

NOVA SCOTIA WORKERS' COMPENSATION APPEALS TRIBUNAL

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

Participants entitled to
respond to this appeal: **[X] (Employer)** and

**The Workers' Compensation Board of Nova Scotia
(Board)**

APPEAL DECISION

Representatives: **[X]**

Form of Appeal: Oral hearing, held at Wolfville, NS, September 15, 2009

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

Date of Decision: October 14, 2009

Decision: The appeal of the April 17, 2009 Board Hearing Officer decision is allowed, according to the reasons of Appeal Commissioner Alison Hickey.

CLAIM HISTORY AND APPEAL PROCEEDINGS:

This is an appeal of a decision of a Hearing Officer of the Board dated April 17, 2009, in which the Hearing Officer determined that the Worker had not suffered a personal injury by accident arising out of and in the course of her employment pursuant to the *Government Employees Compensation Act*, R.S.C. 1985, c. G-8 [“GECA”]. The Worker appealed this decision to the Workers’ Compensation Appeals Tribunal [the “Tribunal”] on May 7, 2009.

This appeal proceeded by way of oral hearing at which the Worker testified. Exhibit “1” at the hearing was a draft harassment investigation report dated January 5, 2009. Exhibit “2” was a letter of disclosure - harassment complaint, for the Worker vs. CD. Exhibit “3”, was a letter of disclosure - harassment complaint, for the Worker vs. CR.

ISSUE AND OUTCOME:

Did the Worker suffer a personal injury by accident arising out of and in the course of her employment?

Yes. The Worker experienced events or stressors that were unusual and excessive in comparison to the work-related events or stressors experienced by an average worker in the same or similar occupation. Her situation meets the criteria of Policy 1.3.6 and she has experienced an “accident” for the purposes of *GECA*.

ANALYSIS:

The Worker submits that she suffered a psychological injury which disabled her from work commencing in July of 2008. According to her Notice of Appeal, her stress injury commenced after she witnessed a severe verbal assault involving a couple of her co-workers, and was asked to provide a witness statement, which she did. The co-workers were terminated from their jobs. One of the co-workers was the partner of another person who worked on the Worker’s shift. This person along with another worker are alleged to have engaged in a continuous pattern of harassment against the Worker including severe bullying which included physical assault. She submits that this made her work-life unbearable and induced her to have a heart attack. The Worker submitted that she did not have psychological difficulties until the harassment she complains of, with the exception of a brief period of counselling associated with brain surgery. Her claim is for gradual onset stress.

As the Worker is a federal government employee, her entitlement to benefits is determined

pursuant to *GECA*. Eligibility for compensation under the provisions of *GECA* is provided at subs. 4(1) and, under subs. 4(2). The rate of compensation and conditions for payment of compensation are determined under the *Workers' Compensation Act*, S.N.S. 1994-95, c. 10 as amended [*"Act"*].

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
 - (a) an employee who
 - (i) is caused personal injury by accident arising out of and in the course of employment, or
 - (ii) is disabled by reason of an industrial disease due to the nature of the employment; and
 - (b) the dependents of an employee whose death results from such an accident or industrial disease.
- (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.

Board Policy 1.3.6, titled "Compensability of Stress as an Injury Arising out of and in the Course of Employment - *Government Employees Compensation Act (GECA)*", establishes criteria for the adjudication of stress claims under *GECA*. The Tribunal is bound by all Board Policy provided it is not inconsistent with the *Act*.

Policy 1.3.6, as it applies to claims for gradual onset stress reads 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.

In *Decision 2006-603-AD* (April 10, 2007, NSWCAT), the Tribunal considered the claim of a federal employee for gradual onset stress alleged to have been caused by physical and psychological harassment in the workplace. The Tribunal determined that the work place stressors experienced by the worker were not, in the words of Policy 1. 3. 6, "unusual and excessive in comparison to the work-related events or stressors experienced by an average worker in the same or similar occupation."

The Tribunal, in *Decision 2006-603-AD*, held that Policy 1.3.6 essentially embodied otherwise binding jurisprudence with respect to gradual onset stress cases. This jurisprudence established that the test for determining whether an "accident" had occurred, required an objective look at the stressors alleged, and the worker's reaction to those stressors. The Nova Scotia Court of Appeal reviewed *Decision 2006-603-AD*, in *Embanks v. NS (Workers' Compensation Appeals Tribunal)* [2008] N.S.J. No.133. It accepted the Tribunal's position that the Policy is "declaratory of the better view of the law on this aspect of gradual onset stress under *GECA*." The Court accepted the objective view as it related to the assessment of the nature of the events which a worker claims give rise to the stress.

The Court elucidated the law in respect to gradual onset stress at p. 8 of its decision:

To put it in simple language, the events must be excessively and unusually stressful, objectively viewed and, in the actual case of the individual worker, give rise to the mental or physical condition on which the claim is based.

The Court stated at p. 9:

An objective assessment, as set out in the Policy, is consistent with the scheme and purpose of *GECA* and, in my view, furthers its overall intent to provide no fault compensation for injuries resulting from workplace accidents.

The Worker testified that she has been employed with the Employer since 1999 as a kitchen helper. Her duties consist of doing dishes, making salads, cleaning floors and tables, and generally all manner of kitchen work with the exception of cooking the main meal.

The Worker testified that she was a witness to an argument between two employees in the winter of 2007. One of these employees, "W" was the partner of CD, a co-worker of the Worker's. The Worker agreed to give a statement about what she had seen between W and the other employee. W and the other employee were fired. CD found out that the Worker had given a statement. The Worker testified that it was this turn of events that precipitated the campaign of bullying that she experienced from CD and another co-worker, CR.

The Worker testified that after the incident with the statement, and the firing of the employees who were involved, she was constantly snubbed by CR and CD. She said that before she gave the statement they had operated as a team, but afterwards, she was consistently left out of conversations and interactions.

The Worker was referred to Exhibit "2", a document produced as a result of the internal investigation into the harassment allegations made by the Worker against CD. It contains an explanation of each allegation and the findings of the Employer in relation to it. The Worker testified that the document did not contain all incidents of alleged harassment. She said that at the time she did not want to be seen as making trouble and there were a lot of incidents that she did not record or report.

Not all of the Worker's allegations as outlined in Exhibits "2" and "3" were found by the Employer to be supported. I found the Worker to be a credible witness, however, and I accept her testimony as to the occurrence of each of these incidents regardless of the official findings in the reports.

Allegation 1 according to Exhibit "2" was that CD cooked special meals for staff and excluded the Worker. This took place in the spring of 2008. Allegation 2 was that on a

regular basis, CD stood beside or behind the Worker watching her work. The Worker stated she felt intimidated by this. Allegation 3 was that CD had removed the Worker's food tray where she had placed it and took that place herself in front of a number of employees. The Worker felt intimidated and embarrassed by this. Allegation 4 was that CD stepped out in front of the Worker when she was carrying a heavy coffee pot with hot coffee in it. Allegation 5 was that CD continuously glared at the Worker.

There was an allegation about the radio volume being too loud in the kitchen. The Worker testified that she had a problem with the radio being too loud. CR offered her a pair of ear plugs and CD stated in a sarcastic manner that she could have more when those were worn out. The Worker felt that this comment singled her out and embarrassed her in front of her co-workers. She stated that the problem of the radio is an ongoing one. Allegation 7 was that CD made a demeaning comment to the Worker about her world being small, when she overheard the Worker talking to another co-worker about her earrings. The Worker saw this as embarrassing and demeaning. Allegation 8 was an allegation that the Worker was elbowed by CD deliberately when the two were passing each other. Allegation 9 was that CD would purposely push trolleys toward the Worker or into the Worker's path.

The Worker testified that on July 28, 2008 there was an episode involving a cheese knife. CD was demanding a knife from an employee in the kitchen who had been asked to use it for a certain task. When CD became demanding, the Worker interjected and stated that arrangements had been made for use of the cheese knife. According to the Worker, CD told the Worker off and told her to mind her own business. The Worker stated that she emotionally broke down. She went to the Sergeant who was in charge and said she could not continue to work that day. She stated she got really out of control emotionally.

The Worker testified that she had reached a point where she could not take any more of CD's verbal abuse, in addition to all of the other incidents. She went outside with the Sergeant and sat on the patio for a while. She was not able to talk. She was physically ill. She sat in her car until she was in a condition she felt she could drive. She began to experience pain in her chest and left arm, and drove herself to Outpatients. She told them she had an upset at work. She found out after having undergone tests at the hospital that she had had a heart attack. Although she was told that there was no damage to her heart, she currently must take medication for her heart, and is in a high risk category.

The Worker was referred to Exhibit "3" which was the complaint against CR. Allegation 1 was with respect to the radio and the comment made by CR to the Worker about the earplugs. The second allegation involved an incident where the Worker tried to help out in the dining room and CR threw her arms in the air and said "I am outta here". The Worker felt humiliated and rejected. Allegation 3 involved an incident where CR hid a greeting card the staff were signing when she saw the Worker approaching. The Worker testified that she felt angry as it was she who had purchased the greeting card.

Allegation 4 against CR was that a number of employees were looking at pictures of the Worker's niece and CR who had been part of the group, threw the pictures across the table when she saw the Worker approaching.

Allegation 5 was that CR made a point of speaking German to her mother when the Worker was present. The Worker testified that allegation 6 was that CR continually gave the Worker snide looks and ignored and snubbed her. The Worker stated that this is an ongoing thing. Allegation number 7 involved another incident where CR snubbed the Worker. The Worker testified that she felt belittled by the way she was treated by CR and CD. She stated she was made to feel as if she was the "bad person", receiving this type of treatment.

Allegation 8 was that CR purposely hit the Worker with a dish cart. Allegation 9 involved an incident with the radio again where CR made the Worker feel embarrassed in front of her co-workers.

Allegation 10 was that CR had told the Worker when she entered into a certain area of the work place that, "if you are not working in this area then move". The Worker testified that CR had yelled at her. Allegation 11 was that CR had yelled a work command at the Worker which made her feel embarrassed in front of the Major to whom she was speaking at the time.

I have considered criterion i) of Policy 1.3.6 and I find that the work-related events or stressors experienced by the Worker were unusual and excessive. I find that when viewed objectively, a reasonable person would conclude that the workplace events were so unusual and excessive so as to potentially cause a disabling reaction. If each incident as described by the Worker were to be viewed in isolation it would not necessarily meet this criterion, but I find that the Worker was subjected to a series of demeaning incidents over a period of time which, when viewed as a whole, constituted a pattern of harassment .

The Employer's definition of "harassment" as contained in Exhibit "1" is helpful in understanding what is meant by the term in the context of a work environment. The definition states in part:

Harassment is any improper conduct by an individual that is directed at and offensive to another person or persons in the workplace and which the individual knew or ought reasonably to have known would cause offence or harm. It comprises any objectionable act, comment or display that demeans, belittles or causes personal humiliation or embarrassment, or any act of intimidation or threat...

The fact that the Employer conducted a full investigation into the Worker's allegations, the result of which was CD and CR being found guilty of harassment and being disciplined,

suggests to me that their behaviour was considered extremely serious. Clearly it was conduct that the Employer found objectionable and unacceptable. If this were something that occurred on a usual basis, the workplace would certainly be dysfunctional, and there was no evidence that it was. This behaviour was out of the ordinary for the type of work environment and was excessive in that it transcended what was proper, or normal behaviour in this workplace. The fact that a total of 11 of the Worker's allegations of harassment were borne out, suggests to me that a pattern of harassment existed.

I do not have any evidence before me that the Worker's work environment was one that could be described generally as "toxic" or generally fraught with conflict, as was the case with the workplace at issue in *Decision 2006-603 AD*. Nor was it a situation where this type of behaviour was common and was engaged in by the Worker herself. It is my impression that prior to these incidents the Worker had enjoyed her workplace and that the Worker and her co-workers had functioned quite happily as a team. It would be a stretch to find that the stressors experienced by the Worker could be considered stressors that an average worker in the same or similar occupation would have to face.

The Worker was subjected to behaviour which made her feel embarrassed, humiliated, hurt, and intimidated. These incidents extended beyond incidents of emotional harassment into the realm of physical intimidation, such as the incident involving the coffee pot, the elbowing incident, and other incidents involving obstruction of the Worker with trolleys. This behaviour continued over a significant period of time and continues even now to some degree, according to the Worker. I find that these events, objectively viewed, could be seen to be potentially disabling.

That the events in issue would be outside the realm of routine employment related actions such as interpersonal relationships and conflicts is suggested by the Court in *Embanks*, supra., where it considers the case of *Rees v. (Royal Canadian Mounted Police)*, 2005 NLCA 15. That was a case where an officer had given a statement about the conduct of a fellow officer and was subjected to harassment by that officer. Although the exact nature of the harassment is not set out, the Court in *Embanks* appears to consider that it is the context within which the harassment arose, that brings it out of the realm of "routine employment related actions such as, "interpersonal relationships and conflicts...". The context in the instant case is similar to that in *Rees*.

The Worker testified that her work environment was and is very strained. She stated that since she has come back to work following her heart attack she has been kept off the shift on which CD and CR work. She does not work on the shift with CD and CR, however, she does come in contact with them on "crossover shifts". She stated that she has been back to work since March of 2009 and she is coping well.

The Worker testified that since she has been back to work she has continued to see Dr. Veasey, psychiatrist. She has been on anti-depressants. She stated that her doctor is

keeping a close eye on her hours of work in relation to her heart condition. She stated that 6 months ago she would not have been able to revisit and recount the events that had transpired at work leading to her claim, as she was able to do at the hearing of this appeal.

The Workers' Adviser presented this case as a stress case. He is not seeking any finding at this time that the Worker's heart attack was work-related. Therefore, I will not be canvassing in detail, the hospital records regarding the heart attack.

Turning now to criteria ii) and iii) of the Policy, I find that the Worker has been diagnosed with a mental condition that is described in the DSM IV. Dr. Veasey has diagnosed her with adjustment disorder with features of anxiety and depression. The Worker was seen by Dr. Kennedy, Psychologist, who wrote to Dr. Wightman, the Worker's cardiologist, on August 26, 2008. Her tentative diagnostic impression of the Worker was of depressive disorder NOS. She stated that the Worker spoke of work-related stress as well as the recent cardiac event. Dr. Veasey is a psychiatrist and Dr. Kennedy is a clinically trained psychologist, and, therefore, criterion iv) of the Policy is met.

Dr. Wightman's report of July 29, 2008 indicated the Worker's discharge diagnosis as being acute coronary syndrome/non-ST segment elevation myocardial infarction. He stated that the Worker presented to the emergency room with an acute onset visceral chest pain radiating to her arm which came on spontaneously after a stress inducing situation at work which was severe enough to have her burst into tears. There is a handwritten note from Dr. Wightman on file, dated August 18, 2008, indicating that the Worker is to be off work indefinitely "related to heart health issues & work-related stress".

A Form 8/10 from the Worker's family doctor, Dr. Seaman, dated October 14, 2008, states that the Worker had an acute myocardial infarction on July 28, 2008. He stated that the chest pain began while sitting in her car following a particularly stressful incident at work. Dr. Seaman queries whether the Board is going to accept this problem and cover the Worker.

Dr. Seaman wrote to Dr. Veasey on October 14, 2008, requesting that Dr. Veasey see the Worker. He asked Dr. Veasey for his assessment of "this harassment business". He informed Dr. Veasey in the letter that the Worker has alleged that she is being harassed at work and that she was having a particularly bad day on the day she developed the severe chest pain.

Dr. Veasey's report of December 9, 2008 states that the Worker has had a tough time with problems with an alleged two years of harassment at work. Dr. Veasey stated that his essential diagnosis was that of an adjustment disorder with features of anxiety and depression which has become chronic in the setting of work stress and litigation ramifications. Dr. Seaman's report of December 30, 2008 states that the Worker is still disabled but more from her psychological state than her cardiac condition.

Dr. Veasey provided a letter dated January 5, 2009 to the Board, stating that the Worker had significant current disability, "as is almost always the case when somebody is involved in this type of aggravating complaint and investigation, which in her case is compounded not only by psychiatric responses with anxiety and depression, but by the issue of her cardiac difficulties, although causation of these is a matter beyond my competence."

That the Worker's psychological condition of depression and adjustment disorder was brought on by the work related events or stressors is supported by the evidence of Dr. Veasey and to some extent by Dr. Kennedy. There is no suggestion in the medical evidence of any other cause. None of the Worker's treating physicians have related the problems which forced her to go off work, to a pre-existing condition.

The Workers' Adviser submitted that the Worker did not have any mental condition that pre-existed the difficulties she experienced at work in 2008. I accept the Worker's argument with respect to a pre-existing condition.

A chart note for a visit February 16, 1996, noted that the Worker felt she could not handle the stress of performing jury duty. She was emotionally labile and prone to headaches. The Worker testified that the stress she was experiencing at that time was not serious. She stated she just had some anxiety about serving on a jury.

The chart notes indicate that the Worker experienced some emotional distress surrounding the death of her mother, her father, dealing with a child with special needs, and some significant health concerns, however, there is nothing in the Worker's history that would lead me to a conclusion that she had any pre-existing condition that would have contributed to her need to be off work in 2008. There is insufficient evidence to suggest that any stress reaction the Worker had was related to any kind of pre-existing susceptibility she had. The Worker, as evident from her medical file, had some various stressors over the years, however, she coped and went back to work.

I find that the Worker has demonstrated that she has suffered a compensable accident under s. 4(1) of *GECA* and Policy 1.3.6, in the form of gradual onset stress.

CONCLUSION:

This appeal is allowed. The Worker suffered a personal injury by accident arising out of and in the course of her employment pursuant to *GECA* and Policy 1.3.6.

WCAT # 2009-315-AD

DATED AT HALIFAX, NOVA SCOTIA, THIS 14th DAY OF OCTOBER, 2009.

Alison Hickey
Appeal Commissioner