Noteworthy Decision Summary

Decision: WCAT-2013-00858 **Panel:** Daphne Dukelow **Decision Date:** March 27, 2013

Mental Disorder – Section 5.1 of the Workers Compensation Act – Policy item #C3-13.00 of the Rehabilitation Services and Claims Manual –Practice Directive #C3-3 - Incident did not arise out of and in the course of the worker's employment –Incident was not traumatic – No exposure to a significant work-related stressor or stressors which arose out of and in the course of worker's employment –Mere physical proximity does not bring an event within the scope of the worker's employment.

This case is noteworthy for its analysis of whether a worker's employment was of causative significance in the development of a mental disorder. In this case two men were involved in a fight outside of the worker's place of employment; the worker saw them fighting, quickly shut the door to stay inside, and afterward saw a pool of blood when she left the work premises. The men involved in the fight did not have any connection with her place of employment and the employer's clients were not in danger. The only connection was a physical one to a location near the employer's premises. That is a mere physical proximity and does not bring the event or the witnessing of the event within the scope of the worker's employment. That physical proximity does not transform the event into one in which the worker's employment has causative significance of more than a trivial nature.

The panel also found the event not to be traumatic. The witnessing of a fight between two men with no connection to the workplace or the worker is not a profound and sudden disturbance of the physical or mental senses or a sudden and violent physical or mental impression. It did not meet the definition of traumatic as being deeply disturbing or distressing.

Workers' Compensation Appeal Tribunal
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Panel: Daphne Dukelow, Vice Chair

Introduction

[1] The worker was employed as an outreach worker at a women's centre when the events relevant to her appeal occurred in early March 2011. The worker's claim for compensation for mental stress was denied by the Workers' Compensation Board (Board), known as WorkSafeBC. The worker's claim arose out of an incident involving an altercation between two men outside the back entrance to the centre. Ambulance and police services attended to deal with the men. The worker felt responsible for the residents of the centre and gathered them in the dining room. The worker saw a pool of blood when she had to leave the workplace later. She heard, although it was not confirmed, that one of the men died as a result of the fight. I have accepted the case manager's description of the events which is the same as the worker provided on June 2, 2011.

[2] The worker sought medical attention. The worker saw her attending physician, Dr. Lapuste, in late April 2011. Dr. Lapuste reported to the Board that the worker had low back strain. She also noted the worker was suffering from depression and post-traumatic stress disorder (PTSD) as a result of witnessing violence at work. The worker completed a teleclaim application for compensation at that time. The worker indicated that the injuries she was suffering from were depression and PTSD. She did not refer to low back strain.

[3] The case manager considered the worker's claim as one for mental stress, alone, and not as one for a physical injury. The Board denied the worker's claim under the then current version of section 5.1 of the *Workers Compensation Act* (Act).

[4] The worker requested a review of the Board's decision. The review officer obtained an opinion from a Review Division medical advisor about the proper diagnosis for the worker's condition. The diagnosis provided was Adjustment disorder with mixed anxiety and depressed mood. The review officer, in *Review Reference #R0132968,* dated November 15, 2011, confirmed the Board's decision.

[5] The worker has appealed to the Workers' Compensation Appeal Tribunal (WCAT). The employer is not participating in this appeal although invited to do so.

[6] The worker asked that this appeal proceed by way of written submissions. No issue of credibility is involved. The issue involves the application of the law and policy to a set of facts.

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[7] A preliminary issue was identified by the worker's representative.

Issue(s)

[8] Is the worker's mental disorder compensable under section 5.1 of the Act?

[9] Did the incident giving rise to the worker's claim arise out of and in the course of her employment?

Reasons

[10] The worker's appeal is brought under section 239 of the Act which provides for appeals from the Review Division to WCAT. As a member of WCAT I am required to apply the policies of the board of directors of the Board except in specific circumstances which are not raised in this case (section 250(2) of the Act).

[11] The *Rehabilitation Services and Claims Manual, Volume II*, applies since the worker's injury occurred after June 30, 2002. The current legislation applies for the same reason. Because the incident occurred after July 1, 2010, the revisions to Chapter 3 of RSCM II, generally, apply to the worker's appeal.

[12] The worker's claim is brought under section 5.1 of the Act. The case manager, in the original decision, and the review officer quoted the version of section 5.1 of the Act which was in effect at the time they made their decisions. Section 5.1 of the Act was amended, effective July 1, 2012. As a result of the amendment to section 5.1 of the Act, the policy was amended. By its terms, the policy indicates that it and the amended section of the Act apply to decisions of WCAT after July 1, 2012 about a claim made but not finally adjudicated. This reflects section 4 of the *Workers Compensation Amendment Act, 2011* which provides:

> Section 5.1 of the *Workers Compensation Act*, as enacted by section 1 of this Act, applies to every decision made by the Board or the Workers' Compensation Appeal Tribunal on or after July 1, 2012, the date section 1 of this Act comes into force, in respect of a claim made but not finally adjudicated before July 1, 2012.

[13] Since the worker's appeal had not been heard by WCAT until I began my deliberations in October 2012, it clearly has not been finally adjudicated by WCAT. I agree that the amended version of section 5.1 of the Act and the related policy, as amended as of July 1, 2012, apply to the worker's appeal.

[14] The worker's representative was provided with an opportunity to provide additional submissions in light of the amendments to the law and policy relevant to the worker's appeal. The worker's representative pointed out that the worker has not been diagnosed with a mental disorder by a psychologist or psychiatrist as required by the

2012 version of section 5.1 of the Act. He submitted that, in fairness to the worker, I should ask the Board to conduct a further investigation and obtain a psychologist's or psychiatrist's diagnosis of the worker. The representative pointed out that the Board would provide such investigation if the worker's claim were at a different stage in the decision-making process. I accepted these submissions. I agreed with the worker's representative, that in the unusual circumstances of the worker's appeal, the worker should not be required to seek out a psychologist's or psychiatrist's opinion about her condition and its work-relatedness. As the representative noted, the worker does have a diagnosis from the Review Division medical advisor of a condition described in the most recent *Diagnostic and Statistical Manual of Mental Disorders* (DSM). A diagnosis by a physician, other than a psychiatrist, was sufficient for purposes of the pre-July 1, 2012 version of section 5.1 of the Act. The Review Division medical advisor is not a psychiatrist, to the best of my knowledge. The worker's attending physician is not a psychiatrist.

[15] The new version of section 5.1 of the Act contains other factors which were not present in the earlier version of the section. The word "acute" has been removed and a mental disorder may be accepted as compensable if it is predominantly caused by a work-related stressor. The Board may have a psychiatrist or psychologist review a diagnosis made. The provision concerning a decision of the worker's employer remains unchanged.

[16] I consider that the worker is entitled to have a decision made about both the new aspect of section 5.1 of the Act, the general work-stressor, as well as the reaction to one or more traumatic events. In relation to the reaction to traumatic event(s), both the original case manager's decision and the review officer's decision were based, in part, on findings that there was not an acute reaction. As I have noted above, the new version of section 5.1 does not contain the word "acute."

[17] Section 246(3) of the Act provides authority for me to request the Board to make a determination where I consider that there is a matter which the Board should have determined. Although this provision speaks in the past tense, I considered that it was available as a process in this particular appeal. This appeal is taking place at an unusual point in time. The legislation and policy governing the worker's appeal has changed since the Board made its initial decision and the Board's Review Division made a second decision about the worker's claim. I consider that the Board should have made a determination under the same law and policy which I am now required to apply. This is so, especially in this case, since there are three facets of the provision in the Act which have been changed and which may affect the worker's claim. The amended policy reflects those changes. Also, the Board did not consider all aspects of the prior version of section 5.1 (notably, whether the event the worker witnessed or the witnessing of that event arose out of and in the course of her employment), in making its prior decisions. The issue whether the event or the witnessing of the event arose out of and in the course of the worker's employment continues to be an issue under the new version of section 5.1 of the Act. Similarly, this issue is pertinent to the question

whether there was a significant work-related stressor which was the predominant cause of the worker's mental disorder.

[18] Section 246(2)(d) of the Act provides me with authority to request the Board to investigate and report back. I decided not to use this process in this case because the change in the legislation means there are other changed factors in section 5.1 of the Act besides the requirement for a psychiatrist's or psychologist's diagnosis. I considered that the fairest way to deal with the worker's appeal was to request a new determination by the Board under section 246(3) of the Act. In order to be fair to the worker I did not consider that I should seek only a diagnosis through the auspices of the Board.

[19] I am not concerned, in this case, that the worker thereby loses her right to request a review of the determination by the Board. The worker asked that one of these two processes be followed. I chose the one which would result in the Board canvassing all relevant aspects of the new version of section 5.1 of the Act. I considered this was the fairer process to follow in the circumstances of the worker's appeal. As noted, the employer is not participating in the appeal, at this point in time.

[20] I suspended the worker's appeal under section 246(3) of the Act and referred the matter back to the Board for a determination as to acceptance of the worker's claim under the new version of section 5.1 of the Act effective July 1, 2012. I provided directions along the following lines. The investigation and determination should include, although it is not limited to, the following. The Board should obtain an opinion from a psychologist or psychiatrist about the worker's diagnosis. If the worker is diagnosed with a condition described in the most recent DSM, then the Board should consider whether the worker's claim meets one of the requirements of section 5.1(1)(a) of the Act. Medical evidence about the cause of the worker's diagnosed condition should be obtained in light of section 5.1 of the Act. Also, consideration should be given to whether the incident said to be the cause of the worker's condition arose out of and in the course of her employment. Should the worker not be diagnosed with a condition under the most recent DSM, then the Board should make its determination in accordance with that fact. The Board had made its original decision on one of the several factors set out in section 5.1 of the Act. The other factors which must be considered in coming to a decision about acceptance of a worker's claim should be addressed. The fundamental question whether the incident giving rise to the worker's claim arose out of and in the course of her employment had not been determined.

[21] The worker's appeal was suspended pending the Board's determination. The employer was re-invited to participate in the worker's appeal. The employer is not participating in this appeal.

[22] The Board made its determination on one of the factors set out in my directions. That is, whether the incident which the worker witnessed and to which she attributes her psychological condition arose out of and in the course of her employment. This is the fundamental question to be determined in a decision about whether to accept a worker's

claim under section 5 or section 5.1 of the Act. Ideally, that question should have been decided in the case manager's original decision on the worker's claim. The case manager now has determined that the incident did not arise out of and in the course of the worker's employment.

[23] I agree with the case manager that the incident giving rise to the worker's claim did not arise out of and in the course of the worker's employment.

[24] Policy item #C3-14.00 indicates that, in considering causation, the focus is on whether the worker's employment was of causative significance in the occurrence of the injury. It points out that the worker's employment has to be more than a trivial or insignificant aspect of the injury. In this case, I consider that the worker's employment was not of causative significance. It was an insignificant aspect of the events leading to the psychological injury for which the worker is seeking compensation. That the worker witnessed the event(s) in question only occurred because the event(s) occurred adjacent to the worker's place of employment.

[25] People in the dining room heard a commotion and the worker went to investigate. She saw two men fighting at the back gate to the premises at her place of employment. She closed the back door of the building and she ushered two clients of her workplace to the dining room. Later she heard another staff member yell that the men had knives. She was not interviewed by police although co-workers who witnessed the event were. Later when she left the premises she saw a pool of blood. She heard a rumour that one of the men had died as a result of wounds suffered in the fight but that was never confirmed to the worker.

[26] The fight and blood, which is presumed related, and the story regarding a death, all of which form part of the incident or are separate incidents giving rise to the worker's claim, do not arise out of the worker's employment. The worker went to the back door to investigate a commotion outside. She did not go outside. The men involved in the fight did not have any connection with her place of employment. The clients of the employer were not in danger.

[27] The worker's representative has submitted that the two fighting men could easily have come onto the premises and posed a safety threat. That did not occur and therefore is not part of the incident which the worker witnessed. Also, it is quite speculative.

[28] The worker escorted two women clients to the dining room. She did not witness an actual stabbing. She could have witnessed a fight at any time in virtually any location. That the fight took place near the back of the employer's premises does not transform the incident into one arising from the worker's employment. The only connection is the physical one to a location near the employer's premises. That is a mere physical proximity and does not bring the event, or the witnessing of the event, within the scope of the worker's employment. That physical proximity does not transform the event into

one in which the worker's employment has causative significance of more than a trivial nature.

[29] In the worker's submission to WCAT, the representative states that the worker went out back and brought two women back into the premises. That is not the fact pattern accepted by the case manager. Also it is not the fact pattern supported by the evidence on the claim file. The employer's report, the teleclaim, and the memo of the interview with the worker all refer to the worker escorting two women back to the dining room or to the front door but none refer to her actually going outside. I do not consider that a critical fact, by itself, in any event. The worker did not witness a stabbing. She saw two men fighting. I accept that she saw blood on the ground when she left the workplace a while after the incident to go to another location.

[30] In addition to finding that the event(s) in question did not arise out of the worker's employment, I agree with the review officer that the incident was not traumatic. The worker saw two men fighting. The rest of the information reported by her is information, the accuracy of which is unknown, she obtained from other persons. A traumatic event is defined by the policy as an emotionally shocking event which is generally unusual and distinct from the duties and interpersonal relations of a worker's employment. Definitions have been provided for the worker's shocking and traumatic in the Board's Practice Directive #C3-3. Although I am not required to apply the practice directive, the definitions included in it are from authoritative sources. I have applied the definitions set out there in the following way. The witnessing of a fight between two men with no connection to the workplace or the worker is not a profound and sudden disturbance of the physical or mental senses or a sudden and violent physical or mental impression, to paraphrase the quotation from the law dictionary in the practice directive. Nor was the event a shock caused by agitation of the mental senses resulting in extreme grief. Nor was it extremely startling, distressing or offensive. It also does not meet the definition of "traumatic" as being "deeply disturbing or distressing."

[31] The worker was told by the police that there was blood on the ground. I have to accept that the worker actually saw the blood. While seeing the blood may have been traumatic or emotionally shocking to the worker the seeing of the blood had no relation, other than physical proximity, to the worker's employment. The worker could have been exposed to blood on the ground at any location where a fight or accident or nosebleed had taken place.

[32] The news of a death was not confirmed. I do not consider it could be considered shocking within the definitions set out in the practice directive since the worker had no connection, through employment or otherwise, to the man possibly involved.

[33] I do not consider that the worker was exposed to a significant work-related stressor or stressors which arose out of and in the course of her employment for the same reasons as set out above in relation to traumatic event.

[34] For these reasons I find the worker did not experience one or more traumatic events which arose out of and in the course of her employment. She did not experience a significant work-related stressor or stressors that arose out of and in the course of her employment. As a result, I deny the worker's appeal and confirm the review officer's decision. The worker's claim for compensation for mental disorder arising out of and in the course of her employment is not accepted.

[35] No appeal expenses were requested. No order concerning expenses is made.

Conclusion

[36] I deny the worker's appeal. I confirm the review officer's decision. The worker's claim is not accepted.

Daphne Dukelow
Vice Chair

DD/gw

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