WSIAT: Limits to entitlement for mental stress violate the *Charter*

by Rob Boswell

On April 29, 2014, the Workplace Safety and Insurance Appeals Tribunal (the WSIAT) issued a much-anticipated decision addressing the constitutionality of limits to entitlement for "mental stress" under the *Workplace Safety and Insurance Act, 1997* (the Act).

In WSIAT Decision No. 2157/09[1] the WSIAT Panel chaired by Vice Chair McCutcheon concluded that subsections 13(4) and (5) of the Act as well as the Traumatic Mental Stress policy of the Workplace Safety and Insurance Board (the WSIB) violate the *Charter of Rights and Freedoms.* As a result of this ruling, the WSIAT Panel decided that the appropriate remedy in the case was to decline to apply these subsections or the WSIB policy and to allow the worker's appeal for initial entitlement to benefits for mental stress.

The Act states that a worker is entitled to benefits for an injury due to an accident arising out of and in the course of employment. An "accident" is defined in the Act as including one of:

(a) a wilful and intentional act, not being the act of the worker,
(b) a chance event occasioned by a physical or natural cause, and
(c) a disablement arising out of and in the course of employment.

Despite this definition, the Act provides that entitlement for a "mental stress" injury is strictly limited. Subsections 13(4) and (5) set out the scope of the limits to entitlement:

> 13(4) Except as provided in subsection (5), a worker is not entitled to benefits under the insurance plan for mental stress.
>
> (5) A worker is entitled to benefits for mental stress that is an acute reaction to a sudden and unexpected traumatic event arising out of and in the course of his or her employment. However, the worker is not entitled to benefits for mental stress caused by his or her employer's decisions or actions relating to the worker's employment, including a decision to

[1] The decision is not yet accessible on the website of the Tribunal or through any online case law service. Until such time that it is publicly accessible, we would be pleased to provide employers with an electronic copy of the decision on request. Please contact rboswell@ccpartners.ca.

change the work to be performed or the working conditions, to discipline the worker or to terminate the employment.

Prior to the enactment of the *Workplace Safety and Insurance Act* the predecessor versions of the legislation did not limit entitlement to claims for mental stress. As a result, the WSIAT adjudicated appeals of claims for mental stress in accordance with the general approach to determining the work-relatedness of an injury. A long history of conflict between the WSIAT and the WSIB existed on this issue, prior to the enactment of the WSIA.

Following the introduction of ss. 13(4) and (5) into the legislation, the WSIB also adopted an operational policy dealing with "traumatic mental stress". That policy provided further guidance as to the test to be met for entitlement. In summary, that policy also required that in order for an event to trigger entitlement it must be:

- clearly and precisely identifiable,
- objectively traumatic, and
- unexpected in the normal or daily course of the worker's employment or work environment.

Many claims for "traumatic mental stress" have been brought in the years since the introduction of the Act in 1998. In both initial adjudication and in appeal adjudication, claims have failed where the event was considered to not be "objectively" traumatic, or where the event was not unexpected as a part of the worker's normal work duties or work environment. A more difficult area for adjudication, with mixed results in appeal decisions, has been circumstances of workplace harassment.

Background facts of case

The worker was employed as a nurse in a hospital for 28 years. She was well regarded as competent and caring. For a period of twelve years, she was subject to "ill treatment" by a doctor who worked with her, including yelling and making demeaning comments in front of colleagues and patients. In the culminating event, when the worker brought her concern to her team leader, her job responsibilities were substantially reduced. In effect, the WSIAT concluded, she was demoted though her job classification was not changed.

The worker then left her employment due to her reaction to this mistreatment. She was diagnosed with an adjustment disorder with mixed feelings of anxiety and depression. Her treating practitioners attributed her condition to workplace stressors.

The worker brought a claim under the Act for benefits for mental stress. Her claim was denied on the basis that she did not have an "acute reaction to a sudden and unexpected traumatic event". That is, her claim did not meet the criteria set out in subsection 13(5) of the Act nor did it fall within the guidelines of the WSIB's operational policy for traumatic mental stress.

In interim decision 2157/09I, the WSIAT panel concluded that while the worker's condition arose out of her employment the circumstances of her claim did not meet the criteria of ss. 13(4) and (5) of the Act nor the criteria of the WSIB's operational policy. It is our view that the Panel took a relatively narrow view of the scope of an "objectively" traumatic event. That view has been challenged in other WSIAT decisions[2], leading to a conclusion that a resolution of this appeal might have been possible without a decision regarding the constitutionality of ss. 13(4) and (5).

It is important to note that the employer chose not to participate in the appeal at any stage of the WSIAT process. When the worker challenged the constitutionality of ss. 13(4) and (5), the WSIAT invited the Office of the Employer Advisor and the Office of the Worker Advisor to participate in the appeal. It appears that neither of these agencies of the Ministry of Labour chose to participate. The Attorney General of Ontario intervened.

It is unfortunate that in a case of such importance that neither the employer nor the Office of the Employer Advisor participated. No other employer organization was invited to participate in the appeal as an interested party. As a result, there was no employer voice in this appeal or legal argument, including no cross-examination of the worker on her evidence, no employer evidence about the employment circumstances surrounding the claim, and no submissions in response to the evidence presented by the worker on the merits of her appeal. This lack of employer participation was compounded in the complex evidentiary and legal argument of the *Charter* portion of the appeal.

Disposition

The Panel decided, after hearing substantial expert evidence and arguments regarding the law and application of the *Charter* to the facts of the case, that subsections 13(4) and (5) and the related policy of the WSIB infringe the worker's right to equality as guaranteed by section 15 of the *Charter.*

The Panel made clear, however, that it was not ruling on the portion of subsection 13(5) which restricts entitlement for traumatic mental stress arising out of decisions or actions of the employer relating to the worker's employment (see this full portion of the subsection above). Despite this, it is difficult to consider how this portion of subsection 13(5) would have any application when the Panel concluded that subsection 13(4) infringes section 15 of the *Charter.*

The Panel concluded that the infringement of section 15(1) is not justified by section 1 of the Charter.

As a remedy, the Panel merely chose to decline to apply subsections 13(4) and (5) and the WSIB's policy to this appeal. The worker's claim for benefits was granted.

[2] See, in particular, Decision No. 483/11.

Judicial Review

Given the nature of the legal issues addressed in the decision, the possibility for an application for judicial review remains. However, the employer chose not to participate in the appeal for reasons which we presume are related to the absence of a direct cost impact of the claim within the experience rating system. As a result, certainly there will be no employer seeking judicial review of this decision.

The question remains, then, as to whether the Attorney General, an Intervenor, will seek judicial review of the decision. The timing of the issuance of the decision at the beginning of a campaign for a provincial election may well have an impact on the direction taken by the Attorney General.

Fallout in future cases

While the Panel declined to apply subsections 13(4) and (5) or the WSIB's policy, they did not rule that the law and policy of the WSIB is invalid. The Panel made clear that the jurisdiction of an administrative tribunal does not extend so far as to issuing a general declaration of invalidity. In other words, the subsections have not been "struck down" by the WSIAT.

The decision has immediate application only to this specific appeal. The WSIB has historically rejected to apply decisions of the WSIAT to other cases where the Tribunal took a contrary position to the WSIB on the scope of entitlement for mental stress. We see no reason to expect the WSIB will deviate from that history in this case. As a result, we expect that there will be further battles over the constitutionality of sections 13(4) and (5) and the WSIB's policy on cases involving mental stress where entitlement would be granted but for the application of the legislation and Board policy. Until such a decision becomes the subject of a judicial review or the government decides to amend the legislation, there will remain uncertainty as to whether such a claim or appeal for mental stress benefits will succeed.

The decision has potential impact for any civil action for damages relating to "mental stress" which would ordinarily be excluded by ss. 13(4) and (5). A party to an action may bring an application directly to the WSIAT to determine the right of the plaintiff to commence the action. Conflicting positions by the WSIAT and the WSIB on the law could result in a claimant losing the right to sue but also having a claim for benefits denied by the WSIB.

Many decisions of the WSIB or the WSIAT have already been made for which workers were denied benefits for mental stress as a result of the application of ss. 13(4) and (5) or the WSIB's policy. We anticipate that some of these workers (especially those represented by experienced injured-worker's counsel, unions, and labour organizations) may become the subject of reconsideration applications by those workers. The potential for a flood of WSIAT reconsideration cases following in the footsteps of Decision 2157/09 is significant.

Proactive case management

We will provide a more detailed overview of the potential implications of this decision in a future blog.

In the interim, we would be pleased to assist employers in any case involving a claim for mental stress with the WSIB or any appeal in respect of such a claim. Our lawyers are capable of assisting employers, in all such cases, in investigating and managing situations of workplace conflict, harassment, bullying, and workplace violence and assessing the risks associated with potential claims of workplace mental stress.