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CURRENT NEWS AND PRACTICAL ADVICE FOR EMPLOYERS

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A traumatic decision?

Ontario's Workplace Safety and Insurance Appeals Tribunal reconsiders entitlement to traumatic stress benefits

BACKGROUND

Stressing over the details

WORKERS' compensation is often considered an insurance system to ensure workers can get by if they can't work after physically hurting themselves. However, claims by workers who are unable to work because of mental issues such as stress caused are increasing and the standards by which these claims are judged are changing.

Standards by which the provincial workers' compensation boards evaluate mental stress claims have been pretty strict in the past, but the Ontario Workplace Safety and Insurance Tribunal recently lowered the bar, part of a possible trend across the country that may make it a little easier for workers to get compensation for being unable to work because of mental stress that is a result of workplace issues or events.

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A RECENT decision from the Ontario Workplace Safety and Insurance Appeal Tribunal (WSIAT) lowers the threshold for entitlement to benefits for traumatic mental stress. An important departure from existing decisions, the decision has significant implications for employers in Ontario.

Under s. 13 of Ontario's Workplace Safety and Insurance Act (the WSIA), an employee is entitled to receive Workplace Safety and Insurance Board (the WSIB) benefits for traumatic mental stress if the employee has "an acute reaction to a sudden and unexpected traumatic event arising out of and in the course of employment".

Acute reaction

The WSIA itself does not define the phrase "acute reaction." However, the WSIB's policy on Traumatic Mental Stress clarifies matters somewhat. According to the policy, an acute reaction is a significant or severe reaction to a work-related traumatic event that results in a psychiatric/psychological response. The reaction must result in

an Axis I diagnosis in accordance with the Diagnostic and Statistical Manual of Mental Disorders (DSM-IV).

Sudden and unexpected traumatic event

The phrase "sudden and unexpected traumatic event" is also not defined in the WSIA. However, the WSIA does state a claim for mental stress cannot arise solely from an employment decision such as termination, demotion, transfer or disciplinary action; a statement that is positive for employers.

The policy sheds additional light by stating a traumatic event may be a result of "a criminal act, or a horrific accident, and may involve actual or threatened death or serious harm against the worker, a co-worker, a worker's family member or others". Examples include:

- Witnessing a fatality or a horrific accident
- Witnessing or being the object of an armed robbery
- Being the object of:
 - physical violence
 - death threats
 - threats of physical violence where the worker believes the threats are

serious and harmful to herself or others (i.e. a bomb threat)

- harassment that includes physical violence, threats of physical violence, being placed in a life-threatening or potentially life-threatening situation.

Previous WSIAT decisions have applied these criteria to limit benefit entitlement to situations in which the traumatic event involves a "real or perceived threat" to a worker, which is life-threatening or potentially life-threatening. This interpretation is consistent with the DSM-IV definition of post-traumatic stress, which requires a life-threatening or potentially life-threatening triggering event. This application of the policy has, until now, provided a degree of predictability for employers by narrowly restricting the circumstances in which a worker is entitled to receive benefits.

The tribunal's recent decision

The WSIAT's recent decision (Decision No. 483/11) allowed an appeal by a worker who claimed she should be entitled to benefits for traumatic mental stress arising from a triggering event which was not life-threatening.

An educational worker was accused of striking a student in a grade five classroom. The school investigation exonerated the worker, but she claimed she suffered significant psychological harm and was unable to work as a result of the mental stress caused by the allegations. The worker's psychiatrist reported the event caused the worker to suffer major depression, itself an Axis I diagnosis under the DSM-IV, but acknowledged she did not meet the diagnostic requirements for post-traumatic stress disorder because there was no precipitating life-threat-

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CASE IN POINT: WORKERS' COMPENSATION

More successful claims could mean fewer lawsuits

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ening event. As a result, the WSIB denied the claim for traumatic mental stress benefits.

The WSIAT overturned the decision. Rejecting the long-standing practice of requiring the traumatic event to be life-threatening, the tribunal held the examples in the policy (referred to above) were not exclusive and to interpret them as such would be inconsistent with s. 13 of the WSIA, which does not expressly define the phrase "sudden and unexpected traumatic event."

According to the WSIAT, to satisfy the requirement for a "sudden and unexpected traumatic event," an employee who has an Axis I diagnosis need only establish the precipitating event giving rise to the diagnosis meets the following criteria:

- Clearly and precisely identifiable
- Objectively traumatic
- Unexpected in the normal or daily course of the worker's employment or work environment.

The WSIAT's decision creates a much lower threshold for entitlement

to benefits and marks a distinct shift away from previous decisions, which required objective evidence of a life-threatening triggering event. Other provinces are considering similar changes to the threshold including, for example, British Columbia.

Implications for employers

For an employer, this decision has both positive and negative implications.

On the positive side, an employee's entitlement to WSIB benefits is granted in lieu of all rights of action against the employer. As such, an increase in the scope of entitlement to benefits under the WSIA should result in a corresponding decrease in the employee's right to sue his employer for compensation for traumatic mental stress arising out of or occurring in the course of employment.

Employers should therefore expect to see fewer lawsuits brought by employees for damages for traumatic mental stress. In the event an employer is sued by an employee for such damages, the employer may now

be in a stronger position to argue the employee's right to commence an action against the employer has been taken away by the WSIAT.

On the negative side, this shift in the scope of entitlement to benefits carries with it the potential for a significant increase in the number of successful claims by employees for WSIB benefits for traumatic mental stress. A successful claim typically means an increase in the employer's cost statement, a reduction in rebates or an increase in annual premiums required to be paid, each of which has financial implications for an employer. 



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A generous trend for stress claims

MENTAL stress at work is getting more attention across Canada when it comes to workers' compensation benefits, particularly the debate over stress caused by a single traumatic event and that caused by more gradual factors.

In 2010, the New Brunswick Court of Appeal, while examining a federal employee's claim, found legislation governing federal employees was broader than that province's for mental stress claims. The federal legislation allowed for gradual onset of stress to be considered an accident leading to compensation, while most provincial legislation specifically excluded stress unless it is "an acute reaction to a traumatic event" (*Stewart v. Workplace Health, Safety and Compensation Commission*, 2010 NBCA 67 (N.B. C.A.)).

In 2009, the B.C. Court of Appeal found this approach in provincial legislation was discriminatory because it resulted in more stringent standards for proving injury from mental stress than physical injury (*Plesner v. British Columbia Hydro & Power Authority*, 2009 CarswellBC 1095 (B.C. C.A.)).

The B.C. government recently announced that it plans to amend that province's Workers' Compensation Act to include cumulative mental stress on the job as eligible for benefits, a change from the existing stipulation that only stress resulting from an "acute reaction to a sudden and traumatic event" could lead to benefits.

MORE CASES

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