

COMPENSATION FOR CHRONIC STRESS

A BRIEFING PAPER¹

1. ISSUE

This paper discusses issues relating to entitlement to workers' compensation benefits for "chronic stress."

2. OVERVIEW

The question of whether claims for injury or disease resulting from "chronic stress" are, or should be, compensable under the *Workers Compensation Act* is a controversial one. Stakeholder views on the compensability of such claims are highly polarized. Questions have focused on what Board policy should be, and whether current Board practice and policy are consistent with the provisions of the *Act*.

3. DEFINING STRESS

A key element of the problem of discussing "chronic stress" is the lack of common understanding about the term.² Stress may be either a cause or an effect of an injury or disease. This paper considers the compensability of injuries or diseases where adverse stimuli acting over time ("stressors") produce psychological impairment or mental disability ("stress").

3.1 Types of Mental Disability Claims

In the American jurisprudence, stress disability claims are often referred to using terminology set out by Larson who distinguishes three kinds of claims:³

- **Physical-mental claims** are those where a physical injury or disability results in a mental condition, e.g. a serious physical disability such as loss of a limb leads to clinical depression;

¹ This paper is one of several that the Policy and Regulation Development Bureau is preparing on topics that may fall within the Royal Commission's terms of reference. The purpose is to give background information on major issues. The WCB does not expect the Commission to make decisions on the basis of these documents. Rather, it is anticipated that the Commission will make its own inquiries.

² Dorland's Pocket Medical Dictionary (23 ed.) defines stress as:

... the sum of the biological reactions to any adverse stimulus, physical, or mental, or emotional, internal or external, that tends to disturb an organism's homeostasis; should compensating reactions be inadequate or inappropriate, stress may lead to various disorders. The term is also used to refer to the stimuli that elicit the reactions.

³ Larson's Workers' Compensation Law, commencing at para. 42.20.

- **Mental-physical claims** are those where a mental stimulus results in a physical condition, e.g. witnessing a hostage taking results in a heart attack; and
- **Mental-mental claims** are those where a mental stimulus leads to a mental condition, e.g. witnessing an industrial accident leads to psychosis or stress at work leads to exhaustion.

“Mental-mental” claims can be further subdivided into two other categories:

- **Traumatic stress claims**, in which psychological injuries are caused by a specific disturbing event or series of events; and
- **Chronic stress claims**, in which psychological injuries are caused by mental stimuli acting over time.

Mental-physical injuries that are caused by factors acting over time (such as a heart attack resulting from occupational stress) are sometimes also discussed under the rubric of chronic stress claims. Many of the issues discussed in this paper apply to both mental-physical and mental-mental chronic stress.

4. LEGISLATIVE BACKGROUND

4.1 Personal Injury

When first enacted in 1916, the *Workmen’s Compensation Act* provided compensation for “personal injury by accident arising out of and in the course of the employment.” “Accident” was defined to include, “... a willful and an intentional act, not being the act of the workman, and shall include a fortuitous event occasioned by a physical or natural cause.” This phrase was interpreted to restrict entitlement to compensation to cases where the injury arose by a sudden, discrete event, thus excluding benefits for conditions caused by factors acting over time.

In 1959, the legislature amended the definition of “accident” in the legislation to include “disablement arising out of and in the course of the employment.” The intent of the amendment was apparently to do away with the requirement that an injury be traumatically-caused.⁴ To emphasize that a discrete event was no longer required to establish entitlement, Mr. Justice Tysoe recommended in 1966 that the reference to “accident” in the basic coverage formula be removed entirely.⁵ The legislature removed all references to “accident” in the basic compensation entitlement provision in 1968.

⁴ Commission of Inquiry, *Workmen’s Compensation Act*, Report of the Commissioner the Honourable Mr. Justice Charles Tysoe, 1966, p. 179.

⁵ *Ibid.*, p. 187.

The entitlement provision in the current legislation provides that compensation be paid for any “personal injury or death arising out of and in the course of employment.”⁶ The former Commissioners interpreted this provision in Decision No. 129,⁷ where they stated that “it is no bar to compensation that an injury occurred over a period of time rather than resulting from a specific incident.”

4.2 Occupational Disease⁸

When first enacted in 1916, the *Act* also included compensation coverage for disease resulting from employment. “Industrial disease” was then defined to be any disease in the Schedule as well as other diseases declared by regulation. In 1959, the definition of “industrial disease” was broadened to include any disease which the Board by regulation, or otherwise, designated or recognized as such. The Board was also given the authority to designate or recognize any disease as being peculiar to or characteristic of a particular process, trade or occupation on such terms and conditions and with such limitations as the Board deemed adequate and proper.

The current legislation allows for compensation where a worker suffers from an occupational disease due to the nature of a worker’s employment. “Occupational disease” is defined in the legislation to be any disease mentioned in Schedule B and any disease which the Board by regulation of general application, or by order dealing with a specific case, may designate or recognize as an occupational disease.⁹

5. POLICY

5.1 *Workers’ Compensation Reporter*

In Decision No. 7¹⁰, the former Commissioners determined that the term “personal injury” included psychological impairment as well as physical injury. On the facts of the case, the worker suffered a back injury at work and developed a paranoid condition rendering him psychologically unfit for work.

In Decision No. 102¹¹, the Commissioners determined that a condition of “physical and emotional exhaustion” resulting from an excessive workload qualified neither as a “personal injury” under Section 5 of the *Act* nor as an “industrial disease” under Section 6 of the *Act*. They noted that “[a]lmost every occupation involves some physical and emotional demands,” and that keeping those demands at an acceptable level involves “judgment by both employers and workers” that is best left to negotiations among employers, employees, and unions. The Commissioners expressed concerns about the difficulty in

⁶ Section 5.

⁷ *Re Injuries and “Specific Incidents”*, 2 WCR 127, July 15, 1975.

⁸ For a detailed discussion of occupational disease, see “Medical and Legal Issues Related to the Recognition of Occupational Disease,” Royal Commission Briefing Papers, Jan. 23, 1997.

⁹ Section 1.

¹⁰ *Re The Determination of Disability*, 1 WCR 19, Sept. 14, 1973.

¹¹ *Re Disablement Through Exhaustion*, 2 WCR 25, Mar. 13, 1975.

adjudicating and inquiring into such claims as well as the administrative cost of same.

The Commissioners said:

... Overall and in the long run, we think it in the public interest that this administrative cost should be avoided, and that rest periods of this kind should be provided for through provisions for vacations, time off for overtime worked, sick leave, or in other ways that are provided for by collective agreement, or by arrangements between employers and workers.

The Commissioners later qualified Decision No. 102 in Decision No. 348¹²:

... if the evidence indicates that a particular condition does result from the employment, adjudication difficulties and costs are not valid grounds for not paying compensation. However, if the difficulty in adjudication arises from the fact that there is insufficient evidence that the employment, as opposed to other factors in the claimant's life caused the condition, then, equally clearly, this is a reasonable ground for not recognizing the condition as an industrial disease. We consider that this was the situation in Decision No. 102.

5.2 Rehabilitation Services & Claims Manual

Item #32.10, *Psychological/Emotional Conditions*, provides that "[t]he Board does accept claims for personal injury where the injury consists of a psychological condition," but also notes that "the Board has not recognized any psychological or emotional conditions as occupational diseases related to employment."

Item #22.33, *Psychological Problems/Chronic Pain Problems*, provides that "[p]sychological problems arising from a physical or psychological injury are acceptable as compensable consequences of the injury," but for a claimant to qualify there must be "evidence that the claimant is psychologically disabled" beyond "unexplained subjective complaints" or "difficulty in psychologically or emotionally adjusting" to an injury. Item #22.33 also provides that where a psychological problem arises "without the occurrence of any physical injury, reference should be made to #13.20 and #32.10."

Item #13.20, *Psychological Impairment* provides that "[p]ersonal injury' includes psychological impairment as well as physical injury," and that claims "for traumatically induced psychological impairment could be accepted even if unaccompanied by any physical impairment." Item #13.20 also states that "[p]sychological impairment has not been deemed to be an occupational disease," but such conditions "may be accepted if they are a sequela to an accepted personal injury or occupational disease."

¹² *Re Alcoholism*, 5 WCR 127, February 25, 1982.

Item #32.20, *Physical and Emotional Exhaustion*, provides that “[p]hysical and mental exhaustion is not recognized by the Board as an occupational disease.”

Item #14.20, *Occurrence or Non-Occurrence of a Specific Incident*, provides that “it is not a bar to compensation when an injury occurs over a period of time rather than from a specific incident.” However, to be compensable there must be “something in the employment that had causative significance in producing the injury.”

6. BOARD PRACTICE & ADJUDICATION TRENDS

Generally, Board practice allows for physical-mental claims under Decision No. 7 and policy items #32.10, #22.33, and #13.20. Mental-physical claims may be accepted if occasioned by a traumatic event or events. Mental-mental claims, again, may be accepted if occasioned by a traumatic event or series of events. All such claims are adjudicated as a personal injury, not as an occupational disease.

Employers have expressed concern that there has been an increase in the number of chronic stress claims accepted by the Board in recent years.¹³ At the same time, workers have expressed concern that the Board's policies inappropriately exclude chronic stress claims from compensation. While the number of accepted mental-mental injury claims has increased, it is likely that most of these claims are for traumatically-caused mental injury rather than for chronic stress since the Board does not generally compensate for chronic stress.¹⁴

The Appeal Division has considered a number of chronic stress claims and in some cases has interpreted Board policies differently, suggesting that claims for gradually-caused mental injury may not always be barred.¹⁵ The potential scope of a broader interpretation is restricted, however, by an apparent difficulty in proving that any particular psychological impairment arose “out of and in the course of employment.”¹⁶

7. DISCUSSION PAPERS

¹³ See e.g., “Compensation review crucial to employers,” Vancouver Sun, p. E2 (June 13, 1997).

¹⁴ The Board's Statistical Services Department has compiled data on stress claims for the last few years. The number of accepted claims has increased from 177 in 1992 to 297 in 1996. These figures do not distinguish between chronic stress and traumatic stress claims.

¹⁵ In one case, the Appeal Division allowed a claim for mental stress on grounds that one event could be isolated and said to precipitate the worker's collapse, in light of a continuing stressful work environment. The precipitating event constituted an “unusual” circumstance in that what was involved was stress of significantly greater dimensions than everyday work stressors. Thus, it was sufficient to satisfy the “personal injury” requirement in the legislation as well as the “traumatically-induced” requirement in item #13.20 of the *Manual*.

¹⁶ Reasons for denying compensation include failure to prove that employment caused the injury, failure to establish a specific diagnosis of the claimant's condition, and because the dispute was considered to be a labour relations problem.

7.1 *Psychological Disabilities and Workplace Stress*

In 1993, the former Chief Appeal Commissioner prepared a discussion paper entitled “Psychological Disabilities and Workplace Stress”¹⁷ concluding that the Board policies concerning the issue were ambiguous, if not inconsistent.¹⁸ She requested clarification from the Board of Governors on a number of issues:

1. Does policy item #13.20 of the *Manual* intend to exclude psychological impairment that is not traumatically induced from the definition of “personal injury”? If so, Decision No. 7 would have to be read narrowly and confined to its facts.
2. Does Decision No. 102 in conjunction with policy item #32.20 of the *Manual* intend to preclude compensation for a state of physical and emotional exhaustion alleged to result from the stress of work, including barring the consideration of such claims in individual cases?
3. Does policy item #31.00¹⁹ of the *Manual* intend to bar the consideration of any form of psychological or emotional condition as an “industrial disease” in individual cases?
4. When using the term “psychological impairment,” what kinds of disorders do the policies contemplate? For example, is a state of emotional exhaustion subsumed under the term “psychological impairment” within the meaning of the policies? If not, on what basis do the policies distinguish between “emotional exhaustion” and “psychological impairment”?²⁰

On considering whether the policies and practice of the Board were consistent with the *Act* itself, the Chief Appeal Commissioner concluded that by routinely denying all claims for chronic stress the Board might be unlawfully fettering its discretion.²¹

Overall, the Chief Appeal Commissioner reviewed the historical evolution away from covering only “accidents” and towards providing compensation for any “truly work-caused disability.”²² She also noted that the concept of “personal injury” is undefined in the *Act* and that the definition of “occupational disease” is open-ended, indicating that the legislature intended these terms to be broad in scope.

With respect to “personal injury”, the Chief Appeal Commissioner considered that because the *Act* places no specific limits on the concept, there are no grounds for excluding mental conditions from its scope. Furthermore, she considered that the *Act* does not distinguish between injury caused by a physical stimulus and injury caused by a mental stimulus, nor does it distinguish between a traumatically-caused injury and a gradually-caused injury. The implication is

¹⁷ 10 WCR 257, November 25, 1993.

¹⁸ *Ibid.*, p. 270.

¹⁹ Now item #32.10.

²⁰ *Supra*, footnote 17, p. 285.

²¹ Also, in a 1990 decision, the Review Board found that the current board practice regarding stress claims amounts to an unlawful fettering of discretion.

²² The statement that the *Act* covers any disability that is “truly work-caused” comes originally from the 1966 Royal Commission Report. See Tysoe, footnote 4, pp. 179, 187.

that making such distinctions may be an unlawful fettering of the Board's discretion.

With respect to "occupational disease" the Chief Appeal Commissioner commented that because the *Act* gives the Board discretionary power to recognize a disease in individual cases, it cannot legally fetter its discretion by declaring, through policy, that a particular condition can never be recognized as an occupational disease. Thus, she concluded that the current interpretation of Board policy in Decision No. 102 to preclude recognition of "physical and emotional exhaustion" as an occupational disease in all cases may be invalid.

8. DISCUSSION

The role that the workers' compensation system should play in dealing with the effects of chronic stress has been the subject of considerable controversy, with the views of workers and employers greatly polarized.²³ In considering whether or how the policies and/or the current legislation should be changed, it is important to view the issues surrounding chronic stress claims in the context of the current *Act* and the broader social debate.

8.1 Is Chronic Stress Compensable under the *Act* and under Board Policies?

In 1994, the Prince Edward Island Court of Appeal held that depression caused by stress in the workplace fell within the definition of "accident" in P.E.I.'s *Workers' Compensation Act*.²⁴ The applicable provisions of the P.E.I. legislation were essentially identical to B.C.'s pre-1968 entitlement provisions. In contrast, the Yukon Supreme Court recently upheld a Yukon Workers' Compensation Health and Safety Board certification which stated that a particular case of willful, ongoing harassment at work was not an "accident" within the meaning of the 1986 Yukon *Act*.²⁵

The Chief Appeal Commissioner, in her discussion paper, commented that the legislation places no apparent limitations on the compensability of mental-mental claims. She went on to proffer questions with respect to the Board's policies

²³ This polarization is dramatically revealed by the comments that the Ontario Workers' Compensation Board received in response to a policy proposal on stress issued earlier in the decade. See Ontario Workers' Compensation Board, "Policy Proposal: Compensation for Disablements Arising from Workplace Stressors" (May 8, 1991) [hereinafter "Ontario policy proposal"].

²⁴ *Dowling v. PEI*, (1994) 7 C.C.E.L.(2d) 157, 124 Nfld. & P.E.I.R. 358, 384 A.P.R. 358 (P.E.I.C.A.). The P.E.I. legislature has since amended its *Act* to disallow claims for chronic stress. See the discussion of other jurisdictions, *infra*, Appendix A.

²⁵ *Yukon v. Yukon Workers' Compensation Health and Safety Board*, (Jan. 18, 1996) unreported S.C. No. 95-A0223 (Yukon S.C.). The old *Act* defined "accident" to include:

- (a) a willful and intentional act, not being the act of the worker,
- (b) a chance event occasioned by a physical or natural cause, and
- (c) disablement arising out of and in the course of the employment, and where the disablement is caused by disease the date of the accident shall be deemed to be the date of disablement.

S.Y. 1986, *Workers' Compensation Act*, s. 1(1). The new 1992 *Act* contains a different eligibility provision.

which, once answered, may resolve a number of outstanding issues around the compensability of chronic stress claims.²⁶

8.2 Should Chronic Stress be a Workers' Compensation Issue?

This question centers on the debate over whether chronic stress claims belong under workers' compensation or whether other remedies are more appropriate.

- **Appropriate Forum**

Those advocating for compensability maintain that stress in the workplace is no more the worker's "problem," or under the worker's "control," or purely the subject of "labour relations" and private contractual arrangements, than are occupational health and safety issues generally. Disallowing compensation for stress-related disabilities because they result from a worker's inability to "meet the demands of employment" is considered by some to be reminiscent of the common law defenses, such as assumption of risk and contributory negligence, that workers' compensation was intended to supplant in the first place.

Others consider that occupational stress is more properly dealt with outside of the workers' compensation scheme. In Decision No. 102, the former Commissioners characterized stress as a labour relations issue, stating that mental and physical exhaustion is best handled "through provisions for vacations, time off for overtime worked, sick leave, or in other ways that are provided for by collective agreement, or by arrangements between employers and workers."²⁷ Further, multiple causes of stress may mean that psychological disabilities caused by stressors acting over time should be considered a public health issue.

The Honourable Mr. Justice Tysoe commented in the 1966 report of the Royal Commission that the goal of the workers' compensation system is to cover all disablements that are "truly work-caused."²⁸ Many consider chronic stress claims to be essentially no different from any other type of injury claim.²⁹ Further, courts have held that workers' compensation legislation is remedial legislation designed to protect workers from economic hardship due to work-related injury, and should be given a broad interpretation.³⁰ Thus, many consider that any restriction on coverage needs to be justified as an extraordinary exception to the basic insurance scheme.

Excluding chronic stress claims from coverage under the workers' compensation system may lead to those claims being actionable in tort. Case law from other jurisdictions suggests that if stress-related mental injuries are excluded from the scope of workers' compensation legislation, workers are free to sue their

²⁶ See section 7.1, *supra*.

²⁷ 2 WCR at 27.

²⁸ Tysoe, footnote 4, pp. 179, 187.

²⁹ See e.g., Andrew Stritch, "Homage to Catatonia," *Chronic Stress: Worker's Compensation in the 1990's* p. 169.

³⁰ Dowling, footnote 24.

employers for those injuries.³¹ Also, at least one commentator has noted that the concept of “personal injury” has evolved in tort law to include gradually-caused psychological harm, and has argued further that:

[i]t was the original intention that workers’ compensation should be a complete substitute for employer’s liability in the industries in which it applied. ... Providing that immunity required that the types of disability for which a worker could claim compensation should be coextensive with the types of disability for which an employer could be sued at common law. Since it was the original intention to provide this immunity for employers, it is a logical corollary that the boards should interpret the phrase “personal injury” in a way that would keep it coextensive with the usage of that term in the common law courts.³²

- **Volume of Claims**

Another issue behind the chronic stress debate is the fear that allowing such claims would be “tantamount to opening the floodgates to literally thousands of claims,” which could “jeopardize service to workers with legitimate claims.”³³ Reference is often made to the “California experience,” where a liberal stress claim policy led to significant increases in payouts for mental injuries during the 1980’s. Oregon experienced a smaller flood during the same period.³⁴ These increases were abated by reforms to state legislation that imposed higher standards of proof and other restrictions on stress claims.³⁵

- **Cost**

Concerns have been raised that opening the door to chronic stress claims will be costly to the workers’ compensation system. According to some U.S. commentators, evidence suggests that stress claims are more expensive than other types of claims because of higher pre-injury wages.³⁶ In addition,

³¹ See Stratemeyer v. Lincoln County, Montana Supreme Court (Apr. 15, 1996) (“the exclusive remedy rule applies only if the injury suffered by the worker is covered by the Act”). See also Yukon v. Yukon Worker’s Compensation Health and Safety Board, footnote 25.). In the latter case, a worker had brought an action against his employer (the Government of Yukon) for mental injuries resulting from continual harassment at work. The defendant employer claimed that the action was barred, and requested a certification from the Yukon WCB to that effect. However, the WCB found that the workers’ compensation system was not intended to protect workers and employers who harass other workers, and that the statutory bar therefore did not apply to the plaintiff’s claim. The court deferred to this determination and the action was allowed to proceed.

³² Terence G. Ison, “A Historical Perspective on Contemporary Challenges in Worker’s Compensation,” (1996) 34 Osgoode Hall L. J. 810, 812.

³³ Vancouver Sun, footnote 13.

³⁴ For statistical details see e.g. Larson, footnote 3 at para. 42.25(a); “Lawyers Said to Provoke Mental Stress Claims,” Workers’ Compensation Insurance News Digest, May 21, 1994.

³⁵ See discussion of other jurisdictions, *infra*, Appendix A.

³⁶ E.g., Donald DeCarlo, “The Latest on Workplace Stress: When is it Compensable?” Journal of Workers’ Compensation 47, 50. In the U.S., stress claims are often added by lawyers to physical injury claims to increase bargaining power and obtain a higher settlement. “Lawyers Said to Provoke Mental Stress Claims,” footnote 34. (The article does not distinguish between chronic stress and traumatic stress claims on this point.) Larson notes that stress claims are “characterized by absence of physical injury, little time off work, low medical treatment costs, insignificant retraining costs, but a lot of litigation.” Larson, footnote 3,

employers assert that chronic stress claims could increase the uncertainty in costs faced by employers.

On the other hand, it is argued that providing compensation for these claims will give employers an incentive to implement stress-reduction measures,³⁷ reducing the cost to society as a whole of productivity losses due to psychological illness while ensuring “good social cost accounting by containing the cost[s] of [chronic stress] within the industries that produce them.”³⁸

8.3 Specific Policy Issues

As already indicated, the Board presently compensates stress claims where the resulting impairment arises as a sequela of another compensable injury or disease or as a result of a single or series of traumatic incidents arising out of and in the course of employment. All other claims are adjudicated by both the Board and the appeal bodies on a case-by-case basis according to the individual circumstances of the cases. The following outlines many of the issues in the context of adjudication.

- **Causation**

Under the *Workers Compensation Act*, establishing work-relatedness is key to entitlement. The standard of proof applied is based on the balance of probabilities. Section 99 provides that decisions must be made according to the merits and justice of the case, and where there is doubt on an issue and the disputed possibilities are evenly balanced, the issue must be resolved in accordance with the possibility which is in favour of the worker.

The Board acts on an inquiry model requiring board officers to gather evidence upon which to adjudicate a claim. Once it has been established that a worker suffers from a psychological impairment, the adjudicator will go on to satisfy him or herself on the issue of the work-relatedness of the impairment. Thus, the extent to which personal factors or non-work stressors may have contributed to the impairment and the extent to which the impairment can be said to be linked to the employment are relevant factors. Issues such as credibility of witnesses, relevance of evidence, the invasiveness of the inquiry, and disclosure to parties of very sensitive medical and personal information are issues arising in the course of adjudication.

A concern raised by employers about allowing compensation for chronic stress claims is that such claims are subjective and present difficult causation issues. For example, in an article in the *Vancouver Sun*, three co-chairs of the Employers' Forum on the WCB commented that

para. 42.25(a). It should be noted that costs of attorney involvement are not an issue in B.C. with respect to workers' compensation cases.

³⁷ See comments of B.C. Nurses Union, Summary of Public Hearing on Occupational Disease Policy, IDSC Secretariat, WCB of BC (Feb. 1994).

³⁸ Ison, footnote 32, p. 816.

[s]tress has become a common sociological problem which can have many sources, and it is out of an employer's control. Moreover, it is highly subjective. There is no reliable definition of what constitutes stress.³⁹

Others consider that difficulties with causation do not lead to the conclusion that compensation should be limited. In her 1993 paper, the former Chief Appeal Commissioner noted that many currently recognized compensable conditions, such as cancer and post-traumatic stress, present tough questions of causation and work-relatedness.⁴⁰ Like psychological problems, these conditions can be caused by a multiplicity of factors, some due to employment and some not. However, these conditions are compensable once proof of work-relatedness is established in an individual case.⁴¹

In addition, those in favour of compensating for chronic stress claims point out that the ability of medicine to determine the symptoms and cause of psychological illness is becoming more objective and more generally accepted.⁴² Medical reports are more and more specific as to diagnosis and cause.

- **Trauma**

It has been suggested that in the case of mental-mental injuries, the trauma requirement plays a special role. Because causation is difficult to establish in these cases, it is argued that the requirement "provides an intuitive guarantee that some alleged psychological impairment is employment related."⁴³ According to this view, the traumatic incident requirement is the best, or even the only way to distinguish between mental disablements that are truly "work-caused" and those that are not.

On the other hand, concerns have been expressed that making a distinction between a traumatically-caused injury and an injury caused by factors acting over time is unjustifiable. Trauma is not a pre-requisite in cases involving physical injury, and in fact the *Act* has gradually evolved away from requiring a specific accident to trigger compensation.⁴⁴ Further, advocates in favour of acceptance of stress claims consider that it is difficult in many cases to distinguish between "a series of discrete events" and "factors acting gradually

³⁹ Vancouver Sun, footnote 13.

⁴⁰ Munro, footnote 17, p. 284.

⁴¹ See also Stritch, footnote 29, p. 169. It may be useful to compare chronic stress with back injuries, a subject discussed at length in Tysoe, footnote 4, pp. 182-188, 207-221. Like stress-related injuries, the causes of back injuries are gradual and "multi-factorial," and reactions to strenuous back activity vary greatly among individuals. Despite these problems, Tysoe concluded that back injuries should be compensable. The Board does compensate for back injuries occurring over time.

⁴² See Donald Elisburg, "Workplace Stress: Legal Developments, Economic Pressures, and Violence," 12(Nov/Dec 1994) John Burton's Workers' Compensation Monitor 15.

⁴³ Munro, footnote 17, p. 268. The Chief Appeal Commissioner did not argue for this position; she merely stated it and referred to a U.S. court decision that accepted it.

⁴⁴ *Ibid.*

over time,” and as a result many claimants could be denied compensation on the basis of potentially arbitrary characterizations of a sequence of events.⁴⁵

- **Susceptibility**

Sensitivity to psychological illness varies in individuals. A concern of employers is that if chronic stress is compensable, they may find themselves paying for the worker’s susceptibilities or pre-existing conditions.

⁴⁵ See Larson, footnote 3, para’s. 42.23(e).

Larson notes that in all jurisdictions, compensation is allowed for physical disablements even if the worker had a particular weakness that rendered the worker more vulnerable to the injury,⁴⁶ and he asserts that there is no reason to change this principle in mental injury cases.⁴⁷

It should be noted that the *Act* and respective Board policies deal with claimants who are more susceptible to injury or have a pre-existing condition, and it has been argued that these rules could be satisfactorily applied in chronic stress cases.⁴⁸

- **Personal Injury versus Occupational Disease**

The Board has never recognized chronic stress as an occupational disease. Rather, stress claims have historically been adjudicated under the personal injury provisions of the legislation. Given the statutory discretion to recognize an occupational disease in individual cases, concerns have been raised that an absolute bar to recognizing chronic stress as an occupational disease would be an unlawful fettering of the Board's discretion.⁴⁹

8.4 Various Approaches in other Jurisdictions to the Chronic Stress Issue

A number of different approaches to the compensability of chronic stress claims have been taken in other jurisdictions.⁵⁰ Specific changes in B.C. may require legislative and/or policy changes, and have possible Charter implications.⁵¹

- **Causation**

These approaches limit compensation by requiring the mental injury to be caused by a specific type of stressor or in a specific manner.

Requirement that stressors be objectively verifiable on the evidence.

Evidentiary standards in some jurisdictions require the stressors that allegedly cause the injury be objectively present.⁵² The rationale for this requirement is to

⁴⁶ This is the common law "thin skull" rule applied in all tort cases.

⁴⁷ *Supra*, footnote 3, para. 42.23(c).

⁴⁸ See section 39(1)(e) of the *Act*, item #115.30 of the *Rehabilitation Services & Claims Manual*, and policy number 30:50:00 of the *Assessment Operating Manual*. Also, section 5(5) of the *Act* provides for proportionate entitlement where personal injury or disease is superimposed on an already existing disability; see also item #44.00 et. seq. in the *Rehabilitation Services & Claims Manual*.

⁴⁹ Munro, footnote 17, pp. 275, 282; see discussion section 7.1, *supra*.

⁵⁰ See Appendix A.

⁵¹ In *Gibbs v. Battlefords and District Co-operative* [1996] 3 S.C.R. 566, the Supreme Court of Canada held that an insurance policy offering reduced benefits to mentally disabled workers as opposed to physically disabled workers violated the Saskatchewan Human Rights Code. The court reasoned that a finding of discrimination does not require that every individual in the affected group be treated identically, and that distinctions made by insurance companies without sufficient justification could be invalid if discriminatory. Thus, discrimination implications may be relevant when considering making distinctions based on chronic stressors versus traumatic stressors in light of the purposes of workers' compensation legislation.

⁵² For example, Michigan has enacted a statute which states that "mental disabilities shall be compensable when arising out of actual events of employment, not unfounded perceptions thereof." See DeCarlo,

ensure that it is work that is causing the impairment, rather than any “misperceptions” about work that are only “in the mind” of the worker. Considered to address subjectivity concerns, adopting this requirement appears to be the trend in the U.S.⁵³

Requirement that the stimulus causing the injury be more stressful than normal. This approach involves consideration of a baseline against which to measure “normal” stressors. Thus, a stressor may be unusual in relation to a specific job or workplace, a particular type of employment, employment generally, or life generally. The first two baselines essentially conform to a “labour relations” view of chronic stress, under which everyday stressor levels are considered to be a matter of private arrangement between the worker or the union and the employer. The latter two baselines conform to an “occupational health and safety” view of stress, under which everyday stressor levels are considered to be akin to other types of potentially hazardous working conditions.

Worker representatives have expressed concerns that the “unusualness” test reintroduces fault into the workers’ compensation system and violates the traditional “thin skull” rule.⁵⁴ Employers, on the other hand, have expressed concerns that it is difficult and inappropriate to compare “potential” stressors, and that if stress-related injuries are compensable then only stressors actually experienced by the worker should be considered.⁵⁵ In contrast, Larson seems to prefer the unusualness test, incorporating “employment generally” as a baseline.⁵⁶ In at least one Appeal Division decision, the panel concluded that psychological impairment resulting from “unusual” stimuli can be characterized as “traumatically-induced” under the policies.

Requirement that the work stressors be the “predominant” cause of the injury. This approach involves a stronger showing of work-connectedness than the current “significant” causation standard,⁵⁷ thus addressing employer concerns that non-work factors play a significant role in many stress cases and that the current causation standard might allow claims that are only marginally attributable to work stressors. Workers generally oppose such a limitation.⁵⁸

Ison’s view is that often there is no scientific way to identify the “predominant” cause of an injury, and that use of such a difficult criterion could lead to an increased number of appeals.⁵⁹

footnote 36, p. 58. Also, the Appeal Division has in at least one case required that an “unusual” stimuli be objectively verifiable.

⁵³ Larson, footnote 3, para. 42.23(d).

⁵⁴ Appendix A of Ontario policy proposal, footnote 23, pp. 12-14.

⁵⁵ *Ibid.*, pp. 14-16.

⁵⁶ “The real distinction should be, not between sudden and gradual stimuli, but between gradual stimuli that are sufficiently more damaging than those of everyday employment life to satisfy the normal ‘arising out of’ test, and those that are not.” Larson, footnote 3, para. 42.23(b).

⁵⁷ See *RSCM* policy item #15.00.

⁵⁸ See Appendix A of Ontario policy proposal, footnote 23, p.10.

⁵⁹ Ison, footnote 32, p. 815:

[W]here a disability has resulted from the interaction of two or more causative factors, and it would not have occurred in the absence of one of them, there is no scientific way in which any one of them can be classified as “predominant.” This classification can only be made by arbitrary choice or political judgment, and this is so, even if the decision is allowed to

A related approach is to require that work-relatedness be shown by “clear and convincing evidence,” rather than applying the normal civil liability standard of proof on the balance of probabilities.⁶⁰

- **Trauma**

Requirement of a critical incident. This is the current practice of the B.C. Board as well as in many other jurisdictions. While it is mentioned here for the sake of completeness, regard must be had for the concerns already raised with respect to this interpretation of current policy in light of the legislative provisions.

- **Susceptibility**

Requirement that the stressors causing the mental injury be considered to be stressful to the “average” worker. This approach precludes entitlement to workers who are particularly susceptible to psychological disorder, the rationale being that it is not really work that caused the disability, but rather, some pre-existing disablement. However, concerns have been expressed that to adopt approach is to abandon the “thin skull” rule, a basic principle of tort law that has been widely applied in the workers’ compensation context.⁶¹

- **Medical Diagnosis**

Requirement that the impairment be generally recognized. Another commonly suggested requirement for compensability of mental-mental injury is that the impairment constituting the injury should be a disease or condition that is generally recognized in the medical community. Requiring the disease or condition to be listed in the American Psychiatric Association’s *Diagnostic and Statistical Manual of Mental Disorders (DSM-IV-R)* is a popular option.⁶² Some have also proposed that the diagnosis be made by a psychiatrist.⁶³

Employers support these suggestions, claiming that they would ensure objectivity.⁶⁴ However, worker representatives have expressed concerns that requiring a DSM-IV-R diagnosis, especially if the diagnosis must be made by a

masquerade as a medical opinion. A decision either way would be hard to justify because it could not be supported by logical reasoning. The use of this ostensible criterion could also tend to clog the appeal system.

⁶⁰ This variation has been used in Oregon; see Appendix A.

⁶¹ Larson notes that “the normal compensation principle that aggravation of a preexisting weakness or disease is a compensable injury” is “the standard rule when a physical trauma precipitates a prior condition, and it should be no less so when the stimulus is non-physical.” *Supra*, footnote 3, para. 42.23(c).

⁶² See discussion of this recommendation in Munro, footnote 17, p. 283.

⁶³ See e.g. Appendix A of Ontario policy proposal, footnote 23, p.4. However, it must be noted that in contemplation of the implementation of Bill 99, Ontario’s new legislation, the Board must receive a confirmation of stress from the worker’s health professional but confirmation need not be in the form of a *Diagnostic and Statistical Manual of Mental Disorders (DSM)* or an *International Statistical Classification of Diseases (ICSD)*. The Board may request such a diagnosis to confirm ongoing entitlement where appropriate: Workers’ Compensation Managing Claims, December 1997, v.8, no.12, pp. 92-94. This requirement applies only to traumatic stress claims, as the Ontario legislation disallows claims for chronic stress entirely. See Appendix A.

⁶⁴ Appendix A of Ontario policy proposal, footnote 23, pp. 6-8

psychiatrist, would create undue delay and require “another layer of medical bureaucracy,” interfering with timely intervention and treatment.⁶⁵ Workers have also noted that people living in northern and rural communities may not have access to a psychiatrist.⁶⁶

- **Personnel Actions**

Requirement restricting certain activities from coverage. Restrictions on coverage with respect to personnel actions such as demotions, disciplinary actions, and layoffs have been implemented in many jurisdictions that have adopted legislation expressly dealing with stress claims, including Manitoba and Ontario.⁶⁷ Appeal bodies have also determined that personnel actions do not occur “in the course of employment.”⁶⁸ Employers comment that accepting claims resulting from such actions would jeopardize their ability to manage their businesses effectively by creating a new right for workers not to be terminated or disciplined, even for cause or for purely economic reasons.⁶⁹

American jurisdictions that have limited recovery for personnel actions generally do so only if the action is “bona fide,” “non-discriminatory,” “good faith,” or “reasonable.” These terms are used so that a personnel action that is abusive or otherwise conducted unfairly can still be the subject of a claim for psychological injury; however, this rule may be considered a return to a fault-based standard of recovery. The legislation in Manitoba and Ontario does not contain such a restriction.⁷⁰

Other Possible Approaches

Reviewing the schemes adopted in other jurisdictions reveals a wide variety of possibilities, and the above list is not meant to be exhaustive.

It should be noted that while various approaches are discussed individually, many have been applied in combination. For example, before passage of Bill 99, the Ontario Workers’ Compensation Appeals Tribunal had the opportunity to apply various principles in the course of considering chronic stress claims.⁷¹ In at least one case, the Tribunal combined the “unusualness” criterion, the “predominance” criterion, and the “clear and convincing evidence” standard, concluding that if the stimulus is unusual for work generally, the regular evidence standard applies, but if the stimulus is not unusual then the higher “clear and

⁶⁵ *Ibid.* pp. 4-5.

⁶⁶ *Ibid.*

⁶⁷ See Appendix A. For details on American jurisdictions, see DeCarlo, footnote 36, p. 58.

⁶⁸ See e.g., Dec. No. 322/89 (1991) 18 *W.C.A.T.R.* 93 (W.C.A.T. Ont.). The B.C. Appeal Division has also found that some stress claims arose from “labour relations” issues and were thus not compensable.

⁶⁹ See e.g., DeCarlo, footnote 36, p. 58; Ontario policy proposal, footnote 23, pp. 22-23.

⁷⁰ See discussion of other jurisdictions, Appendix A.

⁷¹ The Ontario Board itself has never considered chronic stress claims to be compensable, though it did propose to extend coverage to include some claims in the early ‘90’s. See Ontario policy proposal, footnote 23.

convincing” evidence standard applies and the stimulus must be shown to be the predominant cause of the injury.⁷²

9. OTHER JURISDICTIONS

See section 8.4 as well as summary in Appendix A.

10. CONCLUSION

Chronic stress is a highly contentious and relatively new issue in workers' compensation. This paper is meant to be a survey of the major legal and policy implications regarding chronic stress claims, and is intended to present arguments from both employer and worker perspectives. It is not meant to take a position on the issue but is a background paper that may act as a starting point for discussion. It should also be noted that analysis of the medical literature on occupational stress is beyond the scope of the paper and has not been included.

⁷² WCAT Decision 918, (1988) 9 *WCATR* 48. The tribunal adopted this test from Townsend v. Maine Bureau of Public Safety, 404 A.2d 1014 (ME). For other examples of approaches adopted by various Ontario WCAT Panels, see Decision 145/89 (Apr. 4, 1990); Decision 1018/87 (1989) 10 *WCATR* 82; Decision 980/89 (Jan. 17, 1990); Decision 520/90 (1991) 19 *WCATR* 147; Decision 1030/89 (1991) 20 *WCATR* 46; Decision 636/91 (1992) 21 *WCATR* 251; Decision 631/91 (1992) 21 *WCATR* 277; Decision 318/90 (1992) 23 *WCATR* 100; and Decision 198/92 (1993) 24 *WCATR* 155, *inter alia*. For a synopsis, see Association of Workers' Compensation Boards of Canada, "Occupational Stress: How Canadian Workers' Compensation Boards Handle Stress Claims 1995/1996" 28-35 [hereinafter "Occupational Stress"].

Appendix A

Canada

Recent court cases in **Prince Edward Island** and **Nova Scotia** have called into question the practice of denying compensation for chronic stress claims under standard workers' compensation legislation. In *Dowling v. P.E.I.*, the Court of Appeal held that the province's basic compensation provision required the Board to hear chronic stress claims on their merits.⁷³ Similarly, in an earlier case from Nova Scotia, the Supreme Court held that in a mental-physical case, there need not be a traumatic incident in order for the injury to be compensable.⁷⁴

Five provincial legislatures have changed their respective workers' compensation legislation to preclude compensation for gradually-caused mental-mental injuries. **Manitoba, Nova Scotia, Prince Edward Island, and New Brunswick** have all amended the definition of "accident" or "occupational disease," as the case may be, to exclude stress, except as an acute reaction to a traumatic event.⁷⁵ Additionally, **Manitoba** has added a section to its *Act* stating that "accident" does not include "any change in the employment of a worker, including promotion, transfer, demotion, lay-off, or termination."⁷⁶

Ontario has recently enacted an exception to its basic coverage formula that denies entitlement for chronic stress claims. Section 13(4) of *the Workplace Safety and Insurance Act, 1997*, proclaimed into force on January 1, 1998, provides that:

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

Section 13(5) further provides:

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, include a decision to change the work to be

⁷³ *Supra*, footnote 24. The applicable Section 6(1) of the legislation provided for compensation where personal injury by accident arose out of and in the course of employment.

⁷⁴ *Poan v. Nova Scotia (Worker's Compensation Board)* (1994) 113 D.L.R.(4th) 284 (S.C.).

⁷⁵ C.C.S.M. c. W200 s. 1(1) (defn. of "occupational disease"); S.N.S. 1994-95 c. 10 s. 2 (defn of "accident"); S.P.E.I. 1994 c. 67 s. 1(1)(a) (defn of "occupational disease"); R.S.N.B. c. W-13 s. 1 (defn of "accident"). The meaning of the term "traumatic event" is somewhat uncertain, as evidenced by a recent appeals tribunal decision (not yet reported) in New Brunswick in which an accusation that a worker was a thief was accepted as a traumatic event. Another claim on the interpretation of the term "trauma" is currently under review by the appeals tribunal in P.E.I.

⁷⁶ C.C.S.M. c. W200 s. 1(1.1).

performed or the working conditions, to discipline the worker or to terminate the employment.

The Report of the Honourable Cam Jackson, upon which the new legislation was largely based, recommended disallowing recovery for chronic stress claims because of difficulties in establishing causation.⁷⁷ The report states:

The rationale for excluding chronic stress legislatively is that there can be little assurance that, in any one case, the employment has in fact caused a psychological disability that has so many other potential non-work causes.⁷⁸

Concerns about certainty in entitlement, avoiding litigation and lowering costs were also mentioned. The exclusion of chronic stress was part of a general move away from compensating for “multi-factorial” disablements, including chronic pain, repetitive motion disorders, and occupational diseases.⁷⁹

The **Yukon** statute specifically includes claims for “post-traumatic stress,” but the status of chronic stress claims is unclear.⁸⁰ In a recent case, the Yukon Board certified that mental injury caused by ongoing harassment by a co-worker was not compensable under the Yukon legislation.⁸¹ The decision was upheld on judicial review. The case involved the interpretation of an older version of the statute which was quite different from the current statute.⁸²

The remaining Canadian provinces and territories do not have any legislative provisions that address the chronic stress issue. These jurisdictions have dealt with the matter through policy. In addition to British Columbia, 4 jurisdictions – **Alberta, Newfoundland, Quebec, and the Northwest Territories** – essentially preclude recovery for chronic stress. In contrast, **Saskatchewan** policy specifically allows for chronic stress claims.

The **Saskatchewan** policy allows for compensation in cases of chronic stress if 1) the work stressors are excessive and unusual in comparison with pressures and tensions experienced in employment generally, and 2) the work stressors were the predominant cause of the injury. Routine industrial relations actions by the employer, such as disciplinary actions and layoffs, are not considered to be excessive and unusual stressors. The policies also divide claims into three categories, depending on the occupation of the worker and any pre-existing conditions or non-work stressors.⁸³

⁷⁷ The Honourable Cam Jackson, *New Directions for Workers' Compensation Reform*, June 1996.

⁷⁸ *Ibid.*, p. 31.

⁷⁹ See generally *ibid.*, pp. 28-33.

⁸⁰ S.Y. 1992 c. 16 s. 101(1) (definition of “disability”).

⁸¹ *Yukon v. Yukon Workers' Compensation Board*, footnote 25, p. 18.

⁸² The older statute required that injury occur “by accident” to be compensable. The new statute does not have an accident requirement. S.Y. 1992 c. 16 s. 3. See also discussion *infra*, section 8.1.

⁸³ *Saskatchewan Board Policy Manual* item #3.1.4.

In **Quebec**, there are no specific policy guidelines for chronic stress. The Board itself considers chronic stress to be non-compensable; however, the Commission d'appel en matière de lésions professionnelles has allowed some claims for chronic stress on appeal.⁸⁴

In **Newfoundland**, a recent report from an independent statutory review committee made the following recommendations:

1. That [the definition of injury] be amended to exclude stress as an injury except:
 - (i) stress that is an acute reaction to a sudden and unexpected traumatic event (either physical or psychological); and
 - (ii) stress that is excessive and unusual in comparison with that experienced by the average employee in that workplace and where work is the predominant cause
2. That provision should also be made to ensure that:
 - (i) Injury does not include stress caused by an employer's decision or actions relating to any change in respect of the employment of a worker, including promotion, transfer, demotion, discipline, lay-off, or termination.
 - (ii) However, nothing in the amended definition should preclude the recognition of stress associated with a continuing claim arising from either injury or industrial disease.⁸⁵

United States

In the United States, a variety of approaches to stress have been adopted in the different jurisdictions. Larson classifies the states into four basic groups:

- Group One: mental-mental claims are generally compensable (8 states and cases under federal jurisdiction)
- Group Two: mental-mental claims are compensable only if the stressors are unusual (13 states)
- Group Three: mental-mental claims are compensable only if the stressors are sudden/traumatic (1 state; but 7 states have accepted traumatic stress claims without specifically precluding or permitting non-traumatic claims; and Massachusetts has an in-between position, requiring stressors to be "somewhat" sudden)

⁸⁴ Occupational Stress, footnote 72 at pp. 41-48.

⁸⁵ Newfoundland and Labrador Statutory Review Committee, Statutory Review Report, May 1997.

- Group Four: mental-mental claims are never compensable (8 states)⁸⁶

California and **Oregon**, discussed earlier, are both classified as Group One states, even after the reforms implemented in those states to contain the “flood.” In **California**, claims resulting from “regular and routine” employment stressors are compensable only if the worker has had the job for at least 6 months and the work stressors are the predominant cause of the injury. Claims resulting from exposure to violence are not so restricted: the worker need only show that the stressors are a substantial cause of the injury. Also, injuries resulting from lawful, non-discriminatory good faith personnel actions are excluded, and stress claims are restricted after the employment is terminated.⁸⁷

In **Oregon**, the employment stressors must exist in a “real and objective sense.” As well, the stressful conditions must be other than conditions “generally inherent in every situation,” and the injury must be a disorder generally recognized in the medical community. Finally, the worker must prove work-relatedness by clear and convincing evidence. These restrictions reduced the number of stress claims by 38% and reduced the amount of compensation paid from \$10.6 million in 1987 to \$600 000 in 1990.⁸⁸

⁸⁶ Larson, footnote 3, para. 42.25. The remaining 13 states are not classified by Larson.

⁸⁷ “Stress, the Workplace, and the WCB,” Policy and Research Department, Workers’ Compensation Board of British Columbia (1994), pp. 29-32.

⁸⁸ “Lawyers Said to Provoke Mental Stress Claims,” footnote 34, p. 44.

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