweigh the evidence and substitute its decision for the appealed decision or order. WCAT may confirm, vary or cancel the appealed decision or order.

[11] Subject to subsection 250(4) of the Act, the standard of proof in an appeal is the balance of probabilities. Subsection 250(4) of the Act provides that if WCAT is hearing an appeal respecting the compensation of a worker and the evidence supporting different findings on an issue is evenly weighted in that case, the appeal tribunal must resolve that issue in a manner that favours the worker.

[12] Subsection 250(2) of the Act provides that WCAT must make its decision based on the merits and justice of the case, but in so doing it must apply a policy of the board of directors that is applicable in that case.

Legislation and Policy

[13] The board of directors of the Board has approved changes to the policies on compensation for personal injury in Chapter 3 of the *Rehabilitation Services & Claims Manual, Volume II* (RSCM II). These new policies only apply to claims for injuries, mental stress or accidents that occur on or after July 1, 2010. Since the worker's claim is for mental stress occurring before July 1, 2010, the previous Chapter 3 policies apply to this appeal.

[14] Section 5.1 of the Act is the relevant provision authorizing compensation to workers for mental stress arising out of and in the course of employment.

[15] Section 5.1 states:

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

(2) The Board may require that a physician or psychologist appointed by the Board review a diagnosis made for the purposes of subsection (1) (b) and may consider that review in determining whether a worker is entitled to compensation for mental stress.

(3) Section 56(1) applies to a physician or psychologist who makes a diagnosis referred to in this section.

(4) In this section, **"psychologist"** means a person who is registered as a member of the College of Psychologists of British Columbia established under section 15(1) of the *Health Professions Act* or a person who is entitled to practice as a psychologist under the laws of another province.

[16] Policy item #13.30 (*Mental Stress*) of the RSCM II, effective April 30, 2009, states as follows:

> Section 5.1 of the Act sets out that a worker may be entitled to compensation for mental stress that does not result from an injury or occupational disease if the impairment is due to an acute reaction to a sudden and unexpected traumatic event. This is distinct from a worker's entitlement under section 5(1) for psychological impairment that is a compensable consequence of an injury or an occupational disease.
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> In certain situations, a single incident may result in the Board accepting a worker's claim for compensation for a physical injury under section 5(1), and mental stress that is not a compensable consequence of the physical injury, under section 5.1.
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> "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.

[17] Under subsection 5.1(1)(a), the Act establishes a two-part test:

1. There must be an acute reaction to a sudden and unexpected traumatic event.

2. The sudden and unexpected traumatic event must arise out of and in the course of the employment.

[18] 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. In certain situations, however, the acute reaction may be delayed. In all cases, the evidence must establish that the acute reaction is due to a sudden and unexpected traumatic event that arose out of and in the course of employment.

[19] For the purposes of this policy, a "traumatic" event is an emotionally shocking event. In most cases, the worker must have suffered or witnessed the traumatic event first hand.

[20] In all cases, the traumatic event must be

- Clearly and objectively identifiable; and
- Sudden and unexpected in the course of the worker's employment.

[21] 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. The "arising out of" determination is discussed in policy item #14.00.

[22] In considering the matter of work-relatedness, the Board must determine if there is a connection between the work-related traumatic event and the resulting acute reaction. This requires consideration of personal factors in the worker's life, which may have contributed to the acute reaction. For compensation to be provided, the work-related traumatic event must be of causative significance to the worker's mental stress. If the work-related traumatic event is not of causative significance, the worker's mental stress will not be compensable.

[23] It is recognized that some workers, due to the nature of their occupation, may be exposed to traumatic events on a relatively frequent basis (e.g., emergency workers). If such a worker has an acute reaction to a sudden and unexpected traumatic event, compensation for mental stress may be provided even if the worker was able to tolerate past traumatic events.

[24] In all cases concerning entitlement to compensation for mental stress, the worker's mental stress must be 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 diagnosis. A "Psychologist" means a person who is a registered member of the College of Psychologists of British Columbia or a person who is entitled to practice as a psychologist under the laws of another province.

[25] The Board may appoint a physician or psychologist to review a diagnosis of a worker's mental stress condition. When assessing all of the relevant medical evidence, the Board may consider that review in determining whether a worker is entitled to compensation for mental stress. A diagnosis of mental stress is not reviewed in every

case. However, a review may be undertaken where, for instance, the Board receives medical evidence that conflicts with the diagnosis and which the physician or psychologist may not have possessed or been aware of when making the diagnosis. There is no entitlement to compensation if the mental stress is 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.

Background and Evidence

[26] The parties have had disclosure and access to all documentation relating to this appeal. I have reviewed all documentation relating to this appeal, including all submissions. I will not provide a complete background to all of the worker's claim documentation in my decision, but will set out sufficient particulars to explain the issues and my findings on those issues.

[27] In the April 22, 2010 decision under appeal, the review officer noted that the facts related to the worker's claim were not in dispute and provided the following summary of the background up to and including the December 18, 2009 decision under review:

> In an employer's report of injury, dated November 20, 2009, the employer stated that on November 17, 2009, the worker, a 41-year-old engineer, was in a locomotive engine when it ran into a mud slide. The locomotive rolled on its side and the worker was trapped for about two hours.
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> The employer reported that the worker suffered multiple contusions and emotional trauma/nervous shock. The employer did not object to the worker's claim.
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> On November 26, 2009, the Board accepted the worker's claim for a left lower leg and left finger injury.
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> In a report, dated November 30, 2009, Dr. S, a registered psychologist, stated that the worker reported decreased concentration, flashbacks, withdrawal from usual activities, easily emotional, and increased heart rate and blood pressure. Dr. S noted that it was evident that the worker was having an emotional reaction. In a psychological opinion, dated December 14, 2009, a Board Psychology Advisor, ("PA"), stated:
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> - The worker had received psychological services through the Board's Critical Incident Response, ("CIR"), program. Dr. S submitted a progress report, dated November 30, 2009. The Board Officer asked for clarification of a possible DSM-IV diagnosis.

- Dr. S's report listed several presenting symptoms; nightmares, flashbacks, disturbed sleep, agitation and fidgeting, reduced concentration, withdrawal from activities, and physiological reactivity. The worker also displayed affective arousal when describing the accident.

- He spoke with Dr. S on December 11, 2009, and asked about possible diagnoses. He stated that he felt that this worker's symptoms were consistent with an Adjustment Disorder, (a DSM-IV diagnosis). After reviewing file information and talking with Dr. S, he agreed with this impression. Dr. S stated that the worker was doing well in treatment and he felt that the worker would be able return to work in the near future.

- By decision letter dated December 18, 2009, a Board Officer advised the worker that his claim had been accepted for mental stress. The Board Officer stated:

> *I have determined that your claim meets the criteria for acceptance per Sec 5.1 of* the *Act as you had an acute reaction to a sudden and unexpected traumatic event arising out of and during the course of your employment – potentially life threatening accident. There is a confirmed diagnosis as noted above and finally your stress is due to the aforementioned accident and not your working conditions such as labour issues.*

[all quotes reproduced as written except where otherwise indicated]

[28] On January 17, 2010, the employer completed a request for review seeking denial of the worker's claim on the basis that "insufficient processes were done to reach a DSM-IV diagnosis".

[29] The worker arranged to be represented by counsel, who filed a March 22, 2010 submission on his behalf.

[30] The review officer described the employer's submissions of February 12, 2010 and April 6, 2010 as including the following points in support of its position that the worker's claim should be denied based on insufficient processes to reach a DSM-IV diagnosis:

- The Board psychology advisor's diagnosis of adjustment disorder was based on a review with Dr. S.
- Dr. S was not independent as he was the treating psychologist.

- The American Medical Association *Guides to the Evaluation of Disease and Injury Causation* stated that it was improper for a practitioner to both treat and diagnose.
- The role of the CIR Team was not to diagnose.

[31] The review officer concluded, contrary to the submissions of the employer, that the requirements of section 5.1 of the Act were satisfied, stating as follows:

> In this case, I am persuaded that the worker experienced an acute reaction within the meaning of Board policy. In the employer's report of injury, dated November20, 2009, the employer reported that the worker suffered multiple contusions and emotional trauma/nervous shock, resulting from the sudden and unexpected overturning of his locomotive on November 17, 2009. The worker sought medical attention within four days of the event. On November 24, 2009, the Board referred the worker to the CIR team for an intervention.
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> With regard to whether the worker's acute reaction was due to a sudden and unexpected traumatic event within the meaning of section 5.1 and policy item #13.30, I find that the described event, that is the worker driving his locomotive into a mud slide, turning over and being trapped for two hours, was a sudden and unexpected traumatic event for this particular worker.
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> In this case, as well, the worker suffered physical injuries that were accepted by the Board. I find that the incident was an, "unexpected traumatic event", as contemplated by section 5.1 of the *Act*; and, that the worker's mental stress was related to the traumatic incident.

[32] The review officer adopted as his reasons for decision a summary of the worker's submissions. The review officer set out the submissions of both parties and then adopted his summary of the worker's submissions as follows:

> The employer's objection was based on their perception that the process of diagnosing the worker's DSM-IV Adjustment Disorder was flawed. The employer argued that the AMA Guides barred a treating psychologist from providing a psychological diagnosis. The employer also argued that the role of the CIR team was not to provide a diagnosis.
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> The worker's representative argued that:
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> - The diagnosis of Adjustment Disorder was made by the Board PA on December 14, 2009.
> - Section 5.1(1)(b) of the *Act* states that a mental stress injury must be diagnosed by a physician or a psychologist.

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- Section 5.1(4) of the *Act* defines a psychologist as a person who is registered as a member of the College of Psychologists of British Columbia.
- The *Act* did not require that a diagnosis be made by an independent, as opposed to a treating practitioner.
- The AMA Guides do not apply in Canada.
- Dr. S did not provide the diagnosis; The Board PA did.
- The employer did not dispute the facts of the worker's claim.
- The employer did not argue that Dr. S's diagnosis was wrong; just that it was not independent.
- The CIR team is not prohibited from making a diagnosis.
- The employer did not question the Board PA's diagnosis.

I am persuaded by the submission of the worker's representative and I adopt the above summary of that submission as my reasons in this decision.

Appeal Submissions

[33] In its notice of appeal dated May 25, 2010, the employer requested denial of the worker's claim and argued the review officer's decision was incorrect because the standards of practice and procedure were inadequately considered.

[34] In a submission dated August 3, 2010, the employer stated it has never alleged the worker engaged in any wrongdoing throughout the claim; rather, the employer submitted that the Board had not adhered closely to its own policy and professional standards. The employer submitted that it is imperative that the Board follow its own law and policy, as well as insist that its staff adhere to their professional governing body's guidelines. The employer submitted the review officer's decision was wrong because the Board had not properly adhered to proper standards of practice and law. The employer stated it stood by its April 6, 2010 and February 12, 2010 submissions to the review officer, which it asserted the review officer failed to address in any detail whatsoever by merely agreeing with the worker's representative.

[35] The employer asserted that whether or not Board legislation states that a diagnosis must be made by an independent practitioner, well-known professional standards and best practices state that it does.

[36] The employer commented it found it odd that Board policy does not or could not work in conjunction with professional standards of the medical community. The employer argued the AMA guidelines previously submitted did not constitute law, but rather professional standards that would be the same in Canada as in the United States. The employer attached provisions of the Code of Conduct for the College of Psychologists of B.C. and argued that the Board psychologist advisor violated the Code by providing a diagnosis based on a discussion with Dr. S instead of a direct examination of the worker. The employer argued Dr. S also could not provide a diagnosis because, as a staff member of the Critical Incident Response team (CIR), he was not "independent"

within the meaning of a provision of the Code of Conduct for psychologists. The employer submitted that while the CIR program documentation previously submitted to the review division did not explicitly forbid staff from providing diagnoses, it stated its role was to officer critical incident intervention or stress management services while saying nothing about providing diagnostic services.

[37] The employer disputed the assertion that it did not dispute the diagnosis itself, stating that it was logical to consider the diagnosis invalid based on the argument that proper policy and standards were not followed in order to reach the diagnosis.

[38] Counsel for the worker replied in a submission dated August 26, 2010, that he repeated and relied upon the worker's March 22, 2010 submission to the review officer. In regard to the employer's August 3, 2010 submission, the worker had several comments.

[39] The worker submitted it was clearly open to the review officer to accept one party's submissions over those of the other party. The worker further submitted the law on that point is clear that a tribunal's reasons need not address all arguments of a party, but rather need only be sufficient to understand the reasoning of the decision-maker and provide enough information for an appeal.

[40] In regard to the employer's contention that a diagnosis of psychological injury must be made by an independent practitioner, the worker commented the employer cited no law supportive of that position but rather referred to provisions from the Code of Conduct of the College of Psychologists of BC. The worker submitted that these provisions are wholly irrelevant to the matter before WCAT, which is governed by the Act, not guidelines of self-regulating professions. The worker submitted the Act does not require that a diagnosis must be made by an "independent" as opposed to a "treating" practitioner. The worker submitted the only issues for WCAT to decide are whether the expert providing the opinion is appropriately qualified and whether the expert is acting as an advocate. The worker submitted there has been no evidence adduced by the employer to suggest that the experts are not qualified to give the opinion they have, and no suggestion that they are acting as advocates. The worker further submitted that the employer has failed to provide any evidence as to the proper interpretation of the provisions extracted from the Code of Conduct, or the effect of a breach of those provisions.

[41] Counsel for the worker submitted that while the employer had repeatedly stated that the Board has failed in this case to follow its own law and policy, the employer had utterly failed to identify any legislation or a single Board policy which had not been complied with in respect of the worker.

[42] The worker disputed the employer's suggestion that because the documentation provided by the employer concerning the CIRT program did not specifically state psychologist-members of the CIRT program are allowed to provide diagnostic opinions,

they are somehow barred from doing so. The worker characterized this as a logical fallacy, as the description of the CIRT does not purport to be exclusive.

[43] The worker submitted that while the employer on appeal suggested for the first time that it took issue with the diagnosis made by both psychologists, the employer failed to advance any evidence that the worker did not have adjustment disorder at the material time. The worker submitted the law is clear that when WCAT is faced with a medical diagnosis from a properly qualified practitioner, it is not entitled to reject that diagnosis without an appropriate opinion to the contrary. The worker submitted a court decision concerning a petition for judicial review, as well as two WCAT decisions, in support of its contention that there are numerous cases where treating psychological practitioners have provided diagnoses and opinions to the Board and these have been specifically accepted by WCAT in the face of objections from the employer.

[44] In a rebuttal submission dated September 16, 2010, the employer disputed the worker's assertion that when faced with a medical diagnosis from a properly qualified practitioner, the law is clear that WCAT is not entitled to reject that diagnosis without an appropriate opinion to the contrary. In regard to the worker's assertion that there are numerous cases where treating psychological practitioners have provided diagnoses and opinions to the Board and WCAT, the employer submitted that the converse is also true: there are numerous cases where independent psychological practitioners' opinions have been preferred.

[45] The employer submitted that in this worker's case, for unknown reasons, the Board did not adhere to its own practice of retaining a psychologist to provide an independent assessment. The employer submitted that by using its own Board psychologist advisor to identify a diagnosis in conjunction with the worker's treating practitioner, the Board process was highly insufficient in terms of professional standards.

[46] The employer submitted that while the Act may not require that a diagnosis be made by an independent practitioner as opposed to a treating practitioner, it would think that the Board does have a responsibility to ensure that it is utilizing psychologists that adhere to professional standards set by the College. The employer submitted that section 5.1(4) of the Act states the psychologist must be registered with the College of Psychologists of B.C., and if the Board is using registered psychologists, there should be a reasonable assumption that those registered psychologists adhere to the College's code of conduct at all times.

[47] The employer continued to assert that the role of the CIRT is not to diagnose and referred to a September 14, 2010 telephone conversation between its representative and a CIRT program staff member about its role. The employer quoted several statements from that conversation in support of its contention that the role of the program does not include giving a diagnosis for this claim. The employer submitted it is apparent that in this case the CIRT psychologist provided the diagnosis of adjustment disorder in a telephone conversation with the Board psychologist advisor, and the

advisor merely agreed with it. The employer stated in conclusion that "It is absolutely essential that the Board follow proper methods precisely for arriving at acceptances of mental stress claims and we submit that, in this case, they did not. [The employer] stands by our original submission that the DSM-IV diagnosis was arrived at by improper processes and thus, must be declared invalid and the claim denied."

Reasons and Findings

[48] I have decided to deny the employer's appeal.

[49] I agree with the worker's submission to the effect that the Act and Board policy, rather than the professional code of conduct provisions or other sources referred to, govern the adjudication of whether to accept the worker's claim for mental stress. I also agree that the employer has not shown any instance of non-compliance with any provision of the Act or Board policy in this case. I find insufficient support for the employer's contention of procedural defects rendering the accepted diagnosis a legal nullity or otherwise invalid based on alleged breaches of provisions from sources such as AMA guidelines and professional codes of conduct.

[50] I consider that the question whether there should be a legislative provision or Board policy prohibiting the diagnostic process complained of by the employer is beyond my jurisdiction to decide. In regard to the matter that I do see myself as authorized and obligated to decide, I agree with the conclusion of the review officer that the evidence in this worker's case satisfies all of the legal requirements of section 5.1 of the Act and RSCM II policy item #13.30 (*Mental Stress*).

[51] I note the employer in its submissions focused on its policy concerns and said very little to try to refute the worker's assertion that there have been no procedural or substantive breaches of the Act or Board policy. In regard to the argument that there should be an assumption that registered psychologists involved in providing opinions on mental stress claims adhere to their professional code of conduct at all times, I am unable to find any such requirement in section 5.1(4) of the Act, either expressly or by necessary implication. Also, although the employer has alleged breaches of professional codes of conduct, I note there is no indication of any judicial or quasi-judicial determinations to that effect by any court, tribunal or professional regulatory body having the authority to decide such matters. In my view, the employer's allegations do not provide sufficient grounds to conclude that either psychologist in this case did not meet the statutory definition of a psychologist in section 5.1(4) as "a person who is registered as a member of the College of Psychologists of British Columbia … or a person who is entitled to practice as a psychologist under the laws of another province."

[52] I note the employer in its appeal submissions has not disputed the factual background set out as not in dispute by the review officer in the decision under appeal. The employer has focused its protest against allowing the worker's claim on its procedural concerns about the way in which, and from whom, the mental stress diagnosis was

obtained. Whether or not a better process could or should have been utilized, I find the opinion evidence obtained and considered by the Board was provided in good faith by qualified experts, admissible, relevant, informed, reliable, and more than sufficient for the Board to accept the mental stress diagnosis in this worker's case. Even if I assume for decision-making purposes that the employer is correct that as a matter of law I am free to disregard this opinion evidence as not binding on me despite the absence of a contrary opinion by a psychologist or physician, I would still accept the mental stress diagnosis in this case. In my view, whatever the merits may or may not be of the employer's procedural concerns about accepting mental stress claims without a fully independent medical or psychological examination and opinion in every case, there is no legal basis on which acceptance of this claim by this worker, against whom the employer expressly makes no allegation of any wrongdoing at any time, could have been denied by the Board or reversed by the review officer in the decision under appeal.

Conclusion

[53] I deny the employer's appeal and confirm *Review Reference #R0112544.* I find that the Board correctly determined that the worker is entitled under section 5.1 of the Act to compensation for mental stress from the November 17, 2009 work incident.

[54] The worker closed its August 26, 2010 submission by stating that should the appeal be dismissed, the worker seeks compensation for legal expenses incurred in responding to this appeal and to the request for review by the Review Division addressed in the decision under appeal. I find the worker should not be reimbursed for his legal expenses associated with the employer's request for review and this appeal because of RSCM II policy item #100.40 and section 7(2) of the *Workers Compensation Act Appeal Regulation*, which prohibit the reimbursement of a party's expenses for representation in matters before the Board and WCAT, respectively.

Allan Tuokko
Vice Chair

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