WORKPLACE SAFETY AND INSURANCE APPEALS TRIBUNAL

DECISION NO. 693/20

BEFORE: M. Crystal: Vice-Chair

HEARING: June 9, 2020 at Toronto
Oral by Teleconference
Post-hearing activity completed on August 11, 2020

DATE OF DECISION: February 26, 2021

NEUTRAL CITATION: 2021 ONWSIAT 295

DECISION(S) UNDER APPEAL: WSIB Appeals Resolution Officer (ARO) decision dated December 27, 2018

APPEARANCES:

For the worker: Mr. L. Dillon, Lawyer

For the employer: Mr. J. Mandlowitz, Paralegal

Interpreter: Not applicable

REASONS

(i) Introduction

[1] This appeal was heard by teleconference in Toronto, on June 9, 2020. The worker appeals the decision of Appeals Resolution Officer (ARO) R. Calvert, dated December 27, 2018. That decision determined that the worker is not entitled to benefits for chronic mental stress (CMS).

[2] The worker appeared and was represented by Mr. Leo Dillon, lawyer. The employer participated in the appeal, and was represented by Mr. Jason Mandlowitz, paralegal. The worker testified at the appeal hearing. The employer's Vice-President (VP) with responsibility for Human Resources (HR) also testified at the hearing. The parties' representatives each provided written submissions. Written submissions, dated June 30, 2020, were provided by Mr. Dillon. Written submissions, dated July 13, 2020 were provided by Mr. Mandlowitz. No reply submissions were provided.

(ii) Synopsis

[3] In the circumstances of this appeal, the worker, who was 38 years old at the time of the appeal hearing, was employed as a social worker by the accident employer, a community based provider of home support services. The employer provided home care/personal services and also provided social services related to an array of issues affecting its clients, including housing issues, co-morbidity issues, and financial issues. The worker testified that every client file was unique and presented its own challenges. The worker testified that when she was assigned a new client, it was frequently necessary to carry out a social work assessment of the client to determine the types of services that the client might require. She noted that clients often required counselling services, advocacy, linkages to other programs, and other services provided through programs administered by the employer. The worker testified that she provided these and other types of services to the clients who had been assigned to her.

[4] The worker testified that she began working as a social worker in 2005, after having completed a Masters degree, and that her first employment as a social worker was with a different community based service provider. She testified that she began her employment with the employer in August 2006. She testified that, in addition to providing assistance to the clients included in her caseload, which ranged from 20 to 35 clients at any particular time, she performed other work, such as providing leadership to community working groups and programs, as well as programs administered by the employer. The worker testified that she chaired an elder abuse program as well as a bereavement group. She also stated that she worked on a program which had a goal of getting seniors to participate in social activities outside of their home.

[5] In addition to the committee work, the worker also testified that she played a role in mentoring students who had been assigned to the employer as part of a "practicum" required by colleges or universities offering Bachelors or Masters degrees in social work. The worker testified that her regular hours of employment were 35 hours per week, but that her work on committees, and mentoring students resulted in her typically working significantly more than 35 hours per week. The worker testified that she was not paid an additional amount for this additional work, but rather she felt that it was expected of her by the employer if she was to advance in her career as a social worker with the employer's organization. She stated that her

supervisor indicated that, as a senior member of the employer's social work team, she was expected to take on the additional work, and indicated that had she declined these assignments it would be met with disapproval by the employer. The worker testified that until problems arose with her employment in 2018, she believed that she was highly regarded by the employer.

[6] The worker testified that in late summer or early fall of 2017, her employer began to discuss with her a new position that it was considering for the worker. She stated that a position for a "Care Navigator" came up as a possible assignment for the worker at that time. The worker explained that a common issue which sometimes arose among the employer's clients was that a client had been treated for a condition at hospital, and the client's circumstances were such that the client should be discharged from hospital. In some such cases, the client's circumstances were not suitable for the client to return home, and the client needed to be cared for at a different facility, such as a long term care facility. In many cases, the client required assistance to make a number of decisions which arose as a result of the need to transition into the new facility.

[7] The employer advised the worker that a new role as a "Care Navigator" would involve the worker being placed at a particular care facility (hereinafter referred to as "the Centre"), and that her new position would involve her providing assistance, advice, advocacy and related assistance to individuals who were seeking or considering a transition into the Centre from hospital. The worker testified that her supervisor recommended that the worker take on this position and that she accepted the position. The case materials included a Board memo, dated February 22, 2018, reflecting a telephone conversation of that date between the worker and the Board's case manager. The memo noted that the worker indicated that she "agreed she applied for this role and was successful" but that "limited information [had been] provided about the role and its requirements." According to the ARO decision, dated December 27, 2018, which is the subject of this appeal, the worker understood initially that the creation of her new role was to be a "pilot project".

[8] The worker testified that in January 2018, she began to develop misgivings about her upcoming position as a Care Navigator, and she asked for a written description of the new position. The worker testified that in response to this request, the employer provided the worker with a letter dated January 23, 2018. From the Worker's Report of Injury (Form 6), dated January 29, 2018, and the Employer's Report of Injury (Form 7), dated February 6, 2018, the letter was presented to the worker on January 25, 2018. The letter stated, in part:

> We are pleased to offer you a secondment position as a Social Worker/Care Navigator in the [the Nursing Unit at the Centre]. This position is a joint initiative between [the employer and/or its extended organization], [the Centre and its related organization].
>
> The terms are as follows:
>
> 1) Your secondment will commence on February 20, 2018 and end February 16, 2019. In the event that funding for this position is discontinued, you will return to your role as Social Worker at [the employer] on or before the aforementioned end date.
>
> 2) Your hours will be 8:30 am to 4:30 pm.
>
> 3) Your annual salary will remain at $64,000 and you will continue to be paid on a bi-weekly basis by [the employer]. Your salary will be reviewed in April 2018.
>
> 4) Your benefits, vacation and RRSP contributions will remain the same.

> 5) In the event that you wish to end this contract prior to the agreed upon end date, [the employer] requires that you provide a minimum of two (2) weeks written notice of your resignation.
>
> Please indicate your acceptance of this offer by signing below and returning a signed copy to the attention of [the employer's human resources officer].

[9] At the hearing, the worker testified that, prior to receiving this letter, the worker was continuing with her busy caseload, and that she was continuing to have new clients referred to her. She stated that, at the same time, she was training a new social worker to take over her role with the employer, and was beginning the process of transferring files to her replacement. She stated that, in addition, at that time, she was continuing to mentor a student, and that she had ongoing responsibilities for the committee work she had been performing. The worker stated that she was "struggling" to carry on with her workload while transitioning into her new position, when she received the letter excerpted above. The worker testified that during this period of time, just prior to her receiving the letter excerpted above, she had asked the employer for a description of the job that she was to assume, and that her supervisor advised the worker to develop a job description. The worker testified that two other Care Navigator positions had been put in place with other care facilities, and that she spoke to the social workers who had assumed these positions, but that she expected more support from the employer in making the transition to the new position.

[10] The worker testified that when she read the letter, she was surprised that the letter referred to the new position as a "secondment" and that she was confused about her ongoing status with the employer. She stated that until she received the letter, she had believed that she was moving to a new permanent position. The worker testified that she discussed the letter with her supervisor, and her supervisor told her to calm down and "go have a glass of wine". The worker testified that she became distressed about her employment status at the meeting, and that the supervisor observed and discussed the worker's distress with her.

[11] The worker testified that she subsequently had a further meeting with the employer's Vice-President (VP) with responsibility for Human Resources. The VP was also a witness at the appeal hearing. The worker testified that the VP discussed with the worker how a secondment arrangement would work, and that the VP stated that if for any reason, the worker was not successful in her new position as a Care Navigator, she could return to her former position as a social worker with the employer. The worker testified that her recollection of the details of the meeting with the VP was "a blur"

[12] The VP testified that although the worker had never reported to her, prior to her meeting with the worker in January 2018, she knew the worker as an employee of the employer. She stated that she was aware of the worker as a "solid contributor" to the employer's work, and that she had not had any prior performance issues with the employer. The VP testified that she tried to explain to the worker how a secondment would work, and that the purpose of the arrangement was to provide a "safety net" for the worker in the event that her new position did not work out. The VP stated that she met with the worker and the worker's supervisor in the VP's office. She stated that it was apparent that the worker was not happy about the fact that the new position was to be a secondment, but that it did not appear that the worker fully understood how a secondment was to work. She noted that two other social workers had transitioned to the role of Care Navigator with other care facilities, and that in each case, the circumstances were unique, depending on the needs of the care facility. The VP stated that the other social workers who took

on these positions refined the details of the respective positions as they worked in the new positions. The VP testified that, during her meeting with the worker, the worker appeared to be stressed and she was not sure if the worker understood what was being said at the meeting.

[13] The worker testified that after discussing the matter with the VP, the worker's supervisor realized that the worker was in distress and suggested that she take time off work. The worker testified that she had been struggling with her workload and the uncertainty related to her new position, but that when she received the letter, dated January 23, 2018, it "hit her like a ton of bricks" and she experienced symptoms including insomnia, mood changes, loss of appetite, periods of crying, and feeling generally exhausted and overwhelmed by the situation. The worker testified that she felt that she was not supported by the employer, and that she felt unable to obtain answers from the employer to resolve her uncertainties about her employment status. She stated that she stopped working in late January 2018, and that at about that time her depression and anxiety symptoms worsened. She stated that, at this time, due to her symptoms, she having difficulty managing her activities of daily living and was not able to return to work.

[14] The worker testified that she had experienced psychiatric symptoms earlier in her life, prior to the events described above in early 2018. She stated that she had experienced anxiety and depression in or about 2003, when she was an undergraduate student at university. The worker stated that she received treatment from a psychiatrist at that time, but that she did not miss any classes due to psychological issues. The worker testified that she saw a few psychiatrists after her initial episode of symptoms in 2003, and that she was working with her psychiatrists to identify the correct medication regime to control her symptoms. She stated that she has been prescribed anti-depressant medication on a consistent basis since 2003, and that at times, she has been under the care of her family physician, who has prescribed her psychiatric medication for her.

[15] The case materials included a report, dated August 13, 2018, prepared by Dr. Salvatore Mallia, psychiatrist, which stated that he first treated the worker in 2010, when the worker was referred to him by her family physician "with a provisional diagnosis of Major Depressive Illness and anxiety." The report went on state, in part:

> The past psychiatric history dated back to 2003, when the patient was seen by a community psychiatrist for anxiety, depression and obsessive-compulsive disorder. The patient was started on Celexa and clinically monitored by her family physician. The Celexa has been increased up to 60 mg daily on and off from 2003 to 2010.
>
> ….
>
> Over the last year, the patient has been employed by [the employer] as a community social worker. She works providing service for elderly patients as well as providing support for the clients and their family members. Recently she has been working on 2 jobs with the implicit intent of transitioning into a new position. Unfortunately, this past November the upper management confronted the patient and rejected her complaints about the long hours of work she has been forced into. She extended herself into different areas as suggested by upper management. Since the meeting she had with upper management, her mental status has been deteriorating. She has been more anxious, more depressed and dysphoric. She has been unable to socialize with family and friends. She perceives this as a major failure in her career. This has been a devastating feeling. She is a scrupulous and very diligent person, which works with pride and intensive commitment to her work. The harsh criticism she received from upper management was quite traumatic to her ego as well as her mental health.

[16] The report provided the following "final diagnoses":

1. Major Depressive Illness, recurrent, moderate form.

2. Generalize anxiety disorder, moderate to severe.

3. Occupational stressors.

4. Obsessive Compulsive Disorder.

[17] The report concluded by stating:

> The prognostic outcome remains guarded, given the complexity of [the worker's] mental and emotional disturbances as well as compounded by the mental trauma she described at work.

[18] At the hearing, the worker testified that although she had been receiving psychiatric treatment and had been prescribed anti-depressant medication since about 2003, until the incident in 2018, she had never lost time from school or work due to psychiatric or psychological issues. She stated that prior to the incident, she had not lost time from her work with the employer due to her psychological condition, and she had not requested or received any accommodation from the employer related to this condition. She stated that, prior to the incident, although she had not made an effort to conceal her condition, she had not disclosed her prior psychological condition to the employer, and the employer had not been aware of it.

[19] The worker testified that she was treated by Dr. Mallia after the incident in January 2018. She stated that she had some suicidal ideation in June 2018, and that she was hospitalized under a "Form 1" as a result. She testified that she was hospitalized for only one night after which she was discharged from hospital. She stated that she saw Dr. Mallia about once per month following her hospitalization. The worker testified that Dr. Mallia passed away in early 2019, and that she began to see another psychiatrist, but that her relationship with the psychiatrist did not work out. She stated that she became pregnant in 2019, and that during her pregnancy she began treatment with another psychiatrist, Dr. Sharon Szmuilowicz in late 2019. She testified that since the start of the Covid 19 Pandemic in 2020, she has been treated by Dr. Szmuilowicz by videoconference. She stated that she continues to experience symptoms of depression and anxiety.

[20] The worker testified that prior to her employment with the employer, she had some panic attacks and that she also had some panic attacks during the employment, but that she was able to continue working for the employer without accommodation or lost time. She stated that since January 2018, her panic attacks have been related to her ability to work, and that she does not believe that she is capable of returning to work in any employment. She stated that she has daily intrusive thoughts, and that she did not experience intrusive thoughts in this manner prior to January 2018.

(iii) Applicable law and policy

[21] The workplace accident which is the subject of this appeal occurred, as alleged, on January 25, 2018. Accordingly, the worker's entitlement to benefits in this appeal is governed by the *Workplace Safety and Insurance Act, 1997*.("the *Act*")

[22] In this appeal, the worker is seeking entitlement to benefits for chronic mental stress. Section 13 of the *Act* addresses entitlement to benefits for chronic mental stress. In this regard, section 13 provides:

> **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.
>
> ….
>
> **(4)** Subject to subsection (5), a worker is entitled to benefits under the insurance plan for chronic or traumatic mental stress arising out of and in the course of the worker's employment.
>
> **(4.1)** The worker is entitled to benefits under the insurance plan as if the mental stress were a personal injury by accident.
>
> **(5)** A worker is not entitled to benefits for mental stress caused by decisions or actions of the worker's employer 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.

[23] The case materials included *Operational Policy Manual* (OPM) Document No. 15-03-14 on the subject of "Chronic Mental Stress". The policy document states in part:

> **Policy**
>
> A worker is entitled to benefits for chronic mental stress arising out of and in the course of the worker's employment.
>
> A worker is not entitled to benefits for chronic mental stress caused by decisions or actions of the worker's employer 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.
>
> ….
>
> **Purpose**
>
> The purpose of this policy is to provide entitlement guidelines for claims for chronic mental stress with accident dates on or after January 1, 2018.
>
> **Guidelines**
>
> **Definition**
>
> **Workplace harassment**
>
> Workplace harassment occurs when a person or persons, while in the course of the employment, engage in a course of vexatious comment or conduct against a worker, including bullying, that is known or ought reasonably to be known to be unwelcome.
>
> **Chronic mental stress**
>
> A claim for chronic mental stress (as described below) is distinct from a claim for traumatic mental stress. For information relating to claims for traumatic mental stress, see 15-03-02, Traumatic Mental Stress (Accidents on or After January 1, 2018).
>
> A worker will generally be entitled to benefits for chronic mental stress if an appropriately diagnosed mental stress injury is caused by a substantial work-related stressor arising out of and in the course of the worker's employment. For more information see 15-02-02, Accident in the Course of Employment.
>
> **NOTE**
>
> The term "work-related stressor" is meant to include multiple work-related stressors, as well as a cumulative series of work-related stressors

In order to consider entitlement for chronic mental stress the WSIB decision-maker must be able to identify the event(s) which are alleged to have caused the chronic mental stress.

This means that the event(s) can be confirmed by the WSIB decision-maker through information or knowledge provided by co-workers, supervisory staff, or others.

Substantial work-related stressor

A work-related stressor will generally be considered substantial if it is excessive in intensity and/or duration in comparison to the normal pressures and tensions experienced by workers in similar circumstances.

Workplace harassment will generally be considered a substantial work-related stressor.

Jobs with a high degree of routine stress

A claim for chronic mental stress made by a worker employed in an occupation, or a category of jobs within an occupation, reasonably characterized by a high degree of routine stress should not be denied simply because all workers employed in that occupation, or category of jobs within that occupation, are normally exposed to a high level of stress. In some cases, therefore, consistent exposure to a high level of routine stress over time may qualify as a substantial work-related stressor.

Jobs with a high degree of routine stress would typically have one or both of the following characteristics:

- responsibility over matters involving life and death, or
- routine work in extremely dangerous circumstances.

Interpersonal conflicts

Interpersonal conflicts between workers and their supervisors, co-workers or customers are generally considered to be a typical feature of normal employment. Consequently, such interpersonal conflicts are not generally considered to be a substantial work-related stressor, unless the conflict

- amounts to workplace harassment, or
- results in conduct that a reasonable person would perceive as egregious or abusive.

Standard of proof and causation

In all cases, the WSIB decision-maker must be satisfied, on a balance of probabilities, that the substantial work-related stressor

- arose out of and in the course of the worker's employment, and
- was the **predominant cause** of an appropriately diagnosed mental stress injury.

For the purposes of this policy, **"predominant cause"** means that the substantial work-related stressor is the primary or main cause of the mental stress injury—as compared to all of the other individual stressors. Therefore, the substantial work-related stressor can still be considered the predominant cause of the mental stress injury even though it may be outweighed by all of the other stressors, when combined.

Diagnostic requirements

Before any chronic mental stress claim can be adjudicated, there must be a diagnosis in accordance with the Diagnostic and Statistical Manual of Mental Disorders (DSM) which may include, but is not limited to,

- acute stress disorder
- posttraumatic stress disorder

- adjustment disorder, or
- an anxiety or depressive disorder.

In most cases the WSIB will accept the claim for adjudication if an appropriate regulated health care professional provides the DSM diagnosis. However, in complex cases, for example where there is evidence that a non-work-related stressor(s) may have caused or contributed to the injury, the WSIB decision-maker may require a further assessment, including an assessment by a psychiatrist or psychologist, to help clarify initial or ongoing entitlement.

Pursuant to the Regulated Health Professions Act, 1991, regulated health care professionals who are qualified to provide a DSM diagnosis are

- physicians
- nurse practitioners
- psychologists, and
- psychiatrists.

Pre-existing, non-work-related psychological condition

For information on the effect (if any) of a pre-existing, non-work-related psychological condition on a claim for chronic mental stress see 15-02-03, Pre-existing Conditions.

NOTE

When assessing the impact (if any) of a pre-existing condition on a claim for chronic mental stress, the guidelines in 15-02-03, Pre-existing Conditions, apply except that, when determining whether the pre-existing psychological condition has overwhelmed the work-related mental stress injury, the WSIB decision-maker uses the predominant cause test, rather than the significant contribution test. By doing so the WSIB decision-maker ensures that the causation test used to determine initial entitlement in the claim is consistent with the causation test used to determine ongoing entitlement.

Employers' decisions or actions relating to employment

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

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

However, workers may be entitled to benefits for chronic mental stress due to an employer's decisions or actions that are not part of the employment function, such as

- **workplace harassment**, or
- conduct that a reasonable person would perceive as egregious or abusive.

Application date

This policy applies to all accidents on or after January 1, 2018.

(iv) The issue under appeal

[24] The sole issue to be determined in this appeal is whether the worker is entitled to benefits for CMS.

(v) Analysis

[25] From my review of the law and policy related to this appeal, I find it useful to consider the framework for entitlement to benefits for CMS as a general provision of entitlement subject to a few exceptions. The general provision of entitlement is set out in section 13(4) of the *Act*, which provides that "Subject to subsection (5) [i.e., one of the exceptions, to be discussed below], a worker is entitled to benefits under the insurance plan for chronic or traumatic mental stress arising out of and in the course of the worker's employment." The general provision of entitlement is also presented as the opening statement of OPM Document No. 15-03-14, which begins with the statement:

> A worker is entitled to benefits for chronic mental stress arising out of and in the course of the worker's employment.

[26] Section 13(4.1) provides further elaboration on the nature of the entitlement provided under section 13(4), stating that "the worker is entitled to benefits under the insurance plan as if the mental stress were a personal injury by accident."

[27] One of the exceptions to the general provision of entitlement, which is set out in the policy document, relates to the question of whether the mental stress injury "is caused by a substantial work related stressor". I interpret the policy document to mean that entitlement for CMS will not be in order if the work related stressor which caused the injury is not "substantial". The policy document provides that "a work-related stressor will generally be considered substantial if it is excessive in intensity and/or duration in comparison to the normal pressures and tensions experienced by workers in similar circumstances." It follows that entitlement to benefits of CMS will not be in order if the subject work-related stressor or stressors is not considered to be "excessive in intensity and/or duration" when compared to the "normal pressures and tensions experienced by workers in similar circumstances."

[28] The policy document qualifies this point further by indicating that entitlement will not be denied on the basis of comparison to other similarly situated workers in relation to jobs which are associated with a high level of routine stress. The policy document provides that "a high level of routine stress over time may qualify as a substantial work-related stressor" notwithstanding the fact that other similarly situated workers do not sustain an impairment from the routine stress. The policy document provides that this approach of not requiring a comparison to similarly situated workers applies only when the worker's job involves "responsibility over matters involving life and death" or involves "routine work in extremely dangerous circumstances."

[29] The policy document also provides that "interpersonal conflicts" generally will not qualify as "substantial" work-related stressors, but emphasizes the fact that harassment and abusive behaviour may be considered to be "substantial".

[30] A second exception to the general provision of entitlement to benefits for CMS is the requirement set out in the policy document that the work-related stressor must be the "predominant cause" of the worker's impairment. According to the policy document,

entitlement to benefits for CMS will not be in order if the subject work-related stressor is not "the primary or main cause of the mental stress injury." The policy document directs the decision maker to compare the subject work-related stressor to "all of the other individual stressors" affecting the worker. Entitlement will only be in order if the subject work-related stressor is determined to be the most significant cause contributing to the worker's impairment. It follows that, according to the policy document, where the work-related stressors have made a significant contribution to the worker's impairment, but a non-work-related stressor has made a greater contribution to the impairment, entitlement will not be in order, notwithstanding the fact that a work-related factor has made a significant contribution to the worker's impairment.

[31] The policy document also refers to a worker's "pre-existing non-work-related psychological condition", and states that the Board's policy on "Pre-existing Conditions", which is included in *OPM* Document No. 15-02-03, applies. That policy document states, in part:

> **Policy**
>
> Entitlement for a work-related injury/disease will not be denied due to the existence of a pre-existing condition. Once initial entitlement is established, the decision-maker considers the impact, if any, of pre-existing conditions on the worker's ongoing impairment.
>
> **Principles**
>
> The Workplace Safety and Insurance Act, 1997 (WSIA) directs that compensation be provided for work-related injuries/diseases. Entitlement is not granted for injuries/diseases resulting from other factors, such as non-work-related pre-existing conditions. Work-relatedness is established when determining initial entitlement. Decision-makers continue to evaluate the work-relatedness of a worker's ongoing impairment throughout the life of a claim.
>
> The "thin skull" and "crumbling skull" doctrines are well-established legal principles that are components of decision-making at the WSIB.
>
> The WSIB makes its decisions based on the merits and justice of each case, see 11-01-03, Merits and Justice.
>
> When the evidence for and against an issue related to a worker's claim are evenly balanced, the worker must be given the benefit of the doubt, see 11-01-13, Benefit of Doubt.
>
> ….
>
> **Initial entitlement**
>
> The decision-maker first determines entitlement in the claim, see 11-01-01, Adjudicative Process.
>
> Consistent with the "thin skull" doctrine, the fact that a worker may have a pre-existing condition that could increase susceptibility to injury/disease is not considered during the initial determination of entitlement in a claim. In such cases, workers are compensated for the work-related injury/disease and the claim is not denied due to the existence of a preexisting condition.
>
> ….
>
> **Determining work-relatedness of ongoing impairment**
>
> Once the existence of a pre-existing condition has been established, ongoing work-relatedness is determined by considering the relationship, if any, between the pre-existing

> condition, the work-related injury/disease, and the worker's impairment, based on the clinical evidence.
>
> ….
>
> In some cases the clinical evidence may demonstrate that the significance of the preexisting condition is so great it has overwhelmed the impact of the work-related injury/disease, rendering it insignificant. When this occurs, the work-related injury/disease cannot be considered to be of sufficient significance in comparison to the pre-existing condition, for benefits to continue.

[32] *OPM* Document No. 15-03-14 on CMS includes a "NOTE" in its discussion of pre-existing psychological conditions, which provides that the Board's policy on pre-existing conditions applies "except that when determining whether the pre-existing psychological condition has overwhelmed the work-related mental stress injury, the WSIB decision-maker uses the predominant cause test, rather than the significant contribution test." The portion of the CMS policy which addresses the effects of a pre-existing psychological condition is closely related to the analysis necessary to determine whether the subject work-related stressor was a "predominant cause" of the worker's impairment. I interpret the CMS policy to mean that if the significance of a worker's pre-existing psychological condition is greater than the significance of the subject work-related stressors, the work-related stressors, although making a significant contribution to the impairment, will not be considered to have been a predominant cause of the worker's impairment, and entitlement to benefits to CMS will not be in order.

[33] Finally, a third exception to the general provision of entitlement to benefits for CMS is provided by section 13(5) which provides that "a worker is not entitled to benefits for mental stress caused by decisions or actions of the worker's employer 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." I interpret this provision to mean, notwithstanding the fact that a worker sustained an impairment due to the development of mental stress arising out of and in the course of employment, entitlement will not be in order if it can be demonstrated that the impairment arose from the employer's good faith actions in carrying out its role in the employment relationship.

[34] OPM Document No. 15-03-14 restates this exception to the general provision of entitlement noting that "there is no entitlement for chronic mental stress caused by an employer's decisions or actions that are part of the employment function" and provides examples of such decisions or actions, such as discipline, termination, demotion, and changes to working conditions. The policy document also reinforces the requirement that, in order for the exception to general entitlement arising from employers' actions to apply, the employer's actions must be taken in good faith, and not be associated with "workplace harassment" or "egregious or abusive" conduct.

[35] Put succinctly, the combined effect of section 13(4)(4.1) and (5) and OPM Document No. 15-03-14 on CMS provides the following adjudicative framework:

> A worker who sustains an impairment related to chronic mental stress arising out of and in the course of employment is entitled to benefits for the impairment, subject to the following exceptions:
>
> 1. Entitlement will not be in order if the work-related stressor(s) are not substantial;

2. Entitlement will not be in order if the work-related stressor(s) are not the predominant cause of the impairment; and

3. Entitlement will not be in order if the impairment is related to good faith actions taken by the employer in carrying out its role in the employment relationship.

[36] In keeping with the framework noted above, I have considered, first, whether the worker satisfies the general requirements for entitlement (i.e., that the worker sustained an impairment associated with CMS arising out of and in the course of employment), without considering the effect of the exceptions to entitlement noted above. Subsequently, each of the exceptions to entitlement will be addressed.

[37] I note that in her testimony, the worker acknowledged that she had not been the subject of workplace harassment by the employer. I also find that the worker was not subject to abusive or egregious conduct in the context of her claim. Accordingly, these issues will not be addressed in detail further in these reasons.

(a) Did the worker sustain an impairment associated with CMS, arising out of and in the course of employment?

[38] I note that following her meeting, on January 25, 2018, when she received the letter which described her transfer to a new position as a secondment, and following a further meeting with the employer's VP, the worker was treated by Dr. Mallia. Dr. Mallia provided a Health Professional's Report (Form 8), dated January 28, 2018, which indicated that the worker had experienced a "relapse of her depressive illness, occupational stressors", and provided a diagnosis of "Major Depressive Illness, recurrent, Generalized Anxiety Disorder." The Form 8 noted that the worker's treatment plan was to include "individual counselling, pharmacotherapy – Pristiq 100 mg…" and that she had a pre-existing condition which could impact her recovery, namely, "Recurrent Depression/Anxiety". The Form 8 also indicated that the worker was not able to work due to her workplace illness, noting that "patient suffers from a recurrent form of Depression, Anxiety aggravated by occupational stress." The Form 8 also indicated that the worker was "Anergic, anhedonic, [had] insomnia, poor concentration" and was to be reevaluated in 3 months.

[39] Dr. Mallia provided a further report, dated August 13, 2018, which provided information about the worker's past psychological history, which involved an onset of anxiety, depression and obsessive-compulsive disorder. The report also referred to Dr. Mallia's treatment of the worker in 2010 for Major Depressive Illness, recurrent, moderate form and Obsessive Compulsive Disorder. The report also described the incidents that occurred in January 2018, which are the subject of this appeal. This portion of the report is excerpted above. There are elements of the report which, in my view, are somewhat inconsistent with the version of events described by the worker at the hearing. For example, the report stated that in November 2017, "upper management confronted the patient and rejected her complaints about the long hours of work she has been forced into."

[40] My review of the testimony at the appeal hearing does not disclose that, prior to the incident on January 25, 2018, the worker complained to the employer about her long hours of work, or that any complaints made by the worker had been "rejected" by the employer. The report also refers to "harsh criticism" that the worker received from management of the

employer, however, the worker's testimony at the hearing did not reflect the view that she believed that she had been harshly criticized by the employer.

[41] Notwithstanding these inconsistencies with other evidence, I do attribute weight to the portion of the report which provided diagnoses of Major Depressive Illness and Generalized Anxiety, and that the worker had been subject to occupational stressors.

[42] Further, as noted above, the worker began treatment with Dr. Szmuilowicz in November 2019, after she had become pregnant. Dr. Szmuilowicz provided a report, dated March 24, 2020, which also referred to the worker's "biggest stress. anxiety and sadness was related to feeling unsupported and dismissed by her workplace." Although the report also commented on the worker having "some symptoms of baby blues", I am satisfied that the report supports the conclusion that the worker sustained a psychological injury associated with occupational stressors.

[43] On the basis of this medical information and the testimony provided by the worker and by the VP, I conclude that the worker sustained an impairment related to CMS, and that the impairment was occupationally related. I find that the worker's psychological impairment arose out of and in the course of her employment with the employer, in that the worker experienced a number of sources of occupational stress leading up to her meeting and her impairment was triggered when the worker was provided the secondment letter at work on January 25, 2018. Prior to that incident, the worker appeared to be functioning in both her personal and professional capacities, but according to her testimony, and the medical information on file, she was not able to function subsequent to the meeting.

[44] The Board's policy contains a NOTE stating that:

> The term 'work-related stressor' is meant to include multiple work-related stressors, as well as a cumulative series of work-related stressors.
>
> In order to consider entitlement for chronic mental stress the WSIB decision-maker must be able to identify the event(s) which are alleged to have caused the chronic mental stress.
>
> This means that the event(s) can be confirmed by the WSIB decision-maker through information or knowledge provided by co-workers, supervisory staff, or others.

[45] I find that there was a work-related stressor which constituted an identifiable event within the meaning of the policy document and the work related events leading up to it were identifiable events.

[46] I also find that the diagnostic requirements of the policy are met in that Dr. Mallia and Dr. Szmuilowicz provided diagnoses of anxiety and depressive disorder, which are listed in the policy document as diagnoses which satisfy the diagnostic requirements for entitlement to benefits for CMS.

[47] On this basis, I find that the worker sustained an impairment associated with CMS which arose out of and in the course of the worker's employment with the employer.

(b) Was the worker's mental stress injury caused by a substantial work-related stressor?

[48] As noted above, OPM Document No. 15-03-14, provides that "a worker will generally be entitled to benefits for chronic mental stress if an appropriately diagnosed mental stress injury is

caused by a *substantial work-related stressor* [emphasis added]". The policy document goes on to state that "a work-related stressor will generally be considered substantial if it is excessive in intensity and/or duration in comparison to the normal pressures and tensions experienced by workers in similar circumstances." The requirement that entitlement to benefits for CMS must be associated with a substantial work-related stressor, is further qualified by noting that entitlement will not be denied on the basis of a comparison of the worker's circumstances to the circumstances of workers in similar circumstances where the job in question involves a high level of routine stress. According to the policy document, such jobs involving a high level of stress are jobs associated with "responsibility over matters involving life and death" or "routine work in extremely dangerous circumstances."

[49] The approach adopted by the OPM Document No. 15-03-14, which imposes a comparison of the worker's circumstances to the circumstances of other workers "in similar circumstances" is similar in some respects to the approach taken to stress cases at the Tribunal referred to as the "average worker test". The average worker test was discussed in *Decision No. 826/94*, which described the test in the following manner:

> The majority of this Panel would suggest that the test which emerges from this line of chronic stress cases is a two-part test which might usefully be described as follows:
>
> > *Part I*: Is it plausible that workers of average mental stability would have perceived the workplace circumstances or events to be as mentally stressful as the injured worker perceived them to be?
> >
> > *Part II*: If so, would such average workers be at risk of suffering a disabling mental reaction to such perceptions?
>
> If the answer to either question is no, the psychological damage will be held not to be compensable.

[50] The average worker test was reviewed and slightly reworded in *Decision No. 422/96* as follows:

> 1. Is it reasonable that workers of average mental stability would perceive the workplace events to be mentally stressful?
> 2. If so, would such average workers be at risk of suffering a disabling mental reaction to such perceptions?
>
> If the answer to either question is "no", the psychological damage would not be compensable.

[51] Other principles in *Decision No. 826/94* were reaffirmed by *Decision No. 422/96*. In particular, *Decision No. 826/94* also noted the application of the "thin skull rule" to workers compensation cases:

> …Suffice it to say, that in the common law of personal injury compensation the thin-skull rule has been long entrenched and that it is applicable in workers' compensation claims as well.
>
> In *Decision No. 915* (1987), 7 W.C.A.T.R. 1, the reasons for the application of the rule in the workers' compensation system are set out briefly in the following passage: (at p. 136)
>
> > The thin-skull doctrine also applies in Workers' Compensation cases and for two reasons. One reason is that permitting compensation to be denied or adjusted because of pre-existing, pre-disposing personal deficiencies would very substantially reduce the nature of the protection afforded by the compensation system as compared to the Court system for reasons that would not be

> understandable in terms either of the historic bargain or of the wording of the legislation. The other reason is that in a compensation system injured persons become entitled to compensation because they have been engaged as workers. They have functioned as workers with any pre-existing condition they may have had. It seems wrong in principle that conditions which did not affect their employment as workers should be relied upon to deny them compensation as injured workers.

[52] I note that the Board's OPM Document No. 15-02-03 on the subject of "Pre-existing Conditions" also endorses the "thin skull rule". The policy document states:

> The "thin skull" and "crumbling skull" doctrines are well-established legal principles that are components of decision-making at the WSIB.

[53] I also note that OPM Document No. 15-03-14 on CMS incorporates *OPM* Document No. 15-02-03 by reference.

[54] I note that, as a general observation, when applying the "thin skull rule", a workers' compensation decision maker considers the impact of the subject accident on the worker in light of the worker's personal characteristics and vulnerabilities (i.e., subjectively). In accidents causing organic injuries there is generally no need to give particular consideration to whether there is an objective injuring process. In mental stress claims, however, before the "thin skull" principle is applied, the "average worker test" has been considered to help confirm that there is an objective or identifiable injuring process. In applying the "average worker test", the nature of the accident or injuring process is considered in light of the personal characteristics and vulnerabilities of an average person, rather than of the worker in question (i.e., objectively). In this regard, the approach taken by OPM Document No. 15-03-14 on CMS as it relates to the requirement of a "substantial work related stressor" is similar to the approach taken by the "average worker test", in that it sets an objective standard for identifying compensable accidents which are causally related to chronic stress.

[55] *Decision No. 826/94* sought to reconcile the respective approaches reflected by the "average worker test" and "the thin skull rule". In this regard, the decision stated:

> …as indicated explicitly in the route salesman case above (*Decision No. 520/90*), it is obviously the question of the sufficiency of the *association* between the "injuring process" and the employment that is the issue of difficulty in the type of cases from which the chronic stress average-worker test has emerged. Indeed, in the opinion of the majority of this Panel, that test, and the limitations which it imposes on the compensability of chronic stress claims, is only justifiable in terms of the language of the Act to the extent that it is seen as a reasonable way of testing the sufficiency of the causal association between the *injuring process*, which has produced the psychological injury, and *the employment* [emphasis in original].
>
> In our view, what these cases may be taken as saying is that if the injuring process in question is primarily an atypical dysfunctional process in the worker's mind, it cannot then be found to be a process having an association with the employment sufficient to create entitlement to compensation.

[56] I interpret *Decision No. 826/94* to mean that given the entrenched nature of the "thin skull rule" as a principle of worker's compensation jurisprudence (and with the enactment of OPM Document No. 15-02-03 on the subject of "Pre-existing Conditions", it is also now entrenched in Board policy as well) it would not be in order to apply the "average worker test" so as to limit the application of the "thin skull rule". The decision states that the value of the "average worker test" is to ensure that there was an actual injuring process associated with the employment, and

to ensure that the injury was not actually a function of an "atypical dysfunctional process in the worker's mind."

[57] In my view, the requirement in OPM Document No. 15-03-14 on CMS that a "substantial work-related stressor" be demonstrated in order to establish entitlement to benefits for CMS plays a similar role to the role of the average worker test as discussed in *Decision No. 826/94, Decision No. 422/96* and later cases. The requirement for a "substantial work-related stressor" which in turn, requires a comparison with other workers in similar jobs, should be applied exclusively to demonstrate that there was an injuring process associated with the employment. Once this has been established, the requirement in policy to demonstrate a "substantial work-related stressor" should not otherwise limit entitlement to benefits for CMS, on the basis that the degree or extent of the worker's stress reaction was excessive compared to the reaction expected from more typical similarly situated workers, who are not subject to a pre-existing condition.

[58] In this case, the worker's work-related stressors were the worker's busy caseload, which involved working with elderly clients on problems central to the quality of their lives, and their financial and emotional well being. The worker was also expected to serve on committees, such as the elder abuse committee, and although this requirement was voluntary in a formal sense, I am satisfied that it was an expectation of her employment and also a work-related stressor. The worker also testified that she was mentoring a student in January 2018. I find that, although these stressors were significant, they appear to have been part of the worker's regular routine, did not cause injury to the worker in the past and would not be considered, by themselves, to be associated with an injuring process.

[59] I find that another work-related stressor for the worker which arose prior to the meeting on January 25, 2018, was the worker's anticipation of a transition to a different job in January 2018. At a time when the worker was leaving a job she had held for more than ten years, and transitioning into a new job where duties and expectations had not been clearly delineated for the worker, although she would be supporting vulnerable clients in a new setting, significant additional stress would be expected. During this period preceding the anticipated transition, the worker was also training another social worker to take over the position she was leaving. In addition to the extra work associated with training the new person, the act of training a person to perform the job she was leaving, might also create misgivings, uncertainty, and more stress.

[60] Finally, an additional source of stress, and possibly the precipitating factor, was the misunderstanding between the worker and the employer which arose from the letter that the worker was given on January 25, 2018, and the subsequent meeting. The employment arrangement that was disclosed to the worker, described as a "secondment", was a surprise to the worker and it confused her. Whether or not her view was well founded, when the worker received the letter, it was a departure from her expectations, and she believed that the status of her future employment had become uncertain.

[61] I find that these were the worker's work-related stressors. In addition to these stressors, the other factor affecting the worker was her history of mental health, which dated back to 2003, and according to the medical information included recurrent episodes of depression and anxiety, but which had not caused the worker to lose time from work, and had apparently not affected the worker's performance at work prior to the incident in January 2018.

[62] Following the approach taken in *Decision No. 826/94* ,I have considered the question of whether the worker's injuring process was associated with her employment (i.e., the work-related stressors, noted above), or alternatively, whether the injuring process was related to "an atypical dysfunctional process in the worker's mind" (i.e., the worker's pre-existing psychological condition).

[63] In my view, the worker's case reflects a "borderline" situation which might not affect all similarly situated workers. I conclude, however, that it is reasonable that a worker who did not suffer from a pre-existing psychological condition could sustain a stress reaction involving some measure of impairment arising from the work-related stressors to which the worker was subject. A heavy caseload supporting vulnerable clients, additional ongoing "extra-curricular" responsibilities such as the committee work also involving vulnerable people dealing with issues such as elder abuse and bereavement, transitioning into a poorly defined position which would involve support of vulnerable people in a different setting, training another person to replace oneself, mentoring a student, and finally, being surprised and confused by a central element of the worker's new work arrangement could, in my view, lead to a stress reaction in other similarly situated workers.

[64] Accordingly, I find that the worker's injury was caused by a "substantial work-related stressor", within the meaning of the policy document. I note that the representatives made submissions about whether the worker's job involved "responsibility over matters involving life and death." Having found that the worker was subject to a "substantial work-related stressor", within the meaning of the policy document, it is not necessary for me to consider this question.

(c) Were the worker's work-related stressors the "predominant cause" of the worker's impairment?

[65] As I have noted above, a further exception to the general provision of entitlement for chronic mental stress, arising out of and in the course of employment, included in section 13(4) of the *Act*, is the requirement that the work related stressors be the "predominant cause" of the impairment included in *OPM* Document No. 15-03-14 on CMS. The policy document provides that the requirement that the work stressors be the "predominant cause" of an injury should be understood to mean that the work stressors must be the "primary or main cause of the mental stress injury."

[66] I note that this approach is a change from the approach to causation which ordinarily applies in workers' compensation law, that causation will be satisfied if the work-related factors have made a significant contribution to the injury. This approach is described in the Tribunal leading case *Decision No. 915*, 7 W.C.A.T.R. 1 at 134, under the subheading "The Accidental Injury Need Only be One of the Significant Contributing Factors":

> It is also a first principle of personal-injury, civil-litigation law that a defendant's negligence does not need to be the sole cause of the damages claimed. It is equally well established in workers' compensation law that for compensation entitlement to arise, the disability does not have to result solely from the accidental injury.
>
> In its decisions to date as to the meaning of results from, the Appeals Tribunal has taken the view that a disability may be said to have resulted from an injury if the injury made a significant contribution to the development of the disability. The Panel agrees with that interpretation [emphasis in original].
>
> This Panel is, therefore, satisfied that a disability must be seen to have resulted from the compensable injury (and, therefore, to be compensable) if the injury made a significant

> contribution to the development of the disability. This is a principle which arises naturally from the plain meaning of the words "results from" and which is at least not more-embracing than the courts' concept of causation. It accords with the proposition that the breadth of the workers' protection for consequences of injuries was not intended to be reduced by the conversion from the common-law to the statutory system. It is, of course, the principle followed in previous decisions of this Tribunal.

[67] The fact that the requirement that the work stressors must be the "predominant cause" of the injury, is highlighted by the "NOTE" which appears at page 4 of the policy document, which states:

> When assessing the impact (if any) of a pre-existing condition on a claim for chronic mental stress, the guidelines in 15-02-03, Pre-existing Conditions, apply except that, when determining whether the pre-existing psychological condition has overwhelmed the work-related mental stress injury, the WSIB decision-maker uses the predominant cause test, rather than the significant contribution test. By doing so the WSIB decision-maker ensures that the causation test used to determine initial entitlement in the claim is consistent with the causation test used to determine ongoing entitlement.

[68] As is noted above, section 13(4.1) of the *Act* provides:

> The worker is entitled to benefits under the insurance plan as if the mental stress were a personal injury by accident.

[69] I interpret this provision to mean that a worker who sustains a chronic stress injury shall be treated in the same manner as a worker who sustains any personal injury arising out of and in the course of employment. The "NOTE" referred to above, however, appears to prescribe a different legal test for entitlement to benefits for CMS, than would apply to other injuries. It was well established by *Decision No. 915*, and the Tribunal's subsequent jurisprudence that the "significant contribution test" is the standard test for causation in workers' compensation cases. The question arises as to how the requirement set out in policy that the work-place stressors must be the "predominant cause" of the injury for the purposes of a stress impairment, a standard of causation which does not apply to other personal injuries, can be reconciled with the intention expressly provided by the Legislature through the enactment of section 13(4.1) that entitlement to benefits for mental stress be treated as if the mental injury were any personal injury.

[70] In my view, section 13(4.1) should be considered as an interpretive lens for the policy document. In this context, the policy document, including the portions of the document indicating a requirement that workplace factors must be shown to have been the "predominant cause" of injury, should be interpreted in a manner which is consistent with section 13(4.1).

[71] In the preceding section of these reasons, I described and enumerated the worker's work-related stressors. The work-related stressors noted above, included the worker's busy and sensitive case load involving vulnerable clients, the expectation on the worker to serve on committees and perform other "extra-curricular" activities which also involved vulnerable people and elder abuse, the worker's anticipation of a job change which involved training her own replacement, uncertainty about future working conditions in a new setting involving vulnerable clients, and the worker's being surprised and confused, on January 25, 2018, by what she perceived to be a change in the terms of employment for her anticipated job change.

[72] The worker's non-work-related stressor was her pre-existing psychological condition which had initially arisen in 2003, and for which she had been treated since then on an ongoing basis. As is noted above, the worker's pre-existing condition had not caused the worker to lose

time from work during her more than ten years of employment with the employer. The policy document requires the decision maker to determine, as between the work-related stressors and the non-work related stressors, which was the predominant or main cause. The policy document does not give further direction on how to assess the respective magnitudes of the work-related and non-work related stressors.

[73] For reasons that I have provided above, I have concluded that the worker's work related stressors were "substantial" and could be associated with an injuring process. It is apparent that the work-related stressors made a significant contribution to the worker's impairment. Further, although the worker was apparently in some distress from her work-stressors before the meeting on January 25, 2018, her acute reaction appears to have been triggered by the meeting where she was presented with the letter, which was itself a work-related stressor.

[74] Taking these factors into consideration, and also taking into account the direction provided by section 13(4.1) of the *Act*, I am satisfied that the work related stressors affecting the worker were the predominant or main cause of the worker's impairment.

(d) Was the worker's impairment caused by good faith actions taken by the employer in carrying out its role in the employment relationship?

[75] At the hearing, the worker testified that she did not believe that she had been subject to harassment by the employer. Further, having reviewed the evidence in this appeal, I am not aware of any behaviour by the employer which could be considered to have been abusive or egregious. From the evidence, I conclude that, prior to late 2017, the worker had been an exemplary employee whom the employer considered to be a highly reliable social worker. The position of "Care Navigator" arose and the employer suggested to the worker that she would benefit from a transfer to the position. The worker decided to pursue the position and it was offered to her. The chain of events which occurred subsequently, leading up to the meeting on January 25, 2018, is recounted above.

[76] I have carefully reviewed the submissions of the representatives. The employer's representative made submissions on the issues that I have addressed above, however, in my view, the employer's most persuasive submission is that the worker's entitlement to benefits for CMS cannot be allowed because the allowance of entitlement would be contrary to section 13(5) of the *Act*, which provides:

> A worker is not entitled to benefits for mental stress caused by decisions or actions of the worker's employer 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.

[77] I also note that section 13(4), which provides the general grant of entitlement for stress claims, begins with the words "subject to subsection 5…" Given that this limitation on entitlement to benefits for mental stress appears directly and explicitly in the *Act*, it must be considered in interpreting and applying Board policy which reflects this statutory limitation.

[78] As I have indicated above, for the most part, the worker's work related stressors were her busy workload involving vulnerable clients, the expectation of extra-curricular committee work involving abuse of vulnerable people and bereavement, the additional work and uncertainty associated with a job change and training her replacement, and the meeting on January 25, 2018. The non-work-related stressor was the worker's pre-existing condition. I find that the work-related stressors were closely associated with the employer's administration of the employment

relationship. The policy reflects the language limiting entitlement in s. 13(5) and provides the following examples of an employer's decisions or actions that are part of the employment function: terminations, demotions, transfers, discipline, changes in working hours, or changes in productivity expectations.

[79] The worker's busy caseload was related to the employment function of work assignment, hours of work and productivity. The change in her job status, and in particular, the letter dated January 23, 2018, and the meeting that was held on January 25, 2018 to discuss the letter, were associated with a transfer to a new position. Board policy identifies "transfers" as an employer decision or action excluded by section 13(5) of the *Act*.

[80] The fact that the worker's work-related stressors were closely associated with assignment of workload and a transfer to new working conditions requires that I deny the worker entitlement to benefits for chronic mental stress, in keeping with section 13(5) and related Board policy. The worker was not experiencing an impairment prior to the employer offering the transfer, and the impairment developed and became acute as the details of the transfer became the further subject of discussion with the employer. I find that the worker's mental stress impairment was "caused by decisions or actions of the worker's employer relating to the worker's employment, including a decision to change the work to be performed or the working conditions." In my view, it is not possible to characterize the case in another way. If the worker's impairment is to be seen as not related to the employer's actions, it would be difficult to characterize the impairment as work related. I find that the worker's impairment is work-related, but that entitlement has been limited by the explicit words of section 13(5) and as reflected in Board policy.

[81] I have reviewed the submissions provided by the worker's representative as they relate to the exception to entitlement created by section 13(5). The worker representative's main submission relating to the limitation imposed by section 13(5) is set out at page 15 of the representative's submissions, where the submission states:

> The policy provides for entitlement for Chronic Mental Stress, but exempts decisions relating to the "worker's employment". The worker submits that this would exempt "normal" decisions relating to employment, but not all decisions. An employer is entitled to make legitimate employment decisions, but has to respect the rights of workers at the same time. There is inherently a balancing act between the sets of rights on either side of the equation. For example, a transfer from one work location to another may be a legitimate employment decision, or it may not be. Clearly, an employer has a right to transfer an employee, but equally clearly, an employee has a right to object to a transfer that was made for the purpose of retaliation. The point is that any "employment decision" has to be assessed within the context of the balancing of the rights of all of the workplace parties.

[82] I interpret this portion of the representative's submissions to mean that that the employer's actions set out in section 13(5) must be made in good faith, for the employer's actions to be a valid basis of a denial of entitlement under the provision. The submission gives an example of a transfer that was made for the "purpose of retaliation". It appears that this was intended as an example, and not a recounting of what occurred in the worker's case. There was no evidence before me on which to conclude that the worker's transfer to the Care Navigator position was an action taken by the employer by way of retaliation. To the contrary, in this case, it appears that the transfer was motivated by the employer's high regard for the worker. While I accept the worker's representative's submission that consideration would need to be given to evidence of bad faith by the employer, the submission does not persuade me that the employer's

actions taken to transfer the worker to the Care Navigator position were made in bad faith. In my view, the employer's good faith actions are of the type of employment action or decision contemplated by the Legislature when it enacted section 13(5) of the *Act*.

(e) Conclusion

[83] For the reasons provided above, I find that:

- The worker sustained an impairment associated with CMS which arose out of and in the course of the worker's employment with the employer;
- The worker chronic mental stress impairment was caused by a "substantial work-related stressor", within the meaning of the policy document;
- The work-related stressors affecting the worker were the predominant or main cause of the worker's impairment.
- The worker's mental stress impairment was caused by decisions or actions of the worker's employer relating to the worker's employment, including a decision to change the work to be performed or the working conditions.

[84] On the basis of these findings I conclude that the worker is not entitled to benefits for chronic mental stress.

DISPOSITION

[85] The appeal is denied.

[86] The worker is not entitled to benefits for chronic mental stress.

DATED: February 26, 2021

SIGNED: M. Crystal