NOTEWORTHY DECISION SUMMARY

Decision: WCAT-2015-00506 **Decision Date: February 16, 2015**

Panel: Debbie Sigurdson, Caroline Berkey, Terri White

Section 5.1 of the Workers Compensation Act – Section 4(1) of the Government Employees Compensation Act – Policy item #C3-13.00 of the Rehabilitation Services and Claims Manual, Volume II – Supreme Court of Canada's decision in Martin v. Alberta – Federal employees

In this decision, WCAT decided that section 5.1 of *Workers Compensation Act* (Act) applies to federal employee claims for compensation for a mental disorder on the basis that there is no direct conflict between the section 5.1 of the Act and the *Government Employees Compensation Act* (GECA).

In previous decisions, WCAT had determined that section 5.1 of the Act was inapplicable to federal employees as there was a material conflict between section 4(1) of GECA and section 5.1 of the Act. However, a recent Supreme Court of Canada decision, *Martin v. Alberta*, 2014 SCC 25 (*Martin*), called this finding into question. In light of *Martin*, the panel decided that section 4(1) of GECA could not be read as directly conflicting with section 5.1 of the Act. Thus, section 5.1 of the Act applies to the adjudication of federal employees' mental disorder claims.

With respect to the requirements of section 5.1 of the Act, WCAT found that the concept of "employment" in section 5.1 of the Act requires both a subjective and objective assessment of the working conditions normal to the worker's employment. The panel also considered the application of section 55, which sets out a time limit for an application for compensation, to this mental disorder claim.

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Introduction

[1] On August 15, 2012 the worker, a correctional officer at a federal institution, filed an application for compensation for a mental disorder as arising from a series of workplace events. On November 23, 2012 the Workers' Compensation Board (Board)[1] disallowed the worker's claim for a psychological injury as arising out of and in the course of his employment. In doing so, the Board officer considered section 4(1) of the *Government Employees Compensation Act* (GECA), and concluded the events the worker claimed were causative of his psychological condition were not unusual or excessive stressors in the worker's occupation.

[2] A review officer at the Review Division of the Board in a decision dated May 28, 2013 varied the Board decision and concluded the worker's diagnosed Adjustment Disorder with Mixed Anxiety and Depressed Mood arose out of and in the course of his employment[2]. In doing so, the review officer considered section 5.1 of the *Workers Compensation Act* (Act), and concluded a November 2010 workplace event was traumatic. The review officer further concluded that special circumstances precluded the worker from filing an application for compensation within one year of the November 2010 event.

[3] The employer has appealed the Review Division decision to the Workers' Compensation Appeal Tribunal (WCAT). The employer submits the worker failed to file his application for compensation within one year of the date of his injury, and that special circumstances did not preclude the worker from filing the application. The employer submits that labour relations issues and interpersonal conflict were the cause of or contributed to the worker's psychological injury and that the worker has not demonstrated that the alleged traumatic events were of causative significance. The employer further submits the claimed causative events were not significant work related stressors in the worker's employment capable of causing a psychological injury.

[4] The worker was notified of the appeal and is participating. The employer is represented by legal counsel and the worker is represented by his union. The employer's counsel, the worker, his representative, and two witnesses attended an oral hearing held on September 19 and October 27, 2014.

Issue(s)

[5] The issue in this appeal is whether the worker developed a mental disorder arising out of and in the course of his employment.

[6] As the worker's claimed psychological injury dates back to an event that occurred on November 22, 2010, and the worker did not file an application for compensation until

[1] The Board operates as WorkSafeBC.
[2] See *Review Reference #R0153113*.

August 15, 2012, a further issue in this appeal is whether the worker filed an application for compensation in a timely manner. If the worker filed his application outside the time period permitted by section 55(2) of the Act, at issue is whether there were special circumstances that precluded the worker from filing his application for compensation within the time allowed and whether the Board should exercise its discretion to pay compensation.

Jurisdiction

[7] Section 239(1) of the Act provides that a decision made by a review officer under section 96.2 may be appealed to WCAT.

[8] Section 4(3) of the GECA delegates to provincial workers' compensation boards the authority to adjudicate federal workplace injuries. Section 4(2) of the GECA provides that federally-regulated employees are entitled to receive compensation at the same rate and under the same conditions as are provided by provincial law; however, the GECA does not contain appeal provisions. Therefore, federally-regulated employees and their employers have the same appeal rights as provincially-regulated workers and employers, and we find we have jurisdiction to consider this appeal[3].

[9] The standard of proof in compensation matters is the balance of probabilities, subject to the provisions of section 250(4) of the Act. Section 250(4) provides that when the evidence on an issue respecting the compensation of a worker is evenly weighted, the matter is resolved in favour of the worker.

[10] The WCAT chair has appointed a three-member non-precedent panel to decide this appeal pursuant to section 238(5) of the Act.

Background and Evidence

A. Workplace Incidents

[11] The worker commenced employment as a correctional officer at a federal medium security prison (institution A) in August 2009. Prior to that, the worker had been a regular member of the Canadian military.

[12] After completion of training, the worker commenced employment in a segregation unit at institution A. On his first day of work, the worker responded to an inmate slashing his wrists and observed blood in the cell. The worker described the cuts as superficial, and, while he reflected back on the event over the next two weeks, he assumed that responding to such incidents would be part of his job.

[3] While we are not bound by previous WCAT decisions, this approach is consistent with previous WCAT panels: see *WCAT-2005-01542*.

[13] On November 22, 2010 the worker was working in one of the living units of institution A. He responded to a radio call to provide assistance in another living unit. Upon attending at the scene, the worker observed a co-worker administering to an inmate, whose face appeared blue and puffy. The worker later reported to Dr. Chopra, registered psychologist, that he was frozen and unable to provide assistance. This report is consistent with the evidence from the employer that the worker was not actively involved in providing first response to the inmate, who was deceased.

[14] At the oral hearing the worker stated that he was the second correctional officer on the scene. He confirmed that he froze in the doorframe of the cell, approximately five to six feet from the bed (where the deceased inmate lay), and did not know what to do. He stood there for approximately ten minutes while other staff arrived. The worker recalled the smell and appearance of the deceased inmate. He immediately felt like throwing up. The worker recalled feeling petrified and stated he had not seen a dead body before. He completed his shift and did not speak to anyone of the incident.

[15] The worker later learned that the inmate had been deceased for eight to nine hours at the time of response, and that the inmate had been murdered by another inmate.

[16] At the time the worker was not aware of the employer's critical incident stress management program (CISM), which involves debriefing of staff after an incident of significance. The worker testified he did not attend debriefings because he was required to remain at his post. The employer did conduct debriefings following the November 2010 incident and the minutes of a November 23, 2010 staff meeting indicate the worker was offered CISM services[4].

[17] The next day the worker asked a correctional manager for information on the workplace employee assistance program; however, when he did not receive further information, the worker did not take any further steps to contact the program but stated that he relied on his military background to cope with his reaction to the incident. The worker thought he would show weakness by asking for help and felt he had "no room to complain" [5]. He thought he had to just deal with his symptoms as part of his job.

[18] The worker experienced difficulty sleeping after viewing the deceased inmate. He experienced vomiting, stomach pains, nightmares, and flashbacks. The acute symptoms persisted for one to two months, and then subsided somewhat but did not entirely resolve. At the hearing, the worker testified that he turned to alcohol to help alleviate his symptoms and to assist him with falling asleep. His panic and anxiety affected his home life. At the time the worker did not know why he was acting the way he was.

[4] As described in the affidavit of a human resources advisor of the employer.
[5] All quotations are reproduced as written unless otherwise noted. Direct quotations from the worker are taken from his oral testimony or claim file material.

[19] When the worker was seven, his father died of cancer. Following the November 2010 event, the worker was temporarily assigned for one month to a correctional hospital facility where he guarded an inmate who was terminally ill with cancer. The worker was separated from the inmate by glass; however, he could observe the inmate choking and having difficulty breathing. The worker did not speak to the terminally ill inmate, but observed his deteriorating condition. This was the worker's only experience being posted to a hospital surveillance assignment.

[20] During the consultation with Dr. Chopra the worker reported experiencing harassment at the workplace from one particular co-worker regarding his cultural background shortly after commencing employment at institution A. At the hearing, the worker testified that he was an outsider amongst the staff because a number of correctional officers are married to each other, and because he was one of only two correctional officers that spoke his first language. The worker felt that he did not fit in with the other correctional officers at institution A. In May 2011 the worker transferred from institution A to institution B, also a medium security prison, where he continued to be employed as a correctional officer.

[21] In March 2012 at institution B the worker learned of an inmate's overdose and death while in temporary custody. The worker then experienced flashbacks to the inmate's death in November 2010. At the hearing the worker confirmed he was not involved in the response to the in-custody death in 2012.

[22] Following this, there were further incidents at institution B that caused a heightened state of awareness among correctional officers.

[23] One such incident occurred when an inmate in segregation threw bodily fluid on a correctional officer. The worker responded to the call. He made use of a shield when completing rounds that day, something he had not had to do before in the course of performing rounds. The worker had not previously encountered an incident when an inmate threw bodily fluid at a correctional officer.

[24] On another occasion, the worker became aware of death threats made towards a co-worker. While the worker was not targeted by the threats, he testified that all correctional officers were aware of the threats, which increased the stress levels and heightened attention of correctional officers at institution B.

[25] The worker experienced ongoing and increasing stress, trouble eating, difficulties sleeping, and nightmares. On August 15, 2012 the worker reported his situation to the employer and filed an application for compensation for psychological injury.

B. Medical Evidence

[26] The worker sought medical treatment on August 15, 2012 from Dr. Page, his attending physician. In a physician's first report to the Board, Dr. Page noted the November 2010 inmate death and indicated the worker was experiencing flashbacks and nightmares related to this event. Dr. Page noted the inmate's death reminded the worker of his father's death. The worker had also reported experiencing "lots of stress from management". Dr. Page diagnosed the worker with possible Post Traumatic Stress Disorder and situational stress. He referred the worker for counselling and recommended he take time off work.

[27] Dr. van Dam, registered psychologist, assessed the worker on September 10, 2012 and diagnosed the worker with Alcohol Use / Rule Out Abuse and Adjustment Disorder with Mixed Anxiety and Depressed Mood, Acute[6], pursuant to the American Psychiatric Association's *Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition, Text Revised* (DSM-IV-TR)[7]. Dr. van Dam noted the worker had experienced nightmares following the work event of November 22, 2010, but the worker tried to work through it. Dr. van Dam also noted that when the worker learned of the in-custody death in 2012, he experienced a resurgence of his memories of the November 2010 event. Dr. van Dam referred to other recent workplace events that had caused further stress to the worker.

[28] Dr. van Dam noted the worker had experienced a significant loss during his childhood with the death of his father when he was seven years of age. The worker had described providing assistance to the inmate at institution A, who was terminally ill with cancer, which brought back memories of his father's illness and death. Dr. van Dam described the development of the worker's Adjustment Disorder as follows:

> The challenges of work matters, in combination with the exposure to violence, and seeing inmates whose health concerns recapitulated his father's death, would all be viewed as having resulted in his developing an Adjustment Disorder with Mixed Anxiety and Depressed Mood. Since the condition has presumably become exacerbated this summer, the specifier Acute is proffered, and is viewed as resulting from work related events.

[29] The Board referred the worker for further psychological assessment in July 2013. Dr. Chopra diagnosed the worker with Other Specified Trauma and Stressor-Related Disorder – Adjustment-like Disorder with prolonged Duration of stressor – some panic

[6] In the body of her report Dr. van Dam diagnoses an Adjustment Disorder; however, in her summary of diagnoses at Axis I she provided the diagnosis of "Anxiety Disorder with Mixed Anxiety and Depressed Mood, Acute". We interpret this as a typographical error which should read Adjustment Disorder with Mixed Anxiety and Depressed Mood, Acute consistent with the diagnosis provided in the body of her report, and consistent with the DSM-IV-TR classification 679.28.
[7] The DSM-IV-TR is the version in effect at the time of the assessment.

symptoms, pursuant to the DSM-5[8]. Dr. Chopra noted the worker had experienced panic attacks approximately one month after the November 2010 incident, which the worker described as including sweating, increased palpitations, constriction of the throat, and occasional vomiting. The worker gradually experienced improvement in his symptoms, but not complete resolution.

[30] During the assessment by Dr. Chopra, the worker provided further details of the name-calling he experienced from a co-worker at institution A. Dr. Chopra reported the worker was tearful when describing the harassment he received because of his first language. While the employer has a policy regarding harassment and abuse, the worker stated he would be labelled a rat were he to complain. On one occasion the worker did speak with the warden regarding the treatment he received from a co-worker, but after that time the worker coped and "sucked it up". In conclusion, Dr. Chopra provided an opinion as follows:

> It appears from the above that initially after the 2010 incident [the worker] would have met the criteria for an acute stress disorder for a month and thereafter his symptoms began improving. His anxiety and workplace stress was maintained by ongoing harassment and he had ongoing panic attacks. His symptoms deteriorated when after he transferred to [institution B] he was exposed to another incident. Thereafter he was exposed to other incidents, as well as bullying, which continued to cause anxiety and stress to the point where he could not cope.

[31] Dr. Chopra noted that there were no identified pre-existing factors in relation to the worker's psychological condition. Dr. Chopra noted that the harassment the worker experienced at work was a co-existing factor that likely exacerbated his anxiety and distress.

[32] In July 2013 the Board requested chart notes from Dr. Page regarding treatment of the worker dating back to 2005. The first chart note is with regard to medical treatment received on November 22, 2011 for the worker's hip. The chart note also refers to the inmate's death one year earlier. The worker reported experiencing nightmares about the event, but declined treatment at that time. The next documented visit occurred August 15, 2012.

[33] Dr. Atkinson, psychologist, commenced treatment of the worker in September 2013. In his first report to the Board, Dr. Atkinson described the worker's psychological symptoms as moderate to severe, impairing his function with respect to most activities of daily living. Dr. Atkinson noted the worker's concept of a "stoic self" compounded his recovery. In subsequent reports, Dr. Atkinson reported improvement in the worker's symptoms. The worker has recently returned to work at institution B.

[8] The DSM-5 is the version in effect at the time of the assessment. The DSM-5 was released at the American Psychiatric Association's Annual Meeting on May 18, 2013.

C. Delay in Filing an Application for Compensation

[34] As the worker related the onset of his psychological symptoms to an incident in November 2010, the Board sought submissions from the worker regarding his delay in seeking compensation. In reply, the worker noted that prior to seeking medical attention from Dr. Page on August 15, 2012 he had not been diagnosed with a work-related medical condition. The worker confirmed that for the two months before commencing his claim, he had suffered from insomnia, night sweats, and nightmares. He had difficulty falling asleep and awoke during the night. The worker stopped engaging in social activities and avoided going in crowded places. The worker reported seeking help in August 2012 because while he had struggled with stress for a long time, his situation had deteriorated and he was no longer able to cope.

[35] At the oral hearing the worker explained he did not file an application for compensation in November 2010 because he was a new employee, with only 15 months' experience, and believed the difficulties he was experiencing were something that went along with the job. He relied on his military background to "suck it up" and "be tough". At first he denied there was a problem. He thought he could manage his symptoms alone, and did not want to be labelled. The worker testified that after the November 2010 event he thought his reaction was normal and that his symptoms would go away.

[36] The worker explained his reaction to the November 2010 event continued to affect his personal life and he experienced increasing difficulties coping at work. In 2012, the worker had suicidal thoughts, and with his wife's encouragement, he sought help.

[37] The worker stated that although he was aware of the employee assistance program[9] in November 2010, he was not interested; rather, he was focused on "making the team" and not being labelled. It was not important to him to seek employee assistance, and if the correctional manager had provided him with the telephone number, he might not have followed up.

D. The Decisions of the Board and Review Division

[38] In the November 23, 2012 decision, the Board officer accepted the worker had been diagnosed with a psychological disorder pursuant to the DSM-IV-TR; however, he concluded the worker's psychological condition did not arise out of and in the course of his employment. The Board officer characterized the worker's concerns as usual stressors experienced by an average worker in the same or a similar occupation. In reaching this conclusion, the Board officer considered section 4(1) of the GECA, the direction provided in *WCAT-2010-01831*, and a Board policy and practice guideline regarding claims by federal workers for psychological injury.

[9] The panel accepts as fact that the employer has an employee assistance program and that information regarding this program is readily available at institution A.

[39] The review officer, in reaching her decision to vary the Board decision and accept the worker's claim, considered and applied section 5.1 of the Act. She concluded the worker's claim for psychological injury arose primarily from the November 2010 workplace incident. As the worker did not file his application for compensation until August 2012, the review officer considered whether the worker's claim was barred from consideration by section 55 of the Act.

[40] The review officer determined that there were special circumstances that precluded the worker from initiating his application within the time permitted; those special circumstances included the fact the worker did not miss time from work or seek medical attention for his reaction to the event of November 2010 until August 2012. The worker was not diagnosed with a psychological condition until August 2012, and then became aware that it may be work-related. The review officer noted that the worker had relied on his military background to work through his symptoms after November 2010. The worker thought that his psychological symptoms were a normal part of his job. The review officer concluded the worker's 21 month delay in initiating his claim did not impair the ability of the Board or the employer to investigate the claim. For these reasons, the review officer determined that the worker's claim was not barred for being out of time.

[41] On the issue of whether the worker's claim should be accepted, the review officer relied on the worker's evidence that his encounter with the deceased inmate in November 2010 was his first exposure to a dead body. The review officer concluded the worker had not had any significant exposure to inmate deaths prior to November 2010, such that the event was unusual and unique. She concluded the event was emotionally shocking to the worker, and constituted a traumatic event as contemplated by section 5.1(1)(a) of the Act and Board policy. In the alternative, the review officer concluded that the worker's three exposures to inmate death in the course of his employment, when taken together, were excessive in intensity and went beyond the normal pressures experienced by this worker in his short period of employment as a correctional officer. She relied on Dr. van Dam's opinion to conclude the November 2010 workplace incident was of causative significance in producing the worker's mental disorder.

[42] The panel heard testimony from the worker, his spouse, and the current acting warden of institution A. The parties have provided extensive written and oral submissions regarding the issues in this appeal and provided several documents for the panel to consider. We will address the oral evidence, new documentary evidence, and the submissions of the parties in the context of our reasons, which follow.

Reasons and Findings

[43] The Board in reaching its decision to deny the worker's claim considered section 4(1) of the GECA and an associated practice paper of the Board providing guidance on claims by federal workers for mental disorders. In contrast, the review officer in varying the Board decision applied section 5.1 of the Act and policy item #C3-13.00. In order to consider the merits of this appeal, we must first determine the applicable law and policy that applies to a claim made by a federal worker for a mental disorder.

A. The Applicable Law and Policy

1. The GECA and section 5.1 of the Act

[44] Section 4 of the GECA provides, in part, as follows:

> 4. (1) Subject to this Act, compensation shall be paid to
>
> *(a)* an employee who
>
> (i) is caused personal injury by an accident arising out of and in the course of his employment, or
>
> (ii) is disabled by reason of an industrial disease due to the nature of the employment; and
>
> (*b*) the dependants of an employee whose death results from such an accident or industrial disease.
>
> (2) The employee or the dependants referred to in subsection (1) are, notwithstanding the nature or class of the employment, entitled to receive compensation at the same rate and under the same conditions as are provided under the law of the province where the employee is usually employed respecting compensation for workmen and the dependants of deceased workmen, employed by persons other than Her Majesty, who
>
> *(a)* are caused personal injuries in that province by accidents arising out of and in the course of their employment; or
>
> (*b*) are disabled in that province by reason of industrial diseases due to the nature of their employment.
>
> (3) Compensation under subsection (1) shall be determined by
>
> *(a)* the same board, officers or authority as is or are established by the law of the province for determining compensation for

> workmen and dependants of deceased workmen employed by persons other than Her Majesty; or
>
> *(b)* such other board, officers or authority, or such court, as the Governor in Council may direct.

[45] Section 2 of the GECA defines an accident as follows:

> 2. In this Act,
>
> 'accident' includes a wilful and an intentional act, not being the act of the employee, and a fortuitous event occasioned by a physical or natural cause;

[46] The GECA does not contain a specific provision regarding claims for psychological injury or mental stress.

[47] Generally, a federal employee[10] with a claim for compensation while working in British Columbia is considered as if the employee was a provincial worker. This is evident by the language of section 4(2) of the GECA, which provides that the employee is entitled to receive compensation at the same rate and under the same conditions as are provided under the law of the province where the employee is usually employed. Policy item #8.10 of the *Rehabilitation Services and Claims Manual, Volume II* recognizes that employees of the Federal Government usually employed in the province are granted the same rights to compensation as provincial workers.

[48] Prior to June 30, 2002, the Act did not contain specific eligibility provisions for claims for compensation for a mental disorder, and claims for psychological injury were considered pursuant to section 5(1) of the Act both for workers employed provincially and for federal workers working in British Columbia.

[49] Section 5.1 of the Act was enacted by the *Workers Compensation Amendment Act,* 2002, S.B.C. 2002, c. 56 (Bill 49), effective June 30, 2002, and provided for compensation for mental stress if caused by an acute reaction to a sudden and unexpected traumatic event arising out of and in the course of employment. Board policy item #13.30 provided further direction on the compensability of a claim for mental stress. Section 5.1 as it read at the time did not provide compensation for chronic or gradual onset mental stress.

[10] While the GECA refers to an "employee", the Act uses the term "worker". For the remainder of the decision we will refer to a federal employee as a federal worker or worker.

[50] In *Plesner v. British Columbia Hydro and Power Authority*, 2009 BCCA 188, the majority of the British Columbia Court of Appeal found that the requirement in section 5.1 of the Act that mental stress arise from a "traumatic event", when read together with policy item #13.30, breached section 15(1) of the *Canadian Charter of Rights and Freedoms* (the *Charter*). The majority found that workers with purely mental work-related injuries were forced to meet a significantly higher threshold for compensation which was not required of workers who suffered from purely physical work-related injuries, or suffered from mental injuries arising from physical work-related injuries. The breach of section 15(1) could not be saved under section 1 of the *Charter*. The court severed certain portions of policy item #13.30 and declared those provisions to be of no force and effect. Section 5.1(1)(a) of the Act continued to limit compensation for mental stress to claims arising from a sudden and unexpected traumatic event, thereby excluding claims arising over time resulting in chronic mental stress.

[51] In *WCAT-2010-00098* a WCAT non-precedent three-person panel considered a preliminary issue as to whether section 5.1 of the Act applied to claims by federal workers for psychological injury. The panel found the GECA does not contain an express requirement for a "sudden and unexpected traumatic event". The panel relied on the reasoning of the Newfoundland Court of Appeal in *Rees v. Canada (Royal Canadian Mounted Police)*, 2005 NLCA 15 (*Rees*) to find that the GECA does not exclude coverage for gradual onset mental stress. This amounted to a material difference between section 5.1 of the Act and the GECA, such that the Board was not obliged to apply the portions of section 5.1 that have the effect of excluding claims for gradual onset mental stress. Several WCAT decisions have adopted this approach, and considered claims by federal workers for the gradual onset of a psychological condition.

[52] In *WCAT-2010-01831*, a WCAT non-precedent three-person panel considered the eligibility criteria that ought to apply to a claim by a federal worker for compensation for a psychological injury. The panel reviewed the tests that had developed in other jurisdictions and the criteria developed by the former Workers' Compensation Appeal Division in a series of decisions prior to the enactment of section 5.1 of the Act. The panel adopted a two-step test that is summarized in *WCAT-2010-01831* as follows:

> [119] We find it is appropriate in considering the worker's appeal to apply criteria based largely on those adopted by the former Appeal Division for 'traumatically induced' psychological impairment claims prior to the enactment of section 5.1 of the Act. This involves the following two-step process:
>
> 1. It is first necessary to determine whether the worker has suffered a 'personal injury' as contemplated by section 4(1) of the GECA. A psychological 'injury' involves more than a normal reaction to stress, such as being upset or experiencing distress, frustration, anxiety, sadness, worry or depression as those

terms are widely and generally used. An injury must be confirmed by a diagnosis of a mental or physical disorder based on an assessment by a health care professional who is qualified to make such a diagnosis and who has applied the diagnostic criteria from the latest version of the DSM.

2. If an injury is confirmed it is then necessary to consider whether it was "caused by an accident arising out of and in the course of employment" as contemplated by section 4(1) of the GECA. This involves consideration the following three questions:

   (a) Did the workplace events or circumstances involve stressors that are unusual in the worker's occupation? Although the worker's subjective interpretation and response to the events or circumstances must be considered, this question is not determined solely by the worker's subjective belief about the circumstances or events, but requires the stressors to be clearly and objectively identifiable. Routine labour relations or interpersonal issues or processes are not considered to be 'unusual' for this purpose.

   (b) Were those workplace events or circumstances reasonably capable of causing the psychological injury? Again, the worker's subjective belief about the cause of his or her injury must be considered, but this question also requires consideration of whether, in light of all the medical and non-medical evidence, the events or circumstances could be a plausible cause of psychological injury.

   (c) Were the workplace circumstances or events of causative significance with respect to the worker's psychological injury for which compensation is sought?

[53] Section 5.1 of the Act was significantly amended by the *Workers Compensation Amendment Act,* 2011, S.B.C. 2012, c. 23 (Bill 14), effective July 1, 2012, to allow for consideration of claims for a mental disorder that is predominantly caused by a series of significant work related stressors, thereby allowing for consideration of a gradual onset of a mental disorder. Section 5.1(1) of the Act as it presently reads provides for compensation for mental disorders, as follows:

> 5.1 (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.

[54] In *WCAT-2012-02615* the panel considered whether, following the legislative changes to section 5.1, there remained a material conflict between section 5.1 of the Act and section 4 of the GECA and concluded the conflict remained. The panel found that the predominant cause test in section 5.1(1)(a)(ii) conflicted with the causative significance test it found implicit in section 4(1) of the GECA and determined the appeal by applying the approach set out in *WCAT-2010-01831*. Several WCAT panels have adopted this reasoning, and considered claims for compensation for psychological injury by federal workers pursuant to the test set out in *WCAT-2010-01831*[11].

2. The *Martin* case

[55] In Martin *v. Alberta (Workers' Compensation Board)*, 2014 SCC 25 (*Martin*), the Supreme Court of Canada considered if and when the GECA requires a provincial workers' compensation board to apply provincial law and policy to determine a federal worker's eligibility for compensation. The case before the court came from the Alberta Workers' Compensation Board (Alberta Board), and involved a claim by a federal parks warden for psychological injury caused by chronic stress. The Alberta Appeals Commission denied the worker's claim because the work events complained of were neither, "excessive or unusual in comparison to the normal pressures and tensions experienced by the average worker in a similar occupation", nor was there sufficient evidence to objectively confirm the events.

[11] See for example *WCAT-2012-03266.*

[56] The Alberta *Workers' Compensation Act,* R.S.A. 2000, c. W-15 does not include an express statutory scheme to compensate for mental disorders; however, the Alberta Board has developed policy to provide for compensation for mental disorders (the Alberta policy) somewhat similar to that set out in section 5.1 of the Act, including the requirement that a gradual onset of a mental disorder be predominantly caused by significant work-related events or stressors[12]. In the *Martin* case, there was no dispute that Mr. Martin met two of the four criteria of the Alberta policy, as there was a confirmed psychological diagnosis, and the work-related events were the predominant cause of the psychological injury.

[57] On judicial review, the Appeals Commission decision was set aside because the court found that the Alberta policy did not apply to federal workers. The Alberta Court of Appeal did not agree, and restored the Appeals Commission decision. Mr. Martin was granted leave to appeal to the Supreme Court of Canada.

[58] In dismissing Mr. Martin's appeal, the Court found that the Alberta Appeals Commission was required to apply the provincial law and policy to determine the entitlement and rate of compensation for an employee governed by the GECA. The Court concluded that the GECA incorporates provincial workers' compensation regimes, except where there is an express conflict with the GECA. The Court accepted that provincial policies may define eligibility for compensation differently, but such flexibility is intended by the open-ended definition of "accident" in the GECA[13].

3. The impact of the *Martin* case

[59] The reasoning of the Court in *Martin* brings into question whether there is a direct conflict between section 5.1 of the Act and section 4 of the GECA. This raises the issue as to whether section 4(1) of the GECA contains a specific test for causation that is in conflict with the predominant cause test set out in section 5.1(1)(a)(ii) of the Act.

[60] The employer submits that section 4 of the GECA does not set out "eligibility criteria"; rather, it is the provincial legislative scheme that defines the eligibility criteria for a claim for mental disorder. The provincial legislative scheme is only excluded from consideration when there is a direct conflict with the GECA. The employer submits that section 5.1 of the Act does not directly conflict with the GECA, as section 4 of the GECA does not exclude the application of a predominant cause test and does not define causation.

[61] The worker submits there remains a conflict between section 4(1) of the GECA and section 5.1 of the Act, relying on the reasoning of the panel in *WCAT-2012-02615*. The worker submits that the predominant cause test in section 5.1(1)(a)(ii) of the Act sets a higher threshold for gradual onset stress claims, a threshold that conflicts with the

[12] See *Alberta WCB Policies & Information*, POLICY: 03-01 Part II.
[13] Paragraphs 19 and 52 of *Martin*.

language of the GECA. The worker notes that *Martin* did not consider whether a predominant cause test is in conflict with section 4(1) of the GECA, despite the fact that one of the criteria in the Alberta policy requires that the work-related events or stressor be the predominant cause of the injury. Therefore, it remains open to WCAT to continue to find that the predominant cause test in section 5(1)(a)(ii) is in direct conflict with section 4(1) of the GECA.

[62] The issue is whether the wording of section 4(1) of the GECA establishes a specific causation test for claims by federal workers when it provides that compensation is paid if an employee "is caused personal injury by an accident arising out of and in the course of his employment". The starting point for this analysis is not whether the predominant cause test applies to federal workers, but rather whether the GECA provides a causation test, and if so, whether that test conflicts with the causation test set out in section 5.1(1)(a)(ii) of the Act. This raises a question of statutory interpretation.

[63] In *Rizzo & Rizzo Shoes Ltd. (Re),* [1998] 1 S.C.R. 27, the Supreme Court of Canada found:

> [21] ...Elmer Driedger in Construction of Statutes (2nd ed. 1983) best encapsulates the approach upon which I prefer to rely. He recognizes that statutory interpretation cannot be founded on the wording of the legislation alone. At p. 87 he states:
>
> > Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

[64] Further guidance is found in the *Interpretation Act*, R.S.C., 1985, c. I-21, which applies to the interpretation of federal statutes. Section 12 provides:

> Every enactment is deemed remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects.

[65] The modern principle of statutory interpretation raises three lines of enquiry, as described in *Sullivan on the Construction of Statutes*[14] *(Sullivan),* as the grammatical and ordinary sense of the words, the legislative intent, and compliance with established legal norms.

(a) Grammatical and ordinary meaning

[14] Markham: LexisNexis Canada, 2014, p. 8.

[66] Sullivan notes the ordinary meaning rule consists of the following three propositions:

1. It is presumed that the ordinary meaning of a legislative text is the meaning intended by the legislature. In the absence of a reason to reject it, the ordinary meaning prevails.
2. Even if the ordinary meaning is plain, courts must take into account the full range of relevant contextual considerations including purpose, related provisions in the same and other Acts, legislative drafting conventions, presumptions of legislative intent, absurdities to be avoided and the like.
3. In light of these considerations, the court may adopt an interpretation that modifies or departs from the ordinary meaning, provided the interpretation adopted is plausible and the reasons for adopting it are sufficient to justify the departure from ordinary meaning.

[67] In Larson's Workers' Compensation, Desk Edition, Vol. 1 (Larson)[15] Professor Larson discusses the interpretation of "arising out of and in the course of employment", noting that the phrase has been broken into the two parts, with "arising out of" referring to the causal origin and "in the course of" referring to the time, place and circumstances of the injury in relation to the employment. While each part of the test must be met, the concept of compensation is unitary and based on a work connection. Larson further defines "arising out of employment" as requiring, "a showing that the injury was caused by an increased risk to which claimant, as distinct from the general public, was subjected by his or her employment".

[68] The *Concise Oxford English Dictionary*[16] (Oxford) defines "arise from/out of" as, "occur as a result of". *Black's Law Dictionary*[17] defines "arise" as, "1. To originate; to stem (from) … 2. To result (from) ..."

[69] In British Columbia, the phrase "arising out of and in the course of employment" is found in both section 5(1) and section 5.1(1)(a) of the Act. "Arising out of the employment" in British Columbia is defined in policy item #C3-14.00 at item A. as the cause of the injury or death, and is determined by applying a test of causative significance[18]. Causative significance is defined in the policy as "more than a trivial or insignificant aspect of the injury or death." In some WCAT decisions the British Columbia policy that sets out a

[15] Newark: Matthew Bender & Co., 2003. While this text addresses American jurisprudence we find that it provides a useful discussion as these general principles are consistent with B.C.'s workers' compensation system.
[16] 10th ed.
[17] 8th ed.
[18] Provincial workers' compensation schemes have adopted different wording to express the meaning of "arising out of" employment, including whether the injury is caused by some employment hazard. See for example, *Alberta WCB Policies & Information*, POLICY: 02-01 Part I; *Workers Compensation Board of Manitoba Policy & Procedures Manual,* Section 40, Policy 44.05; and *Client Services Policy Manual Newfoundland and Labrador* Policy Number EN-19.

test of causative significance has been applied to mental disorder claims by federal workers.

[70] As noted by the worker, the Court in *Martin* did not consider whether the phrase "is caused personal injury by an accident arising out of and in the course of his employment" in section 4(1) of the GECA was in conflict with a predominant cause test, despite the fact the Alberta policy under consideration applied a predominant cause test for claims of gradual onset mental stress. Karakatsanis J. considered the text and scheme of the GECA and held:

> [20] Section 4(1) of the *GECA* is a general provision which provides that compensation is to be paid to employees who are caused personal injury due to a workplace accident, and to their dependents if death results: 'Subject to this Act, compensation shall be paid to ... an employee who ... is caused personal injury by an accident arising out of and in the course of his employment ...'. **In my view, this does not suggest that the provision is a complete code for determining eligibility for compensation.** Compensation is '[s]ubject to this Act'. Neither the words 'eligibility' nor 'entitlement' appear in s. 4(1). Marginal notes are not part of the provision and are not determinative of the meaning of the section: *Interpretation Act*, R.S.C. 1985, c. I-21, s. 14.
>
> [21] Although the injury must be caused by an 'accident', the broad and open-ended definition of 'accident' in s. 2 of the GECA provides only two categories of events which will constitute accidents: it 'includes' both 'wilful' and 'intentional' acts of others and 'fortuitous event[s]'. **No standard or rule is provided in the definition of "accident" – or in s. 4(1) – by which to determine what categories of 'act[s]' or 'event[s]' may constitute 'accident[s]', which such acts are 'arising out of and in the course of . . . employment' or to address when an injury is 'caused' by an accident.**
>
> [22] **Read as a whole and in context, s. 4 supports the interpretation that the criteria for entitlement are not specified in the GECA and are to be determined according to provincial workers' compensation law and authorities.** [19]

[71] "Entitlement criteria" in the Alberta workers' compensation system refers to the test applied to determine whether a worker is eligible for compensation, and includes the test for causation. The British Columbia workers' compensation system does not use similar phraseology, but the Act and policy do establish eligibility criteria for compensation.

[19] Bold emphasis added.

[72] We rely on the passage from *Martin* quoted above to find that section 4(1) of the GECA does not contain specific entitlement criteria for acceptance of a claim, including a specific test of causation. In *Martin*, the Court clearly stated that no standard or rule is stated in section 4(1) by which to determine which acts are "arising out of and in the course of … employment" or to address when an injury is "caused" by an accident.

[73] In *Martin* the Court noted the parallel language used in subsections 4(1) and 4(2) of the GECA with the use of "caused personal injury by an accident arising out of and in the course of [his] / [their] employment". The Court found the mirroring of language between the two provisions suggested federal workers are to receive compensation in the same circumstances as others in the province where they work[20]. In light of the reasoning in *Martin*, we find the general purpose of section 4 of the GECA is to transfer authority to the provincial workers' compensation bodies to determine the criteria for entitlement to compensation.

[74] We find that the words "arising out of … his employment" in section 4(1) of the GECA, in the ordinary and grammatical sense, are intended to refer generally to the cause or the occurrence of the personal injury. The grammatical and ordinary meaning of the words does not import a specific causation standard that must apply to all claims for compensation by federal workers. Rather, section 4(2) of the GECA provides it is the provincial compensation scheme that determines the criteria for claim acceptance, including the standard of causation that applies to the claim.

(b) Legislative intent

[75] The phrase "arising out of and in the course of employment" has been used in workers' compensation since its inception. The phrase was added to the GECA in 1931[21].

[76] In *Cape Breton Development Corporation v. Estate of James Morrison*, 2003 NSCA 103 (*Morrison*), the Nova Scotia Court of Appeal reviewed the development of the GECA, noting that the Parliamentary debates suggested that the intent of the GECA was for federal employees' right to compensation and the amount to be decided by the provincial authority. The court rejected the notion that section 4(1) of the GECA created a "gateway" to accessing provisions in provincial workers' compensation law, and found that the provincial workers' compensation scheme governed claims submitted under the GECA, provided that the provision in issue was reasonably incidental to a "rate" or "condition" governing compensation under the law of the province, and the provision did not otherwise conflict with the GECA.

[20] Paragraph 25 of *Martin*.
[21] House of Commons Debates on the amendment did not include discussion on the inclusion of "personal injury by accident arising out of and in the course of ..."

[77] In *Martin*, the Court considered the legislative history and purpose of the GECA, and found that Parliament's purpose in enacting the GECA was to rely on provincial compensation schemes to determine claims for compensation by federal workers, except where the GECA clearly conflicts with the provincial legislation. The Court held:

> [28] The history of the text of the *GECA* as well as Parliament's stated intentions clearly demonstrate the Parliament's purpose in enacting the *GECA* was to rely on provincial laws and provincial boards to determine federal workers' compensation claims, except where the *GECA* clearly conflicts with provincial legislation.
>
> …
>
> [35] In short, the legislative history of the *GECA* and statements of parliamentary purpose demonstrate that the intent has remained consistent since 1919: both eligibility for and the rate of compensation are to be determined according to provincial law.

[78] In light of the reasoning in *Martin,* we find that the intent of Parliament in enacting section 4 of the GECA was to transfer the authority to provincial workers' compensation boards to determine whether a federal worker's claim was compensable, unless the GECA clearly conflicts with the provincial legislation. We find the legislative intent for using "arising out of ... his employment" in section 4(1) of the GECA was to require an injury to be work related but to permit each province to apply the specific causation standard each has adopted for purposes of compensation for provincial workers. We find that Parliament did not intend to require a specific test for causation, such as the test of causative significance, to apply to all claims by federal workers.

(c) Compliance with established legal norms

[79] The courts have generally interpreted the GECA broadly, finding that its purpose is to transfer responsibility for federal workers' claims to the provincial authority, with the provincial workers' compensation scheme governing the federal workers' claims. In *Canada Post Corp. v. Smith* (1998), 159 D.L.R. (4th) 283 (available on CanLII) (Ont. C.A.), the Ontario Court of Appeal found that it is the various provincial laws, not the GECA, that set out the relevant boundaries of the compensation schemes for injured workers. The GECA was interpreted as the statutory vehicle for transferring authority to the appropriate provincial body.

[80] In *Canadian Broadcasting Corp. v. Luo,* 2009 BCCA 318 (*Luo*), the B.C. Court of Appeal found that the GECA contemplates the determination by a provincial body of a worker's entire claim for compensation. Madam Justice Saunders concluded, "In summary, I conclude that s. 4 of the *Act* [GECA] contemplates the provincial body

making all determinations necessary to the claim, including whether the individual is an employee as required by s. 4(1), an issue that engages the definition of employee in s. 2 of the *Act.*"

[81] The courts have generally found that the GECA does not preclude claims by federal workers for gradual onset of a psychological injury despite the fact that such claims would otherwise be barred from consideration by provincial authority[22]. In doing so, the courts have interpreted the definition of "accident" in section 2 of the GECA broadly to include the gradual onset of a psychological injury.

[82] In *Martin,* the Court noted that section 4(2) of the GECA contemplates that different rates and conditions of compensation will apply to federal workers in different provinces, depending on the law enacted in the province of employment. This promotes consistency for all workers within a province, rather than consistency for federal workers throughout the country. The Court further noted that it would make little sense to defer to the provincial regime of compensation for the rates and conditions of compensation without also deferring on the question of eligibility. The Court concluded:

> [27] Thus, the text of the *GECA* suggests that s. 4(1) does not set out a complete test for eligibility for compensation. Section 4(1) simply states that federal workers injured in accidents on the job are to be compensated subject to the *GECA*. The broad and open-ended definition of 'accident' in s. 2 does not assist in determining the boundaries of entitlement. It is far more likely that Parliament intended to rely on provincial laws defining the scope of 'accident' to provide some certainty. The authority granted in s. 4(2) and (3) is itself strongly indicative of such a role. According to s. 4(2), federal workers are entitled to the rates and conditions of compensation determined according to provincial law. And in s. 4(3), the *GECA* clearly delegates to the provincial boards the actual *determination* of compensation under s. 4(1). **Provincial institutions and laws thus provide the structure and boundaries necessary to determine whether and how much compensation is to be paid to federal employees.**[23]

[83] We find the above passage further supports our conclusion that the GECA, and section 4(1) in particular, does not specify a causation test that applies to claims by federal workers. Rather, it is the provincial laws that determine the boundaries by which a claim is compensable.

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[22] See *Rees*; *Stewart v. New Brunswick (Workplace Health, Safety and Compensation Commission)*, 2008 NBCA 45 (*Stewart*); *Embanks v. Nova Scotia (Workers' Compensation Appeals Tribunal)*, 2008 NSCA 28 (*Embanks*). We note that the reasoning in *Martin* brings into question the interpretation of "accident" in *Rees*, *Stewart*, and *Embanks*. It is not necessary in the context of this decision to make a finding on that point.

[23] Bold emphasis added.

[84] The Court in *Martin* considered *Morrison* and whether a different standard of proof could apply to federal workers when the provincial law contained a "benefit of the doubt" presumption and agreed with the reasoning of the Nova Scotia Court of Appeal in *Morrison* and in *McLellan v. Nova Scotia (Workers' Compensation Appeals Tribunal)*, 2003 NSCA 106. In both cases, presumptions that benefitted workers seeking compensation under provincial legislation were held to apply to federal workers because there was no conflict with the GECA.

[85] The Court in *Martin* stated:

> [39] ...Where a direct conflict between the provincial law and the *GECA* exists, the *GECA* will prevail, rendering that aspect of the provincial law or policy inapplicable to federal workers. Otherwise, the provincial workers' compensation scheme prevails. In either case, provincial boards and authorities will be responsible for adjudicating the claim.
>
> [40] Given the broad delegation of the determination of eligibility to the provincial level, conflicts between the provincial law and the *GECA* with respect to eligibility will generally only arise in situations where the *GECA* regime has specifically included or excluded matters from compensation in a way that is in conflict with the relevant provincial law, as for example occurred in the case of pulmonary tuberculosis.

[86] The question of whether the standard of proof conflicts between the GECA and a provincial statute is different from the question of whether there is a conflict in causation tests. Both the standard of proof and the causation test to apply form part of the eligibility criteria for claim acceptance, and therefore a similar analysis would apply.

[87] We find that the GECA regime does not specifically exclude a causation standard that departs from the test of causative significance. The original meaning rule looks at the original purposes and policies underlying legislation. Applying the original meaning rule of statutory interpretation also supports a finding that "arising out of and in the course of" does not import a specific test of causation. Rather, the phrase was originally interpreted to determine whether the worker had deviated from the employment. More recently, the phrase "arising out of and in the course of employment" in the context of the Alberta legislation has been interpreted more broadly as defining events covered by the compensation system[24]. As noted above, when we look to the compensation scheme in some other provinces, "arising out of" has been interpreted as requiring evidence that the injury was caused by some employment hazard.

[88] Section 4(1) of the GECA must be read in the context of section 4 as a whole, and in the context of the scheme of the GECA. This approach is consistent with the reasoning

[24] See *Alberta (Workers' Compensation Board) v. Buckley,* 2007 ABCA 7.

of the courts in *Martin, Luo,* and *Morrison.* We find that section 4(1) of the GECA does not provide for a test for causation of a work injury that is in direct conflict with the predominant cause test in section 5.1(1)(a)(ii). Absent a direct conflict with the GECA, it is the provincial compensation scheme that determines eligibility to compensation.

[89] Two recent WCAT decisions have expressed concern about the application of the predominant cause test in the context of claims by federal workers for compensation for psychological injury, without having to decide the question.

[90] In *WCAT-2014-01887* the panel noted concerns regarding the predominant cause test and its potential direct conflict with section 4(1) of the GECA. The panel indicated the higher provincial standard of causation for cumulative psychological injury risked directly contradicting the GECA. The panel stated as follows:

> [52] I reach this conclusion for several reasons. As set out in *Martin*, the question of inconsistency is one of statutory interpretation. The wording in the GECA is silent as to the standard of causation, merely requiring that the personal injury be 'caused' by an accident 'arising out of and in the course employment.' However, the interpretation of this wording must surely take its flavour from the jurisprudence underpinning the long-held acceptance of causative significance as the causal standard in workers' compensation matters.
>
> [53] Indeed, the 'causative significance' standard is well-understood in workers' compensation system and is central to it. It might even be characterized as an anchor point that informs and reflects the very principles underlying the historic compromise itself. To interpret the GECA as intending to depart from this traditional causative test is to look at the wording of the GECA in a vacuum and without reference to either earlier jurisprudence or the fact that Parliament has implicitly endorsed the causative significance test over many years.
>
> [54] Further, it is a well-understood principle of statutory interpretation that the same words are to have the same meaning within a statute. Nowhere in the GECA is there any support for the notion that the Parliament intended that the causative standard within it have different meanings for different types of injuries, in particular, a higher standard for cumulative psychological injuries. Consequently, the presumption of consistent expression suggests as a matter of statutory interpretation that the GECA intended to apply the same causative standards to all types of injuries. Indeed, this principle underpins much of the judicial evolution of the GECA as permitting compensation for an increasingly broad range of injuries over the years.

> [55] Consequently, on the basis of statutory interpretation principles, I doubt that the GECA intended to permit a higher causative test. On the contrary, I consider that, taking into account the history and evolution of workers' compensation law, Parliament intended to adopt and the causative significance test as the causative standard for workers' compensation matters. Further, on the basis of consistent expression, I doubt in any event that the Parliament intended to permit or adopt different causative standards for different types of injuries. I would therefore interpret the GECA as neither endorsing a predominant cause test generally nor endorsing different causative standards for different injuries. Either conclusion demonstrates a direct inconsistency with section 5.1 of the Act so that the latter would be inapplicable.

[91] In *WCAT-2014-02042* the same panel confirmed his reasoning quoted above and further concluded that the predominant cause test should not be applied because its application could lead to absurd results.

[92] We agree that the GECA does not expressly endorse a predominant cause test; but we also find that section 4(1) of the GECA does not expressly exclude such a test. We are not persuaded that the insertion of the words "is caused personal injury by an accident arising out of and in the course of his employment" to the GECA by Parliament in 1931 was intended to import a test of causative significance that applies to all claims by federal workers. While the test of causative significance is well entrenched in the British Columbia compensation system, our analysis is focused on the intent and meaning of "arising out of and in the course of..." in the federal statute.

[93] In addition, we are mindful of the reasoning in *Martin* and the clear direction from the court that absent a direct conflict with the GECA, the provincial compensation scheme determines the eligibility criteria for the acceptance of a claim. At paragraphs 20 to 22, the Court considered section 4(1) of the GECA and held that no standard or rule is provided to determine whether an injury is caused by an accident or whether acts arise out of and in the course of employment. The Court in doing so has rejected the notion that there is a specific standard of causation set out in section 4(1) of the GECA. We interpret section 4(1) of the GECA as providing that there must be a causation test, but not as importing the single test of causative significance that must be applied to all claims by federal workers.

[94] We acknowledge the concern raised by the panel in *WCAT-2014-02042* regarding the application of a predominant cause test and its potential to result in absurdities. However, we find the predominant cause test can be interpreted to avoid an absurd result. We are not persuaded that the application of a predominant cause test necessarily requires the allocation of percentage of cause to any particular event claimed to have contributed to a mental disorder. The predominant cause test is not applicable in this appeal, as it will become apparent in our reasons below. We make

this statement simply to show that there are possible interpretations of that term that would not lead to an absurdity.

[95] Predominant is defined in *Oxford* as, ""present as the strongest or main element". The Merriam-Webster online dictionary[25] defines predominant as "having superior strength, influence, or authority; being most frequent or common". We find the predominant cause test refers to the main cause or the causal element that has the strongest or greatest effect. This is consistent with the interpretation in policy item #C3-13.00 that the predominant cause is the primary or main cause of the mental disorder.

[96] In *WCAT-2014-02042* the panel noted the potential that the predominant cause test may breach section 15(1) of the *Charter*. The question is beyond the scope of this decision as WCAT does not have jurisdiction over constitutional questions[26]. While *Charter* values can be used as an interpretive tool where a statutory provision is subject to differing but equally plausible interpretations, we do not find that there are equally plausible interpretations in this case[27].

[97] Section 5.1(1)(b) of the Act requires that the worker be diagnosed by a psychologist or psychiatrist with a mental condition described in the most recent version of the DSM at the time of the diagnosis. Previous WCAT panels have required a federal worker be diagnosed with a condition as described in the DSM; however, panels have accepted that diagnoses provided by physicians who are not psychologists or psychiatrists meet the diagnostic requirement. In *WCAT-2012-02615* the panel questioned whether the requirement in the Act that the diagnosis be made by a psychologist or psychiatrist conflicted with the GECA, but did not reach a conclusion on that question in light of her finding that the predominant cause test was in conflict.

[98] We find the requirement in the Act that the diagnosis of a mental disorder be made by a psychologist or psychiatrist does not directly conflict with the GECA. The specific provision in the Act as to who must provide the diagnosis forms part of the eligibility criteria for acceptance of a claim. As noted by the court in *Martin*, we turn to the provincial compensation scheme to determine the eligibility criteria for compensation in the absence of a direct conflict with the GECA. While previous jurisprudence has accepted evidence of a psychological diagnosis from physicians who are not psychologists and psychiatrists, we do not find that this was because of an express provision in the GECA directing that this be so. We find that the GECA does not directly conflict with section 5.1(1)(b) of the Act.

[99] In summary, we find there is no express conflict between section 5.1 of the Act and the GECA. Consequently, we find that section 5.1 of the Act applies to claims by federal workers for compensation for psychological injury.

[25] www.merriam-webster.com/dictionary/predominant.
[26] See section 245.1 of the Act and section 44(1) of the *Administrative Tribunals Act*, S.B.C. 2004, c. 45.
[27] *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, at para. 62.

[100] The worker argued it would be fundamentally unfair, if not *ultra vires*, for the panel to apply section 5.1 of the Act retroactively when, at the time of the initial adjudication of his claim, the Board did not consider section 5.1. We find we have the jurisdiction in the context of this appeal to consider and apply section 5.1 of the Act. The current version of section 5.1 of the Act applies to the worker's appeal[28]. This is also consistent with the direction provided in the *Manual of Rules of Practice and Procedure* (MRPP) at item #3.3.1, which provides the WCAT has jurisdiction to address any issue determined in either the Review Division decision or the Board decision that was under review. The review officer in the decision under appeal considered and applied section 5.1 of the Act. The worker has provided submissions on the application of section 5.1 of the Act.

B. Should section 55 of the Act be considered before the merits of the appeal?

[101] The employer's primary position is that the worker's application for compensation was made beyond the time period permitted by the Act and is statute barred. The employer submits the only incident that potentially would be of causative significance in producing the worker's Adjustment Disorder was the November 22, 2010 in-custody murder of an inmate; however, the worker did not file his application for compensation until August 15, 2012.

[102] Section 55 of the Act provides, in part, as follows:

> 55 (1) An application for compensation must be made on the form prescribed by the Board or the regulations and must be signed by the worker or dependant; but, where the Board is satisfied that compensation is payable, it may be paid without an application.
>
> (2) Unless an application is filed, or an adjudication made, within one year after the date of injury, death or disablement from occupational disease, no compensation is payable, except as provided in subsections (3), (3.1), (3.2) and (3.3).
>
> (3) If the Board is satisfied that there existed special circumstances which precluded the filing of an application within one year after the date referred to in subsection (2), the Board may pay the compensation provided by this Part if the application is filed within 3 years after that date.

[103] In most instances, an application for compensation is not considered on its merits until the Board is satisfied the claim is not barred from consideration by the application of section 55 of the Act[29]. In this case, it is not clear whether section 55 applies. The

[28] Changes to section 5.1 of the Act came into effect July 1, 2012. The worker stopped work and commenced his application for compensation on August 15, 2012.
[29] See policy item #93.22.

worker has claimed that there were a series of events that resulted in his diagnosed condition, the most recent of which falls within the one year prior to the date the worker filed his application for compensation.

[104] Policy item #93.21 provides that when a worker's condition results from a series of injuries rather than just one injury, section 55(2) of the Act is complied with if the application is filed within one year of the last injury in the series.

[105] In order to determine whether section 55 applies, we must first determine whether the worker's claim ought to be considered as arising as a reaction to a specific traumatic event or significant stressor that occurred on November 22, 2010, or whether it arose from a cumulative series of significant work-related stressors that commenced in November 2010 but culminated in July 2012 immediately prior to the worker seeking compensation. If the worker's mental disorder is caused by a series of work-related stressors, section 55 would not apply as long as the application for compensation was made within one year of the last incident found to be a significant work-related stressor that contributed to the mental disorder. In order to answer this question, we find the practical approach is to first consider the merits of the worker's claim, following which we will determine whether section 55 applies.

C. Application of section 5.1

[106] We are guided in our analysis by policy item #C3-13.00 which sets out the criteria below for adjudication of a claim for mental disorder.

1. <u>Does the worker have a DSM diagnosed mental disorder?</u>

[107] Section 5.1(1)(b) requires that a worker's mental disorder be diagnosed by a psychiatrist or psychologist as a condition described in the most recent DSM (see policy #C3-13.00, item A.). The worker has been diagnosed with a DSM mental disorder. Both Dr. van Dam and Dr. Chopra, registered psychologists, have assessed the worker and provided expert opinions the worker meets the diagnostic criteria for an Adjustment Disorder[30]. We find the requirements of section 5.1(1)(b) of the Act have been met.

[30] The specific diagnoses provided by Dr. van Dam and Dr. Chopra differ in large part because of the change in diagnostic labeling between the DSM-IV and the DSM-5. Both psychologists diagnosed the worker with an adjustment-like disorder.

2. Were there one or more events, or a stressor, or a cumulative series of stressors?

[108] Board policy requires that the event(s) or stressor(s) be identifiable (see item B in policy #C3-13.00).

[109] There is little dispute that the events the worker claims were causative of his Adjustment Disorder occurred. The worker has testified to specific events that occurred at his workplace between November 2010 and July 2012. The employer has not challenged the factual basis upon which the worker claims compensation. Rather, the employer challenges whether those events were traumatic or significant work-related stressors in the context of the worker's employment.

3. Was the event "traumatic" or the work-related stressor "significant"?

[110] Consistent with the wording in section 5.1(1)(a), item C in policy #C3-13.00 requires evidence that the event was "traumatic", or the work-related stressor "significant".

[111] A traumatic event is defined as "an emotionally shocking event, which is generally unusual and distinct from the duties and interpersonal relations of a worker's employment". Practice Directive #C3-3, while not binding on WCAT, provides guidance on the meaning of "emotionally shocking" and "traumatic", as follows:

> The policy does not define "emotionally shocking" or "traumatic". Common to the definitions of those terms is an element of emotional intensity as well as distinctiveness from the ordinary course of events. The following excerpts illustrate some common definitions of the terms. *Black's Law Dictionary* defines "shock" as, "a profound and sudden disturbance of the physical or mental senses, a sudden and violent physical or mental impression". "Mental shock" is more specifically defines as, "shock caused by agitation of the mental senses and resulting in extreme grief or joy". The Merriam-Webster online Dictionary defines "shocking" as, "extremely startling, distressing or offensive". The *Concise Oxford Dictionary* defines "traumatic" as, "deeply disturbing or distressing".

[112] Policy item #C3-13.00 describes a significant work-related stressor as "excessive in intensity and/or duration from what is experienced in the normal pressures or tensions of a worker's employment". As noted in Practice Directive #C3-3, this will require obtaining a detailed understanding of the working conditions and the specific stressors the worker is reporting in order to determine whether the claimed stressors were excessive in intensity and duration from the pressures and tensions normally experienced in the employment.

[113] The worker submits his diagnosed Adjustment Disorder arose from exposure to a cumulative series of workplace stressors which were unusual in his occupation. The

employer takes the opposing position: that the events the worker experienced do not amount to significant work-related stressors. The employer submits the events the worker complains of form part of the normal working conditions of a correctional officer.

[114] We will consider each event the worker claims has contributed to the development of his Adjustment Disorder to determine whether the event is either a traumatic event as contemplated by section 5.1(1)(a)(i) or a significant work-related stressor as contemplated by section 5.1(1)(a)(ii). Before doing so, however, we will make some preliminary findings based on the extensive evidence presented by the parties both in writing and oral testimony.

(a) Preliminary Findings

(i) Potential for exposure to violence

[115] The employer submits that inmate violence, assault, and verbal abuse are common in the correctional setting, and particularly at medium and maximum security institutions. The employer notes that the potential for exposure to traumatic events is well-recognized in the job description of a correctional officer.

[116] We find that the mere potential for traumatic events, however, does not establish that exposure to violence and trauma is a normal or usual part of the job of a correctional officer. Both the worker and the acting warden testified that while unexpected events do occur at federal prisons, they do not occur on a daily or regular basis. The fact that exposure to a traumatic event may be within the realm of possibility does not exclude from compensation any resulting mental disorder.

[117] The acting warden testified that the inmate population at institution A included dangerous and violent offenders who are serving life sentences. He indicated that most correctional officers at Institution A interact with the inmate population on a daily and regular basis.

[118] We acknowledge that by its very nature a federal prison has the potential for violent events to occur because of the character of the inmate population. The fact that correctional officers interact with dangerous inmates on a daily basis does not provide sufficient basis to find that exposure to a violent event forms part of the usual duties of a correctional officer. Board policy specifically does not preclude a claim for compensation by a worker who due to the nature of the occupation is exposed to traumatic events as part of the job.

(ii) Defining the usual or normal duties of employment

[119] The testimony of the acting warden also revealed that several federal prisons have a much lower incidence of violence than at medium and maximum security institutions, particularly at minimum security institutions and institutions that incarcerate female inmates. This raises the question of whether the general employment conditions at the institution where an event occurs is the appropriate comparator for determining whether an event is traumatic or a work-related stressor is significant, or whether the working conditions in the employment or of the employer generally ought to guide our analysis.

[120] The employer submits we ought to limit our consideration to the events that occur at the particular type of institution in which the claimed event occurred, in this case a medium security prison. The worker takes the opposing position: it is the working conditions in the federal corrections system generally that ought to be used to determine whether an event is traumatic or a work-related stressor is significant.

[121] Recent WCAT decisions have found that the comparator group for determination of whether an event is traumatic or a work-related stressor is significant is not limited to the specific workplace in which the claimed event occurred. In *WCAT-2014-00758* the panel considered a claim for psychological injury by a federal correctional officer employed in a maximum security prison. The same employer advanced a similar argument, that the claimed traumatic event must be viewed within the context of the working conditions of a maximum security prison. The panel rejected that position and found that the character of the workplace event or stressors should be measured against the occupation of correctional officer more generally. This reasoning was followed in *WCAT-2014-02160*, where the panel found that the test of whether the claimed stressors were significant was measured against the occupation generally and not the stressors at the particular workplace in question.

[122] Policy item #C3-13.00 requires consideration of the usual or normal duties, or the pressures and tensions of the employment, when determining whether an event is traumatic or a stressor significant. Section 1 of the Act defines employment in broad terms, as follows:

> 'employment', when used in Part 1, means and refer to all or part of an establishment, undertaking, trade or business within the scope of that Part, and in the case of an industry not as a whole within the scope of Part 1 includes a department or part of that industry that would if carried on separately be within the scope of Part 1;

[123] We find that the concept of "employment" in the context of section 5.1 of the Act and policy item #C3-13.00 is not as broad as the concept of "occupation"; nor does it refer to the worker's specific job and worksite location at the time of injury. Rather, employment in section 5.1 of the Act and policy item #C3-13.00 includes consideration of a person's type of work, trade, or profession. We find that the claimed traumatic event or

significant stressor must also be viewed specific to the circumstances of the particular claim. This requires both a subjective and an objective assessment of the working conditions normal to the employment.

[124] In the present case, the job description of a correctional officer in a prison does not differentiate between the duties of a correctional officer at a minimum security, medium security, or maximum security institution[31]. In addition, this worker's claim involves events that occurred at three different worksite locations: institution A, institution B, and a correctional hospital. We find Board policy does not direct us to consider the working conditions at each worksite separately when determining whether an event was traumatic or work-related stressors significant. We find it is the evidence of the normal or usual working conditions of a correctional officer in the federal corrections system that guides our analysis as to whether the claimed events were traumatic or the work-related stressors were significant.

(iii) Inclusion of risk in the job description

[125] The employer has asked the panel to find that various clauses of the job description of a correctional officer speak to the psychological and emotional effort required for the job and the consequent risk to the psychological health of a correctional officer. The job description recognizes there is a risk of exposure to situations involving severe trauma, injury, or death. The job description also recognizes that correctional officers are at risk of developing post-traumatic stress disorder following traumatic incidents.

[126] A similar argument was advanced by the same employer in *WCAT-2014-02781*, in which the panel stated:

> [69] I am not persuaded that the inclusion of certain tasks in the job description of a correctional officer or the provision of training on how to handle emergency situations precludes a claim for a psychological injury from arising in such circumstances. In many workplaces, there are inherent dangers capable of causing injury to which workers are exposed. The nature of the workers' compensation system, being a no-fault system, is that a resulting injury in the performance of a worker's regular job duties does not create a bar to compensation. I am unable to find the fact that a correctional officer is required by reason of the job description to deal with emergency situations, including response to severe trauma, injury, and death, precludes the acceptance of a psychological injury resulting from exposure to such traumatic events.

[31] The occupational classification for correctional officer under the National Occupational Classification (NOC) 2011 is found in major group 44, "care providers and education legal and public protection support occupations", and includes sheriffs and bailiffs, correctional service officers, by-law enforcement officers, and other regulatory officers and inspectors (publicly available at http://www5.hrsdc.gc.ca/NOC/English/NOC/2011/Welcome.aspx).

[127] The worker asks we rely on this reasoning.

[128] In our view, the inclusion in a job description of the potential for a specific event to occur is insufficient to establish that the event is part of the normal pressures and tensions of the workplace. The inclusion of the potential of exposure to trauma and risk of psychological injury in the job description does not exclude from compensation any resulting mental disorder. Rather, it is the specific facts of any given incident that must be considered in order to determine whether the event is unusual and distinct from the duties and interpersonal relationships of the worker's employment, or is an event that is excessive in intensity or duration from what would be considered the normal pressures or tension of the worker's employment. The inclusion of a traumatic event in the job description does not mean the event is part of the normal pressures and tensions of the job.

[129] The job description of a correctional officer specifically recognizes the risk of developing a psychological injury from exposure to a traumatic incident or series of incidents. Such inclusion of risk does not mean that a reaction to a traumatic event that results in a DSM diagnosis is then exempt from compensation. An employer is not able to "contract out" of the Act merely by including potentially injurious events in the list of job duties and noting the inherent risks associated with the job. When a job description includes heavy lifting, and notes there is a risk of injury associated with heavy lifting, the resulting injury caused by heavy lifting is not barred from compensation. Similarly, the recognition that a job may involve exposure to traumatic events and the risk of developing a mental disorder does not bar a resulting mental disorder from compensation.

(iv) Assessment of the claimed event or stressor

[130] The employer argues that the broader scope of events to which a correctional officer may be exposed must be taken into account. When considering whether viewing the body of a murdered inmate is emotionally shocking or excessive in intensity as opposed to the normal pressures of the job, the employer submits we ought to consider the greater propensity for violent events to occur in a federal correctional institution, and not limit our consideration to murderous events. The worker submits it is the specific facts of the claimed event that must be considered.

[131] The parties' submissions raise the question of whether a claimed traumatic event or significant work-related stressor is assessed objectively or subjectively. Policy item #C3-13.00 provides that although a worker's subjective statements and response to an event or stressor are considered, the issue of whether the event is traumatic or the stressor significant is not determined solely on the worker's subjective belief. We find the panel's reasoning in *WCAT-2014-01745* to be helpful on this point:

> [43] Where psychological injury is alleged, an objective assessment is particularly important because a pre-existing or concurrent psychological condition may have an impact on the worker's

> perception of events in the workplace. In other words, the worker may perceive the workplace events as traumatic or significantly stressful because of his or her psychological condition as opposed to the worker developing the condition as a result of the workplace events. If one accepts that the events were traumatic or significantly stressful simply because the worker perceived them as such, the nature of the workplace events becomes irrelevant.
>
> [44] In simple terms, I consider the October 25, 2012 event must be emotionally shocking and/or excessively and unusually stressful, **objectively viewed**. Once that is satisfied, then there are certain subjective elements which should be considered in the sense that one must assess the effects on the particular worker of the workplace event or stressor. In other words, once persuaded of the objective facts that there has been an emotionally shocking event(s) and/or unusual and excessive workplace stressors compared to those experienced by an average worker in the same or similar occupation, it is necessary to go on to consider whether those events/stressors, in the particular worker, gave rise to a disabling mental disorder.

[132] We agree with this reasoning. In other words, both objective considerations and the specific facts of the worker's appeal are relevant, neither alone is determinative.

[133] The employer has also submitted that the incident on November 22, 2010 did not constitute an "acute" reaction as required by Board policy. We note that the requirement for an "acute reaction" was in the prior version of the Act, which is not applicable in this case.

[134] We turn now to consider the specific events the worker claims have caused his Adjustment Disorder.

(b) Claimed Events

(i) November 22, 2010 incident

[135] While the worker was the second correctional officer on the scene of a murdered inmate, he did not actively engage in a first response to that death. The worker's evidence has consistently been that he froze in the doorway and observed the sight and smells of the deceased inmate for approximately ten minutes.

[136] The employer asks the panel to consider the fact the worker did not witness violence, there were no signs of violence in the cell, the inmate was fully clothed, and the worker did not participate in attempting to revive the inmate, move the body, or investigate the aftermath of the murder. At most, for ten minutes, the worker witnessed the body.

[137] We acknowledge the worker neither provided assistance to the inmate nor participated in the investigation of the murder. As noted in *WCAT-2014-02781*, a worker need not be the person administering medical assistance in order for an event to be traumatic. The worker in that case, a correctional officer at a medium security prison, was exposed to the traumatic scene and present in the vicinity of an injured inmate and at a time there was a heightened response. Similarly, the worker in the present appeal was exposed to the body of a murdered inmate not just in passing but for approximately ten minutes and exposed to the heightened response of the institution to the event.

[138] Objectively we find that responding to an emergency call and then coming across a dead body is traumatic, particularly taking into account the deceased inmate's colour and smell that the worker experienced on arriving at the cell, the length of time the worker viewed the body, and the fact that the death was a result of murder. The employer has argued that the condition of the body would not suggest the event was traumatic, as no blood was apparent on the body or in the cell. We find that there need not be blood in order for the death in this case to be considered traumatic.

[139] The acting warden testified that the most recent murder of an inmate at a federal prison in British Columbia was the inmate's death in November 2010. The fact that the November 2010 event is the only one of its kind in the past four years supports a finding that the event is unusual and distinct from the normal duties of the worker's employment.

[140] The acting warden confirmed that the employer completed a high level and detailed investigation into the murder, which included interviewing correctional officers and reviewing various documents to identify aggravating and mitigating factors, adherence to policy, and potential negligence. This was followed by a coroner's inquest into the death. The employer's response to the event including the provision of critical incident stress management to its staff and the high level investigation into the event further supports a finding that coming upon the body of a murdered inmate is distinct from the usual duties of a correctional officer.

[141] The acting warden testified he has responded on two occasions to a murder of an inmate. He acknowledged, however, that some correctional officers have never encountered a deceased inmate in the performance of their jobs. We find that the evidence from the acting warden confirms that a murder of an inmate is not a usual or regular event to which a correctional officer must respond. To the contrary, his testimony establishes that observing the body of a murdered inmate is an unusual event; one that goes beyond the normal tensions and pressures of the duties of a correctional officer.

[142] The employer has provided statistical data regarding the number of incidents involving serious bodily injury or death in federal institutions across Canada in a twelve-month period in 2011 and 2012 (a total of 144 incidents). The acting warden clarified that the data reflects only serious or significant events. We find it significant that there were only

two murders in federal institutions in the 12 month period under review; a majority of the events listed involved assault or accidental injury.

[143] The employer argues the statistical data supports a finding that the occurrence of traumatic events within the correctional system is not unusual or uncommon. To the contrary, we find that the statistical data confirms that the murder of an inmate in the federal penitentiary system is rare. In 2011 and 2012 there were a total of two inmate murders nationally. The likelihood that a correctional officer would be faced with the aftermath of a murder at the workplace is very low. We do not consider this to be a normal or usual occurrence in the worker's employment.

[144] The employer has also provided statistical data regarding the number of in-custody deaths at institutions in the Pacific region between 2004 and 2013 (75 deaths over ten years). The acting warden clarified the data reflect deaths including natural death, suicide, accidental death, and homicide and includes inmate deaths at nine institutions.

[145] Review of the data over the ten years indicates that institution A had between 0 and 3 inmate deaths in a year, for a total of 13 deaths over ten years. There were 4 inmate deaths at institution B over the same 10-year period. Again, we find the statistical data support a conclusion that the likelihood of a correctional officer observing a dead body in the course of performing his job duties is very low. Such events do not occur with such regularity or frequency that coming upon a deceased inmate would be considered "usual" or "normal".

[146] The employer refers to *WCAT-2011-01352,* a case which involved a correctional officer's claim for psychological injury after supervising an inmate with a history of self harm over a six month period. The panel found that the inmate's conduct could not be viewed either subjectively or objectively as being unusual, taking into account both the job duties and work environment of persons employed as correctional officers and the length of time the correctional officer's duties included guarding the self-harming inmate. In the present appeal, there was no expectation the worker would encounter a deceased inmate on entering the cell, nor had the worker experienced a similar event previously. In addition, the evidence in the present appeal leads us to find that responding to a murder in a federal correctional institution is unusual. We find the factual circumstances between the two claims differ significantly.

[147] We rely on the worker's testimony to find that coming upon the deceased inmate on November 22, 2010 was emotionally shocking. This was the first time the worker had seen a dead body. While the cause of death was not readily apparent at the time, the inmate had been deceased for several hours, such that the worker observed the discolouration and smell associated with the death. This exposure is then compounded by the fact the worker learned of the circumstances of the death, and formed the view the death could have been prevented had the inmate not been placed in that particular cell.

[148] In addition, we must take into account the personal circumstances of this worker. He had been working as a correctional officer for a relatively short period of time. The worker had no prior warning of what situation he would be encountering upon entering the cell. This was his first experience seeing a dead body. He literally froze and could not perform his job duties for the next ten minutes. The worker has consistently described experiencing an immediate reaction to viewing the deceased inmate. We find the workplace event of November 22, 2010 was a traumatic event.

(ii) Temporary assignment to correctional hospital

[149] The worker described observing the deteriorating condition of a terminally ill inmate while temporarily assigned for a one month period to guard this inmate at a correctional hospital. He submits that it is unusual in his employment to be exposed to death, including a natural death. The worker further requests we take into account his personal history including his father's death from cancer.

[150] We find that observing the deteriorating state of a terminally ill inmate in a correctional facilities hospital is not something that is normal or usual in the occupation of a correctional officer. We accept that health care professionals, depending on the type of job performed, may be exposed to terminally ill patients as a regular part of the performance of their job duties. The same cannot be said for an average correctional officer working in a federal prison.

[151] We do not, however, find the worker's experience of observing the deterioration of the inmate over a one month period amounts to a traumatic event as contemplated by policy item #C3-13.00. We accept that observing the deteriorating condition of the inmate would have been upsetting for the worker, particularly given his family background. We also acknowledge that the worker observed the inmate having difficulty breathing, which can be distressing; however, we do not find the circumstances to be emotionally shocking. The natural death of an inmate is not unexpected. The worker did not have interactions with the inmate or the inmate's family. The worker did not provide palliative care to the inmate; rather, he observed the inmate through a glass window. The worker was not on shift the day the inmate passed away. In such circumstances we find the event was not of such intensity to be considered emotionally shocking.

[152] It is less clear whether the cumulative stress of observing the deteriorating health of the inmate would amount to a significant work-related stressor. Board Practice Directive #C3-3 provides that it is necessary to obtain a detailed understanding of the working conditions and specific stressors the worker is reporting to be able to assess whether the claimed stressor is excessive in intensity and duration from the normal pressures and tensions of the employment.

[153] A correctional officer faces a number of varying stresses and tensions in the employment. This is clear from the testimony of the worker, the acting warden, and the job description of a correctional officer. While it may not be every day that a correctional officer is assigned to guard a terminally ill inmate, we do not find that having to do so goes beyond the normal pressures and tensions of the employment. The worker testified to having to guard high risk inmates; in particular inmates that may have been placed in segregation or transferred from other institutions for various reasons. The acting warden testified as to the range of duties to which a correctional officer may be assigned, from duties involving no inmate contact to responding to highly volatile situations. While guarding a terminally ill inmate may not be the regular assignment of a correctional officer, generally, the pressures and tensions associated with this task do not significantly exceed those which would be experienced in the day to day duties of a correctional officer.

[154] In the particular circumstances of this event, we acknowledge that guarding a terminally ill inmate was not part of this worker's normal job duties, apart from the one month period he was assigned to that task. We again find it is significant that the worker did not interact with or talk to the inmate and did not have a relationship with the inmate prior to the temporary assignment. There was nothing exceptional required of the worker while guarding the inmate, his job tasks did not deviate from the normal activities of a correctional officer. While the physical location of the assignment to the correctional hospital may have differed from the worker's regular work location, we find his duties did not differ in intensity or duration from the pressures or tensions the worker would have experienced in the normal course of his employment at institution A or another correctional facility.

(iii) Inmate death in temporary custody

[155] In March 2012 the worker, having heard of the death of an inmate in temporary custody at institution B, experienced a resurgence of the symptoms he experienced after the November 2010 event. While we accept that the knowledge of the in-custody death of an inmate caused the worker to experience a recurrence of his symptoms, we are unable to find the in-custody death amounted to a traumatic event or a significant work-related stressor for this worker.

[156] We find there is a distinction between having experienced firsthand a potentially traumatic or violent event in a correctional setting and having heard of an event that occurred but having no involvement in that event. Policy item #C3-13.00 provides that, while not a requirement, in most cases a worker will have suffered or witnessed the traumatic event first hand. The worker having only heard of the in-custody death through other sources did not suffer or witness the event first hand. While hearing of an inmate's death would be upsetting, we do not find that it constitutes an emotionally shocking event in the circumstances where the worker had no direct involvement either in the response to the event or with the inmate prior to his death.

[157] Similarly, we are unable to find that learning of the death of the inmate in March 2012 constitutes a significant work related stressor. The worker did not respond to the in-custody death. The worker was not working in the temporary detention area at the time. He did not see the deceased inmate, nor was he involved in the aftermath of that event. The worker only heard of the incident from others. He did not directly experience the event. He did not communicate with the inmate prior to his death, nor did he interact with the family after the inmate's death.

[158] Given the worker's limited knowledge of and involvement in the event, we find it was not excessive in intensity or duration from the normal pressures or tensions of the worker's job.

(iv) Attack by bodily fluid

[159] The worker was at work and experienced the aftermath of an assault with bodily fluids by an inmate on a co-worker. He observed the emotional distress of his colleague who was targeted by the bodily fluid. The worker was later required to complete his rounds with the use of a shield in the event of a further attack.

[160] The acting warden acknowledged that assault by bodily fluid is more prevalent at maximum security institutions than at medium security institutions. The acting warden testified that non-emergency response correctional officers at institution A will make use of body shields when conducting rounds on one or two occasions in a year. The worker testified that this was the first instance he had to use a shield while performing rounds; all correctional officers used shields on that day. The worker has not been assaulted by bodily fluid.

[161] The employer submits the worker was not the target of any intended attack by bodily fluids. Further, the employer submits that such attacks are not unusual in medium and maximum security institutions. Recently attack by bodily fluid has been recognized as a disciplinary offence[32] given the prevalence of this behaviour in the correctional setting.

[162] The worker submits that while attack by bodily fluid does occur in correctional facilities, it does not occur with such frequency to form a normal part of the job experiences of a correctional officer. The worker submits that such events do not occur daily, weekly, or even monthly at any given institution.

[163] We find that involvement in an incident of attack by bodily fluid is not something that is usual or normal in the occupation of a correctional officer. We accept that while such events do occur, particularly at medium and maximum security institutions, attacks by bodily fluid do not occur with such frequency to be considered normal or usual in the worker's employment.

[32] *Corrections and Conditional Release Act,* S.C. 1992, c. 20, section 40 (r.2).

[164] We do not, however, find the event constitutes an emotionally shocking event for this worker; nor was the event one that was excessive in intensity or duration to amount to a significant work-related stressor. The worker was neither the intended target of the assault, nor was he adjacent to or near the assaulted correctional officer at the time the bodily fluid was thrown. Rather, the worker was at his post and experienced the aftermath of the incident. This required the worker to monitor events from his post and then use a shield while completing rounds.

[165] We note that using a shield to complete his rounds deviated from what would be considered the normal or usual manner in which he conducts rounds. The fact the worker was required to use a shield on that date does not in our view raise the pressures and tensions of the situation to a level of being excessive. The worker did not need to use his shield to block an attack with bodily fluid. It was a precautionary measure undertaken by all correctional officers at institution B on that date in response to the earlier attack on the co-worker.

[166] We accept that from time to time events in a federal prison will require that normal protocols are deviated from in order to ensure the safety of correctional officers, inmates, and others in the institution. A deviation from the normal routine on its own does not in our view constitute an emotionally shocking event or a stressor that is excessive in intensity or duration, without something more.

[167] It is the specific facts of any given incident that must be considered to determine whether the incident is emotionally shocking (a traumatic event) or excessive in intensity or duration (a significant work-related stressor) when compared to the normal pressures and tensions of the job. We do not find the deviation in this case constitutes an emotionally shocking event or a significant work-related stressor.

(v) Threats towards a co-worker

[168] The worker explained he was not the target of any death threats; rather, he became aware of a death threat made towards another correctional officer. The death threat created a sense of heightened awareness amongst all correctional officers at institution B and added to the normal pressures and tensions of the workplace.

[169] We are unable to find that hearing of a death threat made towards a co-worker constitutes a traumatic event or a significant work-related stressor for this worker. As noted above, policy item #C3-13.00 provides that in most cases a worker will have witnessed or suffered the traumatic event first hand. The worker did not directly hear a threat uttered by an inmate against himself or another correctional officer. He was not directly involved in this event.

[170] The worker was not the target of the threat. He was not involved in an investigation of the threat. At no time was there an indication that an inmate intended to target the worker by assault or in another manner. We find the fact that the worker merely heard

of an incident at work, but did not directly experience it and was not the intended target of the threat, does not amount to a stressor that is excessive in intensity or duration from the normal pressures and tensions experienced by a correctional officer.

[171] It is expected that from time to time a correctional officer will hear talk of an event that may have occurred on a different shift or at a different institution. While such events may not occur on a daily or even weekly basis, when a correctional officer is not directly involved in the event, it diminishes the effect of the event on the correctional officer. We find that indirectly hearing of threats made against a co-worker does not meet the threshold of being traumatic or significant work stressors in this case.

[172] While there is some indication in the file material of the worker being harassed by a co-worker for a period of time at institution A because of his first language, the worker did not argue this contributed to his mental disorder. Accordingly, we have not considered whether the reported behaviour amounts to bullying or harassment as contemplated by section 5.1(1)(a)(ii) of the Act.

[173] In summary, we find the November 22, 2010 workplace event was a traumatic event. We find the subsequent events the worker has complained of, while upsetting, do not alone or in combination constitute traumatic events or significant work-related stressors in accordance with section 5.1(1) of the Act and policy item #C3-13.00.

4. Causation: Was the mental disorder a reaction to a traumatic event arising out of and in the course of employment?

[174] Next, we turn to consider the cause of the worker's Adjustment Disorder. Policy item #C3-13.00 at item D provides guidance on this question. To arise in the course of the employment, the traumatic event must be one that happened at a time and place and during an activity consistent with the obligations of the worker's employment. Under section 5.1(1)(a)(i) to arise out of the employment, one or more traumatic events must be of causative significance, which means more than a trivial or insignificant cause of the mental disorder.

[175] In making the determination on causation, policy item #C3-13.00 provides for review of the medical and non-medical evidence to consider whether:

- There is a connection between the mental disorder and the traumatic event, including whether the traumatic event was of sufficient degree and/or duration to be of causative significance to the mental disorder;
- Any pre-existing non-work related medical conditions were a factor in the mental disorder, and
- Any non work-related events were a factor in the mental disorder.

[176] The November 22, 2010 event occurred at a time and place and during an activity consistent with the duties of the worker's employment, such that the requirement the mental disorder be one "arising in the course of" the employment has been met.

[177] There is no dispute that there are a series of factors that have contributed to the development of the worker's Adjustment Disorder. Under section 5.1(1)(a)(i) of the Act, the work event must be of causative significance, meaning more than a trivial or insignificant cause of the mental disorder.

[178] We are guided on this question by the expert evidence of Dr. van Dam and Dr. Chopra. Dr. van Dam's opinion on causation is summarized in her statement, "The challenges of work matters, in combination with the exposure to violence, and seeing inmates whose health concerns recapitulated his father's death, would all be viewed as having resulted in his develop an Adjustment Disorder with Mixed Anxiety and Depressed Mood." Similar to the opinion of Dr. van Dam, Dr. Chopra expressed the view that the worker's mental disorder initiated following the November 2010 event and was maintained and exacerbated by further workplace events including stress and harassment.

[179] The worker has denied experiencing any anxiety or panic type symptoms prior to November 2010. He had not sought psychological treatment prior to November 2010. Neither psychologist identified pre-existing factors that may have contributed in a significant way to the development of the worker's Adjustment Disorder. The worker has consistently attributed the onset of his anxiety and panic symptoms to the November 2010 work event. There is insufficient evidence of any non-work related events that were a factor in the worker's mental disorder.

[180] The employer has asserted that the worker's Adjustment Disorder arises from labour relation disputes and matters beyond the November 2010 event. We agree that there are other contributing factors to the development of the worker's Adjustment Disorder.

[181] While the worker testified to the harassment and ill-treatment he received from co-workers at institution A, he did not feel this was a significant cause of his mental disorder. It appears the worker in his testimony, which occurred several years after the time period in question, may have diminished the effects of the work environment at institution A, as Dr. Chopra did identify this as a factor that maintained the worker's psychological symptoms. In addition, both psychologists identified the more recent events at institution B in 2012 as maintaining and/or exacerbating the worker's psychological symptoms. We have found those events do not meet the test of being traumatic workplace events or significant work-related stressors.

[182] As noted above, the November 2010 event need not be the sole or even the predominant cause for the mental disorder to be compensable; it need only be of causative significance, meaning more than a trivial or insignificant cause of the mental disorder. We find that the November 2010 work event was of causative significance in producing the worker's Adjustment Disorder. The worker's symptoms commenced

shortly after the November 2010 event, and while those symptoms fluctuated in severity and intensity, they did not fully resolve. We find the November 2010 event to be more than a trivial or insignificant cause of the worker's Adjustment Disorder. It was the initiating event that caused the worker to experience acute symptoms. The medical evidence both from the assessing psychologists and treating physicians consistently shows the worker has experienced flashbacks and nightmares associated with his observations of the deceased inmate. This event has been clearly identified as something that is more than trivial cause with regard to the development of the worker's Adjustment Disorder.

5. The section 5.1(1)(c) exclusion: Is the mental disorder caused by a decision of the worker's employer relating to the worker's employment?

[183] Finally we consider whether the worker's reaction to the November 2010 event is a reaction to a decision of the employer relating to the worker's employment, as contemplated by section 5.1(1)(c) of the Act (item E in policy #C3-13.00). The employer submits the worker's response to this incident is in relation to the employer's decision to place the inmate in a cell with his eventual killer, at a time when the inmate would soon be eligible for parole. The worker in his testimony acknowledged he was upset that the employer had placed the deceased inmate in the same cell with a known serial killer so close to his date of parole. The worker was of the view the murder was preventable.

[184] While the decision to place the deceased inmate in a particular cell was a decision of the employer, we do not find that this decision is one that is related to this worker's employment. Section 5.1(1)(c) of the Act does not exclude from compensation a mental disorder resulting from any decision of the employer; rather, it only excludes from compensation decisions that relate 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 this worker's employment. The decision to place the inmate in a cell was not a decision related to this worker's employment. We find that any contributory effect the employer's decision had on the worker's resulting mental disorder is neither excluded from consideration, nor creates a bar to the acceptance of his claim.

[185] In summary, we find that the worker experienced a traumatic event on November 22, 2010 when he was the second correctional officer on scene of a murdered inmate. This event was of causative significance in producing the worker's Adjustment Disorder. While the subsequent events the worker complained of were upsetting for this worker, the later events do not constitute traumatic events or significant work-related stressors as contemplated by section 5.1(1)(a) of the Act and policy item #C3-13.00.

D. Application of section 55

[186] Having found that the worker has a diagnosed mental disorder that arises from a traumatic event that occurred on November 22, 2010, it is apparent that there is a potential bar to consideration of the worker's claim by virtue of section 55 of the Act.

The worker did not file his application for compensation until August 15, 2012, some 21 months after the event giving rise to his mental disorder.

[187] The employer submits the worker immediately experienced a reaction to the November 22, 2010 event, and sought assistance by way of requesting access to information for the employee assistance program, but he did not file his application in a timely manner. In such circumstances, it cannot be said that special circumstances precluded the worker from filing his application for compensation within one year. Rather, the worker made a personal choice not to deal with his problems.

[188] The employer submits the date of diagnosis of the mental disorder is not relevant in determining the time period in which the worker ought to have filed his application. The employer argues the worker failed to mitigate his condition by not accessing readily available medical treatment and services. Had he done so, the worker would have been aware of his mental disorder and sought compensation in a timely manner.

[189] The worker submits he did not suffer an economic loss in the one-year period following the November 2010 event. The worker was not disabled from work and he did not seek medical treatment before November 22, 2011. The worker submits the panel should take into account his particular circumstances: he had no prior claims experience; he relied on his military background to cope with his symptoms; there is a stigma in federal corrections associated with psychological conditions; he was new to the job and believed the symptoms he experienced were normal and part of the job.

[190] The worker notes he was not active in treatment, such that there was no clear evidence available to him that he had a mental disorder that would warrant filing an application for compensation. The worker submits it is speculative to suggest that had he sought employee assistance he would have been diagnosed with a mental disorder and advanced a claim at an earlier time.

1. Time Period for Filing Application

[191] Section 5.1(1)(a)(i) of the Act provides that it is the reaction to traumatic events that is compensable and not the event itself. Board policy item #C3-13.00 recognizes that a psychological reaction to an event may be delayed. It is therefore possible that section 55 would not apply in the situation where a worker experiences a delayed reaction to a traumatic event, provided the application for compensation is made within one year of the reaction. This raises the question as to when the worker experienced the reaction to the November 22, 2010 event.

[192] The worker at the oral hearing testified that he immediately experienced symptoms following the November 2010 event, including nightmares and panic attacks. The worker turned to alcohol to help control his symptoms. He also relied on his military background, which he described as involving a culture where he was “made to be a warrior,” to “just suck it up,” and to keep going without showing any weakness.

[193] We find the worker experienced a reaction to the November 22, 2010 event shortly after its occurrence. The worker's testimony coupled with the evidence from Drs. van Dam and Chopra establishes the worker did not have a delayed reaction to the event. Rather, the evidence suggests the worker denied he was experiencing a reaction that required medical treatment. Instead, he relied on his military background and his own coping skills to deal with his symptoms. In addition, the worker, relatively new in the occupation, assumed that the symptoms he experienced were normal in relation to the tensions of the job.

[194] The next question to determine is when the one year time period to apply for compensation commences in a claim for mental disorder. Policy item #93.21 provides some direction, noting the one-year period commences at the date of injury and not the date of subsequent disablement.

[195] In *WCAT-2013-01345,* the panel considered when the time period for a worker claiming compensation for a mental disorder is triggered. In that case the worker had claimed compensation for a mental disorder in November 2011 in relation to an event that had occurred in August 2010. The worker had experienced a reaction to the event, but continued to work. She sought treatment 11 months after the August 2010 work event. The panel rejected the notion that a mental disorder diagnosis is required in order to trigger the time period in which to apply for compensation. The panel states:

> [86] I find that a worker's obligation to apply for compensation in a timely manner is triggered when a worker has experienced a physical or psychological change subsequent to a work process, event, incident, stimuli, et cetera. A worker is not required to have a definitive diagnosis before that obligation is triggered. It is sufficient that the worker would have had reason to believe there was a link between the change and the work process, event, incident, stimuli, et cetera.

[196] The panel found special circumstances had not precluded the worker from filing her application within one year, noting that the worker had come to realize by July 2011 that she had unresolved psychological issues from the event, prompting the worker to seek medical treatment within one year of the date of the event. The panel found the fact the worker was able to seek out counselling in July 2011 supported a conclusion she was not precluded from contacting the Board to determine whether compensation could be paid for her psychological reaction to the workplace event.

[197] As noted above, we find the worker experienced a psychological change shortly after the November 2010 event. The onset of this reaction triggers the time period in which the worker ought to have filed his application for compensation. We find the worker did not file his application for compensation within one year of the date of injury (his reaction to the traumatic event), and that his claim is barred from consideration by section 55(2) of the Act unless the requirements of section 55(3) are met.

2. Special Circumstances

[198] If an application is made outside the one year period, section 55(3) indicates that the claim may be considered if there existed special circumstances which precluded the application for being filed within the one year period, and the Board exercises its discretion to pay compensation. Policy item #93.22 provides direction on what constitutes special circumstances; the particular circumstances of each case must be considered and a judgment made.

[199] In determining whether special circumstances existed, the decision maker must look to the worker's reasons for not submitting the application within the one-year period. The validity of the claim itself is not considered. If the worker's reasons for not filing the claim within the one year period are not sufficient to amount to special circumstances, the claim is barred from consideration on its merits. Policy item #93.22 provides the following example of what may constitute special circumstances:

> The following facts illustrate a situation where special circumstances were found to exist. The worker suffered a minor right wrist injury on October 20, 1976, which at the time caused him no disablement from work and did not require him to seek medical attention. There was, therefore, no reason why he should claim compensation from the Board, nor any reason why his doctor or employer should submit reports to the Board. It was not until 1978 when the worker began to experience problems with his right wrist that he submitted a claim to the Board. It was only then that he was incurring monetary losses for which compensation might be appropriate.

[200] The example provided in Board policy was considered in the context of a claim for a mental disorder in *WCAT-2014-02277.* In that case, the worker initiated a claim for compensation for a mental disorder in December 2012 in relation to an event that had occurred in December 2006. The panel found that the worker was not disabled by reason of the mental disorder within one year of the event giving rise to the disorder, nor had the worker sought medical treatment in the one year following the event. The panel stated:

> [63] Thus, while I have some concern as to the accuracy of the worker's assertion that he did not experience a psychological change in the one year following December 31, 2006, I find he did not miss time from work in the one year following that incident and did not see a healthcare professional during that same year for any effects of that incident.
>
> [64] Thus, there were no benefits for the worker to have claimed in the one year following December 31, 2006.

> [65] I find such circumstances establish the existence of special circumstances during that one year that precluded the worker from applying for compensation in a timely manner.

[201] The panel found that while the evidentiary record was not perfect, the Board should consider the claim on its merits.

[202] We find the circumstances in this case are similar to that in *WCAT-2014-02277* and to the example of special circumstances provided in Board policy. The worker did not seek medical treatment or counselling for the symptoms he experienced in the one year following November 22, 2010. The worker continued to perform his regular job duties. The worker was not disabled from work because of a psychological condition until he filed his application for compensation in August 2012. There was no monetary loss for which compensation could be claimed. The worker had no previous experience with the workers' compensation system.

[203] The first mention in the medical records of the worker experiencing difficulties following the November 2010 event appears in Dr. Page's chart note, one year later, at which time the worker sought medical treatment for another condition and denied assistance in relation to the difficulties he was experiencing with sleep and nightmares. While the worker experienced symptoms following the November 2010 event, there would have been no benefit to him claiming compensation when he remained at work and did not seek medical treatment. We find there were no benefits for the worker to claim in the one year following November 22, 2010.

[204] We further note the worker had not previously filed an application for compensation for workers' compensation benefits, and was not familiar with the claims process. The worker was not diagnosed with a mental disorder until August 2012. These factors when considered altogether amount to special circumstances during that one year that precluded the worker from applying for compensation in a timely manner.

[205] The employer refers to *WCAT-2013-02434* in support of the submission that there were not special circumstances that precluded the filing of a timely application. In that case the worker was diagnosed with post-traumatic stress disorder in September 2007, and applied for compensation in 2011. The panel found that there were no special circumstances that precluded the filing of an application for compensation within one year of the date of injury, taking into account the date of diagnosis. In this case the worker applied for compensation the same date that he was initially diagnosed by his physician with possible post-traumatic stress disorder. Given the difference in the facts of this case, we do not find *WCAT-2013-02434* to be of assistance.

[206] The employer has suggested the worker failed to mitigate his situation by neglecting to seek treatment within the one year period, despite the fact that services were readily available either through the employer's employee assistance program or through medical treatment. It may be that had the worker sought treatment for his symptoms,

he would have been aware of the significance of his symptoms, and sought compensation at an earlier date. We agree with the worker though that such an argument is speculative. The failure to promptly seek medical attention is not a bar to compensation in this case.

3. Exercise of Discretion to Pay Compensation

[207] If special circumstances exist that precluded the worker from filing the application within the one-year period, the second requirement of section 55(3) requires that the case be appropriate for the Board to exercise its discretion to pay compensation. This requires consideration of whether the lapse in time in filing the claim has prejudiced the Board's ability to carry out necessary investigations into the validity of the claim. Policy item #93.22 also directs the decision maker to consider the nature of the worker's injury and the ability to obtain collateral evidence of the worker's injury in making a decision to exercise discretion to allow a claim to proceed to adjudication on its merits despite the delay in filing the claim.

[208] The employer has not provided evidence to suggest that the Board has been prejudiced in its ability to investigate the claim by the worker's delay in filing his application for compensation. We note that the worker's time lapse in filing his application, nine months beyond that permitted by the statute, is not excessive. The Board has not been hindered in its ability to collect medical evidence. Given the significance of the November 2010 event, the employer had conducted detailed investigations into the event, such that the factual background of the event is well known. We find it was appropriate for the Board to exercise its discretion to allow the claim to proceed to adjudication on its merits despite the worker's delay in filing his application.

[209] We find that the worker's diagnosed Adjustment Disorder arises out of and in the course of his employment following the November 22, 2010 in-custody murder of an inmate. There were special circumstances that precluded the worker from filing his application within one year of his reaction to this event, and that the Board ought to exercise its discretion to pay compensation.

Conclusion

[210] We deny the employer's appeal and confirm the Review Division decision. We find the worker's diagnosed Adjustment Disorder arose out of and in the course of his employment on November 22, 2010. While the worker filed his application beyond the time period permitted by the Act, there were special circumstances that precluded the worker from doing so. It is appropriate in the circumstances of this case for the Board to exercise its discretion to pay compensation.

The worker has requested reimbursement of his travel expenses to attend the oral hearing on September 19 and October 27, 2014. Section 7(1)(a) of the *Workers Compensation Act Appeal Regulation* provides that WCAT may order the Board to reimburse a party to an appeal for the expenses associated with attending an oral hearing. Pursuant to that section and item #16.1.2.1 of WCAT's MRPP, we order that the Board reimburse the worker for travel expenses in excess of 24 kilometres from the oral hearing location.

Debbie Sigurdson
Vice Chair

Caroline Berkey
Chair

Teresa White
Vice Chair

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