WCAT # 2006-425-AD

CLAIM HISTORY AND APPEAL PROCEEDINGS:

This is an appeal of a decision of a Hearing Officer of the Board dated May 15, 2006, wherein the Hearing Officer found that the Worker had not suffered a personal injury by accident arising out of and in the course of his employment. The Worker appealed this decision to the Workers' Compensation Appeals Tribunal, [the "Tribunal"] on June 13, 2006.

The Worker is a federal employee, and, therefore, the *Government Employees Compensation Act*, R.S.C.1985, c.G-5, as amended ["*GECA*"], is applicable to his claim for workers' compensation. According to the Report of Accident signed by the Worker October 16, 2001, and filed with the Board, his claim is for "mental stress". The Worker's claim was and still is, that he experienced harassment over time from fellow employees and supervisors in his workplace, resulting in psychological injury which disabled him from work.

The Board denied the Worker's claim initially, by way of Case Manager decision dated January 11, 2002. By way of Hearing Officer decision dated September 25, 2002, the denial of the Worker's claim was upheld. The Hearing Officer found that the Worker had not suffered a personal injury by accident arising out of and in the course of his employment, as defined under GECA. This decision was appealed to the Tribunal.

The Tribunal, in *Decision 2002-764-AD* (May 29, 2003, NSWCAT), recognized the Worker's claim for gradual onset stress pursuant to the provisions of GECA. This decision was appealed to the Nova Scotia Court of Appeal, which, in *Nurnber v. Nova Scotia Workers' Compensation Board et al.* (2004), 224 N.S.R. (2d) 276 (C.A.), ["*Nurnber*"] remitted the appeal to the Tribunal for rehearing, on the basis that the Tribunal had wrongly approached the issue of causation.

The issues raised by the Worker's claim and grappled with by the decision-makers dealing with it, arise from the interplay between GECA and the *Worker's Compensation Act*, S.N.S.1994-95, c.10, as amended [the "*Act*"], and their respective definitions of the term "accident". The relevant provisions will be set out below, but the essence of the difference is this : the *Act* contains a "stress exclusion" which effectively limits a non-federal worker's entitlement to compensation for gradual onset stress. No such exclusion exists in GECA.

In arriving at its conclusion to remit the Worker's appeal to the Tribunal, the Court of Appeal did not determine the question of whether gradual onset stress is an "injury by accident " within the meaning of s. 4 of GECA.

Prior to the Worker's appeal being reheard by the Tribunal, the Chair of the Board exercised his authority pursuant to s. 248 of the *Act*, to postpone all appeals which raised the issue of the appropriate test for the compensability of stress claims under GECA. On

July 22, 2005, the Board of Directors approved Policy 1.3.6, entitled, “Compensability of Stress as an Injury Arising out of and in the Course of Employment-*Government Employees Compensation Act* (GECA)”. It is stated to apply to all decisions made on or after July 25, 2005.

By way of *Decision 2002-764-CA-RTH* (September 29, 2005 NSWCAT), the Tribunal referred the Worker’s appeal to the Board, so that an adjudication of his claim in light of the new policy could be done in the first instance. This referral resulted in the Hearing Officer decision of May 15, 2006, which is the decision on appeal to this Panel.

In arriving at its conclusions on this appeal, the Panel was assisted by the written submissions of Counsel for the Worker, for the Employer, and for the Board, filed with the Tribunal on October 31, 2006, November 17, 2006, and November 28, 2006, respectively. It was agreed by all Participants and determined by the Tribunal that the appeal would proceed by way of written submission, primarily on the basis that a transcript from the Worker’s previous hearing before the Tribunal was available.

ISSUE AND OUTCOME:

Has the Worker suffered a personal injury by accident arising out of and in the course of his employment pursuant to GECA?

No. There was no “accident” triggering possible compensation under GECA.

ANALYSIS:

The definition of “accident “ in the *Act* , contains the stress exclusion and is as follows:

s. 2 In this Act,

(a) “accident” includes

(i) a wilful and intentional act, not being the act of the worker claiming compensation,

(ii) a chance event occasioned by a physical or natural cause, or

(iii) disablement, including occupational disease, arising out of and in the course of employment,

but does not include stress other than an acute reaction to a traumatic event; [emphasis added]

The definition of "accident" in GECA includes "a wilful and intentional act, not being the act of the employee, and a fortuitous event occasioned by a physical or natural cause". Section 4 of GECA relates to entitlement and states:

> s. 4(1) Subject to this Act, compensation shall be paid to
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> (a) an employee who
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> (i) is caused personal injury by accident arising out of and in the course of employment, or
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> (ii) is disabled by reason of an industrial disease due to the nature of the employment; and
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> (b) the dependents of an employee whose death results from such an accident or industrial disease.
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> (2) The employees or the dependents 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 dependents 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 the employment.

As noted by Justice Cromwell at paragraph 11 of *Nurnber*, the purpose of GECA is to provide compensation to federal employees on the same terms and conditions as their provincial counterparts. He acknowledged, however, that complex issues arise concerning the interaction of the two statutes, one such issue being the presence of a stress exclusion in the *Act*, and its absence in GECA.

The Panel accepts that there is a conflict between the definitions of accident in the *Act* and GECA. This is consistent with jurisprudence from the Tribunal which recognized claims for stress in GECA cases without the requirement of a traumatic event. (See *Decision 97-933-TAD (*October 27, 1998, NSWCAT) and *Decision 98-007-TAD* (April 19, 1999, NSWCAT)) The very history of this appeal and the adoption by the Board of Policy 1.3.6 points to the existence of this conflict.

What test applies to the recognition of the Worker's claim?

The legal path to arrive at a test to determine gradual onset stress cases under GECA, has been a twisted one. The Court in *Nurnber* held that the Tribunal had erred in determining that the nature of the workplace incidents complained of, and whether other workers would have found them stressful, was irrelevant to the question of a causal link between the incidents and the psychological condition. Mr. Justice Cromwell notes at paragraph 8 of his decision, that the fourth issue before him is, "what the test for recognition of gradual onset stress claims should be." He goes on to say:

> The contest here is primarily between a three-part test arising from some Ontario workers' compensation decisions and sometimes applied by WCAT (see, for example, Tribunal Decision No. 2002-601-AD (Feb. 28, 2003, NSWCAT) and a variant of that, a two-part test, which was used by WCAT in this case. One of the major differences between these two approaches is that the former requires that the employee's reaction to the workplace incidents be reasonable whereas the approach adopted by WCAT in this case rejects this requirement.

In the final analysis, the Court declined to answer the question of whether a stress-based injury must be a reasonable response to the triggering event or events. It noted that the Tribunal itself had been divided on the issue, and left it to the Tribunal to develop its jurisprudence.

So where does the law stand on the issue to date? The three-part test to which the Court referred, was adopted by the Tribunal in *Decision 1997-269* (June 30, 1999 NSWCAT) from *Decision No. 1030/89* (1991), 20 W.C.A.T.R. 46 (W.C.A.T., Ontario), and is as follows:

> (a) There must be evidence of a psychological disability which disables the worker from performing the functions of the job.
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> (b) The disability must be work-related. This requires an evaluation of various stressors in the workplace, including a consideration of whether they are usual or unusual, whether other workers were affected, and whether the stressors are typical, expected or unexpected.
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> (c) The workplace must contribute significantly to the development of the disability. This involves a comparison of the worker's personal situation with the contribution of the work situation.

In *Decision No. 1030/89, supra,* the Panel found for the Worker on the basis that he had suffered an aggravation of a pre-existing condition. This does not seem to accord with the application of an objective test. The Ontario Panel stated:

> In general, the weight of thinking now is that it is the perception of the stressor by the person and his or her selection of ways to cope that determine the type and the degree of the response to the stressor and not just the stressor per se.

Bearing in mind, however, Mr. Justice Cromwell's comments on the objectivity required by the three-part test, the Panel accepts that the test requires an objective look at the stressors alleged, and the worker's reaction to them.

That the correct approach to the question of whether a personal injury by accident has occurred is an objective one, makes eminent sense, given the comments of Mr. Justice Cromwell in *Logan v. Workers' Compensation Board (N.S.) et al.,* 2006 NSCA 88. The Panel notes that the issue in *Logan* was the appropriate test to determine what constitutes a traumatic event for the purposes of the stress exclusion, however, finds the comments equally applicable to the instant case. Mr. Justice Cromwell stated at p. 24 of the decision:

> In my view, **WCA**'s [the Act's] approach to the necessary links among the workplace, the accident and the injury do not suggest that whether there has been an accident should be judged subjectively. In fact, the opposite is the case.

And further:

> There must be an objectively determinable accident which arose out of and in the course of employment.

A similar view was taken in *D.W. v. New Brunswick (Workplace Health, Safety and Compensation Commission)* (2005), 257 D.L.R. (4th) 594; 2005 NBCA 70. The Court, in determining what constituted a "traumatic event" for the purposes of the New Brunswick Workers' Compensation Act, said at paragraph 48, that the law should not readily embrace an entirely subjective test when adjudicating compensation claims. It went on to say that, "At some point, the reaction of the employee to the precipitous event must be measured against the reasonable person standard." The Court stated that if it were to adopt a subjective test, it would effectively be applying the "thin skull" principle.

The Employer's submissions on appeal refer to *Decision No. 2005 98,*[2002] O.W.S.I.A.T.D. No. 73. The questions the Panel in that case formulated and answered in determining the worker's entitlement to compensation for gradual onset stress were as follows:

> (1) Were there stressors, whether usual or unusual in the workplace? (2) If so, would a reasonable person accept that these stressors were potentially disabling?

Given its review of the law canvassed above, the Panel rejects the two-part subjective test used by the Tribunal in *Decision 2002-764-AD* (May 29, 2003, NSWCAT) as being the correct test. Although the test has been expressed in various ways by court and tribunal, the essence is the same: there is no room for a subjective view of the events or the Worker's reaction to them, in determining whether or not an accident occurred under GECA.

Policy 1.3.6 was approved on July 22, 2005, and is stated to apply to all decisions made on or after July 25, 2005 pursuant to GECA. Policy 1.3.6, as it applies to claims for gradual onset stress, states as follows:

> Claims for psychological or psychiatric injuries resulting from gradual onset stress may be compensable if all the following four criteria are satisfied:
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> i. The work-related events or stressors experienced by the worker are unusual and excessive in comparison to the work-related events or stressors experienced by an average worker in the same or similar occupation;
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> ii. The Worker is diagnosed with a mental or physical condition that is described in the DSM IV.
>
> iii. The mental or physical condition is caused by the work related events or stressors; and
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> iv. The condition is diagnosed in accordance with the DSM IV by a health care provider being either a psychiatrist or a clinically trained psychologist registered with the Canadian Register of Health Service Providers in Psychology.

The Policy goes on to state that:

> Mental or physical conditions are not compensable when caused by labour relations issues such as a decision to discipline the worker; a decision to terminate the worker's employment or routine employment related actions such as interpersonal relationships and conflicts, performance management, and work evaluation.

How does the Policy compare with the state of the law as it has developed to date? The Panel sees nothing in Policy 1.3.6 which differs materially from the interpretation of s. 4(1) of GECA set out in caselaw, as it relates to the Worker. The emphasis in the Policy is on the stressors. The Policy suggests that they are to be evaluated objectively; in relation to what an "average worker in the same or similar occupation" would experience. Arguably, it does not deal with the issue of the worker's reaction, unless one could say that if a stressor is found to be unusual or excessive, it would be accepted that a reasonable person would have a disabling reaction to it.

In the Panel's view, the Policy, as it applies to the Worker in this case, neither changes nor adds anything to the common law. The Worker has a DSM-IV diagnosis, and so would meet that aspect of the Policy. The Panel's analysis of the facts, as set out below, leads to the conclusion that the Worker has failed to demonstrate that he was subjected to stressors that could be considered unusual or atypical. He has not established that a reasonable person would accept that these stressors would be potentially disabling.

The specific exclusions in the Policy headed "non-compensable events" have no impact because the events in question, regardless of whether they arise from interpersonal conflict or not, are found by the Panel to be neither unusual, atypical or something a reasonable person would consider capable of causing a disabling reaction. The Panel finds that regardless of whether or not Policy 1.3.6 were to be applied, the result would be the same.

The Panel leaves for another day, the question of whether the Policy simply echoes the common law, or whether in some cases it could have the effect of establishing additional restrictions over and above what was required prior to its approval. Given our finding on the evaluation of the external stressors complained of, the issue of conflict between the Policy and GECA, and the issue of the retroactive application of the Policy, do not have to be determined.

Facts and Analysis:

The Worker claims that a series of workplace stressors which took place following his conviction for the solicitation of prostitutes and the subsequent publication of this fact in the newspaper, led to his psychological injury. In evaluating the facts giving rise to the Worker's claim, the Panel has had the benefit of the transcript of the Tribunal's oral hearing at which the Worker, two of his co-workers, and five of his supervisors testified. In addition, all materials on the Board and Tribunal files have been reviewed. The Panel has afforded deference to findings of fact made by the Hearing Officer and the Appeal Commissioner who had the benefit of hearing oral testimony.

The Worker testified before the Tribunal that he started work with the Employer in 1990. He became a full-time employee in February of 1998, working in "forward consolidation". The events giving rise to the solicitation charge occurred in 1997, with the publication of

his conviction taking place in March of 1998. The publication "destroyed" the Worker's marriage and his divorce was finalized 12-15 months later. He testified that he was depressed during 1998 and was on medication for depression. He was let go for missing too much time. He filed a grievance. He continued to work while the grievance process took place, and was eventually reinstated. It was the Worker's testimony that he did not have any problems with co-workers in the forward consolidation division with the exception of co-worker J.P. who had said something "slanderous" to him relating to the prostitution issue on 4-5 occasions over 4-5 months.

In the latter part of 1998 the Worker moved to the job of forward processing. Soon after this he had an incident with co-worker B.F., whom he said ignored him in a training session, annoyed him by telling him how to do his job, and falsely accused him of stepping on her foot. Profanity was exchanged between the Worker and B.F. He testified that about a year later he was told that B.F. was "bad mouthing" him in the lunchroom.

The Worker described an incident with co-worker T.R. He testified that he was told by his friend and co-worker E.H., that T.R. was badmouthing him to other workers and saying that he was a pervert. After hearing this, when T.R. said something to him about the way he was doing his job, he told her not to talk to him. He also described an incident where he met T.R. on the stairs and she went out of her way to avoid him. She then reported the incident to a supervisor, alleging some kind of inappropriate conduct on his part. T.R.'s husband, a fellow employee, spoke to the Worker after this incident, telling the Worker that T.R. was upset, and that he may have to "take care of business". The Worker took this as a threat.

The Worker testified that about six months after he went to forward processing (approximately November/December 1998) P.D. started work there as well. He said he thought she was a nice person and they got along well. He testified, however, that she began asking him personal questions, and critiquing his work habits. When he saw her in a bar on a Saturday afternoon, he approached her, told her she had no business asking about his life and swore at her.

The Worker testified to an incident involving co-worker A.D. , where she asked him if he had stolen her "binnie", which was a cart workers used for the mail. He told her he didn't appreciate her saying what she said. There was disciplinary action taken as a result of this incident, with A.D. alleging he had told her "to mind her own f-ing business". A grievance was still ongoing on this matter at the time of the Tribunal hearing.

The Worker described the conflicts he had with co-worker M.S. He testified that in the summer of 2000, M.S. would stare at him for minutes at a time. He said she gave him "the finger" on a couple of occasions, called him and idiot and told him to f-off. He described an incident at Tim Horton's where she followed him and told him that he would have a peace bond against him by the morning.

The Worker described an incident, prior to the one at Tim Horton's where M.S. would not allow him to do what his supervisor told him to, which was to put a "letter-tainer on each person's rack in the sorting section". M.S. would not allow him to put them on hers and grabbed his arms saying she didn't want him near her, and to get away from her. There was some jostling after which M.S. ended up on the floor. The Worker claimed he did not push M.S. but he was given a one day suspension as a result of the incident.

The Worker stated that in October of 2000 he moved to "receipt and dispatch" where he had worked originally. Months later, in what the Worker said was the summer of 2001, he had an incident with co-worker S.S. where he said he came close to hitting her with a forklift when he was backing up and she walked into his path. He attended a disciplinary "interview" regarding the driving incident, where, he interpreted comments made by his supervisor to be a reference to his prostitution convictions.

The Worker recounted a number of incidents where he was in conflict with his supervisors. There was more than one incident regarding the loading of the "603 trailer". Both supervisors I.O. and P. M. had conflicts with the Worker about it. The Hearing Officer found that the Worker had been instructed as to the proper procedure on numerous occasions. The Worker offered an explanation for not carrying out his employment activities as instructed but the Hearing Officer did not place any probative value on the Worker's explanations. He accepted the testimony of P.M. on the issue and found that the Worker acted inappropriately to a normal supervisory inquiry.

Based on the facts as found by the Hearing Officer, the Panel accepts that the supervisory incidents the Worker complained of were incidents of performance management, which were neither unexpected or unusual in the normal supervisor/employee relationship. These events were not of a nature that a reasonable person would expect a disabling reaction to them.

The Panel accepts that the Worker reached a point emotionally, where he could no longer stand to be in his workplace. That he suffered from a psychological disability, was accepted by the Hearing Officer, and is accepted by the Panel.

What are the stressors in the workplace the Worker gives for his inability to work? Essentially, what he complains of, is the treatment he received from co-workers and supervisors, which he says started when the local newspaper published his conviction for the solicitation of prostitutes. As noted above, any stressors emanating from the treatment of the Worker by supervisors are considered by the Panel to be neither unexpected or unusual.

The Panel now turns to the consideration of the incidents involving the Worker's co-workers and summarizes its findings. For the purposes of this analysis the Panel accepts the Worker's testimony as it relates to the conflicts he had with co-workers as it is set out

in the transcript of the previous Tribunal hearing.

The Panel accepts that co-workers knew of the Worker's conviction and talked about it behind his back. What the Worker described in his testimony was immature behaviour on the part of some of his co-workers toward him following the publication of his conviction. For whatever reasons they had at the time, some co-workers did not like the Worker and did not treat him well. They appear to have exaggerated and used his conviction as a platform to entertain themselves and create drama in the workplace. Conceivably, some co-workers felt justified in their treatment of the Worker because of his conviction. Was it right? No. Was it nice? No. Did he fight back? Yes.

What the Worker described, in the Panel's view, was a series of petty incidents. He experienced nothing dangerous, nothing repetitive, and nothing beyond what would be akin to schoolyard shunning. Significant periods of time passed between incidents. It would be a stretch the Panel is not willing to make, to say that these incidents accumulated to form a pattern of harassment. That interpersonal conflict arises in a workplace is neither unusual nor unexpected.

This Worker reached a point of psychological disability, due at least in part to the incidents he described at work. Someone else in the Worker's situation might have continued to use the grievance process open to them, or soldiered on, ignoring any gossip, taunts or antagonistic behaviour. A reasonable person viewing the situation, would not accept that these stressors were potentially disabling.

To determine that the Worker suffered an "accident" arising out of and in the course of his employment, based on the events which form the basis of this claim, would necessarily require the application of a subjective test. That is not the test. No "accident ", objectively determined, has occurred in this case.

Does the use of an objective test for gradual onset stress claims violate the Worker's equality rights?

Section 15(1) of the *Charter* provides as follows:

> Every individual is equal before the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

Counsel for the Worker submits that to impose restrictions on a Worker making a claim for gradual onset stress under GECA, discriminates against the Worker on the basis of his mental disability. He asks the question, "does Policy 1.3.6 in purpose or effect, perpetuate

the view that people suffering from a mental disability are less worthy or less capable of recognition or value as human beings or as members of society?" He submits that the Worker is being denied a benefit that is provided to compensation recipients who are not excluded from receiving benefits under GECA due to the intervention of Policy 1.3.6. Counsel states at p. 19 of his submissions:

> From the Appellant's perspective, the distinction in Policy 1.3.6 has an adverse impact and a disproportionate effect on a select group of individuals afflicted with gradual onset stress claims resulting from their respective work conditions and imposes limitations on a person who would otherwise qualify for benefits pursuant to the GECA on a group traditionally disadvantaged from their suffering due to mental illness.

Counsel for the Board submitted that in order to advance a s. 15(1) claim, the Worker must show that he is seeking a benefit that is actually conferred by law. She referred the Panel to the case of *Auton (Guardian ad litem of) v. British Columbia (Attorney General),* 2004 SCC 78. In that case, the claimants, who were autistic children and their parents, sought funding for "all medically necessary" treatment under the B.C. Medicare Act and the Canada Health Act. The court held that the health scheme set out by the legislation did not provide anyone with all medically necessary treatment, and therefore the benefit being claimed was not one provided by law.

Counsel for the Board submits that the Worker is seeking a benefit not provided by law. She states that to accept the Worker's s. 15(1) argument would amount to a finding that the workers' compensation scheme promises compensation to workers for all claims related to all work-related events, when this is not the case. While the objective of workers' compensation legislation is to provide compensation for workers caused personal injury by accident arising out of and in the course of employment , Board Counsel states that the Worker's claim is directed at compensation for virtually all stress claims for all federal employees for all work-related events, regardless of their nature.

The Panel accepts the submissions of Counsel for the Board, concurred in by Counsel for the Employer, as set out above. Until an "accident" for the purpose of GECA is established, no worker is entitled to compensation, whether their claim be for a physical or a mental injury. The tests developed in caselaw and Policy 1.3.6 set out the criteria for determining whether or not an "accident" has occurred.

The group to which the Worker is compared, is the group of federal workers not subject to Policy 1.3.6. The implication is that these workers have a benefit at law in not having to establish an accident for the purposes of GECA. There is no such benefit for any worker. The Worker is requesting a benefit not provided by law.

CONCLUSION:

This appeal is denied. There was no “accident” triggering possible compensation under GECA.