

## FTR Now

# WSIAT Finds Limitations on Mental Stress Unconstitutional

**Date:** May 15, 2014

On April 29, 2014, Ontario's Workplace Safety and Insurance Appeals Tribunal (the "Tribunal") issued a significant decision regarding entitlement to benefits for chronic mental stress under the *Workplace Safety and Insurance Act, 1997* ("WSIA"). In *Decision No. 2157/09*, the Tribunal found that the provisions in the WSIA limiting 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. The Workplace Safety and Insurance Board ("WSIB") policy implementing these legislative provisions was also found to be unconstitutional.

As we discuss in this *FTR Now*, the Tribunal's decision in this case is likely to have a significant impact on employers of all sizes, and will likely increase the number of claims filed by employees who allege that they have suffered mental stress as a result of the regular stressors of the workplace. Employers are strongly encouraged to manage these claims, and their workplaces, more carefully as a result of this decision.

## THE DECISION

*Decision No. 2157/09* involved a claim for benefits under the WSIA by a nurse who had worked in a hospital for 28 years. She alleged that, for a period of 12 years, she was subject to ill treatment by a doctor with whom she worked. The Employer was aware of this conduct, and the Tribunal found that the Employer took no steps to deal with the purported mistreatment, and reduced the worker's duties. She further alleged that the doctor's conduct resulted in her being diagnosed with an adjustment disorder with mixed features of anxiety and depression. As a result of this illness, the worker was unable to work and applied for benefits with the WSIB. There was no assault and no threat of any physical violence.

The worker's claim for benefits was denied by the WSIB. The WSIB relied on subsections 13(4) and (5) of the WSIA, which provide as follows:

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

The WSIB denied the worker's claim for benefits because it did not satisfy the requirements of subsection 13(5) or the WSIB's policy, as the mental stress she suffered was not "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. 2157/09*), the Tribunal concluded that the worker would have had entitlement to benefits but for the exclusions in subsections 13(4) and (5) of the *WSIA*. The worker then challenged the constitutionality of these sections.

In her challenge, the worker submitted that the provisions of the *WSIA* limiting entitlement to chronic mental stress violated the *Charter's* equality guarantee because they drew an unnecessary and discriminatory distinction between those with mental disabilities and those with physical disabilities. In this regard, the worker alleged that the practical effect of subsections 13(4) and (5) was to prohibit entitlement for mental disabilities in circumstances where entitlement would be granted for physical disabilities. In the worker's view, this placed an additional hurdle in front of individuals who had mental disabilities, who were already a historically disadvantaged group.

Ontario's Attorney General provided submissions supporting the constitutionality of subsections 13(4) and (5) of the *WSIA*. The Attorney General relied on the fact that it is notoriously difficult to diagnose mental disorders and determine what caused them. In the Attorney General's view, subsections 13(4) and (5) merely operated as a statutory codification of these difficulties and operated to limit entitlement to mental stress for those cases where the mental stress was clearly work-related.

The Employer did not participate in the appeal and therefore did not provide any submissions regarding the constitutionality of subsections 13(4) and (5) of the *WSIA*. The Employer also did not provide any submissions on the underlying facts supporting the worker's claim.

The Tribunal granted the worker's appeal and held that subsections 13(4) and (5) of the *WSIA* and the WSIB's Traumatic Mental Stress Policy violated section 15(1) of the *Charter* on the basis 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. The Tribunal found that the *WSIA* and the Traumatic Mental Stress Policy improperly place additional restrictions on granting benefits to workers with mental disabilities that do not exist for workers with physical disabilities.

The Tribunal specifically rejected the Attorney General's argument that the difficulty in

demonstrating causation in the case of mental disabilities was a justification for treating them differently than physical disabilities. In the Tribunal's view, any such difficulty could be overcome by the application of the general principles of causation, as set out in the Tribunal's jurisprudence.

In the result, the Tribunal held that subsections 13(4) and (5) of the *WSIA* contravened section 15(1) of the *Charter* and could not be saved by section 1 of the *Charter*. Therefore, the Tribunal declined to apply either of these provisions or the WSIB's Traumatic Mental Stress Policy to the circumstances of the case. Accordingly, the Tribunal held that the worker was entitled to benefits for chronic mental stress.

The Tribunal declined to comment on the constitutionality of the portion of subsection 13(5) that precludes entitlement for mental stress arising out of decisions or actions of the employer relating to the employment relationship. This issue has been left for determination in another case.

## IMPLICATIONS FOR EMPLOYERS

At present, *Decision No. 2157/09* only has an immediate impact on the claim at issue in that appeal, since the Tribunal is technically not bound to follow its own decisions. However, the decision will be highly persuasive in any future appeals on this issue at the Tribunal. From the Tribunal's perspective, the *WSIA* no longer limits entitlement for mental stress to traumatic mental stress claims. Chronic mental stress claims are now eligible for compensation.

The Tribunal's ruling in *Decision No. 2157/09*, if applied in other cases, will have a significant impact on all of Ontario's employers. It significantly expands the scope of entitlement for mental stress under *WSIA* and will put increased pressure on employers to limit and address stressors in the workplace. All employers, specifically those with stressful workplaces, will need to take additional steps to reduce workplace stress in order to limit costly and complicated stress-related lost time claims.

*Decision No. 2157/09* may not have an immediate impact on decisions made by adjudicators at the WSIB level. The Tribunal limited its remedy to the specific case before it. It is, therefore, unclear whether the WSIB will continue to apply its Traumatic Mental Stress Policy. Accordingly, until the situation is clarified, there is likely to be significant inconsistency between decisions of the WSIB and those at the Tribunal level. There is also likely to be a significant increase in appeals to the Tribunal, as well as requests for reconsideration flowing from *Decision 2157/09*.

Employers are encouraged to closely monitor this issue. As the WSIB considers how to address this decision, it will be important for employers to remind the WSIB of the importance of clear evidence and a careful review of files in assessing psychological entitlement.

Employers who have ongoing mental stress cases should ensure that the events giving rise to these cases have been, and continue to be, well documented. More generally, employers should

be reviewing their practices, policies and procedures in order to ensure that they are protecting themselves to the extent possible from potential mental stress claims.

If you require a copy of the decision, or wish to discuss its potential implications for your business, please contact [Jodi Gallagher Healy](#), or any [member of our Workplace Safety and Insurance Group](#) or your [regular Hicks Morley lawyer](#).

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