Compensability of Psychological Injury

WCB Program Policy Consultation
Objectives Today
Objectives

- WCB Policy Consultation
- The Current Framework for Adjudicating Stress
- Proposed Policy: Psychological Injuries (WCA)
- Proposed Policy Changes: GECA Psychological Injuries
- Options
What Is and Isn’t Contemplated by the Proposed Policy

- The proposed policy is about a psychological injury as the “injury by accident”

- Psychological injury causally connected to physical injury is not contemplated
WCB Policy Consultation
Psychological Injuries
WCB Policy Consultation – Deadline for Submissions

- Consultation paper may be viewed at: http://www.wcb.ns.ca/wcbns/index_e.aspx?DetailID=1928
- OEA “Initial Feedback” http://oeans.ca/

- Deadline to provide feedback originally May 24, 2013
- Extension granted to all employers June 30, 2013
- OEA advocating for a further extension until October 2013
The Unfunded Liability
WCB Funding Strategy & Unfunded Liability

- As of December 31, 2012, the unfunded liability was $604,387,000

- “Unfunded liability” means future payment obligations exceed present value of funds available to pay them

- “Relative stability in benefit structure & rates is necessary to eliminate the unfunded liability”
“Given the aging workforce and incidence of chronic pain in Nova Scotia these benefits represent a significant area of risk for WCB”

- *WCB Discussion Document, Funding Strategy 2013-2017*
WCB Funding Strategy & Unfunded Liability

- In early 2012, a presumption in favour of firefighters suffering from an occupational disease was introduced.

- In April 2013, the legislature introduced changes to ensure pre-Charter widows would receive approx. 14 years of survivors benefits.

- 2013 proposed policy expanding the scope of psychological injury beyond acute reaction.
WCB Funding Strategy & Unfunded Liability

- OEA concerned that projected costs linked to proposed policy are undisclosed

- May 29, 2013 OEA met with WCB and an employer representative from WCB Board of Directors

- OEA requested actuarial assessment of future financial costs. WCB states that future cost cannot be estimated because key terms are undefined in the proposed draft policy
WCB Funding Strategy & Unfunded Liability

- Data provided in the WCB Consultation Paper

- Volume & Payments of Stress Claims 2007-2012 (Appendix 5)
  - Total # Provincial Claims: 187
  - Total # GECA Claims: 79
  - Total Cost Stress Claims: $4,097,516 (266 claims @ $15,404)
  - 0.81% of total WCB Claim costs
WCB Funding Strategy & Unfunded Liability

- OEA requested access to information (via FOIPOP Application)
- Industry sectors include:
  - government services (86 claims)
  - transportation/storage (46 claims)
  - health & social science (43 claims)
  - retail trade (19 claims)
  - communication & utilities (18 claims)
  - manufacturing (15 claims)
Per FOIPOP – historically, occupations include:

- not coded (47 claims)
- bus drivers & transit operators (25 claims)
- correctional services (24 claims)
- truck drivers (15 claims)
- security guards (14 claims)
- ambulance attendants (12 claims)
- health services aides / assistants / RN’s (19 claims)
Questions
WCB Current Framework for Adjudicating Psychological Injuries
WCB Current Psychological Injury Policies

- Policy 1.3.5: Criteria for Psychiatric Conditions: Occupational Stress

- Policy 1.3.7: General Entitlement

- Policy 1.3.6: Compensability of Stress as an Injury Arising out of and In the Course of Employment - Government Employees Compensation Act (GECA)
Policy 1.3.5
Criteria for Psychiatric Conditions
Occupational Stress
WCB Policy 1.3.5 – Occupational Stress

- Preamble states: To determine the existence and degree of the workers permanent medical impairment the Board relies on the AMA Guides (refers to s.2 Act)

- In considering cases of permanent impairment, a clear causal relationship must be established …

- Despite the title, OEA submits that Policy 1.3 5. is not relevant to the current issue
Policy 1.3.7
General Entitlement
Policy 1.3.7 General Entitlement

- “Acute reaction to traumatic event” (non-GECA) adjudicated under general entitlement principles – arising out of and in the course of employment

- Factors to consider have been similar to those articulated under the traumatic event section of GECA
WCB Policy 1.3.6
Compensability of Stress GECA
WCB Policy 1.3.6 – GECA Recognition Traumatic Onset

- Applies to federal government employees (GECA)

- The *Government Employees Compensation Act* does not exclude stress other than an acute reaction to a traumatic event

- Policy in effect since July 25, 2005 that provides compensation for both traumatic and gradual onset stress (key terms defined/clarified)
The Trouble to Fix
Workers’ Compensation Act – “accident” defined

- “accident” includes
  - (i) a wilful and intentional act, not being the act of the worker
  - (ii) a chance event occasioned by a physical or natural cause
  - (iii) disablement, including occupational disease

but does not include stress other than an acute reaction to a traumatic event

- Exclusion added February 1, 1996
The Plesner Decision
British Columbia Court of Appeal
The Plesner Decision (BCCA) 2009

- Mental stress compensable only if “acute reaction to a sudden and unexpected traumatic event”

- Court of Appeal found that those suffering from mental disability were treated differently from those suffering from a physical disability

- Access to compensation was significantly restricted in comparison with workers’ suffering physical injuries
The Plesner Decision (BCCA) 2009

- Requirement for a “traumatic event” violated Charter. Differential treatment on the basis of a disability constitutes discrimination under s.15 equality provisions.

- This decision broadens the current approach to mental stress claims under workers’ compensation legislation not just in BC but potentially in other jurisdictions with similar legislation.
Charter Challenge
Nova Scotia Court of Appeal
Nova Scotia Court of Appeal – Dale Charter Challenge

- Claim denied because psychological symptoms arose gradually as a reaction to a number of upsetting events over the years as a provincial corrections officer.

- Worker arguing Act imposes differential treatment upon injured workers who have a mental disability which is not an acute reaction to a traumatic event.
Nova Scotia Court of Appeal – Dale Charter Challenge

- WCB and WCAT denied the claim. Worker appeal to Court.

- Matter adjourned by consent of all parties

- Court documents state WCB is currently conducting a review & public consultation of its policies dealing with psychological stress. Any newly-adopted stress policies might apply to the worker’s claim.
Proposed Policy
Psychological Injury (WCA)
Proposed Policy Psychological Injury (WCA)

- The draft policy proposes criteria that must be considered for compensation of: (a) an acute reaction to a traumatic event; and (b) a cumulative reaction to multiple traumatic events.

- Historically, there was 1 category of compensable stress (acute reaction to traumatic event).

- The proposed policy creates a 2\textsuperscript{nd} category (cumulative reaction to traumatic events).
Issue #1 – The Word “Stress” is Removed

Preamble

- The purpose of this policy is to establish criteria for individualized adjudication of psychological injuries under the Workers’ Compensation Act

Comment

- The language has changed from “stress” which is not a medical diagnostic term to “psychological injury”
Issue #2 – Definition Traumatic Event

Definitions

“Traumatic Event(s)” defined as a direct personal experience of an event or directly witnessing an event that, reasonably and objectively assessed, is:

- Sudden
- Frightening or shocking
- Having a specific time and place; and
- Involving actual or threatened death or serious injury to oneself or others or threat to one’s physical integrity
Comment – Definition Traumatic Event

- The words “reasonably and objectively assessed” are not defined or explained in the proposed policy.

- Generally, “subjective” means “from the perspective of the individual.”

- Generally, “objective” means “from the perspective of a reasonable neutral observer.”
Comment - Definition Traumatic Event

- SASK: “the event will be unexpected for type of employment concerned”
- YK: the event will be “considered uncommon with respect to inherent risks of the occupation…”
- NB: the event must be unusual AND excessive in comparison to events experienced by average worker in same or similar occupation
- AB: same as NB only unusual OR excessive (chronic onset)
Comment - Definition Traumatic Event

- Notable that NB “traumatic event” language is same as NS GECA “gradual onset” events

- In 2008, NSCA considered whether it was correct to assess nature of workplace events and stressors from an objective perspective under gradual onset (Embanks 2008)

- In 2012, NSCA considered “an average worker in the same or similar occupation” (Bishop 2012)
Issue #3 – Examples of Traumatic Event

- Examples of Traumatic events may include, but are not limited to
  - Incidents of **extreme workplace harassment**
  - Actual or threatened violent physical assault
  - Witnessing or being involved in a hostage taking / armed robbery
  - Witnessing or experiencing a horrific accident
Comment – Examples of Traumatic Event

- 5 jurisdictions explicitly state that “harassment” is compensable under the psychological injury policy

- Yukon explicitly excludes a claim that is the result of allegations of harassment

- NS does not define or describe “incidents of extreme workplace harassment”
Comment – Examples of Traumatic Event

- BC includes harassment but does not define it - website links to Centre for Occupational Health & Safety:

- Centre for Occupational Health & Safety defines harassment as:
  - “any behavior that demeans, embarrasses, humiliates, annoys, alarms or verbally abuses a person and that it is known or would be expected to be unwelcome. This includes words, gestures, intimidation, bullying, or other inappropriate activities”
Comment – Definition of Harassment

- ON and NWT define harassment as:
  - Being the object of harassment 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).
Issue #4 – Labour Relations Limit on Compensation

- Mental or physical conditions are not compensable when caused by labour relations:
  - change working conditions / performance management
  - discipline / termination of employment
  - routine employment related actions such as interpersonal relationships and conflicts
Comment – Labour Relations Limit on Compensation

- **AB:** In addition to the duties reasonably expected by the nature of the worker’s occupation, normal pressures and tensions include interpersonal relations and conflicts, health and safety concerns, union issues and routine labour relations...

- **NB:** Examples of pressures and tensions normally experienced may include: interpersonal relationships and conflicts; health and safety concerns; union issues; routine labour relations ..
Proposed Changes
Psychological Injury
GECA
Issue #1 - Policy Statement

- WCB will consider claims for compensation under GECA when conditions result form one of the following:
  - Stress that is a reaction in response to one or more Traumatic Event [“Traumatic Onset Stress”]; or
  - Stress that is a reaction to unusual or excessive work-related stressors acting over time [“Gradual Onset Stress”]
Issue #1 - Comment

- Historically, “cumulative response” to traumatic event was adjudicated under “gradual onset”

- Generally, “cumulative” means increasing in quantity or degree

- Generally, “gradual” means proceeding by steps or degrees
Issue #1 - Comment

- The proposed criteria for adjudicating “cumulative response” is not the same as the criteria for “gradual onset”

- Under “cumulative response” the event must be “reasonably and objectively assessed”

- Under “gradual onset” the events must be “unusual and excessive in comparison to an average worker in the same or similar occupation”
Issue #1 - Comment

- Under the proposed policy “gradual onset” will apply to work-related stressors that do not fall within the definition “traumatic event”

- WCB proposes 3 categories of compensable stress for federal government employees and 2 categories of compensable stress for provincial employees (explicitly articulating a new Charter violation?)

- “Unusual and excessive” changed to “unusual or excessive”
Questions
Options
Options

1. Given the unfunded liability WCB should remain committed to no change the benefit structure

2. Recognizing the risk associated with a Charter Challenge, accept the proposed policy draft and current WCB strategy

3. Proposed alternate language and/or current GECA policy
Option 1
Option #1 - No Change in Benefit Structure

- **Pro**: Sends message to WCB / government that system funders will not tolerate further financial risk

- **Con**: Policy may be adopted as it is currently written
Option 2
Option #2 - Accept the Proposed Policy Draft

- **Pro:** Recognizing the risk associated with a Charter Challenge, accept the proposed policy draft. If WCB strategy is sound then no further changes respecting the compensability of stress may be forthcoming.

- **Con:** There would be 3 categories of compensable stress for federal employees & two categories of compensable stress for provincial employees which highlights an ongoing gap in compensability of stress
Option 3
Option #3 - Propose Alternate Language

- Re-draft the policy and/or adopt current GECA stress policy

- Pro: Mitigate risk by adopting the current GECA stress policy that has been considered by Court of Appeal twice in Nova Scotia

- Con: If the result is not as anticipated then WCB will shift responsibility onto employers
Go Forward
Go Forward

- June 7, 2013 – 2 consultation sessions to be held at Canada Post from 9:30am to 12:00pm and then 1:15pm to 3:15pm

- OEA will ask the court for intervenor status

- June 12, 2013 Small working group respecting proposed options

- Waiting for a response from WCB respecting an extension until October