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WORKERS' COMPENSATION STRESS CLAIMS: IS IT REALLY A BRAVE NEW WORLD?

JULIA L. NOBLE

RÉSUMÉ

L'élaboration de politiques au sein de la Commission des accidents du travail qui tient spécifiquement compte des réclamations reliées au stress en milieu de travail a été perçue comme un écart marqué aux politiques déjà en place concernant le droit à l'indemnisation et comme un prolongement du champ d'activités de l'indemnisation des accidentés du travail. En bref, on considère cela comme le meilleur des mondes en matière de champ d'application des indemnités.

Dans ce document, l'auteure examine et compare l'actuelle stratégie de la Commission des accidents du travail et du Tribunal d'appel des accidents du travail dans les causes reliées au stress. De plus, elle établit une distinction entre les réclamations reliées à un stress chronique ou à un stress de longue durée et celles reliées à un stress ou à un handicap psychologique qui fait suite à une blessure physique du travailleur ou du fait que le travailleur a été impliqué dans une situation soudaine et bouleversante ou qui a mis sa vie en danger.

L'auteure affirme que la reconnaissance des causes reliées au stress n'est pas un écart aux formes déjà existantes du droit à l'indemnisation mais qu'il est, en fait, requis par la Loi. De plus, le spectre des éventuelles indemnisations de réclamations reliées au stress chronique en milieu de travail est plus étroit que ce que l'on peut généralement croire étant donné que bon nombre de causes de ce type font déjà l'objet d'une reconnaissance.

* Copyright © 1994 Julia L. Noble. Julia L. Noble is a staff lawyer with Injured Workers' Consultants Legal Clinic in Toronto.

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1. INTRODUCTION

The development of a Workers' Compensation Board policy specifically recognizing claims for work-related stress has been characterized as a bold departure from existing entitlement policies, and an extension of Workers' Compensation beyond its intended scope; in short, a "Brave New World" of compensation coverage.

In this paper I review and contrast the current approach of the Ontario Workers' Compensation Board and the Workers' Compensation Appeals Tribunal, to stress cases. I also distinguish the stress claims that I am referring to, namely chronic or long-term stress claims, from claims for stress or psychological disability arising from physical injury to the worker or from the worker being involved in a sudden, shocking or life threatening event.

I argue that the recognition of stress claims is not a departure from existing forms of compensation entitlement, but is in fact currently required by statute. Furthermore, I argue that the scope of potential coverage for chronic stress claims is narrower than is commonly assumed, since many claims that are similar to claims for chronic workplace stress are actually currently recognized.

2. STRESS CLAIMS DISTINGUISHED

A stress claim is a claim for Workers' Compensation entitlement, based on a psychological disability caused by some stressful condition (or conditions) in the workplace. Typically the psychological disability will disable the worker to the extent that they are unable to perform their occupational functions, either temporarily or permanently.

The stress cases I focus on in this paper to are claims based on psychological disability, caused by stressful conditions in the workplace, which conditions are ongoing over time. These are sometimes referred to as "chronic stress" claims.

There are a number of different disabilities, injuries and accident processes which tend to resemble those in chronic stress claims but which are not actually the claims for work-related stress which are the topic of this paper. It is important to begin this discussion by distinguishing those claims for work-related disability, to clarify the precise nature of claims that can be properly termed "chronic stress claims".

(1) *Entitlement for Psychological Disability Caused by a Work-Related Physical Injury and/or its Sequelae*

The Board currently has existing policy on entitlement for Psychotraumatic Disability.¹ Under this policy, entitlement for psychotraumatic disability may be established when an "organic brain syndrome" exists or develops as a result

of a traumatic head injury, exposure to toxic chemicals, decompression sickness or hypoxic conditions.

Additionally, however, there is entitlement for a psychotraumatic disability which is *an indirect result of a physical injury*. This would include an emotional reaction to the accident, to a severe physical disability, or to the treatment process.

So for example, under current policy a worker who sustains a work related hand amputation would of course be compensated for the physical aspect of the injury. As well, under existing Board policy, a disabling emotional reaction to the loss of the hand could be recognized as a separate work related disability and compensated separately.

The current Workers' Compensation Board policy also recognizes entitlement for a worker's psychotraumatic disability if it is related to extended disablement or to non-medical, socio-economic factors.

This kind of claim is not a chronic stress claim.

(2) Entitlement for Heart Conditions Caused by Stress

The Board currently has existing policy on entitlement for heart conditions.² Under this policy, entitlement may be granted for cardiac conditions caused by traumatic injury, electric shock, inhalation of smoke, etc.

Additionally, however, there is entitlement for a heart condition that is caused by or related to acute emotional stress, with no significant delay in the onset of symptoms.

So for example, a worker could be subject to acute emotional stress while working, such as witnessing a pedestrian being killed after jumping in front of a subway train the worker was driving. Under the current policy, if the worker had a heart attack as a reaction to the stress, the disability created by the heart attack would be compensable.

This kind of claim is not a chronic stress claim.

(3) Entitlement for Psychiatric Disabilities Caused by Acute Stressors

The Board's current practice is to recognize entitlement in claims for psychiatric disability related to an acute stressor, that is, exposure to stress that can be characterized as a "chance event". The Board has taken the position that the

1. See Workers' Compensation Board Operational Policy Document Number 03-03-03.

2. See Workers' Compensation Board Operational Policy Document Number 02-02-09.

necessary connection to the workplace is established by requiring that the provoking workplace chance event, i.e., the stressor, be sudden, shocking, and life threatening.

Therefore a worker who was a hostage during a robbery, and who later developed a post-traumatic psychological disorder related to the experience, would presumably be covered for that condition under the Board's current practice.

This kind of claim is not a chronic stress claim.

In all three of these types of disabilities, stress is somehow a factor. But there is already Board policy allowing these types of claims.

3. WHEN IS A CLAIM A STRESS CLAIM?

(1) *The Medical Aspects*

Many of the medical conditions that we may refer to as "stress" conditions are contained in the *DSM III R*, including post-traumatic stress disorder, anxiety disorder, and depression. Symptoms of a stress condition vary and could include disabling depression, emotional exhaustion, recurring panic attacks, and inability to function or make the simplest decisions.

Accepted medical theories of stress have indicated that stress disabilities are the result of two processes, the "appraisal process" and the "coping process". Under the former process, a situation is perceived in a certain way by the subject. Under the second process, the subject copes in a certain way with what it has perceived. The results of each of the two processes can vary from person to person.³

(2) *Examples of Fact Situations in Some Chronic Stress Claim Cases*

(a) Decision 145/89 (1990), 14 W.C.A.T.R. 74

In this case an experienced long distance truck driver began to have problems with his driving partners and driving conditions over an approximately eight month period. The worker frequently drove from North Bay to Vancouver and was away from home for periods of two weeks at a time. He slept in the cab of the truck while he was not driving, and while his partner was driving. He often ended up doing 75% of the driving rather than 50% because of inexperienced or incompetent driving partners. One of his driving partners used narcotics in the cab of the truck while the worker was trying to sleep. Another became tired

3. For a more detailed discussion, refer to Decision No. 1030/89, (1991) 20 W.C.A.T.R. 46 at 81-83 and 101-107.

quickly and had to be frequently relieved. During this time period the worker also witnessed, at close range, two separate fatal traffic accidents.

The worker began to experience blackouts and anxiety, and felt too nervous to drive. He stopped work. Doctors diagnosed the problem as “burnout” and as “a disability of a psychotraumatic nature”, with symptoms due to “sustained exposure to the possibility of a severe accident”, and the worker was advised by his doctors to stop driving trucks for several months.

The Panel concluded that the worker had a work related disability.

(b) Decision 684/89 (1990), 16 W.C.A.T.R. 132

In this case the worker was a supervisor of difficult and potentially violent juveniles in a detention centre for ten years. During her eleventh year on the job, (in 1985) the workplace atmosphere changed with the proclamation of the *Young Offenders Act*, in that the resident population became a bit older and were more aggressive, and there was a more jail-like atmosphere in the centre. The transition to the framework of the *Young Offenders Act* was one that created turmoil and added stress to an always potentially stressful workplace. In addition during this same time period there were two occasions in which resident youths went on the rampage, destroying parts of the housing facilities and barricading themselves inside.

The worker developed severe headaches, shakiness, and feelings of extreme anxiety and panic. She left work for a period of months and eventually returned to a clerical job with no resident contact. Her doctor stated that she had an anxiety disability, reactive to her work situation. This panel held that the unusual stressor in 1985 in the workplace led the worker to suffer an anxiety attack and a continuing disability.

(c) Decision 952/89 [unreported]

In this case a factory worker experienced a complete change in his job. Within the next two weeks he received training for the new job but was not particularly successful. This led to complaints from co-workers and his new supervisor and finally culminated in a disciplinary meeting. At the meeting, the supervisor criticized the workers’ personal hygiene in addition to his work performance. The worker left the workplace immediately and sought medical attention the next day for “acute stress” and “acute depression” due to work stress. He did not return to work for seven weeks and he refused to see or speak to anyone for three weeks. He was diagnosed as suffering from “anxiety reaction related to situational crisis”.

The Panel held that the worker had a temporary disability which was caused by a combination of the ongoing stress of a new job, and the triggering event of the

disciplinary meeting in the supervisor's office. The Panel did state that it had concluded that the worker had experienced a "work-related chance event", thereby presumably bringing this case within the scope of existing Board policy.

(d) Decision 1030/89 (1991), 20 W.C.A.T.R. 46

In this case, the worker had been a police officer for 22 years before the onset of a stress-related disability. In the course of his duties over the years since 1962, he was exposed to many disturbing situations such as scenes of traffic accidents and the discovery of suicide and murder victims. He had also been threatened with death by individuals whom he had arrested, who had connections with organized crime. Then in 1984 he worked on a number of very demanding criminal cases involving disturbing fact situations such as rape and murder. Also, in a separate case he gave instructions to another officer to chase a suspect in a car, after promising the suspect's wife that her husband would be returned to her unharmed if she gave information about the suspect to enable the police to chase and catch him. During the chase the suspect's car went off the road and he was killed. The worker testified that this was very painful for him and he felt guilty.

The worker laid off from work in 1984 and in 1986. His symptoms included anxiety attacks, crying spells, tension and depression. The diagnosis was "post-traumatic stress disorder" and "burnout syndrome".

The panel held that the claim should be allowed, noting that

there are no statutory grounds, so far, that would entitle a compensation adjudicator to treat a stress claim differently from any of the other wide range of entitlement claims routinely placed before the WCB and the Tribunal.⁴

(e) Decision 397/92 (28 January 1993) [unreported]

In this case the worker had been a police officer for 25 years when he submitted a claim for "stress/job burnout". Many aspects of the job were stressful before his claim, but he was able to cope. Then two cases that he was assigned to, one after the other, marked the beginning of his psychological problems. The first was a brutal rape and murder of a ten year old girl. The second case concerned a husband who had murdered his wife and the worker headed up the investigation which involved a lot of overtime, travel, and time away from home. Eventually, his symptoms got worse over time, as he was exposed to other major and minor stresses associated with police work. He was anxious, nervous and depressed. Eleven years after his work on the child murder case, he filed his claim.

4. 20 W.C.A.T.R. 46 at 85.

The Panel found that the worker had a psychological disability which disabled him from working, and that the employment was a significant cause of the disability. Interestingly, the Panel stated that they would also have found that the worker's disability was compensable under the current W.C.B. policy, because they held that the worker's experience with the child murder was a "sudden, shocking or life threatening" event.

4. THE W.C.B. APPROACH TO STRESS CLAIMS

The Ontario Workers' Compensation Board currently has no policy which specifically addresses the issue of entitlement for a psychological disability resulting from workplace stress. The Board's practice with respect to claims for psychological disability caused by long-term or chronic occupational stress (that is, not a life threatening type of "chance event") is to deny them.

5. THE W.C.A.T. APPROACH TO STRESS CLAIMS

The legal test that the Workers' Compensation Appeals Tribunal has accepted is basically a two step test.

The first step involves an inquiry into the existence and nature of the worker's psychological disability. The worker must be able to demonstrate through medical or "treatment" evidence that they have a disability and that it disables them, or has disabled them, from working.

The second step is an inquiry into the work-relatedness of the workers' disability. The workplace must have made a *significant contribution* to the development of the disability. This determination involves an examination and comparison of the workers' personal life circumstances and the workplace circumstances. The standard of proof is "on a balance of probabilities".

Thus if a worker has psychological disability, the significant cause of which is a workplace stressor (whether acute or chronic), and the disability prevents the worker from working, entitlement is allowed.

As an aside, it is interesting to note that this current Workers' Compensation Appeals Tribunal test for entitlement is a departure from earlier cases which required that there be "clear and convincing" evidence that the workplace stress was the *predominant cause* of the psychological disability.⁵

5. See for example Decision 918 (1988), 9 W.C.A.T.R. 48.

6. STRESS POLICY DEVELOPMENT AT THE WORKERS' COMPENSATION BOARD

The Board has been engaged for some time in attempts to formulate a policy on stress, specifically, on psychological disabilities resulting from exposure to workplace stressors over time. The policy formulation process has not reached a conclusion, which is especially significant considering that the Board's practice is to deny all of these "disablement-type" stress claims (regardless of the individual merits of the claim and regardless of the wording of the *Act*), unless and until there is a policy specifically allowing such claims.

The policy development process was spurred by W.C.A.T. Decision No. 918,⁶ which denied the worker's claim for a stress-related disability, but indicated that such claims *could* be considered compensable under the *Act*. This decision led the Workers' Compensation Appeals Tribunal Review Advisory Committee in August 1988 to recommend to the W.C.B. Board of Directors, that there should be a review of the Workers' Compensation Board's policy on this issue.

As a result, in January of 1989, the Board distributed a discussion paper to members of its external consultation group. It then produced an 'options paper' dated July 14, 1989, and invited responses.

Responses to the options paper were received, and the Board then issued a 'modified policy proposal' in April of 1990. This was followed by a new policy proposal dated May 8, 1991. Next, public hearings were arranged to address the May 8, 1991, policy proposal. The hearings took place in 1991 and the first part of 1992. The public hearing process is now concluded and all response papers were received by the Board.

In the approximately two years that have passed since the consultation process was completed, *no new policy* on the compensation of disabilities resulting from workplace stressors has been issued by the Workers' Compensation Board. Without a policy on long-term stress, the Board denies all claims. It is worth noting that the last policy proposal from the Board did recommend recognition for chronic stress claims, though it did not recommend adopting the current WCAT test.

7. CONCLUDING COMMENTS

It is clear that, pursuant to the *Workers' Compensation Act*, psychological disabilities caused by the exposure to workplace stressors over time are com-

6. (1988), 9 W.C.A.T.R. 48.

pensable. This injury process is a “disablement” and disablement is specifically included within the definition of “accident” under the *Act*.

It has already been established, pursuant to a W.C.B. Board of Directors review of W.C.A.T. Decision No. 72, that “disablements” include chronic injuries that emerge gradually over time with no sudden onset, *and* that as between “sudden onset” and “disablement” cases there is no difference in the evidence to be adduced, or in the application of the standard of proof or the benefit of the doubt.

As a W.C.A.T. panel noted more recently, in Decision No. 1030/89,

there are no statutory grounds, so far, that would entitle a compensation adjudicator to treat a stress claim differently from any of the other wide range of entitlement claims routinely placed before the Workers’ Compensation Board and the Tribunal.⁷

And yet compensation adjudicators do routinely and almost without exception treat these cases differently, by summarily denying entitlement.

The Board is plainly not applying the *Act* in these cases. The Board is also plainly reluctant to implement a policy on stress disabilities that gives expression to the *Act*.

The Board’s reluctance to act can only be understood as a reaction to intense opposition from employer lobby groups. During the public hearings regarding a new stress policy in 1991, the Employers’ Council on Workers’ Compensation made submissions to the Board. It stated that it was “opposed to the Board developing macro policies such as stress,” and that only “the Government ought to develop such a policy through legislation”. However, we have seen that such a policy is thoroughly consistent with existing legislation.

The Employers’ Council also called on the Minister of Labour to intervene and stop the development of this policy.

And the policy development process is now definitely at a standstill. The problem with this is that there are many consequences which result from the Board’s unwillingness to recognize entitlement for chronic stress cases.

First is that as a result of almost certain denial under the Board’s adjudication system, the claimant must proceed all the way to the Tribunal to have entitlement recognized even in the most meritorious of cases. This represents an unnecessary cost to both the Board and the Tribunal, and adds to their hearing backlogs.

7. Supra note 4.

Second, an even more disturbing consequence is that the disabled worker with a stress claim is often likely not to pursue an appeal, upon hearing from the Workers' Compensation Board that it has denied the claim as a matter of policy. As a result, workers with no compensation for lost time will be thrown into poverty, further exacerbating their stress conditions and lengthening their recovery time. Claimants are not advised by the Board that the W.C.A.T. takes a different approach to stress claims, so justice may often be denied.

Third, whether these disabled workers appeal to the W.C.A.T. or not, they will usually have to find alternative forms of income replacement for the time during which they can't work. In the case of those people who pursue their appeals, this will be for a period of one to two years (while they are waiting to ascend through the appeals process and get a W.C.A.T. decision). In the case of those people who don't pursue the appeal, this is an indefinite situation.

For the lucky, this may mean a Long Term Disability benefit payable by an insurance company. For most, however, it means 15 weeks of Unemployment Insurance benefits followed by welfare. In these scenarios the compensation responsibility is transferred away from the employer funded Workers' Compensation Board system onto another system (frequently tax-payer funded) either temporarily or permanently.

Another point that I have attempted to make with this paper is that the 'scope' of the stress claims that are not already covered by the Board is not alarmingly broad. Many types of claims that appear to be "stress" claims are already specifically covered by Workers' Compensation Board policy or practice, including psychological disabilities caused by "sudden" stressors, heart attacks caused by acute stress, and psychological disabilities caused by the effects of living with a physical disability. Thus, coverage for chronic stress claims is not as broad an expansion as it seems at first blush.

In summary, the formulation and implementation of a Workers' Compensation Board policy on compensation for disablements caused by workplace stressors is not a Brave New World of compensation entitlement. It is a relatively narrow area, which is already recognized by statute if not by policy.