

Noteworthy Decision Summary

Decision: WCAT-2010-00598

Decision Date: February 25, 2010

Panel: Dukelow, Rice, Riecken

Section 5.1 of the Workers Compensation Act – Mental Stress – Policy item #13.30 of the Rehabilitation Services and Claims Manual

This decision considers the application of section 5.1 of the *Workers Compensation Act* (Act) and policy item #13.30 of the *Rehabilitation Services and Claims Manual* (RSCM), as amended following the B.C. Court of Appeal's decision in *Plesner v. British Columbia Hydro and Power Authority (Plesner)*, 2009 BCCA 188, to the worker's claim for compensation for mental stress.

The worker was employed as an operator at a power generating facility. After an incident involving a gas leak at the facility in January 2003, the worker applied for compensation. The Workers' Compensation Board, operating as WorkSafeBC (Board), did not accept the worker's claim for a mental stress injury. WCAT confirmed that decision. The matter was then subject to judicial review by the courts.

The B.C. Court of Appeal found that certain provisions in item #13.30 of RSCM violated the *Canadian Charter of Rights and Freedoms*. Specifically, both the objective test for mental stress, and the requirement that an event be horrific in nature in order to be considered "traumatic", were found to be of no force and effect. The Court set aside the earlier WCAT decision, and remitted the issue to WCAT to reinstate the appeal. The worker's appeal to WCAT was assigned to this panel to decide.

The WCAT panel allowed the worker's appeal, finding his claim was accepted for post-traumatic stress disorder (PTSD). The panel found that: the worker had diagnosed PTSD, a disorder described in the *American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders*, 4th edition; there was an identifiable event; the worker found the event emotionally shocking; and, this was of causative significance in relation to his diagnosed PTSD.

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Deirdre Rice, Vice Chair
Guy Riecken, Vice Chair

Introduction

- [1] The worker was employed as an operator at a power generating facility. After an incident involving a gas leak at the facility, the worker applied for compensation.
- [2] The worker's claim was adjudicated under the *Workers Compensation Act* (Act). A case manager of the Workers' Compensation Board (Board), now known as WorkSafeBC, decided on January 21, 2004 that the worker's claim would not be accepted. The worker sought a review of the case manager's decision.
- [3] The review officer's September 9, 2004 decision confirmed the case manager's decision
- [4] The worker then appealed to the Workers' Compensation Appeal Tribunal (WCAT) seeking a decision that his claim should be accepted.
- [5] On his notice of appeal the worker requested that his appeal be heard by oral hearing but, in a letter dated January 4, 2005, the worker's representative asked that the appeal proceed by written submissions if at all possible.
- [6] The employer is participating in this appeal. The WCAT Registry staff made a preliminary determination that the appeal would proceed by written submissions. Both parties are represented and have provided written submissions. We agree that this appeal can be determined on the basis of the claim file and the submissions of the parties. It involves the interpretation of medical evidence in light of the relevant law and policy and a sequence of events which is largely undisputed.

Issue(s)

- [7] The issue in the worker's appeal is whether the worker's claim should be accepted for post-traumatic stress disorder (PTSD).

Background

- [8] The worker applied for compensation in October 2003. He was employed as an operator in a thermal generating facility. On his application for compensation the

worker listed eight occasions on which a “critical incident” occurred. The incidents began in 1998 and culminated with the one in 2003 that has been the main focus of the worker’s compensation claim. The last of the series of incidents involved a gas leak at the worker’s place of employment on January 16, 2003. The worker indicated that he was suffering from stress and depression as a result of these incidents.

- [9] The employer indicated on their initial report that they considered the worker’s stress was non-compensable and was instead day-to-day stress.
- [10] The worker continued to work until February 6, 2003. He saw his attending physician on January 29, 2003 for various symptoms relating to stress and to the recent pipe burst incident at work.
- [11] In her letter of June 21, 2003, the worker’s attending physician advised that the worker was disabled from work due to depression and that he would be seeing a psychiatrist. She indicated that the worker had first sought attention for his symptoms in the fall of 2002. The worker’s psychiatrist first reported on June 16, 2003. At that time, the psychiatrist diagnosed PTSD. In a July 3, 2003 consultation report, the psychiatrist said that the worker had developed the PTSD since the January 2003 work incident. The psychiatrist also described the worker’s symptoms and noted that the worker had symptoms of PTSD.
- [12] The case manager wrote the letter of January 21, 2004 denying acceptance of the worker’s claim. The case manager found that the worker’s psychological condition developed over time. The case manager considered the worker’s mental stress to be chronic rather than an acute reaction to a sudden and unexpected stressful event as required by section 5.1 of the Act.
- [13] The worker requested a review of the case manager’s decision. The worker provided a description of the January 2003 incident to the Review Division. A significant gas leak was discovered on the employer’s property and a building was evacuated. The local fire department was in attendance at the site for other purposes and so was present to deal with the leak. The worker stated that he feared for his life at the time. He was afraid the gas would ignite and cause an explosion of a hydrogen storage vessel. The worker said he asked to be permitted to evacuate the area where he was but was told it was not safe to do so. The worker said he had to wait until the all clear signal was given.
- [14] The employer’s May 1, 2003 accident investigation report indicates that a six-inch gas line was vented through a break in a three-inch line. There was a 30 to 40-foot high plume of gas. Venting of the gas occurred for more than an hour before the venting was stopped. The break in the line was caused by a heavy truck manoeuvring over the line.

- [15] The employer provided accident questionnaires from several workers who were present at the time of the incident. As noted in the employer's review submission, the questionnaire responses do not indicate a sense of panic among the workers. Although aware of the danger they seem to have responded calmly to the incident and felt that it was under control.
- [16] The review officer confirmed the case manager's decision. He found that the gas pipeline rupture was not a "traumatic event" as required by section 5.1 of the Act. In reaching this conclusion he applied the definition of "traumatic" found in the applicable Board policy at that time. The policy defined "traumatic" as a "severely emotionally disturbing event," and the review officer found that the January 2003 gas leak did not meet that threshold.
- [17] The worker appealed to WCAT. The worker's representative supplied additional medical evidence in support of the appeal. The treating psychologist said, in his letter of January 25, 2005, that the worker's PTSD was caused by repeated accidents at his workplace which the worker had experienced as traumatic. The worker's psychiatrist's consultation reports from July 2, 2003, August 6, 2003, September 10, 2003, October 22, 2003, December 3, 2003, and February 5, 2004 were provided. In the last report, the psychiatrist said the worker had anxiety with post-traumatic features. This was the psychiatrist who provided the original diagnosis of PTSD. In a letter dated January 31, 2005, the psychiatrist explained that the worker's PTSD occurred after the culminating event of January 2003 which followed several events in the workplace when the worker feared for his safety or the safety of others.
- [18] The worker's second psychiatrist conducted a review of the worker's records and provided an opinion dated February 21, 2005. He had been treating the worker since February 2004. He stated that he considered that the worker had severe PTSD and that he suffered that condition as a result of a number of incidents which occurred in the workplace between 1998 and 2003. He noted that the fear the worker felt during the January 2003 incident was compounded by the earlier incidents. He stated that it was the worker's reaction to the January 2003 incident which led to the development of his PTSD condition.
- [19] Another panel of WCAT denied the worker's appeal. That WCAT decision also dealt with another appeal by the worker from a separate Review Division decision concerning the worker's claim for compensation for an occupational disease due to exposure to a chemical in the workplace.
- [20] The worker sought judicial review of the earlier WCAT decision. Ultimately, the earlier WCAT decision was set aside by the British Columbia Court of Appeal. The Court remitted the issue of the worker's compensation to WCAT. The worker's appeal to WCAT has been reinstated and assigned to this panel to decide.

- [21] This decision only addresses the worker's claim for compensation in relation to his mental stress. In a May 13, 2009 letter to the worker's representative, the WCAT Registry advised that only the appeal concerning the worker's mental stress claim would be reinstated. The worker's representative was put on notice that she should respond if she disagreed. The worker's representative has not advised WCAT that she disagrees with this decision. Therefore, the appeal before us concerns only the worker's mental stress claim.
- [22] After the mental stress appeal was reinstated, WCAT invited the parties to provide further submissions. The worker made further submissions referring us to his earlier submissions to the Review Division and to WCAT. The employer provided a submission in response, and the worker replied to the employer's submission. We have considered these submissions as well as the parties' earlier submissions in coming to our decision.
- [23] The panel obtained copies of the January 4, 2005 letters by which the worker's representative requested the opinions of the worker's two psychiatrists and his psychologist. We disclosed these letters to the employer. We did not consider it necessary to request submissions about these letters after obtaining them. The letters did not contain new information beyond that which was already on file. The worker's description of the event, to which the letters refer, was already on file and available to the parties through the disclosure previously provided to them.

Reasons

- [24] This appeal was brought under section 239 of the Act. As a panel of WCAT we are required to apply the policies of the Board (section 250(2) of the Act) unless they are patently unreasonable (in which case the process set out in section 251 would apply). The panel is acting under section 238(5) of the Act.
- [25] The applicable policy is found in *Rehabilitation Services and Claims Manual, Volume II* (RSCM II), since the worker's injury occurred after June 30, 2002. The current legislation applies for the same reason. Section 250(4) of the Act provides that, if the evidence supporting different findings on an issue is evenly weighted, we must resolve that issue in a manner that favours the worker.
- [26] The worker's claim is brought under section 5.1 of the Act, which deals with compensation for mental stress that does not result from an injury for which the worker is otherwise entitled to compensation. Section 5.1(1) provides that a worker is only entitled to compensation if the mental stress:

(a) is an acute reaction to a sudden and unexpected traumatic event arising out of and in the course of the worker's employment,

(b) is diagnosed by a physician or a psychologist as a mental or physical condition that is described in the most recent American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders at the time of the diagnosis, and

(c) is not caused by a decision of the worker's employer relating to the worker's employment, including a decision to change the work to be performed or the working conditions, to discipline the worker or to terminate the worker's employment.

[27] The relevant policy is found at RSCM II item #13.30, "Mental Stress." The version of this policy which applies in this appeal was adopted by the board of directors on July 14, 2009 after the Court of Appeal struck down portions of the previous version of the policy (Appendix "A" to *Board of Directors' Resolution* 2009/07/14-06). This version is said to apply to all decisions, including appellate decisions, made on or after April 30, 2009. The same resolution of the board of directors also enacted another slightly amended version of policy item #13.30, which was Appendix B to the resolution and was to come into effect on January 1, 2010. Since the minor changes to the policy found in the Appendix "B" version have no effect on our decision, it is not necessary to review them here.

[28] The key changes to the policy were as follows:

- Deletion of the policy statements and examples that were severed by the British Columbia Court of Appeal in its 2009 decision concerning this policy.
- Inclusion of a definition of a traumatic event as "an emotionally shocking event," which reflects both the *Dorland's Medical Dictionary*, 24th Edition and *The Concise Oxford Dictionary* definitions of traumatic.
- Inclusion of a reference that an acute reaction may be delayed in certain circumstances, in keeping with the diagnostic features of mental stress. This change and some additional editorial changes were previously approved by the board of directors in October 2007 as part of a policy project to re-write all of the policies in chapter 3 of the RSCM II.

[29] The fact that the worker made a claim for chemical exposure before making the claim for stress and the fact that he made the claim for stress after the chemical exposure claim was denied have been put forward as reasons to deny the worker's claim. We do not consider these matters particularly relevant. Section 55 of the Act establishes a one-year period for workers to file claims for compensation. Later applications for compensation can be accepted in some circumstances. The worker made his application for compensation well within the prescribed one-year period after the January 2003 incident at his workplace. The worker requested a review of the decision

to deny his exposure claim and then appealed from the review officer's confirmation of that decision to WCAT. The same WCAT panel that issued the earlier decision in the appeal that is the subject of this decision also decided the worker's appeal on the exposure claim in the same decision. Since the worker was pursuing both claims in tandem for some period of time, we are unable to agree with the suggestion that he filed the mental stress claim in order to circumvent the earlier denial.

- [30] The requirements of section 5.1(1)(b) and (c) are not in dispute. As the employer acknowledges in submissions to WCAT, the worker has been diagnosed with PTSD by his physicians, and the review officer accepted that the worker has PTSD symptoms. The employer describes the issue in the appeal as whether the diagnosed PTSD symptoms resulted from the employment. We note that the two psychiatrists and the psychologist who treated the worker all diagnosed his condition as PTSD, a disorder described in the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders, 4th edition (DSM-IV-TR). Medical evidence to dispute these opinions has not been provided in the review and appeal process, and does not appear on the claim file. We accept those opinions as to the diagnosis of the worker's condition, and find that the requirement in section 5.1 for a DSM-IV-TR diagnosis is satisfied.
- [31] The employer has not argued that the worker's PTSD was caused by a decision of the employer relating to the worker's employment, and we find that the evidence does not show that such a decision caused the PTSD that is the subject of the worker's claim. Accordingly, this requirement of section 5.1 is also satisfied.
- [32] The disputed issue is whether or not the gas venting event of January 2003 was traumatic within the meaning of section 5.1(1)(a) of the Act. The employer submits that, despite acceptance of the PTSD diagnosis, the worker's employment activities on January 16, 2003 cannot be considered causative of that condition. In particular, the employer submits that the January 16, 2003 incident cannot be established as a traumatic event within the meaning of section 5.1 and policy item #13.30. The employer argues that the overwhelming weight of the evidence, including the numerous witness statements, leads to the conclusion that, while there was reasonable concern and action taken in response to the January 16, 2003 incident, there was no indication of a panic or terror response by the worker or any co-workers at the time or immediately following the incident. The employer also emphasizes the worker's own statements regarding his reaction to the incident, in which he said he "walked" to the muster station and that others in the area did not react with alarm or significant concern for their personal safety at the time.
- [33] The employer's submission seems to suggest the application of an entirely objective test of what is considered "traumatic." However, we consider it significant the Court of Appeal found the application of the objective test in relation to the meaning of "traumatic" that was established in the previous version of the policy to be objectionable

(Paragraphs 120, 129 and 166, and Appendix “A” of the Court’s decision). In particular the Court found that an objective test that defined “traumatic” as “extremely emotionally disturbing” events, as exemplified by “horrifying” incidents, armed robberies, sexual assaults and the like, was unconstitutional. In addition, the Court struck down the portion of the policy that required the event to be “generally accepted as being traumatic.” The Court’s reasoning was that the threshold established in policy item #13.30 meant that those who suffer from work-related psychological injuries were subject to differential treatment when compared to those who suffer physical injuries. In particular, those who suffer physical injuries merely have to show that their injury was work related in fact.

- [34] The event in this case has been identified as required by policy. The gas venting was an obvious and distinct event, and satisfies the requirement of being “clearly and objectively identifiable.” The current version of the policy, however, no longer includes a requirement that the event is “generally accepted as being traumatic.” Thus, although we have considered the evidence summarized in the employer’s submissions, including the co-workers’ statements about the event and the employer’s report, we do not place great weight on that evidence as establishing whether or not the event was traumatic within the meaning of section 5.1 of the Act. While the current version of policy item #13.30 still references the requirement that the triggering event be “emotionally shocking,” the fact that other employees who witnessed the event did not recall it to have been traumatic, or “emotionally shocking,” when questioned more than 18 months later is not decisive. It is important to remember that the Court of Appeal was very clear in confirming that, to the extent there may be an objective requirement in the term “traumatic event,” it must impose no greater burden than that which applies when determining if a worker has sustained a compensable physical injury. Therefore, the crucial questions in this case are whether the worker found the January 2003 event emotionally shocking and, if so, whether this was of causative significance in relation to his diagnosed PTSD.
- [35] The policy indicates that, in most cases, the worker must have suffered or witnessed the traumatic event first hand. In this case, the worker did witness the effects of the burst gas pipe first hand. We accept that the worker experienced this event as emotionally shocking and therefore traumatic.
- [36] In the worker’s first psychiatrist’s letter of January 31, 2005, the psychiatrist stated that the worker’s fears, which had appeared as a result of earlier incidents, suddenly increased after the January 2003 incident and that incident was the “last straw” to cause PTSD.
- [37] In the worker’s second psychiatrist’s letter of February 21, 2005, the psychiatrist stated that he was of the opinion that the worker suffered from severe PTSD. He went on to say that this psychiatric condition was a direct result of a number of traumatic incidents which occurred in the course of the worker’s work up to 2003. Later in his letter he

stated that he felt the worker developed his PTSD primarily in response to the workplace incident of January 16, 2003. He said that event “finally tipped” the worker into a “full syndromal post traumatic stress disorder.”

- [38] The worker’s psychologist, in his January 25, 2005 letter, specifically identified the series of events the worker had witnessed as satisfying the DSM-IV diagnostic criteria for PTSD concerning traumatic events which he witnessed directly or was confronted with indirectly and which involved threatened death or serious injury.
- [39] As can be seen, in this case, both psychiatrists who have treated the worker link his PTSD to the series of events with the January 2003 event having special significance in causing the worker’s PTSD. Both have diagnosed PTSD. The psychologist who treated the worker gave the cause of the worker’s PTSD as the cumulative effect of the series of incidents at work which the worker had experienced as traumatic. Medical evidence to dispute these opinions has not been provided and does not appear on the claim file.
- [40] We acknowledge that, by reason of section 249 of the Act, WCAT does have the authority to obtain further medical opinion evidence in appropriate circumstances. However, our review of the evidence from the psychiatrists and psychologist has not identified a sound basis for rejecting these opinions or for seeking further psychological or psychiatric evidence. There are no apparent material deficiencies in the facts upon which the opinions were based, and nothing in the analysis of the experts stands out as requiring further clarification.
- [41] In particular, we do not consider the worker’s short delay in seeking treatment from his attending physician after the January 2003 incident to be significant. In the diagnostic criteria in the DSM-IV-TR it is noted that PTSD can occur with delayed onset if symptoms appear at least six months after the stressor. Under the heading “Course” in the description of the condition, at page 466 of the DSM-IV-TR, it is noted that symptoms usually begin within three months after the trauma although there may be a delay of months or years before the symptoms appear. Furthermore, policy item #13.30 acknowledges that in certain situations an acute reaction to a traumatic event can be delayed.
- [42] Further, as was pointed out in the worker’s May 25, 2004 submission to the Review Division, the very diagnosis of PTSD indicates that there was a traumatic event giving rise to the symptoms the worker is experiencing. This is clear when we refer to diagnostic criteria for PTSD set out in the DSM-IV-TR, page 467 and following. The first criterion is that the person was exposed to a traumatic event in which the person experienced, witnessed or was confronted by an event that involved actual or threatened death or serious injury or a threat to the physical integrity of the self or others and the person’s response involved intense fear, helplessness or horror.

- [43] We are not bound to accept the description of an event as traumatic by a physician or psychologist, since the diagnostic criteria and the examples of traumatic events found in the DSM-IV-TR were developed to assist in the diagnosis of mental disorders, rather than to aid in legal or adjudicative matters. We are required to make a separate decision on whether or not the evidence as a whole supports acceptance of a claim, including whether an incident was a sudden and unexpected traumatic event as contemplated by the Act and by Board policy. In this case, we are satisfied that the January 16, 2003 event was of such nature that it reasonably had the potential to be “an emotionally shocking event.” Thus, to the extent there may still be an objective standard in the section 5.1 test, that standard would be met. Moreover, we have accepted the medical and psychological opinions with respect to the effect the gas venting incident had on the worker, and on the basis of those opinions and the other available evidence we conclude that it was an emotionally shocking event for the worker. It therefore meets the requirement in section 5.1(1)(a) of being a sudden and unexpected traumatic event.
- [44] There is no dispute that the gas venting event occurred in the course of and arose out of the worker’s employment. We accept that that event was potentially life threatening. The cause of the worker’s PTSD is the January 2003 event set against the background of several previous incidents, which also clearly occurred in the course of and arising out of the worker’s employment.
- [45] Although section 5.1 and policy item #13.30 exclude compensation for chronic or gradual onset mental stress, the policy recognizes that even workers who may be exposed to traumatic events on a relatively frequent basis (such as emergency workers) may have an acute reaction to a sudden and unexpected traumatic event. Compensation for mental stress may be provided even if the worker was able to tolerate past traumatic events.
- [46] In addition, the policy states that for compensation to be provided, the work-related traumatic event must be of causative significance to the worker’s mental stress reaction. The policy explains that this requires consideration of personal factors in the worker’s life, which may have contributed to the acute reaction. It is implicit in this portion of the policy that the traumatic work-related event under consideration need not have been the only contributing cause of the mental stress reaction. It need only have been of causative significance. Accordingly, the fact that a worker experienced previous stressful or even traumatic events at work (or away from work) that contributed to the reaction to the most recent traumatic event, does not necessarily preclude compensation for mental stress, provided the recent event was of causative significance.
- [47] We conclude that the fact that the worker’s PTSD developed against a backdrop that included a number of earlier stressful work incidents does not preclude compensation. Based on the persuasive psychiatric and psychological evidence, we are satisfied that

the January 16, 2003 pipeline rupture and gas venting was of causative significance to the worker's PTSD, and that the PTSD was an acute reaction to that sudden and unexpected traumatic event.

- [48] We find that the worker's claim should be accepted for PTSD.
- [49] The Board will determine the benefits to which the worker is entitled under the Act. We draw the attention of the adjudicator(s) to paragraph 126 of the Court of Appeal judgment in relation to the matter of compensation.
- [50] Section 7 of the *Workers Compensation Act Appeal Regulation*, B.C. Reg. 321/2002 authorizes WCAT to make certain orders about expenses related to appeals. No expenses were requested. We make no order about expenses. The earlier WCAT panel made a direction regarding reimbursement of expenses associated with obtaining medical evidence for the worker's appeal. It appears from the claim file that the expenses associated with obtaining medical reports have been reimbursed in compliance with the earlier panel's direction.

Conclusion

- [51] We allow the worker's appeal. The worker's claim is accepted for PTSD. We vary the review officer's decision of September 9, 2004. The Board will determine the compensation to which the worker is entitled as a result of this decision.

Daphne Dukelow
Vice Chair

Deirdre Rice
Vice Chair

Guy Riecken
Vice Chair

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