Noteworthy Decision Summary

Decision: WCAT-2014-02340 **Panel**: Elaine Murray **Decision Date:** August 5, 2014

Section 5.1 of the Workers Compensation Act – Mental disorder – Diagnosed mental disorder – Policy item #C3-13.00 of the Rehabilitation Services and Claims Manual, Volume II

This decision is noteworthy for its discussion and application of policy item #C3-13.00 of the *Rehabilitation Services and Claims Manual, Volume II* (RSCM II) to a section 5.1 of the *Workers Compensation Act* (Act) mental disorder claim.

The worker, a nurse, filed a claim for compensation for stress and anxiety. The worker was named in a lawsuit brought against the employer hospital, and the resulting involvement in the litigation process forced the worker to re-experience a stressful workplace incident. The Workers' Compensation Board, operating as WorkSafeBC (Board), denied the worker's claim and the Review Division upheld the Board's conclusion, though on different grounds. The worker appealed to WCAT.

WCAT considered the questions outlined in policy item #C3-13.00 of the RSCM II and allowed the worker's claim finding the worker satisfied the criteria for mental disorder under section 5.1 of the Act. The worker had a diagnosed mental disorder, and identifiable workplace events and stressors were found to exist. The worker's involvement in the litigation process was not a traumatic event, but was a significant work-related stressor that was reasonably incidental to her employment. Though the worker experienced other life stressors, the medical evidence and opinions indicated that involvement in the litigation process was the primary cause of the diagnosed mental disorder.

Workers' Compensation Appeal Tribunal
150, 4600 Jacombs Road, Richmond, B.C. V6V 3B1
Telephone: (604) 664-7800; 1-800-663-2782; Fax (604) 664-7898

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Panel: Elaine Murray, Vice Chair

Introduction

[1] The worker is a registered nurse who works in pediatric care in a hospital. In November 2012, she filed a claim for compensation with the Workers' Compensation (Board), operating as WorkSafeBC, for severe stress and anxiety she attributed to the recent repercussions of a workplace incident that occurred in April 2006. At that time, she was a licensed practical nurse in the hospital. She was caring for a child who nearly died as a result of a hemorrhage. Subsequently, in April 2012, the worker was named in a lawsuit the child's family brought against the hospital. As a result, between July and November 2012, she was required to provide her evidence in the litigation process. This forced her to re-experience the April 2006 incident. She went off work as of November 15, 2012, and was referred for psychological treatment.

[2] By decision dated February 27, 2013, a Board case manager determined the worker's claim was barred by statute because she did not file her claim within one year of April 2006. The case manager also indicated that the worker's claim would have been denied in any event because she had not been diagnosed with a mental disorder, as required by section 5.1 of the *Workers Compensation Act* (Act).

[3] The worker requested a review of the case manager's decision. On October 11, 2013 (*Review Reference #R0159648*), a review officer decided the worker's claim was not statute-barred because the one-year time frame for filing a claim ought to have been measured from July 2012. The review officer also had new evidence confirming a diagnosis as required by the Act; however, she was not satisfied that all of the other requirements of section 5.1 had been met. She therefore denied the worker's request for review.

[4] The worker appealed the review officer's decision to the Workers' Compensation Appeal Tribunal (WCAT). The employer is not participating in this appeal. The worker provided a written submission and new evidence on appeal. She did not request an oral hearing. I am satisfied that one is not necessary to properly decide this appeal.

Issue(s)

[5] The sole issue is whether the worker is entitled to compensation under section 5.1 of the Act for a mental disorder arising out of and in the course of her employment.

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Jurisdiction

[6] This appeal was filed with WCAT under subsection 239(1) of the Act. Section 254 of the Act gives WCAT exclusive jurisdiction to inquire into, hear, and determine all those matters and questions of fact, law, and discretion arising or required to be determined in an appeal before it.

[7] Under subsection 250(1) of the Act, WCAT may consider all questions of fact and law arising in an appeal, but is not bound by legal precedent. WCAT must make its decision on the merits and justice of the case, but in so doing, must apply a policy of the Board's board of directors that is applicable in the case. The *Rehabilitation Services and Claims Manual, Volume II* (RSCM II) contains the published policy applicable to this appeal. All references to policy in this decision pertain to the RSCM II, as it has read since July 1, 2012.

Applicable Law and Policy

[8] Section 5.1 of the Act provides:

> 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[1] 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.

[1] Referred to as the DSM.

[9] Subsection 5.1(1)(c) of the Act is not a factor in this appeal and will not be further addressed.

[10] Policy item #C3-13.00 is applicable to claims under section 5.1 of the Act. It basically breaks down the adjudication of mental disorder claims into five key questions:

- Does the worker have a diagnosed DSM mental disorder?
- Was there one or more events, or a stressor, or a cumulative series of stressors?
- Was the event "traumatic" or the work-related stressor "significant"?
- Causation (Was the mental disorder a reaction to one or more traumatic events arising out of and in the course of the employment, and/or was the mental disorder predominantly caused by a significant work-related stressor, or a cumulative series of significant work-related stressors, arising out of and in the course of the worker's employment?
- Was the mental disorder caused by a decision of the employer relating to the worker's employment?

[11] Again, the final question is not relevant on this appeal.

Background and Evidence

[12] On November 27, 2012, the worker's family physician, Dr. Sparks, reported to the Board that the worker had a severe stress reaction secondary to a work incident in 2006, which now involved a lawsuit, and this had led to significant stress and anxiety. He advised the worker was currently unable to cope with her work. He had referred her to a psychiatrist.

[13] In a statement the worker had provided to the employer, she explained that in April 2006 she was she was left to care for a six-year-old child, who was severely hemorrhaging. At that time, she did not have any critical care training, and the child was going into shock. The child was finally rushed to the operating room, where he was stabilized. A couple of months later, she learned there might be a lawsuit at some point. At the end of April 2012, she was told that the child's family was suing the staff. The worker then began meeting with the employer's lawyers in July 2012, and this resulted in her reliving the incident in minute detail on numerous occasions thereafter. The worker felt as if she was being blamed, and this increased her stress.

[14] On December 7 and 12, 2012, the worker saw Dr. McEachran, registered psychologist, for purposes of conducting an initial assessment at the request of a rehabilitation consultant retained by the employer. In her December 17, 2012 report, Dr. McEachran provided a detailed summary of a number of stressors in the worker's life[2]; however,

[2] In addition to the litigation process, they included the worker's son suffering from several conditions/ illnesses. She was also the sole caregiver of her mother, who suffers from heart disease and renal failure. In addition, she had been a caregiver for her in-laws.

she noted the worker had been functioning well until recently. She described how repeatedly reliving the traumatic incident for the lawyers had contributed to high stress and physiological arousal levels, along with symptoms consistent with trauma. They included flashbacks, high startle response, exhaustion, emotional vulnerability, concentration and attention difficulties, feelings of anxiety, guilt and paranoia, agitation and irritability, odd dreams, and significant sleep disturbance.

[15] In Dr. McEachran's view, the worker's current symptoms did not appear to meet the DSM diagnostic criteria for Post-Traumatic Stress Disorder, or Anxiety Disorder, or a Major Depressive Episode; however, she thought the worker was experiencing a number of symptoms consistent with each of those diagnoses. She recommended the worker remain off work until January 2013; attend short-term therapy; and the lawyers should work towards reducing the amount of exposure the worker had to reliving the 2006 incident, if possible.

[16] A Board case manager also spoke to the worker in January 2013. The worker said that she had seen a psychologist (twice in May 2012) before seeing Dr. McEachran, and she had also attended some counselling through her employee assistance program (EAP) in July 2012, where she had been told that she "was doing great." By November 2012, she was no longer coping well. She kept seeing the child from April 2006 whenever she took her own child to the doctor. She described the "real pressure" as starting in July 2012 when the lawyers began questioning her (the worker was in tears when she spoke to the case manager about the questions they were asking her). I understand from the case manager's summary of their conversation that after meetings with lawyers for the employer, she was eventually examined for discovery in October 2012.

[17] The Board then denied the worker's claim.

[18] Dr. Edward-Chandran, psychiatrist, saw the worker on January 14, 2013, upon referral from Dr. Sparks. The worker also described to Dr. Edward-Chandran that there had been a number of stressors in her life over the years, including the pending lawsuit. In his February 7, 2013 consultation report, Dr. Edward-Chandran diagnosed the worker as having an Adjustment Disorder with Depressive and Anxiety symptoms. He was not asked to and did not offer an opinion on causation.

[19] On March 18, 2013, Dr. McEachran again reported to the rehabilitation consultant, after having provided a number of counselling sessions to the worker. Dr. McEachran wrote that she had reviewed Dr. Edward-Chandran's report and, after now treating the worker for several months, she concurred with his diagnosis. She explained that an Adjustment Disorder is characterized by the development of emotional or behavioural symptoms in response to an identifiable stressor or stressors occurring within three months of the onset of the stressor. The symptoms or behaviours must be clinically significant, as exhibited by marked distress that is in excess of what would be expected from exposure to the stressor, and must cause significant impairment in functioning. The stress-related disturbance cannot meet diagnostic criteria for another specific

mental disorder, and once the stressor (or its consequences) has ended, the symptoms do not persist for more than a further six months.

[20] Dr. McEachran reported the worker responded well to short-term psychological treatment, and had successfully returned to work. She recommended additional treatment to help reduce the risk of relapse in the event the lawsuit went to court. Dr. McEachran also was not asked to and did not provide an opinion on causation.

[21] The review officer was satisfied the worker had a DSM diagnosis. She was also satisfied the litigation events beginning in approximately July 2012 were significant work-related stressors within the meaning of section 5.1 of the Act. The review officer denied the worker's claim solely on the basis that she did not consider the litigation events were the predominant cause of the worker's diagnosed Adjustment Disorder, given the other stressors in her life.

[22] The worker's representative requested an opinion on causation from Dr. McEachran, who was provided with the review officer's decision as well as the relevant evidence on the worker's file. Dr. McEachran offered her opinion on February 11, 2014 that the worker's involvement in active litigation was the likely and probable primary cause of her diagnosed Adjustment Disorder. She explained that although the worker had been experiencing a multitude of personal stressors over a period of several years that strained her capacity to cope, she had managed to do so. She then reiterated that for an Adjustment Disorder to be diagnosed there must be the development of emotional or behavioural symptoms in response to an identifiable stressor or stressors occurring within three months of the onset of the stressor. It was not until active litigation began that the worker was forced to relive the 2006 incident and this then resulted in her capacity to function being completely overwhelmed to the point she met DSM diagnostic criteria and required time off of work.

[23] Dr. McEachran added that when the worker was notified there would be no further questioning until the case went to court (if it did not settle), she experienced a significant reduction in symptoms even though she still had a number of personal stressors in her life.

Analysis and Findings

Does the worker have a DSM diagnosed mental disorder?

[24] Based on Dr. Edward-Chandron's diagnosis, followed by Dr. McEachran's agreement with that diagnosis, I accept the worker was diagnosed with a mental disorder under the DSM, as required under section 5.1 of the Act.

Was there an identifiable event or events, or a stressor, or a cumulative series of stressors?

[25] Policy item #C3-13.00 explains that, in all cases, the traumatic event or events, or stressor, or series of stressors, must be identifiable. There is no question that litigation events took place in 2012 in relation to the April 2006 incident. I have no hesitation in finding them to be identifiable events or stressors.

Were the above-noted events either "traumatic" or the work-related stressors "significant"?

[26] In about July 2012, the worker was first required to participate in the litigation process by providing her evidence. In doing so, she was forced to re-experience the April 2006 incident. She was required to describe the child's presentation and near suffocation; her responses to maintain the child's airway; the child's blood loss; as well as the responses of the child's mother and other staff. She was also questioned regarding her own professional competency. She was questioned on several occasions between then and November 2012.

[27] The review officer did not consider the litigation process met the criteria for a traumatic event or incident under section 5.1 of the Act. I agree with that finding. The worker's evidence did not describe the litigation process as "an emotionally shocking event", as defined in policy item #C3-13.00 as being a traumatic event. Rather, the worker described a series of events, which the review officer thought met the criteria for a cumulative series of significant work-related stressors. Policy item #C3-13.00 explains that a work-related stressor is considered "significant" when it is excessive in its intensity and/or duration from what is experienced in the normal pressures or tensions of a worker's employment.

[28] I agree with the review officer that the litigation process beginning in approximately July 2012 was clearly excessive in intensity and beyond the normal pressures of the worker's employment as a pediatric nurse. I find that this process resulted in a cumulative series of significant work-related stressors within the scope of policy item #C3-13.00 and section 5.1 of the Act.

Causation – Was the mental disorder predominantly caused by a significant work-related stressor, or a cumulative series of significant work-related stressors, arising out of and in the course of the worker's employment?

[29] Policy item #C3-13.00 explains that the Act requires the mental disorder be predominantly caused by a significant work-related stressor, or a cumulative series of significant work-related stressors, arising out of and in the course of the worker's employment. There are two parts to this requirement. The first part is the determination

whether the significant stressor or cumulative series of significant stressors arose out of and in the course of employment. This requires the Board to determine the following:

- Did the significant stressor or cumulative series of significant stressors arise in the course of the worker's employment?

  This refers to whether the significant stressor, or cumulative series of significant stressors, happened at a time and place and during an activity consistent with, and reasonably incidental to, the obligations and expectations of the worker's employment.

- Did the significant stressor or cumulative series of significant stressors arise out of the worker's employment?

  A significant stressor or a cumulative series of significant stressors may be due to employment or non-employment factors. The *Act* requires that the significant stressors be work-related.

[30] I find that the lawsuit and the worker's need to participate in the litigation process are reasonably incidental to the obligations and expectations of her employment to conclude that they arose in the course of her employment. There is clearly a work connection. It follows that the lawsuit and associated litigation process are work-related significant stressors.

[31] In reaching this conclusion, I have considered policy item #22.23, which was in effect until changes to Chapter 3 of the RSCM II on July 1, 2010. Since that policy item was not in effect at the time of the worker's injury (in 2012), it is not applicable. I have carefully reviewed Chapter 3 since the changes on July 1, 2010, and it is apparent that policy item #22.23 was not replaced or incorporated into another policy item. Nonetheless, the concept in policy item #22.23 still warrants consideration. That policy item is contained in the portion of Chapter 3 that addresses compensable consequences of work injuries, and is one of the policies that provides examples of what type of events or situations might lead to subsequent compensable injuries.

[32] Policy item #22.23 is entitled "Criminal Proceedings", and states in its entirety:

> As an example, the claimant, a caretaker of an apartment building, became involved in a fight with a tenant and received injuries for which a compensation claim was accepted. The claimant suffered psychological problems as a result of criminal proceedings taken by the Crown for assault and his employer's suspension of him from his employment pending the outcome of the proceedings. If the charges had not been laid and the claimant had not been suspended, he would not have been disabled. While there was an undeniable link between the actions of the Crown and his employer with the compensable incident, it was too

> tenuous to make the disability which flows from these actions compensable. The reaction to the laying of charges did not arise out of and in the course of employment, but from the intervening decision of the Crown, a party extraneous to the employer/employee relationship, to proceed with criminal charges. The disability flowing from that decision was not compensable.

[33] According to this policy, a psychological injury arising from criminal proceedings is not compensable because there is insufficient work connection to bring the injury within the ambit of the Act. In particular, that the proceedings were brought by a party "extraneous to the employer/employee relationship" did not provide sufficient work connection. Although the example involved criminal proceedings, I consider that the principles applied to determine whether the psychological reaction to the proceedings was or was not compensable might also be applicable to civil proceedings.

[34] At first glance, although the actions of the worker that became the subject of the civil lawsuit were employment activities, the civil proceedings were brought by a party (the family of the child) extraneous to the employer/employee relationship. Upon closer scrutiny, however, I consider the worker's situation to differ in some critical ways from that of the employee contained in the example in policy item #22.23.

[35] First, while the child's family may be a party extraneous to the employer/employee relationship, the lawsuit itself is entirely concerned with how the worker (and others) performed their employment duties for the employer. That is not the case with the assault charges in policy item #22.23. Second, unlike the example in policy item #22.23, the employer requires the worker to participate in the civil lawsuit. Third, also unlike the example in policy item #22.23, I understand the employer is responsible for legal expenses associated with the worker being sued in the performance of her duties. In my view, these factors weigh in favour of there being a work connection. Taking these factors into consideration, along with the fact that policy item #22.23 is not applicable[3], I am satisfied the lawsuit and the worker's need to participate in the litigation process are reasonably incidental to the obligations and expectations of her employment.

[36] The second part is the determination whether the significant work-related stressor, or cumulative series of significant work-related stressors, was the predominant cause of the mental disorder. Predominant cause means that the significant work-related stressor, or cumulative series of significant work-related stressors, was the primary or main cause of the mental disorder. Since the worker also had a number of non work-related stressors in her life, this determination is at the crux of her appeal.

[3] It is not applicable because it is not contained in the version of the RSCM II applicable to the worker's claim, and also because it addresses compensable consequences of injuries. The worker's claim is for a mental disorder in the first instance, and not a compensable consequence of an injury.

[37] Without the benefit of an opinion on causation, the review officer decided the totality of the evidence suggested that the work events in 2012 were but one of many causative factors for the development of the worker's diagnosed Adjustment Disorder. She noted that the worker first sought psychological support in June 2012 (it was actually in May 2012), prior to the start of the litigation activities in July 2012. I note, however, that the worker saw the psychologist shortly after being named in the lawsuit. In any event, the psychologist only saw the worker on two occasions in May 2012, and the worker then attended the EAP program where she was told she was doing great.[4]

[38] The review officer also thought it relevant that the worker did not stop work due to her stress until November 9, 2012 (it was actually on November 15, 2012). Yet, in that regard, I note that Dr. Sparks wrote in November 2012 that the worker was not coping well "mainly" as a result of the trial issues relating to the April 2006 incident. By then, the worker had stopped working and Dr. Sparks thought a psychiatric referral was warranted. In my view, this evidence tends to support a conclusion that the litigation process may have been the primary cause of her mental distress at the time.

[39] The review officer acknowledged that both Dr. McEachran and Dr. Edward-Chandran addressed the worker's lengthy history of dealing with stressful personal issues, and she noted that both included the lawsuit as one of those stressful issues. She recognized that Dr. McEachran had reported the worker's involvement in active litigation and stressful discoveries overwhelmed her ability to function effectively at work. Nonetheless, while acknowledging the litigation process was stressful and may have precipitated the worker's leave from work, the review officer thought the preponderance of the psychological evidence established that the worker's stress resulted from significant multiple personal stressors. The evidence could therefore not support a conclusion that the litigation events were the predominant cause of her diagnosed mental disorder.

[40] I have the benefit of Dr. McEachran's February 11, 2014 opinion on causation. She is aware of the evidence and analysis in the review officer's decision, the test for causation, and the non work-related stressors the worker has faced. She has also had the advantage of treating the worker for a number of months, shortly after she stopped working. Dr. McEachran has offered an opinion that the worker's involvement in active litigation was the likely and probable primary cause of the worker's diagnosed Adjustment Disorder. She has provided a reasoned analysis for reaching that opinion. While I can appreciate the review officer's analysis of the evidence in the absence of an opinion on causation, I find Dr. McEachran's opinion to be compelling and persuasive. There is no expert opinion to the contrary.

[4] I considered obtaining the clinical notes and records from the psychologist and the EAP provider, but I do not see what they could add. If non work-related stressors led the worker to seek treatment at that time, it does not appear that the psychologist thought the worker had any diagnosable mental disorder and the EAP thought the worker was doing great. The key medical/psychological evidence is that from the time the worker was disabled from working.

[41] It follows that I rely on Dr. McEachran's opinion to find that the identified significant work-related stressors were likely the predominant cause of the worker's diagnosed mental disorder. She is therefore entitled to compensation under section 5.1 of the Act for a mental disorder arising out of and in the course of her employment.

Conclusion

[42] I allow the worker's appeal and vary *Review Reference #R0159648*. I find the worker's claim satisfies the necessary criteria under section 5.1 of the Act. The Board will determine the nature and extent of benefits flowing from my decision.

Appeal Expenses

[43] The worker seeks reimbursement in the amount of $267.70 for Dr. McEachran's February 11, 2014 psychological opinion. Item #16.1.3 of the WCAT *Manual of Rules of Practice and Procedure* (MRPP) provides that WCAT will generally order reimbursement of expenses for obtaining written evidence, regardless of the result in the appeal, where the evidence was useful or helpful to the consideration of the appeal, or it was reasonable for the party to have sought the evidence. I consider it reasonable for the worker to have sought Dr. McEachran's opinion for purposes of this appeal, and I found it to be useful.

[44] Item #16.1.3.1 of the MRPP provides that, when seeking reimbursement of an expert opinion, WCAT will usually order reimbursement of expert opinions at the rate established by the Board for similar expenses (the Board's fee schedule). Dr. McEachran's invoice for $267.70 is in keeping with the Board's fee schedule, and I direct the Board to reimburse the worker in that amount.

Elaine Murray
Vice Chair

EM/hb