

**NOVA SCOTIA COURT OF APPEAL**

**Citation:** *Henderson v. Nova Scotia (Workers' Compensation Appeals Tribunal)*,  
2018 NSCA 59

**Date:** 20180706

**Docket:** CA 458711

**Registry:** Halifax

**Between:**

Sterling Lee Henderson

Appellant

v.

Nova Scotia Workers' Compensation Appeals Tribunal,  
the Workers' Compensation Board of Nova Scotia, the  
Attorney General for the Province of Nova Scotia, and the  
Town of Truro

Respondents

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**Judge:** The Honourable Justice Jamie W.S. Saunders

**Appeal Heard:** May 23, 2018, in Halifax, Nova Scotia

**Subject:** **Workers' Compensation Act, S.N.S. 1994-95, c. 10.  
Statutory interpretation. Post traumatic stress disorder.  
Police conduct. Accident. Psychological injury. Traumatic  
event. Consistency of Board policy with statutory purpose  
& authority. Standard of review.**

**Summary:** A woman arrested for public intoxication suffered a stroke while in police lock-up and later died in hospital. Investigations were ordered to probe police conduct in the circumstances surrounding her arrest, detention, and subsequent death. A police officer who was the shift supervisor when the woman was placed in the cells, claimed compensation for the PTSD that led to his retirement, on the basis that his involvement in the case, and the subsequent investigations, caused a compensable workplace injury.

WCAT denied his claim, finding that while he did suffer from PTSD which arose out of and in the course of his employment, it did not arise as an acute reaction to a traumatic event, and so did not entitle him to benefits under the Act. As well, the incident led to three subsequent investigations which fell into the exclusion for labour relations matters set out in Board Policy 1.3.9, thereby precluding compensation for the worker's claim. The police officer appealed.

**Result:**

Appeal dismissed. In rejecting the appellant's claim as being non-compensable, WCAT did not err in its interpretation and application of s. 2(a) of the *Act* and Policy 1.3.9. Further, WCAT did not err in its assessment of the cause of the appellant's condition and in rejecting his claim on the basis that his PTSD arose as a result of workplace investigations which were non-compensable work-related events. Finally, WCAT was never asked to decide whether these policies were consistent with the statute or the regulations. WCAT did not err in "failing" to consider a matter not before it, and on the record in this case, it was not an issue the Tribunal was required to address in any event.

The Tribunal's decision demonstrates an intelligible line of reasoning. It's analysis when read together with the outcome, reveals a conclusion that falls within a range of acceptable outcomes.

*This information sheet does not form part of the court's judgment. Quotes must be from the judgment, not this cover sheet. The full court judgment consists of 21 pages.*

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Respondents

**Judges:** Bryson, Saunders and Van den Eynden, JJ.A.  
**Appeal Heard:** May 23, 2018, in Halifax, Nova Scotia  
**Held:** Appeal dismissed per reasons for judgment of Saunders, J.A.;  
Bryson and Van den Eynden, JJ.A. concurring.  
**Counsel:** David McCluskey and Vanessa Nicholson, for the appellant  
Alexander MacIntosh, for the respondent Nova Scotia  
Workers' Compensation Appeals Tribunal  
Rory Rogers, Q.C. and Paula Arab, Q.C., for the respondent  
Workers' Compensation Board of Nova Scotia  
Edward A. Gores, Q.C., for the respondent Attorney General  
of Nova Scotia (not participating)  
John T. Rafferty, Q.C., for the respondent Town of Truro (not  
participating)

**Reasons for judgment:**

[1] On August 27, 2009 Ms. Victoria Rose Paul, along with her son, were arrested by police officers in the Town of Truro for public intoxication. After booking at approximately 3:15 a.m. on August 28, they were placed in cells at the police lock-up. Ms. Paul settled relatively quickly and went to sleep. A few hours later she was observed exhibiting behaviours that were not consistent with her condition upon admission. She fell off the bunk on to the floor and appeared to be in distress. She was not taken to the local hospital for medical assessment until that afternoon. She was later moved to a hospital in Halifax where she was placed on life support. She passed away on September 5, 2009. It was subsequently determined that Ms. Paul suffered an ischemic stroke while in Truro police custody.

[2] The appellant, Mr. Henderson, is a retired sergeant of the Truro Police Service. He was the shift supervisor when Ms. Paul was taken into custody.

[3] At the request of the Truro Police Department, the Halifax Regional Police conducted an operational review of the circumstances surrounding Ms. Paul's arrest and detention. That review was completed in October 2010. It concluded that there were no breaches in policies or statutes and that there was no need for an investigation under the *Criminal Code*, or the *Police Act* of Nova Scotia. The review went on to make several recommendations.

[4] In August 2011, pursuant to a Ministerial Order issued by Nova Scotia's Minister of Justice, an investigation was launched into the circumstances relating to Ms. Paul's death and the adequacy of the review conducted by the Halifax Police Department. That report was released on May 24, 2012 and was particularly critical of the appellant's role in the chain of events involving Ms. Paul.

[5] On that same date, the appellant saw a psychologist for a standard debriefing following an unrelated policing incident in which firearms were discharged by police. The psychologist's report indicated that the appellant was demonstrating a trauma response, which, in her opinion, related to the 2009 incident involving Ms. Paul, and not the 2012 event for which the appellant's debriefing had been arranged. The psychologist diagnosed the appellant with post traumatic stress disorder (PTSD) in relation to the 2009 incident when Ms. Paul suffered a stroke while in police custody.

[6] The appellant filed a workers' compensation claim seeking benefits for the psychological injury said to have occurred in August 2009.

[7] The Board and subsequent institutional appeals repeatedly denied the appellant's claim.

[8] His latest attempt to seek redress was heard by the Workers' Compensation Appeals Tribunal (WCAT) in 2016.

[9] In simple terms, the basis for WCAT's rejection of the appellant's claim was two-fold: it did not meet the statutory definition of "accident"; and workplace investigations such as occurred in this case, constitute a "labour relations matter" which are excluded by Board Policy 1.3.9 and are, therefore, not compensable.

[10] The appellant now appeals that decision to this Court. By order dated November 28, 2017, a panel of this Court granted leave to appeal on three discrete grounds. Those grounds are identified in the Issues section of this decision.

[11] Despite Mr. McCluskey's able arguments on the appellant's behalf, I am not persuaded the Tribunal erred in its analysis or disposition and I would dismiss the appeal.

## **Background**

[12] The material facts are not in dispute. I will quickly summarize the background to this appeal to establish context, and add further detail as may be required during my analysis of the issues.

[13] Mr. Henderson is a retired sergeant with the Truro Police Service. He was the officer on duty on August 27, 2009 when Ms. Paul, a female member of the Mi'kmaq community, was taken into custody following an incident at a bar in Truro. She, along with her son, were arrested for being intoxicated in a public place, contrary to s. 87(1) of the *Liquor Control Act*, R.S.N.S. 1989, c. 260.

[14] At 3:15 a.m. on August 28, Ms. Paul was placed in a cell at the lock-up facility.

[15] At around 6:17 a.m. Ms. Paul exhibited behaviours which were inconsistent with her appearance during the previous three hours. She started rolling around on the bunk and subsequently fell off the bunk on to the floor, in apparent distress.

[16] When the appellant arrived at work at approximately 5:30 a.m., he was told there was an intoxicated female in the cells.

[17] In subsequent testimony the appellant said he received a call from the Commissionaire at approximately 8:30 a.m. advising him that Ms. Paul was not responding. The appellant said he attended the cells along with other police officers, shook and roused Ms. Paul, and ultimately decided not to place her back on the bunk, so she would not fall off and injure herself.

[18] The appellant said the Commissionaire assured him he would check on Ms. Paul every five minutes and call the appellant if there were any change in her condition.

[19] The appellant testified that he received a call between noon and 1 p.m. while he was out on patrol, which indicated that Ms. Paul's condition had deteriorated. He arrived back at the police station just as Ms. Paul was being placed into the back of an ambulance to transfer her to the local hospital.

[20] Ms. Paul was assessed and later transferred to the QEII Health Service Centre, where she was placed on life support. Ms. Paul's family took her off life support and she passed away on September 5, 2009, from the effects of the ischemic stroke she suffered while in police custody.

[21] Apart from the Board's consideration of the appellant's claim for compensation, two other investigations were launched to look into the circumstances surrounding Ms. Paul's death. The first came out of a request by the Chief of the Truro Police Department to the Halifax Regional Police asking for an operational review of the incident. In October 2010 a report was filed containing their findings and recommendations, and concluding that there were no breaches in policies or statutes requiring any further investigation under either the *Criminal Code of Canada*, R.S.C. 1985, c. C-46 or the *Police Act*, S.N.S. 2004, c. 31, as amended.

[22] On August 25, 2011, pursuant to s. 7 of the *Police Act*, Ross Landry, then Minister of Justice, issued a Ministerial Order directing that an independent investigation be conducted into the circumstances of Ms. Paul's arrest, confinement and hospitalization, as well as the adequacy of the subsequent investigation conducted by the Halifax Regional Police. That investigation was led by Ms. Nadine Cooper Mont. Her lengthy report and recommendations were released on May 24, 2012.

[23] For the purposes of this appeal, it is not necessary for me to address the details of either investigation. Their inclusion in this narrative is only important in the context of the appellant's claim for compensation and, in particular, how they feature in WCAT's findings and ultimate rejection of Mr. Henderson's claim. For clarity I will refer to the operational review conducted by the Halifax Regional Police as "the Halifax Police report", and Ms. Mont's inquiry and subsequent report as "the Ministerial report".

[24] On the same date that the Ministerial report was released, Mr. Henderson was treated by a psychologist, Ms. Margaret Grant, as part of a debriefing following an incident in which shots were fired involving officers supervised by Mr. Henderson. During her assessment, Mr. Grant discovered that Mr. Henderson had a "trauma response" which focused on the death of Ms. Paul in 2009.

[25] In a letter dated June 7, 2012, Mr. Henderson's family physician, Dr. Frank Slipp, recommended a medical leave for Mr. Henderson due to a severe adjustment reaction. It was Dr. Slipp who referred the appellant back to the psychologist, Ms. Grant.

[26] Mr. Henderson then met regularly with Ms. Grant between June 2012 and August 2014. Ms. Grant diagnosed the appellant with PTSD, which she opined was caused by a reaction to the August 28, 2009 incident involving Ms. Paul.

[27] I will now briefly outline the procedural history to this claim.

### **Procedural History**

[28] Mr. Henderson completed a WCB Accident Report which he signed on September 11, 2012 claiming he suffered an injury or illness as a result of a specific incident on September 5, 2009 (that being the date of Ms. Paul's death) as well as an injury or illness which occurred over time with symptoms noticed in September 2009. His description of how the injury happened states:

A person had a stroke in cells while I was supervisor of shift. I'm being blamed for the death and lack of action taken as supervisor.

[29] A WCB Injury Report signed by the employer on September 19, 2012 noted an injury of "stress" as a result of a specific incident on September 5, 2009. The

employer's description of how the injury happened is consistent with the appellant's WCB Accident Report.

[30] In a decision dated November 2, 2012, a case manager denied Mr. Henderson's claim. The case manager's decision was upheld by a Hearing Officer. Mr. Henderson then appealed the Hearing Officer's decision to WCAT. In a subsequent decision, WCAT referred the matter back to the Hearing Officer directing that updated medical information be obtained and that the claim be considered under the newly adopted Board Policy 1.3.9.

[31] Following this further review, Mr. Henderson's claim was rejected at all levels, prompting the appellant to file a second appeal with WCAT. Mr. Henderson also filed a Notice of Constitutional Question in which he challenged the constitutionality of s. 2(a) of the *Act*, alleging that it discriminated against workers with mental disability.

[32] In a conference call held on May 26, 2015, it was agreed that Mr. Henderson's appeal to the WCAT would be "bifurcated" to decide in a preliminary decision whether his claim met the definition of "accident" as set out in s. 2(a) of the *Act*, in other words, as being someone who had suffered an acute reaction to a traumatic event. It was agreed that should Mr. Henderson fail to establish that he met the statutory definition of "accident", then a second hearing would be held to determine whether s. 2(a) infringed his equality rights under the *Charter*.

[33] An oral hearing was held on December 3, 2015. The appellant, his wife and his psychologist testified.

[34] Following the hearing, a transcript was requested. It was discovered that the recording equipment had malfunctioned and as a result a second oral hearing was held in June 2016. The same witnesses testified in the same sequence. Post-hearing written submissions were filed on behalf of the appellant.

[35] In a decision dated November 21, 2016 (WCAT #2015-46-AD), WCAT found that Mr. Henderson developed PTSD in response to an August 28, 2009 incident at work and ensuing investigations into that incident.

[36] WCAT determined that Mr. Henderson was not entitled to compensation because the August 28, 2009 incident was not a "traumatic event" as defined in Board Policy 1.3.9.

[37] WCAT said the investigations following the incident constituted a “labour relations matter” under Policies 1.3.6 and 1.3.9, and as such, any psychological reaction to those investigations was not compensable.

[38] After finding that Mr. Henderson’s injury arose, in part, due to the events of August 28, 2009, WCAT concluded that it was not necessary to hear arguments regarding the constitutionality of s. 2(a) of the *Act* and Policy 1.3.9, because Mr. Henderson’s PTSD arose from a labour relations matter unrelated to the stress exclusion.

[39] It is from that decision that the appellant now appeals.

## Issues

[40] This Court’s order dated November 28, 2017 granted leave to appeal on the following grounds:

1. Having stated:

*“I accept that the August 29, 2009 incident was the triggering event for all that followed, particularly the repeated and prolonged investigations. The Worker developed PTSD in response to that incident and the ensuing investigations.”* (Emphasis in original)

did WCAT err in its interpretation and application of s. 2(a) of the *Workers’ Compensation Act*, S.N.S. 1994-95, c. 10, as amended and WCB Policy 1.3.9 with the result that the Worker’s claim was rejected as being non-compensable?

2. Further, did WCAT err in determining that while the Worker’s injury, in the form of PTSD, did arise out of and in the course of his employment as a police officer, “it arose further to workplace investigations, which constitute a labour relations matter” and was therefore “excluded as non-compensable under Policies 1.3.6 and 1.3.9?”
3. Further, did WCAT err in failing to consider whether these Policies are consistent with the *Act* or the regulations?

## Standard of Review

[41] An appeal to this Court from a WCAT decision lies only on a question of law or jurisdiction. Obviously, the three grounds for which we granted leave

satisfy that threshold. The focus then narrows to choosing the proper standard of review.

[42] The first two grounds of appeal in this case involve WCAT's interpretation and application of the *Act* and Board policies. Accordingly, these grounds of appeal attract a reasonableness standard of review. See for example, *Halifax (Regional Municipality) v. Hoelke*, 2011 NSCA 96 at ¶¶11-18. In applying that standard we will undertake an "organic" exercise to see whether WCAT's reasons, considered together with the result, produce a conclusion that falls within a range of reasonable outcomes. If it does, we will not interfere. See for example, *Creelman v. Nova Scotia (Workers' Compensation Appeals Tribunal)*, 2012 NSCA 26; *Ellsworth v. Nova Scotia (Workers' Compensation Appeals Tribunal)*, 2013 NSCA 131.

[43] I would also see the third ground of appeal in this case as involving WCAT's interpretation of the *Act* and Board policies. As such, the standard of review will be reasonableness.

[44] However, to the extent that this third ground of appeal might require this Court to determine, as a matter of first instance, whether the policies are inconsistent with the *Act's* statutory purpose and therefore *ultra vires*, our inquiry is limited to asking if the policies are "irrelevant", "extraneous", or "completely unrelated" to the Board's statutory authority, in accordance with the principles articulated by the Supreme Court of Canada in *Katz Group Canada Inc. v. Ontario (Health and Long Term Care)*, 2013 SCC 64 and more recently applied by this Court in a variety of cases including the *Nova Scotia Barristers' Society v. Trinity Western University*, 2016 NSCA 59; *Surette v. Nova Scotia (Workers' Compensation Board)*, 2017 NSCA 81; and *Skinner v. Nova Scotia (Workers' Compensation Appeals Tribunal)*, 2018 NSCA 23.

[45] For convenience and clarity in the analysis that follows I will shrink the text of the grounds for which leave was granted into three simple questions:

- (i) In rejecting the appellant's claim as being non-compensable, did WCAT err in its interpretation and application of s. 2(a) of the *Act* and Board Policy 1.3.9?
- (ii) Having found that the appellant's injury arose in the course of his employment, did WCAT err in rejecting his claim because the injury arose as a result of workplace investigations which constituted a

“labour relations matter” and was, therefore, non-compensable under Policies 1.3.6 and 1.3.9?

- (iii) Did WCAT err in failing to consider whether these policies were consistent with the *Act* or the regulations?

## Analysis

- (i) **In rejecting the appellant’s claim as being non-compensable, did WCAT err in its interpretation and application of s. 2(a) of the *Act* and Board Policy 1.3.9?**

[46] Before turning to this aspect of the Tribunal’s decision, it would appear from the record in this case that officials involved in the investigation of Ms. Paul’s detention and death, variously refer to her time in police custody as being “August 27”, “August 28”, or “August 29”, 2009. Nothing really turns on the precision of the chosen date. I mention the discrepancy simply to explain the Tribunal’s reference to the “August 29, 2009 incident” throughout its decision. I prefer the chronology taken from the Ministerial report which has Ms. Paul and her son arrested on August 27, but booked and placed in cells at the police lock-up after midnight on August 28. It was not until the afternoon of August 28 that Ms. Paul was taken first to the local hospital for assessment and later transported to hospital in Halifax.

[47] The WCAT accurately identified the issue as:

Did the Worker suffer a personal injury by accident out of and in the course of his employment in a form of a psychological injury in accordance with Policy 1.3.9?

[48] The Tribunal summarized the basis of its conclusion this way:

The Worker sustained an injury in the form of PTSD which arose out of and in the course of his employment. However, it did not arise as an acute reaction to a traumatic event so as to entitle him to compensation under s. 2(a) of the *Act*. The evidence does not support a conclusion that the August 29, 2009 incident was objectively traumatic or threatened the Worker’s physical integrity. The August 29, 2009 incident resulted in three subsequent investigations into that incident. These events led the Worker to develop PTSD. However, workplace investigations fall into the exclusion for labour relations matters set out in Policy 1.3.9, thereby precluding acceptance of the Worker’s claim.

[49] In coming to that conclusion, WCAT made numerous findings of fact, each fully supported by the record, and therefore not open to appeal in this Court.

[50] For convenience, I will here reproduce the statutory provisions that feature most prominently in this case, and attach Board Policy 1.3.9 as Appendix ‘A’ to this decision.

[51] Section 10 of the *Act* provides:

**Payment of compensation**

10 (1) Where, in an industry to which this Part applies, personal injury by accident arising out of and in the course of employment is caused to a worker, the Board shall pay compensation to the worker as provided by this Part.

...

(4) Where the accident arose out of employment, unless the contrary is shown, it shall be presumed that it occurred in the course of employment, and where the accident occurred in the course of employment, unless the contrary is shown, it shall be presumed that it arose out of the employment.

...

(6) The Board may, by regulation, exclude any type or class of personal injury or occupational disease from the operation of this Part. ...

[52] To understand what “accident” means we go back to Section 2 which reads:

**Interpretation**

2 In this Act,

(a) “accident” includes

(i) a wilful and intentional act, not being the act of the worker claiming compensation,

(ii) a chance event occasioned by a physical or natural cause, or

(iii) disablement, including occupational disease, arising out of and in the course of employment,

but does not include stress other than an acute reaction to a traumatic event;

...

[53] In this case, the adjudication of Mr. Henderson’s claim turned on the words that complete s. 2(a):

but does not include stress other than an acute reaction to a traumatic event.

[54] WCAT began its analysis by properly instructing itself as to the relevant provisions of the *Act*. It said:

Where a worker sustains an injury by accident arising out of and in the course of employment, s.10(1) of the *Act* directs the Board to provide compensation to that worker. Accidents are defined in s.2(a) of the *Act* as including:

- (i) a wilful and intentional act, not being the act of the worker claiming compensation,
- (ii) a chance event occasioned by a physical or natural cause, or
- (iii) disablement, including occupational disease, arising out of and in the course of employment,

but does not include stress other than an acute reaction to a traumatic event.

The general adjudicative principles and the standard of proof applicable on any appeal to the Tribunal are set out in ss. 186 and 187 of the *Act*. These provisions require that the Tribunal's decisions be based on the real merits and justice of the case, and be in accordance with the *Act*, *Regulations*, and Board Policy, provided that Board Policy is consistent with the *Act*.

In any application for compensation, on any disputed issue, where the evidence is equally balanced, the dispute must be resolved in the worker's favour. Conclusive or scientific proof is not required. Medical opinion evidence, while beneficial, is neither necessary nor always conclusive. A worker need only provide sufficient evidence to establish a reasonable inference that is as least as likely as not, or evenly balanced with, any other possible inference. While common sense can be applied to infer causation, whether or (sic) any particular inference is reasonable is a question of fact which depends on the circumstances of each case.

[55] It then considered Policy 1.3.9 and the interplay between the undefined term "traumatic event" found in s. 2(a) of the *Act* and the adjudication of psychological claims brought as a reaction to traumatic events. WCAT explained:

Board Policy 1.3.9 is applicable to this appeal. The policy sets out criteria for the adjudication of psychological claims under the *Act*. The Board will only consider psychological claims for compensation under the *Act* when the psychological condition results from stress which is a reaction to one or more traumatic events, and satisfies these following four criteria:

- I. There must be one or more Traumatic Event(s) as defined herein;
- II. The Traumatic Event(s) must arise out of and in the course of employment;

- III. The response to the Traumatic Event(s) has caused the worker to suffer from a mental or physical condition that is described in the DSM; and
- IV. The condition is diagnosed in accordance with the DSM and by a health care provider being either a psychiatrist or a clinically trained psychologist registered with the Nova Scotia Board of Examiners in Psychology.

For the purposes of claims under the *Act*, traumatic events are defined as:

A direct personal experience of an event or directly witnessing an event that is :

- Sudden;
- Frightening or shocking;
- Having a specific time and place;
- Involving actual or threatened death or serious injury to one's self or others or threat to one's physical integrity.

Examples of traumatic events enumerated in Policy 1.3.9 include, but are not limited to:

- A direct personal experience of an event that involve (sic) actual or threatened death or serious injuries;
- An actual or threatened (sic) to violent physical assault;
- Witnessing or experiencing a horrific accident;
- Witnessing or being involved in a hostage taking;
- Witnessing or being involved in an armed robbery.

The Policy also requires that assessment of traumatic events be based on the objective legal standard known as 'the reasonable person' standard, which is "... based on a hypothetical person who exercises a degree of attention, knowledge, intelligence, and judgement that society requires of its members for the protection of their own and others interests. The reasonable person acts sensibly, does things without serious delay, and takes proper but not excessive precautions."

[56] While recognizing that Policy 1.3.6 (which establishes criteria for the adjudication of stress claims brought by federal employees) was not applicable to Mr. Henderson's situation, the Tribunal nonetheless found it helpful in dealing with such claims. WCAT said:

While Policy 1.3.6 is inapplicable to this appeal, it contains a further definition of "traumatic event" which the Tribunal has found helpful in adjudicating these types of appeals:

“Traumatic Event” has all of the following elements:

- The person has experienced, witnessed or was confronted with an event that involved actual or threatened death or serious injury or a threat to physical integrity of self or others; and
- The person’s response involved intense fear, helplessness, or horror.

As pointed out in *Decision 2012-438-AD* (October 18, 2012, NSWCAT):

While the “test” to be applied to the event which a claimant asserts is “traumatic” is described as objective, that exercise is not an easy one. It is critical that the adjudicator not insert himself or herself into the question. The question is not whether the adjudicator, or the Worker, individually, would find the suspect event traumatic but whether the event assessed by an objective person would be found to be a traumatic one. I find it helpful to consider whether the event is so far outside the expected, everyday experience of a worker in that occupation and environment to be shocking, such that the worker may experience the range of feelings or emotions set out in the Board Policy 1.3.6.

[57] Finally, the Tribunal referred to the exclusion contained in Policy 1.3.9 for conditions caused by labour relations issues. It said:

Policy 1.3.9 also provides that physical or mental conditions caused by labour relations issues are not compensable, as follows:

Mental or physical conditions are not compensable when caused by labour relations issues such as a decision to change the worker’s working conditions; a decision to discipline the worker; a decision to terminate the worker’s employment or routine employment related actions such as interpersonal relationships and conflicts, performance management, and work evaluation.

[58] Having correctly set out the legislative framework in which Mr. Henderson’s claim was to be adjudicated, the Tribunal applied those requirements to the evidence relevant to Mr. Henderson’s claim.

[59] First, WCAT accepted that Mr. Henderson sustained an injury, that the injury was PTSD, and that it arose out of and in the course of his employment as a police officer. WCAT said:

The Worker has been diagnosed with PTSD, ... This diagnosis is supported by the medical evidence on file. Neither the diagnosis nor the documentary or

testamentary evidence has been challenged or disputed. ... I state here at the outset that I accept that the injury sustained by the Worker is PTSD. ...

[60] The Tribunal properly instructed itself that such a finding was not sufficient, in and of itself, to entitle the Worker to compensation. WCAT explained:

For clarity, however, it should be noted that the medical diagnosis of PTSD is not implicitly equivalent to a finding that a worker has sustained an acute reaction to a traumatic event. The very question before me in this appeal is whether the Worker's PTSD arose as a result of a traumatic event occurring in the course of his employment.

[61] A careful review of WCAT's comprehensive decision reveals a long list of factors which led it to conclude that Mr. Henderson's condition did not arise as a result of a traumatic event. The Tribunal reasoned:

Under Policy 1.3.9, a traumatic event is generally expected to involve actual or threatened death, or serious injuries... the event in question involved no threat of death or serious injury to the Worker himself. The death was of a woman temporarily in his custody. ...

I find that the Worker's direct involvement with the woman was limited. ... nor was he present at the time of her death, as it occurred in hospital some days after she had left his custody.

... The circumstances of the woman's death were not objectively traumatic in the same fashion as would be a death by violent means, or by vehicular accident. ... It is therefore difficult to accept that a death by natural causes, albeit with the triggering event having occurred in police cells, but which the Worker did not directly observe at the time ... would constitute a traumatic event ...

I do accept that, as the supervising officer responsible for persons held in cells, the Worker would feel responsible for the situation; guilt, even, as well as regret and fear that he had overlooked something ... It is understandable that a person would find such an event to be distressing ...

The timing of the first investigation confirms that it was contemporaneous with the August 29, 2009 incident and the woman's subsequent death. This investigation and those which followed are intrinsically connected to the development of the Worker's PTSD. It is clear that the protracted and repeated investigations added to the Worker's fear and anxiety. ...

... However, I am unable to conclude that the August 29, 2009 incident itself constitutes a traumatic event as defined in Policy 1.3.9. The definition requires that there be a specific time and place and that there at least be a threat to one's physical integrity. There is insufficient evidence to demonstrate that there was

any threat to the Worker's physical integrity arising from the August 29, 2009 incident so as to find that it constitutes a traumatic event. ...

[62] In argument on appeal, counsel for the respondent conceded that the Tribunal commissioner erred when, at one or two places in her decision, she appears to have limited her consideration of what circumstances might, objectively, constitute a traumatic event, to only those situations where claimants were, in fact, police officers. For example, in her decision the commissioner opined:

It is therefore difficult to accept that a death by natural causes ... which the Worker did not directly observe ... would constitute a traumatic event for the reasonable person employed as a police officer.

[Underlining mine]

[63] In his factum and oral argument, counsel for the respondent acknowledged that Policy 1.3.9:

...does not restrict the reasonable person standard to a person in the same or similar occupation as a worker. This is consistent with this Court's assessment of the objective standard in *Logan v. Nova Scotia (Workers' Compensation Board)*, 2006 NSCA 88.

[64] At another place in her decision the commissioner commented upon a lack of evidence demonstrating "any threat to the Worker's physical integrity". Again, the respondent concedes there is no such requirement when advancing a psychological claim.

[65] In my view, any such misstatements by the commissioner were neither central nor fatal to the Tribunal's analysis and disposition. Overall, she properly examined the evidence through a lens of the "reasonable, hypothetical person" and her references to the appellant being "a police officer" were simply to situate the appellant within the context of this case, as opposed to subjecting his personal situation to any kind of heightened or qualified standard. A fair reading of the decision as a whole satisfies me that the commissioner properly applied an objective standard to her assessment of the evidence and that the record in this case fully supports the Tribunal's overall conclusion that the events experienced by Mr. Henderson were not traumatic.

[66] Accordingly, I find that WCAT's reasons, considered together with the result, produce a conclusion that falls within a range of reasonable outcomes. I would dismiss this ground of appeal.

- (ii) **Having found that the appellant's injury arose in the course of his employment, did WCAT err in rejecting his claim because the injury arose as a result of workplace investigations which constituted a "labour relations matter" and was, therefore, non-compensable under Policies 1.3.6 and 1.3.9?**

[67] The appellant says the WCAT erred in its interpretation and application of common law principles of causation. He argues in his factum:

95. Despite finding that the events of August 28, 2009 caused, in part, Mr. Henderson's PTSD, WCAT concluded that Mr. Henderson's claim was not acceptable but for the stress exclusion because it arose as a result of labour relations issues as defined in Policy 1.3.9 ...

96. If WCAT had applied the correct legal test for causation to its findings of fact, WCAT would have concluded that Mr. Henderson had an acceptable claim but for the stress exclusion. This is because WCAT found that the August 28, 2009 incident contributed to his injury. ....

99. ... That a non-compensable factor may have contributed to his personal injury does not bar his entitlement to compensation, although it may have an impact on apportionment as per section 10(5) of the *Act*.

[Underlining in factum]

[68] To support his submission the appellant emphasizes three words from two sentences in the Tribunal's decision. The first is the underlined "and" in the sentence that reads:

I accept that the August 29, 2009 incident was the triggering event for all that followed, particularly the repeated and prolonged investigations. The Worker developed PTSD in response to that incident and the ensuing investigations.

[Underlining in the original]

[69] The two other impugned words "together with" appear in this part of the WCAT decision:

The Worker's mental condition has been caused by the August 29, 2009 incident together with the contemporaneous commencement of the first investigation into that incident, followed by the two subsequent investigations, all of which are work-related events or stressors.

[70] Superficially, the appellant's submission raises an intriguing issue. Respectfully, however, a fair reading of the commissioner's decision as a whole satisfies me that no such error occurred.

[71] In retrospect, the commissioner's choice of words might have been expressed more precisely. However, I do not accept the meaning the appellant asks us to attach to them. Respectfully, I do not read those three words, pulled from the decision, as in any way suggesting that Mr. Henderson's PTSD arose from his brief contact with Ms. Paul the morning of August 28, thus satisfying any "causation" requirements, and entitling the appellant to compensation. On the contrary, having determined that his involvement with and psychological response to Ms. Paul's detention did not qualify as an "acute reaction to a traumatic event", such a finding precluded the worker from advancing a compensable claim under s. 2(a) of the *Act*. That conclusion by the Tribunal effectively ended that aspect of the inquiry. The commissioner then properly turned her attention to whether the "other" potential triggering events, those being the three workplace investigations into Mr. Henderson's conduct, might entitle him to compensation.

[72] I have already described the reasons articulated by WCAT as to why Mr. Henderson's experience did not constitute "an acute reaction to a traumatic event" and which, therefore, did not satisfy the requirements for awarding compensation to him under s. 2(a) of the *Act*. I need not repeat them here. It is enough to say that they are reasonable and fully supported on the record.

[73] In dealing with Mr. Henderson's appeal, the Tribunal was obliged to consider Policy 1.3.9. That Policy applied "...to all decisions made on or after March 25, 2014" pursuant to the *Act*, which obviously covered Mr. Henderson's claim. As well, the very purpose of the policy was "...to establish criteria for the individualized adjudication of psychological injury claims" under the *Act*.

[74] The Policy is intended to offer guidance in the adjudication of a claim for a "traumatic event" under s. 2(a) of the *Act*. The Policy includes a definition for "Traumatic Event(s)", and says the assessment of such events must be based on an objective standard, that being the conduct and perceptions of a reasonable, hypothetical person rather than the attitudes and characteristics of "a particular

person”. A non-exhaustive list of examples of traumatic events is provided, followed by an affirmative policy statement describing the approach the Board will take when considering whether a worker may be entitled to compensation for claims involving psychiatric or psychological injuries resulting from traumatic events. After listing the four criteria, each of which must be satisfied in order to sustain a claim for psychiatric or psychological injuries, the Policy goes on to describe in a separate, bolded heading, the circumstances in which such claims for mental or physical conditions will not be compensable. It reads:

**Non-Compensable Work-Related Events**

Mental or physical conditions are not compensable when caused by labour relations issues such as a decision to change the worker’s working conditions; a decision to discipline the worker, a decision to terminate the worker’s employment or routine employment related actions such as interpersonal relationships and conflicts, performance management, and work evaluation.

[75] Central to the appellant’s submission on this second ground of appeal are two propositions. First, he says this exclusion in the Policy for mental or physical conditions that are not compensable, should be ignored, because it is “redundant” and “subsumed” in s. 2(a) of the *Act*. Second, he says WCAT erred in considering the provisions of Policy 1.3.6 when adjudicating Mr. Henderson’s claim, because this latter policy only applies to federal employees and has nothing to do with this case.

[76] Respectfully, I do not accept either proposition.

[77] I will deal first with Policy 1.3.6. It is obvious the commissioner recognized that Policy 1.3.6 was not applicable to Mr. Henderson’s claim. She said so explicitly. As I have already pointed out, she quite properly looked to its provisions as well as other cases where that Policy had been applied, for assistance. She said:

While Policy 1.3.6 is inapplicable to this appeal, it contains a further definition of “traumatic event” which the Tribunal has found helpful in adjudicating these types of appeals. ...

[78] As far as the second proposition is concerned, I do not accept the appellant’s submission that the non-compensable exclusion for mental or physical conditions “caused by labour relation issues” in Policy 1.3.9 should be ignored as being “redundant” or “subsumed” in s. 2(a) of the *Act*. On the contrary, I regard that explicit exclusion as a clear statement by the Board, intended to provide examples

of the kinds of cases where compensation claims will be rejected for work-related events, notwithstanding the fact that they may otherwise satisfy each of the four necessary criteria for bringing a psychological claim. I agree with counsel for the respondent that the location and placement of this exclusion within the text of the policy itself is immaterial. It could just as easily have been inserted at the beginning of the Policy as a way to provide examples of situations where compensation would be denied.

[79] In the result, I see nothing unreasonable in the commissioner's reference to certain provisions in Policy 1.3.6 and Policy 1.3.9 when determining whether Mr. Henderson's claim was compensable.

[80] Neither do I think it unreasonable for the commissioner to have concluded that the three workplace investigations into Mr. Henderson's conduct fell under the "labour relations issues" exclusion in Policy 1.3.9. She reasoned:

While the investigations pertaining to the August 29, 2009 incident are not explicitly enumerated as an example of a labour relations issue by the policies, I find that workplace investigations generally would fall within that realm. As a result, the Worker's claim for recognition of his PTSD arising out of and in the course of his employment fails, as it has arisen from non-compensable work-related event(s).

[81] As a sergeant in the Truro Police Service, the appellant was subject to his contractual obligations with the town, as well as the terms of the *Police Act*. As is apparent in the claim for benefits he filed with his WCB Accident Report, Mr. Henderson obviously felt at risk when he described the nature of the occurrence for which he was making his claim:

A person had a stroke in cells while I was supervisor of shift. I'm being blamed for the death and lack of action taken as supervisor.

[82] Clearly, that sense of personal jeopardy heightened during the course of the subsequent workplace investigations. In his testimony before the Tribunal, Mr. Henderson said:

**Q.** What was your participation or role in those inquiries, if any?

...

**A.** I think the first one was done from the Halifax police department where they interviewed everybody and went through everything. And at that point, there wasn't any claim put on the Truro Police Service.

The next one was done, I believe, by the Nova Scotia Police Commission ... They interviewed everybody on the police force, or everybody that was involved there. ...

So they got the Crown Prosecutor to ... I'm not sure if it was from Halifax or our Crown ... to go through it and see if there was anything for criminal charges. And they did their investigation.

...

**Q.** Now how did it make you feel being interviewed for those inquiries?

**A.** Stressful, a little angry. I felt that I did my job to the best of my ability, and being an officer for that many years, that to insinuate that, you know, I did something wrong or didn't do enough for that person, you know, it's disturbing.

[83] In my opinion, the jeopardy felt and described by Mr. Henderson could easily be characterized as something “caused by labour relations issues such as ... a decision to discipline the worker ...” and were therefore excluded as being non-compensable under Policy 1.3.9. WCAT's analysis and disposition of this issue was reasonable and I would dismiss this second ground of appeal.

**(iii) Did WCAT err in failing to consider whether these policies were consistent with the Act or the regulations?**

[84] WCAT was never asked to decide whether these policies were consistent with the statute or the regulations. Accordingly, the Tribunal cannot be faulted for “failing” to consider the matter.

[85] I would find that there was no need for the Tribunal to address that question. The Tribunal decided that Mr. Henderson was not entitled to compensation because his psychological condition did not constitute an acute reaction to a traumatic event, but arose from non-compensable work-related events. Accordingly, I see no basis to intervene.

**Conclusion**

[86] In rejecting Mr. Henderson's claim as being non-compensable, WCAT did not err in its interpretation and application of s. 2(a) of the *Act* and Policy 1.3.9. Further, WCAT did not err in its assessment of the cause of Mr. Henderson's condition and in rejecting his claim on the basis that his PTSD arose as a result of workplace investigations which were non-compensable work-related events. Finally, WCAT did not err in “failing” to consider a matter not before it, and on

the record in this case, I am not persuaded it was an issue the Tribunal was required to address in any event.

[87] In summary, WCAT did not err in its interpretation or application of its home statute to the facts as found, all of which are fully supported in the record. An intelligible line of reasoning is apparent. The Tribunal's analysis when read together with the outcome, reveals a conclusion that falls within a range of acceptable outcomes.

[88] I would dismiss the appeal, without costs, and repeat my expression of appreciation to all counsel for the quality of their written and oral submissions.

Saunders, J.A.

Concurred in:

Bryson, J.A.

Van den Eynden, J.

## Appendix 'A'

**POLICY****NUMBER: 1.3.9**

Effective Date:	March 25, 2014	<b>Topic:</b>	<b>Psychological Injury</b>
Date Issued:	March 31, 2014	Section:	Entitlement
Date Approved by Board of Directors:	March 25, 2014	Subsection:	General

**PREAMBLE**

The purpose of this policy is to establish criteria for the individualized adjudication of psychological injury claims under the *Nova Scotia Workers' Compensation Act*.

**DEFINITIONS**

1. The "DSM" is the most current edition of the Diagnostic and Statistical Manual of Mental Disorders, which is a compendium of psychiatric diagnoses produced by the American Psychiatric Association. The manual codes and describes all recognized psychiatric diagnoses and is regarded as the definitive work on the subject. (Source: The Canadian Health Care Glossary).

2. "Traumatic Event(s)" is defined as a direct personal experience of an event or directly witnessing an event that is:

- <sup>1</sup> Sudden;
- Frightening or shocking;
- Having a specific time and place; and
- Involving actual or threatened death or serious injury to oneself or others or threat to one's physical integrity.

The "traumatic event(s)" must be assessed using an objective standard, which is a legal standard based on conduct and perceptions external to a particular person. The objective standard used is the reasonable person standard, which is considered an objective standard because it does not require a determination of what the individual was thinking. Rather it is based on a hypothetical person who exercises the degree of attention, knowledge, intelligence, and judgment that society requires of its members for the protection of their own and others' interests. The reasonable person acts sensibly, does things without serious delay, and takes proper but not excessive precautions.<sup>1</sup>

**Policy Number 1.3.9**

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<sup>1</sup> Black's Law Dictionary, Ninth Edition, 2009

Examples of Traumatic Events may include, but are not limited to:

- A direct personal experience of an event that involves actual or threatened death or serious injury;
- An actual or threatened violent physical assault;
- Witnessing or experiencing a horrific accident;
- Witnessing or being involved in a hostage taking; and
- Witnessing or being involved in an armed robbery.

## **POLICY STATEMENT**

The WCB will consider claims for compensation under the Nova Scotia *Workers' Compensation Act* when the condition results from stress that is a reaction to one or more Traumatic Events and the specified criteria outlined below are satisfied.

More specifically, the WCB will consider claims for compensation in respect of:

An acute response to one or more Traumatic Event(s) which involves witnessing or experiencing a event(s) that is objectively traumatic. Due to the nature of some occupations, some workers, over a period of time may be exposed to multiple traumatic events. If the worker has an acute reaction to the most recent traumatic event, entitlement may be considered even if the worker may experience these traumatic events as part of the employment and was able to tolerate the past traumatic events. Possible examples would include a paramedic who develops Post Traumatic Stress Disorder after responding to a number of fatal traffic collisions, or a drugstore pharmacist after multiple robberies.

### **Criteria for Traumatic Onset Stress**

Claims for psychiatric or psychological injuries resulting from Traumatic Events may be compensable if all of the following four criteria are satisfied:

- I. There must be one or more Traumatic Event(s) as defined herein;
- II. The Traumatic Event(s) must arise out of and in the course of employment;
- III. The response to the Traumatic Event(s) has caused the worker to suffer from a mental or physical condition that is described in the DSM; and
- IV. The condition is diagnosed in accordance with the DSM and by a health care provider being either a psychiatrist or a clinically trained psychologist registered with the Nova Scotia Board of Examiners in Psychology.

### **Non-Compensable Work-related Events**

Mental or physical conditions are not compensable when caused by labour relations issues such as a decision to change the worker's working conditions; a decision to discipline the worker; a decision to terminate the worker's employment or routine employment related actions such as interpersonal relationships and conflicts, performance management, and work evaluation.

## **APPLICATION**

This policy applies to all decisions made on or after March 25, 2014 pursuant to the *Nova Scotia Workers' Compensation Act*.

**REFERENCES**

Workers' Compensation Act (Chapter 10, Acts of 1994-95), Section 2.

The most current edition of the *American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders*