NOTEWORTHY DECISION SUMMARY

Decision: WCAT-2004-04632 **Panel**: Susan Marten **Decision Date**: August 31, 2004

Distinction between Reopenings and New Matters – Scope of Section 96(2) of the Workers Compensation Act –Initial Adjudication of Condition

The scope of section 96(2) of the *Workers' Compensation Act* (Act), which provides the Workers' Compensation Board (Board) limited authority to reopen a matter that the Board has previously decided, is limited to matters previously decided. A condition that was never adjudicated by the Board is not a matter previously decided. The Board's authority to make entitlement decisions relating to such conditions does not come from the reopening power granted to the Board under section 96(2). Thus, where the Board never decided whether a worker's psychological condition was a compensable consequence of a worker's injury, the decision to accept or deny the condition on the claim is a new matter requiring an initial adjudication by the Board.

In this case, the Board had accepted the worker's claim for certain physical injuries. Several years later, the Board reopened the worker's claim under section 96(2)(a) of the Act on the basis that there had been a significant change in the worker's compensable condition. The worker had been diagnosed with post traumatic stress disorder (PTSD) and experienced a major depressive episode. The Board found the psychological disability was a compensable consequence of the worker's injury.

The employer requested a review of the Board's decision to reopen the worker's claim. The employer argued that the original compensable injury was not of causative significance with regard to the psychological disability. It also argued that the grounds for reopening were not satisfied. The Review Division upheld the Board's decision to accept the worker's psychological condition but found that the worker's request for further benefits was not properly characterized as a request for reopening under section 96(2) of the Act, as the worker's psychological problems were new matters for initial Board adjudication and therefore did not fall under the reopening provisions in section 96(2) of the Act.

The WCAT panel agreed with the Review Division decision. A condition that had not been previously adjudicated could not be characterized as either a significant change in the worker's medical condition that the Board decided was previously compensable or a recurrence of injury. It was a new matter to be adjudicated.

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Introduction

The worker was employed as a correctional officer on September 6, 1998, when he was assaulted by an inmate. He reported that he was struck in the left eye, thrown against a brick wall and metal bars, and then thrown down onto a cement floor. The Workers' Compensation Board (Board) accepted his claim. His physical injuries were understood to include a black left eye, a cut to the left hand, a bruised right knee, a bruised left triceps, a bruised upper left hamstring, and a back complaint (November 9, 1998 decision).

By decision dated August 27, 2003, a case manager informed the worker that his claim would be reopened as of February 27, 2003 for the difficulties he was experiencing with respect to a post-traumatic stress disorder (PTSD) and a major depressive episode. The case manager stated it was reasonable to conclude that the PTSD symptoms had contributed to at least 50% of the worker's anxiety and depression symptoms, resulting in disability from work. This was a significant change in his compensable condition. He was entitled to the payment of wage loss benefits.

The employer appealed the case manager's decision to the Review Division. *Review Division Decision #8004* denied the employer's appeal. The employer appeals the Review Officer's decision.

Issue(s)

1. Whether the September 1998 compensable injury was of causative significance with regard to the diagnosed PTSD and major depressive episode.

2. Whether the worker's claim should be reopened for the payment of wage loss benefits as of February 27, 2003.

Jurisdiction

The appeal of *Review Division Decision #8004* was filed with the Workers' Compensation Appeal Tribunal (WCAT) under section 239(1) of the *Workers Compensation Act* (Act).

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WCAT may consider all questions of fact and law arising in an appeal, but is not bound by legal precedent (see section 250(1) of the Act). 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. WCAT has exclusive jurisdiction to inquire into, hear and determine all those matters and questions of fact and law arising or required to be determined in an appeal before it (section 254 of the Act).

This is an appeal by way of rehearing, rather than a hearing *de novo* or an appeal on the record. WCAT has jurisdiction to consider new evidence, and to substitute its own decision for the decision under appeal.

The worker's injury occurred in 1996. His reopening request occurred after June 30, 2002, the transition date for relevant changes to the Act. Entitlement under this claim is adjudicated under the provisions of the Act as amended by Bill 49, the *Workers Compensation Amendment Act*, 2002. Policies relevant to this appeal are set out in the *Rehabilitation Services and Claims Manual, Volume II* (RSCM II).

The worker is participating in the appeal and is represented by his union. The employer did not request an oral hearing. After reviewing the evidence and the policy for considering an oral hearing in item #8.70 of WCAT's *Manual of Rules Practices and Procedures* (MRPP), I conclude that an oral hearing is not required to ensure a full and fair consideration of the issues.

Once submissions were complete, both parties were provided with updated disclosure of the documents placed on the worker's file since disclosure was previously provided in March 2004. I find I am able to render my decision on the basis of the information in the documents disclosed to the worker as of March 2004. I therefore do not find it necessary to provide the parties with an opportunity to provide submissions on the additional claim file documents. I have not relied on that information in this decision Also, MRPP item #21.21 and 21.22 provide that WCAT decisions are to be written without identifiers. The names of the parties or lay witnesses will not be used. The individuals referred to in this decision are therefore identified by a coded initial, which does not correspond to their name.

Background and Evidence

I have read and considered all the information on the claim file and that presented on appeal. What follows is a summary of the evidence relevant to the issues identified above.

The initial medical reports focussed on the worker's physical injuries. In January 1999, the worker was discharged from a work-conditioning program as fit to return to his full pre-injury duties. On February 9, 1999, the Board concluded his wage loss benefits on February 2, 1999. On May 7, 1999, the attending physician (Dr. Burris) reported the worker was working full-time.

On May 14, 1999 a case manager informed the worker of the results of a medical advisor's (MA) review of an April 1999 MRI report on his right knee. The MA noted evidence of pre-existing change and surgery to the knee. There was no direct evidence of trauma related to the work incident. The worker's ongoing right knee pain was not the direct result of the September 1998 compensable injury.

The worker appealed the February and May 1999 decisions to the Workers' Compensation Review Board (Review Board). In findings dated September 21, 2001, the Review Board found the worker's ongoing right knee condition continued to be a result of the compensable injury. He was entitled to full wage loss benefits until April 27, 1999, when he was cleared to return to work.

In March 2003, the Board received correspondence from the worker's employer about matters such as the worker's attendance problems. The director's report noted the worker's heart condition (arrhythmia) was brought on by stress. The worker reported he still experienced nightmares stemming from an incident in 1999 when an inmate attempted to strangle him. The director made a formal referral for the worker to attend counselling through an employment benefit program.

In March 2003, Mr. A [not his real initial], registered counsellor, reported he first saw the worker in April 1999. The presenting problems included his strong negative feelings about his workplace. An altercation with an inmate on September 1998 resulted in physical injuries. He continued to experience pain and some heart dysrhythmia which caused anxiety. He was having further tests on his knee. He reported experiencing symptoms of high blood pressure, headaches, mistrust, resentment, difficulties getting to and staying asleep, depression, and a deep hatred for inmates. He also reported concerns about poor communication, and a quick temper at home.

Dr. Burris provided information on the worker's anxiety disorder, back to 1996. The chart note records included that the worker had a panic attack in July 1996 while driving, after an argument with his wife. Continuing anxiety attacks were noted in August 1996. In September and October 1996, the worker reported stress associated with a transfer at work and a co-worker whom he considered was not working well. In November 1996, the attending physician noted a discussion regarding PTSD and counselling. In September and October 1997, the worker was noted to be feeling stable emotionally with reference to his depression, but had continuing anxiety symptoms. Family issues were also noted with suicidal thoughts. A chronic anxiety disorder was noted. In January 2002, the worker was noted to be doing better with an increased dose of Paxil. In September 2002, chronic anxiety and mild depression were described. The physician would support an occupational change.

In March 2003, Mr. B [not his real initial] registered clinical counsellor, reported on the worker's symptoms of PTSD. Mr. B stated the worker believed he was saved from death, because an officer who was not on the cell block witnessed the event. He relived

the events and experienced intense fear, helplessness, and horror. He continued to have intrusive and distressing recollections of the event. He experienced depressing dreams approximately once a week. He experienced intense fear at work. The traumatic event caused him to suffer from PTSD, including the events leading up to the assault, the assault itself, and its aftermath.

A case manager determined the worker's PTSD would not be accepted, citing the pre-claim history of anxiety and PTSD and the considerable length of time since the PTSD was diagnosed. She referred to the provisions of section 5.1 of the Act regarding mental stress. She considered whether a new claim should be established, but referred to section 55 of the Act regarding late applications for compensation (April 24, 2003 log entry).

The Board referred the worker for psychological assessment. In July 2003, Dr. Davidson, registered psychologist, provided an extensive report that described the history of the worker's psychological difficulties, summarized his interviews with the worker and his wife, and made recommendations for treatment. In brief and in part, Dr. Davidson described previous incidents that included being punched by an inmate in 1995. The worker found himself more anxious at work. He did not believe he fully recovered. Another event occurred in 1997 that the worker did not consider significant. The 1998 compensable injury was the most traumatic event. The worker was terrified as he felt the inmate would kill him. Other inmates were yelling and encouraging the inmate assaulting him and he was worried that others would join in. He began having serious sleep problems with nightmares and became depressed about three weeks after the incident. He saw a psychologist. He felt angry when he returned to work, as he had not improved psychologically and felt he was forced to return early. He continued to have a "fight or flight" response at work and was less tolerant of inmates. He was highly agitated with a fear of re-injury. He spoke to Mr. B in March 2003 about current labour relations problems which he considered about 50 percent responsible for his problems. He thought the PTSD was more of a factor before that time. The worker's wife advised "a piece of him died" after the 1998 injury. He was previously a happy-go-lucky and outgoing person. Dr. Davidson also spoke with Dr. Madryga, registered psychologist, who confirmed he also treated the worker after the assault but could not recall if they dealt with the assault.

Dr. Davidson provided a *Diagnostic and Statistical Manual of Mental Disorder-IV* (DSM-IV) diagnosis of PTSD, chronic, moderate, and a major depressive disorder, recurrent (without full episodic recovery), last episode moderate and in partial remission. He stated there was a need to rule out a generalized anxiety disorder. He provided these diagnoses on Axis I. Dr. Davidson provided the opinion the worker had a somewhat delayed response to the assault, perhaps due to numbness. He had considerable distress. The worker's constellation of symptoms when he was treated by Mr. A could constitute PTSD, although there was no mention in the records of intrusive recollections. The worker experienced an ongoing PTSD state for the half-year or so that he was off work, which diminished to the point of partial remission. He had a

flare-up within 1.5 years and a clinical diagnosis of depression. In early 2002, his mood lifted and he managed reasonably well. He experienced a re-exacerbation, partly due to increased workload and the loss of a job assignment. The last several months of labour relation increased his distress. He appeared to have been in almost total remission when he returned to work in 1999. He had at least two subsequent flare-ups. His PTSD was again in the clinical range, according to the worker's self-report and the results of psychological testing. The September 1998 assault was largely responsible for the initial PTSD. Relapses were not unexpected, given the triggers in the work environment. The ongoing non-claim stressors post-incident aggravated the PTSD. The pre-1998 depression appeared to be secondary to an accumulation of work and personal life stressors. His depressive episodes after the assault may or may not have been present, but for the assault. However, given the assault, the probability was high that a depressive episode would occur. Related stressors influenced the worker's vulnerability, including work stress and family issues. The worker may have reacted more to increased stress than the typical person. However, he also said he never felt recovered from the 1995 assault, which may have produced some ongoing PTSD-like chronic anxiety that made him more vulnerable. The history of panic attacks prior to the 1998 assault suggested a tendency towards anxiety and psychological vulnerability.

Dr. S, Board psychologist, provided the opinion that causality determination was complicated by the presence of numerous pre-injury factors and post-injury stressors, all of which may have affected the worker's psychological functioning. On the basis of the available information and especially Dr. Davidson's opinion, it appeared the claim incident could be considered a significant factor in terms of the development and maintenance of the worker's PTSD. His documented history of anxiety prior to the current claim (i.e. possible generalized anxiety disorder and panic attacks) may well have rendered him more vulnerable to the development of an anxiety disorder post-injury. Labour relations problems appeared to have aggravated the PTSD symptoms. The pre-injury history also indicated the presence of depression. Dr. S agreed with Dr. Davidson that it was impossible to say whether the worker would have experienced further depressive episodes in the absence of the claim incident, but the incident increased the probability the depression would recur (August 6, 2003 log entry).

The case manager also asked Dr. S whether the worker was unable to work as of February 27, 2003 because of a significant change in the accepted PTSD disorder. Dr. S replied that Dr. Burris' records consistently indicated the worker was unable to resume his full-time duties, starting on March 3, 2003. Given that anxiety was present at that time, it was likely also present in the last few days of February 2003. A graduated return to work was scheduled to begin on August 25, 2003. The worker's anxiety symptoms in the spring and summer of 2003 were as a result of interacting factors. These factors likely included a long-standing vulnerability to the development and maintenance of anxiety symptoms, ongoing symptoms of PTSD relating to the 1998 assault, and labour relations issues (the worker's sense that the employer mishandled events surrounding the claim incident and subsequent return to work). In other words, it

was likely the compensable PTSD constituted one source of anxiety in the spring and summer of 2003 (August 20, 2003 log entry).

The August 27, 2003 decision was then issued. The case manager's August 13, 2003 log entry indicated he considered the worker's situation under RSCM II items #13.20 and #22.33. He accepted an ongoing PTSD and major depressive disorder (episodic and in remission) were consequences of the 1998 injury.

Subsequent information on the file documented the Board's ongoing discussions with the worker and the employer about a graduated return to work and an alternate work placement. The worker began a return to work in August 2003, as a supernumerary employee. The employer discontinued the return to work plan in September 2003, because they received medical advice from an occupational physician the worker should be removed from all inmate contact, because of certain unspecified medical conditions. The employer's representative confirmed that the conditions were PTSD and chronic anxiety (November 6, 2003 log entry).

The November 7, 2003 submission of the employer's representative to the Review Division noted the pre-incident history of panic attacks, which were not necessarily associated with the worker's employment. Dr. S's comments about a long-standing vulnerability and labour relations were noted. The employer's representative referred to the legislative change in 2002, which incorporated provisions for mental stress in section 5.1 of the Act. As there were no significant changes to the worker's accepted condition, there was no recurrence of the compensable condition. The worker had a history of anxiety. The employer could not conclude that the anxiety or the PTSD should be one of the accepted conditions under the claim, in accordance with RSCM II items #13.30 and #102.01. The employer could also not conclude that a new claim should be started, given the considerable length of time since the date PTSD was diagnosed. Section 55 would apply.

In a December 17, 2003 submission to the Review Division, the worker's representative responded that section 5.1 of the Act applied to mental conditions that did not result from a compensable physical injury.

The employer did not provide submissions to WCAT, although invited to do so.

Reasons and Findings

On June 30, 2002, the law and policies concerning psychological impairment changed. On March 3, 2003, the law and policies concerning the reopening of claims also changed. I find it necessary to consider under which section or sections of the Act the employer's request is appropriately considered.

Section 5(1) of the Act provides that compensation is paid where a personal injury arises out of and in the course of the employment.

RSCM II item #13.00 provides that "personal injury" is defined as any physiological change arising from some cause. Item #13.20 provides that personal injury includes psychological impairment as well as physical injury. Item #22.33 provides, in part, that psychological problems arising from a physical or a psychological injury are acceptable as compensable consequences of the injury. However, there must be evidence that the claimant is psychologically disabled. It cannot be assumed that such a disability exists simply because a claimant has unexplained subjective complaints, or is having difficulty in psychologically or emotionally adjusting to any physical limitations resulting from the injury.

On June 30, 2002, section 5.1 was added to the Act in 2002, providing new legislative requirements to determine compensation in cases of mental stress. Section 5.1 provides that 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.

On March 3, 2003, the *Workers Compensation Amendment Act (No. 2), 200*2 (Bill 63) amended section 96(2) of the Act. Section 96(2) of the Act states that a matter that has been previously decided by the Board may be reopened if one of two conditions exists. There must be a significant change in the worker's medical condition that the Board had previously decided was compensable, or there must be a recurrence of the worker's injury.

The case manager did not consider the worker's request for compensation for a psychological condition/disability under section 5.1 of the Act. He referred to RSCM II items #13.20 and #22.33, concerning the compensable consequences of an injury.

The review officer agreed with that conclusion, noting that the worker clearly sustained traumatic injuries. On balance, I also agree with that determination. Section 5.1 applies only when the mental stress does not result from an injury for which the worker may be otherwise entitled to compensation. Section 5(1) of the Act and policy items #13.20 and #22.33 are applicable.

Having considered the worker's claim under that law and policy, the review officer concluded the opinions of Dr. Davidson and Dr. S provided sufficient evidence to conclude the worker sustained a psychological disability, namely PTSD and a major

depressive episode, as a result of the 1998 compensable injury. She noted there was no psychological evidence to the contrary.

The weight of the evidence supports that Dr. Davidson provided a comprehensive and thorough assessment of the worker's pre and post-injury levels of psychological functioning. Dr. Davidson considered the fact that the worker may have been a vulnerable individual. Dr. Davidson interviewed the work directly. He spoke with the worker's wife, Dr. Madryga, and Mr. B. He conducted psychometric testing. I find insufficient reason not to accept his opinion.

I also agree with the opinion provided by Dr. S. Although the issues of causation may be complicated in this case, because of the presence of pre-injury factors and post-injury stressors which impacted on the worker's level of psychological functioning, it appeared the compensable injury was a significant contributing factor in terms of the development and maintenance of the worker's PTSD. I also accept Dr. S's opinion in that I consider the assault the worker experienced was significant. It resulted in physical injuries for which he was off work for some seven months. The opinions from the worker's treating psychologist (Mr. B), the Board psychologist and the psychologist the Board asked to provide an opinion agree that the 1998 incident was a significant and material contributing factor. I confirm the review officer's conclusion about the acceptance of the worker's PTSD and depressive episode. There is insufficient psychological and/or medical opinion to the contrary.

With reference to the reopening of the worker's claim for wage loss benefits, the review officer did not agree with the applicability of section 96(2) of the current Act.

The case manager's decision occurred after March 3, 2003. The case manager referred to the provisions of section 96(2). The review officer stated that the consideration of the worker's psychological problems was a new matter for initial adjudication that did not fall within the reopening provisions of the Act.

In considering whether it is necessary to consider the worker's claim under section 96(2), it is necessary to deal with the preliminary question of the scope of section 96(2). Having done so, on balance, I agree with the review officer that the worker's request for further benefits is not properly characterized as a request for reopening under this section of the Act.

Section 96(2) expressly refers to matters that have been previously decided. Section 96(2)(a) restricts the Board's consideration of a reopening request to those medical conditions, injuries or disabilities that the Board has previously decided were compensable. With reference to section 96(2)(b), if an initial adjudication on what conditions or disabilities constitute the nature and extent of a worker's injury has yet to occur, either at the time of the initial acceptance of the claim or at the time the Board finds it necessary to determine if a medical or psychological condition has arisen as a consequence of an injury, I fail to see how it can be viewed as a recurrence of an injury.

I conclude the initial adjudication of the worker's PTSD and depressive disorder falls outside the scope of a section 96(2) consideration. The Board had not previously decided the matter of whether the worker's PTSD and major depressive episode were part of his entitlement under the claim.

With reference to the payment of wage loss benefits as of February 27, 2003, the case manager again relied upon the opinion of Dr. S. That opinion was based upon her review of Dr. Burris' records, wherein he consistently indicated the worker was disabled from work as of March 3, 2003. Given that anxiety was present at that time, Dr. S opined that it was likely also present in the last few days of February 2003. I accept that opinion, which I consider is supported by the weight of the evidence in Dr. Burris's records as well as the reports of Mr. B and Dr. Davidson. There is insufficient evidence to the contrary.

Finally, I agree that the weight of the evidence does not indicate that the circumstances surrounding the worker's PTSD and depressive episode are such that new claim should be established. The medical and psychological opinion referred to above supports that those psychological problems are a compensable consequence of the 1998 injury.

Conclusion

I confirm *Review Division Decision #8004.*

No expenses were apparent or requested and none are awarded.

Susan Marten
Vice Chair

SM/pm