

Decision No. 1527/05

Ontario Workplace Safety and Insurance Appeals
Tribunal

R. McCutcheon (Vice-Chair), W.D. Jago and
J.A. Crocker (Members)

February 13, 2006

SUMMARY

A health care aide appealed a decision of the Appeals Resolution Officer denying entitlement for mental stress, which the worker related to an incident on May 16, 2001.

The worker asked a nurse about medications for a resident. There was a heated exchange between the worker and the nurse, culminating with contact by the nurse, variously described as punching, poking, touching and contact, with the worker's shoulder.

The worker filed a complaint with the College of Nurses. The decision of the Complaints Committee of the College of Nurses was not admissible. The Panel agreed with *Decision No. 669/02*, that s. 36(3) of the *Regulated Health Professions Act, 1991*, applied, under which no decision made in such proceeding is admissible in a civil proceeding.

The Board found that the incident was not traumatic. The Panel noted that neither the *WSIA* nor Board policy requires physical injury in order to establish entitlement for mental stress. In fact, s. 13 of the *WSIA* applies primarily to "mental-mental" stress cases, where the worker claims for a psychological injury resulting from mental stressors at work. The question is whether a reasonable person would consider the incident experienced by the worker to be traumatic. The Panel found that the contact by the nurse was aggressive in nature and would reasonably be perceived as threatening. Considering the contact and verbal abuse, the Panel found that the incident was traumatic in nature.

The worker's reaction to the incident was both immediate and acute. She suffered a psychological injury as a result of the incident, for which she required psychotherapy.

In considering the role of the thin skull doctrine in the context of s. 13(4) and (5), the Panel was satisfied that the *WSIA* did not intend to displace this well-entrenched common law principle. Once it is established that an event was traumatic, the thin skull doctrine applies to the worker's disabling reaction to that event. In this case, the worker required counselling as a teenager to help her deal with her difficult upbringing. She had worked for the employer for 19 years as a health care aide. There was medical evidence that the worker was sensitive to authority figures. This vulnerability would be characterized as, at most, a thin skull, and not a crumbling skull.

The worker had entitlement for mental stress. The appeal was allowed.

K. Hahn, for the worker.

P. Harris, for the employer.

DECISION NO. 1527/05

(i) Background

¶ 1 The worker appeals a decision of the WSIB to deny entitlement for mental stress related to an incident on May 16, 2001.

¶ 2 This worker, born in 1964, worked as a health care aide with the accident employer, a long-term care facility. She was hired in 1982.

¶ 3 On May 16, 2001, the worker reported that she had a confrontation with a Registered Nurse after discussing medications for a resident. The worker claimed that she suffered extreme stress as a result of the incident. In an Incident Report completed for the employer, the worker stated that she was asking the Registered Nurse (referred to in this decision as “C.C.”) about a new medication for one of the residents. According to the worker, C.C. became angry with the worker and began to punch her in the shoulder, saying, “You don’t know everything.” The incident occurred with three other health care aides present.

¶ 4 The incident took place at approximately 7:00 a.m., and the worker reported it to the Director of Nursing (“J.G.”) at approximately 8:30 a.m. Subsequently, the worker also reported the incident to the police, although charges were not pursued.

¶ 5 J.G. discussed the incident with C.C., leading C.C. to approach to worker about the incident. The worker filed another Incident Report relating to her subsequent conversation with C.C. The worker stated that C.C. approached her in the hallway, calling to her “with a big smile on her face,” and said she was sorry if she embarrassed the worker that morning. The worker replied that she was embarrassed. According to the worker’s Incident Report, C.C. said, “yeah, so I heard,” gave a chuckle, and walked away.

¶ 6 The employer investigated the incident, and interviewed the worker, C.C., and three witnesses. The “Report of Investigation of Physical Abuse of Staff” stated in part as follows:

On the date in question, both parties were scheduled to work the day shift
... As is the custom, the RN gave report to the nursing staff at the

commencement of the shift to update them on any recent developments in resident's condition. Operationally ... staff are divided between the male and female sides, thus separate reports are given.

A 7:00 am, with the ... male report concluded, [C.C.] was standing with Health Care Aides [the worker and three others] presenting the report for ... female residents.

Written statements from all parties present at the report essentially agree in their description of events in that the respondent advised the staff of a medication which had been ordered for a particular resident. A verbal exchange occurred between the complainant and the respondent during which the complainant questioned the use of this medication. The exchange became heated and the respondent at some point made contact with the complainant's left shoulder or arm. The extent of the contact is described variously by the parties as "punched," "poked," "touched," and "contact."

¶ 7 The report notes that C.C. verbally apologized to the worker later that day, then sent a written letter of apology on May 18, which the worker did not accept. The report goes on to conclude:

The respondent [C.C.] concedes that she poked the complainant during the verbal exchange at report, and that it was inappropriate to have conducted herself in this manner. She has apologized on two occasions, and has expressed regret for her actions.

In consideration of the actions as reported and acknowledged, and subsequent remorse, the respondent has been disciplined.

¶ 8 The worker sought medical attention from her family physician, Dr. T. Wolder, on May 24, 2001. In the Health Professional's First Report, Dr. Wolder stated that the worker was abused and struck by a nurse and had been emotionally drained since the incident. The diagnosis was acute reactive anxiety. Dr. Wolder prescribed rest and removal from the source of irritation. Dr. Wolder expected complete recovery in two months, and stated that the worker should not return to work with the nurse who abused her.

¶ 9 Dr. Wolder's clinical notes indicate that he prescribed Ativan, an anti-anxiety medication, on May 24, 2001. The worker testified that she did not use it too often. Dr. Wolder referred the worker to Dr. O'Flanagan, psychiatrist. The worker first saw Dr. O'Flanagan in June 2001, and the reports indicate that she continued to see him in the autumn of 2001. Dr. O'Flanagan felt that medications were not necessary to treat the worker. Dr. O'Flanagan noted that the worker had a difficult childhood and that he had counselled her as a teenager.

¶ 10 On June 4, 2001, Dr. Wolder provided a note stating that the worker had been advised not to return to work until July 1, 2001, for medical reasons. On June 27, 2001, Dr. Wolder stated that the worker could return to work on the 11:00 pm to 7:00 am shift, starting July 2, 2001.

¶ 11 Dr. Wolder provided additional notes supporting the worker's request to work on the night shift. For example, on July 1, 2001, Dr. Wolder noted that the worker would be pursuing another career after the summer, but recommended that the worker be assigned to night shifts during the summer months, due to her anxiety state. In a letter dated July 9, 2001, Dr. Wolder stated that he made this recommendation because then the worker would not be working with C.C. The stress of working with C.C. would be detrimental to performing her duties. On July 18, 2001, Dr. Wolder provided another letter to the employer, stating that working the day shift would cause extreme anxiety for the worker in light of the incident. According to Dr. Wolder, working the night shift would remove the worker from the stressful environment and allow her to function in her duties.

¶ 12 While the employer agreed to assign the worker to a different unit from C.C., the employer did not accept the worker's request to be assigned to the night shift to avoid being at work at the same time as C.C. The worker was not willing to return to work under these conditions.

¶ 13 In a decision dated July 16, 2001, the WSIB claims adjudicator denied the worker's claim. After reviewing the information, the claims adjudicator confirmed that there was physical contact but that the contact was not physically violent. Therefore, the claims adjudicator felt that the policy requirements for mental stress entitlement were not met.

¶ 14 The ARO denied the worker's objection, concluding that the events of May 16, 2001 were not traumatic. The worker appealed to the Tribunal.

¶ 15 The worker testified that she found other employment on July 5, 2001. She worked as a health care aide at a different nursing home. She worked as a casual employee for a lower hourly wage and one hour less than her pre-accident work. The worker testified that she was able to perform these duties. She continued to pursue employment on the night shift with the accident employer and the employer gave her the position at the end of August. The worker testified that when she returned to the building, she felt anxiety and sick to her stomach. She did not feel well and was distracted. The worker testified that a resident fell out of bed due to her failure to put the bed rail up, and she received a letter of warning. The worker testified that this was her first warning in 19 years of employment, and attributed the mistake to her stress and anxiety.

¶ 16 Since the events in question, the worker went back to school in September 2001 to become a registered nurse. The worker wanted to continue to work weekends and nights while she attended school, but the accident employer denied her request for an educational leave of absence. It was then that she resigned.

¶ 17 The worker testified that she currently works as a registered nurse at a hospital without problems.

(ii) Preliminary issue

¶ 18 The worker filed a complaint against C.C. with the College of Nurses. During the course of the hearing, reference was made to the decision of the Complaints Committee of the College of Nurses of Ontario. The worker submitted a copy of the decision. Neither party objected to the admission of this evidence. However, following the hearing, it came to the Panel's attention that, pursuant to subsection 36(3) of the *Regulated Health Professions Act, 1991 (RHPA)*, which applies to the College of Nurses, no record of proceeding under the Act or decision made in such proceeding is admissible in a civil proceeding.

¶ 19 This provision of the *RHPA* was addressed in *Decision No. 669/02* (March 27, 2003). The Panel in that case found that proceedings at the Tribunal would be considered civil proceedings. Further, the provisions of subsection 36(3) of the *RHPA* took precedence over section 131 of the *WSIA*, which was a general provision allowing the Tribunal to admit evidence that would otherwise not be allowed. The Panel concluded that the record of proceedings regarding the complaint to the Ontario College of Nurses would not be admitted into evidence. However, the fact that the complaint was laid and the issue of whether the worker falsified evidence were relevant to the issues in the case. Accordingly, the Panel decided that it would consider the fact that the worker faced a disciplinary complaint, without considering the outcome, and would make its own determination regarding the falsification of medical records.

¶ 20 This Panel accepts and adopts the approach taken in *Decision No. 669/02*. Therefore, although the Decision of the Complaints Committee was submitted at the hearing, the Panel has not considered the decision in any way in its deliberations in this appeal.

(iii) Issues

¶ 21 The main issue is whether the worker has initial entitlement to benefits for mental stress arising out of the incident at work on May 16, 2001.

¶ 22 In this appeal, the worker seeks entitlement to loss of earnings (LOE) benefits for wages lost from May 16, 2001 to August 26, 2001. This requires consideration of the worker's level of disability during this period and the suitability of work offered by the employer.

(iv) Law and Policy

¶ 23 The *Workplace Safety and Insurance Act* (the "WSIA") is applicable to this appeal. All statutory references in this decision are to the *WSIA*, as amended, unless otherwise stated.

¶ 24 Section 13 of the *WSIA* is relevant in this appeal:

- 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.

...

- (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.

¶ 25 Pursuant to section 126 of the *WSIA*, the Board stated that the following policy packages, Revision #5, would apply to the subject matter of this appeal:

- * #9 - Stress Entitlement - DOA as of January 1, 1998;
- * #32 - Initial Entitlement - DOA as of March 1, 2000;
- * #300 - Decision Making/Benefit of Doubt/Merits and Justice.

¶ 26 Policy package #9 contained Document No. 15-02-02 of the Operational Policy Manual (OPM), "Mental Stress," dated June 15, 1999. That policy describes the meaning of "acute reaction" in part as follows:

Workers who develop mental stress gradually due to general workplace conditions are not entitled to benefits. However, gradual reactions to general workplace conditions must not be confused with delayed acute reactions to sudden and unexpected traumatic events. Acute reactions may be delayed by days, weeks or months.

In the case of a delayed onset, the evidence that the onset is due to a sudden and unexpected traumatic event arising out of and in the course of employment must be clear and convincing.

¶ 27 The policy provides guidelines for considering what constitutes a sudden and unexpected traumatic event:

A “traumatic” event is an event that would generally be recognized as traumatic. Traumatic events are usually, horrific, or have elements of actual or threatened violence to the worker. The event must also be uncommon in the normal course of the worker’s employment.

Sudden and unexpected traumatic events include

- * 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 or threats of physical violence where the worker has every reason to believe the threat is serious.

...

An event may be considered traumatic even if the worker was exposed to similar events in the past and experienced no ill effects.

Also an event may be considered traumatic even if other workers exposed to the same event did not experience ill effects. Not all workers have the same resilience to sudden and unexpected traumatic events.

¶ 28 The policy goes on to provide examples.

(v) Discussion and Conclusions

¶ 29 The appeal is allowed, for the reasons that follow.

(a) Initial entitlement for mental stress

¶ 30 Generally speaking, entitlement for a workplace injury is established where it is shown that the worker suffered an injury arising out of and in the course of employment. Causation is usually the key issue, rather than the nature of the accident. However, with the introduction of the *WSIA*, mental stress cases are an exception to these general

principles. The nature of the workplace incident giving rise to the claimant's mental stress must also meet the statutory requirements set out in subsection 13(5).

¶ 31 Even prior to the introduction of the *WSIA*, mental stress cases were addressed somewhat differently at the Tribunal. The majority of the Tribunal's decisions applied a "reasonableness" test to determining causation in mental stress cases. See *Decision No. 422/96* (1999), 51 W.S.I.A.T.R. 6, for a discussion of the objective test applied.

¶ 32 In view of the statutory framework and the circumstances of this case, the Panel will consider the following questions in determining initial entitlement:

1. Was there a "sudden and unexpected traumatic event"?
2. If so, did the worker suffer an "acute reaction" to that that event?
3. Was the worker's psychological disability related to the workplace event? In this case, this issue will require consideration of the worker's history.

(1) Sudden and unexpected traumatic event

¶ 33 The Board denied the worker's claim on the basis that the incident was not traumatic. Board policy provides a number of examples, and states that the event must be objectively traumatic. Therefore, the nature of the incident must be assessed independently of the worker's subjective reaction to it. As noted in Board policy, it is not necessarily a bar to entitlement if other workers did not suffer mental stress when exposed to the same event: "Not all workers have the same resilience to sudden and unexpected traumatic events." Therefore, even though an objective test is applied, it is not necessary to establish that all workers would suffer the same type of reaction to the event in order to characterize it as "traumatic."

¶ 34 As noted above, the majority of Tribunal decisions applied an objective test to pre-1998 mental stress cases. Therefore, the Tribunal's pre-1998 decisions, such as *Decision No. 422/96*, may still be relevant in assessing whether an incident is "traumatic."

¶ 35 In this case, the Board's decision-makers have reasoned that the worker was not in physical danger, and the physical contact did not cause injury. The implication is that a more serious assault would be required to render the event "traumatic." For the employer, Mr. Harris supported this interpretation of Board policy.

¶ 36 The Panel notes that neither the *WSIA* nor Board policy require physical injury to establish entitlement for mental stress. If the worker suffered a physical injury in an assault, then arguably, subsections 13(4) and (5) of the *WSIA* would not be in play, but rather, the issue would be whether the worker has entitlement under the psychotraumatic disability policy in conjunction with a physical injury. It would no longer be a "mental

stress” case within the meaning of section 13 if the worker suffered a physical injury due to a wilful act of another. Section 13 applies primarily to “mental-mental” stress cases, that is, where the worker claims a psychological injury resulted from mental stressors at work.¹

¶ 37 The question is, would a reasonable person, with knowledge of the relevant circumstances and context, consider the incident experienced by the worker to be traumatic? In the Panel’s view, the answer is “yes.”

¶ 38 In this case, there are two aspects to the worker’s claim - the verbal abuse and the physical contact.

¶ 39 Turning then to the facts, the Panel notes that there were varying descriptions of the extent of the physical contact, i.e., poking, punching or simply “touching.” The worker has maintained throughout this claim that C.C. punched her repeatedly. In the Incident Report to the employer, the worker stated that C.C. became angry at her and “began to punch [the worker] in the shoulder.” In a conversation with the claims adjudicator on June 22, 2001, the worker stated that C.C. became angry and punched her five or six times in the arm and verbally abused her. The worker stated this again at the hearing - that she was punched several times with a closed fist. The worker’s attention was drawn to witness statements that described the physical contact as a poke or simply as “contact.” However, the worker testified unequivocally that she was punched in the shoulder with a closed fist, although she was not injured. The physical nature of the altercation is also supported by the fact that the employer characterized the matter as a “Report of Investigation of Physical Abuse by Staff.”

¶ 40 There are three witness statements from co-workers. The statement of “C.R.” reads as follows:

At 0700 near the end of report, [C.C.] was telling us about [a patient] being on Haldol.² [The worker] then asked [C.C.] why she was getting it. [C.C.] stated how [the patient] stood in front of the mirror looking at herself for four hrs. [C.C.] pointing [with] her finger to her temple said [the patient] was crazy and needed something. [The worker] then questioned [C.C.] about the amount of Haldol. Then [C.C.] became face to face [with] [the worker], was saying in a very angry voice that she wasn’t an R.N. yet and

¹ See *Decision No. 826/94* (1995), 36 W.C.A.T.R. 102, for a discussion of the distinction between “mental-mental”, “physical-mental,” and “mental-physical” stress cases. It is questionable whether section 13 of the *WSIA* also applies to so-called “mental-physical” stress cases, where a worker suffers a physical disability as a result of workplace mental stressors. See, for example, *Decision No. 708/02* (2003), 63 W.S.I.A.T.R. 189, which found that subsection 13(4) did not apply to a claim that chronic stress caused a heart attack. However, *Decision No. 2056/03* (March 12, 2004) applied subsection 13(4) where a worker developed aphonia as a result of mental stress at work.

² An anti-psychotic medication.

she didn't know everything. At some point [C.C.] [with] her hand touched [the worker's] shoulder. At this point we thought it was time to leave.

¶ 41 The other two witness statements are substantially similar. The witness' statements confirm that the physical contact occurred in the context of C.C. coming "face to face" with the worker, and yelling at her. C.C. herself admitted in the employer's investigation that she poked the worker. In this context, whether the contact was "poking" or "punching," the Panel is persuaded that the contact was aggressive in nature and would reasonably be perceived as threatening. In the heat of the moment, it is both understandable and reasonable that the worker would have felt threatened.

¶ 42 Aside from the issue of physical contact, the Panel notes that the language used by C.C. was degrading and belittling to the worker. C.C. intentionally undermined the worker's professional integrity and it is clear that she wanted to "put her in her place," so to speak. The humiliating nature of C.C.'s statements toward the worker was compounded by the fact that they took place in front of co-workers. In the Panel's view, the combination of the physical contact and the verbal abuse experienced by the worker was traumatic in nature.

¶ 43 This conclusion is supported by several Tribunal decisions that interpret subsection 13(5) of the *WSIA* and the applicable Board policy. For example, in *Decision No. 526/05* (April 13, 2005), [2005] O.W.S.I.A.T.D. No. 837, the worker began working for the employer as a labourer in June 1999. He suffered a neck injury in May 2002. He did not lose any time but did require physiotherapy three times per week. In August 2002, the daughter of the owner of the company got into a heated argument with the worker over attending physiotherapy during work hours. At the end of the argument, the worker left the employer's premises. The worker appealed a decision of the Appeals Resolution Officer denying entitlement for stress-related disability.

¶ 44 In allowing the appeal in *Decision No. 526/05*, the Panel concluded that the conduct of the employer's daughter toward the worker constituted a sudden and unexpected traumatic event pursuant to subsection 13(4) of the *WSIA*. Regarding the application of Board policy, the Panel reasoned:

The Board's policy lists a number of events that the Board accepts are "sudden and unexpected." The use of the word "includes" in the policy, suggests to us that there may be other types of harassment (besides the life-threatening type) that could satisfy the requirements of the Board policy. Further, the use of the word "includes," rather than the word "means" can be interpreted as allowing factors other than those listed.

The Panel cannot find that the Board meant to exclude mental stress caused by an unjustified attack by the employer's daughter. Nowhere does the policy mention the kind of behaviour that is involved in this case.³

¶ 45 In *Decision No. 2685/01* (November 25, 2004), the worker appealed a decision denying entitlement for mental stress. The worker had a number of non-compensable medical conditions, including diabetes, epilepsy and a visual impairment. The worker claimed that a co-worker repeatedly harassed her about her physical disabilities, which led to a breakdown causing her to stop work in November 1997. The Panel in that case noted that OPM Document No. 15-02-02 purports to apply to all mental stress claims occurring after January 1, 1989. The Panel was not necessarily persuaded that the policy applied to pre-1997 accidents. However, the Panel found that, even if the policy applied, the worker had entitlement. The worker had significant non-compensable pre-existing problems. As a result of harassment at work, the worker had a traumatic reaction characterized as a nervous breakdown that also aggravated her pre-existing problems. The worker had an acute reaction to the unexpected traumatic harassment in the workplace and had entitlement even according to Document No. 15-02-02.

¶ 46 *Decision No. 2056/03* (March 12, 2004) is also of interest. The worker in that case was a health care aide who claimed that she developed aphonia as a result of workplace stress in June 2001. In allowing the worker's appeal, the Panel noted that Board policy provides entitlement for traumatic mental stress that is an acute reaction to a sudden and unexpected traumatic event, which is defined in the policy as including being the object of harassment that includes being placed in a life-threatening or potentially life-threatening situation. The Panel stated that use of the word "includes" suggests that there may be other types of harassment other than the life-threatening type that could satisfy the requirements of the policy. The Panel agreed with *Decision No. 669/02* that other types of harassment might attract benefits. The Panel was satisfied that the policy did not exclude entitlement where a worker has experienced mental stress as a result of overzealous scrutiny, as was the situation in this case. The worker was the subject of ongoing harassment from the manager. The worker developed the aphonia as a result of the harassment from the manager.

¶ 47 The Panel agrees with the reasoning set out in this line of Tribunal decisions. The language of applicable Board policy does not exclude entitlement in a case such as this. Being yelled at, berated and humiliated in front of co-workers, while being aggressively poked (or punched), constitutes a traumatic event. C.C.'s rebuke of the worker was deliberately demeaning to the worker's competence and credibility. In addition, as an

³ The Panel also found that the daughter's treatment of the worker was a result of his compensable injury, and that the worker's compensation for his depression could be either a sequel of the compensable injury or a new claim could be set up for a psychotraumatic injury in 2002. The Panel directly addressed the application section 13 of the *WSIA* and Board policy; therefore, the Panel's finding with respect to application of section 13 of the *WSIA* was not rendered obiter.

authority figure, coming face to face with the worker and making contact with her would reasonably be perceived as threatening.

¶ 48 The Panel also accepts the worker's uncontradicted testimony that C.C. offered an insincere apology in the hallway, and snickered. C.C.'s flippant attitude compounded the effects of the initial traumatic event. It was after this that the worker was unable to continue working.

¶ 49 It is fairly straightforward to conclude that the event was sudden and unexpected, rather than a series of events over time - i.e., this is not a "chronic stress" case. The worker testified that, although she was not particularly fond of C.C. in the past, she did not have any prior conflicts with her. The argument occurred suddenly, and C.C.'s actions were unexpected, because it was inappropriate for C.C. to conduct herself in that manner in the workplace.

¶ 50 Therefore, the Panel is unable to accept Mr. Harris' argument that Board policy precludes entitlement in this case.

¶ 51 Mr. Harris also suggested that this event could be characterized as discipline of the worker by a supervisor. If so, then the worker's stress reaction would be non-compensable because mental stress caused by a decision to discipline the worker is expressly excluded from entitlement pursuant to subsection 13(5) of the *WSIA*. The Panel rejects this argument. First of all, there was no evidence that the worker provoked the argument or her behaviour was insubordinate. She asked C.C. why a particular resident was being given Haldol and also asked about the dosage. The worker testified that she needed to know if the drug was being given because the resident had violent tendencies. There is no evidence whatsoever that the worker's questions constituted behaviour that warranted discipline. There is no evidence that the employer reprimanded the worker or took any other disciplinary action against this worker as a result of the incident. Furthermore, even if the worker's behaviour did warrant discipline, the nature of C.C.'s response cannot be described as employee discipline. Verbal abuse and aggressive physical contact cannot be characterized as "employee discipline" in any context. C.C. herself admitted that her conduct was inappropriate, negating any argument that this could be construed as employee discipline.

(2) Acute reaction

¶ 52 In its guidelines on "acute reaction," Board policy states that workers who develop stress gradually due to general workplace conditions are not entitled to benefits. However, this is not to be confused with a delayed acute reaction to sudden and unexpected traumatic events.

¶ 53 In this case, the worker's reaction was immediate and acute. She reported the initial incident to the Director of Nurses immediately. After the encounter with C.C., when C.C. offered an insincere apology and snickered, the worker went to the Administrator and could not continue working that day. She took a week off, and

attempted to return to work a week later, but felt she could not carry on. She was crying in the washroom, and told the Director of Nurses she could not continue.

¶ 54 The worker recalled that she saw Dr. Wolder on May 16, 2001, although it may have been that she made the appointment on that date. Dr. Wolder's records indicate that he did not see the worker until May 24, 2001, approximately a week later. However, even if there was a delay in medical treatment, the worker's stress reaction was immediate, as she was unable to continue working immediately following the traumatic event.

(3) Psychological disability as a result of the traumatic event

¶ 55 There are two aspects to this issue:

1. Did the worker suffer psychological disability beyond a mere transitory emotional response?
2. If so, was the worker's disability causally related to the traumatic workplace incident?

¶ 56 The *WSIA* is designed to compensate workers for injuries arising from workplace accidents. Therefore, in addition to establishing that there was a traumatic event at work, it must also be established that there was an injury or disability as a result. A transitory emotional response is not compensable.⁴ This principle is also reflected in the applicable Board policy, which states that there must be confirmation from a health care professional that the worker is suffering from mental stress.

¶ 57 The Panel is satisfied that there was a disabling mental reaction beyond a transitory emotional response. Dr. Wolder diagnosed Acute Reactive Anxiety and referred the worker to a psychiatrist, Dr. O'Flanagan. Ativan was initially prescribed, although Dr. O'Flanagan later reported that he felt medication was not necessary. Nonetheless, it is clear that the worker did suffer from a disability that required treatment in the form of psychotherapy. In a report of June 13, 2001, Dr. O'Flanagan described the worker's symptoms. The worker became increasingly anxious after the incident. The last time she tried to work, after two hours she became anxious in the building, feelings of choking, palpitations, headache, nausea, and sweating. Dr. Wolder put her on sick leave. Dr. O'Flanagan concluded that she had definite symptoms of anxiety.

¶ 58 It is also necessary to be satisfied that the worker's disabling mental reaction is causally related to the traumatic event. In this case, this warrants more detailed scrutiny, in light of comments in Dr. O'Flanagan's reports. In a report dated June 13, 2001, Dr. O'Flanagan noted that the worker was abandoned by her mother at approximately age four, her father was subsequently admitted to a psychiatric facility and the worker and her

⁴ See, for example, *Decision No. 2599/01* (December 27, 2001) [2001] O.W.S.I.A.T.D. No. 3959.

siblings were separated and placed in foster homes. The worker suffered neglect in a foster home and abuse with an adoptive family, until she was removed at the age of 13. Dr. O’Flanagan provided the following assessment:

Under usual circumstances, obviously anybody would be somewhat anxious and upset at the events that are reported. The patient, apart from being treated for a mild hypertension problem since last October, has been in good health.

The problem here is a transference from mother figures abusing and abandoning, being re-activated by the situation which would result in a lot more distress and anxiety than perhaps one would ordinarily expect.

¶ 59 On August 3, 2001, Dr. O’Flanagan reviewed the worker’s situation and noted that he worked with the worker extensively when she was a teenager, dealing with the difficulty of her upbringing. Dr. O’Flanagan then noted, “Certainly, this person is going to be sensitive to injustice involving authority figures.”

¶ 60 These remarks bring into play the distinction between the so-called “thin skull” and “crumbling skull” doctrines. The governing principles were explained in the context of a claim for psychotraumatic disability in *Decision No. 826/94* (1995), 36 W.C.A.T.R. 102. This decision discusses the distinction between the thin skull and crumbling skull, and the role of symptomatic and asymptomatic pre-existing conditions as follows:

In the application of this thin-skull or egg-shell personality rule, Tribunal decisions have in the past distinguished between pre-existing weaknesses or deficiencies that prior to the accident had not generated any symptoms - so-called asymptomatic pre-existing conditions - and weaknesses or deficiencies which had become symptomatic before the accident. In the former cases, the rule is applied routinely and the pre-existing asymptomatic condition which after the accident is seen to lead to unexpected consequences (as compared to what would have been expected of a “normal” person) typically has no effect on the entitlement question. In the latter cases, however, the pre-existing condition does on occasion affect entitlement to compensation. This arises in two different situations.

First, there may be non-entitlement for the portion of any disability that can be shown to result from the pre-existing, symptomatic condition rather than from the compensable injury. See *Decision No. 420/88* (1990), 14 W.C.A.T.R. 7. Second, there is the situation where the worker’s pre-existing symptomatic condition or pre-disposition is said to be so large a factor in the ensuing disability that it reduces the role of the workplace injury to insignificance in the overall scheme of things thus defeating entitlement altogether. See, for example, *Decision No. 918* (1988), 9 W.C.A.T.R. 48.

...

One's skull may be thin or one's personality may be an egg-shell without affecting entitlement to workers' compensation benefits, but neither the skull nor the personality can have been known to be crumbling. This has sometimes been referred to - rather insensitively, we regret to say - as the "crumbling skull" exception to the thin skull rule.

As mentioned, in the normal course this exception to the thin-skull rule is usually applied only in respect of pre-existing conditions that were symptomatic before the workplace injury.

¶ 61 What is the role of the thin skull principle in the context of subsections 13(4) and (5)? The Panel is satisfied that the *WSIA* did not intend to displace these well-entrenched common law principles through the mental stress provisions. The mental stress provisions do limit entitlement to the type of event described in section 13, that is, a "sudden and unexpected traumatic event." The test of what constitutes a traumatic event is an objective one. However, once it is established that the event was traumatic, the thin skull principle applies to the worker's disabling reaction to that event. On the other hand, if the circumstances fall into the so-called crumbling skull category, then entitlement may be limited or precluded altogether.

¶ 62 The Panel is satisfied that this case does not present a "crumbling skull" scenario. The worker required counselling as a teenager to help her deal with her difficult upbringing. However, there is no evidence that the worker required psychiatric treatment since she was a teenager, and the evidence suggests that she was, in fact, quite resilient. She worked as a health care aide with the accident employer for 19 years. Dr. O'Flanagan noted that she was in a stable marriage with three children. When she was involved in a motor vehicle accident in 1997, she took three weeks off for a neck and shoulder injury, then returned to work. She injured her neck and left shoulder at work in September 1999, but returned to work after a couple of months. Therefore, though the worker had some physical injuries, she was able to return to work and maintain employment for an extended period of time. These circumstances reflect a person who is able to cope with life's difficulties, rather than a "crumbling skull" or "frail spirit."

¶ 63 Furthermore, the worker's disability was not disproportionate to the incident that occurred. The incident occurred on May 16, 2001. The worker attempted to return to work approximately a week later, but suffered anxiety symptoms and was unable to continue. On July 1, 2001, Dr. Wolder stated that the worker could return to work on night shifts, so she would not be on at the same time as C.C. This indicates that the worker was ready to return to her regular work, with a shift accommodation, less than two months following the accident. The worker did not return to work, since the employer was not willing to accommodate this request. In the meantime, the worker mitigated her losses by obtaining alternative employment with another nursing home. She seeks benefits to August 26, 2001.

¶ 64 Therefore, while Dr. O’Flanagan stated that the worker would be sensitive to authority figures, this vulnerability would be properly characterized as a “thin skull” situation, at most. The worker’s motivation and recovery do not reflect a “frail spirit” - quite the opposite. To her credit, the worker went on to pursue her plans of returning to school to become a registered nurse. She testified that she now works as a registered nurse in a hospital without difficulty.

(b) Entitlement to benefits

¶ 65 Section 40 provides that both the employer and the worker shall co-operate in the early and safe return to work of the worker. Section 43 governs entitlement to LOE benefits. Subsection 43(7) provides that if a worker is not co-operating in health care measures and his or her early and safe return to work or with a labour market entry plan, LOE benefits may be reduced or suspended.

¶ 66 Dr. Wolder recommended that the worker stay off work until July 1, 2001, due to her reactive anxiety condition. There is no medical evidence to contradict this recommendation, and the worker is entitled to full LOE benefits during this period.

¶ 67 Beginning with a note dated July 1, 2001, Dr. Wolder repeatedly recommended that the worker be permitted to work on the night shift, when C.C. would not be working. In a letter dated July 13, 2001, the employer’s Administrator wrote to the worker, stating that the employer did not accept Dr. Wolder’s opinion. The employer would accommodate the worker to the extent that she would not be working on the same unit as C.C. The worker testified that there would be many opportunities for her to cross paths with C.C. if they were working at the same time, even if C.C. were not acting as her supervisor. The units are male and female units, which are on different wings of the same floor of the facility. The worker would likely run into C.C. during her shifts, for example, at the nursing station.

¶ 68 In the Panel’s view, Dr Wolder’s recommendation that the worker be assigned to different shifts was directly related to the effects of the compensable injury. The accommodation offered by the employer was not suitable, as it was likely that the worker would encounter C.C. at work if they were assigned to the same shift. The employer did not accede to Dr. Wolder’s request until the end of August. In these circumstances, the Panel finds that the worker did not fail to cooperate with ESRTW and is entitled to benefits for her loss of earnings until August 26, 2001. She did have income from alternative employment during the summer of 2001, and the WSIB shall take this into account when calculating the worker’s LOE benefits.

DISPOSITION

¶ 69 The appeal is allowed. The worker has initial entitlement for mental stress arising out of an event on May 16, 2001. The worker is entitled to LOE benefits to compensate her for her loss of earnings from May 16, 2001 to August 26, 2001.