FTR Now

Ontario Moving Closer to Creating Statutory Presumption for PTSD Claims Made by Emergency Response Workers

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Managing mental illness flowing from workers' compensation claims may become more difficult for emergency management services employers in Ontario. On February 27, 2014, Bill 67, the *Workplace Safety and Insurance Amendment Act (Post-Traumatic Stress Disorder), 2014*, passed Second Reading in the Ontario legislature with all-party support, and was referred to Committee for consideration. If passed, this significant Private Member's Bill would create a statutory presumption in favour of granting emergency response workers who claim workers' compensation benefits for post-traumatic stress disorder ("PTSD").

This *FTR Now* outlines the potential impact Bill 67 could have on emergency response services employers, and reviews key recent case law on the issue of traumatic mental stress.

BILL 67 AMENDMENTS TO *WSIA*

If passed, the proposed Bill 67 amendments to the *Workplace Safety and Insurance Act, 1997* ("*WSIA*") would, in part, enact the following rebuttable presumption:

If an emergency response worker suffers from post-traumatic stress disorder, the disorder is presumed to be an occupational disease that occurs due to the nature of the worker's employment as an emergency response worker, unless the contrary is shown.

"Emergency response worker" is defined as a "firefighter, police officer or paramedic." PTSD is defined as "an anxiety disorder that develops after exposure to a traumatic event or experience with symptoms that may include flashbacks, nightmares and intense feelings of fear or horror."

Previously, similar Private Member legislation had been proposed on four different occasions, but had never passed. Bill 67 has received support from all three parties in the Legislative Assembly and on February 27, 2014, MPPs voted unanimously to send it to the Standing Committee on General Government for further study and review. This is the last step before the Bill can be called for Third Reading and a final vote. Notably, the Bill is also being supported by many interest groups, including the Ontario Professional Fire Fighters' Association, the Toronto Professional Fire Fighters' Association, the Ontario Provincial Police Association, the Police Association of Ontario, the Ontario Paramedic Association, Ontario Public Service Employees Union, Unifor, Canadian Union of Public Employees and the Amalgamated Transit Unit. As a result, this legislation must be taken seriously, even though historically, very few Private Member's Bills are passed by the Legislature into law. We will continue to monitor the Bill's progress over the coming weeks.

IS THERE A NEED FOR THIS CHANGE?

The short answer to this question is no. The Workplace Safety and Insurance Appeals Tribunal ("WSIAT") has recently released a series of decisions on traumatic mental stress in the workplace. In all of those decisions, the WSIAT acknowledges the seriousness of the issue, and has granted entitlement in a number of cases. These decisions include *Decision No. 1700/12*, where a paramedic was diagnosed with major depressive or panic disorder, or PTSD after attending at a particularly gruesome fatal accident. The paramedic was also tasked at the scene with notifying a deceased's father of his son's death. These events were found to be identifiable, objectively traumatic, and unexpected in the normal course of the

worker's employment. While acknowledging that paramedics regularly attend fatal accidents, the Panel found that the circumstances of this accident, coupled with the personal history of the worker, were sufficient to establish entitlement for traumatic mental stress.

Ontario workers can receive workers' compensation benefits for work-related PTSD or other mental illnesses under the Workplace Safety and Insurance Board's Traumatic Mental Stress or Psychotraumatic Disability policies. These areas of entitlement provide compensation for workers who experience compensable mental illnesses either as a result of a work-related traumatic event, or as a corollary to a work-related physical injury, treatment, or socio-economic factors related to their physical injury. Both policies allow entitlement for PTSD, and emergency response workers have received entitlement for PTSD under these policies.

POTENTIAL CONSEQUENCES FOR EMPLOYERS

There are two consequences that flow from this proposed legislation. One is the potential cost of the claims, and the second is the practical difficulty of rebutting the presumption. We will address each of these consequences below.

WSIB claims that granting entitlement for PTSD or other mental illnesses can give rise to significantly longer periods of loss of earnings, in part as a result of the condition. Characteristic symptoms of PTSD include "persistent avoidance of stimuli associated with the trauma" (DSM-IV). Work-related PTSD may likely include an avoidance of the workplace or areas associated with work. This symptom, coupled with the time and techniques needed to treat PTSD, means workers who suffer from compensable PTSD may be entitled to lengthy periods of loss of earnings benefits.

There are some cases (as described above) where entitlement should clearly be granted and employers will have to manage the costs. There are strategies, including early intervention and early and safe return to work, that will assist employers in managing those costs. However, emergency response workers are largely employed by municipal governments, who are Schedule 2 employers under the *WSIA*. This means that municipal employers pay dollar-for-dollar for their claims costs, plus an administration fee to the WSIB. Accordingly, increases in loss of earnings benefits payments mean significant cost increases for municipal employers.

There is the further question of how employers would rebut the presumption. The rebuttable presumption in Bill 67 places the onus on the employer to show that the worker's PTSD is not work-related, in addition to any challenges to the PTSD diagnosis itself. The employer will have the burden of proving, on the balance of probabilities, that the worker's employment as an emergency response worker is not a significant contributing factor to his or her PTSD diagnosis. Overcoming the rebuttable presumption may necessitate retaining psychiatric experts to review existing medical information and/or sending the worker for an independent psychiatric assessment.

Although there is only one civil standard of proof (the balance of probabilities), the burden on employers to rebut the statutory presumption of work-relatedness should not be underestimated. Where a statutory presumption applies, panels at WSIAT have accorded less weight to expert medical opinions, preferring evidence that supports the presumptive factors.

For example, in *Decision No. 2382/12*, the Tribunal addressed the statutory presumption of work-relatedness in section 15.1 of the *WSIA* when a firefighter experiences a heart injury within 24 hours of attending a fire scene or participating in a training exercise. In this case, the worker's symptoms of a heart attack began within 24 hours of attending a fire scene on July 15, 1973. The Panel heard evidence about the fire from the deceased worker's son, also a firefighter. The worker attended a fire at a scrap yard. The fire had started on July 14, 1973. The worker's son provided several photos of the fire scene, and he testified that the photos showed that the fire was still burning on July 15, 1973. The worker was a front line firefighter, and attended the fire scene for approximately 3 hours and 10 minutes. The medical evidence also showed that the worker had pre-existing cardiac problems and pre-disposing factors for a heart attack (angina), a significant smoking history, and high blood pressure.

The employer submitted an expert report from a cardiologist who conducted a review of the medical evidence in the case

record, and concluded that “In my opinion there is no relationship between [the worker’s] vocation as a fire-fighter and his myocardial infarction.”

Despite this expert opinion, the Panel concluded that the employer failed to rebut the presumption in this case, and that the balance of probabilities and medical information supported the conclusion that the worker’s heart attack was related to his firefighting duties on the day in question. The Panel reached this conclusion despite acknowledging that there “was no doubt in our mind this worker had a long-standing range of non-compensable heart problems.” The Panel relied heavily on the temporal relationship between the firefighting activities on July 15, 1973 and the worker’s decline within 24 hours of those activities. The Panel also relied on evidence that the worker did not return to his pre-injury state after the heart attack, but continued to have limitations until his death.

CONCLUSION

The significant potential impact of Bill 67 on employers makes this a legislative development to watch. Despite the unpredictability of a minority government situation, the fact that Bill 67 has received support from all parties is noteworthy and may signal an increased likelihood that it will be enacted, leaving Ontario employers to deal with the outcome.

Bill 67 is currently before the Standing Committee on General Government. The Committee has not released a timetable for community input on the Bill to date; however, employer groups – and in particular, municipal governments – should take advantage of any opportunity to make submissions on this Bill.

If you have any questions about Bill 67, please contact your regular Hicks Morley lawyer.
