WORKERS COMPENSATION APPEAL TRIBUNAL

BETWEEN:

WORKER
CASE ID #[personal information]

APPELLANT

AND:

WORKERS COMPENSATION BOARD OF
PRINCE EDWARD ISLAND

RESPONDENT

DECISION #153

Appellant	Worker, as represented by Maureen Peters, Worker Advisor
Employer	Jennifer I. Perry, Solicitor representing the Employer
Respondent	Brian Waddell, Q.C. Solicitor representing the Workers Compensation Board
Place and Date of Hearing:	April 27, 2011 Inn on the Hill, 150 Euston Street Charlottetown, Prince Edward Island
Date of Decision:	August 15, 2011

1. This is an appeal by the Worker arising from decisions of the Internal Reconsideration Officer (the "IRO") of the Workers Compensation Board (the "Board"): IR Number [personal information], dated March 29, 2005, and IRO Number [personal information], dated October 31, 2007.

FACTS, EVIDENCE AND BACKGROUND

2. The Worker filed a compensation claim with the Board in the form of a Worker's Report (with a letter attached) on September 4, 2003.

3. The Worker stated that her health condition was caused by her workplace and developed over a period of time.

4. The Worker's symptoms included pain and pressure in her [personal information], a feeling of [personal information].

5. The Worker related these symptoms to an environmental sensitivity to her workplace.

6. The Worker stated that her health problems began in the summer of 2000, approximately thirteen (13) months after starting work at her work location (my emphasis), which I will hereinafter refer to as Building Number 1, and became more severe by September 2000.

7. Dr. Donald Neily, the Worker's family physician, completed a Physician's Report dated September 19, 2003, diagnosing the Worker's condition as "environmental sensitivity" but indicated that there was not much to find objectively (my emphasis) except muscle tenderness and tension in the Worker's scapular and occiput area.

8. The Worker saw Dr. Neily several times with respect to her health problems beginning in 2000.

9. In 2000 and 2001 Dr. Neily referred the Worker for an audiological (hearing) evaluation, and examinations by Dr. Ian C. MacMillan, an ear, nose and throat specialist and Dr. Gregg MacLean, a neurologist.

10. The Worker's audiological evaluation was done on November 21, 2000, by Marylou N. Hughes, an audiologist.

11. Ms. Hughes consult report to Dr. Neily dated November 22, 2000, states:

> *...[The Worker] reported experiencing* [personal information] *and pressure in her* [personal information] *for the past seven weeks..*
>
> *Pure tone results revealed hearing sensitivity of both ears to be within normal limits for all frequencies tested. Speech reception thresholds agreed with pure tone findings.*
>
> *Word recognition, at 10dB quieter than normal conversational levels, and with 30dB contralateral masking, indicated good discrimination abilities bilaterally.*
>
> *Normal pressure and compliance, consistent with normal middle ear function, were recorded bilaterally via impedance audiometry. Contralateral acoustic reflexes were present and withing normal range for all frequencies tested.*

12. The Worker's hearing was re-evaluated by Ms. Hughes on July 21, 2003.

13. Ms. Hughes consult report to Dr. Neily dated July 21, 2003, states:

> *...[The Worker] reported still experiencing* [personal information]*, as well as a pressurized sensation in her* [personal information].
>
> *Pure tone results for the right ear revealed normal hearing acuity for all frequencies tested (re enclosed audiogram). Responses for the left ear showed a mild high-frequency sensorineural loss of hearing. Speech reception thresholds agreed with pure tone findings.*
> *Word recognition, at 10dB quieter than normal conversational levels and with 30dB contralateral masking, indicated good discrimination abilities bilaterally.*
>
> *Normal pressure and compliance, consistent with normal middle ear function, were recorded bilaterally via impedance audiometry.*

> *Contralateral acoustic reflexes were present and within normal range for all frequencies...*

14. Dr. MacMillan's consult report to Dr. Neily dated December 29, 2000, states:

> *I saw this* [personal information] *December 28, 2000. You had forwarded a referral note on dated November 16, 2000, in which you noted this* [personal information]*, at that time, had a six week* [personal information] *and in the* [personal information] *region. Also had some* [personal information]. (my emphasis) *There had been no subjective decrease in hearing. No vertigo...*
>
> *Had audiometric assessment done on November 21, 2000, and you had forwarded me a copy of that report. This is essentially normal with the exception of some mild left sensory neural hearing loss. The eustachian tube function was good in both ears. The patient also had mastoid x-rays done about two weeks ago. I checked on those and they were negative...*
>
> *The patient's symptoms seem to have begun in the latter part of November when* [personal information]*. Was treated with Amoxil 500 for a period of 10-12 days. Subsequent to this, developed a sensation of pressure or fullness in the* [personal information] (my emphasis).
>
> *Clinically on examination today, there is some inflammatory edema of the nasal mucosa but this really wasn't pronounced. There was no clinical evidence of any active sinusitis. Cranial nerves were tested and were essentially normal. Fundi did not appear too remarkable to me. Mouth and throat were not remarkable. The patient has had a tonsillectomy in the past. Has a normal gag relex. Larynx was normal. Neck was negative. Ears were not remarkable.*
>
> *I did not feel this* [personal information] *had any serious pathology present.... I gave a Flonasc nasal spray to use for the next several weeks to see if this would alleviate the pressure sensation in* [personal information](my emphasis).

15. Dr. MacLean's consult report to Dr. Neily dated April 10, 2001, states:

> ...*Since last fall, has had a pressure like sensation over the* [personal information] *Had x-rays which were normal and a CT of the* [personal information] *was also unremarkable* (my emphasis). *Recently saw a dentist who found evidence of bruxism and wondered about TMJ dysfunction on the right. Has had some* [personal information] *but no other neurological symptoms....*

> *Has a mixture of tension type headache with some TMJ dysfunction on the right. I reassured* [personal information] *doesn't have any serious neurological disease....If the pressure and discomfort is continuing, then a small dose of tricyclic at bedtime in a therapeutic trial would be warranted..*.(my emphasis)

16. A consult report by Dr. Gregory Mitton, an oral and maxillofacial surgeon, to [personal information] (the Worker's dentist) dated September 20, 2001, states:

> *Thank you for referring [the Worker] to us for a TMJ Consultation. As you know the patient's chief complaints include "*[personal information] *The patient indicates first noticed these symptoms in September of 2000.* (my emphasis) *The pain is described as constant, but waxes and wanes in intensity. No regular pattern to the pain intensity was noted. [The Worker] also indicates has never experienced TMJ noises or episodes of closed/open lock. The patient also describes a very stressful past year and a very poor sleep pattern. According to [the Worker], over the last 12 months has undergone a battery of examinations by various practitioners. Informs me that a* [personal information] *series of x-rays were performed which were within normal limits, x-rays of the* [personal information] *were within normal limits, a CT scan of the* [personal information] *was negative, and consultations with an ENT surgeon and neurologist were also negative.*
>
> *Physical examination revealed mild limitation of mouth opening, severe generalized dental wear facets, and severe tenderness to palpatation of all muscles of mastication, sternocleidomastoid muscles, right trapezius, right rhomboid and right soft tissues of the neck* (my emphasis). *The examination was negative for palpable TMJ clicking and preauricular/retrodiscal tenderness.*
> *In summary [the Worker] is a significant bruxer, which is resulting in generalized head and neck muscle inflammation. This inflammation is manifesting as generalized myofacial pain dysfunction (MPD) with the* [personal information *side being more intense than the* [personal information] *side* (my emphasis). *It was recommended to the patient to have a maxillary biteplate fabricated in the near future. It was also recommended for the patient to seek therapy from a registered massage therapist or physiotherapist and to consider the services of a chiropractor. The patient declined any pharmaceutical therapy at this time. [The Worker] was asked to contact our office one month after biteplate fabrication and delivery so that we could perform a re-evaluation.*

17. The Worker, it appears, did not follow up with Dr. Mitton for the recommended biteplate.

18. On February 26, 2003, (more than two years after first seeing the Worker concerning her condition) Dr. Neily wrote on a prescription pad:

> *I recommend air quality testing at [Building Number 1], in particular around the Worker's office as we are wondering if there may be environment factors affecting her health. (my emphasis)*

19. Earlier on February 10, 2003, Joe Bradley from Environmental Health conducted an inspection of the Worker's office and surrounding area, as a result of concern forwarded to his office by Karen Thomson, a Occupational Health and Safety Nurse, who spoke to the Worker in January 2003 on this matter.

20. The inspection revealed a water infiltration problem around a window in the Worker's office, resulting in water damage below one window.

21. Because corrective action to repair the water damaged area could not be done until the weather (winter conditions) improved, the Worker was relocated from her office in [personal information] Building Number 1 [personal information].

22. The Worker, however, continued to experience the same symptoms despite having moved to another location in the building.

23. On May 20, 2003, the Worker underwent allergy testing at the Polyclinic in Charlottetown.

24. The allergy tests revealed allergies to various grasses and ragweed (pollen) and cat hair but no allergy to other inhalants or molds.

25. The Worker says that her symptoms became so severe that in June 2003 Dr. Neily put her off work hoping to determine if being away from the workplace would make any difference.

26. The Worker was off work from June 19, 2003, to August 18, 2003.

27. At the end of the two month period the Worker says there was improvement in her symptoms, the most noticeable improvement being the lack of [personal information].

28. A letter of Dr. Neilly dated August 18, 2003, addressed To Whom It May Concern states:

> *This woman has been suffering a number of symptoms that have been very bothersome, but somewhat hard to pin down, over the last few years*. (my emphasis) *Recently she has taken a leave of absence from her place of work at [personal information] and it turns out that most of these symptoms have greatly improved while being away from work. She is feeling quite well at the moment and is able to return to work presently, however it seems apparent that the environment at the [personal information] is deleterious to her health. I suspect that the old building with it's propensity towards moisture problems, molds, mildews and possibly formaldehyde and cleaning chemicals may be the source of her symptomology* (my emphasis).
>
> *Although I am recommending she is safe to return to work now, it would be in her best interest if perhaps her office were able to be relocated to a new cleaner environment that is likely to minimize her exposure to such irritants. If this is possible it will certainly make it easier for her to function at work.*

29. The Worker returned to work on August 18, 2003, at the [personal information] of Building Number 1 and she says that on the sixth day after returning to work she began to again experience [personal information] began to surface again.

30. October 7, 2003, the Worker's employer transferred her to another work location which I will hereinafter refer to as Building Number 2.

31. The Worker says that she continued to experience the same symptoms of [personal information] etc., and that the only improvement was that, after approximately three months, the severe pressure [personal information] started to decline.

32. A Board Memorandum To File dated October 17, 2003, states:

> *The Worker confirmed that symptoms of* [personal information] *began in the summer of 2000. Described* [personal information] *and further confirmed working for [personal information]. The Worker indicated* [personal information] *persisted and did not seem to get any better,*

> *therefore saw family physician, Dr. Neily in September/00 at which time x-rays were ordered. To the Worker's recollection, nothing abnormal was indicated in these x-rays. Once again, the Worker confirmed that symptoms persisted with additional symptoms of* [personal information]. *The Worker indicated from the summer of 2000 up to approximately February/03, was sent for numerous testing and assessments with specialists... In approximately February/03, the Worker was advised by Dr. Neily that he was thinking that perhaps it was the work environment/building that was causing the Worker's symptoms, as nothing else seemed to reveal a cause (my emphasis). The Worker indicated this was brought to the attention of the employer and was eventually moved to an* [personal information] *location. However, there was no change in symptoms whatsoever. In June/03, Dr. Neily placed the Worker off work due to the ongoing symptomology. The Worker returned to work on August 18/03. Confirmed that following the two months absent from the workplace that symptoms had decreased substantially, however, still was experiencing some ongoing discomfort in* [personal information]. *On the date of August 18/03 when returned to work the Worker indicated that by the afternoon,* [personal information] *symptoms had started again* [personal information].
>
> *The Worker was off work from June 19/03 to August 18/03. On October 11/03, the Worker was transferred to a new work location at [personal information]. Advised by the end of the week working at that location symptoms had increased once again. Is presently completing some work related duties from home, however, given the nature of job is unable to complete all necessary duties from home.*
>
> *In the course of a workday, the Worker advised in the a.m.* [personal information] *symptoms are already present (those don't seem to go away) and* [personal information] *are usually not too sore. By the late afternoon the symptoms increase substantially. During the evening while at home, the Worker confirmed that the symptoms in* [personal information] *do decrease in nature.*
>
> *The Worker's understanding of the diagnosis is that has an environmental condition and that the cause of the her condition is not known. Did mention the possibility of the cleaning products that are utilized at her workplace being a potential source. However, this has not been looked at to date....*

33. On June 1, 2004, the Board's entitlement officer requested a medical opinion from Dr. D. Barry Carruthers, the Board's medical advisor as to whether there was medical evidence

to support an occupational disease.

34. Dr. Carruthers' medical opinion dated June 4, 2004, states:

> *I have reviewed all the medical information on this claim to date. At issue is the consideration of a diagnosis of environmental hypersensitivity, as best I can figure. There are other diagnosis on the claim, one is tension headache and there is comment this worker has significant stressors in her life.*
>
> *What is being postulated is that this worker has allergies to mold at work. However, when the worker was tested for allergies, there were no allergies that were specifically related to work* (my emphasis). *There were some allergic reactions to grass, mold (probably meant to say pollen) and cats. Interestingly enough, there was no response to mold, the supposed offending agent at work.*
>
> *There have been no objective physical findings that would support a diagnosis of a building related or an environmentally related hypersensitivity. There is good evidence this worker has some stress related disorders, including a tension headache and a degree of anxiety. These are not considered an occupational disease* (my emphasis).
>
> *I will scan into claim a position paper on multiple chemical sensitivity syndrome, which is a synonym for environmental illness, as well as information from a lecture that I attended on this very subject.*
>
> *Given the present medical information, given the working diagnosis, it is my medical opinion this worker does not suffer from an occupationally related condition* (my emphasis).

35. On July 16, 2004, Kerri Batchilder the Board's Entitlement Officer dismissed the Worker's claim concluding:

> *No one factor is the deciding one in this decision, yet in weighing all the evidence on this claim, I have determined it is denied.*

36. In July 2004 air quality testing of Building Number 2 was done by HEPA Atlantic Inc., a Halifax based company, because of the Worker's complaints of health problems she felt were caused by the environment at that worksite.

37. The main purpose of the tests were to determine the concentration levels of airborne mold and fungi.

38. Ten samples were obtained from inside the building and one sample from outside the building.

39. Dr. Lamont Sweet, Chief Health Officer for the Province, reviewed the air quality report and by memorandum dated November 1, 2004, made comment on the health implications of the findings as follows:

> *The levels of mold and fungi found in all samples from [Building Number 2] are below those at which health symptoms are usually found. It would not be expected that residents or staff would experience any health complaints in any of the areas due to mold or fungi* (my emphasis).
>
> *There were some recommendations regarding repairs or renovations to the building which should be addressed. In particular, it is important to prevent the presence of moisture which can result in growth of mold or fungi.*
> *Some species of mold and fungi were found which may be of concern if large amounts are present which was not found in the survey...*

40. On September 17, 2004, the Board received a Notice of Request for Internal Reconsideration from the Worker requesting reconsideration of the Board's decision of July 16, 2004, denying the Worker's claim and stating in the Notice:

> *I have no doubt that my health problems over the past four years are the result of being exposed to asbestos, mold, mildew, cleaning products and chemicals, etc. at [Building Number 1]. Because of my sensitivity to the chemicals in the cleaning products I continued to* [personal information], *etc. at [Building Number 2]. Also, there is mold in the basement (and maybe elsewhere) in [Building Number 2].*

41. On March 29, 2005, Betty McPhee the Board's IRO denied the Worker's reconsideration request.

42. The IRO's decision states:

> *A determining factor in favour of my decision to not accept the Worker's*

reconsideration request was the report submitted to her file by Dr. Lamont Sweet. In his report dated November 1, 2004, he concluded that after reviewing the report of the mold investigation at [Building Number 2], the levels of mold and fungi were below those at which health symptoms are usually found. In addition, it is interesting to note that the Worker had allergy testing done on May 23, 2003, and the results of the testing showed the Worker was allergic to pollens and cat hair while testing for mold and inhalants were negative.

Another factor in favour of my decision was the conclusion of Dr. Carruthers, WCB medical director and specialist in occupational medicine. After reviewing the Worker's file: "there have been no objective physical findings that would support a diagnosis of a building related or an environmentally related hypersensitivity ... given the present medical information, given the working diagnosis, it is my medical opinion this worker does not suffer from an occupationally related condition".

A third factor in favour of my decision was the report submitted by Dr. Mitton, oral and maxiofacial surgeon, that stated, "physical examination revealed mild limitation of mouth opening, severe generalized dental wear facets and severe tenderness to palpitation of all muscles of mastication, sternocloldomastoid muscles, right trapezius, right rhomboid and right soft tissues of the neck. In summary [Worker] is a significant bruxer, which is resulting in generalized myofacial pain dysfunction (MPD) with the [personal information] *being more intense than the* [personal information]*."*

Dr. Greg MacLean made a diagnosis of TMJ (temporomandibular joint dysfunction). A potential cause for TMJ is bruxism (grinding teeth), which can result from anxiety and/or stress. TMJ symptoms include head and neck pain, headaches, aching in an around the ears, sinus pain, loss of hearing, throat inflamation, sinus problems, and congestion. These symptoms are consistent with some of the symptoms [personal information] *related to environmental sensitivity. There is evidence in the Worker's medical records that she had some personal stressors in her life, i.e.* [personal information].

Therefore, based on the medical information and results of the mold investigation in the work site, I cannot support the Worker's request to overturn the decision of the Entitlement Officer, Kerri Batchilder on July 16, 2004.

Based on the evidence on the file, I have denied the Worker's reconsideration request.

43. On April 11, 2005, the Worker filed a Notice of Appeal with WCAT in relation to the IRO's decision of March 29, 2005.

44. In the Notice of Appeal the Worker states:

> *... I firmly believe that my health problems were directly related to my work environment....*
>
> *Since being away from those two facilities for one year, my health has improved one-hundred fold. All of the symptoms which I had been experiencing since the summer of 2000 have been completely eliminated.*
>
> *I believe that the decision of the Workers Compensation Worker and the Internal Reconsideration Officer were based on inaccurate facts and contradictory information from two of the specialists, to the exclusion of the evidence from my personal doctor and the evidence of the health problems when in the facilities and when out of them.*

<u>*Evidence:*</u>

- *A.* *I was not under stress in my place of employment.*
- *B.* *I was enjoying what was one of the best jobs I ever had in my entire life.*
- *C.* *I had never been subjected to* [personal information] *and all of the other symptoms which I experienced during my employment at these two homes.*
- *D.* *Upon leaving the facilities on a short term basis, the symptoms started to lessen.*
- *E.* *Upon being away from the facilities on a long term basis the symptoms have been totally eliminated and my health has returned to normal.*
- *F.* *The environment people, who investigated my office, advised the employer that there was mold and mildew in my office and that they must move me.*
- *G.* *I was subjected to asbestos during this time because the environment people discovered it and the employer had to have the asbestos removed.*

> *I believe that my health problems were the result of being exposed to mold, mildew, asbestos, and the chemicals in the cleaning products.*

45. The Hearing before WCAT commenced on March 21, 2007, but was adjourned part way

through once the Worker sought to introduce documents that had not been previously considered by the Board.

46. The purpose of the adjournment was to allow the Worker to submit the documents to the Board for consideration as to whether or not the information contained in any of the documents was new evidence, and if so, whether it would alter the Board's decision denying the claim.

47. On April 23, 2007, the Worker submitted to the Board certain documents for consideration including letters from Dr. Neily dated April 30, 2004, November 30, 2004, and April 11, 2007; a letter from Karen Thomson, Occupational Health and Safety Coordinator of the Department of Health dated March 26, 2007; and a letter with enclosures from Joe Bradley, Manager of Environmental Health dated March 26, 2007.

48. Dr. Neily's letter of April 30, 2004, addressed "To Whom It May Concern" states:

> *This [Worker] has been off work now for three weeks from her job... Her health has improved dramatically over two weeks away from these environments. It seems that she has some environmental sensitivities to some agents in [Building Number 2] and [Building Number 1]* (my emphasis). *I do not believe that there is any way for her to manage this, other than for her to avoid these environments. Therefore, I have advised her not to return to work in that situation. Unfortunately, in a case like this avoidance of the irritants is the only practical treatment...*

49. Dr. Neily's letter dated November 30, 2004, addressed "To Whom It May Concern" states:

> *This [Worker] had worked at [Building Number 1 and Building Number 2] ...for several years. Over three years prior to ending the position there, suffered from numerous complaints including* [personal information] *and others that made life miserable. It became obvious that when she was away from the workplace, these symptoms would gradually settle down. It was felt that there were environmental factors in these locations which were deleterious to her health* (my emphasis). *She was forced to withdraw from work. She was away from work for a few weeks and these symptoms have abated and have remained absent for the following seven months.*

She is presently getting well and is able to work at this time, other than having to avoid the buildings which were causing her symptoms. There may be other locations with similar environmental factors which would be bothersome to her, however the only way to know this would be for her to have a trial of employment. She seems to be able to go to the other public buildings now without any symptoms, including her church and the mall, etc.

I would consider the Worker to be in good health, other than her sensitivity to factors which were not clearly identified. Mold has been found in her office and surrounding work area since she left her job. Perhaps these were the culprits (my emphasis).

50. Dr. Neily's letter dated April 11, 2007, addressed "To Whom It May Concern" states:

This [Worker] was suffering multiple health complaints while working at [Building Number 1 and Building Number 2], prior to discontinuation of this job in 2004. Since that time the health issues have appeared to completely clear. There seemed to be a clear association with time spent at these facilities and her various symptoms (my emphasis). *I have, in fact, seen very little of her since stopping work at [Building Number 1 and Building Number 2]. I feel that there was some factors in the buildings which had a deleterious affect on her health, which seems to now have completely resolved.*

51. Ms. Thomson's letter dated March 26, 2007, addressed "To Whom It May Concern" states:

I first spoke to the Worker about her health concerns on Jan. 15/03 at which time she was complaining of [personal information]. *She stated she had been feeling unwell for a long period of time but is concerned as the headaches are worse and eye infections are a new concern. She came to see me as her doctor is questioning the possibility of sick building syndrome because she states she improves when she is away from the work site for a few days. On Feb. 4/03 after discussion with [personal information] and [personal information] it was suggested that Environmental Health do an assessment of the Worker's office and surrounding area. This was completed on February 10, 2003 and copy of his recommendations is enclosed. Construction could not be carried out at the time due to winter conditions so the Worker was removed from the office and given office space* [personal information]. *The Worker and her doctor requested air quality studies be done of her office but it was recommended to have the water damaged areas repaired first as she was no longer working in the office. The Worker was off work over the*

> *summer and states her health improved. Returned to work in Aug/03 and symptoms worsened (*[personal information]*). Transferred to [Building Number 2] in Oct/03 to remove her from the building, improved for a short time but symptoms reoccurred.*

52. The information provided by Mr. Bradley to the Worker pertained to the investigation of her former work space in Building Number 1.

53. This information was contained in a letter from Mr. Bradley to the Administrator of Building Number 1 dated February 11, 2003, and an email of the same date from Mr. Bradley to [personal information].

54. Mr. Bradley's letter to the Administrator of Building Number 1 states:

> *As a result of a concern forwarded to our office by Karen Thomson, a Occupational Health and Safety nurse, a visit to [Building Number 1] was conducted on February 10, 2003.*
>
> *At issue is a staff person suffering from* [personal information] . *An inspection of the office in question revealed a water infiltration problem around a window, resulting in water damage below one window.*
>
> *I recommend that all water damaged material be removed from the office area following the attached Guideline on Assessment and Remediation of Fungi in Indoor Environments Level 1.*
>
> *I would also recommend that a thorough inspection of the exterior of the leaking window be conducted to determine the source of water infiltration. Appropriate corrective action should then be taken.*

55. Mr. Bradley's email of February 11, 2003, states:

> *[personal information] and I had reason to visit [Building Number 1] yesterday. A walk through the boiler room revealed pipe insulation in very poor repair. The insulation is probably asbestos....*

56. On July 24, 2007, Ms. Batchilder made a request to Dr. Steven O'Brien, the Board's Medical Advisor as follows:

> *(1) Please review the entire file, inclusive of the new evidence*

submitted since the previous medical comment to file.

(2) Would the new information on file cause a probable change in the previous medical opinion dated June 2, 2004 by Dr. B. Carruthers?

57. Dr. O'Brien's medical opinion dated July 26, 2006 states:

> *...I have reviewed the Worker's file and in particular the information that has come on file since Dr. Barry Carruthers' medical comment to file on June 4, 2004. On a note, dated November 30, 2004, from Dr. Don Neily, Family Physician, he states,*
>
> > *She presently is feeling well and is able to work at this time, other than having to avoid the buildings which were causing her symptoms... I would consider the Worker to be in good health, other than her sensitivity to factors which were not clearly identified. Mold has been found in her office and surrounding work area since she left her job. Perhaps these were the culprits.*
>
> *However, there is a memorandum from Dr. Lamont Sweet, dated November 1, 2004, in which he is asked to review the mold investigation and he states:*
>
> > *I have reviewed this report and have been asked to comment on the health implications of the findings. The levels of mold and fungi in all samples from [Building Number 2] are below those at which health symptoms are usually found. It would not be expected that residents or staff would experience any health complaints in any of the areas due to mold or fungi.*
>
> *Therefore, I would agree with Dr. Barry Carruthers' comment of June 4, 2004, that there was no evidence found to relate the Worker's symptoms to her work environment* (my emphasis). *This was supported by Dr. Lamont Sweet's review of the mold investigation and Dr. Sweet was the Chief Health Officer for Prince Edward Island at that time.*
>
> *In his letter of April 11, 2007, Dr. Neily states,*
>
> > *This woman was suffering multiple health complaints while working at [Building Number 1 and Building Number 2], prior to discontinuation of this job in 2004. Since that time the health issues have appeared to completely clear. There seemed to be a clear association with time spent at these facilities and her various symptoms. I have, in fact, seen very little of her since stopping work at [Building Number 1 and Building Number 2]. I feel that*

> *there was some factors in the buildings which had a deleterious affect on her health, which seems to now have completely resolved.*
>
> <u>*As Dr. Neily noted on November 30, 2004, workplace factors were not clearly identified.*</u>
>
> <u>*As reviewed on the medical history review on file, dated July 21, 2004, as reviewed by Dr. Barry Carruthers in his memo to file and in the IRO review, there were several personal and non-work related health issues identified to be co-existent with her period of work at both [Building Number 1 and Building Number 2]. These were documented in her medical history and the resolution of these problems would have an impact on the fact that Dr. Neily "seen very little of her recently"*</u> (my emphasis).

58. An inter office memorandum of Ms. Batchilder dated August 3, 2007, states:

> *... I told the Worker that I had received her new evidence and have just recently had the Board Medical Advisor put a comment to the file with regard to the new information and medical on file. I told her that I was going to have a letter out to her probably next week stating whether the new evidence she submitted has changed my decision since the original decision.*
>
> *The Worker went on to provide me with some information on the status of her health. She said she has been working for one year now at [personal information]. She has not been having any health issues since shortly after she left work. I asked her if she ever received the plate for her teeth that Dr. Mitton had suggested and she said she has not since he could not be sure it would help. She said Dr. Mitton has never told her she had TMJ. She also said her own dentist told her that her teeth were close and worn down but never said anything about TMJ...*

59. A decision letter was sent to the Worker by Ms. Batchilder on August 13, 2007, stating that her claim had been denied.

60. On September 19, 2007, the Board received a Notice of Request for Internal Reconsideration from the Worker.

61. The Board's IRO, Shauneen J. Hood, identified the reconsideration issue as follows:

> *Does the information received on the file after the internal*

> *reconsideration decision dated March 29, 2005, constitute new evidence and, if so, does it change the decision to deny the claim?*

62. The IRO found that seven of the eight documents were new to the file but did not constitute new evidence as the information in these documents were already on file but in a different format or by a different source.

63. That Mr. Bradley's email of February 11, 2003, to [personal information] indicating poor pipe insulation in the boiler room of [Building Number 1] which might be asbestos would be considered new evidence to the file but did not provide evidence that the Worker's symptoms were related to her work.

64. And that accordingly, the Worker's request for internal reconsideration was denied.

65. On November 21, 2007, the Worker again filed a Notice of Appeal to WCAT stating:

> *I applied for workers compensation and my claim was denied. I met with the Appeal Tribunal* [personal information] *and my case was put on hold pending what was considered important information, which was not on my file, to be forwarded to the Workers Compensation Board.*
>
> *The information was submitted and again my worker denied my claim for compensation. My case then went to the IRO Officer who upheld my worker's decision.*
>
> *I do not agree with the decisions; therefore, I am writing to request a hearing with the Appeal Tribunal to again present my case in person.*
>
> *The reason for this request is that I know my health problems, during my employment years at [Building Number 1], were directly related to the environment in which I was working.*
> *I believe that one's employer is responsible for providing a safe work environment for employees, and this was not the case at [Building Number 1]. My office had much mold and mildew and asbestos was also found in the building. Because the employer refused to have air quality testing done in the building it was never determined the levels of mold, etc. present throughout the entire building.*
>
> *What I am requesting from the Workers Compensation Board is recognition that I was exposed to molds, mildews, asbestos, etc. while working at [Building Number 1], and that these substances adversely*

affected my health.

I request monetary compensation for:

a. *The emotional stress that I experienced during the years I was not well and had to spend much time seeing various medical specialists.*

b. *Monetary compensation for loss of wages and for the decrease of two pension entitlements.*

c. *Monetary compensation because I was forced to use savings and to cash in Canada Savings Bonds in order to meet my monthly living expenses....*

ISSUE

66. The issue is whether the Worker's condition/symptoms arose out of and in the course of her employment?

STANDARD OF REVIEW

67. The standard of review by WCAT in this case is the standard of correctness.

REFERENCES

68. WCAT is bound by the **Workers Compensation Act** (the "Act") and Board Policy unless ultra vires.

69. Section 6(1) of the Act provides that a Worker will receive compensation provided that it is shown that his or her injury arises "out of and in the course of employment."

70. Board Policy Number: POL04-23 defines "arising out of employment" and "in the course of employment" as follows:

1. *"Arising out of employment" means an injury that must be linked to, originate from, or be the result of, in whole or in part, an activity or action undertaken because of a worker's employment.*

2. *"In the course of employment" means the injury must be linked to a worker's employment in terms of time, place, and activity.*

71. Policy 04-23 also states:

3. *The following variables must be examined to determine whether an injury arose out of and in the course of employment:*
   - *whether the injury occurred on the premises of the employer;*
   - *whether it occurred in the process of doing something for the employer;*
   - *whether the injury occurred during a time period for which the worker was being paid; or*
   - *whether the injury was caused by some activity of the employer or of a fellow worker.*

72. Board Policy Number: POL-04-30 (Weighing of Evidence) states:

1. *In determining entitlement, the Workers Compensation Board will consider the following:*
   - *whether an injury has occurred;*
   - *whether the injury was caused by an accident arising out of and in the course of employment;*
   - *whether the diagnosed condition is compatible with the accident history provided; and*
   - *whether medical treatment by a health care provider was required as a result of the injury.*

2. *The Workers Compensation Board will examine the evidence to determine whether it is sufficiently complete and reliable to allow a decision to be made. If the Workers Compensation Board determines more information is required to make a decision, the Workers Compensation Board will work with the worker, employer, and health care providers to obtain the necessary information.*

3. *The standard of proof for decisions made under the Act is the balance of probabilities – a degree of proof which is more probable than not* (my emphasis).

4. *Decision makers must assess and weigh all relevant evidence. Conflicting evidence must be weighed to determine whether it weighs more toward one possibility than another. Where the evidence weighs more in one direction than that shall determine the issue.*

5. *If the evidence is weighed in favour of the worker, the claim shall be allowed and compensation benefits provided.*

6. *If the evidence weighs against a workers claim, the claim will not be allowed.*

7. *If the Workers Compensation Board concludes that the evidence for and against entitlement is approximately equal in weight, then the issue will be decided in favour of the worker, supported by a rationale for finding the evidence to be approximately equal in weight.*

DECISION

73. The Worker's health complaints/symptoms were compatible with Dr. Neily's diagnosis of "environmental sensitivity."

74. However, other health conditions could have caused some or all of the Worker's symptoms.

75. Dr. MacLean was of the opinion that the Worker had a "mixture of tension type headache with some TMJ dysfunction on the right" in relation to the Worker's symptoms of [personal information].

76. Dr. Mitton was of the opinion that the Worker was a "significant bruxer (teeth grinder) resulting in generalized head and neck muscle inflamation and that this inflamation was manifesting as generalized myofacial pain dysfunction (MPD) with the [personal information] side being more intense than the [personal information] side."

77. Dr. Mitton found that the Worker had "severe generalized dental wear facets, and severe tenderness to palpatation of all muscles of mastication, sternocleidomastoid muscles, right trapezius, right rhomboid and right soft tissues of the neck."

78. Dr. Neily's report and other correspondence do not mention these specialist's opinions nor specifically rule out these conditions as a possible cause of some or all of the Worker's symptoms.

79. It is not clear from the Appeal Record whether Dr. Neily or the Worker first suspected that Building Number 1 was causing the Worker's symptoms.

80. The fact that most of the Worker's symptoms apparently improved while she was away from her place of work and that her office was in an old building appears to be the main reasons for Dr. Neily's suspicion that the Worker's building or office might be the "culprit".

81. Air quality testing was not done of Building Number 1 but only an inspection of the Worker's office.

82. This revealed a water damaged area around a window, possibly a source of mold.

83. Allergy tests of the Worker however, proved negative for molds and the Worker continued to have similar symptoms after moving to a different office (main floor) in Building Number 1 and later to Building Number 2.

84. Air quality testing was done of Building Number 2 but the levels of mold and fungi were below those at which health symptoms are usually found.

85. Further, the Worker's allergy tests revealed allergies to various grasses and ragweed (pollen) and cat hair but not to other inhalants tested for or molds.

86. Perhaps testing of the Worker's sensitivity to the cleaning chemicals used in Building Number 1 and Building Number 2 would have been advisable but apparently this was not done.

87. The Panel finds the analysis and medical opinions of both Dr. Carruthers and Dr. O'Brien to be persuasive.

88. Dr. Neily's opinion is not based on any objective medical evidence but is subjective and speculative, albeit the Worker appears to have completely recovered from her condition after leaving her workplace in both buildings.

89. After studying the Appeal Record and considering the submissions of the Worker's Advisor and the Board's solicitor, this Tribunal finds on the balance of probabilities that the Worker's condition/symptoms did not arise out of and in the course of her employment.

90. The Tribunal finds no evidence to connect or link the Worker's symptoms to an

environmental sensitivity to her workplace.

91. To find otherwise would be purely speculative.

92. Therefore, the Worker's appeal is dismissed.

93. The Panel wishes to thank the Worker's Advisor and the Board's Solicitor for their excellent presentations.

Dated this 15th day of August, 2011.

____
John L. Ramsay, Q.C., Vice-Chair
Workers Compensation Appeal Tribunal

Concurred:

____
Bruce Gallant, Worker Representative

____
Donald Turner, Employer Representative