Mental Stress – The WSIA and Policy is Unconstitutional

On April 29, 2014, Ontario’s Workplace Safety and Insurance Appeals Tribunal (WSIAT) issued a significant decision (Decision 2157/09) regarding entitlement to benefits for chronic mental stress. This decision has the potential to significantly increase the number of claims filed by workers who wish to receive benefits for chronic mental stress thereby increasing costs for Ontario employers. The Tribunal found that the statutes in the WSIA which limit entitlement to mental stress that “arises from an acute reaction to a sudden and unexpected event” violate the equality guarantee in section 15 of the Canadian Charter of Rights and Freedoms (the “Charter”) and are therefore unconstitutional.

An Overview of Decision No. 2157/09

A nurse employed at a hospital for 28 years claimed she was subjected over the course of the past 12 years to harassment by a physician. There was no claim of any physical threat of violence and most of the alleged harassment was of a verbal nature. The evidence supported that the hospital was aware of the physician’s conduct but did little to intercede. When the nurse complained about the physician’s conduct her work hours were reduced. As a result, the employee was diagnosed with anxiety and depression and she made a claim for mental stress arising out of and in the course of employment to the WSIB.

The WSIB denied the worker’s claim for benefits because it did not satisfy the requirements of subsection 13(5) of the Act and the WSIB’s policy (15-03-02). Both the Act and WSIB policy allows the WSIB to grant entitlement to mental stress but only when the mental stress was “an acute reaction to a sudden and unexpected traumatic event.”

The worker appealed the WSIB’s decision to the Tribunal. In an interim decision (Decision No. 2157/09I), WSIAT concluded that the worker would have had entitlement to benefits but for the exclusions in subsections 13(4) and (5) of the WSIA. In other words, the worker would have had entitlement to mental stress but for the requirement that entitlement only be granted in response to a sudden and unexpected traumatic event. The worker responded to the interim decision of WSIAT with a constitutional challenge; whereby, she claimed that the WSIA and WSIB policy was discriminatory. The worker’s representative pointed out that workers who sustain a physical injury are routinely granted entitlement to mental stress while those who claim mental stress absent a physical disability must show that this was in response to a sudden and traumatic event.
WSIAT’s Decision No. 2157/09 found that the statutes in the WSIA which limit entitlement to mental stress that “arises from an acute reaction to a sudden and unexpected event” violate the equality guarantee in section 15 of the Canadian Charter of Rights and Freedoms (the “Charter”) and are therefore unconstitutional. Further the Workplace Safety and Insurance Board (“WSIB”) policy implementing these legislative provisions was also found to be unconstitutional. The Tribunal noted that limiting entitlement for mental stress to situations of “an acute reaction to a sudden and unexpected traumatic event” was substantively discriminatory both in perpetuating prejudice and disadvantage, and failing to correspond to the actual circumstances and characteristics of workers with mental disabilities.

A Brief History

In the late 1990’s there was extensive debate about whether or not to grant entitlement to mental stress as a stand-alone diagnosis and therefore unassociated with a physical injury. The solution which was adopted in Ontario was that a compromise was proposed. The compromise was that mental stress (as opposed to mental stress arising from a physical cause) would be extended only under very exceptional circumstances with the changes to the WSIA in 1998 as follows:

**Exception, mental stress**

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

Same

13 (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.

As a result of WSIAT decision 2157/09 the legality of the above provisions were found unconstitutional. The WSIAT Panel conducted a very comprehensive examination of the mental health exception in section 13 and also reviewed the historical prejudice against mental illness and those persons with mental health conditions.

The Impact for Employers

Decision No. 2157/09 now allows for claims of chronic mental stress to be compensable. While the WSIB will have to determine how it will consider entitlement in view of this decision, it is clear that the Tribunal will accept claims for chronic mental stress much more frequently by referencing 2157/09. We anticipate that legislative amendments to the WSIA will be made in order to clarify this issue although it is unknown when this will occur. Absent these legislative changes employers should be prepared for inconsistent decision making on this issue as the WSIB operates with one set of rules (WSIB Policy 15-03-02) and WSIAT operates by referencing decision 2157/09.
Recommendations

1. **Prevention** Immediate action by an employer about an employee’s complaints of harassment may avoid the inherent difficulty in managing these sensitive claims. Employers should assess the workplace for stressors and review their current practices, policies and procedures, promoting a healthy and safe work environment. The employer in 2157/09 could have avoided a claim of mental stress by listening to the nurses allegations of harassment by adopting a zero tolerance policy. This would have required an investigation and immediate corrective action with the physician.

2. **Claims Management** It should be noted that the employer did not participate in the hearing at the WSIB or WSIAT. While the employer may not have had much to contribute in these circumstances it is generally a very good idea for employers to participate in hearings. Without the employer’s participation testimony by workers can be one-sided. Aon Hewitt represents Canadian employers at hearings with WCB’s and Appeals Tribunals across Canada.

3. **Employment Decisions** WSIB policy 15-03-02 and Subsection 13(5) of the Act states that entitlement to mental stress cannot be granted because decisions or actions of the employer relating to the employment relationship. Decision 2157/09 did not comment on this section of the Act and therefore entitlement cannot be granted for mental stress allegedly caused by employment related decisions (e.g. change in work duties, discipline, etc.).

Should you wish additional information on this topic, please contact Michael Mitchell at +1.416.263.7857 or michael.mitchell@anhewitt.com; or your local Aon Hewitt Consultant, or send an email to info@aonhewitt.com.

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