

Labour, Employment and Human Rights Law Bulletin

May 2009

Fasken Martineau DuMoulin LLP

B.C. Court of Appeal Re-Writes WorkSafeBC Policy on Compensation for Mental Stress

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Executive Summary

The B.C. Court of Appeal has struck down the restrictive application and interpretation of mental stress claims in British Columbia. As a result, employers can expect more mental stress claims in the coming years.

In 2002, the B.C. *Workers' Compensation Act* (the "Act") was amended regarding the ability to obtain benefits for mental stress. The intent of the change contained in Section 5.1 was to establish that compensation would only be provided in cases where the stress was caused by a sudden and unexpected traumatic event, or flowing from a compensable physical injury, but not to be provided in situations such as chronic stress conditions resulting from everyday personal and workday life. It was also noted that when the change was made, that it would bring the workers' compensation legislation of B.C. in line with most other provinces in Canada.

The change flowed in part from the recommendations of the Commissioner who had been retained to

comment on a Core Services Review of the Workers' Compensation Board. The Commissioner noted that acceptance of chronic stress claims generally could produce a significant increase in chronic stress claims, which could create substantial cost implications. The Commissioner raised a concern that exclusion of chronic stress claims from coverage completely could offend the *Canadian Charter of Rights and Freedoms* (the "Charter").

Section 5.1 of the Act specifically provided that in order to be entitled to compensation for mental stress not resulting from an injury for which the worker would otherwise be entitled to compensation, the mental stress must be an acute reaction to a sudden and unexpected traumatic event arising in and out of the course of the worker's employment; the condition must be diagnosed by a physician or a psychologist and described in the DSM-IV; and the condition must not be caused by a decision of the worker's employer relating to the worker's employment including a decision to change the work to be performed or the working conditions or to discipline the worker or terminate the worker's employment.

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In addition to Section 5.1 of the Act, WorkSafeBC developed a Policy that in order to obtain benefits for mental stress, where the stress was not due to physical injury or occupational disease, the worker would have to show an acute reaction to a sudden and unexpected traumatic event that arose in the course of employment. The Policy established conditions as to what might constitute a traumatic event and an acute reaction to the event, as well as examples of both. The Policy noted that a traumatic event must be a severely emotionally disturbing event such as a horrific accident, actual or threatened physical violence or a death threat. Examples of an acute reaction were provided, such as: resulting from a direct personal observation of an actual or threatened death or serious injury; or witnessing an event that involves death or injury. The Policy set out examples for situations which likely would lead to entitlement to compensation for mental stress and examples where there likely would be no entitlement.

In 2003, Mr. Plesner suffered post-traumatic stress disorder resulting from the rupture of a natural gas pipeline at his workplace. He was denied benefits by WorkSafeBC on the basis that his mental stress condition did not fall within the required criteria of Section 5.1(1) when read together with the Policy. In particular, the Review Officer found that the rupture of the gas pipeline did not amount to a traumatic event for a number of reasons: the rupture took place a significant distance from the operating location of the worker; the rupture was dealt with promptly to suppress the possibility of explosion; the worker himself did not deal with the rupture but rather evacuated to a muster station; the worker walked to the muster station; Mr. Plesner had not reported that he smelled gas or felt that he was surrounded by gas that was likely to explode. Mr. Plesner appealed this decision to the B.C. Court of

Appeal, which rendered a decision on April 30, 2009. At issue was whether Section 5.1(1)(a) was contrary to Section 15(1) of the *Charter*.

Section 15(1) of the *Charter* provides that every individual has the right to equal protection without discrimination based on, among other grounds, mental or physical disability. The majority of the Court of Appeal held that, read together, Section 5.1(1) and the Policy offended Section 15 of the *Charter* and could not be saved under Section 1 of the *Charter*. In short, the Court of Appeal found that those suffering from mental disability were treated differently from those suffering from physical disability, and that the differential treatment constituted discrimination under Section 15. Further, the discriminatory conduct was not saved under Section 1 of the *Charter*.

The Court found that the requirement that there must be a traumatic event rather than a case-specific assessment of whether the individual's mental injury was genuinely work-related, ignored the particular needs of workers suffering such mental stress injuries. The Court noted that access to compensation and benefits was significantly restricted in comparison with workers suffering physical injuries. There was no justification in the evidence before the Court to demonstrate "minimal impairment" or "proportionality" between the ends sought to be achieved and the methods chosen to achieve them.

The Court noted the most obvious remedy would be to strike the provisions of the Policy which define and describe a traumatic event, including the examples given. The Court then produced a severed version of the Policy, with the severed provisions of the Policy to be of no force and effect, leaving it to WorkSafeBC to revisit drafting a new policy. Further, and in light of the Court's reasons, WorkSafeBC in consultation with the Legislature, is to consider an amendment to Section 5.1(1)(a), as well. The

Court ordered that the determination of Mr. Plesner's compensation be remitted back to the Workers' Compensation Appeal Tribunal.

This important decision broadens the current approach to mental stress claims under workers' compensation legislation not just in British Columbia, but potentially in other jurisdictions in Canada with similar legislation. Certainly in British Columbia, WorkSafeBC will have to revisit the adjudication of stress claims arising from the workplace, generally.

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