

**NOVA SCOTIA WORKERS' COMPENSATION APPEALS TRIBUNAL**

Appellant: **[\*] (Worker)**

Participants entitled to respond to this appeal: **Department of Fisheries and Oceans (Employer) and  
The Workers' Compensation Board of Nova Scotia (Board)**

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**APPEAL DECISION**

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Representatives: The Worker presented his own case

Form of Appeal: Oral Hearing, June 18, 2008, Halifax

WCB Claim No.(s): **[\*]**

Date of Decision: July 16, 2008

Decision: The appeal of the January 3, 2008 Board Hearing Officer decision is allowed, according to the reasons of Appeal Commissioner David Pearson.

**CLAIM HISTORY AND APPEAL PROCEEDINGS:**

In 2001, the Worker filed a Report of Accident in relation to alleged harassment in his workplace. The Board allowed the Worker's claim, and he was provided with various benefits. The Worker returned to an alternate job with the same Employer in September, 2003, and continued to work until June 1, 2005 when he stopped working again.

On February 15, 2006, the Worker filed another Report of Accident with the Board, citing stress as the reason why he had stopped working in June, 2005. The Board reviewed the Worker's claim, but determined that he had not sustained a new personal injury by accident, arising out of and in the course of his employment. The Worker did not appeal this decision, but asked the Board to consider whether he had experienced a recurrence of his 2001 compensable stress injury.

In an October 15, 2007 decision, a Board Case Manager decided that there was insufficient evidence to determine that there had been a recurrence of the 2001 injury. The Worker appealed that decision to a Hearing Officer, but his appeal was denied in a January 3, 2008 decision. The Worker appealed the Hearing Officer's decision to the Tribunal.

The Tribunal appeal proceeded by way of an oral hearing on June 18, 2008 in Halifax. The Worker was the only participant in attendance at the hearing, and he testified on his own behalf. No written submissions were received from any participant.

**ISSUE AND OUTCOME:**

Did the Worker experience a recurrence of his 2001 stress injury in June, 2005?

Yes, in June, 2005, the Worker sustained a recurrence of his 2001 stress injury. The Board will determine the Worker's entitlement to benefits as a result of this decision.

**ANALYSIS:**

The Worker worked for a Federal Government department, initially on board a ship, and then in a shore-based position. Thus, his injuries came under the initial authority of the *Government Employees Compensation Act*, R.S.C. 1985, c. G-8 ["GECA"].

Unless there is conflict between the provisions of the GECA and the provincial legislation, a worker's compensation is determined at the same rate and under the same conditions

as workers falling under the provincial worker's compensation legislation.

For this Worker, the applicable law is the *Workers' Compensation Act*, S.N.S. 1994-95, c.10, as amended (the "Act"). Section 187 of the Act requires me to give the Worker the benefit of the doubt, which means that if the disputed possibilities are evenly balanced on an issue of compensation, then the issue will be resolved in the Worker's favour.

The Act does not compensate for gradual-onset stress injuries, and only compensates for stress unless it develops as an acute reaction to a traumatic event. The GECA does not specifically address stress claims, so the Board passed Policy 1.3.6 in an attempt to treat Federally-regulated workers in the same way as non-Federal workers.

Policy 1.3.6 deals both with traumatic-origin stress claims, as well as gradual-onset stress claims. The Worker's original injury was decided without resort to this Policy, as it had yet to be passed by the Board. The Board applied the Policy to the recurrence, and his denial of compensation for the recurrence is directly related to the Policy criteria.

The Board determined that the cause of the Worker's stress in June 2005 was job dissatisfaction, which the Board considered a labour relations matter. Under the Policy, mental or physical conditions caused by labour relations issues are non-compensable.

In my opinion, once a worker's stress claim has been recognized by the Board, whether or not there is a recurrence of that stress injury then becomes a matter of evidence and causation, using general principles. While the source(s) of the stress would be a relevant consideration, in my opinion, the Worker is not required to meet the particular Policy criteria.

If he were required to meet the Policy criteria to establish a recurrence, it would also meet the requirements for recognition of a new stress injury. That result would be non-sensical, as it would ignore any residual deficits owing to the original injury. In addition, the Worker's claim was recognized before the Policy was adopted. If the Policy applied to the recurrence issue, then it is arguable that the Board is applying a more stringent test than applied to the issue of initial recognition. The unfairness of that result is evident.

I find that the question of whether the Worker had a recurrence of his stress injury falls to general principles of causation, and not to the particular demands of the Policy.

#### Worker's Testimony

The Board recognized the Worker's original stress claim in 2001. The Worker had experienced harassment from another individual on the ship. He had worked with this person from 1993 to 2000. For the first six months or so, the Worker worked on deck with this individual, but then it became too much, and the Worker transferred to the engine room, where he worked for the next six years.

The Worker said that he complained to his Employer numerous times, but that the harassment continued. The Worker filed a human rights complaint against this individual, as well. The Worker believed this occurred in 1998.

It was only after the Worker left this ship to go to another ship, the Hudson, as a stores keeper, that he began having more serious problems and filed his claim. The Worker said that he lost interest in his job, even though the stores job was the best job on the ship. He stopped going to the gym, started getting depressed and anxious, and his outside relationships suffered.

The Worker saw a psychiatrist, Dr. Walentynowicz, beginning in 2002. He took various anti-depressant and anti-anxiety medications, and continues to take them today.

The Worker stopped working in 2001. Due to the effects of the harassment, the prospect of returning to work on board ship caused great distress, and it was recommended that he not return to work on a ship. As a result, the Worker returned to work initially at the Bedford Institute of Oceanography in the warehouse. The Worker said that his mind would "go blank" and he would get confused in that job. He would not remember what he was doing or where he was going. As the result of a complaint that there might be a safety concern with the Worker working in that environment, and he was moved to a clerical position in an office.

The Worker duties were mostly clerical in the new position, but he also went and picked up supplies in a truck too.

The Worker said that he never felt normal after his initial time off of work in 2001. He said that he got episodes of depression and anxiety, where he would get all tensed up with a feeling like he was trapped in his position.

The Worker said that he was sent to Marine House to work. He worked in a cubicle, as a CR-3 in finance and procurement. The Worker found this job stressful. He said there were tight deadlines to adhere to, and he had to juggle a number of tasks while trying to meet the deadlines. He found the environment made him anxious, and he had to take anti-anxiety medication while in the position.

The Worker said that after three months in this job, his boss told him it was time for him to become permanent in that role. The Worker told his boss that he did not want to become permanent in that job, and that he would rather be doing a job painting.

The Worker said he was sent to see Dr. Karen MacDonald, to find a new job. She told the Worker that he had been tried in three different jobs, and each aggravated his illness. The Worker said that Dr. MacDonald recommended a medical retirement, as she did not think there was any job available for him to do.

The Worker applied for [and received] the medical retirement. It was effective in October, 2007. Prior to that, the Worker said he received two years of short-term disability benefits through Sun Life, the Employer's disability insurer. The Worker said that he currently receives a pension from work, topped up by Sun Life.

The Worker feels he lost his career before it really began, all the result of the harassment he experienced at work, and the stress that it caused. At the time the Worker began his position as a stores keeper, he had planned to go into officer training. All that became impossible because of the stress he developed.

The Worker said that most of the work as a stores keeper was clerical, but it was the best job on the ship. The off-ship positions were similarly clerical, but he could not handle the jobs. The Worker said that this was because he was still experiencing the effects of the initial illness from 2001.

The Worker said he was experiencing mood swings, anxiety and depression, that would come on seemingly without any trigger. He also found that he was quick to lose his temper. These issues continue today. The Worker believes these are the permanent results of the initial stress injury.

In response to some evidence in the Worker's file indicating that he had pre-existing depressive symptoms, the Worker said that he did experience episodes of depression and anxiety, mostly in his teens. He said that he talked to a counsellor at school. He also said that he had mild bouts off an on in his 20's, which might last a few hours to a day in duration. The Worker said that he never took any medications for anxiety or depression until after his compensable stress claim.

Presently, the Worker said that he tries to stay busy, with his grandchildren, or tinkering in his shed. He said he does not have the drive he used to have and questions whether he could work full-time because of his ongoing depressive symptoms. The Worker takes Trazadone and Wellbutrin to address his symptoms, and sees Dr. Merritt regularly for monitoring purposes. The Worker is not presently in counselling.

### Employer Evidence

Correspondence from the Employer confirms that the Worker was initially deemed temporarily unfit for sea duty on his return to work in September 2003, and that one year later, in September 2004, he was deemed permanently unfit for sea duty, but that he was able to work in a low stress position.

The Employer confirmed that the Worker worked in three positions on his return to work: (1) shipping and receiving at CCG Base Stores from September 1, 2003 to October 19, 2003; (2) in vessel support at the Bedford Institute of Oceanography from October 20,

2003 to November 24, 2004; and (3) in Finance and Administration at Marine House from November 24, 2004 to June 1, 2005.

The Employer indicated that the Worker's disability is not due to a work-related injury. The Employer said that it removed the Worker from sea duty, and that since he has only worked eight-hour days, and not shift work, evenings or long hours.

The Worker told his Employer at the end of May 2005 that he could no longer perform the duties of his job. At this point, the Employer requested the Worker undergo a fitness for work evaluation. In a May 24, 2005 letter from Yvonne Perrin, A/Duty To Accommodate Officer to Health Canada, Ms. Perrin noted that the Worker had said that he feels the job causes him great stress and that "he feels exactly the same way as he did prior to leaving his job on the ships."

#### Medical / Psychiatric Evidence

At the time of the Worker's original injury, he was referred by Dr. Merritt, his family doctor, to Dr. Walentynowicz, a psychiatrist.

Dr. Walentynowicz produced a November 28, 2002 report outlining the reasons for the referral, and the initial examination findings. At that time, the Worker had been experiencing symptoms of depression and anxiety for two years, and began with difficulties at work. He had tried various medications in those two years, without resolution of his symptoms. On exam, the Worker was "somewhat depressed". The Worker was worried about returning to work, as he felt that he might not be able to handle the stress. He was also experiencing anxiety, especially in crowded places. Dr. Walentynowicz diagnosed "Major Depressive Disorder - recurrent, moderate episode, partially treated." Dr. Walentynowicz noted the Worker's past history of "mild depressive-like symptoms since his teenage years". She intended to modify the Worker's medications, and perhaps have him attend depression group sessions.

Dr. Walentynowicz corresponded with Dr. MacDonald on February 3, 2003 and reviewed her treatment to date. Dr. Walentynowicz recommended some restrictions on any return to work effort, so as not to increase the Worker's stress. Those restrictions involved not returning to duty on the ship, not working shift work, and finding an appropriate work placement. She thought that the Worker "might do quite well" if those factors were met.

After the Worker returned to work in October 2003, there was some evidence indicating the Worker continued to have difficulties, and required ongoing medication and counselling. The Worker's family doctor, Dr. Merritt, provided chart notes covering the period from 2002 to 2007, which included:

- a December 8, 2003 note, citing depression caused by work, with a WCB reference;

- a May 19, 2004 note indicating that the Worker was on the anti-depressant medication, Wellbutrin. The note said that the Worker had been back to work since October, and that he was bored with his job. The Worker was sleeping ok, his appetite was good, there was little improvement in interest in family and friends, and the Worker had been exercising more and working outside. Dr. Merritt noted the Worker had therapy for depressive anxiety, and that he saw the counsellor every three months. He noted some stress coming from a situation at home with his grandson, who was living with him. On exam, the Worker was anxious and had a flat affect. Dr. Merritt diagnosed anxiety and ongoing depression. Dr. Merritt diagnosed the medication Buspar, in addition to the Wellbutrin and Trazadone;
- a February 11, 2005, note dealt with the office job. The Worker was down and depressed, and felt like crying. He felt there was nothing to do in the office, and indicated that he would rather work with his hands. The Worker recounted losing his temper. The rest of the note is hard to decipher, but it is clear that Dr. Merritt prescribed another medication, Clonazepam;

There were chart notes after the Worker stopped working again on June 1, 2005, including:

- an August 22, 2005 note, in which Dr. Merritt noted that the Worker was unable to work as there was no job;
- a January 16, 2006 note, in which Dr. Merritt noted that the Worker was still seeing his psychiatrist every three months, and that his medications were stable. The Worker wanted some papers completed as to his chronic disability.

Additional notes citing anxiety occurred on September 28, 2006 and April 20, 2007.

At the time of the June 1, 2005 work cessation, the Worker had a number of dealings with Dr. Karen MacDonald, Medical Officer for the Employer. She appears to have been responsible for making recommendations on how best to accommodate the Worker's workplace restrictions. In her May 31, 2005 memo, she recounted the circumstances giving rise to the Worker's predicament. She noted,

... [a]t times gets so worked up regarding the short deadlines or things that his anxiety has been increasing. Had gone to see his family doctor, Dr. Merritt, who has prescribed what sounds like Xanax. He keeps these in his desk drawer and takes them PRN. Takes approximately one 3x/week.

Dr. MacDonald noted Dr. Walentynowicz's disagreement about the Worker taking the anti-anxiety meds. Her preference was to double up on the Trazadone, as the Xanax was very addictive.

Dr. MacDonald noted that the Worker had been seeing Dr. Walentynowicz every three months, but that now he was seeing her every six weeks. She wanted the Worker to undergo some anger management sessions.

In terms of work, the Worker told Dr. MacDonald that he could do the clerical work, but found it "monotonous and routine". He also said that there was a lot of pressure at times to get something done quickly. He preferred to do a job where he worked with his hands. Dr. MacDonald thought the Worker was best suited to a labourer or trades type of position, rather than clerical work, as it was too stressful on him.

Dr. MacDonald wrote Dr. Walentynowicz on June 1, 2005 for an opinion on whether clerical work was too stressful for the Worker.

Dr. Walentynowicz wrote to Dr. MacDonald on June 15, 2005. She had most recently seen the Worker on May 19, 2005, at which time he was presenting with increased anxiety and irritability. The Worker noted high stress levels coming from his dog's serious illness, and because of the unsuitability of work he was doing. The Worker felt he was not made for the type of job he was doing, and found it difficult to handle. The Worker was more a hands-on type of person, and he was having a difficult time adjusting to the new job at that stage of his life and career. The job struggles were producing fluctuations of feeling where he would be down and very frustrated, causing an increase in anxiety. Dr. Walentynowicz felt this work was not conducive for the Worker.

Dr. Walentynowicz acknowledged the difficulty of finding suitable work, but stated,

... if he continues to be stressed by his work, finding it very non-fulfilling and frustrating and never feeling confident about what he is doing, he may become more depressed and definitely more anxious and required to go off work which I certainly don't want to happen.

Following receipt of this report, Dr. MacDonald wrote to the Employer, stating in part,

As before, [the Worker] is considered permanently unfit for sea duties. He would be fit for work onshore that would be low stress and not involve shift work (especially night shift). He is medically unsuited to working in a clerical type of position as this is not his background and the stress has served to aggravate his medical condition.

There were some further efforts to secure an alternate position within these restrictions, including in vessel support, and as a general labourer, but neither was deemed suitable. Following that review, Dr. MacDonald recommended in an August 16, 2005 letter that the Worker take a medical retirement based on him being permanently unfit for work. In making that recommendation, Dr. MacDonald noted that the "several work trials but these

have aggravated his medical condition.”

The Worker followed Dr. MacDonald’s advice and took a medical retirement.

Dr. Merritt provided a September 27, 2006 report to the Board, addressing the Board’s chronic pain assessment. Most of this report is not relevant to this appeal, except for two parts. Dr. Merritt said that,

[h]e has been seen for a variety of illnesses... but his chief problem has been related to anxiety and depression for which he also sees psychology. He describes his mood is depressed and Saturn (sic) feels like crying. At his job, he claims there is “nothing for me really to do”. He is irritable and loses his temper frequently.

...

I do believe his psychological condition is permanent although it does fluctuate and is improved with medication.

In a February 21, 2007 letter, Dr. Merritt referred the Worker for a psychiatric assessment. In his referral letter, Dr. Merritt indicated that the Worker had been disabled for two years because of anxiety. He noted the Worker’s job became too stressful and he was put on long-term disability. Dr. Merritt stated that the Worker had episodes of depression but no suicidal ideas. The Worker wished to return to work, and required a psychiatric clearance in order to do so. An appointment was made by Dr. Brooks, but it was cancelled shortly later, and not re-scheduled.

The only other medical opinion on file pertaining to this appeal is that of Dr. Gosse, psychiatrist, acting in a capacity as an advisor to the Board. In response to the Adjudicator’s question as to whether the Worker had experienced a recurrence, Dr. Gosse stated,

I have reviewed the file in its entirety, Based on the medical information on file, it is noted that the worker was diagnosed with a major depressive disorder. The worker has had a long history of stress and inter-personnel conflict. It appears that the worker is stressed due to work place dissatisfaction and personal reasons and not work place trauma. It is likely that he has a depression illness which appears to be the case here and will recur. Therefore, it now appears his depression is due to work place dissatisfaction and not work trauma, the medical documentation on file refers more to the worker’s personal stress. Therefore, it is my opinion that this worker’s condition is not work related nor is it a recurrence from the incident of 2001.

The only opinion directly addressing whether the Worker's symptoms and related time loss in June, 2005 was the result of a recurrence of his 2001 stress injury was Dr. Gosse. He, however, was not a treating physician, which may affect the weight given to his opinion. In addition, his opinion appears to suggest that [psychological] trauma is required in order to make a finding of a recurrence. In my opinion, that may, in fact, set too high a bar, as it suggests that the Worker is required to meet the "unusual stressor" criteria in the Policy.

I agree with Dr. Gosse that there must be some nexus between the workplace and the stress in the case of a recurrence, but depending on the circumstances, the nature of event or circumstance triggering the recurrence may be relatively minor or innocuous. My rationale for saying this is that if a worker had a compensable injury, but was left with residual deficits, the probability of having a recurrence may be increased. I find that is precisely what occurred with the Worker in the present appeal.

I canvassed the medical information in detail so as to highlight the fact that when the Worker returned to work in September 2003, he had not returned to his previous state of psychological health. The Worker continued to have symptoms of depression and anxiety, he continued to take medications for these problems, and he continued to receive counselling from Dr. Walentynowicz.

The tentativeness of the success of a return to-work-effort was alluded to in Dr. Walentynowicz's February 3, 2003 report, where she indicated the workplace restrictions that would have to exist in order for return to work to be successful. Not only was the Worker unable to return to work on the ship, he could have nothing to do with the ships. In addition, he could not work shift work, as the disruption in sleep patterns was thought to aggravate his symptoms. Finally, Dr. Walentynowicz thought that an appropriate placement would have to be found for the Worker; one that did not cause him stress.

What followed was the return to work efforts. The Worker was moved out of the first job in the warehouse because of safety concerns due to the Worker's inability to concentrate, and indications that he became disoriented. The clerical jobs that followed appeared to require the performance of relatively mundane tasks, but not for someone of the Worker's psychological state. The harassment and constant criticism that he experienced prior to going off work the first time had left the Worker with persistent doubts over his abilities. Any return to work effort was supposed to be in a low-stress position. While a clerical job might appear to be non-stressful to an outsider, the multi-tasking and tight deadlines caused the Worker an increase in his anxiety and depressive symptoms, and resulted in him taking more anti-anxiety medications. He also had to see Dr. Walentynowicz more frequently, to every six weeks instead of every three months.

After the fact, both Drs. MacDonald and Walentynowicz agreed that the Worker was not suited to that work, and that it caused an aggravation of his symptoms. Further, both physicians agreed that clerical work should be added to his workplace restrictions.

There is some evidence in the Worker's file that confirms the presence of pre-existing depressive and/or anxiety symptoms, and that his experience of these symptoms went back to his teenage years. In addition, there is some evidence of a family history for depression, in that the Worker's sister suffered from depression. The Worker acknowledged those symptoms were present before the harassment happened on the ship, but said that he never required medication to deal with those symptoms before the harassment, and the symptoms were of limited duration. Since the harassment, however, the Worker required [and continues to require] medication. He also required quite a period of counselling, from 2002 to 2007, which had not been required prior to the harassment.

Thus, while there is evidence confirming the existence of pre-existing depressive and/or anxiety symptoms, there is no evidence suggesting that those symptoms would have progressed to the state they are in presently, but for the workplace injury.

There is also evidence of other stressors in the Worker's life at the time he went off of work in 2005. Those stressors included the decline of a pet to illness, issues with a grandson who lived with him, as well as relationship difficulties. There is also evidence indicating a sexual dysfunction, perhaps attributable to the medications the Worker was taking. It is difficult to say whether those only became stressful because of the Worker's prior injury, or whether they operated entirely independently of that condition. In any event, I find that the original stress injury from 2001, and the deficits attributable to that injury were the primary cause of the Worker's inability to cope with work in 2005.

I find sufficient evidence, on an as likely as not basis, that the Worker sustained a recurrence of his 2001 stress injury in June, 2005.

The Board will determine the Worker's entitlement to benefits flowing from this decision.

## **CONCLUSION:**

The Worker's appeal is allowed. In June 2005, the Worker sustained a recurrence of his 2001 stress injury. The Board will determine the Worker's entitlement to benefits as a result of this decision.

DATED AT HALIFAX, NOVA SCOTIA, THIS 16<sup>TH</sup> DAY OF JULY, 2008.

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David Pearson  
Appeal Commissioner