FTR Now

Ontario Introduces Legislation Creating Statutory Presumption of Work-Relatedness for First Responders Diagnosed with PTSD

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On February 18, 2016, the Ontario government introduced Bill 163, Supporting Ontario's First Responders Act (Posttraumatic Stress Disorder) 2016, amending the *Workplace Safety and Insurance Act, 1997* ("WSIA") and the *Ministry of Labour Act*.

If passed, Bill 163 would create a statutory presumption in favour of granting workers' compensation benefits to first responders diagnosed with posttraumatic stress disorder ("PTSD"). The creation of this presumption will likely have costs consequences for employers of first responders and will impact Workplace Safety and Insurance Board ("WSIB") appeal strategy.

This *FTR Now* outlines Bill 163 and its implications for employers of first responders.

BILL 163 AMENDMENTS TO *WSIA*

If passed, Bill 163 would create a rebuttable statutory presumption of work-relatedness if a first responder is diagnosed with PTSD by a psychiatrist or psychologist, as follows:

The posttraumatic stress disorder is presumed to have arisen out of and in the course of the worker's employment, unless the contrary is shown.

A rebuttable presumption shifts the burden of proof to the employer to show that the worker's PTSD is not work-related. Statutory presumptions already exist in the WSIA for certain prescribed cancers and heart disease suffered by firefighters.

If passed, Bill 163 will apply to the following "first responders":

- Police officers (including First Nations constables)
- Firefighters (full-time, part-time, and volunteer firefighters, and fire investigators)
- Paramedics, emergency medical attendants and communications officers
- First Nations emergency response teams
- Workers in correctional institutions, places of secure custody or places of secure temporary detention
- Dispatchers of the above workers

For the statutory presumption to apply, first responders must receive a diagnosis of PTSD from either a psychiatrist or psychologist that is consistent with the description of PTSD in the DSM-V (Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition).

The presumption will apply to both new and pending WSIB claims, but not those that have been exhausted through an appeal process. Former first responder workers who develop PTSD within a specified time period of Bill 163 coming into force will be entitled to the benefit of the presumption.

Under the proposed legislation, the *Ministry of Labour Act* would also be amended to give the Minister of Labour authority to ask employers of workers covered by the PTSD presumption to provide their plans to prevent PTSD and to publish those

plans.

Bill 163 was introduced further to the PTSD initiatives introduced by the Ontario government on February 1, 2016. Those initiatives were discussed in our *FTR Now* of February 6, 2016, "PTSD Strategy Announced by Ontario."

IMPLICATIONS FOR EMPLOYERS

Bill 163 presents two key challenges for employers of first responders: first, the potential cost consequences of expanded entitlement; and second, the practical difficulties of rebutting the statutory presumption of work-relatedness.

WSIB claims for mental illness, including PTSD, are often costly for employers. They may result in an extended period of loss of earnings benefits, and return to work attempts may be prolonged and challenging. This can occur in part because of the nature of the condition itself. Characteristic symptoms of PTSD include "[p]ersistent avoidance of stimuli associated with the traumatic event(s)" (DSM-V). 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. Presumptive entitlement for PTSD therefore creates potential for increased absences and associated loss of earnings awards.

Employers should also consider that, as drafted, Bill 163 will apply not only to claims established after the Bill comes into force, but will also provide a window for claims currently in the objection or appeals process (both at the WSIB and the Workplace Safety and Insurance Appeals Tribunal) to be adjudicated with the benefit of Bill 163's statutory presumption. In addition, Bill 163 allows those who ceased to be first responders no more than two years prior to the Bill coming into force to make claims up to two years after the Bill comes into force.

These aspects of the Bill broaden the potential scope of application for the statutory presumption and increase the potential financial burden on employers of first responders. First responders are typically employed by municipal governments, which are largely Schedule 2 employers under the WSIA. Schedule 2 municipal employers pay their claims costs dollar-for-dollar, plus a significant administration fee, to the WSIB. Accordingly, higher loss of earnings benefit payments may result in significant WSIB cost increases for municipal employers.

Employers of first responders should evaluate their preparedness for returning workers with PTSD to the workplace on modified work. Having suitable modified work available for those with PTSD will assist in containing claims costs, and help return first responders to the workplace.

An important question raised by Bill 163 is how employers, practically speaking, will be able to rebut the presumption of work-relatedness when first responders are diagnosed with PTSD. To do so, the onus will be on the employer to prove that: a) PTSD is an incorrect diagnosis; or b) work-related trauma was not a significant contributing cause of the worker's PTSD. Importantly, Bill 163 excludes from entitlement PTSD caused by an employer's decisions or actions, such as changes to the work to be performed, working conditions, discipline or termination. However, establishing that either a non-work-related event(s) or an employment decision is the cause of a worker's PTSD may require independent medical evaluations and/or retaining experts. This shifts a significant evidentiary burden (and cost) to employers of first responders who wish to challenge entitlement.

CONCLUSION

If passed, Bill 163 will likely have a significant impact on employers of first responders. To address the implications of Bill 163, employers of first responders should review their policies and procedures with the goal of reducing incidents of PTSD, assisting workers with PTSD and determining if suitable modified work can be made available to workers diagnosed with PTSD. By doing so, employers of first responders may be able to help first responders minimize, cope with and recover from PTSD.

If you have any questions about Bill 163, please contact Joseph Cohen-Lyons at 416.864.7213, Samantha C. Seabrook at 416.864.7024, Jodi Gallagher Healy at 519.931.5605 or your regular Hicks Morley lawyer.

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