

Noteworthy Decision Summary

Decision: WCAT-2014-01272 **Panel:** Sherryl Yeager **Decision Date:** April 29, 2014

Mental state – Bullying and harassment – Work-related stressors – Occupational Health and Safety Guideline G-D3-115(1) – Policy item #C3-13.00 of the Rehabilitation Services and Claims Manual, Volume II

This decision is noteworthy for its reference to the *Occupational Health and Safety (OHS) Guidelines G-D3-115(1) – 3 Bullying and harassment* in assessing the meaning of “bullying and harassment” in the workplace, and how the guidelines interact with section 5.1 of the *Workers Compensation Act (Act)* and policy item #C3-13.00 of the *Rehabilitation Services and Claims Manual, Volume II*. Specifically, the objective and subjective standards as described in the guidelines are used to assess impugned conduct to decide if certain behaviours in the workplace constitute bullying and harassment.

The worker complained about workplace conduct that the worker found offensive and threatening. He grew depressed and experienced panic attacks, and was eventually laid off. The worker filed a claim with the Workers’ Compensation Board, operating as WorkSafeBC (Board), seeking compensation for mental disorder arising from workplace bullying and harassment under section 5.1 of the Act.

The Board denied the worker’s claim, finding that the criteria for a mental disorder arising out of and in the course of employment were not met. A review officer confirmed the Board’s decision.

WCAT allowed the appellant’s appeal, finding that the worker was subjected to bullying and harassment in the workplace. In assessing the context of “bullying and harassment”, WCAT referred to newly implemented OHS guidelines which explain policy item #C3-13.00’s objective and subjective standards for assessing behaviour.

The panel found that conduct not intended to intimidate a specific individual was not bullying and harassment. However, conduct and comments directed at the individual worker were considered by the panel in part on the basis of a subjective analysis to determine whether the worker’s individual characteristics meant that the conduct complained of amounted to bullying and harassment.

After weighing the evidence, WCAT found that the workplace intimidation and harassment advanced the worker’s mental stress to the point that he developed depression and panic attacks.

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Introduction

- [1] The worker was employed as a painter for a large institution in the summer of 2012. The worker filed a claim for compensation, reporting his co-workers had bullied and harassed him to the point he was under too much stress to continue working in October 2012.
- [2] An officer of WorkSafeBC (the Board) advised the worker that his claim for compensation would not be accepted by letter dated November 27, 2012. The Board officer concluded the claim did not meet the criteria set out in the law and policy for a mental disorder arising out of and in the course of the employment.
- [3] The worker requested a review of this decision. A review officer denied the worker's request in *Review Decision #R0155234*, dated July 12, 2013.
- [4] The worker has appealed that decision to the Workers' Compensation Appeal Tribunal (WCAT).

Issue(s)

- [5] Did the worker develop a mental disorder arising out of and in the course of his employment?

Jurisdiction

- [6] The worker's appeal was brought under section 239(1) of the *Workers Compensation Act* (Act).

Law and Policy

- [7] Section 5.1 of the Act is applicable. The section states:
 - (1) Subject to subsection (2), a worker is entitled to compensation for a mental disorder that does not result from an injury for which the worker is otherwise entitled to compensation, only if the mental disorder
 - (a) either
 - (i) is a reaction to one or more traumatic events arising out of

and in the course of the worker's employment, or
 (ii) is predominantly caused by a significant work-related stressor, including bullying or harassment, or a cumulative series of significant work-related stressors, arising out of and in the course of the worker's employment,

(b) is diagnosed by a psychiatrist or 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.

- [8] The relevant policy is contained at policy #C3-13.00 of the *Rehabilitation Services and Claims Manual, Volume II* (RSCM II). Policy #C3-13.00 provides that the legislation requires the worker experience more than the normal reactions to traumatic events or significant work-related stressors, such as being dissatisfied with work, upset or experiencing distress, frustration, anxiety, sadness, or worry as those terms are widely and informally used.
- [9] The Board's Practice Directive #C3-3, which is not binding on WCAT, also provides guidance on adjudication of mental disorder claims. It states at item B regarding significant stressors:

A work-related stressor is considered significant when, "it is excessive in intensity and duration from what is experienced in the normal pressures or tensions of a worker's employment." However, a claim for a mental disorder made by a worker employed in an occupation characterized by a high degree of stress or conflict should not be denied simply because they are normally exposed to an intense level of stress...

As noted in policy, interpersonal conflicts between a worker and co-workers, supervisors or customers are not generally considered significant unless the conflict results in behavior that is considered threatening or abusive. The *Act* states that significant work-related stressor(s) includes bullying and harassment. The *Act* and policy do not define bullying, harassment, threatening or abusive. In general terms, both bullying and harassment reflect conduct that is intended to, or should reasonably have been known would, intimidate, humiliate or degrade an individual.

Although bullying and harassment are generally considered in terms of a pattern of ongoing behaviour, this does not preclude acceptance of a claim for a mental disorder based upon a single event. A single event of bullying, such as a threat of physical harm, or a single act of harassment may be more appropriately adjudicated as a traumatic event rather than as a single work-related stressor depending upon the nature of that event.

Not all interpersonal conflict or conduct that is rude or thoughtless will be considered abusive behaviour. Each case will need to be investigated to determine the details and nature of the interpersonal conflict. However, conduct that is determined to be threatening or abusive is a significant work-related stressor.

The interpersonal conflict reported by the worker must have an employment connection for the resulting mental disorder to be compensable. The significant stressor or stressors must have happened at a time and place and during an activity consistent with or reasonably incidental to the duties and obligation of the worker's employment.

Appeal Method

- [10] An oral hearing was held on March 5, 2014. A member of the Workers' Advisers Office represents the worker. The employer was notified of the appeal and participated. A human resources officer represented the employer.

Background and Evidence

- [11] The worker's physician completed a progress report on September 28, 2012 indicating the worker had anxiety and an adjustment disorder. The worker had first attended on August 24, 2012 reporting anxiety and depressed mood. He was having difficulty with the work ethic of a group of workers who were senior to him. They counselled him to commit fraud. The worker said he felt unwell at work and that stress had now triggered a breakdown in his relationship. The worker felt unsafe because of his difficulty concentrating and sought time off work.
- [12] The employer completed an injury report to the Board on October 4, 2012 indicating it was unaware of any stressful situations endured by the worker while employed.
- [13] The worker's physician provided further progress reports indicating the worker was having trouble focusing, sleeping a lot, and feeling overwhelmed. He had an appointment pending with a community mental health team. The physician diagnosed adjustment disorder with anxiety and depression. The physician felt the primary stressors were the worker's co-workers.
- [14] For ease of reference and to ensure anonymity, I will refer to his co-workers by letter.

- [15] The three senior workers were brothers, A, B, and C. C was the shop foreman. Co-worker D was a long-term friend of the brothers, who had several years of seniority with the employer. A fifth worker, E, had been there for one year. Finally, worker F was a long time employee as well whose wife also worked for the employer in a related area. F was the shop foreman on occasion.
- [16] The Board case manager interviewed the worker and prepared a memo dated October 15, 2012. The worker made the following complaints:
- The workload was heavy and he was under time pressures. He could not complete the work in the allotted time.
 - His co-workers took so many breaks it impeded the ability to complete the work. This attitude was encouraged by his co-workers who chastised him for trying to work hard.
 - His partner “talked bad” about him.
 - He was forced to complete incorrect work orders and hours of work. His co-worker was engaged in this activity. He had tried complaining to the supervisor but the fraudulent completion of forms was tacitly encouraged.
 - His co-workers were drinking on the job and pressured him to do the same.
 - One of his co-workers snooped through people’s belongings, and drove too quickly.
 - They stole paint and materials from the employer’s supplies for side jobs.
 - They swore and used foul language frequently.
 - The worker had a number of complaints about mould and asbestos in buildings that was not being removed and families were moving into the buildings.
- [17] He was afraid of losing his job if he complained, as he was a temporary worker.
- [18] The worker saw his doctor again on October 19, 2012 and reported significant back pain for which he was taking Percocet. He continued to have anxiety despite medication for anxiety.
- [19] The worker’s physician provided a progress report dated November 20, 2012 indicating the worker had reported his concerns to the union, which then addressed the former co-workers, who were now angry and calling him at home, and the worker felt betrayed by the union. He was unable to sleep.
- [20] The Board case manager requested a field investigator attend the worksite and conduct interviews. The investigator filed a number of reports.
- [21] The worker’s supervisor indicated to the field investigator that on September 24, 2012, the worker presented a doctor’s note to him indicating the worker needed a month off work. He did not work that day, then worked September 25 to 27. He did not work September 28, he took this as a modified day off. The worker was handed his one week layoff notice on September 27, 2012. He did not return to work after that time.

[22] In summary, the investigator made the following observations:

- The worker reported that D would make offensive comments in front of the worker about other people, women and other ethnic groups.
- D was not the worker's supervisor but acted as if he was.
- The work pattern of frequent and long breaks stressed the worker because he was not able to finish a full day's work in the actual time he was being allowed to work.

[23] The worker provided many hours of audio and video recordings. The field investigator listened to portions of these tapes. He noted there were recordings of D telling the worker to wrap up work early, and how to fill out his time card and allocate time to jobs he did not do.

[24] There are hours of audiotapes. I have listened to those highlighted by the field investigator as well as random samples from others. The recordings capture the worker talking in normal tones to D, as well as talking to himself about events that had just transpired on the tape and his stress levels, and his concerns his co-workers were trying to make him look bad. In a tape labelled August 30, 2012, the worker can be heard talking to a co-worker, presumably F, about a plan regarding how to expose the time theft and falsification of time cards. It is also evident from this tape that the group are going for coffee outside the normal break time. On a tape labelled September 25, 2012 the worker is heard at the outset of the tape describing his symptoms and efforts to book off work on stress leave but the difficulty assessing which route he could do this with, through the union or his personal insurance plan.

[25] The case manager concluded that there was no evidence the worker was being coerced. While he may have felt peer pressure to conform to certain behaviours, there were no repercussions for not following group norms. There was a lack of evidence of threats, violence, abuse, and coercion that would be required to raise the level of activity to a significant workplace stressor.

[26] In support of his request for review, the worker provided numerous pages of handwritten notes outlining events during the time period he worked. I have reviewed these in their entirety. In summary and of relevance, the worker indicated that he experienced the following:

- He had a prior falling out with D many years prior and lost his job as a result because D was the foreman.
- He was left to work alone on large jobs he could not complete.
- He was left to work alone in an area where there may be bears and believed D did this deliberately in order to scare him.
- He was pressured into falsifying his time cards.
- His co-workers pressured him into taking prolonged breaks with them.

- His co-workers drank alcohol on the job and took items from the site that did not belong to them. This included abandoned bicycles, tires, and paint supplies.
- Given his age and difficulty finding work, he was concerned that he would be the one dismissed if there were problems found with the time cards, while D would receive minimal punishment.
- D told him if he said anything about alcohol consumption he would be in “big trouble” and gave him a nasty look. The worker stated it was his conclusion that he would be assaulted or worse, an accident caused to hurt him.
- Co-worker F said that if he did not do what he was told, the brothers and D would send him down the hill to the EI (Employment Insurance) office. The worker then goes on to say this was the least that could be done, the worst was they would harm him physically and disable him from working. He wrote, “...you may say I am reading all this into it I am not you can just feel it in the air. The tension. You need a butcher knife to cut it.”
- He did not know if his co-workers were drinking all day or not, but as they were drinking twice a week at the end of the day, he was concerned they were intoxicated all the time, and he had to drive with them.
- D would play “chicken” when driving on the grounds with other workers, and there was a possibility there could be an accident.
- D would watch when he was filing out his time cards and speaking to other people. He would hide and jump out at the worker to startle him.
- The worker was concerned he would get into trouble, be charged criminally, go to jail, and have a criminal record which would prevent future employment, because of the falsification of his time cards.
- D would tell him to do what he was told regarding the painting tasks and time cards or else D would tell C about it. The worker did not know what that meant, if C would beat him up or stop extending his contract, which threatened his livelihood and ability to pay his bills and he would be left homeless.

[27] The worker described anxiety and panic attacks, being argumentative at home, feelings of inadequacy, and losing motivation. He described feeling paranoid at work and at home, being unable to attend to his personal hygiene, and a variety of other symptoms.

[28] He noted that there was more than one way to do the job, but work had to be done the way the three brothers and D wanted, or they would make working there unbearable. He had to pretend to be someone he was not.

[29] The worker said he had dreams about car accidents because his co-workers were drunk and it would be covered up by the employer, that he would be convicted of theft and fraud, and go to jail where he would die of old age or be killed by an inmate for not following jail house rules. He did not know whom he could trust to go through the proper channels at work to deal with the problems.

- [30] The worker's representative also provided an opinion prepared by Dr. Dunn, psychiatrist, on February 28, 2013. Dr. Dunn noted the worker had been referred to the urgent referral clinic for an assessment related to "probable depressive disorder, reactive from events at work."
- [31] The worker reported he was separated from his common-law partner for the past several months but they were working on the relationship. The worker described depressive symptoms over the prior six months. The worker reported harassment by co-workers, in particular one person who was verbally abusive and hit him in the back of the head. This hitting had stopped but the verbal abuse continued. The worker felt hopeless and helpless to deal with the situation. The worker had lost his job 18 years prior after a conflict with this person. The worker felt there was pre-existing animosity to him from this person based on their past. The worker began to have anxiety attacks and then frank panic, and then developed depressive symptoms. The worker cited drinking at work, playing chicken on the road, and falsifying time cards. The worker indicated he drank six beers a month and used marijuana approximately once a week; however, stated that in his current condition, using marijuana made him more paranoid than normal.
- [32] Dr. Dunn noted the worker's speech had an anxious quality to it, and the worker's thought content was remarkable for the injustices done to him at the worksite in question.
- [33] Dr. Dunn believed the worker's symptoms met the criteria for major depressive disorder with generalized anxiety disorder and panic attacks. The symptoms developed in the context of psychosocial stressors related to the workplace, and according to the worker's report, being bullied by co-workers to the point where he was fearful that he would lose his job. The depression and anxiety worsened from there and went on to affect his relationship with his girlfriend. The worker denied any past psychiatric history. The worker expressed some suicidal ideation and thoughts of revenge, however indicated he would not follow through with these actions.
- [34] Dr. Dunn provided an Axis I diagnosis of Major Depressive Disorder, with generalized anxiety disorder with panic attacks; Axis II was deferred; Axis III diagnosis was general aches, pains, and headaches; and Axis IV was conflict in the place of employment with co-workers that had resulted in the worker's current emotional and behavioural state of distress. The worker's Global Assessment of Function was 45.

Oral Hearing

- [35] The worker said he started working with the employer on June 4, 2012 as a maintenance worker on a two week contract or permit basis.

- [36] The worker provided evidence that he had worked with D and B in the past. On that occasion, D was the supervisor. The worker had finished his work early and the two men got into an argument regarding quitting early, so the worker had done some sanding for 10 minutes, and when he returned to the shop, D chastised him in front of the crew for being lazy. The worker said D told him to go look for work elsewhere, however when he called in and asked to be re-assigned to a different area he was told he had been laid off.
- [37] The worker said the brothers A and B and their long time friend D bullied and harassed him. The worker said that D wanted him to misrepresent his work on the daily time cards and when he would not comply then D began calling him names.
- [38] The worker described the normal workday as heading into the office, receiving the work orders, and then going to a coffee shop for an unscheduled break before heading to the work area. The crew was regularly told to stop working 10 minutes prior to the official break time, at which point they would drive back to the shop, have a 50 minute coffee break, and then resume work. Lunches were an hour long. The workers were entitled to 15 minute breaks and 30 minutes for lunch. He usually worked with D; however, he was often left alone to work.
- [39] The worker said frequently the crew would quit early and then drive around for the remainder of the day to kill time, or go to other work areas to talk to other staff. Often on Thursday and Friday, when all three brothers were on site, they would go to C's shop and drink alcohol until after quitting time.
- [40] The harassment he was subjected to took the form of inappropriate jokes (using foul language and references to sex acts) directed at his ethnic heritage, signing out extra paint for personal use by the brothers, and slapping him on the head.
- [41] The jokes the worker described were directed at his ethnic heritage. There were also statements about how people of his culture could not manage money, their country was in turmoil and badly run, and other comments of this variety.
- [42] His co-workers told him that he ate like a pig eating out of a trough. He was mocked for dressing in "whites" which the worker considered appropriate as he was a painter. The worker said he could not say anything to his co-workers about these comments and jokes because the men were all friends and would be disrespectful towards him if he did.
- [43] The worker said he could not go to the foreman, C, because the brothers were best friends with D. The worker said while one of the brothers seemed decent, he could not trust him as he could not trust anyone there. While that brother did not make any jokes directed towards him, he did laugh at the jokes of the others.

- [44] Worker E was never the target of any jokes or jibes from D or the brothers. When the worker complained to E, he reportedly said not to worry about it; it was all just in fun. The worker said F would not have lunch with the crew because he was tired of listening to the jokes and behaviour.
- [45] The worker said the crew thought it was funny that they were not working hard and making use of the employer's supplies for personal projects.
- [46] He believed the brothers were jealous and did not want him talking to management about the time cards because he was good and fast at his job. The brothers were overcharging management for the work they did by falsifying hours, so did not want him talking about that.
- [47] The worker said D slapped him in the back of the head a dozen times when it was time to pack up for the day. When he told D that he did not like the swearing, name calling, or slapping, D told him it was all in fun and compared the crew to the "Three Stooges" comedy troupe.
- [48] The worker said he would fear for his safety because the brothers would drink at work. He said they drove the work vehicles quickly around the site; they did not stop at signs or use turn signals. He participated in the drinking at work twice, however when he learned this was the weekly norm he felt it was wrong, and would stop after the second glass or pour it out into the garbage.
- [49] He was told he would be "in a world of shit" if he told anyone what was going on. He was not certain if this meant he would be fired or physically harmed. He took this as a threat and said he did not believe he could trust anyone at the worksite.
- [50] He was afraid of losing his job if he spoke out, and feared for his safety and well-being because of the group's conduct. He was told by D to do as D said, or he would talk to C and the worker would be collecting unemployment benefits for his next cheque.
- [51] When asked about the frequency of the ethnic or sexual jokes, the worker said this occurred almost every day, and then said every other day for certain.
- [52] The crew would be given four or five work orders which should be done that day, and D would tell him to put 8 hours on only one and then put his own hours on the rest, but without having worked on those orders, to make it look like D was a good painter. The worker said he talked to C about this a few times but was told to just do what D said. The worker said he was very uncomfortable with this.

- [53] He was also told to take extra paint from the supplies, and he did not feel very good about this and was worried about the repercussions. D would watch over him when he was filling out the time cards to ensure the worker was doing it the way he wanted it done. However, he kept his own personal time cards and gave these to F's wife when he left, she was the person who assigned or dispatched the work orders to the crew.
- [54] He talked about this with members of the crew, all of whom were present when it was happening, but he did not report it to management because he did not know whom he could trust. The worker said F told him not to make waves. He needed to work on the sight for 9 months to earn "call-back" rights with the union, and F told him that other people made waves and were not called back. The worker said F's wife told him she knew what was going on with the painting crew but it was hard to do anything about it.
- [55] The worker said the maintenance manager came in a few times, and knew about the extended breaks but never disciplined anyone. The worker said he therefore did not know whom he could trust, as everyone in the union was friends with everyone else. He did try to file a grievance through the union but this was never acted on. He went to the Labour Board in September 2013 with a complaint.
- [56] The worker said the harassment towards him continued until early September 2012, and lessened when the employer's busy season began and there were more people in the area around the workers.
- [57] He became depressed over the situation and developed anxiety, which he took medication to treat. He could not do his job in a safe way because he could not focus and his work was taking longer to complete. He was not sleeping well, he was overeating, and he was worrying about what was going to happen. This affected his relationship with his girlfriend, her sons, and his family. There are ongoing grievances with his union and the employer. There had been a confidential human rights settlement for indignity and impact on his feelings. The worker said his co-workers were ultimately disciplined by the employer for the theft of paint but not for their behaviour towards him.
- [58] In response to questioning by the employer's representative, the worker said he believed D was telling him what to do in an effort to make him look inept, for example by not "cutting in" properly. The worker said he did not know why D was doing this. He also said he did not follow such directions from D; rather he would cut in and do his work in the right way. The worker said D was not his supervisor but would try to act as if he was to make his day harder, because he was a vindictive person.
- [59] He felt the ethnic jokes made by D were an attempt to put him down, oppress him, and hurt him. He considered the name calling, jokes, slapping him on the head, the lack of professionalism on the job site, and putting him "down" to be significant stressors. He felt the brothers and D were trying to get him to commit fraud and become involved in their corruption.

- [60] He said driving with D was traumatic because he did not know if D was impaired by alcohol. He was concerned even about working on an extension ladder with D. He cited the instances of playing “chicken” in the vehicle, and said D had backed up into posts a few times. D would speed when driving and not stop at stop signs.
- [61] He was being argumentative with people in his life because of the situation at work and this was stressful. This led to a temporary separation from his common-law partner in October 2012.
- [62] Other environments he worked in had more professionalism; the workers were accountable for how they spent their time and how they spoke to people. He said the language amongst his co-workers on many job sites could be coarse, people may call each other a “goof”, but when speaking to management the language would be cleaned up. There was vulgar language, he acknowledged, but said this was not directed at individuals; rather it was used in more general terms.
- [63] The worker denied making a joke about ethnic groups himself. The worker said it was possible to tell when someone was joking or not, because if they were not joking the comments would come across in a hurtful way.
- [64] There was not one single event that triggered his complaint to the union; rather it was the combination of events. He had never seen D or anyone else on the crew carry out on a threat, but noted that “these people are smart. They are not going to do something to someone in front of witnesses.”
- [65] He did not request a transfer to another job because of his age, and all the union shops are full in mid-season. He did phone around looking for other work but found nothing. The worker said he did not initially want to leave this employer as he thought the behaviour would taper off and stop, but it did not.
- [66] The worker acknowledged in response to questions from the panel that D did make jokes about F and his wife, and may have called another worker lazy. He said the three brothers also made remarks to him, not as frequently as D, but did make comments of a sexual nature about F and his wife, and the worker and his girlfriend.
- [67] He considered sitting with F at breaks and for lunch to avoid the comments directed at him, but he did not want to be a burden to F so he would go and eat alone outside of the paint shop. The worker said he mainly sat and talked with his co-workers because he felt that if he did not put up with their “nonsense” he would not be employed.
- [68] The conversation on the tapes he had supplied seemed normal because he wanted things to smooth out, so he was not arguing with anyone. He was joking around because he was just trying to get along. He insisted there were also times he was

being yelled at and told to falsify his time cards on the tapes, and of him being called a “dink head.” The worker said he was just trying to work long enough to be eligible for EI benefits.

[69] After working with this employer for six to eight weeks he started feeling depressed and having anxiety attacks. He initially thought he was having a heart attack because of the chest pain and shortness of breath. He did not go to the doctor initially because he deduced from searching the Internet and his girlfriend’s medical journal that he was only having a panic attack.

[70] The employer claimed the worker was given notice his contract was ending on September 27, 2012 but the worker claimed he never received this. He did not return to work after that date because he felt he was not capable of doing his job duties. He could not concentrate or focus, and did not want to endanger anyone. He noted he worked with knives, ladders, spraying machines, chemicals, and solvents and therefore needed to be safe. The worker acknowledged his relationship with his girlfriend broke down in this time period and he moved out of the home in October 2012 for four to six weeks. He acknowledged he used Percocet for low back pain, but did not use it when he was at work.

[71] The worker said that if he knew someone, he would make jokes but if he did not know someone, he would not be offensive to them. The worker said in most workplaces no one was “riding” you other than the foreman, and said some to basically all of his former worksites were “pretty normal. No one made jokes about ethnicity. He stated when the foreman and the boss were not around the situation would be pretty relaxed, and when they were around, everyone would try to look like they were working. He said construction was a “dog eat dog” business where people would talk bad about others because they were good tradesmen. The worker said he was doing his work fast and efficiently for the employer in 2012. He believed others on his job site were talking bad about him because they knew he was good, and if you are better than the person running the job, they will “talk bad” about you.

[72] F told him that there was a lot of work, and he thought he would be able to continue with the employer. He did not keep working after September 27, 2012 because he had a nervous breakdown.

Submissions

[73] The worker’s representative submitted that the worker experienced a series of significant work-related stressors in the course of his employment. The worker’s evidence met the test in policy because of the intensity and duration of the harassment and bullying. The worker had been in the industry for many years but the dialogue between workers, while there was swearing, had not approached anything near this level in terms of personal attacks.

- [74] The worker's experience was far outside the norm even for the painting and the construction industry. The policy provided that interpersonal conflict was not significant unless it was threatening or abusive. The evidence confirmed the worker's situation was more in line with bullying and harassment than interpersonal conflict. The worker provided evidence he feared he would lose his job if he resisted his co-workers, and this put the actions into the category of bullying and harassment. The behaviour of D towards the worker was threatening and abusive.
- [75] Practice Directive #C3-3 provided that conduct intended to degrade or humiliate an individual was bullying and harassment, and in this case, the actions of D were clearly intended to humiliate and degrade the worker.
- [76] The employer's representative submitted that the workplace behaviours were not a significant enough stressor or event to trigger the harassment and bullying policy. There was a prior bad relationship between the two men. The representative also argued that jokes and behaviour described by the worker was not uncommon in the industry. He argued that the dispute arose outside of this employer's workplace, as in the example of a divorced couple working for the same employer. He argued it was not water under the bridge as suggested by the worker, it was an ongoing dispute.
- [77] The worker's representative replied in rebuttal that there was a negative interaction between the worker and D in the past, however it was over 15 years prior and was a relatively short working relationship. The worker's contract had been renewed several times over the summer and if D did not like him personally he could have had him laid off or dismissed sooner. While it was generally accepted there was profanity in the worksite, what the worker experienced was directed at him personally and was personal and nasty only towards him and F. Even if the behaviour was in the line of the behaviour in the industry, a decision should be made that it was unacceptable.

Reasons and Findings

- [78] At the oral hearing, the worker downplayed his past conflict with D, and insisted it was water under the bridge between the two of them. However, I note that his prior relationship with D was brought up in his own notes or records that were provided to the review officer, and mentioned to the field investigator and to Dr. Dunn. I do not accept the worker's statements at the oral hearing that there was no bad blood between the two men as this is not consistent with his prior statements provided closer to the events. I find that the worker and D had a prior workplace dispute many years prior, and the worker lost his employment as a result. For reasons set out below, this is a significant part of the evidence.
- [79] In November 2013, the Board introduced policies to help workers and employers prevent and address workplace harassment and bullying. Although this was implemented after the claim in question, I refer to the Occupational Health and Safety (OHS) Guidelines G-D3-115(1) – 3 *Bullying and harassment* for assistance in assessing

the meaning of "bullying and harassment" in the workplace and how this interacts with the Act and policy #C3-13.00.

[80] The guideline provides at D3-115-2, in part:

What is "bullying and harassment?"

"Bullying and harassment" is defined in the Policy as including "any inappropriate conduct or comment by a person towards a worker that the person knew or reasonably ought to have known would cause that worker to be humiliated or intimidated, but excludes any reasonable action taken by an employer or supervisor relating to the management and direction of workers or the place of employment."

There are a number of elements in the definition, which are described below.

"Conduct or comment"

The use of these two terms is intended to indicate that a broad spectrum of behaviour is captured in the definition. It includes not just words, but actions, gestures and other behaviours.

Examples of conduct or comment that might constitute bullying and harassment include, but are not limited to, the following:

- Verbal aggression or insults; calling someone derogatory names
- Vandalizing a worker's belongings or work equipment
- Sabotaging a person's work
- Spreading malicious gossip or rumours about a person
- Engaging in harmful or offensive initiation practices
- Physical assault or threats (this would also constitute "violence" or "improper activity or behaviour")
- Making personal attacks based on someone's private life and/or personal traits
- Making aggressive or threatening gestures
- Engaging in targeted social isolation

While a number of these examples will involve overt or easily observable behaviours, bullying and harassment can also include more subtle and less obvious conduct or comment. Whether any conduct or comment will constitute bullying and harassment will depend on the context, and whether the individual engaging in the conduct or comment knew or reasonably ought to have known that the worker subject to it would be humiliated or intimidated.

...

"Knew or reasonably ought to have known would cause that worker to be humiliated or intimidated"

The use of the phrase "knew or reasonably ought to have known" creates an objective standard for bullying and harassing behaviour. That is, the test of whether any conduct or comment is bullying and harassment includes the following:

- The person knew his or her conduct or comment would cause that worker to be humiliated or intimidated, or
- **A reasonable person would have considered the conduct to cause humiliation or intimidation to that worker.**

Even if the person alleged to have engaged in bullying and harassment claims to be unaware that the behaviour was humiliating or intimidating, the behaviour may still be bullying and harassment if a reasonable person in the same situation would have known the behaviour was humiliating or intimidating to that worker. The use of this phrase ensures that anyone engaging in offensive behaviour cannot be "willfully blind" to its effects, nor can the behaviour be excused on the basis that the person engaging in the behaviour didn't intend it to humiliate or intimidate the worker.

The use of the phrase "that worker," means that the characteristics of the worker who is the subject of the alleged bullying or harassment need to be taken into account in determining if the conduct or comment would be humiliating or intimidating. Conduct or comments that one worker may accept or tolerate might cause a different worker to be humiliated or intimidated. (Emphasis added)

What is *not* bullying and harassment?

The definition of "bullying and harassment" specifically excludes reasonable action taken by an employer or supervisor relating to the management and direction of workers or the place of employment.

Management and direction of workers or the place of employment include, for example, decisions relating to the following:

- Job duties or the work to be performed
- Workloads and deadlines
- Lay offs, transfers, and reorganizations
- Work instruction, supervision, or feedback
- Work evaluation
- Performance management
- Discipline, suspension, or termination

While the employer may exercise its authority to make legitimate management decisions, this does not mean that these decisions can be undertaken in a manner that would constitute bullying or harassment.

- [81] The evidence in this matter indicates that many of the behaviours of his colleagues offended the worker. These ranged from swearing to off-colour jokes, racist remarks, discussing women in sexual terms, use of nicknames, and discussing disagreements with decisions of the employer's management group. I do not consider this behaviour, which is undoubtedly unacceptable in the workplace and should not be condoned, to be bullying or harassment. The behaviour was not targeted at the worker, nor was it intended to intimidate or humiliate him. It appeared to be the normal and accepted behaviour amongst this group of individuals. The worker himself can be heard swearing and telling sexist jokes on the audiotape he provided to the Board.
- [82] The evidence also indicates that the worker had disagreements with his colleagues over the proper manner in which work should be performed, ranging from prepping of surfaces to how product should be applied. I do not consider this to be harassment or bullying. It is not unusual for individuals to have a difference of opinion on how tasks should be performed. While this may be a source of interpersonal stress, it does not constitute harassment or bullying unless it is said in a manner that intimidates or humiliates another. For example, a public chastising about quality of work would be an attempt to humiliate a co-worker, whereas disagreeing about the need to prepare an area for painting or how to apply the paint is not. The worker believed that the co-worker D was attempting to make him look "bad"; however, there is no evidence to substantiate this other than the worker's own thought process. This does not meet the reasonable person test
- [83] Similarly, the actions of D regarding looking at other people's belongings and reportedly helping himself to abandoned or stored items is also not an act of bullying or harassment. These actions were not directed towards the worker and cannot be viewed as attempts to intimidate or humiliate him. The fact that a co-worker's behaviour is repugnant or offends another person's moral code and causes feelings of stress or anxiety is not sufficient to meet the definition of bullying or harassment because it is not directed towards the individual with intentions to humiliate or intimidate. The actions of D playing "chicken" on the road or not stopping at stop signs is poor judgement and foolish, but it is not an attempt to bully or harass the worker.
- [84] However, on the subject of time fraud, I accept the worker's evidence that there were significant amounts of time spent not engaged in productive work. There were frequent, unscheduled, and prolonged breaks and the workday ended early. D would remove the worker's tools from his hands and tell him to pack up. This was recorded on the audiotapes taken by the worker. D gave the worker a slap or cuff on the back of the head when he was telling him to knock off work early. The physical act towards the worker by D did stop after the worker expressed his displeasure, however D continued to take away his tools and insist they stop working.

- [85] On the audiotapes many of the conversations the worker recorded are conducted in a civil manner. There are no overt threats or aggression towards the worker. There are, on occasion, significant amounts of angry swearing from an individual, I believe to be D, as he complains about various issues, other drivers, etc. D can be heard telling the worker how to complete his time cards, in one example when the worker notes that he did not work on a particular job, D tells him to say he was there, and to assign two hours to it.
- [86] The worker's evidence at the oral hearing was that he was just trying to get along because he wanted to keep working. It is consistent, in my view, for the target of bullying and harassment to attempt to go along and not retaliate or be belligerent in response. This is the very nature of bullying and harassment, that one party targets another who is unlikely to fight back.
- [87] When the worker complained to C, who was in charge of the crew, about the lengthy breaks and incorrect information on the time cards, he was told not to worry about it. He was frequently warned by D not to speak to management, and to do as D said or else C would be informed. F advised the worker in a non-threatening way that if he wanted to work long enough to earn his hours for EI benefits or call-back rights and ongoing employment, he needed to go along with D's and the brothers' ways. It is important to remember that the worker had been recently unemployed, having lost a long-term contract position. He was anxious to obtain employment. The worker wanted to work hard and do a good job, and felt the actions of D and the rest of the paint crew were preventing this, as he could not get his work done in the time he was allowed to work. He was told if he complained or told management about his concerns, he would be "in a world of shit." He felt watched, monitored, and harassed by D.
- [88] I think a reasonable person would conclude that this aspect of D's behaviour and to a lesser extent that of C as the shop foreman was an attempt to bully and harass the worker, as he was being intimidated into going along with the rest of the crew's work ethic or lack thereof. It is inconceivable that D would not be aware the worker wished to obtain renewal of his contracts and call-back rights. Both of the men were aware that after a prior workplace conflict, the worker lost his job. While D was not the worker's supervisor, there was a power imbalance between them resulting from their prior relationship and D's strong connections with the three brothers and, in particular, the foreman, C.
- [89] I also consider the description of the nicknames and jokes directed towards the worker regarding his weight and personal hygiene, as well as jokes about his ethnic heritage, to be an attempt to embarrass and belittle the worker. This is a conclusion a reasonable person would reach.

- [90] Some of the evidence in this matter is troubling, in that the worker displayed paranoid thoughts and catastrophized possible outcomes in his writings. For example, the worker's notes indicated he was fearful of being beaten up to the point he was disabled, of being jailed for falsifying a time card, and dying in jail.
- [91] I refer to the OHS guidelines mentioned above, in particular the statement that it is necessary to consider the characteristics of the worker who is the subject of the alleged bullying or harassment, as conduct or comments that one worker may accept or tolerate may cause a different worker to be humiliated or intimidated. This introduces an element of subjectivity into the assessment of the conduct; however, I do not consider the guideline to imply that the characteristics of an individual worker are the primary consideration.
- [92] In the current matter, not all people would object to being told to falsify time cards or taking long and extended breaks. In this worker's circumstances, he was being asked to participate in conduct he did not personally agree with, and which he was concerned would jeopardize his chances of securing other employment. The evidence leads to a conclusion that the worker felt harassed and intimidated by his co-workers, in particular C and D, to comply with this behaviour.
- [93] The worker indicated in his initial visits to his physician that he was having difficulty with senior co-workers and their work ethic, and being counselled to commit fraud. In the audiotapes from late September 2012 the worker can be heard describing his symptoms both to himself and to a co-worker in a similar fashion to that elsewhere on the claim file. I also consider it relevant that the worker was so upset by his colleague's behaviours that he felt compelled to audiotape his workdays in an effort to gather evidence and protect himself.
- [94] This documentation included a video of the group of men in a small room with numerous open bottles of wine and liquor. It is not possible to determine what time of day this video was recorded, and if this event occurred during work hours, however it does confirm the worker's account that there was use of liquor on the employer's premises.
- [95] I refer to the opinion of Dr. Dunn, that the worker developed Major Depressive Disorder with generalized anxiety disorder with panic attacks, as a result of conflict with his co-workers. I note that in the letter to Dr. Dunn requesting an opinion, the worker's representative advised the worker's claim for a mental disorder due to bullying and harassment was denied, and then asked three questions, including: "In your opinion, did the bullying described by (the worker) cause or contribute to his psychological condition?"

- [96] Whether the worker was bullied in the workplace is an adjudicative finding of fact. The worker's representative runs the risk of having Dr. Dunn's opinion be given less weight when the questions are asked in such a leading fashion. A more objective question would be, "In your opinion, what is the cause of the worker's psychological condition?"
- [97] However, Dr. Dunn characterized the cause of the worker's mental disorder as conflict with his co-workers, and used other objective language in providing his opinion and describing the information provided by the worker. I therefore accept and place weight on this opinion despite the leading questions from the worker's representative. The opinion was based on a thorough interview of the worker. It is the only opinion from a psychologist or psychiatrist on this issue before me. The worker's reported statements to Dr. Dunn are consistent with those contained elsewhere on the file.
- [98] I also place significant weight on the nature of the audiotapes, which the worker started compiling in July and August, well prior to the employer's decision to lay him off. The worker can be heard discussing exposing the time fraud by his colleagues with F, which I consider evidence of how significant the worker viewed this situation. The worker was seeking medical treatment and time off for his stress and panic attacks by the end of August 2012, well prior to the layoff. I therefore find the worker's reaction was to the harassment and bullying in his workplace, not to the employer's decision to conclude his employment.
- [99] The legislation requires that the predominant cause of a worker's mental disorder be either a traumatic event, or series of events, or a significant stressor including bullying and harassment. It is not enough that the event or stressor be of causative significance, as it is with other compensable injuries. I interpret this to mean that the stressor must be a primary component in development of a mental disorder as opposed to one of many factors. In my view, it is difficult, if not impossible, to differentiate how the worker was responding to his co-workers' various behaviours and which one would be of more significance than another in the onset of a mental disorder. I note that Dr. Dunn lumped all of the behaviours together and did not differentiate among them.
- [100] I am persuaded by the worker's emphasis on the fraudulent time cards and prolonged and frequent breaks which included drinking alcohol and the behaviour of his co-workers in this regard that this was the most predominant stressor he was experiencing in this workplace. He mentions this very frequently in his writings. On the audiotapes, the worker emphasizes these incidents by repeating them under his breath after they occur, or by making pointed references to the fact they are going for coffee. The discussions about the manner in which work should be performed, swearing and other behaviours the worker objected to did not, in my view, reach the same level of predominance in the worker's concerns. I am satisfied that the worker's stress would not have advanced to the point he sought medical treatment for depression and panic attacks if he was not being counselled and intimidated to falsify his time reports and prevented from completing his full work hours.

- [101] In the alternative, section 250(4) of the Act requires WCAT to decide a matter in the worker's favour when the evidence is evenly balanced. Given the inherent difficulty in parsing out the psychological reactions of an individual to a series of stressors, a reasonable argument could be made that the evidence on this limited aspect of the appeal is evenly weighted, and a decision must be made in the worker's favour.
- [102] I find that the worker was subjected to bullying and harassment in his workplace which was intended to intimidate him into complying with time theft in the form of unauthorized and extended breaks from work. I find this bullying and harassment was a predominant cause of the worker's diagnosed depression with generalized anxiety and panic attacks.
- [103] I do not consider the remainder of the behaviours by his colleagues that the worker took issue with to constitute harassment or bullying.
- [104] I allow the worker's appeal.

Conclusion

- [105] I vary the Board's decision set out in *Review Decision #R0155234*, dated July 12, 2013. I find the worker developed a mental disorder in accordance with section 5.1 of the Act as a result of workplace harassment and bullying. The worker's file is returned to the Board for further adjudication on the worker's entitlement to benefits, if any, as a result of this decision.
- [106] The worker requested reimbursement of expenses in the form of transportation to the oral hearing. As the appeal was successful, in accordance with WCAT standards, I order the Board to reimburse the worker this expense, to the limit of the existing tariffs.

Sherryl Yeager
Vice Chair

SY/hb