# Downs Construction Ltd. v. Workers' Compensation Appeal Tribunal

Decision Summary

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| Court | B.C. Court of Appeal |
| Citation | 2012 BCCA 392 |
| Result | Appeal Allowed |
| Justices | Mr. Justice Lowry<br>**Mr. Justice Chiasson**<br>Madam Justice Garson |
| Date of Judgment | October 4, 2012 |
| WCAT Decision(s) Reviewed | WCAT-2010-02812 |

**Keywords:**

*Judicial review – Determination under section 257 of the Workers Compensation Act – Meaning of "arose out of, and in the course of, the worker's employment" – Section 10(1) of the Act – Mental stress – Section 5.1(a) of the Act (prior to 2012 amendment) – Meaning of "sudden and unexpected" – Legislative intent – "Historic trade-off"*

**Summary:**

The Court of Appeal held unanimously that notwithstanding that the worker's mental stress injury in this case was not of the sort compensated under the *Workers Compensation Act* (*Act*), the Workers' Compensation Appeal Tribunal (WCAT) was patently unreasonable in determining that the worker's mental stress injury did not arise out of or in the course of employment.

The worker had been subjected to periodic verbal abuse by a co-worker throughout the time she worked for the employer. After what would prove to be the final instance of abuse, the worker stopped working altogether and was diagnosed with post-traumatic stress disorder resulting from the abuse. She sued her co-worker and her employer for damages. The defendants pleaded that the worker's action should be barred because the injury arose out of her employment. They applied to WCAT under section 257 of the *Act* to certify that fact, with the likely result that the worker's civil action would be barred under section 10 of the *Act.* At the same time, the worker claimed benefits under the *Act*.

The Workers' Compensation Board (Board) denied benefits to the worker on the basis that her injury did not meet the requirement of section 5.1 of the *Act* (as that section read at the time) that the mental stress injury be unexpected. Given the history of verbal abuse, the Board determined that the injury was not unexpected. WCAT agreed with the Board and, based on the same finding of fact, WCAT also certified under section 257 of the *Act* that the injury did not arise out of or in the course of the worker's employment. WCAT reasoned that the threshold for compensation under section 5.1 was also a causative threshold and, therefore, an injury that did not meet the criteria in section 5.1 could not be said to have arisen out of, or in the course of,

the worker's employment for the purposes of a section 257 determination. Only that conclusion, said WCAT, was consistent with the legislative intent expressed in the so-called "historic trade-off" whereby workers gave up their right to sue their employers for workplace injuries in exchange for receipt of no-fault compensation benefits.

The co-worker and employer petitioned the B.C. Supreme Court for judicial review of the WCAT decisions on the grounds that they were patently unreasonable because accepted facts clearly demonstrated that the injury was work related. In dismissing the petition, the chambers judge noted that the interpretation of the *Act* argued for by the defendants would leave the worker without a remedy under either the *Act* or in tort.

In reversing the Supreme Court's order, the Court of Appeal agreed with the co-worker and employer that WCAT misunderstood the historic trade-off. The Court of Appeal said WCAT's analysis ignored the trade-off made by employers, who are forced to contribute to the no-fault insurance scheme in exchange for complete immunization from workplace injury claims. The Court said that the determination WCAT was asked to make under section 257 was a finding of fact and not one of mixed fact and law. The Court concluded that based on the record, WCAT's determination that the worker's post-traumatic stress disorder did not arise out of or in the course of her employment was patently unreasonable. The Court of Appeal set aside the affected paragraph of the certificate and substituted the following:

> The mental stress injury suffered by the plaintiff Vicki Lynn Christianson arose out of and in the course of her employment within Part 1 of the *Workers Compensation Act*, but she is not entitled to compensation because the event giving rise to the injury was not unexpected as required by s. 5.1 of the *Act*.