DECISION OF THE WORKERS' COMPENSATION APPEAL TRIBUNAL

Introduction

[1] On August 14, 2014 a case manager at the Workers' Compensation Board (Board), which operates as WorkSafeBC, concluded that the worker did have an acceptable claim for compensation for an upper back contusion. A significant work-related event was described where the worker's cab of the vehicle he was in was crushed by a falling heavy container of great weight. However, it was concluded the worker did not have an acceptable claim for mental disorder under section 5.1 of the *Workers Compensation Act* (Act) as there was not a DSM-5[1] diagnosis.

[2] A review officer in a March 2, 2016 Review Division decision (*Review Reference #R0199395*) confirmed the Board decision.

[3] The worker appealed the above decision to the Workers' Compensation Appeal Tribunal (WCAT) and asked that the appeal proceed by oral hearing which occurred on September 29, 2016.at WCAT's Richmond offices.

[4] The employer was notified of the appeal and participated in the process.

Issue(s)

[5] Does the worker have an acceptable claim for Post-traumatic Stress Disorder (PTSD)?

Jurisdiction

[6] 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 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. Under the provisions of section 253 of the Act, WCAT may confirm, vary, or cancel the appealed decision or order.

[7] Sections 239(1) and 241(1)) of the Act provide that a worker may appeal a decision of a review officer made under section 96.2 to WCAT.

[8] Section 250 provides WCAT may consider all questions of law and fact arising in an appeal, but is not bound by legal precedent. WCAT must make its decisions on the justice and merits of the case.

[1] The American Psychiatric Association's *Diagnostic and Statistical Manual of Mental Disorders*, 5th edition

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[9] I am bound to apply the published policies of the Board, subject to the provisions of section 251 of the Act. The *Rehabilitation Services and Claims Manual, Volume II* (RSCM II) contains the published policy applicable to this appeal.

[10] The standard of proof required in this appeal is proof on a balance of probabilities. Section 250(4) of the Act provides that in an appeal respecting the compensation of a worker, where the evidence supporting different findings on an issue is evenly weighted, WCAT must resolve the issue in a manner that favours the worker.

[11] Section 254 of the Act provides WCAT has 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. The WCAT considers the record and also has jurisdiction to consider new evidence and to substitute its own decision for the decision under appeal.

Background and Evidence

[12] The Review Division decision described some of the background and evidence relevant to the issue in question. I have considered this summary, the claim file evidence, and the submissions provided to WCAT and those on the claim file. I will not set out the evidence on the claim except as necessary to decide the issue and will refer in a summary way to the evidence as it relates to my findings in this case.

[13] The essential background as to the incident that occurred is not in dispute. It was summarized in a June 26, 2015 Board phone memo:

> The worker explained that a crane operator was lifting 2 x 28 tones containers off his bomb cart. He reports that the front end closest to him came off his cart but the back end wouldn't dislodge. He explained that this creates an angle and the back end of the container started to slide towards the cab of the bomb cart. The worker knew that this was not going to end well so he laid down in his cab and when the front end of the container was about 6-8 feet off the trailer it fell and crushed his cab. Because he was laying down the crushed cab did not crush him. It crushed to the point where it was 6 inches from his head. He noted that the crush broke all the glass and popped open a door and he was able to crawl out. He notes that the ambulance took him to the hospital and he was monitored for a few hours then released and he took a cab back to work and picked up his car and drove home.

[14] Pictures in the claim file demonstrated the extent of the actual damages.

[15] Dr. Hobson, physician, in a June 8, 2015 report referenced the bomb cart being crushed by a container and that there was diffuse pain in the worker's neck but that there was a normal neurological examination.

[16] Dr. Miller, a psychologist, in a July 24, 2015 Psychology-Diagnostic or Comprehensive Assessment Report, outlined how the event occurred. It was noted the worker scraped his elbow and hurt his neck. The report referenced that the day after the incident the worker stated

that Dr. Hobson, the worker's physician, recommended the worker take three days off work "due to stress." It was noted the actual physician's report of June 8, 2015 indicated "due to pain."

[17] The report referenced:

> [The worker] reported that he feared for his life during the June 7, 2015 incident, and experienced some flashbacks, irritability, anger, hyperarousal, mild problems sleeping, and increased work safety concerns in the initial aftermath of the incident. He denied receiving any counseling or taking any medication. [The worker] reported that he was "reluctant" to return to work on June 11, 2015, but pointed out that he "has to pay the bills". He expressed frustration and anger with the (alleged) lack of safety regulations on the waterfront. However, he stated that due to his incident, there have been new safety measure[s] implemented including providing drivers with radios to communicate safety risks to others as needed. He noted that he has become the "poster boy" for safety because he was alert and took action to protect himself during the June 7, 2015, work incident. He said that he remains concerned about work safety, but copes with this by continuing to stay alert to safety risks. [The worker] reported that he is currently functioning well psychologically in his work.

[18] The report further:

- Noted that the physician's first report did not specifically mention psychological symptoms.
- Described testing completed in the assessment process.
- Noted no pre-incident history of significant psychological difficulties or contact with mental health professionals was identified.
- Stated the worker appeared to have a valid profile.
- Provided the impression was that it did not appear that the worker had a DSM-5-diagnosable disorder related to the June 7, 2015 work incident. It was stated:

  > The available evidence indicates that although [the worker] experienced some anxiety symptoms in the initial aftermath of the June 7, 2015 work incident, his reaction appears to fall within the parameters of a normal reaction to a very stressful event, and his symptoms were not of sufficient intensity or severity to result in a DSM-5 diagnosable mental disorder. This is suggested by the fact that although Dr. Hobson's June 8, 2015 Physician's First Report indicated [the worker] was now medically capable of working full duties or full time, he wrote "due to pain" under current physical and / or psychological restrictions. There was no mention of psychological symptoms, and [the worker] successfully returned to work on June 11, 2015.

- Did not identify any psychological limitations or restrictions with respect to the worker continuing work.

[19] On September 13, 2016 a neighbour, in an unsigned statement, outlined since the worker's accident, the worker has dreaded going to work, seemed to be preoccupied with safety issues, and afraid that he would get injured badly. The neighbour also noticed a change in personality

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since the incident happened. The worker used to be an easy-going person and now got angry very quickly. He got angry about many different things, not just work. It was noted that the worker was not a person who would admit to feeling depressed or having PTSD but he had changed so much that it was felt there was something wrong. Prior to the incident it the neighbour was not aware of anything that was significantly affecting the worker's mood and had not noticed any changes in personality.

[20] The worker sought some counselling in September and November 2015 through an employment assist program.

[21] On August 24, 2016 Dr. Nader, a psychologist, provided a report. The psychologist outlined the requirements based on the scientific research literature for the diagnosis of PTSD. Dr. Nader also specifically addressed how his opinion differed from the opinion of Dr. Miller and the reasons for why he believed his diagnosis of the worker having PTSD was correct. Dr. Nader specifically noted that the worker met DSM-5 diagnostic criteria for PTSD.

[22] It was noted in part in the report that with regards to managing work-like settings, it appeared that the worker's PTSD symptoms were exacerbated by him being at work. The worker did not appear to be habituated into the work environment and was likely becoming more sensitized to danger at work due to his focus on workplace safety and heightened awareness to times when unsafe practices were occurring. This tended to flare up the anger. The worker was getting easily overwhelmed by workplace stressors and it was taking him awhile to calm down or refocus. It also likely the worker was less efficient at work due to increased stress caused by heightened anxiety levels.

Oral Hearing

[23] The employer at hearing was provided the package of materials that have been forwarded by the worker's representative to WCAT as she noted she had not received the materials. She was provided an opportunity to review the documents and confirmed that she had sufficient time to do so and did not require additional time.

[24] Also entered as exhibit A was a signed copy of the previously unsigned statement from the worker's neighbour dated September 13, 2016.

[25] The parties agreed that the worker need not describe the actual incident as it was well described in the file.

[26] The worker at the hearing noted:

- Some of his work experience prior to working for the current employer.
- He took off three days a work after discussion with this doctor due to the stress.
- That he was determined to try and overcome and face some of his fears but he found the work stressful and he was apprehensive. When he is under a crane he is on edge contemplating an incident.
- He has to face the circumstances that gave rise to the incident about 20 to 30 times a day.

- He has modified some of his work habits and is now more cognizant of hazards and is always vigilant.
- He now keeps a microphone in his hand when the containers are being loaded over his head, which is different than before.
- Even at his home the incident comes to his mind. He has some residual thoughts and flashbacks.
- He thinks about the event daily, intermittently, particularly when going under a crane. He does feel stress. However, he has a job to do and it is hard to give it up.
- His interactions with co-workers have suffered as a result of the incident.
- Before the incident he was normally happy, laughing, and joking. Since the incident he has been more short tempered, tense, and more critical.
- He feels distress from the "near death" experience.
- Some of his experiences with two psychologists. He found that the latter psychologist, Dr. Nader, had a more detailed interview.
- He did not have any counselling before the accident.

[27] In response to questions from the employer, the worker noted:

- After the accident he took three days off.
- Since June he works four to five days a week.
- Before the incident he worked five to six days per week.
- He works less now because he is apprehensive.
- He is a full member of the union and can pick and choose his jobs but most other jobs are not generally available full time. He does have a frontloading ticket which allows him to do an alternate job and he does take some of those jobs when available.
- He did attend for some relaxation therapy and counselling.
- He does not take any medication other than Robaxacet for neck pain and back pain.
- He generally sleeps well but when he wakes up it is usually because he is thinking of the incident. He does have some flashbacks.
- He is not a fan of medication.
- He tries to deal with conditions naturally.
- The president of the union did say they would give him whatever jobs for which he was qualified.
- He likes to do his job diligently, which gives rise to some safety concerns with the employer.

Submissions on behalf of the worker

[28] The worker's representative submitted that the evidence weighs in favour of the worker's psychological condition being a result of the accident. It was stated the worker was consistent and credible and that the worker's diagnosed condition of PTSD was supported by the medical

opinion of Dr. Nader. Dr. Nader outlined deficiencies of the other examination by Dr. Miller. Dr. Nader noted that he used a more structured interview in order to properly assess PTSD. Dr. Miller only had one set of questions. No weight should be given to earlier comments of the worker that he did not have a psychological condition as he was underestimating the impact of the incident on himself. The worker has met the requirements of section 5.1 when there was a traumatic event. The worker had no pre-existing condition.

Submission on behalf of the employer

[29] The employer's submissions were that the worker may have frustration and anxiety but PTSD is a serious condition which is very debilitating. The worker continued to work with no ongoing psychological treatment. There was no real effect on the worker's activities of daily living. The worker had no real sleep issues. The worker has an option of changing job duties if there was really PTSD. Dr. Miller has provided an expert opinion and he is well versed in PTSD and psychological conditions. Dr. Nader was hired specifically by the appellant and would be an advocate for the worker and may be biased. It is submitted that the Review Division decision should be upheld.

Rebuttal submissions on behalf o f the worker

[30] In rebuttal the worker's representative acknowledged that Dr. Nader was paid but was not biased and had specifically in his opinion documented his responsibilities, as outlined by the Supreme Court of Canada, not to be an advocate for the worker. The employer's representative has not actually pointed to specific issues of bias in the report. The employer's view of PTSD is stereotypical. Dr. Nader's report noted that there does not have to be disability in order for there to be PTSD.

Discussion, Reasons and Findings

[31] Section 5.1 of the Act and policy item C3-13.00 of the RSCM II apply to this decision.

[32] Section 5.1 of the Act states, in part:

> **5.1** (1) Subject to subsection (2), a worker is entitled to compensation for a mental disorder that does not result from an injury for which the worker is otherwise entitled to compensation, only if the mental disorder
>
> (a) either
>
> (i) is a reaction to one or more traumatic events arising out of and in the course of the worker's employment, or
>
> …
>
> (b) is diagnosed by a psychiatrist or 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.

[all quotes reproduced as written, except for changes noted]

[33] The evidence establishes a traumatic event with a heavy container crashing and causing substantial damage to the vehicle in which the worker was working. I am satisfied by the worker's testimony that he was an immediate fear for his life given the circumstances of the event. The worker also has a clear reaction to such experience with not only the need for counselling but that fact that it affects him not only at work but in daily life with some flashbacks and also some changes in his daily behaviour. The worker meets the statutory requirement of a reaction to a traumatic event arising out of and in the course of employment.

[34] Policy item #C3-13.00, provides guidance on the adjudication of mental disorder claims. It includes a requirement that a worker's mental disorder be diagnosed by a psychiatrist or a psychologist as a condition that is described in the most recent DSM, at the time of diagnosis. As set out in the DSM, a DSM diagnosis generally involves a comprehensive and systematic clinical assessment of the worker. The Board is responsible for the decision-making process, and for reaching the conclusions on the claim. Under section 5.1(2) of the Act, the Board may obtain expert advice to review the diagnosis and where required, may obtain additional diagnostic assessment. In reviewing the diagnosis, the Board also considers all of the relevant medical evidence, including prior medical history, attending physician reports and expert medical opinion. The findings of this additional information are considered in determining whether there is a DSM diagnosed mental disorder.

[35] The Board has also published Practice Directive #C3-3, to provide Board officers with guidance on the Board's application of section 5.1 and policy item #C3-13.00. The practice directive does not constitute binding policy.

[36] With regard to whether the worker has a mental disorder there is in essence a contest of opinion in this case between two psychologists' opinions.

[37] Although the employer's representative suggested that the report of Dr. Nader may be biased as a result of him being paid by the worker for his report, I do not find that established. Dr. Nader on August 24, 2016 at the start of his report acknowledged his duty as an expert to assist the Court and not be an advocate for any party and confirmed that he has prepared that report in conformity with that duty. I do note that the employer's representative did not comment on the fact that Dr. Miller would have been paid by the Board and has no such statement in his report. I, however, accept that Dr. Miller was also honestly reporting what he concluded from his assessment.

[38] I am satisfied that the report of Dr. Nader included more comprehensive testing, and as well more comprehensive in-depth interview with the worker than that which occurred in the assessment process of Dr. Miller. I accept Dr. Nader's opinion, which he noted was based on clinical interview, behavioural observations, psychometric test results, and review of clinical

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records. I found Dr. Nader considered the relevant medical evidence, understood the worker's medical history, and also reviewed Dr. Miller's contrary expert medical opinion.

[39] Although the employer's representative did not think there was sufficient severity of symptoms for there to be a recognized diagnosis of PTSD, I rely on the opinion of the trained psychologist, Dr. Nader, who outlined the constellation of symptoms that gave rise to the diagnosis of PTSD which meets the DSM-5 diagnostic criteria for PTSD. The requirements of section 5.1(1)(b) that there be a diagnosed mental condition by a psychologist that is described in the most recent American Psychiatric Association's *Diagnostic and Statistical Manual of Mental Disorders* at the time of the diagnosis has been met.

[40] I conclude the worker does have an acceptable claim under section 5.1 of the Act for PTSD.

[41] In this case, the worker meets the requirement of section 5.1 as he did have a reaction to a very specific traumatic event that was potentially life-threatening, and also arose out of in the course of the worker's employment. This is not a case under subsection 5.1(1)(c) of the Act where some exclusion might apply. The worker's condition, as required by the Act, was diagnosed by a psychologist as a mental disorder under the most recent DSM-5 in effect at the time of the diagnosis.

Conclusion

[42] The appeal is allowed. I vary the March 2, 2016 Review Division decision (*Review Reference #R0199395*) decision.

[43] I conclude the worker has an acceptable claim under section 5.1 of the Act for PTSD.

Expenses

[44] The worker seeks travel expenses for travel to and from attendance at the WCAT hearing held at Richmond, British Columbia. Item #16.1.2 of the WCAT *Manual of Rules of Practice and Procedure* (MRPP) states that WCAT will generally order reimbursement of certain expenses for the worker's attendance at an oral hearing if the worker was successful on the appeal. The worker was successful in his appeal.

[45] Item #16.1.2.1 provides that oral hearings will normally be held in British Columbia locations closest to the community where the appellant resides and that travel expenses are not paid for that portion of the journey, which takes place within a distance of 20 kilometres of the oral hearing location.

[46] The worker came to the hearing from a place he resides which is not his mailing address. The distance each way was 78 kilometres.

[47] Therefore, I order the Board to reimburse the worker for mileage in accordance with the Board's fee schedule and usual practice.

[48] The worker also seeks reimbursement of Dr. Nader's psychological report on a September 24, 2016 invoice of $2,716.25 plus tax for a total of $2,852.06.

[49] The representative noted that this was in excess of the usual tariff amount for psychological reports but the report was detailed and reasonably necessary.

[50] The employer did not object to the amount of the expense of the report.

[51] Subsection 7(1)(b) of the *Workers Compensation Act Appeal Regulation* states that WCAT may order the Board to reimburse a party to an appeal for expenses associated with obtaining or producing evidence submitted to WCAT. MRPP item #16.1.3 notes that WCAT will generally order reimbursement of expenses incurred in producing evidence if the evidence was useful or helpful to the consideration of the appeal or it was reasonable for the party to have sought such evidence in connection with the appeal.

[52] MRPP item #16.1.3.1 states that WCAT will usually order reimbursement of expert opinions at the rates or fee schedule established by the Board for similar expenses. The maximum fee schedule rate for a psychological assessment is $2,310.00. This provides for 12 hours of assessment and report production time, and a timely report fee (provision of a report within 10 days). MRPP item #16.1.3.1 goes on to state that WCAT has the discretion to award reimbursement in an amount greater than the fee schedule, in limited circumstances.

[53] I agree that the report was useful and reasonably obtained. However, I do not consider the circumstances of this case to warrant a departure from the fee schedule rate. The psychologist performed all his required testing and reporting within the 12 hours allocated for such a report.

[54] I note that tax is separate from the fee schedule and is a cost required by other governmental legislation and is legitimately added to the amount to be reimbursed.

[55] The Board shall reimburse an amount of $2,310.00 plus tax for the report of Dr. Nader.

Paul Pierzchalski
Vice Chair

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