Noteworthy Decision Summary

Decision: WCAT-2004-06341 **Panel**: Teresa White **Decision Date**: November 30, 2004

Arising out of and in the course of employment – Mental stress – Increased risk – Positional risk – Personal risk factor – Section 5.1 of the Workers Compensation Act – Policy item #14.00 of the Rehabilitation Services and Claims Manual, Volume II

Although a ferry worker witnessed a boat capsizing because the ferry on which she was working sailed past it, witnessing the accident did not arise out of her employment. The ferry was not involved in rescue attempts, and the evidence did not support a conclusion that it could or should have been involved. The worker was in no different position than a member of the general public who may have been on the ferry, on shore, or on another vessel in the area that day. The fact that she was personally acquainted with some of the people who died in the boat capsize was a personal risk factor.

The worker, who was a deck hand on a ferry, was trained and expected to respond to emergencies on board her ferry. She suffered post traumatic stress disorder (PTSD) when a fishing boat capsized, causing the death of people with whom she was personally acquainted. The worker's account was that she and others on the ferry were told to "stand down" when they were willing and able to assist in the rescue. Media coverage of the incident related to two coast guard divers who were prohibited by safety rules from attempting to enter the overturned hull until a second team of military divers arrived. The issue on appeal was whether the worker's claim for mental stress under section 5.1 of the *Workers Compensation Act* should be accepted.

Whether or not the worker's PTSD could be considered acute, there was no sudden and unexpected traumatic event arising out of and in the course of her employment. When applying policy item #14.00 of the *Rehabilitation Services and Claims Manual, Volume II*, the panel considered a number of approaches to the analysis of risks relating to employment - the peculiar risk, positional risk, and increased risk approaches. Under the positional risk approach the fact that the worker was in a position to see the incident by virtue of her employment is enough, but it is not clear that this approach applies in British Columbia. The increased risk approach should be applied in this situation, but policy states that the fact that employment placed the worker in a position to observe an emergency - in this case the aftermath of the vessel capsize – cannot alone be a determinative factor in granting compensation. Where a worker is not involved in the accident, he or she is not exposed to any increased risk as a result.

The evidence did not support a conclusion that the worker was in a position to offer direct assistance, or be told to "stand down". She was not one of the two coast guard divers who were barred from entering the overturned hull because of safety rules, and there was no suggestion that her work on the ferry required her to participate in rescues by scuba diving. The ferry was not on the scene and was not involved in the rescue and, given the number of vessels already involved, the evidence did not support a conclusion that it could or should have been involved. The fact that the worker was personally acquainted with some of the people who died in the accident was a personal risk factor that contributed to her injury, and supported a conclusion that the risks associated with employment were less operative. Thus, the worker's witnessing of the accident did not arise out of her employment. She was in no different position than a member of the general public who may have been on the ferry, on shore, or on another vessel

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in the area on the day in question. The worker did not develop PTSD as an acute reaction to a sudden and unexpected traumatic event arising out of and in the course of her employment.

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Panel: Teresa White, Vice Chair

Introduction

The worker, a deck hand on a passenger ferry, appeals a decision of the Review Division of the Workers' Compensation Board (Board) dated March 26, 2004. The Review Division denied the worker's request for review of a decision of the Board dated September 24, 2003.

The Board decision was that there were no special circumstances that precluded the worker from making an application for compensation within the time limits set out in section 55 of the *Workers Compensation Act* (Act). The Board went on the state that even if special circumstances had existed, the worker's claim for emotional symptoms could not be accepted.

The Board decision, dated September 24, 2003, also contains an "addendum" which notes that the worker had brought to the case manager's attention a prior stress claim filed in 1993. The case manager said that the file had been requested for review, and if there was any information contained in the file that would alter the decision to deny the 2003 claim, the worker would be informed. However, it was unlikely that any information would alter the decision to deny the claim. The case manager recorded in a memo dated October 1, 2003 that the previous claim had been reviewed. The 1993 claim could not be reopened as the claim was denied. The worker's new problems "would have no bearing whatsoever on the 1993 claim."

The worker's claim is for mental stress alleged to have arisen out of and in the course of her employment on August 25, 2002. The worker's application for compensation was made in September 2003.

The worker is represented by her union representative, and the employer is participating.

This appeal is proceeding by way of read and review of the evidence and submissions on file. Although an oral hearing had been originally scheduled, the worker, through her representatives and based on a submission from her psychiatrist respecting her mental state, requested that the appeal proceed without an oral hearing. I am satisfied that the issues on this appeal can be fully and properly considered, and resolved, based on a review of the evidence and submissions on file, which are extensive.

During the WCAT pre-decision processes, a report of the incident prepared by the Transportation Safety Board of Canada (the Transportation Safety Board Report) was

disclosed to the parties, and submissions invited. The Board's claim file respecting a previous stress-related claim made by the worker in 1993 was also obtained and disclosed.

Issue(s)

The first issue is whether the worker's claim satisfied the requirements of section 55 of the Act. That involves consideration of whether there were special circumstances that precluded the worker from making a claim for compensation within the one year period set out in section 55 of the Act. If so, the question becomes whether the Board should have exercised its discretion to pay compensation.

Despite their conclusions respecting section 55, both the Board officer and the review officer went on to consider whether, if special circumstances had existed, the worker's claim should have been accepted on its merits. Thus, the second issue is whether the worker's claim for mental stress should have been accepted.

I do not consider the "addendum" referred to above gives rise to an issue before WCAT on this appeal. It does not contain any decision. The decision suggested by the addendum was made after the decision letter underlying this appeal. The worker's remedy in that respect would be another appeal. However, that does not mean that information in the 1993 claim is not relevant to the issue before me, and as such, I have reviewed the 1993 claim file.

Jurisdiction

This appeal was filed with the WCAT under section 239(1) of the Act. WCAT may consider all questions of fact and law arising in an appeal, but is not bound by legal precedent (section 250(1)). WCAT must make its decision on the merits and justice of the case, but in so doing, must apply a policy of the Workers' Compensation Board's board of directors 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).

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 Act was amended by the *Workers Compensation Amendment Act, 2002* (Bill 49), effective June 30, 2002. Among other things, Bill 49 added section 5.1 of the Act, which provides for compensation for mental stress. As the events underlying the worker's claim took place in August 2002, the Act as amended by Bill 49 applies. Applicable published policy is found in the *Rehabilitation Services and Claims Manual*, *Volume II* (RSCM II).

Section 5.1 of the Act refers to the "most recent applicable *Diagnostic and Statistical Manual of Mental Disorders*." The most current version is the DSM-IV-TR, which is referred to in this decision as the "DSM."

Law and Policy

General

Policy item #14.00 in the RSCM II provides criteria, which are not exclusive, that are considered in determining whether an injury arose out of and in the course of a worker's employment. The criteria in place at the time this claim arose were:

> (a) whether the injury occurred on the premises of the employer;
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> (b) whether it occurred in the process of doing something for the benefit of the employer;
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> (c) whether it occurred in the course of action taken in response to instructions from the employer;
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> (d) whether it occurred in the course of using equipment or materials supplied by the employer;
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> (e) whether it occurred in the course of receiving payment or other consideration from the employer;
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> (f) whether the risk to which the employee was exposed was the same as the risk to which the employee is exposed in the normal course of production;
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> (g) whether the injury occurred during a time period for which the employee was being paid;
> (h) whether the injury was caused by some activity of the employer or of a fellow employee.

Policy states that this list is by no means exhaustive. All of these factors can be considered in making a judgment, but no one of them can be used as an exclusive test.

Policy item #16.50 in the RSCM II states:

> **#16.50 Emergency Actions**

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Where an emergency occurs at a time when a worker is in the course of employment, the worker is considered to be covered if injured when acting to protect a fellow worker or protect the employer's property. If, however, the action is that of a public spirited citizen, she or he would be doing no more than anyone would do, whether or not working for an employer at the time. This cannot be considered to be related to the employment.

However, there is an exception to this general proposition, notably where the injury occurs through the presence of a hazard on the premises of the employer. The situation can perhaps best be illustrated by an example. Suppose a worker receives a telephone call at work indicating that there is a fire in a portion of the employer's premises. The worker races from the office and, due only to haste, trips over his or her own feet, falls and injures an arm. There is no doubt that in light of the relationship of the emergency to the employment this injury would be compensable. In other words, it would be found to have arisen out of the employment.

Suppose, then, that the same worker receives a telephone call to the effect that a family member has been seriously injured in an accident. Once again the worker races from the office and, due only to haste, falls and injures an arm. In these circumstances there is no relationship to the employment. The reason for the worker's departure is totally unrelated to the employment and nothing about the employment contributed to the injury. However, if the worker were to race from the office and trip over a poorly laid carpet, a relationship to the employment would be present. In other words, the injury would not have occurred had it not been for a hazardous condition on the employment premises.

Therefore, while it is incorrect to say that compensation will be payable when a worker is injured while leaving the premises of the employer for whatever reason, it is correct to say that any injury will be compensable which was suffered in any emergency and which also arose out of a hazard on the employment premises. Even if the injury does not arise from a hazard of the employment premises, and the emergency does not concern a fellow worker or the employer's property, claims may still be accepted from workers who, in the ordinary course of their work, are situated in an environment which by its very nature may become the site of an emergency situation. An excellent example of this "positional risk" would be all employees in the various aspects of the operation of an airport. The Board is of the understanding that, for example, at Vancouver International Airport groups or "teams" are formed to act in cases of emergency. The members of these groups will be drawn from various aspects of the operation and the nature of their specific employment may be totally unrelated to emergency rescue. Baggage handlers or concession operators could not be considered to have as part

> of their employment the need to react in the event of a crash of an aircraft. Nevertheless, their very presence as employees at the airport places them in the position of being the logical choices to become members of such teams. Apart from this exception, the fact that the employment places one in a position to observe an emergency cannot be of itself a determinative factor in granting compensation.
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> If a worker's injury is the result of an emergency action to prevent a crime, there may be entitlement to benefits under the *Criminal Injury Compensation Act*. (4)

Relating to Section 55

Section 55(2) of the Act provides that no compensation is payable unless an application for compensation is filed, or an adjudication is made, within one year of the "date of injury, death or disablement from occupational disease", except as provided in subsections (3), (3.1), (3.2), and (3.3). Sections 55(3) and 55(3.1) provide that compensation may be paid, if the Board is satisfied that special circumstances precluded the filing of an application within the one-year time limit.

Sections 55(3.2) and (3.3) concern claims for occupational disease. Policy item #93.21 of the RSCM II provides that the requirements of section 55(2) are not complied with simply by reporting the injury to the First Aid attendant, or having it confirmed by witnesses.

There are no DSM diagnoses designated as occupational diseases. Section 5.1 provides that mental stress must arise from a "sudden and unexpected traumatic event." As such, the provisions respecting personal injury in section 55 of the Act apply.

Item #93.22 of the RSCM II provides that, before an application for compensation can be considered on its merits, it must satisfy the requirements of section 55 of the Act. Policy item #93.22 states, in part:

> The general effect of these provisions is that two requirements must be met before an application received outside the one-year period can be considered on its merits. These are:
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> a. There must have existed special circumstances which precluded the application from being filed within that period, and
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> b. The Board must exercise its discretion to pay compensation.
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> The application cannot be considered on its merits if no such special circumstances existed or the Board declines to exercise its discretion in

favour of the claimant. Each of these two requirements of Section 55(3) must be considered separately.

1. Special Circumstances

It is not possible to define in advance all the possible situations that might be recognized as special circumstances which precluded the filing of an application. The particular circumstances of each case must be considered and a judgment made. However, it should be made clear that in determining whether special circumstances existed, the concern is solely with the claimant's reasons for not submitting an application within the one-year period. No consideration is given to whether or not the claim is otherwise a valid one. If the claimant's reason for not submitting an application in time are not sufficient to amount to special circumstances,

The application is barred from consideration on the merits, notwithstanding that the evidence clearly indicates that the claimant did suffer a genuine work injury. The following facts illustrate a situation where special circumstances were found to exist. The claimant suffered a minor right wrist injury on October 20, 1976, which at the time caused him no disablement from work and did not require him to seek medical attention. There was, therefore, no reason why he should claim compensation from the Board, nor any reason why his doctor or employer should submit reports to the Board. It was not until 1978 when the claimant began to experience problems with his right wrist that he submitted a claim to the Board. It was only then that he was incurring monetary losses for which compensation might be appropriate.

[reproduced as written]

Item #93.22 also provides that the Board must consider whether to exercise its discretion to pay compensation, assuming that special circumstances are found to exist. Generally, the Board should exercise its discretion in favour of allowing workers' applications to be considered on their merits. However, it is not automatically done, and the particular facts of each case should be considered. The extent of the lapse of time since the injury is a consideration to be made.

Relating to Section 5.1 (Mental Stress)

Section 5 of the Act provides for compensation for personal injury arising out of and in the course of employment. Section 6 provides for compensation for an occupational disease due to the nature of a worker's employment.

Section 5.1 of the Act became effective June 30, 2002. It provides:

> 5.1 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 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.

Policy item #13.30 in the RSCM II states that a "traumatic" event is a severely emotionally disturbing event. The event could be a direct personal observation of an actual or threatened death or serious injury; a threat to one's physical integrity; witnessing an event that involves death or injury; or witnessing a personal assault or other violent criminal act. Examples given are a horrific accident, an armed robbery, a hostage taking, an actual or threatened physical violence, an actual or threatened sexual assault and a death threat.

The policy states that in most cases, the worker must have suffered or witnessed the traumatic event first hand.

Policy is very explicit in stating that *in all cases*, the traumatic event must be *clearly and objectively identifiable*, and *sudden and unexpected in the course of the worker's employment.* Policy also injects an "objective" test, in that the event must be "*generally accepted as being traumatic*." [Emphasis added]

To further assist the decision-maker, published policy provides specific examples of instances where entitlement may flow from section 5.1:

- A person commits suicide by jumping in front of a bus. The bus driver is not physically injured by the incident, but is unable to work due to mental stress arising from the event. The bus driver's physician or psychologist confirms the driver is suffering from a condition described in the DSM, and requires time off and professional counseling.

- A worker directly witnesses a very serious accident to a co-worker. The worker suffers no apparent symptoms for the first two weeks after the accident, but then calls in one morning to say he/she is unable to work because he/she is haunted by

the images of the event. A diagnosis by a physician or psychologist confirms that the worker suffers from post-traumatic stress disorder as described in the DSM.

- During a prison riot, inmates hold a guard hostage. The guard is subsequently diagnosed by a physician or psychologist as suffering from a mental condition described in the DSM, and requires time off from work to recover.

- A female worker attends at work and is confronted by her male supervisor who sexually assaults her. As an immediate and direct result of the assault, the worker suffers an acute reaction and is subsequently diagnosed with a mental condition described in the DSM. In addition to a potential claim for physical injury, the worker may be entitled to compensation for mental stress.

Policy also provides examples of circumstances where there would be no entitlement to compensation for mental stress:

- A worker is subjected to frequent sexual innuendo, humour in poor taste, practical jokes, and other forms of inappropriate attention from co-workers. One day the worker calls in to say the stress is too much, and he/she cannot work.

- A worker in a machine shop characterized by high levels of sudden noise calls in one morning to say he/she is unable to work due to mental stress. The worker also cites impossibly high production quotas, machine-pacing of work and constant threats of termination by the foreperson as reasons for the mental stress.

Background and Evidence

On August 13, 2002 a commercial fishing boat capsized in waters off the coast of B.C. Tragically, five of the seven persons on board, including two children and their mother, were trapped in the overturned hull and drowned. The worker was personally acquainted with the two children and their mother, who had resided in the same small community in the past, and continued to travel on the worker's ferry on a regular basis. The mother had cut the worker's hair in the past.

The incident was well-publicized by the media. Many of the media reports focused on one particular issue. Although there were two coast guard divers on the scene very quickly, they were able to conduct external searches of the capsized vessel only, because of then relatively new occupational health and safety rules that required the presence of a four person dive team before divers could enter an overturned vessel. This meant that the two divers could not attempt a rescue of the persons trapped within the vessel. They were required to wait until a team of military divers arrived. The two divers were extensively quoted in the media, and expressed their frustration with the necessity of waiting for the second dive team.

The employer operates a fleet of ferries. One of those ferries (Ferry A) was directly involved in the rescue efforts. On the day in question, the worker was part of the crew of another ferry (Ferry B), which was not involved in the rescue efforts, although it sailed within visual distance of the incident. However, the captain of Ferry B states, and I accept, that Ferry B was so far away from the incident that it could be seen in any detail only through binoculars.

The worker's claim is fundamentally based on her belief and assertion that although she was trained in marine rescue, she and others on Ferry B were not permitted to assist in the rescue. The worker asserts that she and others were told to "stand down." The employer disagrees with the worker's perspective, and asserts that Ferry B was not involved in the rescue in any way.

Based on my review of all of the evidence, and the submissions, I have made the following findings of fact. Given the detailed information on file, in the Review Division decision under appeal, and publicly available in sources such as the Transportation Safety Board Report, I do not consider it necessary or useful to provide a detailed summary of the events as they unfolded. In that respect, I have given significant weight to the Transportation Safety Board Report, which provides a very detailed factual summary, including the timing of the incident and subsequent rescue attempts. It also provides a careful and detailed account respecting those involved in the rescue and in what capacity. I have included in this decision only those facts that are essential to explain my decision.

I have concluded as follows:

- Although Ferry B "sailed past" the incident on two occasions, those on Ferry B did not "witness" the capsizing of the fishing boat. Ferry B was in dock at the time of the capsizing. The site may have been visible from Ferry B as it sailed past, but only from a distance. As such, I do not accept that the worker witnessed the capsizing. I do accept that she and others on Ferry B could see the incident site from a distance as rescue attempts proceeded.

- Ferry B was not involved in rescue attempts, and there is insufficient evidence to conclude that the ferry or its crew were ordered to "stand down" for any reason. The Transportation Safety Board Report does not mention Ferry B. As such, the worker was indeed not involved or asked to be involved in the rescue. It may be that Ferry B offered assistance (there is no direct evidence of this) but at no time was Ferry B or its crew directly involved. Further, there is no suggestion whatsoever in the Transportation Safety Board Report that Ferry B should have or could have been involved and of assistance.
- The evidence supports a conclusion that Ferry B may have been asked, because of its sailing path and the prevailing ocean conditions, to keep a watch for possible victims of the incident in the water. It is unclear on the evidence whether the crew

knew of any such request during the incident. This is not mentioned in the Transportation Safety Board request or confirmed anywhere else in the evidence.
- Ferry A and its crew were very involved in the rescue, including directly assisting survivors, and the positioning of the ferry to provide a "lee" for rescue attempts.
- The identity of the individuals on board the fishing boat was not known by the crew of Ferry B and in particular by the worker until some time after the incident. The worker learned of their identity that evening, after her shift.

Based on a comprehensive review of the worker's 1993 claim, and the submissions, the following is a summary of the evidence respecting the worker's history and psychological condition, and her submissions and evidence with respect to the development of her condition:

- The worker was born in 1948. In August of 2002 she had worked for the employer for over 15 years.
- The worker made a claim for stress-related problems in 1993 (the 1993 claim).
- The 1993 claim was based primarily on the worker's belief that she was wrongfully harassed by the employer and other members of the crew.
- There is extensive correspondence from the worker to the Board on the 1993 file. It describes, in significant detail, the worker's perspective of events. There are also reports from Dr. M, the worker's psychiatrist, relating to her mental health at the time. Dr. M is the same psychiatrist that treated the worker in relation to this claim.
- In a letter dated August 5, 1993, Dr. M expressed the view that the worker had developed an idiosyncratic, somewhat schizoid style, accompanied by idiosyncratic thought patterns. The worker had great difficulty with social relationships and had trouble understanding how her behaviours and expressions affected others. The DSM diagnosis at the time was Brief Reactive Psychosis. On Axis II of the DSM, Dr. M noted "Probable Schizotypal and Schizoid Personality Traits." The diagnosis of agitated depression is also offered on Dr. M's physician's reports.
- The worker's 1993 claim was denied, on the basis that the worker had not sustained a personal injury, and the condition arose from conflicts with the employer and fellow workers. The situation was considered to be one of labour relations conflict.
- The worker ultimately returned to work.
- As noted above, the fishing boat capsize occurred on August 13, 2002.
- On September 17, 2003 the worker spoke to the case manager. She said that she, her coworkers, the coast guard and various other potential rescuers had been told to "stand down" as there were no experienced divers at the scene, and that no attempts were made to rescue the individuals on the fishing boat for "about 10 hours."
- The worker's impression that no attempts were made at rescue for about 10 hours is incorrect. As noted above, the Transportation Safety Board Report sets out the timeline of the rescue attempts in detail. The capsizing took place between 0857 and 0902. Other vessels, including coast guard vessels and divers, were on scene very quickly. Two divers entered the water to make external searches. Notably, both became entangled, at separate times and had to be assisted by the other diver.

As noted above, these divers were not permitted to enter the overturned hull due to occupational health and safety rules/regulations.

- The military divers had arrived and one of the children was recovered from within the vessel at approximately 1120. Dive operations were suspended at 1230 because of undue risk to the safety of the divers. The overturned vessel was towed to shallow water after attempts to lift it out of the water by a crane were unsuccessful. Shortly after 1900 divers were able to recover the body of the second child. The report states that, "None of the persons recovered was located in a pocket of air within the vessel."
- The worker told the case manager that she had a great deal of frustration and guilt, in particular because she had the necessary training and access on the ferry to the proper equipment to initiate a number of different rescue manoeuvres.
- The worker's report of injury, dated August 18, 2003, states, in summary form, that despite her skills and training, the worker was unable to prevent the loss of five lives in the incident. The worker noted her personal relationship with the mother and two children who died in the incident.
- On her application for compensation, the worker stated "close friends drown on [fishing boat name]. Coast guard tells our crew to stand down and watch for bodies as we sail past northbound and southbound." The worker said this was unconscionable to her and caused extreme distress, intrusive memories, nightmares, and anxiety that Dr. M was trying to help.
- The worker wrote an August 18, 2003 letter to the Board. She said she was trained in marine emergencies, but was not trained to be able to sail past an overturned hull with a young family that she knew and cared about under it, twice in one morning.
- The worker said that had Ferry B's help been enlisted, she would without a second thought have been able to implement "one of at least fifteen rescue plans that went through my mind at the time and have been going through my mind since…".
- The worker feels that there was no coordination of the rescue effort. She said she had worked diligently since the accident hoping that more coordination of rescue efforts would occur in the future.
- The worker said that it was unacceptable to her that, "we 'May not' help people in distress on the sea!"
- Dr. M wrote a report dated August 19, 2003. He stated that the worker's current diagnosis was Post Traumatic Stress Disorder, (PTSD) as a result of observing the capsizing of the [fishing boat name] in August 2002. Dr. M said the worker was "highly trained" and had taken many courses in marine safety as well as being a capable scuba diver. The worker found it "very difficult to experience the sense of helplessness and frustration while knowing that her skills could have been put to good use."
- Dr. M said that since the incident the worker had difficulty sleeping and intrusive memories, but managed by focusing heavily on work. In late March 2003 she went off work for an inner ear infection, and, "Once the structure and focus of work were gone the insomnia and anxiety worsened, as well as the sense of hyper vigilance and sadness with frequent tears." The worker had severe guilt.
- The worker said she had post traumatic stress syndrome, and chronic insomnia,

delayed onset until a second "critical incident."

- The second "critical incident" referred to is the collapse and death of an elderly man on board Ferry B some time in the spring of 2003. Other members of the crew attempted to resuscitate the man but were unsuccessful. The employer offered a "debriefing" but the worker did not attend because she did not feel capable because her symptoms were already worsening.
- The worker's neighbour, who is stated to be an acupuncturist, is said to have recommended to the worker that she seek advice for symptoms which appeared to be psychological in nature. The worker told the case manager that she decided to tough it out and continue working.
- The worker saw her family physician, Dr. L, on an almost weekly basis from the fall of 1992, and although she was experiencing emotional symptoms she thought these were due to the ear infections rather than the incident in August 2002. The worker told the case manager she did not report the emotional difficulties in relation to the incident until much later.
- Beginning in or about March 2003, the worker was on sick leave because of a chronic ear infection. It was during this absence that her PTSD symptoms were said to have worsened to the point of disability.

In a submission to the Review Division dated December 23, 2003, the worker's representative said that had the worker not been on Ferry B she would not have developed the disorder. She was on Ferry B because she was at work. The worker's representative submitted that the claim had substantive merit and contained special circumstances which create an exception to the one year requirement to file a claim. The substance of the claim can be summarized by saying she has PTSD. The disorder was brought on by witnessing a tragedy while she was at work, and, "The tragedy is related to her work because she rightly believes that it is part of her job to save passengers at sea."

Dr. M's opinion is that the worker's PTSD is of delayed onset. The worker saw her condition as something she was capable of handling, albeit with difficulty. When she stopped work because of her ear infection, the symptoms became unmasked and increased. The worker should not be penalized because the disorder was delayed.

The worker's representative submitted that there were special circumstances that precluded the worker's application for compensation, and that the circumstances were such that the worker is entitled to compensation for mental stress pursuant to section 5.1 (the representative referred to section "5(1)" but it is apparent he meant to refer to section 5.1 of the Act). The worker's representative submitted that policy item #13.30 in the RSCM II differentiates between chronic stress and conditions such as PTSD. The worker did not develop PTSD because of workplace conditions or workload, and it was not brought about by stress over a period of time. There was a specific traumatic event and the worker's feelings of helplessness because she could not help.

The worker's representative submitted that the example given in policy item #13.30 of a worker who can no longer work two weeks after witnessing a serious accident to a coworker shows that policy allows for delay in the onset of presenting symptoms.

With respect to the evidence concerning the worker's vicinity to the incident, and that she learned of the victim's identify later, the worker's representative submitted that it was not those factors which were critical to her condition. What was important was the worker's feelings of helplessness when "she was not permitted to assist in the rescue operations." Had the worker not been on duty that day, her feelings of helplessness and inability to aid would not have arisen.

The employer's representative submitted that the worker's description of the events, and her psychiatrist's opinion suggests that she was in attendance at the scene and forbidden to offer assistance. This is incorrect. The worker was not exposed to a crisis quickly, and the capsizing occurred while the vessel was in dock. The worker's vessel did not attend the scene. The rescue activities were undertaken by Ship A. There were upwards of ten vessels in the water surrounding the capsized fishing boat, and the worker's exposure was the same as that of other public citizens. She had no intimate knowledge of the events and only later learned she knew the victims.

The employer did not dispute the diagnosis of PTSD, but submitted it did not meet the criteria in section 5.1 (the employer also referred to section 5(1) but clearly meant section 5.1). The employer submitted that the worker's condition would be the same had she been at home and learned of the capsizing through the media. The worker is a knowledgeable seaman and would have the same insights of what she felt could have been done differently regardless of whether she was at work that day. The worker's idea that she could have saved the victims, if only the "stand down" order had not been made, is, the employer submitted, "simply and wholly false." Ship B was not afforded an opportunity to either obey the order or even receive the order. The worker's ability to offer assistance would have been no more available had she been at home that day.

Findings and Reasons

The worker's claim is for mental stress arising out of and in the course of her employment. There is no suggestion that the worker sustained a personal injury or that she developed an occupational disease, either of which were causative of her psychological disability. Thus, the worker's claim is adjudicated in accordance with section 5.1 of the Act.

Section 55

The first issue is whether the worker's claim satisfies the requirements of section 55 of the Act. As noted above, the applicable portion of section 55 is that respecting personal injury.

Section 55 requires that an application for compensation must be made within one year after the date of injury, death or disablement from occupational disease. If the application is not made within the one year, but is made within three years, the Board may pay compensation if there existed "special circumstances" which precluded the filing of an application within the one year.

The worker's application was made just over one year from the date of the incident on August 13, 2002.

The Board officer did not consider that special circumstances existed. In reaching that conclusion, the officer considered that the worker started incurring time loss from work in March 2003, and did not make a claim even after it became apparent that emotional difficulties were playing a role in her disability. Ignorance of Board policy and regulation was not considered special circumstances.

The review officer noted that the worker's symptoms became significant in March or April 2003, and was causing her significant problems by at least April 2003. It could be argued that the worker was precluded from applying until the spring of 2003 because of the lack of disabling symptoms. However, the worker's psychiatrist described her symptoms as becoming unmasked and increasing significantly at that time. She had also been advised to seek medical attention before that.

The review officer noted that the one year time for filing an application expired in August 2003. The worker had already been experiencing symptoms and off work for approximately five months. On that basis, the review officer did not consider that special circumstances existed that precluded the worker from filing her application within one year.
The "special circumstances" suggested to have precluded the worker from making an application within one year of the date of injury is that she continued to work until she became disabled by her ear infection. When that occurred, the structure of work was missing and the worker's PTSD was unmasked.

Published policy states that it is not possible to set down in advance all those situations where there are special circumstances. Each situation must be considered based on its own individual merits.

In this worker's situation, I am persuaded by the evidence regarding the "delayed onset" of the worker's PTSD that special circumstances existed that precluded the worker from applying for compensation before the one year period expired. I note further that the application was made just over one year from the incident. The delay was short, and I consider the evidence to support the conclusion that the worker's mental state precluded the application earlier. The worker notes in her August 18, 2003 letter to the Board that she had "worked diligently all last Fall Winter and Spring hoping we could learn to co-ordinate our efforts to effect rescues in the future. I wrote letters to Transport Canada asking for more information in that respect with no response."

It appears likely from the evidence that worker's mental condition developed and worsened during the year after the incident. I accept Dr. M's opinion that the worker's condition then worsened once she was away from work.

On that basis, the worker's appeal respecting section 55 is allowed. There were special circumstances that precluded the worker's application for compensation until just over one year from the date of the incident in August 2002.

Once special circumstances have been established, a decision must be made respecting whether the Board should exercise its discretion to consider the claim. In these specific circumstances, I consider that the discretion should be exercised in favour of the worker, and the claim considered.

Compensation for Mental Stress

As noted above, there is no dispute, and I accept, that the worker has PTSD. I also accept that her PTSD results, at least to a significant degree, from the capsizing of the fishing vessel and the death of her friends. However, that does not mean the worker's condition is compensable. Regardless of how closely the worker's condition relates to the fishing vessel capsizing and the tragic deaths that resulted, and regardless of the worker's degree of disability from work as a result, the requirements of section 5.1 of the Act must be satisfied.

Section 5.1 requires that the worker have a DSM condition (diagnosed by a physician or psychologist) and that it be an acute reaction to a sudden and unexpected traumatic event arising out of and in the course of the worker's employment. Section 5.1(c) also requires that the condition not be 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.

I do not consider the circumstances of this case to fall within section 5.1(c). It could be argued that the worker's evidence regarding being told to "stand down" suggests that her condition arose as a result of a decision of the employer relating to the worker's employment. I am not persuaded that the employer made a decision relating to the worker's employment during the incident, and in particular that she was told by her employer to "stand down," in any sense that would bring these factors within section 5.1(c).

Thus, the question that remains is whether the worker's PTSD was an acute reaction to a sudden and unexpected traumatic event arising out of and in the course of her employment.

It is certainly questionable whether the worker's PTSD was an "acute reaction." The diagnosis is PTSD, delayed onset, chronic. This suggests that the condition was not an acute reaction. Rather, it developed over time.

Whether or not the worker's reaction could be considered "acute", there was no sudden and unexpected traumatic event arising out of and in the course of the worker's employment. The capsizing of the fishing vessel and the loss of lives that resulted was, without question, a tragic event. I have no doubt that it was traumatic for the worker. However, section 5.1 makes it very clear that the worker must have developed her DSM diagnosis as an acute reaction to a sudden and unexpected traumatic event arising out of and in the course of her employment.

As was noted by the employer, the worker's ship (Ship B) was in the dock at the time the capsizing occurred. While it sailed within visual distance of the incident, Ship B was not involved in the incident. The worker found out about the identity of the victims after her shift was over. The worker was in the course of her employment when the incident occurred, but had no employment-related role in relation to the incident. Dr. M relates the worker's PTSD directly to the incident, and I accept his opinion. However, his opinion is one commenting on medical causation, and not the requirements of section 5.1.

In that respect, it should be noted that the DSM criteria for PTSD include witnessing an event that involves death, injury, or a threat to the physical integrity of another person; or learning about unexpected or violent death, serious harm, or threat of death or injury experienced by a family member or other close associate. The worker did witness the aftermath of the accident that caused the death of persons she knew and was friendly with. PTSD may be diagnosed as a result of such an incident, but the very fact that the worker's condition falls within the DSM criteria does not make it compensable. Section 5.1 and the published policy that provides guidance in its interpretation requires that the incident be and sudden and unexpected traumatic event, and that it arise out of the employment.

It is also apparent that Dr. M's understanding of the events on the day of the incident is based on the worker's account, which includes the suggestion that the worker and others were told to "stand down" when they were ready, willing and able to assist with the rescue. It is understandable, given the extensive media coverage of the aspects of the incident relating to the two coast guard divers being prohibited by safety rules to attempt to enter the overturned hull, that it could be concluded that the worker and others on Ferry B were also prohibited from participating. However, the evidence does not support such a conclusion. The worker may well feel that she could have helped. However, Ferry B was not on the scene and was not involved in the rescue. Furthermore, the evidence does not support a conclusion that Ferry B could or should have been involved. In that respect, I rely on the Transportation Safety Board report, which does not mention Ferry B or make any suggestion that the involvement of another ferry would have changed the outcome or been of any assistance whatsoever. In that

respect, the fact that the worker was a trained scuba diver does not place her in any unique position. There is no suggestion in the evidence that the worker was working on Ferry B in any capacity that would require or expect her to participate in a rescue by scuba diving.

I have applied the criteria found in policy item #14.00 of the RSCM II to the facts and circumstances of this case. I have also considered the policy respecting "emergency actions" and the so-called "positional risk" doctrine, as follows.

The "incident" that is alleged to have caused the worker injury did not occur on the premises of the employer. The worker's direct "exposure" to the incident did occur on the employer's premises. It is also the case that the worker would likely not have personally witnessed the site of the capsizing had she not been at work. However, it is likely that she would have seen media coverage regardless of whether she was at work or not on the day in question.

The worker was in the process of carrying out her duties as Ferry B sailed by the incident. As such, the worker witnessed the capsizing while she was in the process of doing something for the benefit of the employer. However, the worker witnessed the site of the capsizing simply because Ferry B happened to follow a route that took it past the location, and not because Ferry B or the worker had any duties or responsibilities relating to the incident.

The next criterion is whether the risk to which the employee was exposed was the same as the risk to which the employee is exposed in the normal course of production. This criterion relates to fundamental principles of workers' compensation relating to risks of particular employments.

There are a number of approaches to the analysis of risks relating to employment. It is not clear from applicable published policy which of these approaches applies in British Columbia. The jurisprudence relating to risk analysis in this context is relatively well-developed in the United States.

Historically, some American jurisdictions applied what is known as the "peculiar-risk doctrine."

The peculiar risk doctrine requires that a worker show that the source of harm was peculiar to her occupation. A frequently cited example is that of an outside worker. Under the "peculiar risk" doctrine, even if the work subjected the worker to an increased quantitative risk of injury by heat or cold, compensation could be denied because everyone was subject to this same weather.

The now prevalent risk analysis in the U.S. is the "increased risk" approach. Under this approach, if the employment specifically exposes the worker to a particular risk, the fact that the risk is not specific to the employment will not lead to denial of compensation.

Under the "increased risk" approach, the worker required to work outdoors during cold weather would be entitled to compensation for frostbite, even though the cold weather is a risk to which everyone in the area was exposed. The employment is considered to have exposed the worker to an "increased risk" of frostbite.

The least degree of connection to employment is necessary to satisfy the "positional risk" analysis.

The positional-risk analysis provides that an injury arises out of employment if it would not have occurred "but for" the fact that the conditions and obligations of the employment place the worker in the position where he or she was injured. An injury is compensable if the employment relationship itself placed the employee in a particular place at a particular time when she was injured by some "neutral" force that was neither personal to the worker nor distinctly associated with the employment.

Of these approaches to the analysis of risk, the "positional risk" analysis would link the worker, by virtue of her employment on Ferry B, to the risk of injury from witnessing the site of the incident, regardless of whether the employment gave rise directly to the risk. The fact that the worker was in the position to see the incident by virtue of her employment is enough.

It is not clear from the Act or published policy whether the positional risk doctrine applies in British Columbia. It is mentioned in a number of policies. The application of the doctrine is said in policy to arise in the case of employees involved in the operation of an airport. However, the policy makes it clear that it is not, strictly speaking, the positional risk doctrine that is applied. The example given cites the fact that airport workers may be employed as "teams" to respond to emergencies, by virtue of their presence at the airport, and despite the fact that responding to emergencies would not, under other circumstances, be a risk of the employment.

In the circumstances of those employees, responding to an emergency is a part of their employment by virtue of their inclusion on the team. As such, an injury resulting from responding to an emergency in that capacity would be compensable. It arises out of the employment despite the fact that employment in the same capacity would not necessarily give rise to the same risk. The difference is that the employees are also part of teams who respond to emergencies.

Other polices, such as published policy relating to insect bites, make it clear that the pure "positional risk" doctrine is not imported into B.C. workers' compensation law and jurisprudence. In the case of an insect bite, a worker is not entitled to compensation unless his or her employment exposes them to an increased risk of such a bite. For example, a worker employed to handle bananas shipped to the province from a tropical location might be covered for a bite by a tropical insect found in the bananas. A roofer might be entitled to compensation for a wasp sting resulting from her encountering a wasp nest under the rafters of a roof. In both cases, the employment exposes the

worker to an increased risk of the particular hazard. These are clearly not examples of the "positional risk" doctrine. They are examples of the "increased risk" doctrine.

In consider that the "increased risk" approach should be applied to this situation. There are commonalities between the worker's situation and that of an airport worker who is part of a "team" trained to respond to an accident. However, where the worker is not involved in the accident, he or she is not exposed to any increased risk as a result.

In this case, the worker was trained by the employer and expected to respond to emergencies on board the ferry. The employer may well also expect workers to respond to emergencies involving other sea-going vessels. The actions of Ship A and its crew are an example. As such, an injury resulting from responding to an emergency would likely be compensable. Published policy specifically states that apart from the exception cited, which involved airport workers trained to respond to emergencies, and part of a team that does so, the fact that the employment places one in a position to observe an emergency cannot be of itself a determinative factor in granting compensation.

Thus, the fact that the worker's employment placed her in a position to observe the aftermath of the fishing vessel capsize is not by itself a determinative factor.
The final two criteria in policy item #14.00 are whether the injury occurred during a time period for which the employee was being paid; and, whether the injury was caused by some activity of the employer or of a fellow employee.

In this case, the worker was exposed to the capsizing incident during a time when she was being paid.

The worker submits that her PTSD results from being told to "stand down" or, in a general sense, not being permitted by her employer to participate in the rescue attempts. As noted above, the evidence does not support a conclusion that the worker was in position to offer direct assistance, or to be told to "stand down." The worker was not, for example, one of the two coast guard divers who were not permitted to enter the overturned hull because of the safety rules. Her sole connection was that she was on board a ferry that was not involved in the rescue attempts. Furthermore, the evidence does not support a conclusion that Ferry B was in any position whatsoever to offer assistance given the number of vessels already involved, including Ferry A.

It is also apparent that there are factors personal to the worker that have contributed to her injury. The worker was personally acquainted and friendly with the mother and her two children who, tragically, perished in the accident. The presence of personal risk factors supports a conclusion that the risks associated with the employment were less operative.

On that basis, although the worker witnessed the site of the capsizing because Ferry B sailed past the site, her witnessing the accident did not arise out of her employment.

The worker was in no different position than a member of the general public who may have been on the ferry, on shore, or on another vessel in the area on the day in question.

For those reasons, I have concluded that the worker did not develop PTSD as an acute reaction to a sudden and unexpected traumatic event arising out of and in the course of her employment.

The worker's representative sought costs, but did not make a specific request for reimbursement of a particular cost. In the circumstances, the worker and/or her representative were entitled to reimbursement of cost related to Dr. M's report. It was reasonable that Dr. M's report be obtained and the report was useful in considering this appeal. The Board should reimburse the worker or her representative on submission of the relevant receipt.

Conclusion

The worker's appeal is denied and the Review Division decision of March 26, 2004 is confirmed.

Teresa White
Vice Chair

TW/gw