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Chronic Mental Stress and the *Workplace Safety and Insurance Act, 1997*

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Chronic Mental Stress and the *Workplace Safety and Insurance Act, 1997*

On January 1, 2018, amendments to the *Workplace Safety and Insurance Act, 1997* (the *Act*) prompted by Bills 127 and 177 came into force. These amendments will expand the scope of entitlement for mental stress, with transitional provisions to apply these changes retroactively in specific circumstances.

The amendments also repealed the versions of subsections 13(4) and (5) of the *Act* which previously read (with emphasis added):

Exception, mental stress

(4) Except as provided in subsections (5) and 14 (3), a worker is not entitled to benefits under the insurance plan for mental stress.

Same

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

In recent years, a few claim appeals before the Workplace Safety and Insurance Appeals Tribunal (WSIAT) have challenged these provisions as being contrary to section 15 of the *Charter of Rights and Freedoms*. On April 29, 2014, the first and now leading decision of the WSIAT on this issue, [WSIAT Decision No. 2157/09](#), determined that the provisions did infringe the *Charter* and entitlement to benefits was granted in a case where the traumatic mental stress threshold was not met.

Decision 2157/09 was followed in several more WSIAT decisions since April 2014. Despite this line of cases, the *Act* was not amended to bring it into compliance with the *Charter*. WSIB policy and decision making practice on mental claims remained unchanged until January 1, 2018.

Although Ontario introduced presumptive entitlement to benefits for PTSD for First Responders in April 2016, only through Bills 127 and 177 have they addressed the impact of the WSIAT case law. With Bill 127, subsections 13(4) and (5) of the *Act* now reads as follows (again, with emphasis added):

Mental stress

(4) Subject to subsection (5), a worker is entitled to benefits under the insurance plan for chronic or traumatic mental stress arising out of and in the course of the worker's employment.

Same, exception

(5) A worker is not entitled to benefits for mental stress caused by decisions or actions of the worker's employer relating to the worker's employment, including a decision to change



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

The terms “chronic mental stress” and “traumatic mental stress” are not defined in the Act. The WSIB has already established operational policy respecting traumatic mental stress which has been applied over the past 20 years. In response to Bill 127, the WSIB has now released a new policy, no. 15-03-14, defining the conditions under which a claim for chronic mental stress (“CMS”) will be allowed. A copy of that policy is attached to this paper. Of particular interest, the policy sets out a new causation test for CMS which requires a worker to demonstrate that the employment is the predominant contributor to the stress. This threshold is contrast to the “significant contribution” test for all other areas of injury.

Bill 177 was introduced in October and passed in December, also coming into force on January 1, 2018. This Bill amends the Act by including transitional provisions for chronic stress entitlement. These provisions provide the same entitlement for chronic stress to a worker who has an existing mental stress claim that is pending before the WSIB or WSIAT. Workers who had not yet filed a claim for mental stress that occurred on or after April 29, 2014 (the date of the WSIAT’s leading *Charter* decision) will be permitted to file a claim for mental stress on or before July 1, 2018. Of note, this provision does not distinguish between traumatic or chronic stress. As a result, the amendments provide an avenue for close to four years of retroactivity. Consider the possibility, for example, that a worker’s claim for workplace harassment has been resolved by the workplace parties only to now present itself once again under these transitional provisions. The time frame aligns with experience rating liability for Schedule 1 employers as well as the full liability imposed on Schedule 2 employers.

Expanded benefit coverage for mental stress will have wide ranging implications for Ontario’s workers and workplaces. Mental health injuries and disabilities are a significant cause for insured disability benefit claims, absence from work, and requirements for workplace accommodation. An expanded role of the WSIB in respect of injuries and illnesses that previously have been excluded from coverage could affect the cost of insured benefits and cost of WSIB insurance. Adjudication for benefits under the Act could bring many mental health claims outside of grievance arbitration or civil litigation, and will move benefit decisions from private insurers to the WSIB. These changes will undoubtedly involve the WSIB in worker health care management, return to work, and disability accommodation for cases that they previously had no involvement.

We anticipate that the absence of a definition of “chronic mental stress” in the Act will lead to more disputes over adjudication of entitlement and an increase in claim appeals. It will be important that employers conduct a thorough investigation into any claim of mental stress, traumatic or chronic. We are already seeing a noticeable overlap between workplace harassment investigations and early claims for chronic mental stress.