

IN THE MATTER OF AN ARBITRATION

BETWEEN:

CITY OF TORONTO

(the "Employer")

AND

CANADIAN UNION OF PUBLIC EMPLOYEES, LOCAL 79

(the "Union")

**AND IN THE MATTER OF GRIEVANCES OF WENDELL CHARLES AND
PATRICK SHAW CONCERNING HEALTH AND SAFETY**

ARBITRATOR

ROBERT J. HERMAN

APPEARANCES

FOR THE UNION

**DOUGLAS J. WRAY
DON STYLES
PATRICK SHAW
WENDELL CHARLES**

FOR THE EMPLOYER

**HEATHER CRISP
JUDY ALLAN NICHOLLS
WENDY ST. CYR
ANN DOGGETT**

HEARINGS WERE HELD IN TORONTO ON JULY 29, 2014 AND JUNE 26, 2015

AWARD

1. The grievors were both employees of the City of Toronto (the “City”) who worked at a community centre operated by the City, the Falstaff Community Centre (“Falstaff” or the “Centre”). Both were the innocent victims of a shooting incident that took place at Falstaff in October 2008, and both filed grievances alleging that the City had failed to comply with its obligations under the Collective Agreement and the *Occupational Health and Safety Act, 1977*. In an Award dated January 20, 2014, it was found that the Employer had breached Article 36.01 of the Collective Agreement and Section 25 (2) (h) of that Act through its failure to take reasonable steps to provide a safe and healthy environment in which to work for Falstaff employees and its failure to take reasonable precautions to protect the grievors. This matter was then remitted to the parties, and I remain seized for any matters arising from the grievances and the Award, including all remedial issues.

2. The parties were unable to resolve remedial issues. Both grievors seek damages for pain and suffering and mental distress, and it is agreed that I should determine both their eligibility for such damages and the quantum of any such damages. The grievor Charles also seeks special damages for costs incurred for dental expenses, damage to his car and increased car insurance rates, and for business losses he maintains resulted from

the shooting. With respect to these damages, this Award will only determine eligibility and not quantum, which issue will then be remitted to the parties.

3. The previous Award (the “Award”) read:

42. . . . With respect to the jurisdictional issue raised by the City, the Union submits that an arbitrator does have jurisdiction to determine whether the Act or the Collective Agreement has been breached, although there may be issues with respect to particular remedial orders that an arbitrator can issue. In this respect, the Union referred to *Toronto (Municipality) v. Canadian Union of Public Employees, Local 79 (Tomasetti Grievance)*[1992] O.L. A.A. No. 1173 (MacDowell); *Municipality of Metropolitan Toronto and CUPE, Local 79 Multiple Grievances Alleging Health and Safety Concerns* (January 31, 1996, Starkman); *Ontario Public Service Employees Union (Monk et al) and the Crown in Right of Ontario (Ministry of Community Safety and Correctional Services and Ministry of Children and Youth Services)*(April 29, 2010, GSB#1995-1694, Gray), upheld on review at [2012] O.J. 4301 (Div.Ct.) *Greater Essex County District School Board v. Elementary Teachers’ Federation of Ontario (Collective Agreement Grievance [2010] O.L.A.A. 597, 203 L.A.C. (4th) 282 (Brent); and Toronto Transit Commission and A.T.U. Local 113(Grievance of Yosvany Mirabal) [2012] O.L.A.A. no. 553, 227 L.A.C. (4th) 1 (Howe). In response to any argument that section 26 (2) of the *WSIA* deprives an arbitrator of jurisdiction to consider this matter, the Union asserts that this provision speaks only to the jurisdiction to award certain types of damages, which matter has been deferred until or if a finding of breach has been made, and which accordingly need not be addressed at this time.*

51. This is not to suggest that an arbitrator’s jurisdiction is unrestricted when dealing with alleged breaches of the Act and/or the Collective Agreement that involve health and safety issues that are also addressed under the Act or in contexts where benefits under the *WSIA* can be claimed and to which Section 26 (2) of that Act applies. For example, it may be that certain types of remedial relief following a finding of breach are not available or would be limited in some respects. **As the Divisional Court concluded in *Ontario Public Service Employees Union (Monk et al) and the Crown in Right of Ontario (Ministry of Community Safety and Correctional Services and Ministry of Children and Youth Services)* (above), while arbitrators could not award damages for injuries otherwise compensable under the *WSIA*, they could potentially award a monetary remedy for breach of health and safety provisions of a collective agreement,**

such as for property loss or damage. And in *Toronto Transit Commission and A.T.U. Local 113 (Grievance of Yosvany Mirabal)* (above), the arbitrator had to decide whether additional relief could be awarded under a collective agreement when an employee had received benefits under the *WSIA* for a workplace injury. The arbitrator concluded that the *WSIA* precluded an arbitral award for damages in respect of the compensable injury but not a declaratory award or directory remedies. While there may be limitations on the remedial authority of an arbitrator, issues of jurisdiction to award certain types of remedial relief do not deprive an arbitrator of the jurisdiction to consider whether a breach has occurred.

60. **It is unnecessary to determine whether the failure to implement any specific protective measure is a breach of the Act and/or the Collective Agreement, since it could reasonably have been expected of the City that it implement most of the requested changes.** These include better lighting, the removal of obstructing trees, bushes or objects outside the Centre, the upgrading of the video surveillance system, the provision of bullet proof vests and walkie-talkie radios to CRO's who were responsible for patrolling outside, the installation of an emergency alarm button, and the provision of paid duty police, at least during periods of heightened concern. None of these were fully in place when the shooting took place on October 17, 2008, and it was unreasonable for the City not to have ensured that most, if not all, of these measures were in place by then, if not earlier. The City had been made aware of the problems with safety at Falstaff for years, it had been told expressly of what could be done to improve the safety of the working environment at the Centre, and without justification it failed to implement most of the improvements, even though they would have materially reduced risks for employees working at the Centre and for patrons using the Centre.
61. **The City maintains that even if all the protective measures in issue had been in place at the time, the October 2008 shooting would still have occurred and Charles and Shaw would still have been injured, and therefore the lack of any of the additional security measures did not cause any harm and it cannot accordingly be said that the City breached the Act and/or the Collective Agreement.** However, the Act and the Collective Agreement require that the City provide a safe and healthy work environment and take all reasonable precautions to protect the employees working there. These obligations do not disappear if no-one is injured because of unsafe conditions in a workplace. An employer will generally be in breach of the Act (and any collective agreement provision like the one in issue here) through a failure to take reasonable precautions to make the workplace safe, regardless of whether an employee suffered harm as a direct result of any such failure. Here, **I am satisfied that the City failed to take reasonable precautions in the circumstances for the**

protection of employees working at Falstaff and failed to take reasonable steps to provide a safe and healthy environment in which to work, thereby breaching Section 25 (2) (h) of the Act and Article 36.01 of the Collective Agreement, and I so declare.

- 62. As to the City's assertion that both Shaw and Charles exposed themselves to unnecessary risk by lingering outside by their cars on the night of the shooting and that they were thereby partially responsible for any injuries suffered, the City did not raise this as an issue at any time prior to final submissions.** It is too late in my view to first raise such an issue in final argument, when all the evidence on the merits has already been led and when the Union would no longer have any opportunity to fully address the matter insofar as it may relate to the merits. To allow the City to do so in these circumstances would be fundamentally unfair to the Union and the grievors. In any event, **whether or not the two grievors were somehow partially responsible for the injuries they suffered because they exposed themselves to risk only peripherally relates, if at all, to the question before me at this stage of the proceeding, which is whether the City breached the Collective Agreement and/or the Act. To the extent that this issue is relevant to any remedial orders, it can be raised during the litigation of any such issues.**

(emphasis added)

The Facts

4. Only the grievors testified. No medical evidence or evidence from any professional was provided in support of any of their claims for damages.
5. The night of the shooting the grievors Shaw and Charles, another employee and two patrons of the Centre, went outside around 10:30 p.m. to warm up their vehicles before leaving for the night. The five of them lingered by the vehicles for about five minutes. During this time, Shaw observed a car drive back and forth in front of the Centre a few times. The car stopped and two men got out and started shooting at the people by the cars. Charles was shot in the leg and extensively injured, and had to go to

the hospital. He required medical treatment for some time, and as a result of his injuries was off work for a year. He applied for *Workplace Safety and Insurance Act* (“WSIA”) benefits, including compensation for psychological injury and/or mental distress. He received WSIA benefits from the Workplace Safety and Insurance Board (WSIB”), and though not legally required to do so, the City topped off his WSIA benefits so that he suffered no loss of income during the period he was off work.

6. Charles was left with a significant number of bullet fragments embedded in his leg. His doctors ultimately concluded that it was not medically advisable to remove the bullet fragments, so they remain in his leg to this day, continuing to cause him chronic pain and continuing to interfere with the full use of his leg. He has difficulty standing or walking for long periods of time and requires more frequent rests off his feet. He testified that he will always have some measure of pain because of his being shot, and he has to take prescribed painkiller medication. Charles saw a psychologist for a couple of months after the shooting, and continues to discuss the traumatic events and their aftermath with his pastor. He has trouble sleeping, is jumpy around loud noises, and sometimes has difficulty going out and mingling with people. He does not require or take prescribed medication for the emotional, mental or psychological consequences of the shooting. Charles returned to work to an accommodated position not at Falstaff. He has never returned to work at the Centre.

7. Charles testified that subsequent to the shooting he incurred dental expenses that he had to pay for himself, for which he seeks reimbursement. At the time, he was not

entitled to dental benefits under the Collective Agreement. He also testified that he operated a part-time graphic arts and design business prior to the shooting, designing labels, business cards and other similar items. He testified that the business “went under” during the year after the shooting, as he was concentrating on getting better and was not in the mood to be running his business. He has not attempted to resurrect the business in the years since then. With respect to his car, Charles testified that a number of bullets hit and damaged the car. When his insurer advised him that the car was not worth repairing, he had it repaired at his own cost, which he recollects cost between \$1,000.00 to \$1,200.00, and his insurance company advised that his insurance would go up because he was now high risk. He then changed insurance companies and maintains that his new car insurance costs were thereafter significantly higher.

8. Shaw was not shot, though he suffered some injuries through his efforts to evade the shooters and escape from the area of the shooting. In his case, no medical attention was immediately required and he did not miss any work. Though offered at the time the option of working at another community centre, Shaw declined and continued to work at Falstaff. He did not miss any work and did not lose any income. Shaw does not assert that he was permanently impaired, and he filed no claim under the WSIA and received no benefits under that Act.

9. Shaw continued as the full-time Community Recreation Programmer at Falstaff subsequent to the shooting, and he still works there. After the shooting incident, he participated in a group counselling session, and subsequently had two one-on-one

counselling sessions with the psychologist who ran the group session. From time to time over the years he has talked to his church pastor about the shooting. Shaw testified that he too is jumpy when he hears a loud sudden noise, continues to experience sleep problems, such as sleeping fewer hours on average, and can be nervous and anxious in crowds and where a large number of people are gathered. He takes no medication because of the shooting, nor has any medication been prescribed for him to deal with any lingering consequences of the shooting, whether physical, psychological, or emotional.

10. There are currently two outstanding grievances Charles has filed that relate to his work history after his return to work, one alleging a failure to properly accommodate and one alleging an improper layoff. Neither of those grievances is before me and neither alleges breaches related to the shooting nor do they appear to relate to remedies for the breaches by the City as found in the Award.

Submissions

11. The Union submits that Charles is entitled to damages for pain and suffering and/or mental stress or distress arising from the City's breaches and the shooting and its consequences. It recognizes that there is an issue concerning his entitlement to such damages, given the decision of the Grievance Settlement Board in *OPSEU v. Ontario (Ministry of Correctional Services and Ministry of Children and Youth Services (Monk Grievance))* [2010] O.G.S.B.A. No. 119 (Gray), upheld by the Divisional Court [2012] O.J. No. 4301 and the Court of Appeal [2013] O.J. No. 2769 (the "Monk decision"), but it maintains that Section 26 (2) of the WSIA does not preclude Charles from obtaining

such damages through arbitration. The Union also asserts that there is a nexus between the City's breaches and Charles' loss of earnings and lack of benefits coverage since his return to work, and asks that he be compensated for his subsequent loss of earnings and lack of benefit coverage. The Union submits that should I find no entitlement in the instant proceeding to such damages, I should then declare that these damages are available in the two outstanding grievances. With respect to the car damage, increased insurance costs, and Charles' business losses, the Union maintains that such kinds of losses are not barred by the Monk decision, as they are not compensable by the WSIB.

12. The Union also seeks damages for pain and suffering and/or mental distress or stress for Shaw. It notes that Shaw lost no income and made no claim for benefits under the WSIA, and asserts that there is no evidence supportive of a conclusion that his damages were compensable under the WSIA, nor any basis for so concluding. Accordingly, it submits, Section 26 (2) of the WSIA does not bar his claim in the instant arbitration for such damages.

13. The City argues that Section 26 (2) of the WSIA bars an award of damages on any basis that is or was compensable under the WSIA; that is, if the claim for a remedy at arbitration could have been made to the WSIB under the WSIA then it cannot be the basis of an award for damages from an arbitrator. Further, the City submits, general damages are not normative for breaches of a collective agreement and/or statute, and a grievor must prove a nexus or connection with the breach and a basis for any damages claim. The City emphasizes that it was not a City employee who came to Falstaff and began

shooting and that the City was in no way responsible for the shooting. It also notes that there was no finding in the Award that the shooting occurred because the City failed to implement the safety precautions or protections that the Union claimed it should have. It submits that almost all of the cases relied upon by the Union are cases where damages were awarded for a breach of a grievor's rights under the Ontario Human Rights Code, and there are few instances of general damages awarded in other circumstances.

14. More specifically, with respect to Charles' claims for damages, the City relies on the Monk decision (cited above in paragraph 11) and argues that he is precluded from any claim for pain and suffering and/or mental distress resulting from the shooting because of Section 26 (2) of the WSIA. Insofar as Charles' other claims for damages are concerned, the City acknowledges that he could in theory be entitled to damages on any basis not compensable under the WSIA, but that on most of the other grounds asserted, the grievor is not in fact entitled. It does not dispute Charles' recollection of how much it cost to repair the gunshot damage to his car, but does dispute that his automobile insurance went up as a consequence of the shooting, as it asserts that there was no nexus between the shooting and Charles' insurance rates, and in any event, it maintains that Charles has not established that his insurance rates have in fact increased or that any increase was related to the shooting. The City similarly argues that there is no nexus between the shooting and the grievor's decision to discontinue his part-time business, and no proof other than his testimony of the nature and extent of his business, nor any medical evidence supportive of the assertion that he was unable to continue with his business after the shooting. As to Charles' dental expenses, the City notes that Charles was not entitled to

dental benefits pursuant to the Collective Agreement at the time. As there is no suggestion or evidence that the dental work was required because of injuries suffered during the shooting, the City submits that it is not responsible for any dental expenses. With respect to the claims by Charles for damages because of lost income after his return to work or because he was improperly laid off, the City maintains that any such damages do not flow from the shooting but are separate matters that relate to the outstanding grievances and not to the instant grievances.

15. With respect to Shaw's claims for damages, the City submits that he too could have made a claim for benefits under the WSIA for the types of damages he seeks here, so he too is barred from receiving damages through this arbitration. In any event, the City maintains, the evidence falls short of establishing that Shaw suffered any compensable injury or any losses. It notes that he never sought medical help for any injury, whether psychological, mental, emotional or physical, and although he met with a counsellor a few times, he stopped seeking further counselling many years ago. Though offered a move or transfer to another location, Shaw declined and remained at Falstaff, further indication, asserts the City, that he was not suffering from any continuing mental or emotional injury. The City also asserts that Shaw contributed to his own injuries, if any, by hanging around by the vehicles in the Centre parking lot the night of the shooting, despite previous warnings to be careful and to exercise reasonable vigilance. Through his failure to encourage other staff and community centre patrons not to hang around, Shaw's actions made the situation more dangerous than it otherwise might have been, so

that any damages otherwise appropriate should be reduced to reflect his contributory behavior.

Decision

16. I turn first to consider the claims of the two grievors for damages for pain and suffering and/or mental distress. Section 26 of the WSIA reads:

26. No action for benefits – (1) No action lies to obtain benefits under the insurance plan, but all claims for benefits shall be heard and determined by the Board.

(2) *Benefits in lieu of rights of action* – **Entitlement to benefits under the insurance plan is in lieu of all rights of action (statutory or otherwise) that a worker, a worker’s survivor or a worker’s spouse, child or dependant has or may have against the worker’s employer or an executive officer of the employer for or by reason of an accident happening to the worker or an occupational disease contracted by the worker while in the employment of the employer.**

(emphasis added)

17. The Monk decision (above) was a decision of a Vice-Chair of the Grievance Settlement Board (“GSB”). The Vice-Chair concluded (at paragraph 110 of the decision) that the effect of Section 26 (2) of the WSIA was to preclude the GSB from awarding “damages ‘for or by reason of an accident happening to the worker or an occupational disease contracted by the worker while in the employment of an employer’ if the alleged accident or disease is or was compensable under the WCA or the WSIA, whichever applies.” The Vice-Chair stated that the proper question to ask in assessing whether Section 26 (2) barred the GSB from awarding damages was whether the injury or

illness would be or would have been compensable under the WCA/WSIA if proven. The Divisional Court upheld the decision on the basis that the Vice-Chair's decision was reasonable, but also stated that in its view it was correct. On further appeal, that decision was upheld by the Court of Appeal, that court also stating that the Vice-Chair's decision was correct in concluding that Section 26 (2) of the WSIA meant that the GSB could not award damages under a collective agreement for compensable injuries to which the WSIA would have applied.

18. I am bound by and must follow and apply these decisions of the court and the interpretation and application of Section 26 (2) described therein. Accordingly, where a claim for a type of damages would have been compensable under the WSIA, Section 26(2) of the WSIA bars an arbitrator from awarding such damages.

19. With respect to Charles, he suffered physical injury and made a claim to the WSIB because of his injury, his inability to work and resulting lost income, and for compensation for psychological injury and mental distress, and he received benefits from the WSIB. Compensation for Charles for pain and suffering and/or mental distress arising from the workplace injury was compensable under the WSIA. Unfortunately, Section 26 (2) of the WSIA therefore bars him from recovery of damages on these grounds through this grievance.

20. Shaw is in a different position, for he made no claim under the WSIA, whether for lost wages, pain and suffering and/or mental distress. However, if Shaw **could have** made such claims to the WSIB, Section 26 (2) of the WSIA would bar any similar claims

for damages through a grievance, as that provision stipulates that entitlement to benefits under the WSIA “is in lieu of all rights of action (statutory or otherwise) that a worker . . . has or may have against the worker’s employer . . . for or by reason of an accident happening to the worker . . .”, and as a grievance is a “right of action” within the meaning of this term in Section 26 (2). Thus, if Shaw could have made a claim for damages or benefits under the WSIA for the same types of damages that he seeks here, Section 26 (2) of the WSIA would bar me from awarding them. It is necessary, therefore, to determine whether Shaw could have made a valid claim under the WSIA for compensation for pain and suffering and/or mental distress.

21. Shaw did not suffer a lasting workplace injury, it does not appear from the evidence that he had or has any permanent impairment, and he did not miss any work or lose any income. Neither party referred to a section of the WSIA under which Shaw could have made a claim for damages in these circumstances, nor was it suggested how he could have made such a claim, where there was no continuing injury, no permanent impairment and no loss of work hours or income. I accordingly do not find that a stand-alone claim by Shaw for damages or benefits could have been made to the WSIB or would have been compensable under the WSIA. His claim for damages for pain and suffering and/or mental distress is not, therefore, barred by Section 26 (2) of the WSIA.

22. The City argues that Shaw’s actions the night of the shooting were partially responsible for the injuries he suffered, but this assertion is not borne out by the evidence. First, I am not satisfied that Shaw was directed to or required to go directly to his car at

night and immediately start it and exit the parking lot, or was required to advise patrons not to linger, or was not permitted to talk to patrons in the parking lot, as Shaw did that night. Second, the perpetrators were obviously determined to go to the Centre and start shooting at people, for they drove back and forth a few times before stopping to exit their car and shoot at the people standing around by their vehicles. Since others, including patrons, were also lingering for a short time by the cars, there is little reason to infer that the shooters would not have stopped and commenced shooting had Shaw not been out there at the time. Even if no-one had been out by the cars, since the shooters' car drove back and forth a few times before stopping, the shooters would likely have waited until someone was out by the cars. Shaw had to go to the parking lot to get into his car to go home, and accordingly it is at best speculative that his behavior that night was in any way improper or inappropriate or contributed to the likelihood of his being caught up in the shooting. I do not find that his conduct that night was in any way responsible for his being involved in the shooting or for the injuries he received.

23. I am satisfied from the evidence tendered during the hearing on the merits, Shaw's testimony during the remedial phase, and what is most probable in the circumstances, that Shaw suffered some physical injury at the time, and experienced subsequent trauma and some continuing psychological or emotional effects because of the shooting. It would be surprising if it were otherwise. However, I have only his testimony about the connection between the shooting and his continuing anxieties and emotional trauma, such as disrupted sleep patterns, or about the nature, consistency, and pattern of his symptoms. The lack of medical evidence makes it difficult to assess the

extent of any continued interference with his enjoyment of life. We do know that he did not need to go to the hospital or seek medical attention for his physical injuries at the time, that he missed no work as a result and wanted to continue to work at Falstaff and has done so, that he had a few counselling sessions not long after the shooting but neither sought or required professional counselling after those initial sessions, and that he has not sought medical attention for injury or damage over the intervening years nor has he had medication prescribed or had to take medication for pain and suffering or mental distress. Accepting his evidence as accurate, we also know that except for specific exceptions, he does not appear to have been hampered in his enjoyment of life because of the shooting. While I am satisfied that he suffered pain and discomfort at the time of the shooting and subsequent mental distress related to the shooting, the extent of the continued effect upon him remains unclear.

24. Some measure of damages for pain and suffering and mental distress is appropriate, for I am satisfied that the City's breaches did deprive Shaw of statutory and Collective Agreement rights and protections to which he was entitled, and there is a reasonable prospect that the shooting would not have taken place had the City's breaches not occurred. While damages are appropriate as a remedy for the breaches, the amount of damages awarded should also reflect the lack of independent medical evidence detailing or verifying the extent and nature of the pain and suffering and mental distress.

25. In the result, I award Shaw damages for pain and suffering and mental distress of \$5,000.00. The City is directed to pay this amount, without deductions, to Shaw.

26. There remains for consideration the special damages claimed by Charles for dental costs, car damage and increased car insurance rates, and compensation for the loss of his part-time business. It is not suggested that any of these damages, if proven, would have been compensable under the WSIA or are barred by Section 26 (2) of the WSIA.

27. Charles was not entitled under the Collective Agreement to coverage for dental costs at the time he incurred those costs. Those claims are not related to the City's breaches, and reimbursement for dental costs is not a remedy that has any connection to those breaches. Since he was not entitled to dental costs benefits, and since he did not need the dental work in question because of the City's breaches or the shooting, he is not entitled in this grievance to recovery of such costs. Insofar as his claims for benefits coverage and loss of earnings relate to the two other outstanding grievances, those are matters that must be addressed in the context of those grievance proceedings.

28. With respect to damage to his car, Charles is entitled to compensation for the reasonable costs of repairing the car, since it was the shooting that caused his car to be damaged, and but for the City's breaches there is a reasonable prospect that his car would not have been shot up. Although I am not at this stage determining the actual costs of repairing the car, I note that the City does not dispute that the costs as testified to by Charles were reasonable. With respect to increased insurance premiums, there is no evidence other than Charles' testimony about why his rates went up. Since Charles paid for the repair of his damaged car himself, it is not apparent why the shooting incident and resulting car damage would result in an increase in his car insurance rates. I am not

satisfied that Charles' evidence establishes that his rates increased because of the shooting incident and not for other reasons, and accordingly, this claim is denied.

29. With respect to damages related to his part-time business, the evidence falls short of establishing any causal link between the City's breach, the shooting and the temporary or permanent cessation of Charles' part-time business. For example, the evidence does not explain why the business has remained dormant for so many years, nor is there any medical evidence supportive of a claim that his physical and/or emotional or mental state materially interfered with his ability to operate his part-time business. As there could be many reasons other than the City's breach and the shooting and its effect on Charles for the cessation of his part-time business, I am not satisfied that the City should be required to pay damages related to Charles' decision not to continue his part-time business. This claim is also denied.

30. This matter is remitted to the parties, and I remain seized.

Dated at Toronto, this 11th day of August, 2015



Robert J. Herman - Arbitrator