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WSIB UPDATE

Are the Floodgates Opening for WSIB Mental Stress Claims? The Latest Word from the Courts

Ryan J. Conlin

The issue of whether employees ought to be entitled to receive WSIB benefits for mental stress conditions has been controversial for many years. As a matter of law, the WSIB will only grant entitlement for mental stress where the stress arises out of a reaction to an unexpected traumatic event or a series of traumatic events. Workers are not entitled to benefits for traumatic mental stress that is a result of the employer's decisions or actions. Workers who develop mental stress gradually over time, due to general workplace conditions are not entitled to benefits.

For many years, both unions and injured worker activists have asserted that denying WSIB entitlement to most types of mental stress is unconstitutional. They have argued that the *Charter* prohibits the WSIB from treating mental stress claims differently than physical injuries. In what could be a precedent setting case across the country, the British Columbia Court of Appeal has at least partly accepted this argument.

Plesner Case

(i) Factual History

The case[1] involved a worker employed at a B.C. Hydro generating station. While attending a training session with several coworkers, he witnessed a rupture of a natural gas pipeline. He gave evidence that he was fearful that the gas leak would result in an explosion, thus triggering a chain reaction.

Two weeks after the incident, the worker visited his family doctor, who noted symptoms of stress and referred him to a psychiatrist. The worker stopped working, and his psychiatrist ultimately diagnosed him as having post-traumatic stress disorder ("PTSD").

The worker's initial workers' compensation claim was denied on the grounds that his condition was chronic. He appealed the denial of his claim to the Review Divison (B.C. equivalent to Ontario's WSIB Appeals Branch). The Review Division accepted that Mr. Plesner was suffering from PTSD linked to the gas rupture, but ruled the circumstances of the gas rupture did not qualify as a traumatic event within the meaning of the legislation, as interpreted by Board policy. In particular, the incident did not meet threshold to qualify as "horrific", and the worker's appeal was dismissed. Ontario WSIB policy with respect to traumatic mental stress is very similar to the policy language at issue in this case.

[1] *Plesner v. British Columbia Hydro and Power Authority*, 2009 BCCA 188 (B.C.C.A.)

Mr. Plesner appealed to the Workers' Compensation Appeal Tribunal ("WCAT", the B.C. equivalent of the Ontario Workplace Safety and Insurance Appeals Tribunal). Again, the appeal was denied on the grounds that the gas rupture did not meet the threshold for qualifying as a traumatic event.

(ii) B.C. Court of Appeal Decision

On judicial review to the British Columbia Court of Appeal, the majority held that the "traumatic event" descriptor under section 5.1 of the Act, when reviewed concurrently with Board policy breached the equality provisions of the *Charter* on the basis that it gave rise to discrimination on the basis of mental disability. According to the majority, when compared to workers suffering from physical disability, workers similarly situated to Mr. Plesner were at a significant disadvantage in terms of entitlement to compensation.

In the majority's view, the fact that workers suffering from physical disabilities only had to show they suffered a work-related injury in order to receive benefits, while workers suffering from mental disabilities were required to exceed the "traumatic" threshold as defined by the Board's mental stress policy before receiving compensation.

Interestingly, the majority held that the provision in the legislation which confined entitlement to stress arising out of a sudden and unexpected traumatic event was **not** unconstitutional. However, the majority went on to find that the high threshold set by the Board's mental stress policy for establishing that a "traumatic event" occurred offended the *Charter*. The majority identified the specific provisions of the Board's mental stress policy which it determined were unconstitutional.

The dissenting Judge took a very different approach than the majority. She held that the distinction drawn between physically injured workers and psychologically injured workers did not amount to discrimination based on disability. The dissenting Judge ruled that treating workers' compensation claims differently on the basis of the way they were acquired did not breach the *Charter*. She was also sympathetic to the argument that line-drawing is inevitable in a government benefits scheme and that the government is entitled to decide for itself how resources are allocated provided that the *Charter* is not breached.

Notwithstanding the detailed dissenting judgment, the B.C. government has apparently decided not to pursue a further appeal to the Supreme Court of Canada. The Board has removed the provisions of the mental stress policies which the Court held offended the *Charter*. [2] The Board redefined "traumatic event" as "an emotionally shocking event", which the Board indicated was consistent with both the *Dorland's Medical Dictionary*, and *The Concise Oxford Dictionary* definitions of "traumatic".

[2]See www.worksafebc.com/regulation_and_policy/policy_decision/board_decisions/2009 /july/assets/20090714-06.pdf for a copy of the resolution which amended the mental stress policy

"Traumatic" Threshold Remains in Effect

It is important to appreciate that the *Plesner* decision does not open the door to WSIB entitlement for every type of work related stress condition. Mr. Plesner argued that confining entitlement to work related mental stress arising out of a "traumatic" event was in and of itself unconstitutional. In other words, Mr. Plesner argued that the discrimination arose out of the fact that workers with physical injuries simply had to establish that the injury was work-related, whereas workers suffering from mental stress had to establish that the stress was **both work related and traumatic**.

It was argued that it was unconstitutional to confine entitlement to "traumatic" mental stress when almost any kind of work-related physical injury automatically results in entitlement being granted. The Court did not accept Mr. Plesner's argument and held that it was not unconstitutional to confine entitlement to work-related "traumatic" stress. However, the Court went on to find it unconstitutional to set an extremely high threshold for establishing that the work-related stress is also "traumatic" when no similar barrier exists for physical injuries. The Court noted that it was evident from the examples provided in the policy that the circumstances must be quite extreme for stress to be considered "traumatic".

It is fair to say that the nature of the examples listed in the policy was such that most workers will likely seldom, if ever experience an event which would meet the policy's threshold for "traumatic". Although the issue was not analyzed extensively in the judgment, it appears that the Court was prepared to accept differential treatment between physical and mental conditions is permissible, provided that the threshold for entitlement to mental stress benefits is not set too high.

Long Term Impact

It is clear from this decision that entitlement to workers' compensation benefits for mental stress will expand significantly in B.C. (and possibly across the country if this decision is followed by other Courts or is accepted by the Supreme Court of Canada). Workers in B.C. will now have to establish that the stress condition arises from a reaction to "an emotionally shocking event". Clearly, the Court intended to expand entitlement to workers' compensation benefits for mental stress without requiring the elimination of the hurdle that stress be a reaction to a work-related event which is objectively traumatic.

However, it remains to be seen how "emotionally shocking event" will be interpreted and it is not clear where the new line will be drawn. For example, would an employee be granted entitlement for a reaction to a single incident of being loudly yelled at by a supervisor? Would an employee be entitled to compensation after being sent a pornographic e-mail by a co-worker? Under the old policy it is fairly clear that such incidents would not be considered "traumatic". After the *Plesner* decision, there may be some circumstances where a reaction to such events would be treated as compensable in B.C.

The mental stress policy in B.C. continues to deny entitlement for stress which is caused by an employer's decision 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 worker's employment. This means that stress arising out of an employee's reaction to ordinary work related events continues to be non-compensable.

However, employers should also appreciate that other Courts will likely be asked to go further than the B.C. Court of Appeal in *Plesner* and find that imposing the "traumatic" threshold for entitlement is unconstitutional regardless of how "traumatic" is defined by policy. Such a finding would dramatically lower the bar to entitlement for mental stress even further and could possibly result in dramatic premium increases. How the *Plesner* approach is treated in Ontario remains to be seen. It is anticipated that it will not be long before the WSIB and the Courts are required to determine whether to follow the *Plesner* approach or not.

For more information contact:
Ryan Conlin at rconlin@sbhlawyers.com 416-862-1616.

UPDATE is an electronic publication of **STRINGER BRISBIN HUMPHREY**
110 Yonge Street, Suite 1100, Toronto, Ontario M5C 1T4

T: 416-862-1616 Toll Free: 1-866-821-7306 F: 416-363-7358

65 Cedar Pointe Drive, Unit 806A, Barrie, Ontario L4N 5R7
T: 705-727-0808 Toll Free: 1-866-878-6253 F: 705-727-0323

E: info@sbhlawyers.com I: www.sbhlawyers.com

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Presenter: Ryan J. Conlin

Half Day Seminar
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