Bill receives Royal assent

Worker's compensation to cover chronic mental stress

BY MICHAEL MCKIERNAN
For Law Times

Employers should be thinking about how they can prevent bullying and harassment in the workplace after the provincial government expanded workers compensation law to include claims for chronic mental stress, says a Toronto lawyer.

In May, Bill 127, the Stronger, Healthier Ontario Act received Royal assent, allowing claims for Workplace Safety and Insurance Board benefits from individuals who suffer from chronic mental stress in the course of their employment.

The bill takes effect in January, but in the meantime, the WSIB has released a policy that explains when it will approve claims. According to the policy, any worker who can show they have a "diagnosed mental stress injury" caused by a "substantial work-related stressor," which includes bullying and harassment, is entitled to benefits.

William Goldbloom says changes to provincial laws around workplace bullying and harassment have flown under the radar of many employers.

"I think that employers need to take preventative measures to make sure these claims don't arise in the first place," says William Goldbloom, a lawyer with Toronto-based employment law boutique Rubin Thomlinson LLP.

Before Bill 127 amended the Workplace Safety and Insurance Act, compensation for workplace mental injuries was only available in cases stemming from a single traumatic event, such as witnessing a horrific accident.

The previous version of the act specifically excluded all other mental injuries, including chronic stress that builds up over time, prompting a series of Charter challenges alleging the law was discriminatory.

Goldbloom, who conducts workplace investigations and training as part of his practice, says the provincial government's belated action on the issue could result in a wave of fresh claims from workers who would previously have been put off by the legal barriers.

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>
> Antony Singleton

The changes have flown under the radar of many employers, he says, but more should be paying attention.

"Most of the discussion so far has been among lawyers, and I'm not sure it has totally filtered down to employers," he says.

"They are aware of the WSIB and the fact that their rates may go up as a result of claims, but it doesn't have the same direct impact as a big civil action for constructive dismissal."

Still, a WSIB claim can be an intrusive process for employers, according to Goldbloom, who says they can head off trouble before it starts by conducting a thorough assessment of the risk of harassment or bullying in their workplace.

"Even if you feel your workplace is free from harassment and bullying, an assessment may still need to be done, because these are problems that are often invisible to management," he says.

Although the Occupational Health and Safety Act requires employers to investigate internal complaints of harassment, Goldbloom says a reactive approach is risky, because workers can suffer stress and make WSIB claims without ever alerting management via a complaint.

"If employers are proactive, they can start managing workplace dynamics themselves, without the involvement of a third party, which might make it easier or more comfortable," Goldbloom says.

Antony Singleton, a Toronto lawyer who acts for injured claimants before the WSIB, says the legal bar on mental stress claims was a longstanding source of displeasure for workers' groups.

On three occasions since 2014, claimants have convinced the Workplace Safety and Insurance Appeals Tribunal that the law was unconstitutional. However, after each decision, the provincial attorney general declined to appeal the ruling. And since the WSIAT has no power to strike down legislation, claimants with mental stress injuries are forced to start again from the beginning with their own expensive and lengthy Charter challenges.

Singleton says Bill 127 appeared to be a "step in the right direction" but the WSIB's new policy for putting the law into action has only angered workers' advocates further.

For example, it makes no provision for any individuals with claims that pre-date the Jan. 1 in-force date for the amendments.

"There are lots of people with injuries that arose before now, many of whom have already been denied benefits or are somewhere else in the appeals system," Singleton says. "The law leaves

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Belated action

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them in exactly the same place as before — they're barred from making claims by legislation that the tribunal has already found unconstitutional several times."

A Superior Court application led by Toronto labour law firm Goldblatt Partners LLP aims to plug that gap in the new law. Acting on behalf of the Ontario Network of Injured Workers Groups and Injured Workers Consultants, as well as an individual claimant, the firm wants a judge to declare the bar on mental claims invalid for all claims relating to accidents before January 2018. The application also seeks an order that the WSIB and WSIAT assess the claims as if the prohibition did not exist.

After consulting with industry and worker groups, the WSIB policy on chronic mental stress also tightened up the requirements for proving a claim.

The board's initial draft policy mirrored its stance on physical injuries, by requiring that the workplace stressor, such as bullying or harassment, must have "caused or significantly contributed to the chronic mental stress" in order to meet the test for benefits. However, the final policy now requires claimants to show that the work-related stressor "was the predominant cause" of the mental injury.

"This is a significantly higher threshold than for physical injuries, and in my view, the differential treatment is discriminatory. It's not justified," Singleton says.

In addition, workers must prove they have a properly diagnosed mental stress injury listed in the Diagnostic and Statistical Manual of Mental Disorders, also known as the psychiatrists' bible.

In a statement to *Law Times*, WSIB spokeswoman Christine Arnott said the "predominant" test is "consistent with other workers' compensation boards across Canada who are already covering chronic mental stress."

Singleton says that puts the WSIB on a different course from the Supreme Court of Canada, which just this summer ruled expert evidence is not needed to prove a mental injury in the personal injury case of *Saadati v. Moorhead*.

The new policy also narrows the number of routinely high-stress-level jobs that can qualify as substantial work-related stressors by virtue of their normal responsibilities, Singleton says.

"They did this consultation and had a huge number of worker and employer groups give their feedback," he says. "But as far as I can see, every change to the draft policy was to make it more difficult to meet the threshold for entitlement." LT

Deadline quickly approaches

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be able to take a more restrictive approach to marijuana possession and use.

"They can look at other measures that they can implement to ensure the safety of the public and their workers," she says, noting that two recent decisions provided guidance on when drug testing and discipline for drug use are appropriate.

In *Amalgamated Transit Union, Local 113 v. Toronto Transit Commission*, an Ontario Superior Court judge declined the union's motion for an injunction to halt the TTC's random testing regime pending the outcome of an arbitration, after the employer demonstrated the value of testing and the existence of a culture of drinking and drug-taking among its workforce.

And in *Stewart v. Elk Valley Coal Corp.*, the Supreme Court of Canada upheld the firing of a truck operator dismissed for cocaine use, despite his claim that he was addicted to the drug. The company's workplace policy offered immunity from discipline for self-disclosed dependency, but only if the admission came before an accident and positive test.

"There is lots of useful information in those decisions for

George Waggott says it could be challenging for recreational cannabis to be labelled with its THC content, because it can vary on a plant-by-plant basis.

drafting policies and determining impairment," French says.

However, Jessome says marijuana presents its own unique challenges because of the difficulty of testing for impairment.

"There is no currently recognized medically recognized test for impairment, so that is going to challenge people," she says.

While breathalyzers offer an accurate reflection of the amount of alcohol in a subject's bloodstream and how it affects them, experts have yet to develop a reliable version for marijuana, thanks to the way Tetrahydrocannabinol, its active ingredient, breaks down in the body.

Some metabolites of the drug can linger in the blood long after use in amounts that vary from person to person, meaning there is little correlation between the amount detected and the level of impairment at the time of testing.

The HRPA report notes that a "per se" limit on drug levels in the blood is still seen as the most likely way forward, but it expresses concern about the lack of consensus around where that threshold should be set.

"The government should set a clear legal definition of 'impairment' and the grounds under which an employee can be tested in relation to cannabis use. Special considerations for safety-sensitive industries may be necessary," the report recommends, adding that recreational cannabis should come labelled with its THC content.

Waggott says that could prove challenging, since THC content can vary wildly on a plant-by-plant basis. However, he says, the growth and professionalization of the industry could improve the situation over time.

"By allowing big businesses in marketing, sales and distribution are going to become much more regulated and standardized, which will make it easier to say: 'This quantity of the drug will lead to this expected level of impairment,'" he says. LT