

**WORKERS' COMPENSATION BOARD  
APPEAL TRIBUNAL**

Case I.D. # [personal information]

**BETWEEN:**

**WORKER**

**APPELLANT**

**AND:**

**WORKERS' COMPENSATION BOARD  
OF PRINCE EDWARD ISLAND**

**RESPONDENT**

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**DECISION #15**

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**Robert A. McConnell**

**Solicitor for the Appellant**

**John K. Mitchell, Q.C.**

**Solicitor for the Respondent**

**Place and Date of Hearing**

**Best Western - MacLauchlans  
Charlottetown, Prince Edward Island  
December 18, 2001**

**Date of Decision**

**May 6, 2002**

## **BACKGROUND**

The Worker claims that due to the conditions present in connection with his employment, which caused him significant stress, he was unable to work.

On February 20, 1996 the Case Manager did not accept his claim for compensation. Eventually, on November 30, 1999, the matter was reconsidered by the Internal Reconsideration Officer, at the request of the Worker. Her Decision was rendered on January 28, 2000.

The salient parts of the Decision read as follows:

### **NATURE OF THE CASE:**

5. [The Worker] argues that due to the abusive nature of a co-worker, [ ], [the Worker] suffered stress which caused him to eventually leave his place of work and, to this day, the stress-caused illness has prevented him from returning to employment of any nature.
6. There are no statements from either [the Worker's] immediate supervisor at the time of his lay-off or from fellow workers that substantiate [the Worker's] claim of this harassment.
7. After the interview of November 30, 1999, efforts were made to contact two individuals named by [the Worker], but neither individual was able to provide a statement to support or deny [the Worker's] allegation of harassment by [ ].
8. During the interview, [the Worker] stated he did not notify his employer during his employment with [the Employer] as to the degree of harassment that he now feels caused his illness and lay off from work.
9. [The Employer] representative, [ ], at the interview stated he could find no record of any complaints from [the Worker] or any statement from [the Worker's] supervisor on [the Worker's] records during employment or in [the Employer] office records of any harassment from [ ] having been reported by [the Worker] during his employment with [the Employer].

## **DECISION**

10. I find, due to the lack of any written evidence or record of complaint from [the Worker] to his employer during the time when [ ] is alleged to have been harassing [the Worker], that I am unable to grant [the Worker] his reconsideration request due to this lack of collaborative and/or supporting evidence of an accident/injury arising out of and in the course of [the Worker's] employment.

The worker subsequently filed his Notice of Appeal as follows:

## **GROUND OF APPEAL**

The Grounds of Appeal are as follows:

1. The Internal Reconsideration Officer erred in requiring that [the Worker] had to adduce corroborative evidence that he had suffered a work-related accident or injury. In the process of making that decision, the Internal Reconsideration Officer made the following additional errors:
  - i. The Internal Reconsideration Officer erred in failing to apply Section 6(4) of the *Workers' Compensation Act* (the "Act");
  - ii. The Internal Reconsideration Officer erred in failing to apply Section 17 of the *Act*; and
  - iii. The Internal Reconsideration Officer erred in ignoring the uncontradicted evidence of [the Worker] as to the abuse and harassment he had suffered on the job and in failing to draw an adverse inference against the employer for the employer's failure to present available contradictory evidence.

## **REVIEW OF INFORMATION**

On December 20, 1995 Dr. David E. MacKenzie reported to the Worker's insurer (Disability Group Insurance) that he began seeing the Worker in November of 1995 for what he felt was "acute anxiety disorder".

That Report speaks of:

- “recent history” of depression;
- issues “most specifically surrounding his work”;
- [The Worker] feels that he can not work because of anxiety;
- issues at work which Dr. MacKenzie feels were “contributing to his anxiety state” which he feels are “the main contributing factor.”

He concludes that

*“... it would certainly seem reasonable that something more recent at work would spark off his anxiety state.”*

On January 19, 1996 the Board received the Report of Injury from the Worker (Form 6). That form states:

*I have a co-worker that has been after me for 10 years to get my full time job, he would do anything to get me fired. He was abusing me all of the time.*

In January of 1996 the Workers Compensation Claims Adjudicator, in a memo to the file wrote:

*[The Worker] is filing a claim for stress related problems, he is relating it to work. . . . part of the problem is the pressure which started in July 1995 as [The Worker] indicates is related to the fact that he was unable to [personal information] at the end of December, 1995 . . . he is going to have [ ], Supervisor of [The Employer], Charlottetown, submit an employer's report. . . . I do not see anything traumatic or unusual or excessive which is the criteria for a policy, however we will have to look at that at that time.*

On January 29, 1996 the Workers Compensation Board wrote the Employer advising that it must send a report concerning an incident reported by the Worker on November 28, 1995. That letter noted the fact that the report was to be filed within three days of the reported injury.



On May 12, 1999 Dr. Beck wrote to the Employer stating:

*[The Worker] has a serious psychiatric illness and stress at work had a significant role in that. [The Worker] should continue on his disability.*

(Emphasis added)

One week before this, Dr. MacKenzie, the Worker's family physician, prepared a report to the Board. After an extensive review, going back to 1995, and referring to reports of at least two (2) psychiatrists, especially the reports of Dr. Beck he concluded:

*It is my impression that the most significant contributing factor to his depression is his work.*

*It is my impression that he is permanently disabled from working [personal information].*

In his extensive hand written report to the Board, dated May 21, 1999 the Worker detailed significant incidents that he claimed were matters directly relating to and/or responsible for the stresses in the work-place becoming intolerable. In and of themselves, a few of these incidents, which if true, would not likely have such an impact on a worker so as to cause him to suffer stress to the degree which would require medical treatment and/or a permanent removal of himself from the environment at the work-place.

On the other hand, the cumulative affects of these agitations appear to support the findings of Dr. MacKenzie who concluded that

*the stresses at work had a significant role in that [a serious psychiatric illness].*

Some of the incidents that the Worker reported happened at work were:

- i. The co-worker claimed that a [personal information] (a prank).
- ii. Verbal abuse (cursing and swearing) by the co-worker on the day that the Worker had to [personal information] .

- iii. Accusations by the co-worker that the Worker was sleeping on the job.
- iv. The co-worker not providing assistance to the Worker in [personal information], causing him to be fearful of getting into an accident that could affect his job.
- v. The Worker was subjected to verbal abuse by the co-worker when he reported that, [personal information] .
- vi. The co-worker, according to the Worker, was very abusive to the Worker and apparently was very uncomplimentary toward him (calling him vulgar names in the presence of other workers). Mildly put, he claims he was called stupid and no good. Other words, not worthy of print, were apparently used by the co-worker to describe the Worker's character (dozens of times).
- vii. The [personal information] by the co-worker was apparently a common occurrence - with the City Police investigating; and, the Worker having to explain the incident to the Manger, [personal information] .
- viii. The co-worker, apparently frustrated over a [personal information], put his fist up and was going to hit the Worker.
- ix. The co-worker apparently had some contact with the City Police, who were advised that the Worker may be [personal information] .
- x. The co-worker was able to cause [personal information]. On more than one occasion, according to the Worker, the RCMP would call to inquire as to what was going on.
- xi. At routine stops, the Worker was so upset and frustrated by the actions of his co-worker that he would cry while the co-worker [personal information] - so upset that he had difficulty [personal information]. On these occasions the co-worker reportedly [personal information] with his fist and swore at the Worker.
- xii. On one occasion the co-worker was reportedly so upset with the Worker that he threatened to "*throw the Worker* [personal information] *on his head*".

xiii. All went smooth at work before this particular co-worker entered the scene at the workplace.

A copy of this summary of work related incidents was sent to the psychiatrist, Dr. Beck - albeit about ten (10) days after he wrote his report to the Employer (a copy of which was supplied to the Board).

On August 6, 1999 the Worker requested an internal reconsideration, indicting that Dr. MacKenzie (his family physician) could provide further information.

In a memo to the file, dated August 25, 1999, the Case Manager wrote that he did not see any new information, included in the correspondence, since the date of his initial decision to deny benefits some two years earlier in February 20, 1996. Seeing “nothing” to alter his previous decision including the two reports of Dr. Beck on January 19, 1998 and May 12, 1999, he moved the matter on to reconsideration. In fairness to the Case Worker, these reports were not prepared for the Board; and, they do not have a receipt stamp on them - although they are now part of the Board’s file.

On September 17, 1999 the Board notified the Employer of the Internal Reconsideration Hearing date, asking for the Employer’s position on the matter.

On November 16, 1999 the Employer, through its Solicitor, requested information in this matter and was given same by the Board.

In his six (6) page letter to the Board, the Worker refers to his putting up with “mental abuse for ten (10) years” at the hands of a co-worker, who he claims made a concerted effort to be the man in charge - “top man” at the workplace. He names the Manager of the Employer as the person to whom these overtures were apparently made.

According to this report, which was received by the Board on April 1, 2000, the Worker stated that he carried gravol tablets to counter sickness when on the job. He reported taking seizures on the job and suffering verbal abuse at the hands of his co-worker when he was in some degree of discomfort. There were reports of the co-worker turning off the air-conditioning [personal information]. On some occasions, according to the uncontradicted report of the Worker, the [personal information] would also be turned off while the co-



worker was away [personal information] for extended periods of time. Apparently, this is not in keeping with the requirements of this particular work. The Worker was not able to [personal information] for extended periods of time. It is not clear if this was for [personal information]. In any event, this was so common an occurrence that the Worker, to use his words:

[personal information]

The Worker reported that the co-worker [personal information] - while the Worker would be [personal information] to be used in the case of an emergency, if necessary.

The Worker also referred to an incident when he found himself getting tired [personal information] and, upon checking out an odour, he discovered a can of ether [personal information] - placed in such a way that movement of the seat [personal information]. He reports that he never carried ether [personal information].

The Worker refers to further bouts of vulgar verbal abuse by the co-worker, involving the Worker's disapproval of the co-worker [personal information] in the Charlottetown area, which was against Company policy.

He also relates to having to [personal information], after he reported it to his supervisor. He expressed his fear [personal information] was the Worker's responsibility [personal information] .

He sums up his six (6) page report by saying he could "not take the mental cruelty any more" from the co-worker; and, that the local Manager did not inform the Head Office [personal information] as to these problems at the work place. He cites a friendship between the co-worker and the local Manager as the reason for the local Manager not properly addressing the problem.

Incidents of the co-worker putting "his fist up to my face, roaring and spitting" were not countered by the Worker because he was fearful of being arrested.

In the decision of the Internal Reconsideration Officer, dated January 28, 2000 the Internal Reconsideration Officer stated:

6. *There are no statements from either [the Worker's] immediate supervisor at the time of his lay-off or from fellow workers that substantiate [the Worker's] claim of this harassment.*
7. *After the interview of November 30, 1999, efforts were made to contact two individuals named by [the Worker], but neither individual was able to provide a statement to support or deny [the Worker's] allegation of harassment by [the Co-worker].*
8. *During the interview, [the Worker] stated he did not notify his employer during his employment with [the Employer] as to the degree of harassment that he now feels caused his illness and lay-off from work.*
9. *[The Employer's] representative, [ ], at the interview stated he could find no record of any complaints from [the Worker] or any statement from [the Worker's] supervisor on [the Worker's] records during employment or in the [the Employer] office records of any harassment from [the Co-worker] having been reported by [the Worker] during his employment with [the Employer].*
10. *I find, due to the lack of any written evidence or record of complaint from [the Worker] to his employer during the time when [the Co-worker] is alleged to have been harassing [the Worker] that I am unable to grant [the Worker] his reconsideration request due to this lack of collaborative and/or supporting evidence of an accident/injury arising out of and in the course of [the Worker's] employment.*

What is clear from the detailed reports is that there were several persons, fellow workers, the co-worker and the Worker's immediate supervisor who could have provided the Board with evidence, one way or the other, on the issue of the harassment as alleged by the Worker.

It is noted that the Employer's Representative gave evidence at the Hearing that he could find no record of any complaints from the Worker or from the Worker's Supervisor (local Manager).

Absent any such written and/or collaborative evidence, the Internal Reconsideration Officer did not disturb the initial and the subsequent decision of the Case Manger.

It is noted that the Employer and the Worker were both represented by Counsel at the Internal Reconsideration Hearing.

It is also noted that the Worker did not have any of the number of people (fellow workers, including his Supervisor) at the Hearing. To her credit, the Internal Reconsideration Officer, after the Hearing, either herself or through her subordinate, contacted two (2) people named by the Worker, both of which offered no helpful information one way or the other.

It is clear that the Worker's Counsel could have secured the attendances of any available witnesses that could have shed some light on the issue before the Internal Reconsideration Officer.

Unfortunately, the Lawyer who represented the Worker at the Hearing is not currently practising. We mention this because the Worker attributes, as one of the reasons in the late filing of his Appeal, his belief that his lawyer had filed it. In a memo to the file dated September 7, 2000, the Board's Recording Secretary noted that she in fact spoke with the Worker's lawyer who informed her that she (the Lawyer) thought she had filed an Appeal on behalf of the Worker.

That same memo makes reference to one, [personal information] , who was "urged" by the Worker, subsequent to the Internal Reconsideration Hearing in November of 1999 to give a brief statement in writing to the Internal Reconsideration Officer.

If any such written evidence was presented, this Tribunal would be obliged to submit the matter back to the Board.

Section 56 (22) states:

***The Chairperson may at any time refer a matter to the Board for further investigation and shall refer a matter to the Board where new or additional evidence is presented to the Appeal Tribunal.***

Section 56 (23) states:

*In hearing a matter under subsection (20), the Appeal Tribunal shall give the Board and all other parties who have a direct interest in the matter an opportunity to make representations, but shall not allow the presentation of new or additional evidence and it shall, pursuant to subsection (22), immediately refer a matter to the Board where there is new or additional evidence.*

It is noted that although the Internal Reconsideration Hearing was held on November 30, 1999, the Board wrote another Co-worker on December 14, 1999 indicating that

*[The Worker] has identified yourself as having information which would support the stress that he underwent before leaving his employment - that stress being directly related to a fellow worker, [ ].*

While some urgency in the need to get a response was set out in that letter, the information requested, does not appear in the record.

The next day, December 15, 1999 the Board wrote the Worker's immediate supervisor requesting information. In part, that letter, sent out under the direction of the Internal Reconsideration Officer states:

*[The Worker] has asked the Internal Reconsideration Officer of the Workers Compensation Board to reconsider his case toward allowing a claim for stress arising out of and in the course of his employment with [the Employer] which, in [the Worker's] opinion, caused him to become 100% disabled. [The Worker] has identified yourself as having information which would support the stress that he underwent before leaving his employment - that stress being directly related to a fellow worker, [\_\_\_\_\_].*

No reply to that letter appears in the record.

That there were serious evidentiary problems with this hearing, both during and after, as the record shows, there is little doubt.

The memo from the Board's Recording Secretary to the file dated January 31, 2000, three (3) days after the decision of the Internal Reconsideration Officer states:

*I spoke today with [the Worker]. He received Elaine's decision and asked why she did not refer to the statement from [a Co-worker]. I told [the Worker] that I contacted [ a Co-worker] by telephone and [the co-worker] stated he would not submit a statement in writing.*

*I also advised [the Worker] that I spoke with [immediate Supervisor], who stated he would submit a statement but failed to do so.*

Should the Worker's claim fail for lack of evidence, when he had little or no power to compel the presence at the Hearing of those who should have it?

While it appears from the record that the Worker was somewhat lax in not immediately documenting the numerous incidents that he claims caused his employment to cease, it can not be fairly concluded that he is solely responsible for the lack of information that the Internal Reconsideration Officer referred to in her Decision.

While an experienced Lawyer may have attempted (with or without success) to secure the attendance of these other witnesses, by subpoena; it is clear that the Internal Reconsideration Officer had the power to ensure that all of the relevant information was presented to the meeting.

In the circumstances, she would have been able to invoke Section 26 (1) and (2);

Section 26 (1)

*The Board has the like powers as a judge of the Supreme Court for compelling the attendance of witnesses and of examining them under oath, and compelling the production of books, papers, document and things.*

Section 26 (2)

*A member of the Board sitting alone has all such powers, rights and*

*privileges as are vested in a justice of the peace by the Provincial Court Act R.S.P.E.I. 1988, Cap. P-25, in respect of the following matters:*

- a. enforcing the attendance of witnesses and examining them on oath or otherwise;*
- b. compelling the production of the books required to be kept by an employer by this Act or the regulations;*
- c. punishing persons guilty of contempt, and a summons signed by one member of the Board may be substituted for and is equivalent to any formal process capable of being issued in an action for enforcing the attendance of the witnesses and compelling the production of documents.*

Clearly, when a Co-worker reports to the Board, when requested to supply information on such a matter as serious to all parties as the one at hand, that “he has nothing to say” and “did not wish to get involved in this matter”; then, it should have been clear to the Internal Reconsideration Officer that she could “get him involved” - justice and the appearance of justice and fairness requires at least that much.

### **NEW EVIDENCE**

While the Hearing conducted by the Internal Reconsideration Officer in this matter was held on November 30, 1999, with her Decision following on January 28, 2000, the Respondent in this matter argues forcefully that the Worker’s injury is “very much called into question” by Dr. Beck’s letter of April 29, 1997.

The Respondent at Paragraph 36, 37 and 38 states:

*36. Dr. Beck states as follows: He [the Appellant] had been treated back [personal information] by my father, Dr. Malcolm Beck, also a psychiatrist, and at that time he had presented with depression with paranoid feelings of persecution.*

*37. Dr. Beck also advises that he began treating the Appellant in [personal information] for “major depression with paranoid psychosis”*

***38. Finally, in the same letter Dr. Beck states “this man has had a prolonged history over a few decades of significant potential risk for developing psychotic depression”.***

Although this letter/report from Dr. Beck to the Canada Pension Commission was dated April 29, 1997, it was not part of the evidence presented to the Internal Reconsideration Officer at the November, 1999 Hearing as the first notice of the existence of this letter appears in Dr. Beck’s September 8, 2000 letter to the Board.

Clearly this is “new” or “additional” evidence within Section 56 (22); and, Sub-Section 56 (23) prohibits the Appeal Tribunal from allowing its presentation - with a directive that the matter be referred to the Board.

Accordingly, the matter is hereby referred back to the Board.

In addition, the matter is referred to the Board for further investigation pursuant to 56 (22) and the Internal Reconsideration Office is directed to invoke Section 26, if necessary, to compel the attendance of all necessary witnesses.

\_\_\_\_\_ **Dated** this 6<sup>th</sup> day of May, 2002.

\_\_\_\_\_  
Allen J. MacPhee, Q.C.  
Chair of the Appeal Tribunal

\_\_\_\_\_  
Don Cudmore  
Tribunal Member

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Neil MacFadyen  
Tribunal Member