

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

## Decision Summary

Court	B.C. Supreme Court
Citation	2011 BCSC 1129
Result	Judicial Review Dismissed
Judge	Mr. Justice Macaulay
Date of Judgment	August 18, 2011
WCAT Decision(s) Reviewed	WCAT-2010-02811 WCAT-2010-02812

### **Keywords:**

*Judicial review – Determination under section 257 of the Workers Compensation Act – Section 10(1) of the Act – Mental Stress – Section 5.1(a) of the Act – Meaning of “sudden and unexpected” – Effect of section 257 determination*

### **Summary:**

The Petitioner stopped working for her employer after an alleged humiliating incident at work involving a supervising employee of the employer. The worker was subsequently diagnosed with post-traumatic stress disorder (PTSD) among other psychological conditions. The worker sued her employer and the other employee alleging negligence and breach of contract and seeking damages for personal injury, including mental stress.

In the lawsuit, the employer and the coworker argued that the worker's claim was barred by section 10(1) of the *Workers Compensation Act*. Section 10(1) prohibits a worker from suing an employer or coworker for any injury, disablement or death if it arises out of and in the course of employment and if the actions of the employer or coworker which caused the injury also arose out of and in the course of employment. The employer and coworker applied to the Workers' Compensation Appeal Tribunal (WCAT) under section 257 of the Act for a determination as to whether these two conditions were met in this case.

Soon after the worker brought her lawsuit she also applied to the Workers' Compensation Board, operating as WorkSafeBC, (Board) for compensation for mental stress arising from the incident. The Board, and subsequently the internal Review Division of the Board, denied her claim on the basis that it did not meet the requirements set out for mental stress claims in section 5.1(a) of the Act, i.e. her psychological condition was not “an acute reaction to a sudden and unexpected traumatic event”. The employer appealed the Review Division decision to WCAT.

As the issues were essentially identical in both matters, WCAT issued a single decision (with two decision numbers) which addressed both the employer's appeal to WCAT as well as the employer's section 257 application. WCAT found that the worker was not entitled to compensation under the Act because although the actions of the employer and coworker arose out of and in the course of their employment, the worker's mental stress injury did not arise out of and in the course of her employment. WCAT found that while the worker did suffer an acute reaction to a sudden traumatic event, the incident was not unexpected as the coworker had treated the worker similarly in the past on multiple occasions in similar circumstances and was therefore behavior that the worker could reasonably have expected on the day in question.

The employer and coworker applied for judicial review of WCAT's decision, which the court dismissed. The court found that WCAT's decision was not patently unreasonable.

The court found that WCAT's conclusion that the trauma was not unexpected was not patently unreasonable. First, the court found that WCAT's findings of fact relating to the coworker's previous behavior were supported by the record. Second, the court found nothing unreasonable about WCAT inferring an expectation from the evidence about the coworker's prior course of conduct. The court found that it was not patently unreasonable for WCAT to have applied the legal test that it did when determining whether an event was unexpected, i.e. one that was not wholly objective as urged by the employer and coworker but rather one that took into account the worker's knowledge of how her coworker reacted to a particular situation.

The court also rejected the coworker's argument that WCAT's decision was patently unreasonable in that it found that the words "sudden" and "unexpected" had different meanings. The court found that the statutory language could bear more than one interpretation and WCAT's finding that they had different meanings was within the rationally defensible range of choices. As an example, the court suggested that to describe an event as "sudden" may import an aspect of temporality, whereas "unexpected" may relate to the predictability of the event.

Lastly, the court rejected the coworker's argument that WCAT's decision was patently unreasonable because it determined that the worker's injury did not arise out of and in the course of her employment simply on the basis that the worker was not entitled to compensation under section 5.1. The court said that this argument misapprehends the reasoning in the Court of Appeal's decision in *Plesner v. Workers' Compensation Appeal Tribunal*, 2009 BCCA 188 and other cases. This reasoning suggests that the criteria in section 5.1 is to properly be viewed as setting a "causative threshold" that describes when mental stress will have arisen out of and in the course of employment, as opposed to a section which simply limits the situations in which compensation may be payable (a distinction discussed in the WCAT decision).

The court said that if the coworker's argument was correct, the worker would be left without any remedy under either the Act or in tort. This result could create a "black hole" for workers and would be contrary to the legislative scheme. The court said that absent a right to claim no fault benefits under workers compensation legislation, workers are otherwise able to sue coworkers and employees for tortious conduct that occurs in the workplace. A proper understanding of the Act in its legislative context supports the view that workers who may not be entitled to claim under the Act retain their right to sue for tortious conduct and the employer loses any entitlement to rely on section 10.