

Noteworthy Decision Summary

Decision: WCAT-2005-02226**Panel:** Sarwan Boal**Decision Date:** April 28, 2005

Relief of Costs under section 39(1)(e) of the Workers Compensation Act – WCAT panel applied policy item #114.40B of the Rehabilitation Services and Claims Manual, Volume II – Meaning of “condition” and “pre-existing condition” – Vulnerability and Predisposition to Injury – Post Traumatic Stress Disorder

Vulnerability or predisposition to the development of personal injury or occupational disease does not constitute a pre-existing condition, disease or disability for the purpose of section 39(1)(e) of the *Workers Compensation Act* (Act).

In this case, the worker, a housing superintendent, discovered a decomposing human body while working. The worker received counselling, continued working for a time, then stopped working for a period of several months. A Workers' Compensation Board (Board) psychologist stated that the worker met the DSM-IV criteria for Post Traumatic Stress Disorder (PTSD) as “an extreme traumatic stressor involving direct experience of an event that involves actual or threatened death” and the Board accepted the worker’s claim for a PTSD.

However, the worker, over the course of his employment, had discovered 60 dead and decaying bodies prior to the most recent incident. In relation to at least one of the previous incidents, the Board had also accepted the worker’s claim for PTSD. In relation to four of the previous incidents the worker’s counsellor stated that the worker experienced significant and impairing stress reactions. The counsellor stated that the worker’s reaction relating to the most recent incident was similar to those from previous incidents although the worker told the counsellor that the most recent incident was the worst one. The counsellor, although noting that the worker had generally managed similar events in the past without difficulty, identified the worker’s “cumulative stress reaction” as a “factor complicating recovery”. The worker’s attending physician opined that the worker’s previous incidents would affect the worker’s recovery.

The Board found that the worker’s disability was not “enhanced by reason of a pre-existing disease, condition or disability” and therefore denied the employer relief of costs under section 39(1)(e) of the Act. The employer requested a review of the Board’s decision by the Review Division and argued that at the time of the accident the worker was pre-disposed to further psychological problems and that this pre-disposition constituted a pre-existing condition under the Act. The Review Division upheld the Board’s decision and concluded that a predisposition or vulnerability to develop post-traumatic stress disorder (PTSD) did not amount to a condition as contemplated by section 39(1)(e) of the Act.

On appeal, the WCAT panel agreed with the Review Division and denied the employer’s appeal. The WCAT panel considered whether a “vulnerability” or “predisposition” constitutes a “pre-existing condition, disease or disability”. The panel referred to the *Concise Oxford Dictionary (Ninth Edition)* and determined that in the context of section 39(1)(e) of the Act, the most applicable definition of the word “condition” was “an ailment or abnormality (a heart condition)”. The panel therefore found that vulnerability or predisposition to the development of personal injury or occupational disease does not constitute a pre-existing condition, disease or disability for the purpose of section 39(1)(e) of the Act. The fact that a disability has been

prolonged or enhanced by other factors than a pre-existing condition is not a ground for relief of costs under section 39(1)(e).

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Introduction

The employer appeals a June 24, 2004 *Review Decision #12995* of a review officer of the Review Division. The review officer concluded that a predisposition or vulnerability to develop post-traumatic stress disorder (PTSD) did not amount to a condition as contemplated by section 39(1)(e) of the *Workers Compensation Act* (Act) and denied the employer relief of costs.

The employer's manager is representing the employer and he has provided a December 7, 2004 submission. Attached with the submission are copies of the definition of a "condition" from "*Merriam-Webster's Online*" dictionary, a physician's first report dated July 15, 2003, two reports from a registered clinical counsellor, Beth Helsley, dated September 25, 2003 and January 13, 2004. The worker is not participating in this appeal.

After a review of the evidence on file and the employer's submission, I find an oral hearing is not necessary to fully and fairly adjudicate this matter.

Jurisdiction

The Workers' Compensation Appeal Tribunal (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 Workers' Compensation Board (Board) that is applicable in the case. WCAT has exclusive jurisdiction to inquire into, hear and determine all those matters and questions of fact, law and discretion 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.

Background and Evidence

The employer does not appear to dispute the facts as outlined in the Review Division decision. Therefore, only the evidence most relevant to the employer's argument and the issue will be repeated here.

The worker had been employed as a housing superintendent since April 2, 1986 with the accident employer. On May 30, 2003 the worker discovered a dead and decaying body of a tenant in the course of his employment. He was immediately referred for crisis counselling. The evidence on file shows that the worker has previous compensation claims for PTSD when he discovered a dead body.

A June 13, 2003 letter from Ms. Helsley indicated that she had previously provided such debriefing services to the worker for similar events occurring in 1992, 1996 and 2001. She noted the worker had managed similar events in the past without difficulty. She said a few of such events in the past had resulted in persistent, debilitating stress reactions, depending on the nature of interaction or relationship the worker had with the deceased or the degree of graphic body imagery and odour involved. She said the worker's reaction relating to the recent event were similar to those from previous events.

In the physician's first report of July 15, 2003, the worker's attending physician Dr. Gordon, in answer to a question "Are there prior or other problems affecting injury, recovery, and disability?" responded "yes – previous similar episodes at least 2 occasions."

The employer, on its employer's report of injury or occupational disease dated July 16, 2003, indicated the employer did not know of any defect or disability the worker had prior to the injury. The worker continued to work on special assignments, although away from the primary location of the incident.

In a July 16, 2003 report, Ms. Helsley indicated that "continuing to work has likely stalled [the worker's] healing process."

On July 27, 2003 the case manager requested a medical opinion from the Board psychologist as to whether the May 30, 2003 work incident resulted in a *Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition* (DSM-IV) diagnosis.

In a log entry of July 24, 2003, the Board psychologist doctor A stated that the worker met the DSM-IV criteria for PTSD as "an extreme traumatic stressor involving direct experience of an event that involves actual or threatened death."

The Board accepted the worker's claim for a PTSD.

In a September 25, 2003 report Ms. Helsley stated in part:

Factors complicating recovery:

1. Cumulative stress reaction. [The worker] has discovered 60 bodies (decomposing remains) of tenants in the duration of his employment. Four of these have resulted in significant and impairing stress reactions. [The worker] states: "this was the worst one."
2. The deceased tenant was a young man in the addiction recovery program. [The worker] was personally involved, appropriate to his duties, in this man's recovery progress. His fatal relapse was extremely disappointing and sad for [the worker]. As a parent of three young adult children, [the worker] personally related to the tragedy of this loss of life.

The next report on file from Ms. Helsley is dated January 13, 2004. She stated in part:

[The worker] also reports feeling more resolved in the stored cumulative reactions and impact of several such incidents as a result of the extensive approach we took in this one incident. In sum, [the worker] is fully back at work with no limitations or restrictions and in fact, describes greater confidence in his revised approaches to the performance of his duties.

Submission

The employer's manager argued that the worker's doctors all stated that his current condition was partially influenced by his prior exposures to dead bodies. He further argued that the worker's attending physician suggested that the worker would likely suffer the same condition if exposed again. He contended that according to the definition of "condition" the worker's vulnerability to PTSD placed him at ongoing risk. He finally argued that the worker had a pre-existing condition which enhanced/prolonged his PTSD reaction and subsequent illness.

Law and Policy

Policy item #114.40B of the *Rehabilitation Services and Claims Manual, Volume II* deals with "Enhancement of Disability by Reason of Pre-Existing Disease, Condition or Disability" and provides in part:

Section 39(1)(e) requires the Board to "provide and maintain a reserve for payment of that portion of the disability enhanced by reason of a pre-existing disease, condition or disability."

The section applied most frequently in cases where a permanent disability award has been made. There are, however, claims where temporary total or temporary partial disability can be said to have been protracted by reason of a pre-existing disease, condition or disability. In such cases, no consideration will be given to the application of section 39(1)(e) until the worker has been temporarily disabled for a minimum period of 10 weeks following the injury. All of the costs of a claim cannot be charged under section 39(1)(e).

Since the section specifically refers to the enhancement of “disability”, it has no application in fatal cases or in cases where only health care benefits are payable.

Two questions are considered when evaluating the application of section 39(1)(e):

1. Was there a pre-existing disease, condition or disability and, if so, to what extent?
2. How severe was the incident initiating the claim in question?

Obviously, if a worker suffers an injury and there is no evidence of any preexisting [*sic*] disease, condition or disability, the subsection is inapplicable. Similarly, where there is confirmation of a pre-existing disease, condition or disability of a minor degree, but the incident which precipitated the instant claim was of a severe nature, the section may be considered but will normally not be applicable. However, the section will clearly be applicable to those situations where a worker suffered a relatively minor injury at the time the instant claim was initiated, but there is evidence that the recovery period was prolonged, or a permanent disability was enhanced, by reason of a pre-existing disease, condition or disability. The fact that a disability has been prolonged or enhanced by other factors than a pre-existing condition is not a ground for relief under section 39(1)(e).

How much disability stems from the injury and how much from the enhancement of the disease, condition or disability and, therefore, to what extent costs should be charged under section 39(1)(e) can never be more than an estimate and will always be difficult to determine. In cases of continuing wage-loss and health care benefits, it will be appropriate for the Board officer to determine that all of the costs of these benefits after a particular point in time should be charged under section 39(1)(e). In some instances, it may be appropriate for the Board officer to charge such costs on a percentage, rather than a time basis. In respect of permanent partial or permanent total disabilities, it will be necessary for the Board officer in

Disability Awards, using her or his own best judgment and having reference to the advice of the Disability Awards Medical Advisor, to establish a percentage applicable to the pre-existing condition and to charge the relevant costs accordingly.

Reasons and Findings

The first question to answer is whether the worker had a pre-existing condition. The evidence on file indicates that the worker had two previous episodes of a similar nature. Ms. Helsley says, in essence, that when she treated the worker previously for similar episodes his condition had resolved and he was successfully able to return to his pre-injury employment.

The employer basically argues that the worker's pre-disposition to further psychological problems constituted a pre-existing condition which prolonged the worker's recovery.

I have considered as to whether the "vulnerability" or "predisposition" constitute a pre-existing condition, disease or disability. *The Concise Oxford Dictionary (Ninth Edition)* contains a number of definitions of the word "condition." In the context of section 39(1)(e) of the Act, the most applicable definition appears to be "an ailment or abnormality (a heart condition)." I find that vulnerability or predisposition to the development of personal injury or occupational disease does not constitute a pre-existing condition, disease or disability for the purpose of section 39(1)(e) of the Act.

Ms. Helsley says the factors that might have complicated the worker's recovery were the deceased tenant who was a young man and the worker being a parent of three young children personally related to this tragic loss of life and this incident was the worst incident of all the previous incidents. Ms. Helsley is not saying that any pre-existing condition, disease or disability enhanced the worker's disability or prolonged his recovery. Therefore, I find there is insufficient medical evidence on file to show that any pre-existing condition, disease or disability has either prolonged the worker's recovery or enhanced his disability. The fact that a disability has been prolonged or enhanced by other factors than a pre-existing condition is not a ground for relief of costs under section 39(1)(e). I further find the Board correctly denied the employer relief of costs.

Conclusion

I deny the employer's appeal and confirm the June 24, 2004 Review Division decision. No expenses were requested and none are awarded.

Sarwan Boal
Vice Chair

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