

The worker was credible and there was a finding that the totality of the evidence supported the worker's assertion that she was sexually assaulted but there was no causal connection between the injury and the worker's employment.

Nova Scotia WCAT says assault by supervisor not covered by Workers' Compensation

The recent decision of *Re 2014-363-AD*, 2017 CanLII 4004 (NS WCAT), determined that there was no entitlement to workers' compensation for injuries sustained in a sexual assault committed by a worker's supervisor because the injury was not connected to the workplace. The incident occurred in 2008. On that day, the worker was at home on a day off when she received a call from a workplace supervisor with whom she had little contact at work. The male supervisor asked her what she was doing and what she was wearing and indicated that he was coming to her home for a visit. The worker stated that she did not actually believe that the supervisor would come to her home because she had never seen him outside of work and he had never come for a visit before. The worker saw his car pulling into the driveway and she proceeded to let him in as she was concerned about being in trouble at work.

The decision reads in part, "He sat down and she asked him if he wanted a drink. As she was walking towards the sink, he grabbed her arm and pulled her towards him. He then sexually assaulted her. She testified that she kept telling him to stop. He had her pinned and she became very scared and started screaming. She was not sure why but he just stopped. Afterwards, they sat at her kitchen table and cigarettes were lit. She doesn't remember him leaving but she remembers seeing his car leave."

One aspect of the appeal dealt with the legislative provision in s. 83(6) which serves as an absolute bar to a claim upon the passage

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of five years. S. 83(6) states: "Subsection (5) does not apply where five years or more have elapsed from (a) the happening of the accident; or (b) the date when the worker learns that the worker suffers from an occupational disease, as the case may be." The assault occurred in 2008 and the initial claim for compensation was filed in 2014 which would ordinarily preclude the Board - pursuant to s. 83(6) - from entertaining the claim. The worker's representative argued, however, that the Tribunal held in previous matters that the time limit started to run from the point at which the worker became disabled or learned that they had a disability related to the workplace, such as PTSD. If this approach was followed, then the worker would not be barred from making a claim because the first time that she became aware that she was suffering from PTSD was in September 2011 when she first saw her physician and was diagnosed.

The Appeal Commissioner agreed with that approach and said, "For psychiatric disablement, the Tribunal has interpreted the provisions in s. 83 akin to the provisions for occupational disease claims and have required that claims be filed within five years of a diagnosis or five years of the presentation of symptoms."

The worker's appeal ultimately failed because there was no evidence that the injury arose out of and in the course of her employment. The Board adopted Policy 1.3.7 to assist in determining whether an injury had arisen out of and in the course of employment. That Policy considered circumstances which would permit entitlement to compensation to include: time and place consistent with employment or the employer's premises and while performing an activity directly or incidentally related to employment. The worker's representative argued that the relationship between the worker and her supervisor was exclusively employment related and the only reason that the worker let the supervisor into her home was her assumption that he was there for a work-related reason. In her evidence, the worker was unable to say why her supervisor visited her home.

In concluding that the injury was not causally connected to employment, the Appeal Commissioner stated, "There was no reason for him to be there and he didn't give her a reason. I find that at the time of the assault, the worker was not doing

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something for the benefit of the Employer and [the supervisor] was not acting at the instruction of the Employer. The activity (meeting) was not part of the job or a job requirement. [The supervisor] was not there for any employment related purpose. It was simply one person going to another person's home. The fact that they knew each other from work did not create a work-related reason for the visit.”

What this case shows is that many women do not report contemporaneous to the event, and/or the trauma results in lack of recollection of all of the details of the assault but that does not necessarily mean that the witness is not credible. The decision maker here concluded that the worker was credible. The finding of a lack of connection to the workplace was predicated upon the wording of the statute and the considerations articulated in the Policy. There might well be a different conclusion reached involving another workplace subject to a different statute and/or Policy wording.

Takeaways for investigating sexual violence

There is not a one size fits all response to how and when sexual violence is reported. It is common for a complainant to need time to process what happened and may take even longer to be able to talk about the experience. Delay in reporting does not equate to lack of truthfulness about the sexual violence.

The inability to recall specifics - such as the time of the assault or what the respondent said after the assault was over - is commonplace. It is important to find a piece of memory and explore the details of that rather than looking for the detailed recall of each moment of the assault.

Assessing credibility is critical to the determination of incident of sexual violence. These events usually take place in private with only the complainant and respondent present. If the complainant is found to be credible, that is honest, sincere, and truthful - even in the face of challenge – that may well result in a conclusion that, on a balance of probabilities, the incident of sexual violence is found to have taken place. 

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