WORKPLACE SAFETY AND INSURANCE APPEALS TRIBUNAL

DECISION NO. 2185/11

BEFORE:	R. McCutcheon	: Vice-Chair
	S.T. Sahay	: Member Representative of Employers
	A. Grande	: Member Representative of Workers
HEARING:	November 2, 2011 at Toronto Oral	
DATE OF DECISION:	June 20, 2012	
NEUTRAL CITATION:	2012 ONWSIAT 1433	
DECISION(S) UNDER APPEAL:	WSIB Appeals Resolution Officer (ARO) dated May 20, 2009	

APPEARANCES:

For the worker:	T.W. Zwiebel, Lawyer
For the employer:	Not participating
Interpreter:	Pham Hoang Van, Vietnamese

REASONS

(i) Introduction to the appeal proceedings and the issue

[1] The worker appeals a decision of the ARO, which concluded that he did not have initial entitlement for traumatic mental stress which he attributed to workplace events in 2008. The ARO rendered a decision following an oral hearing.

[2] The worker testified under oath at the Tribunal hearing and his representative made submissions.

(ii) Background

[3] The now 51 year old worker started with the accident employer, a knife manufacturer, in September 2000. The worker was employed as an order picker in the warehouse at the time of the relevant events in 2008.

[4] The worker's personnel file indicates that the worker had previously been subject to written disciplinary notices for leaving work without authorization, attendance, and job performance. The worker was also given a written notification to stop using his cell phone during work hours against company policy.

[5] In or about June 2008, the worker made complaints to the employer regarding what he felt were unsafe practices, particularly regarding unlicensed forklift drivers in the warehouse. He identified two forklift drivers who he stated were not licensed to operate a forklift.

[6] On June 24, 2008, the worker saw his doctor for complaints of stress and difficulty sleeping. Dr. B. Cheung, family physician, prescribed Ativan. The worker continued working.

[7] The worker filed a claim for mental stress with the WSIB in relation to an incident at work on July 4, 2008. The worker stated that he was violently threatened by another worker who was driving a lift truck without a certificate or driving license. The worker described that the co-worker shouted at him with a cruel face and violently threatening gestures: "F**k you! It's not your business!"

[8] The Employer's Report of Injury (Form 7), noted that the employer conducted an internal investigation and confirmed that the co-worker had shouted at the worker using profane language, although a witness did not confirm that the co-worker approached the worker in a threatening manner. The employer's distribution manager confirmed that the co-worker was informed both verbally and in writing that his conduct was inappropriate and that he must in the future operate company equipment properly and safely and refrain from addressing his co-workers in a threatening or rude manner.

[9] The WSIB undertook an investigation of the worker's claim. The investigator pointed out to the worker that Dr. Cheung's clinical notes indicated that the worker was seen on June 24, 2008 for stress and had been authorized off work for a few days at that time. The worker stated that the stress related to fear of being run over at work by co-workers operating the forklifts without being certified. He stated this had been going on for a month and despite voicing his concern to the employer, nothing had changed.

[10] A witness interviewed by the WSIB investigator confirmed the profane language used by the co-worker, but stated that the co-worker's arms were not raised or moving and he did not physically touch the worker.

[11] The worker saw his family doctor on July 8, 2008. In a note of August 18, 2008, Dr. Cheung reported:

> 1) [The worker] is suffering from insomnia, nervousness, fatigue and nightmares after being threatened by a co-worker.
>
> 2) Prognosis is good if the working environment changes.
>
> 3) [The worker] should try to return to work if arrangement is made for him to work elsewhere, away from the worker who threatened him.

[12] The worker took three days off after July 8, 2008, and lost several days from work throughout July and August. He stopped working on or about August 18, 2008. On September 3, 2008, the worker was assessed by a psychologist, Dr. G.K. Lau, upon referral from his family physician. Dr. Lau's notes including the following information:

- September 3, 2008: Dr. Lau reported that the worker presented with multiple stress-related symptoms and was not fit to return to work at that time.
- October 1, 2008: Dr. Lau stated that the worker was suffering from an Adjustment Disorder with Mixed Anxiety and Depressed Mood as a result of stress at work (he felt threatened by a co-worker). Dr. Lau gave the opinion that the worker was fit to return to work as long as he would no longer be threatened by the co-worker.

[13] The WSIB Adjudicator denied the worker's claim for mental stress, finding that the co-worker did not threaten him physically and "there were no physical actions with respect to raised arms, etc." It was also noted that following the verbal altercation the worker returned to work with the co-worker still present in the area.

[14] In denying the worker's objection, the ARO found that no objectively traumatic event occurred in the workplace. The ARO found that there was no evidence of previous harassment or a threat of physical violence in the confrontation. The co-worker swore at the worker and told him to mind his own business. The ARO found that this was a "labour relations issue." The worker also related his stress to unsafe workplace conditions. In this regard, the ARO stated that Board policy excludes entitlement for stress that is due to workplace conditions or employer decisions or actions. The ARO noted that the worker had the legislative right to refuse unsafe work, but a worker is not entitled to benefits for traumatic mental stress that is the result of an employer's employment decisions or actions. The ARO concluded that there was no event of a "criminal, horrific, or physically threatening nature." Entitlement could not be granted for the labour relations issues identified by the worker.

(iii) The worker's testimony

[15] The worker confirmed that he was 51 years of age at the time of the hearing and born in Viet Nam. He is 1.6 metres in height and weighs 65 kilograms. In terms of education, he went to the college level, and studied management, business and sales. He worked from 1979 to 1998 and then came to Canada, where he was married. His wife came to Canada earlier and sponsored him.

[16] When he first arrived in Canada, the worker was employed at different companies. He had no mental problems before or psychiatric treatment.

[17] He started with the accident employer, a knife manufacturer, in 2001. He worked in the warehouse, and then moved to order picking. He worked for the accident employer for eight years and earned under $31,000.00 per year. He had prior work-related injuries to his finger and ankle.

[18] The worker described the physical environment at the accident employer's premises. It is a large warehouse, which he estimated was 40,000 square feet. It is a busy warehouse. There are three reach trucks and one "walkie" truck. He had previously driven a forklift at a plastics company. He was trained on forklift driving at the accident employer. He was aware of how a forklift operates and the potential dangers. He described the training for forklift driving as being strict. A new manager came in and did not learn the details. He ignored a lot of safety issues in the warehouse. More than five people did not have a forklift licence and the manager allowed them to run the forklift. As a principle, the order pickers were not allowed to enter the packing area when the forklift was moving around. The forklifts cannot enter the order picking area. The new forklift drivers did not follow this guideline and entered different areas without stopping to see if pedestrians were there. The worker described a track on top of the order picking area. It would be easy to have an accident when knives are dropped on workers' heads. The worker testified that he drove a forklift safely. Other drivers were unsafe and violated the rules by entering the order picking area.

[19] The worker testified that he complained to management about this situation.

[20] The worker described the events of July 4, 2008. Around 3:10 p.m., he was labeling products. A co-worker with what the worker described as a damaged eye came at him with "an angry aspect." He was driving a walkie truck. The co-worker angrily asked the worker what was the matter. The worker replied that, if he were in charge, the co-worker would not drive because he did not have a license. The co-worker held up his fists and his face was red when he told the worker "f**k you, it's none of your business." The worker testified that, in Vietnamese culture, this phrase means I will kill you. The worker testified that another co-worker in the packing area asked what was going on.

[21] The worker went to the office of the vice-president to report the incident. The worker testified that he could not sleep that night. He had nightmares of stabbing and blood. He was so nervous. He reported to the warehouse manager, and then went to the doctor. The doctor gave him a prescription for sleeping pills.

[22] The worker testified that the co-worker was taller than him, medium sized, and had one eye damaged. When angry, the co-worker looked scary. The co-worker was there almost a year. One or two weeks previously, the worker reported to the office that the co-worker drove the forklift without supervision. That was why the worker thought the co-worker was angry. He continued working on and off until mid-August. He had nightmares and could not sleep. He felt it was not safe for himself and others, but he had to work to support his family.

[23] Dr. Cheung provided a note. The worker got worse and he was referred to Dr. Lau, psychologist. The worker saw Dr. Lau on two occasions. He paid the fees himself. The company did not reimburse him enough for the costs.

[24] Before the incident, the worker testified that he had no relationship with the co-worker. The co-worker was in the packing department and the worker was in order picking. The co-worker had a friendship with the manager. The co-worker had a long-term pattern of bullying other workers. When the worker reported to the vice-president that the co-worker was driving without a certificate, he became angry towards the worker. Two weeks before July 4, 2008, when he reported the co-worker, the co-worker did not confront him.

[25] The worker testified that he went to the doctor on June 24, 2008 because of stress related to the safety in the department, which went downhill after the new manager started. He testified that it was easy to get hit by a forklift. On the upper level was a different assembly line where sharp knives and forks are unpacked and can drop. It would be easy to get hit by sharp knives or forks. Previously, on one occasion, all the racks fell down and spread out from the upper level. The knives fell on the mezzanine above. They could have fallen down to the first level. He did not see the knives, but he heard a loud noise. The worker felt the environment was increasingly unsafe and he felt stress at work. There was another incident in the order picking area where a whole box fell on a co-worker's shoulder.

[26] The worker testified that he only had attendance problems after the incident with the co-worker. After the incident, he wrote a report which he gave to the warehouse manager. The incident occurred on a Friday. When he went back to work, the co-worker was still driving a forklift. The worker worked on and off after July 4, 2008. After three months, the employer gave him a package and kicked him out.

[27] His doctor and Dr. Lau had written notes that the worker should return to work away from the co-worker.

[28] The worker testified that this incident has affected his memory. He tried to find a job. He received employment insurance benefits for a period of time. He worked for a temporary agency. He has worked since September 2010. He used to do landscaping work on the weekends, but after the incident, he could not work in that business anymore. The worker testified that he is not scared about the co-worker anymore, but his memory has been affected and he has to re-read things. Sometimes he still has nightmares and wakes up at night. He read that it was not good to take sleeping medications, so he stopped that in October or November 2008.

[29] The worker's attention was drawn to the WSIB investigation report. That report provides the statement of a different co-worker as follows:

- He and [the worker] never discussed the incident of July 4, 2008 and he has not spoken to [the worker] since he last worked.
- On July 4, 2008, he and [the worker] had been talking and [the worker] had pointed to [the co-worker] driving the forklift and said that [the co-worker] should not be driving the forklift because he was not licensed and/or certified.
- He left [the worker] but returned when he heard loud voices. There are knives all over the place and he went to see what was going on.
- He could hear [the co-worker] say, "f—k you and it's none of your f------g business. [The co-worker] was standing close to [the worker], his arms were not raised or moving and he did not physically touch [the worker].

[30] The worker did not recall that he was pointing to the co-worker at the time of the incident. The worker also testified that he did not think he told the witness who made the

statement that the other co-worker should not be driving. The worker testified that he had reported to the vice-president two weeks earlier that there were two people driving without a licence. The worker testified that the co-worker may have mixed up the times in his statement to the investigator.

[31] The worker testified that the co-worker who made the statement to the investigator would not have been able to see gestures because the threatening co-worker had his back to him.

[32] The worker also denied that he ever spoke to the threatening co-worker after the incident. He also denied that he was gesturing towards the co-worker.

[33] The worker testified that he had nightmares of knives and blood after the incident. He would see the shape of a person attacking who looked like the co-worker. The employer put the worker under surveillance and the worker noticed people following him. His family thought they were friends of the co-worker, but he later learned it was surveillance when he received a letter from the warehouse manager.

(iv) Traumatic mental stress: The Act and Board policy

[34] Since the worker was injured in 2008, the *Workplace Safety and Insurance Act, 1997* (the "WSIA") is applicable to this appeal. All statutory references in this decision are to the WSIA, as amended, unless otherwise stated.

[35] Initial entitlement and mental stress claims are governed by section 13 of the *Workplace Safety and Insurance Act, 1997* (the WSIA), which states:

> **13(1)** A worker who sustains a personal injury by accident arising out of and in the course of his or her employment is entitled to benefits under the insurance plan.
> **(2)** If the accident arises out of the worker's employment, it is presumed to have occurred in the course of the employment unless the contrary is shown. If it occurs in the course of the worker's employment, it is presumed to have arisen out of the employment unless the contrary is shown.
> **(3)** Except as provided in sections 18 to 20, the worker is not entitled to benefits under the insurance plan if the accident occurs while the worker is employed outside of Ontario.
> **(4)** Except as provided in subsection (5), a worker is not entitled to benefits under the insurance plan for mental stress.
> **(5)** A worker is entitled to benefits for mental stress that is an acute reaction to a sudden and unexpected traumatic event arising out of and in the course of his or her employment. However, the worker is not entitled to benefits for mental stress caused by his or her employer's decisions or actions 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 employment.

[36] Claims for traumatic mental stress are also subject to Board policy, in particular, Document No. 15-03-02 of the *Operational Policy Manual* (OPM) contained in Addendum No. 1. That policy includes the following guidelines for the adjudication of traumatic mental stress claims:

> **Policy**
>
> A worker is entitled to benefits for traumatic mental stress that is an acute reaction to a sudden and unexpected traumatic event arising out of and in the course of employment.

A worker is not entitled to benefits for traumatic mental stress that is a result of the employer's employment decisions or actions.

Guidelines

Sudden and unexpected traumatic event

In order to consider entitlement for traumatic mental stress, a decision-maker must identify that a sudden and unexpected traumatic event occurred. A traumatic event may be a result of a criminal act, harassment, or a horrific accident, and may involve actual or threatened death or serious harm against the worker, a co-worker, a worker's family member, or others.

In all cases, the event must arise out of and occur in the course of the employment, and be

- clearly and precisely identifiable
- objectively traumatic, and
- unexpected in the normal or daily course of the worker's employment or work environment.

This means that the event

- can be established by the WSIB through information or knowledge of the event provided by co-workers, supervisory staff, or others, and
- is generally accepted as being traumatic.

[…]

Acute reaction

An acute reaction is a significant or severe reaction by the worker to the work-related traumatic event that results in a psychiatric/psychological response. Such a response is generally identifiable and must result in an Axis I Diagnosis in accordance with the Diagnostic and Statistical Manual of Mental Disorders (DSM-IV).

An acute reaction is said to be immediate if it occurs within four weeks of the traumatic event.

An acute reaction is said to be delayed if it occurs more than four weeks after the traumatic event. In the case of a delayed onset, the evidence must be clear and convincing that the onset is due to a sudden and unexpected traumatic event, which arose out of and in the course of the employment.

Workers who develop mental stress gradually over time due to general workplace conditions are not entitled to benefits.

Cumulative effect

Due to the nature of their occupation, some workers, over a period of time, may be exposed to multiple, sudden and unexpected traumatic events resulting from criminal acts, harassment, or horrific accidents. If a worker has an acute reaction to the most recent unexpected traumatic event, entitlement may be in order even if the worker may experience these traumatic events as part of the employment and was able to tolerate the past traumatic events. A final reaction to a series of sudden and traumatic events is considered to be the cumulative effect.

The WSIB recognizes that each traumatic event in a series of events may affect a worker psychologically. This is true even if the worker does not show the effects until the most recent event. As a result, entitlement may be accepted because of the cumulative effect, even if the last event is not the most traumatic (significant).

In considering entitlement for the cumulative effect, decision-makers will rely on clinical and other information supporting that multiple traumatic events led to the worker's current psychological state. Also, there may be evidence showing that each event had some effect or life disruption on the worker, even if the worker was not functionally impaired by the effect or life disruption.

An employer's work-related decisions or actions

There is no entitlement for traumatic mental stress due to an employer's decisions or actions that are part of the employment function, such as

- terminations
- demotions
- transfers
- discipline
- changes in working hours, and
- changes in productivity expectations.

However, workers are entitled to benefits for traumatic mental stress due to an employer's actions or decisions that are not part of the employment function, such as violence or threats of violence.

Diagnostic requirements

Immediate acute reaction

Where the acute reaction is immediate, the WSIB will accept the claim if an appropriately regulated health care professional confirms the worker is suffering from an Axis I diagnosis which may include but is not limited to

- acute stress disorder
- post-traumatic stress disorder
- adjustment disorder, or
- an anxiety or depressive disorder,

in accordance with the DSM-IV. The decision-maker may, at a later point, require an assessment by a psychiatrist or psychologist to confirm ongoing entitlement.

Delayed onset or onset due to cumulative effect

Where the acute reaction is delayed, or where the claim is based on the cumulative effect of multiple traumatic events, there must be an Axis I diagnosis in accordance with the DSM-IV by a psychiatrist or psychologist before the claim is adjudicated.

(v) Interpretation of traumatic mental stress: the Tribunal case law

[37] OPM Document No. 15-03-02 includes examples of the types of incidents that may be characterized as traumatic events within the meaning of the WSIA, including the following:

- witnessing a fatality or a horrific accident
- witnessing or being the object of an armed robbery
- witnessing or being the object of a hostage-taking
- being the object of physical violence
- being the object of death threats

- being the object of threats of physical violence where the worker believes the threats are serious and harmful to self or others (e.g., bomb threats or confronted with a weapon)
- being the object of harassment that includes physical violence or threats of physical violence (e.g., the escalation of verbal abuse into traumatic physical abuse)
- being the object of harassment that includes being placed in a life-threatening or potentially life-threatening situation (e.g., tampering with safety equipment; causing the worker to do something dangerous).

The worker must have suffered or witnessed the traumatic event first hand, or heard the traumatic event first hand through direct contact with the traumatized individual(s) (e.g., speaking with the victim(s) on the radio or telephone as the traumatic event is occurring).

[38] In *Decision No. 620/08* (2008), 85 W.S.I.A.T.R. (online), the Panel considered a worker's claim for mental stress attributed to harassment by a supervisor. The Panel found as a fact that the incidents cited by the worker did not involve threats of physical violence, either explicitly or implicitly. The Panel went on to consider whether "harassment" in the ordinary sense of the word met the statutory and policy criteria for mental stress entitlement. The Panel in *Decision No. 620/08* disagreed with previous Tribunal decisions, such as those cited by the worker's representative in this case, which found that "overzealous scrutiny" by a supervisor could meet the statutory requirements. The Panel agreed with those decisions that the list of examples provided in Board policy was not exhaustive, but found that the types of examples listed ought to be considered instructive in interpreting whether the events at issue should be considered objectively traumatic. The Panel reasoned in part:

> We do not agree that all types of "harassment" which would fall within a dictionary definition of that word, would attract entitlement under the policy. For example, in our view, the circumstances where a co-worker insults another co-worker, or calls another co-worker a vulgar name, might very well qualify as "harassment" according to a dictionary definition (i.e., subjecting (someone) to…unpleasantness), but, in the absence of other contributory factors, would fall short of the requirements for entitlement under the policy. We reach this conclusion having regard for the list of occurrences which are explicitly stated in the policy as examples of occurrences that would attract entitlement.
>
> In our view, the list should be considered as instructive, although not necessarily exhaustive. The items on the list suggest that entitlement applies when the circumstances are very serious, and where a threat to personal security is implicit, if not explicit. As indicated above, this must be considered from an objective perspective, and not solely from the subjective perspective of the aggrieved party. Having said that, we wish to re-emphasize our view that the occurrences listed in the policy which would attract entitlement should not be considered to be an exhaustive list. There are types of harassment not included in the list, such as sexual harassment, which could, in appropriate cases, provide the basis for entitlement.
>
> We note that *Decision No. 2056/03* granted entitlement to benefits for traumatic mental stress in a case where the worker was subjected to "overzealous scrutiny" by her supervisor. We are not able to agree with the Panel in *Decision No. 2056/03*, to the extent that the decision stands for the proposition that a worker may be entitled to benefits for traumatic mental stress as a result of "overzealous scrutiny" by a supervisor, in the absence of other extraordinary or mitigating circumstances.

[39] In *Decision No. 3022/07* (2008), 87 W.S.I.A.T.R. (online), the Panel considered a worker's claim for mental stress attributed to harassment by her supervisor and co-workers. The Panel in *Decision No. 3022/07* agreed with the interpretation articulated in *Decision No. 620/08*. The Panel in *Decision No. 3022/07* set out its analysis of the law, in part, as follows:

> We agree with the interpretation of section 13, and of Board policy, set out in *Decision No. 620/08*. Although that decision recognizes that the type of traumatic events that may form the basis for entitlement are broader than those listed in Board policy, we agree that the list found in Board policy should be considered as instructive, although not necessarily exhaustive, of the kinds of events that fall within the policy. The items on the list suggest that entitlement applies when the circumstances are very serious, and where a threat to personal security is implicit, if not explicit. As indicated above, this must be considered from an objective perspective, and not solely from the subjective perspective of the aggrieved party.
>
> We agree that there are situations not expressly listed, that might meet that criterion, such as, in some circumstances, sexual harassment. Sexual harassment can involve an implicit threat to personal security, but it is not listed in the policy. Also, in our view, the facts of *Decision No. 929/04* provide another such example. In that case, the threat to the police officer was of a criminal conviction and possible jail. A threat of incarceration is a threat to personal security, although it is not specifically listed in the policy.
>
> However, in our view, the policy does not apply when the facts established amount only to unpleasant or hostile interactions between co-workers. That is not an uncommon occurrence in a workplace. Further, when management actions are involved, we agree that the Act requires that the impugned actions must go beyond an "employer's decisions or actions that are part of the employment function". To fall outside this exclusion, in our view, the action of management must be egregious and/or carried out in bad faith. Even "overzealous" scrutiny, when carried out for the purposes of accomplishing the work functions, is insufficient in our view to fall within the provisions of the Act.

[40] In *Decision No. 3022/07*, the Panel also addressed the statutory exclusion of mental stress reactions to employment actions:

> Section 13 excludes acts that are carried out within the management function even when they are traumatic for workers. The Act contemplates that some actions that managers must carry out will be traumatic for employees: such as demotions, discipline, or terminations. However, section 13 excludes trauma that is the result of actions carried out within the management function.

[41] *Decision No. 141/08I*, 2009 ONWSIAT 2648, addressed a health care aide's claim for mental stress attributed to criticism from her supervisor and conflicts with co-workers. That decision stated in part:

> […] the Panel accepts that the worker was subject to criticism of her work performance that was insensitive and unfair. The supervisor often put notes in the log book that the worker understood to be directed at her. Her supervisor also often spoke to her critically about her job performance. The worker was berated at meetings in front of other employees and her supervisor encouraged co-workers to gang up on her at meetings. The worker's personnel file demonstrates that the worker previously had no disciplinary or performance problems during the period of her employment, going back to 1991.
>
> Nonetheless, these types of events in the workplace do not meet the standard of being objectively traumatic for the purposes of the WSIA and Board policy.

[42] The Panel went on to consider how the Tribunal's interpretation of section 13 applied to the facts of the case in *Decision No. 141/08I*:

> In this appeal, we agree with the reasoning of *Decision Nos. 3022/07* and *620/08*, because these decisions advance an interpretation that is true to the plain meaning of the WSIA and Board policy. As a general principle, "an Act shall be interpreted as being remedial and shall be given such fair, large and liberal interpretation as best ensures the

> attainment of its objects." Applying a large and liberal interpretation, however, does not permit the Tribunal to ignore the plain meaning of the language of the statute and Board policy. Here, the object of the statute is clear, in that the Legislature intended to exclude chronic stress as a basis for entitlement to workplace insurance benefits.
>
> Yet, that is the very case we have before us here: a chronic stress claim. The pre-1997 Act contained no provisions limiting claims for chronic stress. Chronic stress claims were adjudicated according to whether there was a workplace-injuring process that could be characterized as a disablement. Individually, none of the events described by the worker can reasonably be construed as objectively traumatic, as that term has been construed in Board policy and the Tribunal's decisions. The worker suffered a mental stress disability as a result of the accumulation of ongoing events and general hostility that gradually led to her inability to work. As noted above, Board policy interprets a traumatic event to be threatening in nature. The Panel accepts that the worker was subject to ongoing hostility and overzealous scrutiny in the workplace, but the events at issue are not analogous to the types of events listed in Board policy. They did not involve the threat of physical harm or danger.
>
> The Panel finds that the events at issue do not meet the objectively traumatic standard set out in the Act, as interpreted in the Tribunal's decisions.
>
> It is also clear that the worker did not experience an acute reaction to a particular traumatic event, but rather, she gradually became increasingly unable to cope with the ongoing poor treatment at the hands of her supervisor and her co-workers. The worker did describe an unpleasant meeting on January 18, 1999, but she was able to continue working after this meeting. The worker was singled out for criticism again in a meeting on March 13, 1999, and was unable to work after that. The worker described that "she could not take it anymore," after that meeting, suggesting that her inability to work was due to the increasing stress in the workplace, not just the meeting itself. Furthermore, the meeting was not analogous to the types of situations listed in the applicable Board policy.

[43] In *Decision Nos. 483/11I*, 2011 ONWSIAT 1231, and *483/11*, 2011 ONWSIAT 2257, the Panel considered an educational assistant's claim for traumatic mental stress related to a wrongful allegation of hitting a child. The worker was ultimately exonerated but her employment was suspended pending an investigation. The Panel in that case concluded that the worker had entitlement under the terms of the Act, in that she had suffered an acute reaction to a sudden and unexpected traumatic event. In the interim decision, the Panel characterized recent Tribunal decisions as adopting a narrow approach to Board policy in requiring that there be a threat to a person's physical integrity, whether direct or implied. The Panel was of the view that this interpretation is inconsistent with other terms of the policy. The Panel decided to put questions to the WSIB regarding the interpretation of its policy. In *Decision No. 483/11*, the Panel explained its interpretation of the policy and the responses from the WSIB's legal counsel in part as follows:

> However, after reviewing the Board's policy and the manner in which that policy was applied by the ARO in the decision under appeal, the Panel concluded that there appeared to be a potential inconsistency within the Board's policy. Specifically, the ARO found that the portion of the policy that set out examples of a "sudden and unexpected traumatic event," for which entitlement could be considered, was limited to instances in which there was a real or implied threat "on a person's physical well-being." Because that reading of the policy appeared to be a narrower one than would be consistent with the rest of the policy, we asked the Board to clarify the policy. That clarification has been set out in a letter prepared by the Board's Senior Legal Counsel, E. Brown, dated July 25, 2011. In that letter, Board Counsel, Ms Brown, addressed the following questions posed by the Panel in our interim decision, at paragraph 60:

In the present case, the Panel concludes that the portion of Document No. 15-03-02 that lists "examples" of a sudden and unexpected traumatic event appears to limit entitlement to such events or analogous events and may be inconsistent with both the remainder of the policy document and with the provisions of section 13 of the Act. But prior to making a referral under section 126, we refer the matter to the Board for submissions. In making this request, we ask the Board to address the following questions:

1. Is a "sudden and unexpected traumatic event," set out in the Board's policy, an event that involves an actual or implied threat to a person's physical well-being or integrity?

2. If so, and noting that the Board policy seems to envision entitlement for psychological conditions in addition to PTSD with its narrow diagnostic criteria, does the Board agree that the policy generally can be read in a manner that authorizes entitlement for psychological conditions other than PTSD?

3. If the Board's view is that entitlement is limited to circumstances where a worker has experienced a sudden and unexpected traumatic event reflecting or resembling the list of examples set out in the policy document, is that limitation consistent with the legislative stipulation in subsection 13(5) that there be "an acute reaction to a sudden and unexpected traumatic event arising out of and in the course of [a worker's] employment," a stipulation that seems not to be limited to physical trauma?

Ms Brown responded to Question 1 as follows:

The relevant policy is *Operational Policy Manual* Document No. 15-02-03, "Traumatic Mental Stress." The policy sets out what constitutes a "sudden and unexpected traumatic event"; it states, at p.1:

In all cases, the event must arise out of and in the course of the employment, and be

- clearly and precisely identifiable
- objectively traumatic,
- unexpected in the normal or daily course of the worker's employment or work environment.

Nowhere in the policy document is it stated that an event will only be characterized as a "sudden and unexpected traumatic event" if it involves an actual or implied threat to a person's physical well-being or integrity. Although generally there will be such a threat, it is not a requirement.

In *Decision No. 483/11I*, the Panel notes that the listed examples of "sudden and unexpected traumatic events" all involve events that are physically threatening to a person's well-being. The listed examples describe the types of situations in which traumatic mental stress claims most usually arise. The list of examples is not an exhaustive list; it begins: "Sudden and unexpected traumatic events *include"*. Therefore, the term "sudden and unexpected traumatic event" is not limited to the examples listed in the policy.

In response to the Panel's second question, Ms Brown acknowledged that the policy recognises that a number of psychiatric diagnoses can result from the occurrence of a traumatic event and states:

The policy therefore lists a number of conditions in addition to (post-traumatic stress disorder) and, in addition, specifically indicates that the list is not exclusive.

With respect to acute reactions that are delayed or where the claim is based on the cumulative effect of multiple traumatic events, the policy requires "an Axis I diagnosis in accordance with the DSM IV by a psychiatrist or psychologist before the claim is adjudicated." There is no restriction on the psychological condition as long as it falls within Axis I.

In response to the Panel's third question, Ms Brown wrote:

> As the response to question 1 indicates, entitlement for traumatic mental stress is not restricted to the situation listed in the examples of the policy. The examples listed are illustrative of the situations in which most traumatic mental stress claims arise. Situations not reflected in the examples may give rise to entitlement for traumatic mental stress if the statutory and policy requirements are met.

[44] In *Decision No. 483/11*, the Panel accepted Ms. Brown's interpretation of the TMS policy and allowed the appeal. *Decision No. 483/11I* characterized the case law as follows:

> In his submissions on behalf of the worker, Mr. Linley cited several Tribunal decisions in which Panels allowed entitlement to workers who developed a mental stress reaction following unfounded allegations against them (see e.g., *Decisions No. 406/03* and *929/04*). However, in our opinion, subsequent Tribunal decisions have taken a narrower view of Board policy (see e.g., *Decision Nos. 3022/07, 141/08I, 620/08,* and *214/10I*). The Panels/Vice-Chairs in those decisions have concluded that entitlement for TMS under the Board's policy is allowable only where the alleged traumatic event involves a real or implied threat to a person's physical wellbeing or integrity. In those decisions, it is clear that the Panels/Vice-Chairs have adopted the Board's interpretation of the policy, as reflected in the decision under appeal, where the ARO stated:
>
> > The intent of policy was to provide benefits to those who suffer a stress reaction from an objectively traumatic experience and threats on a person's physical well-being are implied in the examples listed.

[45] To the extent that the foregoing passage indicates a view that there are two lines of potentially conflicting Tribunal decisions, we find that these lines of Tribunal decisions are not necessarily irreconcilable when considered carefully in the context of the facts of each appeal. Neither *Decision No. 3022/07* nor *Decision No. 620/08* held that the list of Board policy examples is exhaustive. *Decision No. 3022/07* specifically cites *Decision No. 929/04* with approval as an example of a situation in which entitlement was allowed although the types of facts at issue were not listed in Board policy:

> We agree that there are situations not expressly listed, that might meet that criterion, such as, in some circumstances, sexual harassment. Sexual harassment can involve an implicit threat to personal security, but it is not listed in the policy. Also, in our view, the facts of *Decision No. 929/04* provide another such example. In that case, the threat to the police officer was of a criminal conviction and possible jail. A threat of incarceration is a threat to personal security, although it is not specifically listed in the policy.

[46] *Decision Nos. 3022/07, 141/08I, 620/08,* and *214/10I* stand for the proposition that unpleasant or hostile interactions with co-workers and managers, in themselves, will not generally meet the statutory entitlement criteria for mental stress, which requires "an acute reaction to a sudden and unexpected traumatic event." These cases addressed claims for mental stress related to ongoing unpleasant interactions and adverse employment decisions rather than a precisely identifiable traumatic event. Nonetheless, these decisions also noted that the list in Board policy was not considered exhaustive.

[47] *Decision No. 949/11*, 2011 ONWSIAT 1405, addressed a claim for mental stress attributed to unpleasant workplace interactions and increased productivity demands. The reasons referred to *Decision Nos. 3022/07* and *620/08* and concluded with the following interpretation:

> The objective of the WSIA is clear, in that the Legislature intended to provide entitlement for acute mental stress caused by clearly identifiable traumatic events and exclude

> chronic or gradual-onset stress as a basis for entitlement to workplace insurance benefits. This approach reflects that negative interactions in the workplace are not necessarily unexpected or extraordinary. To be characterized as objectively traumatic within the meaning of the Act and Board policy, there *usually* must be an element of threatening or violent actions, either implicitly or explicitly.
>
> [emphasis added]

[48] The Panel noted that there "usually" must be an element of threatening actions, but did not state that this would always be required. This is consistent with the submissions of WSIB Legal Counsel which were accepted as persuasive in *Decision No. 483/11*.

[49] In summary, the approach in *Decision No. 483/11* shifts the focus away from whether the event involved a serious threat of physical harm or whether it is analogous to the types of events listed in Board policy, although counsel for the Board submitted that there usually will be such a threat. In any case, the Tribunal case law is consistent in finding that the event must be objectively traumatic to attract entitlement for mental stress. In the language of Board policy, it is an event that "is generally accepted as being traumatic." *Decision Nos. 3022/07* and *620/08* stand for the proposition that merely unpleasant or hostile interactions in the workplace are to be expected to a certain degree and are not considered objectively traumatic. We find that this proposition to continues to be valid in evaluating mental stress appeals.

(vi) Conclusions and analysis

[50] The appeal is denied. Taking into consideration the language of section 13 of the Act, applicable Board policy, and the Tribunal's case law, the Panel finds that the worker does not have entitlement for mental stress because he was not subject to a sudden and unexpected traumatic event in the workplace.

[51] Board policy requires that the event at issue must be "objectively" traumatic. According to the Tribunal's case law, this means that the worker's subjective perception is not determinative of whether an event is traumatic, but rather, the situation must be viewed through the lens of the reasonable observer. In our view, the reasonable observer is one who has full knowledge of the context in which the event occurred and other relevant facts. The objective test is not meant to exclude consideration of relevant information, but rather, it is intended to focus the analysis upon relevant and objective evidence, rather than being determined solely by the claimant's reaction or personal experiences.

[52] In considering the context of this claim, we note that the worker first reported stress and poor sleep to his family physician on June 24, 2008, approximately two weeks prior to the confrontation with the co-worker and Ativan was prescribed. Dr. Cheung's notes do not indicate the cause of the stress. The worker has stated that the stress was related to what he considered to be unsafe conditions in the workplace. He reported to management that there were two employees operating forklifts without a licence. In his testimony, the worker described an incident in which a container of knives fell, although no one seriously hurt and the worker was not present in the area.

[53] In this regard, there are two relevant points. First, Dr. Cheung's notes do not indicate that the worker's stress in June 2008 was work-related. Secondly, even if we accepted the worker's statements that his stress in June 2008 was work-related, there was no objectively traumatic event within the meaning of the Act and Board policy. Board policy requires that "the worker

must have suffered or witnessed the traumatic event first hand, or heard the traumatic event first hand through direct contact with the traumatized individual(s) (e.g., speaking with the victim(s) on the radio or telephone as the traumatic event is occurring)." In the Panel's view, the worker's description of the circumstances surrounding the onset of his stress in June 2008 does not meet this criterion. The worker attributed his stress to what he perceived to be unsafe working conditions. He was not satisfied with the response from management, but no traumatic event occurred within the meaning of Board policy and there is a lack of evidence of imminent threat or danger. The worker did not suffer or witness a traumatic event. As such, the Panel does not accept that the worker's stress reaction during this time was related to events that were objectively traumatic.

[54] Turning then to the confrontation with the co-worker on July 8, 2008, we note that Board policy requires that the traumatic event:

- Can be established by the WSIB through information or knowledge of the event provided by co-workers, supervisory staff, or others, and
- Is generally accepted as being traumatic.

[55] We find that the worker's confrontation with the co-worker was not traumatic in the sense intended by the Act and Board policy. Firstly, we note that the worker's statements that the co-worker approached him or gestured at him in a threatening manner are not confirmed by information provided by witnesses. The WSIB investigator spoke to a witness who confirmed what the co-worker said. Although the co-worker was standing close to the worker, he stated that "his arms were not raised or moving and he did not physically touch" the worker. The witness also did not verify the worker's report that the co-worker subsequently backed up the forklift and almost hit another worker.

[56] The circumstances leading up to the confrontation between the worker and the co-worker also do not support a finding that the incident was objectively traumatic. The witness confirmed that, before the confrontation with the co-worker, the worker was pointing to the co-worker and stated that he should not be driving the forklift. The co-worker also stated that that the worker was gesturing in his direction while he was driving the forklift. The Panel finds that the worker's actions in openly gesturing toward the co-worker are not consistent with a finding that the worker had a fear of reprisal from the co-worker at the time of the event. We find it more likely that the worker was gesturing in the direction of the co-worker before the confrontation took place based upon the eyewitness statement. Even if we accepted the worker's testimony in this regard, it is undisputed that the worker challenged the co-worker when the co-worker approached the worker. The worker told him that, if he were in charge, the co-worker would not drive a forklift. In the Panel's view, this does not support a finding that the conditions in the workplace were threatening or unsafe, since the worker apparently felt comfortable confronting the co-worker about what he felt were his lack of qualifications. The worker basically told the co-worker his opinion that the co-worker was unqualified to do his job. In response, the co-worker lost his temper and shouted at the worker. In the Panel's view, this event is not objectively traumatic, but rather, falls within the scope of unpleasant or hostile workplace interactions. While this type of confrontation is unfortunate and we do not condone it, it is not objectively traumatic when viewed in the context of the events that took place.

[57] We do not accept the worker's representative's argument that the worker was the object of threats or that the co-worker "came at him." We also do not accept that the co-worker raised

his fists as this was not supported by the eyewitness to the event. The worker's representative also submitted that the incident was "culturally threatening." The meaning of this argument is unclear as there is no independent evidence concerning the meaning of this phrase. We note that the worker testified that the language used by the co-worker means "I will kill you," in his native language. We note, however, that this assertion that had not previously been made during the WSIB investigation and our attention was not drawn to any indication to this effect in the medical reporting. If the meaning of the co-worker's language had been an important feature of the event, the Panel would have expected the worker to raise the issue in his statement to the WSIB investigator.

[58] The Panel is unable to find that the co-worker's appearance rendered the situation threatening or traumatic. The worker testified that he perceived that the co-worker had an eye disfigurement. While the worker may have felt that the co-worker had a threatening demeanour, the worker testified that he was previously aware that the co-worker had an injury which affected his eye. The fact that the co-worker was larger than the worker could be relevant, but as noted above, the worker felt secure enough to point at the co-worker as he performed his job duties and to state to him directly that he should not be driving a forklift. If the worker were truly intimidated by the co-worker's size or appearance, we would have expected the worker to avoid confrontation, rather than provoke it.

[59] The worker's representative also referred to the following statement from the investigation report:

> I asked [the witness] if he was concerned for [the worker's] safety and he stated he could not tell for sure if [the worker] was in danger but things can get out of control very quickly and with knives all over the place you can't be too careful.

[60] Nevertheless, the Panel notes that the co-worker was not holding a knife and did not threaten the worker with a knife. The statement of the eyewitness was purely speculative in this regard and was not applicable to the actual events that took place. The fact that knives were present could be relevant if the co-worker had made a threat or implied that he would use a knife, but that is not the case here.

[61] We find *Decision No. 1239/11*, 2011 ONWSIAT 2287, to be instructive in determining whether these facts are objectively traumatic. In *Decision No. 1239/11*, the Panel considered a claim for mental stress by a worker who experienced conflict with his supervisor between 1999 and 2006. The worker was subject to close scrutiny by the supervisor. The tasks assigned to the worker changed frequently. On several occasions, the supervisor reprimanded the worker in front of co-workers in a loud and aggressive manner. The supervisor on one or perhaps several occasions stood "nose to nose" with the worker. There was also an incident in the parking lot when the supervisor threw a bag he was holding to the ground. The Panel denied the claim for mental stress, reasoning in part:

> We also find that none of the circumstances raised on behalf of the worker as a basis for entitlement amounted to physical violence or a threat of physical violence. As noted below, we interpret the policy document in a manner which would allow entitlement to benefits for traumatic mental stress in some circumstances where physical danger or violence, or a threat to personal security were not present, however, the main thrust of the policy document is to allow entitlement in circumstances where danger or violence or a threat to personal security are present. We conclude that, when the circumstances of the worker's case are considered from an objective perspective rather than from the worker's subjective perspective, as the policy document requires, the worker was not subjected to

> danger or violence, or a threat to his personal security. We have taken into account the circumstances in which the supervisor apparently stood "nose to nose" with the worker, as well as the incident in a parking lot when the supervisor apparently threw down a bag in anger or frustration, and we are not able conclude that these incidents can be considered to have been objectively violent or threatening to the worker's personal security.
>
> We note that the policy document provides a list of examples of occurrences which could be considered to be "sudden and unexpected traumatic events" and which would attract entitlement under the policy. Because the policy document states that "sudden and unexpected traumatic events" "*include*" events as described in the policy document, the list of events should not be considered to be exhaustive. Rather, the word "includes" suggests that other occurrences would also attract entitlement. Although we interpret the policy document in a manner such that the list of event is not exhaustive, we do not interpret the document to mean that the types of events which will attract entitlement is entirely "open- ended".

[62] We find that the above-noted reasoning is applicable in this case. In summary, the worker developed stress in June 2008. The cause of the stress in June 2008 was not confirmed in the medical records. Even accepting the worker's statement that his stress at that time was caused by safety concerns, no objectively traumatic workplace event has been identified during that time period. The confrontation with the co-worker on July 8, 2008, while unpleasant and hostile, was not objectively traumatic within the meaning of the Act and Board policy.

DISPOSITION

[63] The appeal is denied.

DATED: June 20, 2012

SIGNED: R. McCutcheon, S.T. Sahay, A. Grande