Chapter 11

STRESS CLAIMS

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1. INTRODUCTION

Workplace stress is ubiquitous — it affects workers of all ages, and from all types of occupations. A recent study conducted by the Heart and Stroke Foundation indicates that work is the most common source of stress, followed by family and financial stress.[1] A 1993 Report by the United Nations' International Labour Organization identified workplace stress as one of the most serious health issues of the 20th century, and called it a "global phenomenon".[2]

The term "stress" can refer to both the cause and the effect of a workplace injury. The term is often used without a full appreciation that for workers' compensation cases one must be precise about what one means by "stress".

As a cause, stress refers to a non-physical event or workplace condition, i.e., a "psychological" or mental cause. Witnessing a co-worker's death on the job, or being exposed to a poisoned work environment as a result of sexual harassment are examples of different types of causes. These examples point to another important distinction in stress claims between an "acute" and a "chronic" case. This parallels the distinction between a physical injury resulting from a distinct event versus one with a gradual onset, i.e., a disablement claim.

As an effect, stress can refer to a host of psychological disabilities, including post-traumatic stress disorder, anxiety disorder, depression, or adjustment disorder. However, there are also physical disabilities associated with stress or aggravated by stress including high blood pressure, diabetes, and heart attacks. Although this chapter refers mostly to the psychological effects of such injuries (i.e., mental-mental claims), it is also applicable to the physical effects that such injuries can have on a worker (i.e., mental-physical claims).[3] If stress entitlement is granted, and a permanent impairment accepted, rating will normally occur under the Psychotraumatic Disability Rating Schedule (see Chapter 9: Psychological Disability, Section 4.2).

Although stress is a much discussed, studied, and lamented topic, compensation for workers suffering from stress-related disabilities in Ontario is now minimal. Prior to 1998, the Appeals Tribunal had developed jurisprudence under the *Workers' Compensation Act* that compensated stress-related disabilities like any other workplace injury. However, since the enactment of the *Workplace Safety and Insurance Act, 1997*, entitlement for stress for workers injured on or after January 1, 1998, has been drastically limited by statute. Compensation is now available only to workers who suffer from an "acute reaction to a sudden and unexpected traumatic event".[4]

This chapter will cover the following areas:

- History of stress claims at the Board and Tribunal;
- Adjudication of Pre-1998 Stress Cases; and
- Adjudication of Post-1997 Stress Cases.

2. HISTORY OF STRESS CLAIMS AT THE BOARD AND TRIBUNAL

2.1 Historic Board Practice

Prior to 1998, there was no Board policy for adjudicating claims for work injuries caused by stress. The Act made no distinction among work-related disabilities. However, a practice had developed at the Board of restricting compensation to situations where there were acute stressors which were sudden, shocking, and/or life-threatening. As a general rule, stress claims were not allowed at the Board level, although there were some exceptions to this practice at the Hearings Officer level.[5]

2.2 Tribunal Approaches to Stress Claims

In July 1988, the Workers' Compensation Appeals Tribunal (WCAT) issued Decision 918.[6] This was not the first Tribunal decision to suggest that stress claims could be compensable, but it became the leading decision because of its thorough analysis of the legal and evidentiary issues which stress claims present. In this decision, the WCAT stated clearly that a mental disability which resulted from stress at work could be compensable as a disablement. In so doing, it rejected the possibility of stress being characterized as an industrial disease.

In Decision 918, the panel set out a legal causation test for stress claims which was higher than that for organic disabilities, by requiring workers to show that the workplace stressors were either unusual or predominant.[7] This test was subsequently rejected in Decision 1018/87, in which the panel concluded that the test that was applied to all other claims applied to stress claims.[8] This test was whether, on a balance of probabilities, work was a significant contributing factor in causing the stress-related disability.

Subsequently, the Tribunal's approach to determining whether work was a significant contributing factor was tackled differently in a number of decisions, and no universal approach has been adopted. The approach proposed in Decision 717/88 has had considerable influence, and seems to reflect the factors which are generally considered by the Tribunal in deciding stress cases.[9] In that decision, the panel posed four questions:

1) Are there workplace stressors?
2) If so, were they significant contributing factors in the development of the worker's disability?
3) What is the role of any personal stressors?

4) Is there evidence of any pre-existing condition so as to affect the comparative role of work stressors?

These factors provide a useful framework for advocates, and continue to be considered in some decisions at the WSIAT.

However, the approach in Decision 717/88 has been largely overshadowed by the two-part "average worker" test developed in Decision 826/94:

Part I: Is it plausible that workers of average mental stability would have perceived the workplace circumstances or events to be as mentally stressful as the injured worker perceived them to be?

Part II: If so, would such average workers be at risk of suffering a disabling mental reaction to such perceptions.[10]

The reasons offered by the panel for adopting this test are: the need to identify the injuring process; and the need to ensure that the injuring process arose out of and in the course of employment, and was not merely a product of the worker's imagination. A strong argument can be made that the "average worker" test is not the best way to identify the injuring process, and constitutes an unjustifiable encroachment on the "thin skull" rule. Who is the average worker and how do we determine the average worker's response to a situation? This argument is especially relevant in harassment claims where the injured worker may be a person of colour and/or a woman — is he or she the average worker?

It is well-accepted that the thin skull rule applies to workers' compensation, and it has specifically been applied in a variety of stress cases.[11] This rule establishes that the fact that a particular worker may be unusually vulnerable to an injury does not preclude them from entitlement. The average worker test seriously encroaches on the thin skull test by adjudicating entitlement based on the response of the average worker to stressors, rather than on the response of the particular worker. Decision 826/94 offers no justification for why the thin skull rule should not apply to stress cases as it does to all other injuries. The average worker test was somewhat modified by Decision 422/96 which suggested that the word "plausible" in Part I be replaced by "reasonable".[12]

Currently, there is no uniform test for deciding stress claims at the WSIAT. The average worker test from Decision 826/94 predominates. However, other Tribunal decisions have followed the approach in Decision 717/88,[13] while others adopt an amalgam of the two.[14]

2.3 Statutory Restrictions on Stress Claims in 1998

With the enactment of the WSIA, s.13 of the new Act drastically limits entitlement for stress-related disabilities:

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

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 employment, including a decision to change the work to be performed or the working conditions, to discipline the worker or to terminate the employment.

Section 13 is not retroactive; it applies to accidents on or after January 1, 1998. The *Workers' Compensation Act*, with no restrictions on entitlement, continues to apply to pre-1998 stress claims. However, as the next section of this chapter will discuss, there have been attempts by the WSIB to impose, through policy, similar restrictions on pre-1998 stress claims.

2.4 Policy Development Since the WSIA

With the new legislation, the Board issued a bound book entitled "Bill 99 Operational Policies", which contained a policy on mental stress, Document 1.1, which applied to accidents on or after January 1, 1998. That policy was superseded by a policy in the WSIB OPM, Document 15-02-02, dated June 15, 1999, which contained virtually identical wording to the prior policy document, and was also applicable to accidents on or after January 1, 1998. The policy outlines the Board's interpretation of s.13, including the meaning of "acute", "traumatic", and "employment-related decisions". The policy contained a number of case examples to assist adjudicators in deciding claims.

As a result of a number of concerns regarding stress claims, including several WSIAT decisions and pressure from stakeholders, the Board undertook revisions to its stress policy, issuing Document 15-02-02, dated May 24, 2002 (now OPM, Document 15-03-02).[15] The details of this policy as it affects the adjudication of claims will be discussed in the next sections of this chapter.

The most significant change generated in the revised stress policy is its application to pre-1998 claims. The policy is clearly framed within the confines of s.13 of the WSIA. It limits entitlement to acute reactions to traumatic events, and clearly excludes entitlement to any gradual onset stress claims. It also imposes the s.13 exclusion from entitlement on any stress-related disability, acute or chronic, resulting from employment-related decisions.

For workers injured before January 1, 1998, and hence covered under the *Workers' Compensation Act*, this policy is in direct conflict with the legislation. It is important to understand this policy in the context of the ongoing "dialogue" between the WSIB and the WSIAT about pre-1998 stress claims. Section 2.6 of this chapter reviews the history of this dialogue, and the legal issues that remain unresolved.

2.5 Board's Stress Adjudication Unit

Shortly after the May 2002 revised stress policy was issued, the Board established a specialized claims unit for adjudicating stress claims. Specialized staff in the unit includes adjudicators and nurse case managers, but does not include specialized investigators or appeals resolution officers. The unit is located within the Schedule 2 sector, but it handles both Schedule 1 and 2 claims.

The unit adjudicates claims registered on or after July 2, 2002, with an accident date on or after January 1, 1989 (the effective date of the policy). In addition, if a worker or representative has a claims decision that was made prior to July 2002, the "home" adjudicator may be contacted for a

request to transfer the file to the Stress Adjudication Unit for reconsideration under the revised policy.

2.6 Pre-1998 Stress Claims and s.126 of the WSIA

Section 126 of the WSIA, known as the "policy-binding" provision, has added further complexity to pre-1998 stress cases at the Tribunal. This section applies to all Tribunal decision-making, regardless of the date of accident. Under s.126(1), when a Board policy is applicable to the subject matter of an appeal, "the Appeals Tribunal shall apply it when making its decision". While s.126(2) allows the Board to state the policy which applies in an appeal, the Tribunal may refer the policy back to the Board if it finds that the policy is "inconsistent with, or not authorized by, the Act".

Initially, after the policy-making provision was enacted, the Board's stated policy for pre-1998 stress cases was that it had no policy, only a practice. However, in later communications to the WSIAT, the Board boldly asserted that its "practice" of denying claims with no "sudden, shocking and/or life-threatening event" was a "clearly established, well publicized and widely recognized policy of the Board from its inception in 1915".[16] The final communication by the WSIB was the board of directors' decision declaring that its practice was a policy.[17] Part of the August 1999 "policy statement" arising from the Minute reads: "The Board of Directors confirms that it is restating the WSIB's policy on chronic mental stress formally and is writing to put aside any discussion or debate about the existence, substance or applicability of its policy...".[18]

Three WSIAT decisions reviewed the pre-1998 stress policy issue in light of the August 1999 policy statement by the board of directors. In Decision 871/99I2, the panel concluded that there was no policy regarding pre-1998 stress claims.[19] Specifically, the panel found the August 1999 policy statement was not a policy within the meaning of s.126.

In both Decision 809/98I2 and Decision 262/99I2, it was determined that there was no evidence that the pre-1998 practice was a policy, and that the August 1999 board of directors' Minute that the WSIB called its policy, was inconsistent with and not authorised by the Act because it placed limits on entitlement in the absence of any limits in the Act.[20] Therefore, the policy was referred to the Board pursuant to s.126(4). The WSIB's resulting direction to the WSIAT regarding pre-1998 stress claims was that "the practice described in the Board Minute had not been established through a formal enough process to be considered a policy for the purposes of s.126".[21] This allows the WSIAT to continue to apply its caselaw to pre-1998 stress claims.

The next phase of WSIAT and WSIB dialogue for pre-1998 stress claims will likely be another s.126 referral of the current stress policy, Document 15-03-02, to determine its legality for pre-1998 stress claims. Although this policy was established through a formal process, its retroactive application to workers under the *Workers' Compensation Act* is in direct conflict with the legislation and Tribunal caselaw. By making the policy retroactive, the Board has introduced more uncertainty into the system.

3. ADJUDICATION OF PRE-1998 STRESS CLAIMS

With the passage of time, this has become a declining area of casework. Nevertheless, there remain a significant number of pre-1998 claims, so it is worth reviewing the issues that arise in these cases.

3.1 Time Limits

In a March 2001 WSIB board of directors' resolution, a commitment was made to revise the Board's handling of pre-1998 stress claims, and "...time limits for application for benefits or for appeals should not be allowed to impede proper resolution of this issue".[22]

Although the stress policy is silent about time limits, the Board does not apply time limits to workers bringing forward stress claims to be decided under the revised policy. This is certainly of benefit to workers who in the 1980s and 1990s were told not to make a claim or were denied claims and did not appeal. However, once a decision is issued under Document 15-03-02, it is advisable to meet the time limits for appeals.

3.2 Applicability of Board Policy

The Board's stress policy has been made retroactive to January 1, 1989. As discussed in detail in Section 2.4 above, the narrowness of entitlements under the policy is in direct conflict with the absence of any restrictions for stress claims under the WCA.

For workers with stress claims prior to January 1, 1989, the policy will not be applied, and the Board will fall back on its old practice of denying all stress claims unless there is a sudden, shocking and/or life-threatening event to hook the claim on. For claims that do not meet that strict test, the only hope of success will come at the Tribunal level.

For workers injured from January 1, 1989 to December 31, 1997, the Board will apply Document 15-03-02 to their stress claims. The policy does not require that an event be "life-threatening", but uses the term "traumatic" as its guide. Unfortunately, the policy contains a narrow interpretation of traumatic: it is limited to events which are "objectively traumatic", such as a criminal act, harassment, or a horrific accident.[23] For harassment claims, a worker must be the object of actual or threatened physical violence, or be placed in a life-threatening situation.[24] As is evident, the policy is only a slight improvement on the old "sudden, shocking, and/or life-threatening" threshold.

If as a result of this policy, a worker's meritorious stress claim is denied, then serious consideration should be given to challenging the legality of this policy at the WSIAT.

3.3 Strategy at the Board

As indicated above, if a worker's stress claim is based on chronic workplace conditions, such as work overload, or harassment constituting a "poisoned work environment" but not linked to any one event, then it is not worth the resources and psychological investment to spend time convincing the Board to allow the claim. The current policy is clear that "workers who develop mental stress gradually over time due to general workplace conditions are not entitled to benefits".[25] Similarly, for workers whose pre-1998 stress claims arise out of events relating to

their employment, such as discipline and termination, the policy will likely mean a denial of their claims.

Workers are well-advised to move their claims to the WSIAT as quicky as possible, where the WCA should be properly applied to the facts of their claims.

3.4 Strategy at the Tribunal

In determining whether the workplace was a significant contributing factor to a stress-related disability, the Tribunal has adopted a variety of tests, discussed above in Section 2.2. Whatever the approach adopted by a particular panel or vice-chair, the WSIAT almost always addresses the following factors in deciding an appeal:

- Is there a disability?
- Are there work stressors?
- Were the stressors a significant contributing factor in the development of the disability?
- What is the role of any personal stressors?
- Is there evidence of any pre-existing condition so as to affect the comparative role of work stressors?

As well, representatives should always try to fit the facts of their case into the "average worker" test discussed above in Section 2.2.

3.4.1 Is There a Disability?

Although it seems self-evident, it is essential to establish, through medical evidence, that the worker suffers from a medical condition, and that the worker is disabled by that condition. The Tribunal will deny claims if there is no evidence of a true disability: it distinguishes between a disabling condition and anger or frustration.[26] It is best to have evidence from a psychiatrist, although in recognition of the fact that not everyone has access to a psychiatrist, other forms of evidence will be considered.[27]

3.4.2 Are There Workplace Stressors?

The dominant test for determining if there are workplace stressors is the "average worker" test, although it is by no means the only approach, as discussed earlier in this chapter. The average worker test asks: "Is it plausible that workers of average mental stability would have perceived the workplace circumstances or events to be as mentally stressful as the injured worker perceived them to be?"[28] This is an attempt to create an objective test to identify the injuring process. However, like all "reasonable person" legal tests, the determination is ultimately dependent on the impression of the adjudicator. Nevertheless, representatives should always try to characterize the worker's reaction as that of the "average worker" to similar stressors.

A wide variety of factors have been found to be stressors, including:

- conflict with co-workers or managers;[29]
- effect of disciplinary action;[30]
- change in working conditions;[31]
- harassment;[32] and
- false allegations of misconduct.[33]

There is no expectation that representatives will produce statistical or other evidence of how workers respond to given events. However, in harassment cases it will be important to analyze how the injured worker's race, religion, gender, sexual orientation, etc., may have influenced the worker's reaction to the stressors in the particular workplace.[34]

Work stressors need not be unusual or unexpected in the worker's employment. This is particularly relevant for workers in fields that are inherently stressful, such as police officers, prison guards, and firefighters. Emergency services workers are not barred from receiving compensation simply because their work is frequently traumatic.[35]

The worker's assertions about the workplace stressors, either events or general conditions, must have some correlation with reality. Specifically, they cannot be primarily a product of the worker's imagination, nor a "distortion" of the events or conduct at issue.[36] Of course, a worker's perceptions, and any distortions, should be carefully delineated to ensure that other "objectively" stressful events are properly identified.[37] For cases where a worker's "thin skull" is going to be at issue, you may want to underplay the "average worker" test, and focus on the purpose of the test, i.e., to identify the injuring process, and argue that this can be done without resort to the "average worker" test.[38]

3.4.3 Were the Stressors a Significant Contributing Factor in the Development of the Disability?

This is essentially a question of medical proof. It is very important to have medical evidence that makes a causal connection between the workplace stressors and the worker's disability. If there are issues of a "thin skull" for a particular worker, then consideration should be given to providing the Tribunal with medical or psychological evidence of the wide range of possible coping strategies for the type of stressors experienced by the worker.

The board of directors' recent adoption of the Smith report[39] with respect to occupational disease may provide the basis for a liberal definition of what constitutes a significant contribution for the purposes of stress entitlement (see Chapter 7: Entitlement Issues and Chapter 8: Occupational Disease for a discussion of the Smith report). The Smith report suggests that any contribution beyond *de minimis* is significant. There is no basis for a different standard of causation in occupational disease and stress claims. In both areas, there are injuring processes arising both from work and elsewhere, and the nature of these processes and their combination is extremely difficult to ascertain. To have a different standard of causation amounts to treating psychological conditions differently from physical ones.

Besides being a medical issue, the question of how stressors contributed to the disability is also part of the "average person" test. The second part of the average worker test asks: "Would such average workers be at risk of suffering a disabling mental reaction to such factors?" Recent jurisprudence suggests that once the first part of the average worker test is answered affirmatively, the second part flows fairly directly from that finding.[40] However, advocates should be prepared to make distinct arguments about the second part of the average worker test.

3.4.4 What is the Role of Any Personal Stressors?

The purpose of evidence about personal stressors is to allow the panel to determine the significance of the workplace stressors in the development of the disability.[41] If personal stressors are overwhelming as compared to work stressors, the panel is likely to conclude that work was not a significant contributing factor.[42] Non-occupational stressors may also be found to be significant intervening events which can limit the extent of benefits.[43]

In defending against an argument that the workplace factors were not significant or were relatively insignificant, representatives should, if appropriate, compare the worker's ability to cope with the personal stress prior to the introduction of workplace stressors to their diminished ability after that time.[44] In this way, the disabling role of the workplace factors is highlighted.

A thorough review of a worker's medical records will reveal any medical notes or treatment for non-occupational stressors. In the absence of such evidence, representatives should ask the worker questions about personal history early on in the preparation of an appeal. If there are significant stressors identified, consideration should be given to seeking a medical opinion from the worker's treating specialist as to the relative contribution of the non-occupational stressors to the disability.

Although there is no obligation to lead evidence regarding the worker's personal life and stressors (e.g., divorce or death of family member), it is best to bring this evidence out in the worker's direct examination. Not only does this allow the worker's representative to better control the characterization of the evidence, but it demonstrates that the worker has nothing to hide. This approach also protects the worker from being taken by surprise by the employer's cross-questioning.

3.4.5 Is There Evidence of Any Pre-existing Condition so as to Affect the Comparative Role of Work Stressors?

As with personal stressors discussed above, the Tribunal will review evidence of related pre-existing conditions to determine the relative role of the workplace stressors. Indeed, it is standard practice for the WSIAT to request past medical records prior to proceeding to a hearing. If there is a pre-existing condition, the important legal point to consider is whether or not the condition was symptomatic at some point prior to the introduction of the workplace stressors.

These issues were addressed in Decision 826/94:

> [...] "career invalid" cases may be seen, on reflection, to be merely particular instances of the more general category of cases in which the role of the symptomatic pre-existing condition is shown to be so dominant a factor in the emergence of the subsequent disability as to render the role of the workplace events insignificant or insubstantial or

> negligible in the overall picture. One's skull may be thin or one's personality may be an eggshell without affecting entitlement to workers' compensation benefits, but neither the skull nor the personality can be known to be crumbling. This has sometimes been referred to — rather insensitively, we regret to say — as the "crumbling skull" exception to the thin-skull rule.[45]

If the worker has a pre-existing condition that was asymptomatic at the time of the workplace stressors, then it should not affect the Tribunal's determination of entitlement. However, the presence of a symptomatic pre-existing condition may affect entitlement.[46] And if entitlement is allowed, a symptomatic pre-existing condition may affect the extent of benefits granted, depending on the severity of the pre-existing condition and the intensity and duration of the workplace stressors.[47]

4. ADJUDICATION OF POST-1997 STRESS CLAIMS

With the enactment of ss.13(4) and (5) in the *Workplace Safety and Insurance Act*, there has been a drastic narrowing of entitlement for workers who suffer from stress-related disabilities. The discussions that follow present both legal analyses and practical casework strategies.

4.1 Legislation

The relevant provisions of the Act are:

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

There are a number of legal issues arising from this provision, including its effect on a worker's right to sue and its consistency with human rights principles.

4.1.1 Right to Sue

It is important to note that the mental stress subsections are part of the larger s.13 which outlines the parameters of insured injuries under the Act. The section begins with s.13(1): "A worker who sustains a personal injury by accident arising out of and in the course of his or her employment is entitled to benefits under the insurance plan." Hence, there is a very broad entitlement section for workers sustaining "injury by accident", but then certain types of injuries are excluded.

Limiting mental stress claims in this manner makes it difficult for a worker who is denied benefits under ss.13(4) and (5) to launch a successful civil action against the employer. Because s.26 of the Act provides that entitlement to benefits for work "accidents" is in lieu of any right of action, a strong argument can be made that a denied stress claim remains within the definition of

accident, thus removing the worker's right to sue. This is better understood by comparing Ontario's Act to the Nova Scotia *Workers' Compensation Act*,[48] which limits entitlement for stress claims through its definition of "accident". Because excluded stress claims do not fall within the definition of accident, there is a good argument that a Nova Scotia worker whose stress claim is denied retains the right to sue the employer.

4.1.2 Compatibility with Human Rights Legislation

Many worker advocates view ss.13(4) and (5) as violations of both the Ontario *Human Rights Code*[49] and the equality provisions of the *Charter*.[50]

There are two different ways in which the provisions are discriminatory. First, on their face, ss.13(4) and (5) treat a subset of workers with mental disabilities differently from workers with physical disabilities. Second, there is an adverse impact on a particularly vulnerable group of workers, those who are the victims of harassment based on personal characteristic(s), such as race or gender. Frequently, this type of workplace harassment does not take the form of "acute" incidents, but a pattern of conduct over time. If ss.13(4) and (5) are interpreted to exclude situations described in human rights jurisprudence as a "poisoned work environment" or "*quid pro quo*" harassment, then they are not consistent with either the *Charter* or the *Code*.

For a discussion of using human rights arguments in casework, see Section 4.4 below.

4.1.3 WSIAT Caselaw

At the time of writing, there are a few cases which have attempted to interpret s.13 as it relates to mental stress claims. There are three decisions that have rejected post-1997 mental stress claims based on work assignments, general working conditions, or discipline by an employer.[51] However, the WSIAT has allowed two mental stress claims under ss.13(4) and (5) for non-physical and non-life threatening harassment in the workplace.[52] In doing so, one panel concluded that "the policy does not exclude entitlement to benefits where a worker has experienced mental stress as the result of 'overzealous scrutiny of supervisors or vexatious pursuits of co-workers'".[53] In another recent case, the WSIAT concluded that a wrongful accusation of serious misconduct on the job is generally accepted as being traumatic.[54]

One WSIAT decision found that ss.13(4) and (5) do not limit entitlement to benefits for workers with physical impairments which arise from any workplace stressors.[55] The vice-chair in that case went on to decide the appeal based on whether workplace stressors were a significant contributing factor to the worker's physical disability. This decision highlights the discriminatory nature of the provisions which differentiate entitlement to benefits based on whether a worker's reaction to workplace stressors is physical or mental.

At the time of writing there were no WSIAT decisions on the issue of the consistency of the ss.13(4) and (5) exclusions with human rights legislation.

4.2 Time Limits

Under the WSIA, a claim must be filed within six months of the accident date (s.22(1)), and a worker has six months to appeal a negative decision to the Appeals Branch (s.120(1)(b)). In developing its current policy, the board of directors made a commitment not to let time limits

"impede proper resolution" of stress claims or appeals.[56] Although the policy is silent on this issue, there has been confirmation of this in correspondence from the Board. Specifically, in April 2003 the Board has stated that it "will consider claims or appeals submitted by injured workers that are not within the six month time limit".[57] Workers and their representatives are strongly advised to meet the statutory time limits. However, if that does not happen, there is support for an extension of the time to claim or appeal.

4.3 Policy

The Board's current policy, Document 15-03-02, entitled "Traumatic Mental Stress" is dated October 12, 2004, but has retroactive effect. The title of this policy is deceptive, as it suggests that the policy relates only to acute stress, and hence would be silent regarding chronic or gradual onset stress claims. However, the policy clearly spells out that "workers who develop mental stress gradually over time due to general workplace conditions are not entitled to benefits".[58]

In general, the current policy is a narrow interpretation of the legislation, which is likely to exclude from entitlement many workers who would fall within a larger and more liberal reading of the legislation. This restrictive interpretation runs contrary to the entitlement-granting provision, s.13(5), which is the subject matter of the policy. The discussions below review several ways to expand the policy's narrow reading of the Act.

4.3.1 Sudden and Unexpected Traumatic Event

The current stress policy states that there must be an "event" arising in and out of the course of employment, that is:

- clearly and precisely identifiable;
- objectively traumatic; and
- unexpected in the normal course of the worker's employment.

The policy lists the types of events which the Board would accept as sudden and unexpected traumatic events; for example, witnessing an horrific accident, being the object of death threats, being the object of harassment that includes physical violence or threats of physical violence, or being the object of harassment that includes being placed in a life-threatening situation. The list is focussed entirely on events with a physical component. Furthermore, that physical component must meet the high standard of life-threatening or horrific.

It would appear that workers experiencing harassment that involves degrading language or inappropriate touching would not fall within the purview of the policy. Yet, these things can easily be characterized as "traumatic" events. Other traumatic events that are not included in the policy list, but which the Tribunal caselaw has clearly recognized as such, are those in which workers have been falsely accused, whether by an employer, a co-worker, or a consumer, of serious misconduct, such as sexual abuse.[59]

A final area for concern is the requirement that the traumatic event be "unexpected in the normal course of the worker's employment". Workers' compensation is a no-fault system, yet this criterion introduces the legal concept of voluntary assumption of risk into claims. There should

be no distinction in adjudicating stress claims based on a worker's type of employment. Why should there be any difference between compensation for a prison guard who is threatened with a knife and a factory worker who is threatened with a knife? This aspect of the policy is particularly problematic for emergency workers whose regular work entails traumatic events.

To ensure this policy is interpreted as broadly as possible, it should be argued that "sudden and unexpected" are to be understood as referring specifically to the experience of the individual worker at the instant of the traumatic event. For example, at the moment the police officer peered into the demolished car, she was not expecting to see a horrible sight, despite her knowledge that there might be a dead body in the car.

4.3.2 Acute Reaction and Delayed Onset of Disability

The current stress policy attempts to define "acute reaction" as a disability that occurs immediately, without delay, after a triggering event.[60] Delayed onset of a worker's disability is recognized in the policy. At page 3 of the policy, it states that "an acute reaction is said to be delayed if it occurs more than four weeks after the traumatic event". Unfortunately, the policy does not simply recognize that stress-related disabilities can have delayed onsets, but also places a higher and more subjective standard of proof on these workers: the evidence that the onset is due to a sudden and unexpected traumatic event must be "clear and convincing". There is no justification in the legislation for a higher standard for workers with delayed onset acute stress claims. In each claim, the Board must determine work-relatedness on the balance of probabilities, with the benefit of doubt going to the worker.

4.3.3 Cumulative Effect

The term "cumulative effect" is used for claims where more than one event leads to a worker's stress-related disability. This provision of the current stress policy is explained as an attempt to recognize that some occupations expose workers to multiple traumatic events resulting from horrific accidents, criminal acts, or harassment.[61] The purported benefit of this provision is that the Board will not count against a worker the fact that he or she tolerated traumatic events in the past.

Unfortunately, the Board's policy relies on a simple cause and effect relationship for stressful events. It fails to recognize that some stress-related disabilities resulting from a series of traumatic events may be triggered by a minor, and even a non-compensable, event. Instead, the policy states that "entitlement may be accepted because of the cumulative effect, even if the last event is not the most traumatic". This is a very narrow understanding of disabilities which result from a series of multiple traumatic events. Psychiatric disabilities do not follow the same paths as organic conditions; they are more complex in their causes and effects and vary greatly among workers, yet the policy does not recognize this.[62]

4.3.4 Diagnostic Requirements

For a "simple" stress claim, that is, an immediate acute reaction to one traumatic event, the worker need only have a DSM-IV diagnosis from any regulated health professional. As such, the opinion of a worker's family doctor will suffice.

If there is delayed onset of a stress disability or if the disability is due to a cumulative effect, workers must have a DSM-IV diagnosis from a psychiatrist or psychologist.[63] For workers living in areas of Ontario where access to qualified mental health professionals is limited or non-existent, this requirement is a significant and unjustifiable barrier to the proper adjudication of their claims.

4.3.5 Exclusion of Employer Decisions or Actions

Subsection 13(5) states that a "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 current stress policy contains a list of employment decisions encompassed by the statutory exemption, namely: terminations, demotions, transfers, discipline, change in working hours, and change in productivity expectations.[64]

Although the new statutory provision contains no qualifier on the restriction of benefits, the policy does. Workers are entitled to benefits if the actions of an employer are not part of "the employment function".[65] The policy gives violence or threats of violence as examples of actions that are not part of the employment function. This leaves open the possibility of arguing that an employer who disciplines or terminates an employee in a particularly callous, racist, sexist, or otherwise inappropriate way, will not be protected from stress claims. Similarly, if part of a larger harassment complaint against an employer or supervisor involves imposing work requirements or discipline on the worker, it should be argued that this is not part of the employment function.

Another type of claim that remains uncertain is that of false accusations of misconduct directed at workers. Although under the old Act the Tribunal granted entitlement in these situations, s.13(5) provides little guidance on how they should be treated under the current Act. For cases where the allegations are made by the employer or co-workers, representatives should be prepared to argue that false allegations and their sequelae do not fall within "the employment function" as set out in the policy. If the false allegations are made by others, such as students, patients, or customers, then it should be argued that the s.13(5) exclusion does not apply at all. Therefore, the focus becomes whether the false allegation and related events meet the "sudden, unexpected and traumatic" test.

4.4 Casework Issues and Strategies

Given the restrictive nature of ss.13(4) and (5), it is important to narrowly define "mental stress". To this end, representatives should not assume that a worker who either self-describes as having "mental stress" or who is diagnosed with a stress-related disability truly falls under ss.13(4) and (5). It should be concluded that a worker is covered by these provisions only if there are no physical injuries or sequelae that have contributed to the stress-related disability (i.e., if you have a true "mental-mental" claim). To be able to do this, representatives should be familiar with the law and policy on psychological disabilities arising from organic injuries. These are thoroughly reviewed in Chapter 9: Psychological Disabilities.

For true mental stress claims, advocates will have to be creative in arguments about the proper interpretation of ss.13(4) and (5) and the policy. In doing this, an assessment should be made of whether a particular worker's case has a reasonable chance of success without launching a legal

challenge to the Act itself. For instance, a worker who is subject to sexual touching by a customer at a restaurant could have a successful claim within the current policy and Act. Although the harassment is not necessarily "life-threatening", it certainly can be described as physical violence against the worker, which falls within the policy language.

Workers may want to consider filing a human rights complaint if the mental stress claim can be linked to a prohibited ground of discrimination. Although this may not, in and of itself, produce a successful complaint at the Commission, it may strengthen arguments about giving the term "traumatic" an expansive reading.

Another strategy to consider is pursuing the benefit of the more judicious decision-making at the WSIAT. As discussed above, the Board's policy contains a narrow interpretation of traumatic that could benefit from the expertise of, and greater legal scrutiny by, the Tribunal. There are many good arguments about ensuring that the granting provision of s.13(5) is interpreted in a large and liberal manner. Dictionary definitions are useful in any argument about what is "traumatic". For instance, *The Concise Oxford Dictionary* defines traumatic as "of or for wounds; or causing trauma, (colloq.) unpleasant (*a traumatic experience*)".[66] None of the policy's requirements of "horrific", "life-threatening", or "physical violence" are to be found in the ordinary meaning of the word, and the Tribunal is likely to give the Act a broader interpretation.

For those workers with stress claims that do not fall within the Act and/or policy, representatives should do a careful analysis of the facts and law to consider whether the case is one which merits a human rights or *Charter* challenge to the policy or Act. The Supreme Court of Canada's recent decision regarding the Nova Scotia Workers' Compensation Board's restriction on benefits for workers with chronic pain disability suggests that the WSIB's exclusion from benefits of workers based on their type of psychological disability is discriminatory, and not justifiable under the *Charter*.[67] These are important issues which should be raised early in the development of ss.13(4) and (5) jurisprudence. If a representative is considering such a challenge to the provision, it would be useful to contact a specialty clinic (e.g., IAVGO or IWC) to find out what other similar challenges have been undertaken and for legal consultation.

There are other, less litigious, methods of raising human rights arguments, that should be considered in appropriate cases. Rather than launching a direct challenge to the Act, representatives may want to develop legal arguments based on interpretations which are in accordance with the *Charter* and the Ontario *Human Rights Code*.[68] An example of how these arguments can be made without requiring a direct legal challenge is helpful. A worker has a stress claim based on racial harassment at the workplace, which is based on general workplace conditions, none of which involve physical violence, or threats thereof. Under the policy, this claim is very likely to be denied by the Board. However, arguments can be made as to why any human rights-based harassment must be part of the legal definition of "traumatic". Any interpretation of the Act must be consistent with the *Code* and *Charter* by not precluding compensation for the psychological trauma of human rights-based harassment.

When considering legal strategies, it is always helpful to case conference with other advocates. This is even more important for stress claims. The law and the policy are very new, so seeking out current information is critical if you are assisting an injured worker. Representatives are encouraged to contact the specialty legal clinics or other resources, such as the Office of the Worker Adviser, for assistance.

NOTES

1. S. Fine and M. Stinson, "Stress is overwhelming people, study shows", *The Globe and Mail*, 3 February 2000.

2. "Stress — Workplace plague 'global phenomenon'", *The Globe and Mail*, March 1993.

3. For psychological disabilities caused by a physical injury (i.e., physical-mental claims), the Board applies its poorly titled "Psychotraumatic Disability" policy, Operational Policy Manual, Document 15-04-02.

4. WSIA, ss.13(4) and (5).

5. "Submission of the Tribunal Counsel Office" dated October 18, 1999, in Decision 871/99I (3 June 1999), pp.5-8. There is a description of four Hearings Officer decisions where claims for chronic stress, based on harassment or on excessive workload demands, were allowed despite the practice of requiring a sudden, shocking, and/or life-threatening event.

6. Decision 918 (1988), 9 WCATR 48.

7. A worker had to show either (1) that the stress to which the worker was exposed was greater than that which would be experienced by an average worker (i.e., unusual stressors), or (2) if the stress was not greater, then with clear and convincing evidence, that the workplace stressors (usual stressors) were significant and predominated in causing the disability.

8. Decision 1018/87 (1989), 10 WCATR 82.

9. (19 August 1992).

10. (1995), 36 WCATR 102 at 126.

11. Decision 1030/89 (1991), 20 WCATR 46 at 46; Decision 717/88, supra, note 9; Decision 75/93 (24 April 1995); Decision 500/94 (30 April 1997); and Decision 834/97 (18 January 1999).

12. Decision 422/96 (1999), 51 WSIATR 6.

13. See Decision 500/94, supra, note 11 and Decision 1108/99 (29 December 2000).

14. See Decision 75/93, supra, note 11; Decision 834/97, supra, note 11; and Decision 2660/00 (27 April 2001).

15. For a background leading up to the revisions to the policy, see J. Seamon's "WSIB Policy and Practice for Stress Claims" in *IAVGO Reporting Service*, Vol. 16, No.2, October 2002.

16. An excellent history of the Board's position on pre-1998 stress claims and its practices and policies is found in Decision 809/98I2 (1999), 52 WSIATR 64 at 78-85.

17. "Policy Statement — Chronic Mental Stress Occurring Prior to January 1, 1998", Board Minute 9, August 26, 1999, p.6180.

18. Ibid.

19. Decision 871/99I2 (2000), 53 WSIATR 101.

20. Decision 809/98I2, supra, note 16 and Decision 262/99I2 (30 December 1999).

21. February 18, 2000 letter from Glen Wright, WSIB Chair, to Ian Strachan, WSIAT Chair.

22. Board Minute 1, March 7, 2001, p.6334.

23. Operational Policy Manual, Document 15-03-02.

24. Ibid.

25. Ibid.

26. Decision 980/89 (1990), 13 WCATR 304; Decision 1164/96 (7 January 1998); and Decision 1772/99 (27 March 2002).

27. Decision 684/89 (1990), 16 WCATR 132.

28. Supra, note 10.

29. Decision 952/89 (23 January 1991); Decision 227/95 (2 February 1996); Decision 422/96, supra, note 12; and Decision 834/97 (18 January 1999).

30. Decision 297/91 (29 March 1995); Decision 830/96 (27 May 1997); and Decision 1328/99 (31 August 2000).

31. Decision 1030/89 (1991), 20 WCATR 46; Decision 86/96 (1996), 38 WCATR 182; Decision 24/98 (1998), 49 WSIATR 57; and Decision 2055/99 (22 March 2000).

32. Decision No. 636/91 (1992), 21 WCATR 277; Decision 778/95 (18 February 1999); Decision 809/98I2, supra, note 16; and Decision 1467/99 (28 April 2000).

33. Decision 269/98 (30 January 2001); Decision 557/02 (26 April 2002); and Decision 215/98 (5 June 2002).

34. See Decision 636/91 (1992), 21 WCATR 277 for a case where issues of race and gender, and the worker's particular reactions are analyzed by the panel.

35. Decision 717/88, supra, note 9; Decision 397/92 (28 January 1993); Decision 1595/97 (12 August 1998); and Decision 809/98I2, supra, note 16.

36. Decision 1018/87 (1989), 10 WCATR 82; Decision 520/90 (1991), 19 WCATR 147; and Decision 2645/00 (8 January 2001).

37. See Decision 1187/02 (30 September 2002), where the panel separates out the worker's "overreactions" to some events from other "stressful" events.

38. See Decision 500/94, supra, note 11; Decision 672/92 (11 December 1992); and Decision 506/97 (24 June 1998) for versions of this argument.

39. Brock Smith, *Final Report of the Chair of the Occupational Disease Advisory Panel* (Toronto: Workplace Safety and Insurance Board, February 2005).

40. Decision 422/96, supra, note 12 and Decision 1595/97 (12 August 1998).

41. Decision 323/94 (20 February 1995).

42. Decision 142/93 (21 November 1995) and Decision 1149/01 (22 May 2001).

43. Decision 670/02 (17 June 2002).

44. Decision 500/94, supra, note 11 and Decision 324/98 (31 July 1998).

45. Decision 826/94, supra, note 10, p.123.

46. Decision 122/97 (21 May 1998).

47. Decision 1030/89, supra, note 11; Decision 297/91, supra, note 30; and Decision 422/96, supra, note 12.

48. SNS 1994-95, c.10.

49. RSO 1990, c.H.19.

50. Part I of the *Constitution Act, 1982* being Schedule B to the *Canada Act 1982* (UK), 1982, c.11.

51. Decision 1971/01 (2001), 58 WSIATR 356; Decision 881/01 (24 January 2002); and Decision 392/02 (5 April 2002).

52. Decision 2056/03 (12 March 2004) and Decision 406/03 (29 April 2004).

53. Decision 2056/03, ibid, para 33.

54. Decision 929/04 (18 November 2004).

55. Decision 708/02 (2003), 63 WSIATR 189.

56. Supra, note 22.

57. April 7, 2000 letter from Slavica Todorovic, Director, Benefits Policy, to Laurie Hardwick, OFL's Director of Organizational Services, p.4.

58. Supra, note 23.

59. See supra, note 33, for Tribunal cases on this issue.

60. In stress claims, the term "acute" is normally used in contrast to "chronic" to refer to the course of onset of a stress-related disability, i.e., sudden vs. gradual onset.

61. Supra, note 23.

62. B. Hoffman et al., *The Emotional Consequences of Personal Injury: A Handbook for Mental Health Professionals and Lawyers*, 2nd ed. (Markham, Ontario: Butterworths, 2001).

63. Supra, note 23.

64. Ibid.

65. Ibid.

66. J. B. Sykes, ed., *The Concise Oxford Dictionary of Current English*, 6th ed. (Oxford: Oxford University Press, 1976), *s.v.* "traumatic".

67. *Nova Scotia (Workers' Compensation Board) v. Martin; Nova Scotia (Workers' Compensation Board) v. Laseur,* [2003] 2 SCR 504, 231 DLR (4th) 385, 310 NR 22.

68. The *Canadian Charter of Rights and Freedoms*, s.15(1), requires equal treatment under the law based on listed or analogous personal characteristics (race, age, sex, etc.), subject to the reasonable limits provision in s.1. Under s.52(1) of the *Constitution Act, 1982* (of which the *Charter* is Part I), laws may be declared invalid to the extent that they are inconsistent with the *Charter*. The Ontario *Human Rights Code* requires provincial legislation, agencies, etc. to comply with the *Code* in accordance with s.47 as follows:

> (1) This Act binds the Crown and every agency of the Crown.
>
> (2) Where a provision in an Act or regulation purports to require or authorize conduct that is a contravention of Part I, this Act applies and prevails unless the Act or regulation specifically provides that it is to apply despite this Act.