

## Compensation for Mental Stress: Is Current Law and Policy in Ontario's Workers' Compensation System Too Restrictive?

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### Introduction

A suicidal man has locked himself into his house with several chemicals capable of starting a fire. Paramedics are called to the scene. The standoff lasts for several hours, during which time the man douses himself with gasoline. Paramedics are not informed about the gasoline. An explosion eventually occurs, and the man is screaming and badly burned when the paramedics treat him. One paramedic on the scene later develops Post Traumatic Stress Disorder. She reports shock at not being told about the presence of the gasoline.

A metal fabricator is aggressively confronted by the majority shareholder's daughter, who is not his supervisor. She yells at him about that fact he takes time off work to attend physiotherapy treatment for a work-related injury. He subsequently becomes depressed.

The paramedic was denied workers' compensation benefits for her Post Traumatic Stress Disorder. In September 2005, the British Columbia Workers' Compensation Appeals Tribunal upheld the denial of benefits, finding that the event was not "sudden and unexpected" based on objective criteria as required by the B.C. *Workers' Compensation Act*. The Appeals Tribunal reasoned that the paramedic waited five hours at the scene, and a suicide attempt or serious injury had to be expected.<sup>1</sup> By contrast, the metal fabricator was granted benefits on appeal to the Ontario Workplace Safety and Insurance Appeals Tribunal (WSIAT) because the immediate cause of the worker's depression was being accosted by the shareholder's daughter.<sup>2</sup> The WSIAT determined that the statutory bar in the Ontario *Workplace Safety & Insurance Act, 1997* did not preclude compensation since the woman was not the worker's supervisor and therefore the reprimanding of the worker could not be considered a legitimate part of the employment function.

Compensation for mental stress has become an increasingly heated area in workers' compensation in Ontario and, indeed, across the country. In Ontario, s. 13(1) of the *Workplace Safety and Insurance Act, 1997* (the WSIA) provides benefits for workers who sustain "personal injury by accident arising out of and in the course of his or her employment". However, the provision is qualified in respect of workers who develop mental stress arising out of the course of

<sup>1</sup> "Compensation for Mental Stress: Is Current Law and Policy in Ontario's Workers' Compensation Too Restrictive?" from *The IAVGO Reporting Service*, June 2006.

employment. Section 13(4) provides that a worker is not entitled to benefits for mental stress except as set out in s. 13(5), which reads as follows:

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.

In response to these provisions, the Ontario Workplace Safety and Insurance Board (WSIB) developed an Operational Policy (Document 15-03-02) which potentially creates an extremely limited scope for compensation for mental stress - where, essentially, entitlement will only be granted if the events precipitating the traumatic reaction were physically violent or life-threatening. Injured workers and their advocates have been working both at the WSIB and WSIAT levels to determine the limits of the current Policy and whether it can be more broadly interpreted to grant compensation to workers who experience other forms of traumatic stress at the workplace.

Cases at the WSIAT, the final level of appeal for Ontario workers, evidence a fairly broad reading of Operational Policy 15-03-02 which allows compensation for workplace events such as verbal harassment or unjustified scrutiny by supervisors or co-workers. Adjudicators at the WSIB Operations and Appeals Branches, however, have been reluctant to grant entitlement for traumatic mental stress where the precipitating events did not involve physically violent or life-threatening events.

A recent decision of John Slinger, Chief Corporate Services Officer of the WSIB, in his role as an Appeals Resolution Officer (ARO), offers some hope for a more comprehensive interpretation of Operational Policy 15-03-02 at the WSIB. In October 2005, ARO Slinger granted entitlement to a worker who suffered Post Traumatic Stress Disorder after repeated verbal harassment by her supervisor.

Even if the WSIB adopts a more liberal interpretation of Operational Policy 15-03-02, however, the Policy itself remains very restrictive. It is likely that, certainly in the initial decision-making process, many workers with workplace-related stress will be denied compensation on the basis that the precipitating events are not sufficiently traumatic or horrific to fit within the Policy's language. In addition, the WSIB has routinely denied entitlement to workers, such as emergency personnel, whose jobs regularly expose them to traumatic

events on the grounds that, for these workers, any given traumatic event is not “unexpected in the normal or daily course of the worker’s employment or work environment”, as required by the Policy. In addition, workers who suffer psychological injuries as a result of overwork, termination or other decisions related to their employment have no recourse to any compensation under the express language of s. 13(5) of the WSIA, which states that workers cannot be compensated 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”.<sup>3</sup>

The legislative exclusion of mental stress in the WSIA would be vulnerable to a *Charter* challenge by injured workers. The legislative exclusion may violate the s. 15 equality rights of injured workers with traumatic mental stress. A *Charter* challenge would find strong support in a 2003 decision of the Supreme Court of Canada which determined that the exclusion of workers with chronic pain from the usual scheme of workers’ compensation benefits in Nova Scotia was an unjustified violation of workers’ equality rights.

In this paper, I undertake an overview of the current prospects for the compensation of workplace mental stress in Ontario. After a brief review of the history of compensation for mental stress in Ontario, I compare Ontario’s current approach to that in other provinces. I then detail recent decisions of the WSIAT about the scope of compensation for mental stress, and discuss a recent ARO decision which suggests a possible broader interpretation of Operational Policy 15-03-02 at the WSIB level. Finally, I briefly suggest the limits of even a generous interpretation of the current Policy, and consider whether a constitutional challenge against the legislative exclusion could expect success.

### **History of Compensation for Mental Stress in Ontario**

Workplace stress-related injuries can arise in a number of different ways, many of which are routinely recognized in Ontario by the WSIB.<sup>4</sup>

First, “physical-mental” claims are those claims which originate with a compensable workplace physical disability which leads to a psychological disability such as depression, anxiety, or chronic pain disorder. These claims are routinely adjudicated at the WSIB, and WSIB policies authorize their compensability. Physical-mental claims are not strictly “stress” claims, and because they originate in a physical trauma they do not fall within the parameters of the traumatic mental stress policy or the exclusion in the WSIA.

Next, “mental-physical” claims are claims where physical disability is caused by a work-related psychological stressor. For example, in WSIAT *Decision No. 633/01*, the worker claimed that workplace stress (in the form of harassment by a member of the Board of Directors of the condominium corporation that employed him) aggravated his high blood pressure. The Tribunal clarified that Operational Policy 15-03-02 [then 15-02-02] does not apply to such claims. The Panel noted at paras. 70-71 that the Policy does not specifically indicate that it applies to organic conditions arising out of stress in the workplace. Since the Tribunal had previously granted entitlement for organic conditions arising out of stress in the workplace, the Panel determined that it was appropriate to continue to adjudicate “mental-physical” claims based on the standard causation test rather than with regard to Operational Policy 15-02-02 and ss. 13(4) and 13(5) of the WSIA.

While in the result in WSIAT *Decision No. 633/01*, the Panel found that the workplace stress was not causally related to the high blood pressure, the case suggests that stress causing organic disability may not – at least before the WSIAT – be subject to the rigours of Operational Policy 15-03-02.

Finally, the third category of workplace psychological injury – and the most controversial – consists of so-called “mental-mental” claims. These claims arise where both the stressors and the disability are psychological in origin. Some commentary has further divided mental-mental claims into those arising from acute stress (such as witnessing a homicide or being taken hostage) versus those arising from gradual or chronic stress.<sup>5</sup> Chronic stress claims may involve situations ranging from stress due to overwork and job duty demands to trauma caused by racial, sexual or other harassment.

Historically, there was no legislative exclusion for any form of mental stress and no policy at the Ontario Workers’ Compensation Board, as it then was, about compensation for mental stress. The WCB’s informal practice was to limit entitlement for “mental-mental” claims to injuries suffered following acute, shocking, life-threatening events.

Before the Workers’ Compensation Appeals Tribunal, as it then was, workers could be compensated for “mental-mental” stress other than that arising from acute, shocking or life-threatening events. Two lines of jurisprudence are evident in the WCAT’s treatment of “mental-mental” stress claims. Some Panels determined that mental-mental stress claims should be allowed on the same basis as other disablement injuries, namely if on a balance of probabilities the work was a significant contributing factor in the disability.<sup>6</sup> Other Panels, representing perhaps the more dominant trend, allowed compensation only if workers could demonstrate that the work-related events were such that a

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person of average mental stability would consider them to be stressful and be at risk of becoming disabled as a result of such events.<sup>7</sup>

### **Current Ontario Law and Policy on Mental Stress**

The *Workplace Safety and Insurance Act, 1997* sets out, in subsections 13(4) and (5), that:

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

(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 decision 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.

On May 24, 2002, the WSIB adopted Operational Policy 15-02-02 [now 15-03-02] on Traumatic Mental Stress. The Policy sets out, as dictated by the WSIA, that a worker is entitled to benefits for traumatic mental stress developed as a result of a sudden and unexpected traumatic event arising out of or in the course of employment, but is not entitled to benefits for traumatic mental stress arising out of the employer's employment decisions or actions.

Operational Policy 15-03-02 also creates a number of criteria that add to and interpret the legislative exclusion. It states that a traumatic event must be clearly and precisely identifiable and unexpected in the normal or daily course of the worker's work or work environment. It outlines that a traumatic event may be the result of a criminal act, harassment or a horrific event "and may involve actual or threatened death or serious harm against the worker, a co-worker, a worker's family member, or others". The event must be generally accepted as traumatic. The worker must have witnessed the traumatic event first hand, or through direct contact with the traumatized worker. The Policy allows entitlement for either a single acute traumatic event or a series of traumatic events that together cause an acute reaction, even if the last event before the traumatic reaction is not the most significant.

The Policy sets out a list of sudden and unexpected traumatic events as follows:

Sudden and unexpected traumatic events **include**

<sup>7</sup>"Compensation for Mental Stress: Is Current Law and Policy in Ontario's Workers' Compensation Too Restrictive?" from *The IAVGO Reporting Service*, June 2006.

- witnessing a fatality or a horrific accident
- witnessing or being the object of an armed robbery
- witnessing or being the object of a hostage-taking
- being the object of physical violence
- being the object of death threats
- being the object of threats of physical violence where the worker believes the threats are serious and harmful to self or others (e.g., bomb threats or confronted with a weapon)
- being the object of harassment that includes physical violence or threats of physical violence (e.g., the escalation of verbal abuse into traumatic physical abuse)
- being the object of harassment that includes being placed in a life-threatening or potentially life-threatening situation (e.g., tampering with safety equipment; causing the worker to do something dangerous). [emphasis added]

The Policy states that entitlement is not allowed for decisions of the employer such as terminations, demotions, transfers, discipline, or changes in work hours or productivity expectations. However, entitlement may be allowed for an employer's actions that are not part of the employment function, "such as violence or threats of violence".

The types of disorders which may be compensated under the Policy include but are not limited to acute stress disorder, post-traumatic stress disorder, anxiety, depression, or adjustment disorder.

Operational Policy 15-03-02 purports to apply to all claims for traumatic events arising on or after January 1, 1989. However, the WSIAT has repeatedly questioned whether the Policy can apply to workplace events arising before the enactment of the WSIA with the limitation on claims for mental stress in 1998.<sup>8</sup> Previously, there was no such statutory limitation on compensability of mental stress claims. The matter was recently addressed in WSIAT *Decision No. 1047/04*, released on October 4, 2005, in which the Tribunal expressly refused to apply Policy 15-03-02 to a claim where the workplace stressors occurred before 1998.

Many other provinces have similar exclusions as that in the Ontario WSIA for entitlement for mental stress.<sup>9</sup> Even in provinces with similar legislative provisions, the scope of entitlement as set out in the respective policies of provincial workers' compensation boards varies significantly. For example, Policies No. 21-103 and 21-103.01 of the Workplace Health, Safety and Compensation Commission of New Brunswick appear to limit compensation to claims involving Post Traumatic Stress Disorder, thereby excluding claims for

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<sup>8</sup>"Compensation for Mental Stress: Is Current Law and Policy in Ontario's Workers' Compensation Too Restrictive?" from *The IAVGO Reporting Service*, June 2006.

depression, anxiety and the like as is allowed in Ontario. In British Columbia, the scope of the type of events which will be considered acute and traumatic appears very limited. The applicable Policy cites examples of claims where there would likely **not** be entitlement. One of the examples is a case where “[a] worker is subjected to frequent sexual innuendo, humour in poor taste, practical jokes and other forms of inappropriate attention from co-workers. One day the worker calls in to say the stress is too much, and he/she cannot work.” On the other hand, the B.C. policy does allow compensation for an acute reaction to a traumatic event, even where traumatic events happen relatively frequently in the course of the worker’s employment, as may be the case with emergency workers.

### **Decisions of the Ontario Workplace Safety and Insurance Appeals Tribunal on Mental Stress**

As noted above, the WSIAT has demonstrated a fairly broad interpretation of the scope of Operational Policy 15-03-02 and the types of mental stress claims it can allow. In particular, the WSIAT has allowed claims arising from verbal harassment or unjustified scrutiny not legitimately part of the employment function. Entitlement has also been allowed in instances of wrongful accusations of wrongdoing, and where a worker is expected to engage in unethical work practices. However, the WSIAT has also invoked Operational Policy 15-03-02 to limit entitlement in cases where stress arose from decisions about job assignments and where the events in question would not generally be considered traumatic.

#### **Potential of Violence Cases**

In WSIAT *Decision No. 341/04*, released on January 6, 2006, a worker was granted entitlement for traumatic mental stress after he was aggressively confronted by his supervisor, who was loud and angry and swore at him. The worker testified that the supervisor put his hand on the worker’s shoulder and shook him. The supervisor denied this characterization, stating instead that he brought his hand down gently on the worker’s shoulder. After the incident, an investigation was conducted by the employer, resulting in an apology by the supervisor and also in placement of the worker on a different shift from the supervisor for a period of time.

The Panel determined that the incident was a sudden and unexpected event within the meaning of s. 13(5) of the WSIA. It also determined that the incident was traumatic, both in the ordinary sense of the term and as set out in Board policy. It noted in particular that the act of the supervisor bringing his hand down on the worker’s shoulder, either while or just after swearing at the worker, was an act which had the potential for physical violence. It was

significant to the Panel that the employer and union engaged in an investigation of the event as an event outside of workplace norms.<sup>10</sup>

*WSIAT Decision No. 341/04* suggests a number of important approaches to which events will be considered sudden, unexpected and traumatic. In particular, the Panel highlights the importance of what are considered traumatic and unusual events in the *specific workplace*. The Panel drew on the decision of the Nova Scotia Court of Appeal in *Children's Aid Society of Cape Breton-Victoria v. Nova Scotia (Workers' Compensation Appeals Tribunal)*<sup>11</sup> in discussing the meaning of "traumatic". In the Nova Scotia case, the worker was granted entitlement for mental stress by the Nova Scotia WCAT after a confrontation with his supervisor in which the worker and supervisor became physically aggressive toward each other by standing chest-to-chest, such that there was the potential for physical violence. The Panel in *WSIAT Decision 341/04* cited approvingly the following statement of the Nova Scotia Court of Appeal: ". . . WCAT found the meeting to be highly charged with the potential for physical violence. The word "traumatic" was taken to mean something other than the common workplace experiences of the particular worker, suggesting an objective element. And WCAT addressed itself to the question of what employees working for the employer in general, not just this worker, would find normal or unacceptable."

### **Sexual Harassment**

In *WSIAT Decision 406/03*, released on April 29, 2004, the Panel granted the worker entitlement for traumatic mental stress arising from sexual harassment, from her employer's investigation into her complaint, and from other co-workers retaliatory responses to the allegations. The Panel concluded that the sexual harassment itself would be generally regarded as traumatic, as would her co-workers' retaliatory reactions to her allegations. The Panel also found at para. 70 that the employer's investigation in response to the sexual harassment was not excluded from the purview of compensation as an employment-related decision. The Panel stated that:

We are also satisfied that the actions taken by the accident employer in response to the incidents of June 1999 were not simply "decisions or actions that are part of the employment function", as described in OPM Document #15-02-02, but are more appropriately treated as part of a sequence of "actions or decisions that are not part of the employment function, such as violence or threats of violence". In our view, the accident employer's actions, including the internal investigation and the discipline meted out to AB, were in response to the worker's report of sexual harassment, and the warning to co-workers of possible disciplinary action was probably the employer's

<sup>10</sup>"Compensation for Mental Stress: Is Current Law and Policy in Ontario's Workers' Compensation Too Restrictive?" from *The IAVGO Reporting Service*, June 2006.

response to some knowledge or suspicion of retaliation against the worker.

It is not clear from the Panel's reasoning in WSIAT *Decision 406/03* whether investigations into allegations of harassment would therefore generally be considered outside of the employment function for the purposes of Operational Policy 15-03-02.

#### **Non-Violent Harassment/ Scrutiny Cases<sup>12</sup>**

In WSIAT *Decision No. 669/02*, released on March 27, 2003, the workplace stress involved events taking place in 1992, before the enactment of the WSIA and the WSIB Policy on Traumatic Mental Stress. The Panel declined to determine whether Operational Policy 15-02-02 applied in the instant case because it found that even if applicable the Policy would not affect the outcome. In the case, the worker, a nurse, alleged that she was subject to unjustified scrutiny by the clinic supervisor. The Panel outlined that the fact that the Policy mentions "harassment that includes physical violence or threats of physical violence" does not mean that the Policy limits compensation for harassment to cases of physical violence. The use of the word "includes" as opposed to the term "means" indicates that the Policy allows for other types of harassment. The Panel further stated at para. 80 that:

We cannot find that the Board meant to exclude mental stress caused by unjustified attacks by the immediate supervisor and co-workers which caused trauma to the worker. In fact, had the Board intended to exclude any actions of the employer or the co-workers as causes of mental stress, it would not have listed a number of "decisions or actions" that, as part of the employment function, do not give rise to entitlement. The policy mentions such exclusionary conditions, including "terminations, demotions, transfers, discipline, changes in working hours and change in productivity expectations." **Nowhere does it mention the overzealous scrutiny of supervisors or the vexatious pursuits of co-workers, the factors which are involved in this case.**

The Panel found that the worker's case therefore would be compensable both under Operational Policy 15-03-02, if applicable, or under one of the WSIAT's traditional tests of whether the stressors were unusual and whether a reasonable person would accept the stressors as disabling. The clinical manager's frequent interventions and unflattering remarks, many in the presence of other staff, could not be justified as normal staff directions.

In WSIAT *Decision No. 2056/03*, released on March 12, 2004, the WSIAT considered the case of a worker who developed a conversion aphonia (loss of voice) which her doctors linked to workplace stressors. The worker, a personal support worker in a nursing home, testified that in 1999 she reported a co-worker for abusing residents. After this “whistle blowing” incident, some of her co-workers began to treat her differently. Co-workers called in sick to avoid working with her. In addition, the worker had difficulties with one of the employer’s managers. The manager criticized the worker without justification (such as accusing her of making an illegal transfer of a patient) even though he was not her manager. At one point, the worker had secured a resident to a gear-chair under a physician’s authorization but she was accused by the manager of abusing the patient. A co-worker testified that the manager said he was going to “get her” in reference to the worker. Evidence was given at the WSIAT hearing that management turned a blind eye to what was happening with respect to the worker.

In this case, the Panel observed that Operational Policy 15-03-02 identifies as compensable events such as “being the object of harassment that ***includes*** being placed in a life-threatening or potentially life-threatening situation.” [emphasis in original] The Panel noted that the use of the word “includes” suggests that other types of harassment – besides the life-threatening type – could satisfy the Policy. The Panel further agreed with the Panel in WSIAT *Decision No. 669/02* that the policy could not have meant to exclude mental stress “caused by unjustified attacks by [a supervisor] which caused trauma to the worker”. The Panel determined that the worker was credible, and that the worker’s aphonia could be causally related to the nature of her employment, and consequently ordered that the worker had entitlement for traumatic mental stress under Operational Policy 15-03-02.

In WSIAT *Decision No. 526/05*, released on April 13, 2005, the Panel granted benefits to a worker who suffered from depression after being aggressively confronted by the daughter of the company’s majority shareholder, who was not the worker’s supervisor. The worker, a metal fabricator, experienced a workplace injury to his arm and shoulder in 2002. He required physiotherapy during work hours in order to treat this injury. The plant manager and lead hand authorized payment for physiotherapy. On August 8, 2002, the daughter of the majority owner of the company approached the worker to ask who gave him the authority to take the time off for physiotherapy. The daughter told the worker that he had to take physiotherapy after work hours, and when he said he could not because his wife worked and he had to cook supper, the daughter swore at him and called him a liar. The worker testified that while the daughter was yelling at him, he was getting sick. He felt his blood pressure rising. The

worker had not had any prior dealings with the daughter prior to this, and he had walked by her desk every day on his way to physiotherapy at 2 p.m.

The Panel concluded that the immediate cause of the worker's depression was his treatment by the daughter of the majority shareholder. The Panel noted that the daughter was employed in a clerical capacity and was not in the worker's line of supervision. Therefore, her behaviour could not be characterized as an employment decision or action. The Panel concluded that the confrontation was a sudden and unexpected traumatic event falling into the category of an unjustified attack constituting harassment of the worker.

Most recently, in WSIAT *Decision No. 2885/01*, released on December 16, 2005, the Panel addressed entitlement for traumatic mental stress where the worker and a co-worker were singled out for disciplinary action for refusing overtime as part of a labour dispute. The worker also suffered recriminations and was ostracized by his co-workers when he yielded to the employer's demands. Since the events in question occurred before 1998, the Panel concluded that Operational Policy 15-03-02 did not apply. Nonetheless, the Panel stated that even if the Policy did apply, their decision would be the same. While the Panel conceded that the Policy and WSIA may well preclude entitlement with regard to the employer's actions in disciplining the worker, it found at para. 91 that recriminations from co-workers when the worker yielded to the employer's demands "reflect[ed] a workplace environment that exceed[ed] the type of stressful scenario generally associated with employer discipline" and that the associated stress "exceed[ed] that which is contemplated in Board policy".

#### **"Near Miss" Situations**

In WSIAT *Decision No. 1751/05*, released on October 14, 2005, a worker was granted entitlement for traumatic mental stress related to two workplace incidents occurring in 2000. In the summer of 2000, the worker, a carpenter, experienced two incidents at work. In the first, a scaffold upon which he was standing broke, leaving him holding on to an overhead I-beam. Co-workers helped him get his footing, but if he had fallen, he would have fallen about ten feet onto the subway track bed, which was covered with construction debris including rebar, bolts and pieces of wood. In the second incident, about a month later, the worker's partner accidentally pulled the worker off his feet while standing over an eighteen foot drop. Had the worker not been secured by a rope around his waist, he would have fallen eighteen feet. After the incidents, the worker stopped working. He later sought medical attention and was diagnosed with Post Traumatic Stress Disorder.

In considering the worker's case, the Panel framed the question to be answered as, given that the worker's diagnosis was unquestionably PTSD, whether "this

is a reasonable reaction in the circumstances” (para. 54). In granting entitlement for traumatic mental stress under the applicable law and Operational Policy 15-02-02, the Panel found that the first workplace incident could be objectively characterized as a sudden and unexpected traumatic event which involved the threat of serious harm to the worker. The Panel stated that it did not find the worker’s reaction to the event as shocking to have been an unreasonable reaction, given the circumstances of the incident.

#### **Wrongful Accusations of Wrongdoing**

In WSIAT *Decision No. 929/04*, released on November 18, 2004, the Tribunal addressed whether false accusations of serious wrongdoing would fall within the scope of Operational Policy 15-03-02. The Panel granted the worker, a police officer, entitlement for traumatic mental stress suffered after he was falsely accused of sexually assaulting two female prisoners, arrested at home and subjected to a trial based on weak evidence. The Panel reviewed the Board’s Policy, noting previous WSIAT decisions concluding that the Policy is not exhaustive, and that a wrongful charge of sexual assault would generally be accepted as objectively traumatic, particularly when the charge was proceeding to trial. The Panel stated at para. 35 that:

In our view, the worker has fulfilled all requirements of Policy No. 15-02-02 for initial entitlement. He suffered a sudden and unexpected traumatic event in the nature of a wrongful sexual assault charge for which he was tried and eventually acquitted.

#### **Unethical Work Practices**

In WSIAT *Decision 970/03*, released on April 1, 2004, the Panel granted entitlement to a worker for mental stress flowing from his work as a crematorium attendant. The worker was ordered by his employer to throw excess human bodies in the garbage and commit other indignities to human remains. The Panel concluded that the non-exhaustive examples of traumatic events under Operational Policy 15-03-02 did not preclude entitlement. The workplace events would be generally viewed as traumatic and horrific. The events were not part of the employment functions of the employer since they were likely directed by a co-worker not the employer. In any case, the Panel concluded that “[u]nethical work practices of the kind found in the evidence are not listed in these exclusions [of employment decisions like terminations]” in Operational Policy 15-03-02.

### **Denials of Entitlement Based on Operational Policy 15-03-02**

Despite its reasonably generous approach to compensation for mental stress arising from traumatic events, the WSIAT has applied Operational Policy No. 15-03-02 and ss. 13(4) and (5) of the WSIA to limit entitlement for stress related to workplace decisions or conflicts. In WSIAT *Decision No. 587/04*, released on June 13, 2005, the Panel concluded that the worker's stress was rooted in the disagreements between the worker and the employer about job assignments and in disagreements between the worker and his trade union. Consequently, the worker was not entitled to benefits for his mental stress.

WSIAT *Decision No. 392/02*, released on April 5, 2002, denied entitlement for mental stress to a worker whose depression arose out of his gradually deteriorating relationship with the employer, which the worker stated included an excessive workload and the threat of dismissal for incompetence. The Panel found that, while past Panels had allowed entitlement in such cases, given the legislation and Board policy, no entitlement could be allowed.<sup>13</sup>

In WSIAT *Decision No. 1406/03*, released on August 27, 2003, the Panel concluded that there was no entitlement for mental stress for a worker who was notified of the death of a co-worker in a fatal car accident the day after the accident by a phone call to his home. First, the Panel found that there was an insufficient work relatedness to make the stress in the course of employment. In addition, the Panel noted that the phone call was not traumatic within the scope of the Policy or s. 13(5) of the WSIA. The Panel stated that generally for an event to be considered traumatic, there must be something beyond the normal or ordinary types of experiences such as a notification of death.

### **A Change in Direction at the WSIB? Recent ARO Decision**

While the WSIAT has adopted a fairly broad interpretation of Operational Policy 15-03-02, the WSIB itself has applied a strict interpretation of its Policy. Generally, the WSIB has denied compensation unless the traumatic events were life-threatening or involved violence or threats of violence. In addition, the WSIB, especially at the operations level, has denied compensation to workers – such as emergency or health care workers – whose occupations expose them to traumatic events on a frequent basis. In such cases, the WSIB often concludes that, for such workers, traumatic events are not “unexpected in the normal or daily course of the worker's employment or work environment”, as stipulated in the Operational Policy.

Recently, John Slinger, Chief Corporate Services Officer of the WSIB, issued a decision in which he was acting as Appeals Resolution Officer. The worker claimed that she was entitled to benefits for traumatic mental stress under the

WSIA and Operational Policy 15-03-02. In the alternative, in the event that it was found that the Policy or Act excluded her claim, the worker challenged the constitutionality of ss. 13(4) and (5) of the WSIA as violating the *Canadian Charter of Rights and Freedoms*. It was agreed that before addressing the challenge to the legislation, ARO Slinger would make a decision on the merits of the worker's case to determine if a finding on the constitutionality of the WSIA exclusion was necessary.

The worker, whose job involved making cakes, had worked for the employer since about 1992, shortly after she immigrated from Vietnam. Most of the employees were immigrants from Vietnam, Korea, India and China. In 1996, a new supervisor took over. The supervisor demanded that the employees work faster, called them "stupid", demeaned their ethnic backgrounds, and swore at them. At times, the supervisor stood right next to the worker and loudly shouted "faster" in her ear.

From September 2000 to April 2001, the worker took sick leave for an unrelated medical treatment. When she returned to work, the supervisor increased her scrutiny of the worker. She weighed the worker's cakes more often and questioned the quality of her work, although she was a good employee who often received top bonus levels. On June 27, 2001, the supervisor screamed in the worker's ear that she was going to talk to the owner and "ask her to lay you off". The worker was so upset by this that she fainted. She was taken to the hospital and referred for psychological counselling. The worker was later diagnosed with Post Traumatic Stress Disorder and Major Depression with anxiety related in significant part to workplace stress. She was unable to return to work. The worker filed a human rights complaint which was eventually settled.

The WSIB adjudicator concluded first that the incident on June 27, 2001 was not objectively traumatic because it did not involve threats of violence and was really a response to general working conditions over time. On reconsideration, the adjudicator determined that the instant case fell within the specific exclusion in s. 13(5) as the stress experienced by the worker was caused by the employer's actions related to the worker's job performance.

In his decision, ARO Slinger noted that the examples of harassment in Operational Policy 15-03-02 all reference threats of violence. ARO Slinger identified a central question here as whether the list was intended to be exhaustive. ARO Slinger answered the question in the negative, stating that:

First, the policy states that traumatic events "include" the situations listed, suggesting there are situations not reflected that would be

covered. Second, the policy identifies three distinct types of traumatic events to be covered. These are criminal acts, harassment and horrific events. It is reasonable to infer from this that instances of harassment which do not involve criminal acts or criminal behaviour would be covered even though the situations listed in the policy do not specifically identify such cases.

ARO Slinger concluded that the acts of the supervisor in screaming at the worker in close proximity would be generally accepted as traumatic in nature. Such behaviour was also not an expected part of the worker's job in assembling cakes, and accordingly met the policy and legislation's requirement that the traumatic event be "unexpected".

ARO Slinger also found that the supervisor's activities could not be considered within the "employment function". ARO Slinger noted that Operational Policy 15-03-02 expressly excludes from the employment function employer's actions or decisions "such as violence or threats of violence". ARO Slinger noted that again the "such as" qualification indicated that other types of employer behaviour would also fall outside the "employment function", and concluded that the verbally abusive and harassing behaviour in the instant case would fall outside of the employment function.

Since ARO Slinger accepted that the worker developed Post Traumatic Stress Disorder arising out of and in the course of her employment, he determined that she was entitled to receive loss of earnings and other benefits. As noted above, the worker had also challenged the constitutionality of the exclusion of traumatic mental stress in the WSIA. However, since ARO Slinger decided in the worker's favour on the merits, the question of the legislation's constitutionality was not addressed.

This case represents what is perhaps a significant victory for injured workers who suffer from traumatic mental stress. It may indicate that the WSIB is willing to move towards a more comprehensive and nuanced interpretation of Operational Policy 15-03-02 which, while it will not likely approach the breadth with which the WSIAT approaches the Policy, better reflects the realities facing workers with disabilities caused by traumatic workplace events.

### **Future Directions and Conclusions**

No matter how broadly the WSIB and WSIAT interprets Operational Policy 15-03-02 and the statutory mental stress exclusions, many workers will be left without any recourse where they suffer psychological injuries at the workplace. Workers disabled by employment-related decisions, overwork, or other

potentially severe stressors will have no recourse to workers' compensation benefits.

With the Supreme Court of Canada's decision in *Nova Scotia (Workers' Compensation Board) v. Martin; Nova Scotia (Workers' Compensation Board) v. Laseur*<sup>14</sup>, in October 2003, it became clear that workers have a strong basis to challenge the legislative exclusion of mental stress from the workers' compensation scheme in Ontario.

In *Martin*, the Supreme Court of Canada concluded that a legislative exclusion of workers with chronic pain disability from the regular workers' compensation regime in Nova Scotia violated the section 15 equality provision of the *Canadian Charter of Rights and Freedoms*. The legislation in question excluded chronic pain from the purview of the workers' compensation system and provided instead a maximum of a four week rehabilitation program to workers diagnosed with Chronic Pain Disability. In addition to finding that the Nova Scotia Appeals Tribunal had jurisdiction to determine the *Charter* compliance of the impugned provisions, the Supreme Court concluded that the legislative exclusion discriminated against workers who develop chronic pain following a workplace injury as compared to injured workers who do not develop chronic pain. This differential treatment was discriminatory because it did not correspond to the actual needs and circumstances of injured workers who develop chronic pain, and further reinforced stereotypes about workers with chronic pain. The Supreme Court rejected financial pressures or fraud prevention as sufficient justification to legitimate the discriminatory treatment. Since there was no sufficient justification for the infringement of s. 15, the Court determined that the impugned provisions were invalid.

Based on the logic of *Martin*, the exclusion of workers who develop mental stress from compensation under the WSIA may be constitutionally invalid. It is clear that the WSIAT has the jurisdiction to consider the constitutionality of ss. 13(4) and (5) of the WSIA if it is raised. There is also a strong argument that the legislative exclusion of mental stress claims creates differential treatment between workers with psychological injuries caused by workplace events or conditions and, for example, workers with physical injuries caused by workplace events or conditions. The distinction between psychological and physical injuries demeans the dignity of workers who develop psychological disabilities as a result of their working conditions, and fails to reflect their actual needs and circumstances.

Some commentators, such as employer representative Rob Boswell, have suggested that the generous interpretation of Operational Policy 15-03-02 at the WSIAT – combined with the distinction made whereby “mental-physical”

<sup>14</sup>“Compensation for Mental Stress: Is Current Law and Policy in Ontario's Workers' Compensation Too Restrictive?” from *The IAVGO Reporting Service*, June 2006.

claims and “physical-mental” claims are not subject to the mental stress statutory exclusion or Operational Policy 15-03-02 – will allow workers’ representatives to effectively bypass the WSIA’s exclusion in ss. 13(4) and 13(5).<sup>15</sup>

Certainly, the WSIAT’s comprehensive interpretation of Operational Policy 15-03-02, as well as a more generous interpretation at the WSIB level, will create more space for workers to find their mental stress claims covered under the current Act and Policy. However, it must be noted that the WSIAT has clearly limited entitlement for workers who have developed medical conditions such as depression because of chronic workplace stressors expressly excluded by the legislation. In addition, the WSIB will likely continue to be restrictive about what events will be considered “traumatic”, and may continue to deny entitlement to workers whose professions regularly expose them to traumatic events. Workers who are denied benefits for their psychological injuries caused by work are being – and will continue to be – disadvantaged in relation to other injured workers. Therefore, the possibility of having ss. 13(4) and (5) ruled invalid by the courts remains an important option for injured workers, and the future of compensation for mental stress in Ontario and across Canada remains very much in flux.

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<sup>1</sup> “British Columbia paramedic’s mental stress claim denied”, *Canadian Occupational Health & Safety News*, January 9, 2006, Vol. 29, No.1 at 2.

<sup>2</sup> Decision No. 526/05, released on April 13, 2005

<sup>3</sup> Except, of course, for the common law right to sue. Where workplace injuries are not covered by the WSIA, they may not be subject to the bar on litigation against employers and co-workers in ss. 28 and 29 of the WSIA.

<sup>4</sup> For a useful discussion of the distinction between types of workplace stress claims, see “Chronic Stress Claims - Interpretation of the Law”, *Workplace Stress: Prevention, Adjudication & Compensation* (Toronto: Southam Business Information & Communication Group, 1990) at 3-7.

<sup>5</sup> See Lippel article, *supra* note 3

<sup>6</sup> See, e.g., WSIAT *Decision No. 809/9812*, in which entitlement was granted to a correctional officer for chronic stress arising out of her job, and WCAT *Decision No. 1063/94*, in which the Panel allowed a claim for psychological disability (depression, anxiety) in part caused by workplace stress as a welfare caseworker. See also, WCAT *Decision No. 834/97*, WSIAT *Decision No. 145/89*.

<sup>7</sup> See, e.g., WSIAT *Decision No. 1647/04* at para. 108, WCAT *Decision No. 377/92*, released on November 9, 1992, and WSIAT *Decision No. 669/02*, released on March 27, 2003 at paras. 86-87. Recently, in WSIAT *Decision No. 757/04*, released on October 21, 2005, there was some question whether the pre-1997 Act or the WSIA applied. The Panel determined that, before addressing this

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question and the potential related issue of the constitutionality of ss. 13(4) and (5) of the WSIA, it should first consider whether the worker would be entitled to stress-related disability but for s. 13(4) of the WSIA and corresponding Board Policy 15-02-02. The Panel concluded on the facts that the worker was not harassed by his supervisor, but rather was simply faced with progressive disciplinary measures relating to valid performance issues (para. 49). Although the Panel determined that the WSIA likely applied to the worker's case, it also found that he did not have a personal injury by accident even according to the "average worker" test used in much previous Tribunal jurisprudence on pre-1998 mental stress cases. *WSIAT Decision No. 757/04* potentially implies that, even prior to the statutory exclusion in s. 13(4), if disciplinary measures were justified, they may not be able to form the basis for entitlement for mental stress.

<sup>8</sup> See, e.g. *WSIAT Decision 799/04* (November 8, 2004); *WSIAT Decision No. 633/01* (February 18, 2004). The Tribunal has also issued a number of decisions in which it declines to accept the applicability of Policy 15-03-02 to pre-1998 injuries, but finds that even if applicable the Policy requirements were met in the instant case, see e.g. *WSIAT Decision No. 669/02*, *WSIAT Decision No. 2685/01* (November 25, 2004).

<sup>9</sup> See, e.g., in Newfoundland and Labrador, *Workplace Health, Safety and Compensation Act*, R.S.N.L. 1990, c. W-11, s. 2 (o) which states that "injury" means an injury, disablement, industrial disease or death "arising out of and in the course of employment and includes a recurrence of an injury and an aggravation of a pre-existing condition but does not include stress other than stress that is an acute reaction to a sudden and unexpected traumatic event"; in British Columbia, *Workers' Compensation Act*, RSBC 1996, c. 492, s. 5.1(1) which states that "a worker is entitled to compensation for mental stress that does not result from an injury for which the worker is otherwise entitled to compensation, only if the mental stress (a) is an acute reaction to a sudden and unexpected traumatic event arising out of and in the course of the worker's employment . . . and (c) is not 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, to discipline the worker or to terminate the worker's employment"; in Manitoba, *Workers' Compensation Act*, C.C.S.M. c. W200, s. 1(1) defines an occupational disease as a "disease arising out of and in the course of employment and resulting from causes and conditions . . . but does not include . . . stress, other than an acute reaction to a traumatic event". In addition, s. 1(1.1) specifies that the definition of "accident" in subsection 1(1) "does not include any change in respect of the employment of a worker, including promotion, transfer, demotion, lay-off, or termination; in Nova Scotia, *Workers' Compensation Act*, [S.N.S. 1994-95, c. 10](#), s. 2 (a) defines "accident" as not including "stress other than an acute reaction to a traumatic event"; in New Brunswick, *Workers' Compensation Act*, [R.S.N.B. 1973, c. W-13](#), s. 1 defines accident as ". . . not include[ing] the disablement of mental stress or a disablement caused by mental stress, other than as an acute reaction to a traumatic event".

<sup>10</sup> In addition, in determining that the supervisor's actions were not employer's actions in relation to employment, the Panel cited the decisions of other Panels finding that overzealous scrutiny of supervisors or vexatious pursuits of co-workers are not included in "employer's decisions or actions relating to the worker's employment" (*WSIAT Decision No. 669/02*, *WSIAT Decision No. 2056/03*).

<sup>11</sup> [2005] N.S.J. No. 75 (C.A.)

<sup>12</sup> See also, *WSIAT Decision No. 2685/01*, released on November 25, 2004, in which the Tribunal considered a case arising before the legislative bar on stress claims was enacted and before the Board's policy was implemented. The Panel noted previous cases concluding that Operational Policy 15-03-02 did not apply to pre-1998 claims, but found that even if the Policy were applicable, the facts surrounding the worker's injury bring the worker's claim within the scope of the Policy. In the case, the worker experienced harassment by a co-worker. The harassment consisted of repeated verbal comments about the worker's pre-existing physical disabilities,

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notably visual impairment, and a perception that the worker received special treatment because of this impairment. The parties agreed that the appeal should be allowed in part because the worker experienced traumatic and stressful harassment which caused an acute aggravation of her pre-existing problems including a non-organic injury.

<sup>13</sup> See also WSIAT *Decision No. 881/01*, released on January 24, 2002, where entitlement was denied based on the legislation and policy to a worker who claimed depression related to an incident at work in which the employer assigned work to the worker, which the worker refused, and the employer later suspended the worker; and WSIAT *Decision No. 1971/01*, released on August 23, 2001, in which the worker was denied entitlement for stress she related to supervisors and co-workers trying to heap more work on her.

<sup>14</sup> [2003] 2 S.C.R. 504 [“Martin”].

<sup>15</sup> Rob Boswell, “Update on Mental Stress: Review of Recent WSIAT Jurisprudence”, <http://www.oba.org/en/wcb/mar05/PrintHtml.aspx?DocId=62874>