

CLAIM HISTORY AND APPEAL PROCEEDINGS:

The Worker* sought to have a psychological stress injury recognized as compensable under the *Government Employees Compensation Act*, R.S.C. 1985, c. G-8 [“GECA”].

The Worker’s claim was initially denied by a Board Case Manager [June 27, 2001 decision]. A Board Hearing Officer confirmed the decision [August 2, 2002]. On appeal, the claim was recognized by this Tribunal in *Decision 2002-601-AD* (NSWCAT, February 28, 2003). However, the Court of Appeal subsequently determined that the Tribunal had erred in law and remitted the appeal back to the Tribunal for a rehearing [*Canada Post Corporation v. Nova Scotia (Workers’ Compensation Appeals Tribunal)* et al, 2004 NSCA 40].

Before the Worker’s appeal could be reheard by the Tribunal, it was placed on hold pending a review by the Workers’ Compensation Board’s Board of Directors as to the appropriate test to determine the compensability of stress claims under *GECA*.

On July 27, 2005, the Board of Directors issued 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)*”.

The Tribunal then referred the Worker’s appeal back to the Hearing Officer [*Decision 2002-60-CA-RTH* (NSWCAT, September 29, 2005)]. The basis of the referral was that the Board had not had an opportunity to consider the Worker’s eligibility for benefits under the new policy. The Tribunal therefore found that a referral was necessary to allow the claim to be first adjudicated at the board level.

On October 20, 2005, a Hearing Officer issued a decision directing that the Worker’s file be returned to the Case Manager for re-adjudication in accordance with Policy 1.3.6.

The Worker appealed the October 20, 2005 decision to this Tribunal on the basis that the Hearing Officer erred in failing to make a decision on the issue raised in the Worker’s appeal, as required by s. 197 and s. 198 of the *Workers’ Compensation Act*, S.N.S. 1994-95, c.10, as amended [the “Act”].

In *Decision 2005-437-AD* (NSWCAT, March 6, 2006), the Tribunal found that the Hearing Officer had the authority to refer the Worker’s claim to the Case Manager for re-adjudication. Therefore, the claim was subsequently re-adjudicated.

In a decision dated May 2, 2006, the Case Manager denied the Worker’s claim for

*This decision contains personal information and may be published. For this reason, I have not referred to the participants by name.

recognition.

The Worker now appeals to this Tribunal from the Hearing Officer decision dated July 26, 2006 finding that he had not suffered a personal injury by accident arising out of and in the course of his employment in the form of gradual onset stress and, furthermore, finding that he had not suffered a recurrence of his April 1998 compensable injury.

The appeal proceeded by way of written submissions. The Worker's representative filed written submissions on April 2, 2007. The Board's representative filed written submissions on April 18, 2007 and the Employer's representative filed written submissions on June 5, 2007. The Worker's representative filed rebuttal submissions on June 12, 2007.

I requested additional submissions from the participants. Submissions dated August 31, 2007 were filed by the Employer and the Worker.

I have also considered under s.246 of the *Workers' Compensation Act*, S.N.S. 1994-95, c.10, as amended [the "Act"] the contents of the Worker's Board files as well as the decision under appeal. Although the Court of Appeal alluded to the need for clarification of certain factual issues, the evidentiary basis for this appeal is essentially the same as it was at the time of the August 2, 2002 Hearing Officer decision but for a subsequent statutory declaration by the Worker and an affidavit filed in response by the Employer.

No additional evidence was filed on this appeal.

ISSUES AND OUTCOME:

Did the Worker suffer a personal injury by accident arising out of and in the course of his employment pursuant to *GECA*?

No. The Worker's psychological injury is not compensable as it did not arise out of and in the course of his employment.

Did the Worker suffer a recurrence of his previous compensable injury of April 3, 1998?

No. The Worker did not suffer a recurrence of his previous compensable stress injury.

ANALYSIS:

The Worker seeks to have his psychological stress injury recognized as compensable under *GECA*.

The Worker is an employee, as defined in *GECA*. The issue before the Tribunal is one of

recognition, that is, whether the Worker suffered a personal injury by accident arising out of and in the course of his employment. A determination as to whether the Worker's condition is work-related and, therefore, compensable must be made according to the provisions of *GECA*. If the Worker is found to be eligible for compensation under s.4(1) of *GECA*, then under s.4(2) of *GECA*, the compensation to which the Worker is entitled is determined under the *Act*.

Section 2 of *GECA* provides that the definition of "accident" includes a willful and an intentional act, not being the act of the employee, and a fortuitous event occasioned by a physical or a natural cause. The word "includes" in the definition indicates that criteria other than those contained in the s.2 definition may be included in the definition of "accident". Thus, an injury which occurs over time, or injuries by process such as repetitive strain injuries, are covered under s.4(1)(a)(i) of *GECA*.

The Worker's claim may also be compensable if it is found to be a recurrence of a previous compensable injury, in his case, a recurrence of his 1998 compensable psychological injury.

The Worker is entitled to the benefit of the doubt on any issue involving compensation. Where there is doubt on an issue and the disputed possibilities are evenly balanced, the issue must be resolved in the Worker's favour (s.187 of the *Act*).

Generally the worker must show a causal link between the injury and the workplace. Causation need not be proved to a scientific certainty. Common sense may be used to infer causation where appropriate. See *Workers' Compensation Board (N.S.) v. Workers' Compensation Appeals Tribunal (N.S.) and Johnstone* (1999), 181 N.S.R. (2d) 247 (C.A.)

It is not necessary that an injury be solely due to work. The necessary causal link is established where it is shown that "but for" factors arising from work, a worker would not have suffered an injury. Alternatively, the test is met where work is a material contributing factor; ie. more than an insignificant or trifling amount. See *Ferneyhough v. Workers' Compensation Appeals Tribunal (N.S.)* (2000), 189 N.S.R.(2d) 76 (C.A.).

The foregoing principles apply to all recognition matters whether or not a particular policy is in place.

Application of Policy 1.3.6

The Worker's representative argued that Policy 1.3.6 should not be applied pursuant to s.183 (6A) of the *Act* which provides that a policy may only be made retroactive where it benefits the Worker. The Worker's representative argued that the Policy did not benefit the Worker because it sets out a more restrictive basis for recognizing stress as a personal injury by accident arising out of and in the course of employment under *GECA* than was the case prior to the Policy's enactment.

From a factual point of view, the Worker's representative argued that workplace stressors impacting on the Worker constituted a significant contributing factor to the development of his stress injury. He recognized that the Worker's underlying psychological condition may also have been a factor, however, he argued that it would not have been the sole cause. He added that more weight should be given to the impact of the Worker's compensable stress injury of 1998 as a contributing factor to the development of his stress injury commenced in 2000.

The Worker's representative submitted that a retroactive provision is one that operates as of a time prior to its enactment. He referred to recent case law and the following definition of retroactive:

"See *Benner v. Canada (Secretary of State)*, [1997] 1 SCR 358, para.39; also, more recently, see *Canada (Attorney General) v. Hislop*, 2007 SCC 10, paras.124-129, confirming the principles discussed in *Benner*.

A retroactive statute is one that operates as of a time prior to its enactment. A retrospective statute is one that operates for the future only. It is prospective, but imposes new results in respect of a past event. A retroactive statute *operates backwards*. A retrospective statute *operates forwards*, but it looks backwards in that it attaches new consequences *for the future* to an event that took place before the statute was enacted. A retroactive statute changes the law from what it was; a retrospective statute changes the law from what it otherwise would be with respect to an event. [Emphasis in original.]

[This passages is quoted in *Hislop*, para.127]"

Policy 1.3.6 is retroactive as it operates to determine the Worker's entitlement to recognition and benefits as of January 12, 2001, the date of his claim. However, whether it is retroactive or not, there is a fundamental flaw in the Worker's argument. The argument is that Policy 1.3.6 changes the law by changing the legal test applicable to the recognition of stress claims under *GECA*. The Worker's representative argued that retroactivity should not be evaluated in relation to legal decisions, but rather retroactivity considerations arise in the context of whether a provision affects vested or substantive legal rights.

He argued that the Worker acquired the substantive right to have his stress claim adjudicated consistent with the relevant legal principles from the time of his injury or, alternatively, from the time he made his workers' compensation claim.

Fundamentally, the law in force at the time of this decision is the same as was in force at the time the Worker filed his claim. That is the basic entitlement provision of s.4(1) of *GECA*.

As pointed out by my colleagues in *Decision 2006-425-AD* (NSWCAT, February 19, 2007), the legal path to arrive at a test to determine gradual onset stress cases under *GECA* has been a twisted one. In that case, a Tribunal panel was dealing with a referral back by the Court of Appeal in *Nurnber vs. Nova Scotia Workers' Compensation Board et al.* (2004), 224 N.S.R. (2d)276 (C.A.).

As noted by my colleagues, 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 noted at paragraph 8 of his decision, that the fourth issue before him was, "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."

The Court in *Nurnber* did not determine the appropriate test to use and left it to the Tribunal to develop its own jurisprudence. This is the crux of this matter. The jurisprudence in regard to the proper test was unsettled as clearly evidenced by Justice Cromwell's analysis in *Nurnber*. The *Nurnber* decision was issued by the Court of Appeal prior to the final determination of the appeal in this case and as such is a good indicator that the law was far from being settled. In the circumstances, I cannot accept the Worker's representative's argument that Policy 1.3.6 changed substantive rights or vested rights that the Worker may have had when he filed his claim.

I accept and agree with the panel's analysis in *Decision 2006-425-AD* in regard to what is the state of the law on the issue. The panel describes a three part test to which the Court referred and which had been adopted by the Tribunal in *Decision 97-269-TAD* (NSWCAT, June 30, 1999). The panel concluded after reviewing recent case law including decisions of the Court of Appeal in *Logan v. Workers' Compensation Board (N.S.) et al.*, 2006 NSCA 88 and *D.W. v. New Brunswick (Workplace Health, Safety and Compensation Commission)* 2005, 257D.L.R.(4th) 594 that the correct approach to the question of whether a personal injury by accident has occurred is an objective one. The test requires an objective look at the stressors alleged and the Worker's reaction to them. In the end, the panel rejected a two part subjective test used previously by the Tribunal.

I further agree with the panel's finding that the policy does not defer materially from the interpretation of s.4(1) of *GECA* as set out in case law. The emphasis in the policy is on

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. The panel did not specifically answer the question of whether the Policy echoed the common law or whether in some cases it would have the effect of establishing additional restrictions over and above what was required prior to its approval and, therefore, did not deal with the issue of conflict between the Policy and *GECA* or the retroactive application of the Policy. However, I find their analysis instructive.

It is clear from the panel's analysis of case law that a requirement that a stressor be unusual or excessive is not a change in the law, as argued by the Worker's representative. Jurisprudence evolves and is not static. The Policy mirrors the principles of interpretation applied by the Courts to s.4(1) of *GECA*. It is possible that the Policy establishes additional restrictions, for example, requiring a DSM-IV diagnosis when one would not be possible perhaps several years after the initial injury. This is not the case in this appeal.

I find that the application of Policy 1.3.6 in regards to the requirement for unusual or excessive stressors cannot be struck down under s.183 (6A) as there is no evidence that the Policy is detrimental to the Worker or does not benefit the worker as compared to the state of the law without Policy 1.3.6 as outlined by the panel in *Decision 2006-425-AD*.

For similar reasons, I find that the Policy is not in conflict with *GECA*. There is no doubt that the definition of accident under *GECA* does not include an exclusion similar to the one under the *Act*. But the Policy recognizes gradual onset stress claims. Is it too restrictive when one looks at the general provisions applicable to workers' compensation legislation? Workers' compensation legislation should be interpreted broadly, and this principle is compatible with the enactment of interpretation tools and rules to determine whether or not an injury arises out of and in the course of employment. Determining the work-relatedness of certain injuries such as psychological injuries is difficult. 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:

- 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;
- 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
- 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."

I find that subclauses i, ii and iii of the Policy reflect generally accepted principles of interpretation relating to stress injuries as discussed by Justice Cromwell in *Nurnber* and *Logan* and Justice Robertson in *D.W.* The fourth provision dealing with the diagnosis by psychiatrists or clinically trained psychologists, if it were to prevent a worker from bringing forward a claim, might be objectionable. However, I need not deal with that matter.

Finally, the Policy discloses a potential conflict between the non-compensability of a mental condition caused by labour relation issues or routine employment related actions if they also constitute unusual or excessive stressors. I need not determine this issue due to my findings of fact.

Application to the Facts of this Case

The Worker's claim for recognition of a second stress injury was filed in January 2001 when the Worker reported to the Board that he had suffered a stress injury as a result of events in the workplace. More specifically, he indicated that he had suffered a recurrence of a previous stress injury due to unsafe working conditions in the workplace. He outlined his complaints in a statement dated January 17, 2001 attached to the report of accident.

The Worker's initial claim for compensation was filed in January 1999 when the Worker claimed to have suffered a post-traumatic stress disorder as a result of specific events on April 3, 1998. A Board Hearing Officer eventually recognized the Worker's claim in a decision dated December 9, 1999. Applying a three-part test from *Decision 97-269-TAD*, the Hearing Officer found: 1) that the Worker had suffered a psychological disability which disabled him from work for several months; 2) that the disability was work-related as the Worker had been exposed to unusual, atypical and unexpected stressors in the workplace; and 3) that the workplace stressors had contributed significantly to the development of his disability.

On appeal by the Employer to the Tribunal, the Hearing Officer decision was confirmed in *Decision 2000-29-AD* (NSWCAT, October 2, 2000). Applying a two-part test, the Tribunal found that the Worker had suffered a psychological injury as a result of stressors in the

workplace which included primarily events that occurred on April 3, 1998 when his personal safety had been threatened by the actions of a co-worker. This decision was not appealed.

The Worker returned to work in March 1999 and remained at work until January 12, 2001.

It is important to review the factual underpinning of both of these claims. In *Decision 2000-29-AD*, a panel of this Tribunal confirmed the compensability of the Worker's psychological injury under s. 4(1) of *GECA*. It is clear from the panel's analysis that an incident involving a forklift driven by a co-worker which occurred on April 3, 1998 was the significant stressor. The panel interpreted the incident as a threatening incident. The panel also found that the Worker had been exposed to shunning or harassing behaviour following the April 3rd incident. Clearly the Worker had been targeted with violent threatening behaviour and he was afraid of personal confrontations with co-workers.

In the claim filed on January 17, 2001, the Worker claimed a recurrence of his stress-related symptoms, that is, the same symptoms he experienced after the April 1998 incident but this time due to health and safety issues he perceived were not being dealt with by management. He outlined his concerns in a statement attached to his report of accident.

He stated that he returned to work in March 1999 and remained at work until January 12, 2001 when he was put off work by his family physician. He had seen his physician because he felt that his health was being affected by his work. He would get pains across his chest, knots in his stomach and a tightness in his throat. He could not ignore health and safety issues. He felt that management and co-workers would turn a blind eye to these issues.

The Worker's concerns included driving forklifts improperly, not chocking both wheels on trailers and trucks, not putting "KingPros" on trailer pins, Montreal based drivers backing up unsafely, heated debates on H&S issues from shift to shift between co-workers and the human factor not being near the top of concerns for management. Under personal safety, he cited alleged KKK recruitment, the "boys' club" attacks on women verbally or mentally, graffiti on the walls, being called sheriff of the dock and management back stabbing each other. Basically, the Worker complained of a hate or toxic atmosphere in the workplace.

The Hearing Officer, in a 45 page decision, issued on August 2, 2002 detailed the oral testimony given by the Worker as well as by several other witnesses. She concluded upon a review of the evidence that the stressors the Worker experienced in the workplace were usual and expected. She made this finding after accepting the Worker's testimony that there were occupational health and safety violations occurring within the Employer's workplace including the improper driving of forklifts, the failure to chock trailer wheels, the improper use of King-pins and Besner drivers improperly backing into trailers as well as graffiti on the bathroom walls. She accepted the Employer's testimony that it attempted to rectify any health and safety issues as voiced by the Worker or other workers within the plant through either the five minute meetings that occurred prior to the commencement of every shift as well as through the Occupational Health and Safety Committee. She noted

that none of the safety violations were directed at the Worker nor personally involved the Worker.

She noted that the racial harassment, KKK recruitment and “boys’ club” mentality and attacks on women would not be characterized as usual, typical or expected within the workplace. However, it appeared from the Worker’s testimony that neither the Worker nor the witnesses had direct and personal knowledge of these issues. Therefore, the Worker could not be personally subjected to these stressors in the workplace. Having made these findings of fact, she found that the Worker’s psychological injury was not work-related in the sense that there was no objective evidence that the Worker’s exposure to improper forklift driving subsequent to the April 3, 1998 incident, failure to chock trailer wheels or the improper use of King-pins etc. gave rise to the Worker’s development of a psychological disability.

I agree with the Hearing Officer’s analysis that the stressors experienced by the Worker can be characterized as concerns over safety violations which he perceived as not being addressed by the Employer. These safety violations were not directed at the Worker nor did they personally involve the Worker.

In a statutory declaration dated December 10, 2002, filed in support of an appeal, the Worker referred to unsafe handling of a large telescoping conveyor system on roller wheels which potentially could have caused an accident for those, including the Worker, working inside the trailer. A safety officer, A.J., for the Employer addressed the concerns in an affidavit filed in rebuttal. He stated that he had no knowledge of any incidents or near misses involving the conveyor system on roller wheels as mentioned by the Worker.

The Worker also acknowledged in his Declaration that in October 2000, he had been transferred to “loose-loading”, where he was less likely to be exposed to the ongoing safety violations committed by his co-workers and ignored by his Supervisors on the dock. This work involved working on a trailer for the most part and the Worker was not on the dock as much. In his testimony, however, the Worker stated that he continued to witness repeated offences with respect to Health and Safety issues even in that area, he discovered basic safety protocol was not being followed. He started feeling anxiety and tightness in his chest. He decided to see his family physician in January 2001 as he was concerned about experiencing a relapse.

Therefore, to recap, the Worker left work due to concerns about safety issues he perceived were not been addressed by management. I find, based on the evidence including the testimony before the Hearing Officer in 2002, that these stressors were not unusual nor excessive in comparison to the work-related events experienced by an average worker in the same or similar occupation.

The medical evidence also supports these findings.

The Worker reported stress related to workplace safety issues to Dr. Bagley, locum for Dr. Burgess, on January 12, 2001. Dr. Bagley noted the Worker demonstrated frustration and agitation and change in mood. The diagnosis was work stress. There are follow-up reports from Dr. Bagley on file noting ongoing symptoms of anxiety and stress, for which medication was prescribed. Dr. Bagley also referred the Worker to Dr. Mulhall for a psychiatric consultation.

There is a report from Dr. Mulhall on file, that being the June 23, 2001 form filled out in response to the questions posed by Medisys, the employer's occupational health services company. Dr. Mulhall disagreed with the diagnoses offered by Dr. Rosenberg and provided his own of Anxiety Disorder and Personality Disorder O.C. (Obsessive Compulsive) Traits.

The Worker was assessed by Dr. Rosenberg who reported his findings in a report dated February 14, 2001. Dr. Rosenberg noted that the Worker reported a return of symptoms in November 2000 and expressed concern about "a consistent inconsistency regarding workplace safety". I note that Dr. Rosenberg stated that nightmares and flashbacks of the April 1998 incident were not prominent. He added that the incident of 1998 was accompanied by symptomatology suggesting acute stress disorder and/or post-traumatic stress disorder.

He stated that the Worker's description of his personality functioning is typical of an obsessive compulsive personality disorder. He added that the Worker by his very nature remained concerned about workplace safety.

Dr. Rosenberg concluded that the 1998 incident had been a significant stressor which had caused an acute stress disorder. He also found that his obsessive compulsive disorder rendered him susceptible to the development of depressive and anxiety symptomatology when he could not see any positive changes in the workplace.

Dr. Rosenberg noted that the Worker's symptoms were related to a depressive disorder but were short of a major depressive disorder. Specifically, he diagnosed:

[The Worker's] reports of dysphoria and anxiety are, in my opinion, related to the occurrence of depressive disorder (NOS): i.e., [the Worker] experienced symptomatology of depression with anxiety, for periods of time greater than two weeks, but with fewer that the diagnostic criteria necessary for major depressive disorder.

Please consider the following DSM-IV-TR multi-axial assessment of [the Worker's] psychiatric illness:

Axis I - 308.3 - Acute Stress Disorder, recurrent, remitting.

- 311 - Depressive Disorder NOS, remitting.

Axis II - 301.4 - Obsessive-Compulsive Personality Disorder.

Axis III - None.

Axis IV - Perceived psychosocial stress relating to the workplace.

Axis V - GAF (Global Assessment of Functioning, in consideration of psychological, social and occupational functioning, but not including impairment in functioning due to physical limitations) - 60 (moderate symptomatology, with moderate difficulty in social and occupational functioning).

He stated that the Worker re-experienced symptoms of acute stress disorder when he encountered a situation at the workplace which was similar to that which had precipitated the initial symptomatology in 1998. He added that the Worker's experience of anxiety and depression is, in his opinion, directly related to the perceived stress he was experiencing at the workplace.

In a subsequent April 10, 2001 report, Dr. Rosenberg confirmed that the Worker suffered a recurrence of a prior psychiatric disorder secondary to events which were viewed by the Worker as stressful. He appears to assume that the stressors present in 2000 were the stressors present in 1998. Dr. Rosenberg concluded that the Worker developed symptomatology of an acute stress disorder, recurrent following exposure to significant stressors in the workplace in November 2000.

He noted that by the end of April 2001, the Worker should be ready to start a gradual return to work; however, he added that given the stressors which are unique to the Worker (in his perception) in his workplace situation, the prognosis for relapse was unfortunately guarded. He noted that the Worker's previously existent obsessive-compulsive personality disorder would render him less flexible in accepting the views of others regarding workplace safety.

Dr. Burnstein, occupational health consultant for the Employer, commented on Dr. Rosenberg's February 2001 report in a memorandum dated February 28, 2001. He referred to Dr. Rosenberg's statement that the Worker re-experienced symptoms of acute stress disorder when he encountered a situation at the workplace which was similar to that which had precipitated his initial symptomatology in 1998. He noted that although the Worker experienced a stressful event in 1998 when he was nearly struck by a forklift, he was unaware of any recent event, accident or near miss which could be interpreted as traumatic or stressful.

I agree with that conclusion.

I conclude, therefore, based on the medical reports and the evidence from the Worker and other witnesses that although there were incidents such as safety violations in the workplace, none of these incidents directly affected the Worker nor would the Worker have been threatened by these violations, as he was by the incident that occurred in April 1998. Furthermore, it appears that it is the Worker's perception of inaction by management that

was the most bothersome to him.

In summary, I cannot make a reasonable inference of causation between the workplace and the Worker's psychological condition in November 2000/January 2001. I find that the Worker did not experience a new traumatic event, nor was he subjected to unusual or excessive stressors in comparison to the work-related stressors experienced by an average worker in the same or similar occupation. Furthermore, the stressors were neither unusual, atypical or unexpected. The Worker's psychological disability is not work-related and he has not suffered a compensable injury under s.4(1) of *GECA* regardless of Policy 1.3.6.

Recurrence

Although the Worker did not suffer a new injury in the fall of 2000, he may have suffered a recurrence of his compensable 1998 injury.

I agree with the analysis made by my colleague in *Decision 2006-05-AD* NSWCAT, February 20, 2007). Essentially if there is a causal link between the previous injury and the disabling symptoms in 2000, a Worker need not prove a new stressful or traumatic event.

I find, however, that the medical evidence and circumstances differ between the fact scenario in *Decision 2006-05-AD* and the one in this appeal. In *Decision 2006-05-AD*, medical evidence clearly pointed to a flare-up of an underlying compensable post-traumatic stress disorder which had been in remission. On the evidence, the Tribunal found that, but for the post-traumatic stress disorder, there would not have been a flare-up of symptoms in future years causing a further loss of earnings.

I cannot make the same conclusion on the facts in this case. Although Dr. Rosenberg diagnosed a recurrent acute stress disorder, there was no evidence of an underlying post-traumatic stress disorder or ongoing symptoms after the Worker's recovery from his 1998 compensable injury, nor was there any evidence of a precipitating event "similar" to the events of April 1998 which underlies Dr. Rosenberg's diagnosis.

I note that the Worker's treating psychiatrist in 1998 and in 2001, Dr. Mulhall, disagreed with Dr. Rosenberg's diagnosis and stated that the diagnosis was rather an anxiety disorder. I give more weight to that opinion as Dr. Rosenberg's is partly based on the assumption that the Worker experienced similar events.

As Dr. Burnstein remarked, the Worker in 1998 was subjected to an event that most workers would find stressful. This was not the case in November 2000.

Having found that there was no underlying condition that flared-up (or recurred) nor any similar event that precipitated the new disabling psychological condition, can it be said that

the 1998 injury made a material contribution to the 2000 injury? That is, but for the injury, would the Worker have suffered the anxiety disorder in 2000/2001?

Typically a recurrence is said to have occurred if a worker is not fully recovered and continues to have symptoms and experiences flare-ups. In other words, a recurrence occurs when symptoms reoccur as a result of the same injury with or without a new event. (See *Decision 2000-284-AD* (NSWCAT, October 23, 2000) and *Decision 2007-184-AD* (NSWCAT, June 28, 2007))

The Hearing Officer in her decision quotes from Isen's text on workers' compensation in Canada and outlines the four criteria for a recurrence which were utilized by this Tribunal also in *2000-284-AD*. In applying the four criteria, there is no evidence that the Worker experienced ongoing problems after returning to his employment; he did not seek continual medical attention; and he returned to his regular employment and was at his regular place of employment from April 1999 until January 2001. The diagnoses are medically compatible to the extent that they are anxiety disorders. Did the same injury cause the disabling symptoms? The events that followed the Worker's lay off in January 2001 indicate that the Worker was not suited due to his personality for an environment where he would necessarily come into conflict with co-workers. The Worker was unable to return to work not only to his former workplace but also in an alternate location in the city. He returned to work in an alternate rural location where there was less likely to be the potential for safety issues arising at work. This is due to his personality disorder and not his 1998 injury.

Dr. Mulhall, in a June 23, 1998 report, described the Worker as an over-controlled, intense individual who has an extreme response to interpersonal conflicts at work.

There is no doubt that the Worker experienced traumatic and stressful events in 1998 leading to his psychological injury at that time. However, on the whole of the evidence, I am unable to find that it is just as likely as not that the '98 injury was a material contributing factor to the stress injury and symptoms he suffered in late 2000 and 2001.

CONCLUSION:

The appeal is denied. The Worker has not suffered a personal injury by accident arising out of and in the course of his employment under s 4(1) of *GECA*, nor has he suffered a recurrence of his 1998 compensable injury.