

Noteworthy Decision Summary

Decision: WCAT-2004-06735-RB **Panel:** Teresa White **Decision Date:** December 21, 2004

Psychological Impairment – Stress – Side Effects of Preventive Antibiotics – Contamination – Sections 1 and 5 of the Workers Compensation Act – Policy Items #32.10 and #32.60 of Rehabilitation Services and Claims Manual, Volume I

Subjective reactions to stress, such as anxiety and difficulty sleeping, are common and do not constitute psychological impairment. In the absence of personal injury or occupational disease, side effects from a drug administered as preventive treatment are not compensable. “Contamination”, in the definition of “occupational disease” in section 1 of the *Workers Compensation Act* (Act), means “a substance with inherent properties causative of adverse consequences from exposure”, such as a poison.

The worker, a transit operator, discovered a white powder on the bus he was operating. A hazardous materials team arrived to investigate and the worker was sent home and advised to seek medical attention for possible anthrax exposure. The worker saw his family physician the following day and was prescribed the antibiotic Ciprofloxacin (Cipro) pending test results. The worker returned to work one week later. The white powder was never identified.

The worker claimed benefits for stress secondary to possible anthrax exposure. The Workers’ Compensation Board (Board) denied his claim on the basis that he had not suffered a personal injury. The worker’s physician subsequently provided a letter concluding that the worker’s disability was the result of side effects (dizziness and disorientation) from Cipro. The Board considered the worker’s claim again and denied it on the basis of policy item #32.60 of the *Rehabilitation Services and Claims Manual, Volume I* (RSCM). The worker appealed both decisions to the Workers’ Compensation Review Board. The worker’s appeals were subsequently transferred to the Workers’ Compensation Appeal Tribunal under the *Workers Compensation Amendment Act (No. 2), 2002*, section 38.

The panel considered whether the worker was entitled to compensation for mental stress, either as a separate diagnosis or as a consequence of a personal injury, as well as whether the worker was entitled to compensation for the consequences (side effects) of preventive treatment with Cipro.

The Act did not make specific provision for compensation for mental stress at the time the claim was filed. Item #32.10 of the RSCM provided that the Board accepted claims for personal injury where the injury consisted of a psychological condition or the psychological condition was a consequence of a physical injury.

The panel accepted that the worker was upset and suffered insomnia to a degree. However, the objective medical evidence did not establish a sufficient degree of psychological impairment or injury upon which a claim for compensation could be based. Anxiety, hyperventilating, and difficulty sleeping are very common subjective reactions to stress. It was also unlikely that anxiety was a significant factor in the worker’s disability. Thus, the panel concluded that the worker did not suffer from a compensable psychological impairment.

The panel accepted the worker had side effects relating to the Cipro. Item #32.60 of the RSCM stated that the Board could accept responsibility for reasonable preventative measures after a claim for a compensable injury or occupational disease had been established. In the present case, the worker had not suffered personal injury.

The panel also held that the side effects caused by the Cipro were not an occupational disease. Section 1 of the Act defines an "occupational disease" as including "disablement resulting from exposure to contamination." The panel held that an unidentified white powder could not be considered "contamination". The panel considered that "contamination", in the context of section 1, means a substance with inherent properties causative of adverse consequences from exposure, such as a poison. Furthermore, even if the panel was incorrect in its interpretation of the term "contamination", the worker's reaction was not to the white powder itself but to the Cipro.

The worker's appeals were denied.

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Introduction

The worker is a transit operator. On October 16, 2001 he discovered an unknown substance in the form of a “white powder” on the bus he was operating.

The worker was concerned and notified his supervisor. The reaction, it appears at least in part because of the proximity in time to the “911” attacks and several incidents of anthrax being sent through the mail in the United States, was swift. A hazardous materials team arrived at the scene, and the worker was subject to their procedures before he was sent home with advice to see his physician as soon as he could.

The worker saw his family physician the next day, and was prescribed the antibiotic Ciprofloxacin (Cipro) pending the results of nasopharyngeal swabs. The worker then missed a few days of work, returning on October 23, 2001.

The worker claimed workers’ compensation benefits. The physician’s first report states he had work stress secondary to possible anthrax exposure. His claim was denied by the Workers’ Compensation Board (Board). A letter to the worker from the case manager dated January 24, 2002 informed the worker that it was not considered that he had suffered a personal injury, and his claim was denied.

The worker’s physician, at the request of the worker’s union representative, then provided a letter dated December 7, 2002. He reviewed the events of October 2001 and said that the worker’s disability from working was the result of side effects (dizziness and disorientation) from Cipro.

The Board considered the worker’s claim again, and in a letter dated January 30, 2003, informed him that the application of policy item #32.60 in the *Rehabilitation Services and Claims Manual, Volume 1* (RSCM 1), “Preventative Measures and Exposures” meant that his claim for the adverse effects of prophylactic drug treatment must be denied.

The worker appealed both decisions to the former Workers’ Compensation Review Board (Review Board).

The worker is represented by his union representative, and the employer is participating in these appeals, represented by a consultant. An oral hearing was held in Richmond, British Columbia on December 13, 2004.

Issue(s)

The overriding issue is whether the worker is entitled to worker's compensation benefits flowing from the October 2001 incident.

This includes consideration of whether the worker is entitled to compensation for mental stress, either on its own or as a consequence of a personal injury, or for the consequences (side effects) of prophylactic (preventative) treatment with Cipro.

Jurisdiction

This appeal was filed with Review Board. On March 3, 2003, the Review Board and the Appeal Division of the Board were replaced by the Workers' Compensation Appeal Tribunal (WCAT). As this appeal had not been considered by a Review Board panel before that date, it has been decided as a WCAT appeal. (See the *Workers Compensation Amendment Act (No. 2), 2002*, section 38.)

The events underlying this appeal took place in October 2001, which is before amendments to the Workers' Compensation Act (Act) that added specific provisions relating to compensation for mental stress. Section 5.1 of the current Act was effective on June 30, 2002. The worker's claim is adjudicated based on the provisions of the Act before the amendments.

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 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.

Background and Evidence

The worker's November 1, 2001 application for compensation states that he noticed a white powdery substance on the back steps of his bus. His claim was for possible exposure to the white powdery substance. He further noted that "somebody must have left that white substance in the bus, I just noticed it at the end of the line."

The worker gave sworn evidence at the oral hearing in a straight-forward manner, and in clear, fluent English. I had no reason to question his credibility, and I accept his evidence.

At the oral hearing, the worker said that once he discovered and reported the white powder, he was instructed to park the bus at the next safe location. He did so, and asked the passengers to leave the bus. The firefighters, including the hazardous materials team, arrived. They suited up and entered the bus. In the tent, the worker was asked to remove all of his clothes, which were placed in a sealed bag. He was then sprayed down with a solution that he thought contained bleach. He was given an “orange suit” and big firefighter boots to wear. He was told to take a shower when he got home, and to see his physician as soon as he could.

The worker said at the oral hearing that it was cold in the tent, and he felt shaky.

The worker was told that a sample of the white powder had been taken, and that it would be kept in a safe place. It would not be tested unless someone became ill. The evidence does not suggest it was ever tested.

The employer provided a “defuser” who brought the worker a sweater, took the worker to the depot, offered him coffee and explained to him that talking about the incident would be helpful. The worker was then driven to the nearest transit station, and went home by himself on public transit. The worker said that he felt that he was the subject of considerable interest from others using the public transit system because of his orange suit and boots.

The worker’s evidence at the oral hearing was that he felt scared and afraid that evening. The “whole thing” had surprised him, and he was “sort of terrified.” He did not sleep well that night. He did not take any medication that evening, and throughout the events relevant to these appeals the only medication he was on was the Cipro.

The worker saw his family physician the next day. The worker said he felt “bad, normal, a little nervous.” A nasopharyngeal swab was taken, and he was given a prescription for Cipro. The worker filled the prescription immediately after the appointment, and took one of the pills. A prescription receipt, which was Exhibit #3 in the oral hearing proceeding, confirms that the worker filled a prescription for Cipro on October 17, 2001. He received twenty 500 mg tablets, indicated to be for a ten-day course.

What appears to be a patient information sheet from the worker’s Cipro prescription states, among other things, “THIS MEDICINE MAY CAUSE DIZZINESS. Taking this medication alone, with other medicines, or with alcohol may lessen your ability to drive or to perform other potentially dangerous tasks.” [emphasis in original]

The worker’s evidence was that almost immediately after taking his first pill, he felt dizzy. He telephoned his physician who told him he could not drive a bus while he was dizzy. The worker’s evidence was that every time he took one of the pills he felt dizzy for a few hours.

I asked the worker at the oral hearing about the fact that his physician reported he was “disoriented.” He replied that he felt confused.

The worker said he spent the next several days at home. He felt worried and was thinking about the incident. On October 22, 2001 he saw his physician who told him the swab was negative and he could stop the Cipro. The worker was very relieved, and telephoned his wife right away.

A physician’s note dated October 22, 2001 states that the worker was “ill and unable to work” from October 17 to October 22, 2001 and, “He may return Oct 23/01.” The worker did return to work on October 23.

At the oral hearing, the worker said that he felt very anxious and confused about the events. He was very worried about possible exposure to Anthrax. He did not receive any counselling through the employee assistance plan.

I asked the worker what he felt was disabling him from working, and, recognizing that he was not a physician, specifically whether he thought it was his anxiety or the reaction to Cipro. He was not certain but said he thought both of these things were operating together. He said he could not relax and felt confused. He was wondering what would happen if it was “really anthrax.” He said he did not see his physician regarding the incident except on the two occasions described above.

The worker’s physician did not send a report to the Board until December 2001, apparently at the worker’s request as the Board had told him that a medical report was needed. That report states that the worker’s condition was “work stress secondary to ? Anthrax exposure.” Parts of the report are difficult to read but it appears to state that the worker was “++ anxious. Hyperventilating.” That report does not mention Cipro or side-effects of medication.

In a letter dated January 24, 2002, the case manager of the Workers’ Compensation Board (Board) informed the worker that there was “no evidence to support that you were, in fact, exposed to a dangerous substance. You were not exposed to Anthrax.” The case manager said in the letter that there nothing in the worker’s employment that caused a personal injury. The fact that the powder was on the bus while he was working was coincidental, and the worker was at no greater risk than a member of the general public.

As noted above, the worker then sought reconsideration of the Board’s decision. He provided a December 7, 2002 letter from his physician stating that he was unable to work because of the side effects of Cipro.

The December 7, 2002 letter from the worker’s physician is summarized in point form following:

- The October 2001 event occurred at a time when there was “widespread hyper

vigilance and anxiety” surrounding the anthrax exposures in the U.S.

- The anthrax exposures in the U.S. were widely believed to be a terrorist attack, and the public were “specifically warned by the media, and even our local media, to be wary of any fine white powder.”
- “White powder is almost never seen in day to day life, and its presence in the workplace or on public transport is even under normal circumstances quite unusual.”
- The worker came to the clinic on October 17, 2001. There was “genuine concern” by all that the white powder may be anthrax.
- A bus was considered to be a “logical potential target.”
- The worker “frankly was less concerned about this than his supervisor.” The worker was quite anxious and stressed because his supervisor was anxious and stressed.
- The worker was prescribed “high dose Cipro.” He had side effects that included dizziness and disorientation, and these made it unsafe for him to operate public transportation.

The worker’s physician went beyond reporting the medical circumstances and offering a medical opinion, in that he noted that the discovery of the white powder was not a coincidence, as someone had placed it there. He said it was not normal to find white powder on a public commuter bus, and as a result of “this and the necessity for him to take Cipro,” the worker “did suffer a personal injury as a result of his work.”

The Board considered that evidence, and again denied the worker’s claim. In a letter dated January 30, 2003, a client services manager of the Board informed the worker that published policy #32.60 addressed “Preventative Measures and Exposures.” The worker’s symptoms were due to prophylactic drug treatment and the side effects were not compensable.

According to information obtained from the employer, the substance on the bus was not tested as the fire department did not think this was necessary. The bus was back into service the next day.

Reasons and Findings

The overriding issue is whether the worker is entitled to worker’s compensation benefits flowing from the October 2001 incident. This includes consideration of whether the worker is entitled to compensation for “mental stress,” or for the consequences (side effects) of prophylactic (preventative) treatment with Cipro. The evidence also raises the possibility that the worker was disabled from work by a combination of mental stress and Cipro side effects.

Psychological Injury

I will first address compensation for mental stress. This requires consideration of whether the worker suffered a compensable psychological injury.

At the time that this claim arose, the Act did not make specific provision for compensation for mental stress. Policy #32.10 in the RSCM I provided that the Board does accept claims for personal injury where the injury consists of a psychological condition or the psychological condition is a consequence of a physical injury. However, no psychological or emotional condition had been recognized as an occupational disease.

There are a number of decisions of the former Appeal Division which formulated a several step inquiry to assist in the adjudication of psychological injury claims made before the addition of the mental stress provision in the current Act (see, for example, *Appeal Division Decisions #2001-0058* and *#99-1254*, which is reported at 17 WCR 117). The inquiry is based on the following questions which have been used to determine whether there was a psychological injury arising out of and in the course of a worker's employment:

1. Did the worker have a psychological impairment for which compensation is claimed?
2. If so, were the workplace circumstances and events unusual?
3. If so, were the workplace circumstances and events reasonably capable of causing psychological injury?
4. If so, were the workplace circumstances and events of causative significance with respect to the worker's psychological condition for which compensation is sought?

It is, of course, necessary that the "workplace circumstances and events" claimed to have caused psychological injury arise "out of and in the course of" the worker's employment as required by section 5 of the Act.

Decisions of the previous Appeal Division are not binding on WCAT. However, an inventory of psychological claim appeals relating to the former provisions of the Act continue to come before WCAT panels, and the analysis provided in those Appeal Division decisions is of assistance in fostering a consistent approach to adjudication and analyzing the relevant law and policy. I will approach this appeal on the basis of the inquiry set out above.

The first question is thus whether the worker had a psychological impairment.

It is not necessary that a Diagnostic and Statistical Manual of Mental Disorders (DSM) diagnosis be present before it can be concluded that a worker has a psychological

impairment. However, as was noted in *Appeal Division Decision #2001-0574*, in discussing policy item #13.20 in the RSCM I, with respect to whether psychological impairment or injury exists:

“Stress” is not a medical diagnosis. Neither is “anxiety,” and as noted above, “depression” is used to describe a wider range of feelings and conditions. In a case such as this, where it is claimed that these symptoms and/or emotions amount to a psychological injury, it is critical that the physician’s diagnosis be based on an objective psychological or psychiatric assessment founded on recognized diagnostic criteria.

We do not consider that an assessment of this nature necessarily requires the involvement of a psychiatrist or psychologist. But, where it is claimed that symptoms such as those described in this case amount to a psychological injury and these symptoms are not preceded by an obvious traumatic event, the medical opinion and diagnosis must reflect a considered evaluation or assessment of the symptoms reported and a reasoned basis for concluding that the symptoms constitute an injury.

I accept that the worker was very upset by the workplace events in October 2001. The worker’s evidence suggests that he was worried, afraid, scared, surprised and “sort of terrified.” He had trouble sleeping, at least on the first night after the incident. He thought about the incident. He also felt confused about the possible consequences of anthrax exposure.

The worker’s physician stated on the report that he filed with the Board in December 2001 that the worker was anxious. Although it is not very legible, the report also appears to state that the worker was hyperventilating. The diagnosis was work stress secondary to possible anthrax exposure. The physician’s letter (written approximately one year later) does not focus on mental stress problems. It states that the worker was “frankly” less concerned than his supervisor. It does state that the worker was quite anxious and stressed because his supervisor was.

I consider this case to fall within the category of cases where the objective medical evidence does not establish a sufficient degree of “psychological impairment” or injury upon which a claim for compensation can be based. As noted above, it is not necessary that there be a diagnosis found in the DSM. However, descriptions such as “anxiety” and “hyperventilating” are descriptions of subjective reactions to stress that are very common, as is difficulty sleeping.

Without more, I do not consider them to constitute psychological impairment for the purposes of the Act, even as it existed prior to the addition of section 5.1. In that respect, I have given considerable weight to the worker’s own descriptions of his mental state, and to his physician’s December 2002 letter which makes it clear that the reason for the worker’s absence from work was the side effects of Cipro. I note in particular

that the worker said his physician told him not to work because he was dizzy. The worker did not say that his physician advised him to take time off because of his anxiety, although I do recognize that the physician's first report states that the worker was "++ anxious." The worker was not prescribed any medication aimed at reducing psychological symptoms.

Given the later report, and the worker's evidence, I consider it unlikely that anxiety was a significant cause for the worker's disability from working.

Because he was upset about the incident, it may well have been beneficial to the worker to be away from the workplace for a period of time, but the evidence does not support a conclusion that the worker was disabled by a psychological impairment for which the Act provided compensation.

As a result, it is not necessary or appropriate to consider the remainder of the questions set out in the previous Appeal Division decisions. The worker did not suffer from a compensable psychological impairment. I sympathize with the worker, and have no doubt that the events were upsetting, but the evidence does not support a conclusion that he had a psychological impairment.

Side Effects of Cipro

The worker's evidence was that he telephoned his physician after he took the first Cipro pill because he felt dizzy, and at that point was advised to stay off work.

I accept that the worker was prescribed Cipro for prophylaxis, given the concern that the white powder could be anthrax. I also accept that the worker had side effects relating to the Cipro that included dizziness. Further, given the patient information insert in the file, I accept that Cipro can cause dizziness.

There are a number of published policies that impact the resolution of this issue.

Policy item #26.10 in the RSCM I states that confirming the diagnosis of many occupational diseases may be difficult. It refers specifically to poisoning by some of the metals listed in Schedule B to the Act. The example given is a worker who was advised by his physician to temporarily withdraw from work because it was thought he had lead poisoning. Laboratory testing done one month later led to a conclusion that initial tests had been wrong and that the worker never did have lead poisoning. The policy states that the Board concluded that in these circumstances, where the worker acted reasonably in reliance on medical advice that the Board agreed with, the merits and justice of the claim warranted a conclusion that the worker was suffering from an occupational disease at the time in question even though in retrospect this was proven not to be the case.

Policy #32.60 deals with preventative measures and exposures. It states that once the basic requirements of a claim for a compensable injury or occupational disease have been met, the Board can accept responsibility for reasonable preventative or curative measures. The example given is of a nurse who pricked a finger with a contaminated hypodermic needle.

If there is no personal injury (such as a pricked finger) or occupational disease, the policy states that no matter how appropriate it may be for the worker to be provided with prophylactic health care, the Board does not have the statutory authority to pay for the health care. Any medical or other expenses that the worker may incur to prevent the onset of an injury or disease remain the responsibility of the worker and employer.

A number of examples are given. A laboratory assistant who accidentally spilled blood from a person with hepatitis on her hand, which already had an infected hangnail, is not entitled to compensation for subsequent treatment with gamma globulin. An ambulance attendant who has the blood of a suspected Hepatitis B carrier splashed onto a hand with pre-existing cuts from gardening at home is not entitled to preventative health care benefits. Neither is a pipe fitter who unknowingly works in an area containing asbestos.

On the other hand, a laboratory technician who in the course of employment cuts a finger on the sharp edge of a specimen bottle, and a teacher who contracts ringworm at the time of an outbreak in the classroom are entitled to "reasonable health care benefits."

The difference, as I understand it, is that in the first case, there was an actual "personal injury" in the form of a cut, and in the second case, there is an "occupational disease" in the form of ringworm.

In this case, there was nothing that could be considered to amount to a personal injury. In that regard, I have considered the possibility that the worker may have inhaled some of the white powder. I do not consider such a possibility to constitute a personal injury. Neither is there any suggestion that the worker cut himself or sustained any other personal injury. I also do not consider that ingesting Cipro falls within the definition of personal injury.

I have also considered whether the dizziness and/or disorientation reported as side effects of the Cipro were an occupational disease.

Policy item #32.60 notes that section 1 of the Act defines an "occupational disease" as including "disablement resulting from exposure to contamination." The word "disablement" is given emphasis (it is italicized) in the policy.

Could the worker's reaction to Cipro fall within the definition of occupational disease because he was disabled from "exposure to contamination"?

Webster's dictionary defines contamination as a "substance that contaminates," or the act of contaminating or polluting, including (either intentionally or accidentally), unwanted substances or factors.

In this case, the worker found "white powder" on his bus. If the identity of the substance was ever determined, that evidence is not before me. The question is whether an unidentified white powder could be considered "contamination" in the definition of occupational disease contained in section 1, and if so, the worker was disabled by exposure to it.

It is undisputed that the substance was "unwanted." It is also apparent on the evidence that, at least in the limited circumstances of this case, which include the proximity in time to the 2001 terrorist attacks and anthrax incidents in the United States, the white powder was viewed by those concerned with deep suspicion. The worker's supervisor took the white powder very seriously, as did the firefighters, and hazardous materials team and the worker's physician. However, the powder was not identified. Although it may be somewhat unusual, I do not consider an unidentified white powder, without more, to fall within the meaning of "contamination." Although it may be uncommon, "white powder" could describe many everyday substances, including such things as baby powder and icing sugar. These substances would not be unusual or unexpected on a public transit bus.

I do not consider that an unidentified "white powder" falls within the term "contamination." If that were the case, any unidentified substance, including, for example, apple juice spilled on the bus by a child, could be considered "contamination." I consider that the word must be given meaning beyond that of "any substance" that is unwanted, which could conceivably include almost anything dropped or spilled on the floor. I consider that "contamination" means, in the context of section 1, a substance with inherent properties causative of adverse consequences from exposure such as a poison.

Even if I was incorrect with respect to the definition of "contamination," the worker's reaction was not to the white powder itself. Rather, it was to the antibiotic Cipro. He did not suffer any type of sudden collapse or reaction to the white powder. The evidence does not suggest that the powder itself was the cause of his disablement from working. The cause was the preventative treatment.

On that basis, policy item #32.60 appears to clearly apply to preclude acceptance, on the basis that the Board does not have statutory authority to provide benefits in the absence of a personal injury or occupational disease. In this case, the worker did not suffer a personal injury arising out of and in the course of his employment, nor an occupational disease due to the nature of his employment.

Disablement by a combination of mental stress/anthrax side effects

The worker's representative submitted that the worker was disabled from working by a combination of the mental stress of the October 2001 events and the side effects of Cipro. I do not consider that the evidence, taken as a whole, supports that conclusion. The worker was not able to go to work because it was not safe for him to drive a bus while dizzy. I consider it more likely than not that had the worker not been dizzy and/or disorientated from the medication, he could have attended work. I accept that he was anxious and upset but those feelings did not disable him from working. As discussed above, the worker did not have a compensable psychological injury.

Expenses and Costs

The worker missed one shift in order to attend the oral hearing. He also seeks reimbursement of the cost of his physician's December 2003 letter.

An oral hearing was held in these appeals because the worker, through his representative, requested that one be held. The *WCAT Manual of Rules of Practice and Procedure* (MRPP) states in section 13.22 that where a party has requested an oral hearing, WCAT will generally order reimbursement of expenses for a party's own attendance at the hearing if the party was successful on appeal.

The worker was not successful in this appeal and as such no reimbursement of expenses for his attendance at the hearing is ordered.

Section 13.23 the MRPP states that WCAT will generally order reimbursement for expenses incurred in obtaining written evidence, regardless of the result in the appeal, where the evidence was useful or helpful to the consideration of the appeal or it was reasonable for the party to have sought such evidence in connection with the appeal.

I consider that the December 2003 report of the worker's family physician was useful in the consideration of the appeal, and that it was reasonable for the worker and/or his representative to have sought the evidence.

The worker and/or his representative will be reimbursed for the costs of obtaining the December 2003 report from the worker's family physician, in accordance with Board policy and practice. In that respect, I note that there is an account dated December 7, 2002 from the physician in the amount of \$295.00.

Conclusion

The worker's appeal is denied, and the January 24, 2002 and January 30, 2003 decisions of the Board confirmed. The worker is not entitled to workers' compensation benefits flowing from the incident on October 16, 2001.

Teresa White



Vice Chair

TW/cd