

Proposed Ontario legislation presumes PTSD in first responders is work-related

Post-traumatic stress disorder, first responders, and presumed entitlement to worker's compensation benefits: What does it mean for Ontario employers?

BY CARISSA TANZOLA

ON Feb. 18, 2016, the Ontario government proposed Bill 163: An Act to amend the Workplace Safety and Insurance Act, 1997 (WSIA) and the Ministry of Labour Act (MOLA) — also known as Supporting Ontario's First Responders Act (Post-traumatic Stress Disorder), 2016. As of Feb. 23, 2016, Bill 163 made it to second reading.

If passed, Bill 163 will allow first responders faster access to Ontario WSIA benefits by removing the need to prove a causal link between post-traumatic stress disorder (PTSD) and a workplace event, and instead creating a presumption that PTSD diagnosed in a first responder was sustained “out of and in the course of employment.” This assumption is intended to address the fact that first responders are at least twice as likely as members of the general public to suffer PTSD given the risk of routine exposure to traumatic stressors. The proposed legislation would apply to more than 73,000 first responders in Ontario including employees of healthcare providers, municipalities and correctional services.

As the likely result of Bill 163 will be an increase in successful PTSD claims, the cost of worker's compensation coverage, primarily for Schedule 2 employers, is expected to rise. Affected employers should therefore look for ways now to proactively manage these anticipated costs and, at the very least, budget for them.

The current landscape

At present, s. 13 of the WSIA allows a worker who sustains a personal injury by an accident arising “out of and in the course of his or her employment” to collect worker's compensation benefits. There is a presumption the injury occurred in the workplace unless the contrary is shown.

However, a worker is not entitled to benefits for “mental stress” (including PTSD) unless the worker has “an acute reaction to a sudden and unexpected traumatic event arising out of and in the course of his or her employment.” This means that while a worker (including a first responder) is currently eligible for worker's compensation benefits for a mental health condition, the onus is on the worker to prove the mental illness or injury fits within the somewhat narrow parameters set out in the WSIA and subsequent interpretations. As a result, it

can be a difficult and long process to obtain benefits.

The details of Bill 163

As it is currently drafted, Bill 163 amends the WSIA as follows:

It is presumed that the following first responders, once diagnosed with PTSD, sustained the disorder out of and in the course of employment:

- full-time, part-time and volunteer firefighter
- fire investigator
- police officer
- member of a First Nations emergency response team

First responders won't need to prove a causal link between PTSD and a traumatic workplace event

- paramedic
- emergency medical attendant
- communication officer (for purposes of the Ambulance Act)
- worker in a correctional institution
- worker in place of a secure custody or place of secure temporary detention
- worker whose duties include dispatching firefighters and police officers.

The above noted presumption may be rebutted with evidence. However, the onus is on the employee.

The diagnosis of PTSD must be made by a psychiatrist or psychologist using the current DSM-5 diagnosis regime. Benefits will not be provided if it is shown the PTSD was caused by the employer's decisions or ac-

tions relating to the worker's employment (such as reasonable direction with respect to how the work is to be performed, working condition, discipline and/or termination).

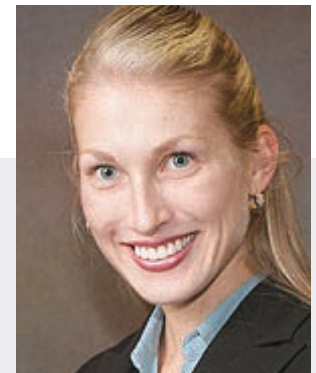
A worker who is not a first responder but is diagnosed with a mental health condition, or is a first responder but has not been diagnosed with PTSD (as defined), may still file a claim for compensation for mental stress under the existing WSIA provisions. However, there will be no presumption.

Retroactive application

If passed, the amendments will apply to a PTSD diagnosis made on or after “24 months before the bill comes into force,” so long as the worker worked for at least one day since the law is enacted. For example, if Bill 163 was in force today, a first responder working today who was diagnosed with PTSD two years ago could apply for worker's compensation benefits for the prior two years — as long as a previous, related claim was not denied). The amendments will also apply to any prior claim currently under appeal — or within the appeal window — provided the diagnosis of PTSD can be made under the DSM-5 (rather than a prior version). Finally, the amendments will apply to a first responder who has stopped work but who is diagnosed with PTSD within 24 months of the bill coming into force.

In the interest of improving workplace health and safety and collecting relevant information, Bill 163 allows the Ontario Minister of Labour to direct an employer to provide the ministry specific information re-

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ABOUT THE AUTHOR

Carissa Tanzola

Carissa Tanzola is a lawyer with Sherrard Kuzz LLP, a management-side employment and labour law firm in Toronto. Carissa can be reached at (416) 603-0700 (Main), (416) 420-0738 (24 Hour) or by visiting www.sherrardkuzz.com.

Increased cost of coverage likely

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lating to workplace PTSD prevention plans. This information may be published.

Practical considerations for employers

Most, though not all, first responder employers are Schedule 2 employers for the purpose of the WSIA. A Schedule 2 employer does not operate under the collective liability insurance principle, but instead is directly responsible for the full cost of accident claims filed with and managed by the Ontario Workers Safety and Insurance Board (WSIB). As the likely result of Bill 163 will be an increase in successful PTSD claims from first responders, the cost of worker's compensation coverage for Schedule 2 employers is expected to rise. In addition, because the bill will apply retroactively, an employer may find itself having to bear the claim costs resulting from past PTSD diagnoses or absences only now attributed to PTSD.

In light of the foregoing, and in anticipation of the passage of Bill 163, employers could consider the following proactive steps to minimize risk and related worker's compensation costs:

- Review existing training and support for first responders to minimize the potential for PTSD in the first place.
- Successful return to work is the most effective way to minimize claim costs. Accordingly, consider each claim critically and, as soon as possible, provide suitable modified duties and meet all accommodation responsibilities in order to return workers to the workplace.
- Carefully review any related past claim or appeal that may be covered by Bill 163. Consider the medical information in the WSIB claim file or tribunal case record to ensure a prior PTSD diagnosis fits within the current DSM-5 criteria. If not, and a claim is brought under the amended act, take steps to ensure the "Bill 163 presumption" is not applied.