WCAT Decision Number: WCAT-2007-03305
WCAT Decision Date: October 25, 2007
Panel: Paul Petrie, Vice Chair

Introduction

The worker, a 58-year-old fish plant millwright, struck the back of his head in the upper cervical area on a water pipe on August 24, 2004. The Workers' Compensation Board (Board), operating as WorkSafeBC, eventually accepted the worker's claim for a permanent aggravation of his pre-existing cervical degenerative condition and chronic pain. On September 20, 2005 the Board case manager concluded that the worker's psychological condition was not acceptable as a consequence of the compensable injury. In a decision dated April 18, 2006 (*Review Decision #R0058512*) a review officer confirmed the Board's decision and concluded that the worker did not sustain an aggravation of his pre-existing depression as a consequence of the August 24, 2004 compensable injury. The review officer found there were a number of stressors and said it would be speculative to conclude that the compensable injury was a significant cause of the aggravation.

Following treatment for chronic pain in October/November 2005, the Board concluded that the worker's disability had reached a plateau of recovery effective February 12, 2006 and terminated temporary disability benefits effective that date. The Board commenced vocational rehabilitation benefits effective February 13, 2006. In a decision dated September 25, 2006 (*Review Decision #R0064970*) the Board's review officer confirmed the Board's decision to conclude temporary disability benefits effective February 12, 2006.

The worker now appeals the April 18, 2006 Review Division decision on grounds that his psychological condition, diagnosed as depression, is a compensable consequence of the August 24, 2004 compensable injury. This is the "A" appeal. The worker also appeals the Review Division decision dated September 25, 2006 on grounds that he continued to be temporarily disabled as a result of the psychological condition. This is the "B" appeal.

Issue(s)

With respect to the "A" appeal, whether the psychological disability diagnosed as depression in January of 2005 is a compensable consequence of the August 24, 2004 injury at work.

With respect to the "B" appeal, whether the Board correctly terminated temporary disability benefits effective February 12, 2006.

Jurisdiction

The worker appeals the Review Division Decisions to the Workers' Compensation Appeal Tribunal (WCAT) under section 239(1) of the *Workers Compensation Act* (Act). Section 250 of the Act requires WCAT to make its decision on the merits and justice of the case, but in doing so, WCAT must apply a policy of the 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, law and discretion arising in the appeal. WCAT has jurisdiction to consider new evidence and to substitute its own decision for the decision under appeal. This is, therefore, a rehearing by WCAT.

Background and Evidence

In his application for compensation dated September 16, 2004 the worker said he injured the right side of the nape of his neck resulting in right shoulder, arm and hand pain when he "brought up" his head when walking under a six-inch water pipe. He continued working and did not report the injury to his employer until August 30, 2004. The employer protested acceptance of the claim on the basis of the delay in reporting and evidence that the worker had a degenerative neck condition.

The worker first saw his family physician, Dr. Nedd, on August 27, 2004 who diagnosed a soft-tissue injury to the neck and upper back. He indicated the worker was capable of full-time duties at that time. On September 5, 2004 the worker attended a hospital emergency department for pain radiating down the right arm to the hand. He was evaluated by neurologist, Dr. A. Prout, who noted the worker had a significant head injury in a 1967 motor vehicle accident, but no other specific neck injury. He indicated the worker had symptoms consistent with a C7 radiculopathy and recommended an MRI scan that was carried out on October 5, 2004.

The radiologist reported multi-level degenerative changes with moderate spinal stenosis at the C4-5 and C5-6 levels. The claim was reviewed by a Board medical advisor on October 21, 2004. The medical advisor said it was likely the worker's neck pain was due to the pre-existing osteoarthritis which could have been aggravated by the accident on August 24, 2004 if the worker sustained a significant blow to his neck.

On October 28, 2004 Dr. Prout indicated that the stenosis at the C5-6 level could contribute to the worker's upper extremity symptoms. Dr. Prout said the worker did not have any neurologic symptoms and had normal reflexes and power. He indicated the residual pain was myofascial and would likely resolve with conservative management. He thought the worker:

> …should be able to return to work within a month or so. He tells me that he is due to be laid off at the end of November in either event and he will therefore likely not return to work. His symptoms should resolve

> satisfactorily and I feel he can now start to wean himself off the Neurontin as he is not describing neuropathic pain at this point in my opinion.

On November 12, 2004 the medical advisor reviewed Dr. Prout's report and reiterated his opinion that a significant blow to the neck could temporarily aggravate the underlying osteoarthritis.

On November 19, 2004 the worker advised the Board's entitlement officer that the employer was downsizing and he and other millwrights were facing a lay off. The entitlement officer advised the worker on December 10, 2004 that he would be denying the claim on the basis of the delay in reporting the incident and the minor nature of the incident. This decision was not communicated in writing to the worker until January 10, 2005.

The worker's treating physician, Dr. Lai, provided clinical treatment notes to the Board in 2005. The clinical note for December 7, 2004 indicated the worker continued to receive physiotherapy that was helping his symptoms somewhat. On December 13, 2004 the physiotherapist notes indicated the worker was "getting better day by day."

Dr. Lai noted on December 30, 2004 that the Board had refused the worker's claim and the worker would go through the appeal process. On January 3, 2005 Dr. Lai indicated the worker was getting a lawyer to assist him with the appeal. He also reported the worker was possibly going to receive a severance package from work.

Dr. Lai's clinical noted dated January 10, 2005 noted the worker was depressed and anxious "over the situation". On January 11, 2005 Dr. Lai reported that the worker was:

> Feeling very depressed
> → with the work situation.

Dr. Lai diagnosed "mild depression". On January 20, 2005 Dr. Lai noted the worker was "still feeling depressed" and would be off work for four weeks. He indicated the worker had a lawyer dealing with his claim. There is no further reference to depression in Dr. Lai's clinical notes up to the last note dated August 11, 2005 which stated "generally asymptomatic but generally well".

In his three page letter dated March 30, 2005 in support of his application for review of the January 10, 2005 decision, the worker did not refer to any problems of depression. Dr. Lai provided a medical-legal letter dated March 21, 2005 in support of the worker's application for review of the January 10, 2005 decision. There is no reference in that letter to any depression or psychological problems.

The employer's representative submitted the worker was disabled by a non-compensable condition of clinical depression and provided a copy of Dr. Lai's note to the employer dated January 20, 2005 which stated:

> This letter is to confirm that I recommend [the worker] to be off work for four weeks for reason for [sic] clinical depression. He is currently undergoing treatments for this and will be assessed regularly prior to his return to work.

In the June 21, 2005 decision, the review officer was unable to identify what condition the Board had accepted under the claim. The review officer referred the claim back to the Board's case manager to clarify what condition had been accepted and to provide the worker with a new decision after further investigation.

On July 13, 2005 the worker advised the case manager that he was still off work because of his physical injuries. The worker indicated he was offered a severance package in November but did not take it. The case manager reported that the worker did not accept the severance package because:

> …he did not like the way he was treated by his employer after the time he has worked there. He was #4 in seniority and feels that he was being shuffled aside. He retained a labour relations lawyer but nothing has happened since then because he told him to put it on hold until his physical injuries had resolved. His aunt died approximately three years ago and he has hired an estate lawyer to deal with issues concerning the estate. I asked the worker about Dr. Lai's note regarding clinical depression. He states that the depression is due to the issues dealing with his aunt's death, how his employer treated him regarding the severance, the difficulties dealing with the entitlement officer and denial of wage loss and the resulting financial difficulties.…

The case manager noted that Dr. Lai had prescribed Paxil but had not referred the worker for any psychological treatment.

The case manager summarized the worker's evidence as follows:

> He has had a prior history of depression all through his life as a result of dealing with an alcoholic father, death of his mother and being raised by foster parents. He dealt with the depression initially by taking alcohol. July 20, 1985, 20 years ago, he stopped drinking and did miss time from work when he attended a residential treatment center for alcoholism. I asked him what was different now about his depression and what he experienced prior to August 2005. He commented that he felt *"down and*

> *out"* and when it got to the point where he felt like striking out he saw Dr. Lai.
>
> I asked what the cause of his inability to work was, and he responded that it was his physical injuries.
>
> [emphasis in original]

The case manager indicated there was insufficient medical evidence to pay wage loss beyond November 7, 2004 and advised the worker that he would obtain further medical information and "make a new decision on the extent of wage loss and whether his depression was a consequence of the injuries accepted under this claim."

The case manager referred the file to a Board medical advisor and a Board psychologist for an opinion regarding the worker's ongoing physical injuries and his psychological condition.

The medical advisor reviewed the claim on September 9, 2005 and said the worker appeared to have sustained a permanent aggravation of his pre-existing cervical degenerative disc disease. The medical advisor noted:

> His condition could be considered plateaued as of March 4, 2005 based on the physiotherapy notes. There are no restrictions. There is no assessment of his limitations. A functional capacity evaluation could be considered. He has chronic pain in excess of normal healing for this condition. No further treatment is indicated.

The Board psychologist's opinion is contained in a claim log memo dated September 14, 2005. The psychologist pointed out:

> There is no supportive evidence that [the worker] has been clinically depressed since his work injury. While he feels "down" about his current situation, and may be frustrated by his right arm condition, there is no evidence that he has clinically significant depressive symptoms. He was taking Paxil for years prior to his work injury, and this continues. As noted above, there are a number of stressors in his life that are impacting on his mood. I am unable to conclude that he has a psychological injury related to the August 2004 work incident.

In the September 16, 2005 claim log memo the case manager concluded there was insufficient evidence to find that the worker had sustained a psychological injury as a consequence of the physical injuries accepted under the 2004 claim. The case manager accepted that the worker sustained a chronic pain condition and indicated he would refer the worker to an occupational rehabilitation program for treatment of chronic

pain and continue to pay temporary disability benefits until that treatment was concluded.

The case manager left a voice mail for the worker regarding his decision. The case manager reported the worker called back to say that:

> …he had an appointment with what he thought was a psychiatrist, but it turned out to be a therapist and couldn't help him.

The case manager issued the September 20, 2005 decision advising the worker his compensable neck condition was considered stabilized. However, his chronic pain condition was not considered stabilized and he would continue to receive temporary disability benefits until he completed treatment for that condition. The case manager also advised the worker his claim was not accepted for any psychological condition as a consequence of his compensable injury. The worker applied for a review of the September 20, 2005 decision.

The case manager relieved the employer of 75% of the claim costs under section 39(1)(e) of the Act.

The worker attended the occupational rehabilitation program between September 28 and November 10, 2005. He advised the occupational therapist that he had become quite depressed since the injury. The therapist reported there were no range of movement limitations noted in the neck, although the worker did report some neck discomfort and stiffness. Upper arm strength was within normal limits. There was some muscle atrophy in the upper arm muscles and some tenderness at the C6-7 level and upper trapezius muscles.

A number of barriers to return to work were indicated including decreased neck and upper arm strength, decreased general conditioning and lack of a return-to-work plan. However, depression was not listed as a barrier and treatment for depression was not indicated in the treatment plan. The November 3, 2005 progress report noted slow progress. The November 16, 2005 discharge report indicated no range of movement limitations with respect to the worker's neck. The therapist found no significant change in the worker's right arm strength. The worker reported continuing pain in the right side of his neck, right shoulder blade and right arm down to his hand, but not as severe as when he started the program. He was discharged from the program as fit to return to work with limitations. The three occupational rehabilitation reports did not note any observed problems with depression.

The Board medical advisor reviewed the occupational rehabilitation discharge report on December 7, 2005 and concluded there were no medical restrictions. Limitations included:

- lifting floor to waist - 20 pounds,
- waist to overhead - 15 pounds,
- push/pull – 23 pounds,
- bilateral carry - 25 pounds,
- unilateral carry 17 pounds, and
- avoidance of repetitive forward or overhead reaching.

A Board team meeting was held on January 26, 2006 where it was determined that the worker had reached a plateau of recovery.

In the February 1, 2006 decision the case manager advised the worker his condition was deemed to have stabilized and temporary disability benefits would be terminated effective February 12, 2006. The case manager said the worker would continue to receive vocational rehabilitation benefits equivalent to wage loss payments as long as he participated in the vocational rehabilitation program. The worker's claim file was referred to the Board's Disability Awards Department for assessment of permanent disability.

The worker was assessed for permanent disability on April 7, 2006. The disability awards medical advisor reported a slight decrease in range of motion for the cervical spine. The neurological exam was negative for radiculopathy. Based on the medical advisor's findings, the disability awards officer calculated the worker's cervical spine impairment at 0.71% as a result of the minimal limitations in extension and left rotation. The disability awards officer noted the worker's chronic pain was disproportionate to the cervical impairment and granted the worker a 2.50% award for chronic pain. In the May 19, 2006 decision the disability awards officer granted the worker a 3.30% permanent disability award including a 0.09% award for age adaptability. The award was paid in a lump sum of $8,202.29.

In a further decision dated June 14, 2006 the disability awards claims adjudicator advised the worker that the Board considered he had the essential skills to continue in the pre-injury occupation and was not entitled to a loss of earnings assessment under section 23(3) of the Act.

Decision Reviews

The worker provided a medical-legal report dated October 28, 2005 from Dr. C. Leech-Porter, a psychiatrist, which was addressed to the worker's legal counsel. Dr. Leech-Porter indicated he first examined the worker on October 20, 2005 at the request of Dr. Lai. Dr. Leech-Porter noted the blow to the worker's head in August 2004 and said:

> He has had continued pain in his head and radiation of that pain to his right shoulder, plus psychological stress and depression since that time.

> The longer the pain has gone on, the more agitated and depressed [the worker] has become. That depression has compounded an existing poor self-image problem that has never been previously addressed.

Dr. Leech-Porter noted the worker's prior history and state of mind predisposed him to be "indirectly self-destructive" and said:

> The self-destruction of overeating, smoking, and drinking too much coffee has been worsened with his inability to return to work and the ongoing pain. Although the incident at work did not in itself cause the depression, it aggravated a previously existing condition.

Dr. Leech-Porter said the worker "suffers ongoing depression aggravated by the work injury" and should improve with treatment directed to his self-image and his health.

Dr. Leech-Porter provided a copy of his consultation report to Dr. Lai also dated October 28, 2005. He indicated that as a result of the August 2004 injury the worker "…had significant pain in his head and subsequent pain which radiated down his neck and into his shoulder." Dr. Leech-Porter said the worker was attending a pain clinic "to deal with both the pain in his head and his general discomfort." He described the worker as "a loner" who didn't have much support to draw on. He indicated the worker was involved in a legal dispute over the estate of his aunt, where his only sister was contesting the distribution of the assets. Dr. Leech-Porter outlined the worker's prior history including:

- His mother died when he was two years old.
- His father, a travelling salesman, was an alcoholic.
- He and his sister were in an orphanage for a few years.
- He had a bed wetting problem until age 37 when he was properly diagnosed with a urological condition.
- He lived with his aunt and uncle overseas on occasion.
- He has never formed any long term relationships.
- He was an alcoholic until 1984, but has abstained since then.
- He smokes three packs of cigarettes per day and weighs 277 pounds.
- He has suicidal thoughts and has been on Paxil for a number of years to treat emotional stress.

Dr. Leech-Porter diagnosed depression and post-traumatic stress disorder (Axis I):

> …related to difficulties during childhood which were worsened by the fact that his urethral problem was never diagnosed nor treated until his adult years. The bed wetting alone caused long-term psychological affects.

He also diagnosed significant stress (Axis IV) "related to the head injury of August of 2004 and ongoing stress related to his difficulty in getting relief from this and satisfaction with WCB." Dr. Leech-Porter recommended an increase in the Paxil prescription and said:

> I have strongly suggested that his current death wish by smoking three packs a day, weighing too much, overeating the wrong things and not doing any activity needs to be addressed.

The worker's representative submitted that Dr. Leech-Porter's opinion should be preferred over the opinion of the Board psychologist and said the worker's injury had caused him to become psychologically disabled.

The employer's representative submitted that Dr. Leech-Porter's opinion, when read closely in conjunction with his consultation report to Dr. Lai, shows that the impact of the actual physical injury on the worker's mental state was minimal.

The worker's representative wrote to Dr. Leech-Porter on February 21, 2006 requesting clarification of his previous opinion. In his supplementary opinion dated March 9, 2006 Dr. Leech-Porter advised the worker's counsel that the worker's litigation over his aunt's will caused him "significant stress" and this has brought forward the early childhood stressors related to his mother's death and bed wetting. Dr. Leech-Porter said:

> Independent of the stresses above, [the worker] continues to have some difficulty with pain in his neck and headache, which are related to the injury in August of 2004. It has already been commented on that the psychological effects of that injury were coincident rather than causative. [The worker] already felt threatened at [the employer] in terms of being retained at his job before he was injured. Coincident with the injury, [the worker] already felt that the company was trying to get rid of him. He was fourth in seniority and yet he felt that with his lack of agility brought on by his physical condition and the fact that the company had not used him in a machinist capacity that they had trained him for left him vulnerable to being let go. After the injury, he knew that if he went back to work, he would be offered a buy-out package by the company. He did not want to be put in the position to have to take it. He was only 57 at the time. He was physically incapable of returning to work for some time.

Dr. Leech-Porter indicated that the worker was:

> …in the position of being very depressed and feeling that "everyone is out to get him". He has difficulties with the estate problems. He feels that even if he were able to return to work, he couldn't do the job, which in fact may be the case.

He stated:

> It is my opinion that [the worker] was at a stage in his life where his ability was becoming marginal. He was generally depressed; he felt if he could not keep up at work and when he was injured, it pushed him over the edge (the 'thin skull' effect). He might have been able to continue in his current position until he reached the mandatory age of retirement of 65, but with the extended duration of the physical injury, it put him to the state where he could not possibly return to work and to his previous activities without the immediate risk of being let go.

As previously noted, the review officer in the April 18, 2006 Review Division decision denied the worker's application on the basis that there were too many stressors to suggest that one event or issue was the cause of the aggravation of the worker's depression. The review officer stated:

> It would be speculative to conclude that the worker's injury alone is a significant cause of that aggravation.

In the Review Division decision of September 25, 2006, the review officer reviewed the February 1, 2006 decision which included temporary disability benefits effective February 12, 2006. The review officer noted the worker's representative's argument that the worker's medical conditions had not plateaued and that his psychological conditions should be considered. The review officer specifically found he had no jurisdiction to consider temporary disability benefits related to the psychological condition since that condition had not been accepted by the Board and there was an outstanding appeal to WCAT on that issue. The review officer concluded the worker's neck and shoulder injuries had reached a plateau of recovery and were no longer temporary in nature. The review officer found the February 12, 2006 plateau date was appropriate and denied the worker's application.

Appeals

The worker appealed the April 18, 2006 Review Division decision on grounds that the review officer applied the wrong standard in denying acceptance of the aggravation of the psychological condition. The worker requested that the appeal be considered by way of written submissions rather than an oral hearing.

In the August 11, 2006 written submission, the worker relied on Dr. Leech-Porter's opinion and argued that unless there was expert medical evidence that refuted Dr. Leech-Porter's opinion, the review officer had no jurisdiction to dismiss it simply because he was unable to attribute the aggravation to the compensable injury. Counsel argued that the Board psychologist's September 14, 2005 opinion should not be given any weight because it was not based on all relevant evidence including

Dr. Leech-Porter's subsequent medical opinion. Counsel for the worker submitted the worker's claim for an aggravation of his pre-existing psychological condition should be accepted and the file referred back to the Board to reassess the worker's entitlement to benefits including wage loss, health care and ongoing vocational rehabilitation.

The employer provided a submission dated August 28, 2006 and relied on their February 9, 2006 submission to the Review Division. The employer submitted the worker had a long standing, pre-existing, non-compensable psychiatric/psychological history including drug therapy ongoing at the time of the August 2004 injury. The representative argued that Dr. Leech-Porter had no direct knowledge of the worker's condition prior to his assessment in October 2005 and his opinion should not be given significant weight. He submitted the worker did not return to work because he had no job to return to as a result of the November 23, 2004 severance package offered by the employer. The employer argued that it was this fact that precipitated the aggravation of the worker's pre-existing psychological problems.

The worker's September 14, 2006 response noted that the employer seeks to discredit Dr. Leech-Porter's opinion, but did not provide any medical evidence to support that position. Counsel for the worker argued that the panel should draw an adverse inference from the employer's failure to provide new medical evidence to challenge Dr. Leech-Porter's opinion.

On October 31, 2006 the WCAT registry joined the worker's appeal from the April 18, 2006 Review Division decision (the "A" appeal), with the worker's appeal from the September 25, 2006 Review Division decision (the "B" appeal). The Registry advised the parties that the two appeals would proceed by way of oral hearing which was scheduled for January 26, 2007.

On January 12, 2007 the worker's legal counsel wrote to the WCAT Registry requesting postponement of the January 26, 2007 oral hearing on ground that the worker had recently appealed two additional Review Division decisions to WCAT. The worker's counsel requested that the oral hearing be postponed to join the joint "A" and "B" appeals with the new "C" and "D" appeals. On January 17, 2007 the WCAT appeal coordinator advised the parties that since resolution of the psychological disability issue raised in the "A appeal" is pivotal to determining the issues in the subsequent appeals, the oral hearing would proceed as scheduled to avoid further delays.

Oral Hearing Evidence and Submissions

At the January 26, 2007 oral hearing, the worker testified he was first prescribed Paxil in 1991 by a physician at a walk-in clinic. At the time he was a student at a technical school upgrading his trade qualification and he found the course very stressful. He had a prior alcohol problem and was concerned that he might start consuming alcohol again. He found that Paxil helped him feel more at ease and not as tense.

He described his work activities as a retort operator at the fish canning plant. He said his job involved a lot of pressure because they would get large volumes of fish to process at a time. He would often start work at 7 a.m. and work until 11 p.m., sometimes seven days a week. At one point he worked 63 days straight. In the four years prior to his injury, there was a downturn in salmon runs and the hours as a retort operator "were not as horrendous". There would usually be a six to eight week lay off in the winter months before the plant would start processing herring in the spring.

The worker testified that in the years prior to the August 2004 injury he "never took time off". He acknowledged there was a lot of stress at work because of the pressure of production and long hours. He noted his job as a retort operator required close monitoring and careful record keeping of the process because of the quality standards required by the department of fisheries for canned fish products.

The worker stated he did not know about the severance package associated with the lay off until the end of November of 2004. He acknowledged that he found the death of his aunt was upsetting but this did not affect his ability to work.

Submissions

At the January 26, 2007 oral hearing, the worker's representative submitted the worker's pre-existing psychological condition was not disabling and there was no evidence to suggest the pre-existing condition was likely to lead to a disabling psychological condition. The worker's representative pointed out that the depression diagnosis in January 2005 was a new diagnosis and not a continuation of the anxiety condition for which Paxil was proscribed. The representative argued the review officer placed too high a standard on determining a work related cause for the depression by concluding that the condition was not solely due to the August 2004 injury. He submitted the appropriate test is whether the worker's injury had more than a trivial contribution to the diagnosed depression. Dr. Leech-Porter provided a clear opinion that the worker's depression was a compensable consequence of the injury based on the "thin skull rule".

The employer's representative argued that less weight should be given to Dr. Leech-Porter's opinion because the worker's onset of symptoms occurred when he was involved in a labour relations situation related to termination of his employment. The employer's representative noted the worker claimed that he first learned of the lay-off/severance in November 2004 but he had told others, including Dr. Prout, that this was brewing for a while prior to November. He noted there were a lot of significant stresses in the worker's life. When the worker spoke with the case manager in July 2005 he related his depression to those other stressors and didn't see a connection between the depression and his physical injury. The employer submitted the worker's subsequent evidence when he saw Dr. Leech-Porter in October 2005 was not in harmony with all that went before that visit. He submitted that Dr. Leech-Porter's

opinion should be approached with a healthy degree of scepticism because it involved a leap to a conclusion rather than a reasoned analysis. He submitted that to the extent that the physical injuries had an effect on the worker's psychological condition, it didn't go beyond the *de minimus* level.

In response, the worker's representative said the worker's discussion with the case manager in July 2005 should not be given much weight. The worker does not have the expertise to answer a medical question regarding causation. Counsel for the worker emphasised that all the stresses before the injury had no impact on the worker's ability to work and did not require any particular psychological counselling or treatment.

Following the oral hearing the panel determined that further medical evidence was required to fully and fairly consider the issues in the worker's appeals. On March 16, 2007 the panel referred the worker to an independent health practitioner under section 249(6) of the Act to provide an assessment regarding the possible relationship between the worker's psychological condition and the August 24, 2004 work injury.

Dr. D. H. Smith provided a June 6, 2007 report in response to the issues raised by the panel. Dr. Smith is a psychiatrist and clinical professor in the Department of Psychiatry at the University of British Columbia. He is a recognized expert in disability assessments and traumatic brain injury assessments.

In reviewing the documentary evidence on file Dr. Smith observed:

- The September 5, 2004 MRI which showed a narrowing of the C5-6 disc did not adequately show the C7-T1 junction that would be the site of interest for a C7 radiculopathy.
- The clinical record between August 1999 and September 2004 did not contain any reference to symptoms of depression or anxiety predating the accident.
- The global assessment of functioning (GAF) rating of 30 to 40 by Dr. Leech-Porter is indicative of impairment in reality testing and at a level where hospitalization may be indicated.

Dr. Smith offered the following comments in his clinical interview notes:

- It appears that the prescription for Paxil in the mid-1990s was for treatment of an anxiety disorder rather than depression.
- The worker suffered a severe traumatic brain injury at age 19 and was in hospital for two months for that injury.
- The worker said he initially became depressed about two weeks after the injury when the radiating pain increased. At the time he was worried that he might go back to drinking alcohol.

- The worker acknowledged his condition was aggravated by the death of his aunt, some uncertainties of the aunt's estate, and the fact that his employer wanted to lay him off and give him a severance package.

Dr. Smith responded to seven questions raised by the panel which can be summarized as follows:

1. The panel asked Dr. Smith to comment on the nature and extent of the worker's pre-existing problems and the effects those pre-existing problems had on the depression diagnosed on January 10, 2005. Dr. Smith responded indicating the nature of the worker's pre-existing condition "was far from certain" and the treatment for his pre-existing condition "may have been for an anxiety condition rather than for depression".

2. The panel asked Dr. Smith to comment on the likely impact of the August 24, 2004 injury on the worker's depression and in particular whether it represented an exceptional circumstance that triggered the depression diagnosed in January 2005. Dr. Smith stated:

   > The workplace accident of August 24th, 2004 triggered this man's depression. …there was no evidence in the pre-existing medical records that he actually was suffering from any depressive illness.

   Dr. Smith noted:

   > Depression is a complex illness and it is very often the case that there are multiple causes for an episode of depression. In this case it is my opinion that [the worker] was at risk for developing depression because of ongoing pain secondary to the workplace injury of August 24th, 2004. There is no doubt that the dispute with the WCB in November and the fact that he was laid off contributed to him developing depression in January 2005. It is impossible, however, to give a percentage of cause to these various stressors. It would appear to me, however, that all of the stressors are in some way related to the workplace accident of August 24th, 2005.

3. In response to the specific question as to whether the worker's lay off in November 2004 triggered the worker's diagnosed depression, Dr. Smith stated that the worker's lay off is one of the factors that triggered his depression.

4. The panel requested Dr. Smith's opinion as to whether the depression diagnosed in January 2005 either improved, stayed the same or worsened over the subsequent six months. Dr. Smith stated it was likely the worker's depression continued throughout 2005 until he was assessed and treated by Dr. Leech-Porter. Dr. Smith

went on to state he was unable to determine whether the worker's condition worsened or stayed the same after February 2005 but indicated the condition likely remained the same because Dr. Lai did not augment his treatment for depression over that period of time.

5. The panel asked Dr. Smith whether the August 2004 injury itself accounted for the development of the psychological problems, or whether it was more likely that the worker's dealings with the Board and with compensation issues precipitated or triggered the psychological problems. Dr. Smith stated:

> As I have previously stated, there is no doubt that the pain from the injury, the complications of [the worker's] dealing with the board and the fact that he was laid off all made some contribution to him developing depression. However, all of these issues with the possible exception of him being laid off appear to relate to the injury.

Dr. Smiths' independent health professional report was distributed to the parties for comment.

In a June 21, 2007 submission, the worker's representative said Dr. Smith's opinion supports acceptance of the worker's appeal and places the worker's psychological problems within the "thin skull rule" established in policy item #15.10 of the *Rehabilitation Services and Claims Manual, Volume II* (RSCM II).

The July 19, 2007 response from the employer's representative noted Dr. Smith acknowledged the worker's pre-existing psychological condition "was far from certain" and submitted that both Dr. Smith and Dr. Leech-Porter "speculated that the worker was initially prescribed Paxil for anxiety, but that comment was first made by Dr. Leech-Porter in his initial document of 10/28/05. There is no medical/psychiatric evidence to support that statement." The employer's representative argued Dr. Smith did not appear to appreciate that the worker was well aware of the pending lay off and severance package prior to the injury and ignored the other serious issues such as family grief, estate litigation, and non-compensable health problems. The representative submitted Dr. Smith's comment that all the stressors were in some way related to the work-place accident was "beyond [her] comprehension". She submitted the medical evidence showed the worker suffered from depression prior to August 24, 2004 based on the Paxil prescription. She noted the worker was recovering from the physical injury as observed by Dr. Prout on October 28, 2004. She submitted that the actual first documentation of depression was made only four months post injury, too early for a diagnosis of chronic pain. She stated:

> It seems more likely in [the worker's] case that the pre-existing depression and his ongoing and increasing non-compensable stressors led to the chronic pain not vice versa.

In response the worker's representative submitted that the employer had failed to provide any medical evidence to dispute Dr. Smith's opinion and submitted that the representative's lay opinion in the guise of an argument should be given no weight.

Decision and Reasons

The primary issue in this appeal is whether the worker's disability diagnosed as depression in January 2005 is a compensable consequence of the August 24, 2004 injury. Section 5(1) of the Act provides that compensation is payable where a personal injury arises out of and in the course of employment. Policy item #13.20 of the RSCM II confirms that "personal injury" includes psychological impairment as well as physical injury. Psychological impairment has not been designated as an occupational disease, but psychological conditions may be acceptable if they are ~~a~~ sequelae to an accepted personal injury or occupational disease.

Policy item #22.00 discusses compensable consequences of work injuries. The minimum requirement before one event can be considered as a compensable consequence of another is that it would not have happened but for the other. Not all consequences of work injuries are compensable. A claim will not be reopened merely because a later injury would not have occurred but for the original injury. Looking at the matter broadly and from a "common sense" point of view, it should be considered whether the previous injury was a significant cause of the latter injury.

Policy item #22.33 states that psychological problems arising from physical or psychological injury are acceptable as compensable consequences of the injury. There must be evidence that the worker is psychologically disabled. It cannot be assumed that such a disability exists simply because the worker has unexplained subjective symptoms or is having difficulty in psychologically or emotionally adjusting to any physical limitations resulting from the injury.

Counsel for the worker relies on the "thin skull rule" which involves the concept of "causative significance" in workers' compensation law. Counsel relies on the expression of this principle in *Athey* v. *Leonati* [1996] 3 S.C.R. 458 (*Athey*). The principles regarding causation in Athey were set out and discussed in *WCAT Decision #2006-00841* as follows:

1. Causation is established where the plaintive proves to a civil standard on a balance of probabilities that the defendant caused or contributed to the injury;

2. The general, but not conclusive, test for causation is the "but for" test, which requires the plaintiff to show that the injury would not have occurred but for the negligence of the defendant;

3. The "but for" test is unworkable in some circumstances, so the courts have recognized that causation is established where the defendant's negligence "materially contributed" to the occurrence of the injury;

4. Causation need not be determined by scientific precision; and

5. It is not necessary for the plaintiff to establish that the defendant's negligence was the sole cause of the injury. There is no basis for a reduction of liability because of the existence of other preconditions; defendants remain liable for all injuries caused or contributed to by their negligence.

The panel in *WCAT Decision #2006-04195* found:

> Although enunciated in terms of fault and negligence, the principles [in Athey] remain valid in determining whether an injury is caused by, or arose out of, a worker's employment. The court in Athey goes on to discuss the "thin skull" rule, and makes a differentiation between a thin skull and what the court refers to as a "crumbling skull".

The concept of "crumbling skull" was addressed by the panel in *WCAT Decision #2006-04195.* In that decision the panel cited I. N. Klar, *Tort Law*: second edition (Scarborough: Carswell, 1996), at 347 as follows:

> Cases in which plaintiff's pre-existing conditions are either aggravated or activated by an accident frequently arise. Where a plaintiff has a pre-existing condition which is latent and inactive at the time of the accident, but becomes triggered by it, the courts appropriately treat this as a thin skull case. The plaintiff is entitled to full compensation. Where, however, the plaintiff is suffering from an active and existing condition at the time of the accident, which is aggravated by the accident, courts will assign only partial responsibility for the plaintiff's injuries to the defendant. The defendant's responsibility will depend upon the extent to which the accident aggravated the plaintiff's existing condition. Finally, a third category of cases has been suggested. A case may arise where the plaintiff has an asymptomatic, degenerative condition at the time of the accident which ultimately would have resulted in the type of injury suffered by the plaintiff in the accident. The accident accelerates the process of degeneration. This has been called a "crumbling skull," with the plaintiff entitled only to the damages corresponding to the effect of the accident on the accelerative process. In principle, this category of cases raises the same issue as raised by cases where plaintiffs are suffering from existing conditions which become aggravated by the defendant's negligence, and should be treated in a similar way.

It is not sufficient to simply point to non-work related factors that contributed to the onset of the condition to deny the claim. Nor is it necessary, as implied by the review officer, that the worker's depression must be attributable solely to the compensable injury. Finally, it is not necessary that the workplace injury be established as the predominant cause to be compensable. Policy item #22.00 does not suggest that it is necessary for injury be **the** significant cause of the subsequent injury. It does, however, require that the injury be "a significant cause of the later injury".

I interpret this to mean that there must be substantial evidence to show the compensable injury made a material contribution to the onset of the depression.

The evidence from both Dr. Leech-Porter and Dr. Smith indicate the worker did not have significant symptoms of depression prior to the compensable injury. The evidence also shows the worker had a pre-existing anxiety condition that was not disabling and was treated with Paxil. I do not accept the employer's submission that the Paxil prescription was sufficient to establish a significant pre-existing depression condition. There is no substantial medical evidence to support that proposition.

I do, however, accept that the worker had a vulnerable psychological condition at the time of the August 24, 2004 injury. He had experienced the death of his aunt who was a significant figure in his life. There were some estate litigation issues related to that death that were outstanding in 2004. The worker had a pre-existing condition of anxiety that had been responsive to medication. What I find significant in this case is that these pre-injury stressors had not resulted in a reduced capacity to work and had not required medical treatment other than the Paxil prescription.

The evidence indicates that at some point in 2004 the worker became aware that the employer was downsizing and that his employment would be terminated. The worker indicated that he did not know about this until the latter part of November 2004. However, on October 28, 2004 Dr. Prout reported the worker was due to be laid off at the end of November and would not likely return to work. I also note that Dr. Leech-Porter said the worker "felt threatened" in terms of being retained at his job before he was injured in August 2004 and that coincident with his injury he felt that the company was trying to get rid of him. From the available evidence, I find that the worker was likely aware of the pending lay off prior to late November 2004, although he did not recall this at the time of the oral hearing. The employer established that the details of the severance package were communicated to the worker on November 23, 2004. Dr Smith acknowledged that the worker's lay off was one of the factors that triggered his depression. The available evidence shows that the lay off and severance was a significant factor in the onset of the diagnosed depression. The evidence also shows that it was not the only significant causal factor.

Both Dr. Leech-Porter and Dr. Smith attach causal significance to the August 24, 2004 injury in the onset of the disabling depression in January 2005. Dr. Smith has provided

a reasoned analysis explaining that it was the significant ongoing pain resulting from the August 2004 injury that triggered the depression. The Board has subsequently accepted chronic pain as a compensable consequence of the August 2004 injury. This, in my view, lends added weight to Dr. Smith's analysis.

After considering all the evidence I find the August 24, 2004 injury and the resulting pain from the injury is a significant cause of the worker's depression in this case. I allow the worker's appeal for acceptance of depression as a compensable consequence of the August 24, 2004 injury. I return the file to the Board to determine the worker's entitlement to appropriate benefits for the compensable depression.

The further issue to consider under the "B" appeal is whether the physical injury accepted under the claim as of February 1, 2006 including chronic pain, had reached a plateau of recovery. The worker's counsel submitted that the worker's plateau date of February 12, 2006 should be set aside on grounds that the worker continued to be disabled as a result of the depression at that point in time. I agree with the review officer that benefit entitlement for the depression was not an issue arising from the February 1, 2006 decision. The only question arising from that decision and the September 25, 2006 Review Division decision is whether the conditions accepted under the claim at that point in time had reached a plateau of recovery. I find that they did. There is no persuasive medical evidence that those conditions required further treatment or were likely to significantly improve or worsen. I therefore confirm the September 25, 2006 decision and deny the worker's appeal on that issue.

As a result of my decision on the "A" appeal, the worker is entitled to consideration of further benefits resulting from the depression condition now accepted under the claim.

Conclusion

I vary the review officer's decision of April 18, 2006 and allow the worker's appeal for acceptance of the depression condition as a compensable consequence of the August 2004 injury. I return the claim to the Board to consider the worker's entitlement to benefits resulting from the compensable depression.

I confirm the September 25, 2006 review officer's decision with respect to the issue of the plateau date for the conditions accepted under the worker's claim as of February 1, 2006. The worker's appeal on that issue is denied.

I accept the expense associated with Dr. Leech-Porter's medical opinion in the amount of $600.00. No other expenses were identified in this appeal and I make no further order with respect to appeal expenses.

Paul Petrie
Vice Chair

PP/ljn