

DECISION OF THE WORKERS' COMPENSATION APPEAL TRIBUNAL

Introduction

- [1] The worker, a marketing sales professional, filed a claim for a mental disorder, diagnosed as an Adjustment Disorder with Mixed Anxiety and Depressed Mood¹ which he attributed to various workplace incidents during the time period from June 2017 and October 2018. The Workers' Compensation Board (Board), operating as WorkSafeBC, in a July 2, 2019 decision, denied the worker's claim for compensation under section 135 of the *Workers Compensation Act* (Act).
- [2] The worker requested a review of the Board's decision. In a February 26, 2020 decision (*Review Reference #R0255732*), the Review Division confirmed the decision of the Board.
- [3] The worker has appealed the Review Division decision to the Workers' Compensation Appeal Tribunal (WCAT) and is represented by a lawyer. The employer is not participating in this appeal, although it was invited to do so.
- [4] An oral hearing was held on October 14, 2020 via videoconference.
- [5] On April 6, 2020, a revised Act came into force as a result of a review under the *Statute Revision Act*.² The underlying decision of the Review Division was issued prior to this date. However, I find that the provisions of the new and previous versions of the Act considered in this decision did not materially change. Consequently, I have referenced the provisions of the Act as it read as of April 6, 2020 in this decision. In addition, parts of Bill 23 (*Workers Compensation Amendment Act, 2020*) came into force on August 11, 2020. Section 135 of the Act, which addresses mental disorders, was amended to clarify that compensable mental disorders are treated as injuries, rather than as occupational diseases. That amendment also applies to this appeal.

Issue(s)

- [6] Did the worker develop an Adjustment Disorder that arose out of and in the course of his employment, under the provisions of section 135 of the Act?

¹ Hereinafter referred to as an "Adjustment Disorder" for ease of reference.

² The *Statute Revision Act* establishes a mandate for the Chief Legislative Counsel of British Columbia to consolidate, renumber, and reorganize British Columbia's Acts into more coherent and readable "revised" Acts. The Office of Legislative Counsel identified the *Workers Compensation Act* as an Act that was in need of revision.

Jurisdiction

- [7] This appeal was filed with WCAT under section 288(1) of the Act which provides for appeals of final decisions by review officers regarding compensation matters. Section 308 of the Act gives WCAT exclusive jurisdiction to inquire into, hear, and determine all those matters and questions of fact, law, and discretion arising or required to be determined in an appeal before it. This is a rehearing by WCAT. WCAT reviews the record from previous proceedings and can hear new evidence. WCAT has inquiry power and the discretion to seek further evidence, although it is not obliged to do so. WCAT exercises an independent adjudicative function and has full substitutional authority. WCAT may confirm, vary, or cancel the appealed decision or order.
- [8] The standard of proof is the balance of probabilities, subject to section 303(5) of the Act. Section 303(5) provides that if WCAT is hearing an appeal regarding the compensation of a worker and the evidence supporting different findings on an issue is evenly weighted in that case, the appeal tribunal must resolve that issue in a manner that favours the worker.
- [9] I am bound to apply the published policies of the board of directors of the Board, subject to the provisions of section 304 of the Act. The applicable Board policies are set out in the *Rehabilitation Services and Claims Manual, Volume II* (RSCM II).
- [10] On March 25, 2020 the board of directors of the Board approved amendments to several policies of the RSCM II. The policy regarding mental disorders in chapter 3 of the RSCM II was renumbered and consolidated. I find that the change to the Board policy on mental disorders (now item #C3-24.00) represented a simple renumbering of the policy and there was no substantive change as a result of this. Regardless, this new policy does not apply to this appeal as the March 25, 2020 board of directors resolution did not state that its changes to the mental disorder policy apply to appellate decisions. Consequently, in this decision I will be referring to the Board mental disorder policy #C3-13.00 as it read before March 25, 2020.

Law and Policy

- [11] Section 135(1) of the Act concerns claims for mental disorders and reads as follows:
- (1) Subject to subsection (3), a worker is entitled to compensation for a mental disorder, payable as if the mental disorder were a personal injury arising out of and in the course of a worker's employment, if that mental disorder does not result from an injury for which the worker is otherwise entitled to compensation under this Part, only if all of the following apply:
- (a) the mental disorder is either
- (i) a reaction to one or more traumatic events arising out of and in the course of the worker's employment, or
- (ii) predominantly caused by a significant work-related stressor, including bullying or harassment, or a cumulative series of significant work-related stressors, arising out of and in the course of the worker's employment;

- (b) the mental disorder is diagnosed by a psychiatrist or psychologist as a mental or physical condition that is described, at the time of diagnosis, in the most recent Diagnostic and Statistical Manual of Mental Disorders [DSM] published by the American Psychiatric Association;
- (c) the mental disorder is not caused by a decision of the worker's employer relating to the worker's employment, including a decision to change the work to be performed or the working conditions, to discipline the worker or to terminate the worker's employment.

[12] The adjudication of mental disorder claims involves five key questions per policy item #C3-13.00:

- A. Does the worker have a DSM diagnosed mental disorder?
- B. Was there one or more events, or a stressor, or a cumulative series of stressors?
- C. Was the event "traumatic" or the work-related stressor "significant"?
- D. Causation (was the mental disorder a reaction to one or more traumatic events arising out of and in the course of the employment, and/or was the mental disorder predominantly caused by a significant work-related stressor, or a cumulative series of significant work-related stressors, arising out of and in the course of the worker's employment)?
- E. Was the mental disorder caused by a decision of the employer relating to the worker's employment?

Evidence Reasons and Findings

[13] I will start my analysis by determining whether the series of events that the worker experienced were traumatic events or significant stressors as contemplated under section 135(1)(a) of the Act. I will not summarize all of the testimony and disclosed evidence in this decision for the purposes of brevity and consolidation and will only highlight the specific evidence that I considered to be relevant and necessary to come to a conclusion with confidence in determining the outcome of this appeal, although I have read and considered the evidence in its entirety.

[14] The worker's representative did not raise or suggest in any way that the worker experienced a traumatic event. He suggested that the series of events the worker experienced met the Board criteria for bullying and harassment and thus were significant stressors. As the representative did not raise the issue of a potential traumatic event I will not consider it in this decision, but even if he had, I would not have concluded that any of the events the worker experienced to be traumatic events. I will now analyze whether these events were significant stressors.

Significant Stressor – Bullying and Harassment

[15] Policy item #C3-13.00 defines a significant stressor as being "excessive in intensity and/or duration from what is experienced in the normal pressures or tensions of a worker's employment." It further notes that "[i]nterpersonal conflicts between the worker and his or her supervisors, co-workers or customers are not generally considered significant unless the conflict results in behavior that is considered threatening or abusive."

- [16] Several events were raised as being significant stressors where the worker was harassed by co-workers. I accept that the worker felt he was subjected to bullying and harassment from his co-workers, and I will consider his subjective feelings about the various incidents as well as conduct an objective analysis of the same. This is because policy states that the question of whether an event was traumatic or a significant stressor is not determined solely by the worker's subjective belief about an event. The Board Interim Practice Directive #C3-3 further outlines that policy indicates that this analysis involves the consideration of both subjective and objective factors. The adjudicator will consider whether a reasonable person, in the worker's situation (and with the general characteristics of the worker), would expect to find the event a significant stressor. I accept the guidance in the practice directive in this regard.
- [17] Although I am not bound by previous decisions of WCAT and I am able to come to my own conclusion, I also find significant guidance to the necessity of considering both subjective and objective factors as well as the definition of "general characteristics" of a worker in previous decisions of WCAT, including *WCAT Decision A1800049*. In this decision, the vice chair outlined:
- [55] There is no definition in policy or practice of "general characteristics" or "characteristics of the worker." I first observe that the word "general" seems superfluous, as the policy is referring to the characteristics of the specific worker. I do not see what "general" adds to that. In any event, I consider that "general characteristics" would likely include whether the worker had some physical characteristic (perhaps a physical impediment, for example)³ that made them particularly sensitive to certain comments that others would not find stressful, but any reasonable person would see how they could be stressful to that particular worker. They might also include whether a worker's past life experiences (perhaps past physical or sexual abuse, exposure to war, or living in refugee camp, for example) resulted in the worker reasonably viewing an event as more stressful than others would.
- [18] Through an analysis of the claim file evidence and the worker's testimony I did not find that the worker had any general characteristics that would make him more sensitive to comments than the average person. However, this does not mean that the worker cannot meet the test as to whether an event is traumatic or a significant stressor; it simply means that I do not have to consider any specific characteristics of the worker when I am objectively analyzing the events that occurred.
- [19] There are two specific events which occurred where I find there was objective evidence of bullying and harassment and I find objectively the worker was subjected to harassment from his co-workers. I consider these two circumstances in their own right to be significant stressors

³ For example, see *WCAT Decision A1604648* (dated June 21, 2017), in which a worker who was suffering from an undiagnosed and deteriorating speech disorder was traumatized when he received a text message from his supervisor that was crude, inappropriate, and insulting, but under ordinary circumstances it would not be traumatizing for most individuals. Psychological evidence established that when the worker's particular circumstances were taken into account, it was plausible that the distasteful text message was misconstrued by the worker as severely threatening.

without having to consider a series of incidents. These incidents involved an incident on a workplace group chat session and an incident concerning the worker's performance (regarding an award he did not win) which was publically shared with his co-workers by his manager.

Group Chat and Award E-mail

- [20] The worker stated at the hearing that there was a group text message chat where his co-workers were able to chat about work issues that would affect the group as a whole. The worker provided a copy of an interaction that the worker was not a part of, but he had access to viewing as he was a member of the group chat.
- [21] One of the worker's co-workers has a daughter who at the time was "14 or 15 years old" according to the worker. This co-worker who was the father of the daughter posted two pictures of his daughter to the group chat session which were apparently from a photoshoot. The worker's co-workers to my knowledge were all male and some of the co-workers were commenting in a positive manner about the daughter's physical appearance through comments such as "Bragging Dad...." and an emoji⁴ indicating that the co-worker liked the daughter's picture.
- [22] In this chat session the worker, who was not participating at the time the texts were sent, was specifically referred to. One co-worker stated "[the worker's name] stay away" and another co-worker responded to this text with "She ain't Puerto Rican, [name of daughter] is safe from that predator!" The daughter's father then stated "Do the pre[d]ators respect country boundries?????"
- [23] I consider that this exchange with co-workers was a public workplace exchange as text messages on a chat session that is intended to be for work-related exchanges is analogous to a similar public exchange in the workplace. The worker was not present during these exchanges and was not an immediate participant; he only discovered the entire string of messages at a later time when he read the entire dialog that had already been recorded on the chat session. The comments towards the worker were inappropriate as in my view they implied that the worker was a sexual predator who would have an interest in a co-worker's teenaged daughter.
- [24] The Board conducted several interviews with the co-workers during its adjudication of the claim and the general consensus from the co-workers was that this chat was a jocular circumstance and the nature of the office environment involved some degree of camaraderie and comments said in jest. I understand, as the worker's representative alluded to at the hearing, that there can be a fine line between things said in jest and harassing behaviour.
- [25] I also acknowledge that present societal viewpoints can, at times, be overly-focused on extreme sensitivities to comments and have certain individuals present with a victim mentality when the most innocuous (and often unintended) slight occurs to them. The reality is that there are people who are subjectively offended by nearly everything and engage in commensurate behaviours to seek their own version of justice or in some cases vengeance. However, such persons would be unlikely in most cases to meet the subjective-objective test in the Board Practice Directive #C3-3. While not binding, practice directives do lead to consistency in adjudication and

⁴ An emoji is a small digital icon used to express an idea or emotion.

I adopt it for consideration on this appeal. The subjective-objective test outlines that it is not only the worker's own perception of events which determines whether an event is a significant stressor, but also an objective analysis of the same.

- [26] Objectively, I found that the comments made about the worker during the group chat session were a significant stressors and represented harassment of the worker. The worker was not a participant in the group chat session at the time the comments were made. He did not initiate or suggest that he had any interest in the co-worker's teenaged daughter and at least two co-workers stated (implicitly and explicitly) that the worker was a sexual predator. Being accused of this in a public workplace setting in my view was a significant stressor.
- [27] I do not consider this text messaging to be jocular or workplace banter. Had the worker been actively involved in the message thread making similar comments about the co-worker's daughter or his co-workers I may have come to a different conclusion; however, that was not the case in this circumstance. The worker was singled-out by name in the chat session and called a predator after the picture of the teenaged girl was posted—this was entirely unprovoked on the part of the worker. I recognize that in the interviews with the co-workers undertaken by the Board some of the responses of the co-workers were in relation to the worker apparently regularly mentioning his weekend escapades which involved (adult) women and drug use. I make no finding in this appeal whether the worker's alleged statements were substantiated as it was unnecessary to come to the conclusion that I have, but even if they were, it would not change my finding regarding the workplace group chat session. These were targeted and unfounded comments toward the worker suggesting he had proclivities towards an under-age daughter of a co-worker. Regardless of what the worker may have said about his extracurricular activities I find such comments represent targeted harassment of the worker, which meets the definition of a significant stressor in the relevant Practice Directive.
- [28] The second event that I found both subjectively and objectively met the test of a significant stressor consisted of an email from the worker's supervisor "R" (not his real initial). There was a circumstance where the worker was excluded from a workplace award in error. The worker testified that when this occurred he was laughed at by R and his co-workers while his work was discredited. At a later date the worker did not win another award that he was being considered for. An e-mail was sent to R noting the name of the successful award recipient and R forwarded this e-mail to the worker's entire team of co-workers with the commentary "Damn [the worker's name]...you got robbed again man!"⁵
- [29] The worker stated that subjectively he found the event to have shocked and affected him greatly. He considered the history of R previously mocking him about being excluded from an award and stated that he found this to be an attempt to publicly humiliate him. Objectively, I come to the same conclusion. The worker was a credible witness and I found him to be forthright in his testimony at the hearing. I have no reason to disbelieve that the worker had previously experienced a negative circumstance with R concerning the first award. There is objective evidence of the second e-mail from R and this e-mail substantiates that his comment about the worker was sent to the worker's entire workplace team. On the surface by literally reading the words, one could possibly argue that R was attempting to express sympathy for the worker's circumstances, but when I consider the previous context concerning the first

⁵ All quotations reproduced as written, except where indicated.

unsuccessful award I find that R was attempting to mock or embarrass the worker in front of his co-workers.

- [30] The email from R was not necessarily unprofessional in itself had it been sent only to the worker with the intent to console or assist him, but the fact that R chose to circulate such comments to the worker's entire team is what, in my view, converted his comments into a significant stressor for the worker. Having one's work publicly criticized by his immediate supervisor by way of a forwarded email would be shocking and represents harassment; such conversations should take place in private. This is not a reasonable action that would be expected in any workplace, much less a professional environment. There was absolutely no reason for R to have sent such an e-mail to the worker's entire team of colleagues, which highlighted the worker's failure, other than to embarrass or harass him. In fact, I find there would be very limited circumstances where highlighting an employee failure to the entire team would be even necessary, other than perhaps to offer constructive feedback. Had R recognized the effort of the worker and expressed his belief that the worker should have won the award or stated that the worker made a good effort but the award committee decided to go another way, it may have been reasonable to send such an e-mail, but stating the worker had been "robbed again man!!" is not what I consider to be constructive feedback.

Ancillary Events

- [31] At the hearing the worker raised a number of other events, which he alleged were significant stressors consisting of bullying and harassment. The worker's representative argued that these events also demonstrated a pattern of bullying and harassment towards the worker. I find that none of these events were traumatic events or significant stressors in their own right, but I also find that these events viewed as a whole represented a series of significant stressors. For the record I note a non-exhaustive list of the ancillary events:

- R made references to male genitalia and sex toys that represent such body parts
- R and co-workers commented on the worker's weight
- A co-worker stole the worker's marketing idea and presented it as his own
- R yelled at the worker in front of his co-workers
- A co-worker pranked the worker suggesting to R that the worker arrived late to work
- Co-workers suggested the worker's weekends involved cocaine and prostitutes
- R tricked a co-worker into almost eating the worker's breakfast as a prank

- [32] In my view, the above-noted events individually would not have been significant stressors. Each individual event in isolation would have not met the test of being excessive in intensity or beyond the reasonable expectations of employment. These particular events when looked at in isolation were brief and would be considered a trifling stressor, representative of an interpersonal conflict, or considered mutual banter. Yet, when the ancillary incidents are viewed as a group with the other two events that I found represented significant stressors in their own right a pattern begins to develop which involves the worker being frequently harassed in the workplace.

- [33] The employer chose not to participate in the appeal and as such the worker's allegations are uncontested, at least with respect to the evidence presented at the WCAT hearing in particular. The employer did put itself at a disadvantage by choosing not to participate in the WCAT appeal as it waived its right to cross-examine the worker or present additional evidence, which may have provided some further context to or refuted the worker's allegations. However, regardless of whether or not the employer decided to participate I must still analyze the whole of the evidence as is present on the claim file.
- [34] The evidence that is most persuasive to the employer's presumptive arguments against the worker's version of events is the audio recordings by a Board investigator where the investigator interviewed the worker's colleagues. The colleagues generally portrayed the worker as a poor performer who had difficulties meeting sales targets and contributed equally to the banter in the workplace including initiating comments regarding his weekends with "hookers and coke." The worker denied that he behaved in such a manner and stated that the employer's co-workers colluded to provide a portrayal of him that was less than favourable.
- [35] I found that the worker was a credible witness and I did not find any reason to disbelieve his statements as they stand from his direct examination, although I note again that the worker was not subjected to any cross-examination for me to assess as the employer chose not to participate in the appeal. I also place less weight on the statements of the worker's colleagues as I found that at times the Board investigator obtained evidence from the colleagues that would be contrary to the worker's arguments through the use of leading questions. That is to say, at times in the interviews, the Board investigator suggested the answer to a colleague of the worker based on what a previous colleague had stated. I also note that the statements of the colleagues in the Board interview consisted of a large number of instances where the co-workers failed to recall events. Considering the deficiencies in the Board investigation interviews and the uncertainty of the colleagues' testimony in comparison with the certainty of the worker's testimony I prefer the worker's version of events and place more weight on his statements.
- [36] Based on the worker's unrefuted testimony, I find that he experienced a series of targeted events which constitute harassment in the workplace, which consisted of some events that on their own would be considered significant stressors, and others which would not stand on their own as significant stressors. However, notwithstanding that many of these events would not stand on their own as significant stressors, I find that the worker's evidence established a pattern of seemingly benign or trivial individual events that when viewed as a whole consisted of harassment towards the worker.
- [37] As I have found that the worker had experienced at least two significant stressors that stand on their own and also a series of significant stressors two of the criteria in policy item #C3-13.00 are met. I now must analyze whether the worker was diagnosed with a DSM mental disorder by an appropriate mental health professional, consider causation, and the applicability of the employer exclusion. My analysis in this regard follows.

Diagnosed Mental Disorder and Causation

[38] The worker meets the criterion of having a diagnosed mental disorder as he was diagnosed with an Adjustment Disorder by Dr. Bubber, a psychologist. This was noted in the May 16, 2019 psychological assessment report.

[39] Policy describes the causation test for a significant stressor as follows:

Was the mental disorder predominantly caused by a significant work-related stressor, or a cumulative series of significant work-related stressors, arising out of and in the course of the worker's employment?

...

Predominant cause means that the significant work-related stressor, or cumulative series of significant work-related stressors, was the primary or main cause of the mental disorder.

[40] In the May 16, 2019 psychological assessment report Dr. Bubber opined that no one event contributed significantly to the onset of the worker's Adjustment disorder, but the sole cause was an accumulation of small incidents that the worker took personally and he perceived to be targeting him that resulted in the development of the disorder. Dr. Bubber stated in the report:

It is my opinion the onset of the Adjustment Disorder was a result of these accumulated workplace stressors where [the worker] came to believe he was being unfairly targeted by his manager and was treated poorly by coworkers. The symptoms were severe enough that he was unable to continue working in November 2018. Notably during his time off, many of his symptoms resolved.

[41] While it appears that many of the worker's symptoms resolved after being away from the workplace, Dr. Bubber did opine that the cause of the worker's Adjustment Disorder was the series of incidents that he experienced at the workplace. As this is the only cause that Dr. Bubber identified it also stands to reason it is the predominant cause of the worker's mental disorder. I find that the predominant cause of the worker's Adjustment Disorder was the series of harassing events that the worker experienced. The worker meets the criteria of having a diagnosed DSM mental disorder and having this mental disorder predominately caused by the significant workplace stressors to which he was exposed.

Employer Exclusion

[42] Section 135(1)(c) of the Act states that there is no entitlement to compensation if the mental disorder is caused by a decision of the worker's employer relating to their employment. The Act provides a list of examples of decisions relating to a worker's employment. The Board's Practice Directive #C3-3 states that the conduct surrounding the employment decisions would have to be in some way abusive or threatening, which includes targeted harassment, to not fall under the exclusion.

- [43] I did not find that any of these events were decisions of the employer. However, the event that would be the closest to a decision of the employer would be where R announced that the worker did not win an award to the team. While I have found that this was not a decision of the employer, even if it were, it was conveyed with an intent to mock or embarrass the worker and I would consider such an action to be abusive. Consequently it would not fall within the employer exclusion if it were applicable to this case.
- [44] In summary, I find that the worker completely met the criteria contained in section 135 of the Act, and therefore, I further find that his Adjustment Disorder arose out of and in the course of his employment. The worker's appeal is allowed.

Conclusion

- [45] The worker's appeal is allowed and I vary the February 26, 2020 Review Division decision (*Review Reference #R0255732*).
- [46] The worker developed an Adjustment Disorder that arose out of and in the course of his employment under the provisions of section 135 of the Act.
- [47] I am not aware of any expenses and make no orders in this regard.



Chad McRae
Vice Chair