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
WCB Policy Consultation
Psychological Injuries
Issue #1 - Consultation Process

- Consultation paper may be viewed at: http://www.wcb.ns.ca/wcbns/index_e.aspx?DetailID=1928

- 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
Issue #1 - Consultation Process

- September 2011, Pink, Breen, Larkin and WCB external legal counsel co-presented “Psychological Injuries Caused by Workplace Stress” at a meeting of the WCB Board of Directors

- June 2013, WCB, WAP and WCB external legal counsel co-presented “Psychological Illness and Workers’ Compensation” at InSight Conference in Halifax
Issue #2 - 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”
  - *WCB Discussion Document, Funding Strategy 2013-2017*
Issue #2 - 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.
Issue #3 – Estimated Financial Risk

- OEA concerned that projected costs associated with the proposed policy are undisclosed

- May 29, 2013 OEA met with WCB and an employer representative of 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
Issue #4 – The Quantitative Data

- Data provided @ Appendix 5 of WCB Consultation Paper

- Volume & Payments of Stress Claims 2007-2012
  - 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
Issue #4 – The Quantitative Data

- WCB Annual Report 2012
  - Average Duration All Claims 2012 - 99 days

- OEA FOIPOP Application
  - Average Duration GECA Psy 2012 - 160 days
  - Average Duration Non-GECA Psy 2012 - 149 days
Issue #5 – Effective Date of the Policy

- April 15, 1985: effective date s.15 Charter
- February 1, 1996: effective date acute reaction exclusion Act
- December 6, 2012: date of the Dale WCAT Decision
WCB Current Framework for Adjudicating Psychological Injuries
What Is and Isn’t Contemplated by 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 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)
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

- “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 – 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
Issue #6 – Definition of “accident”

- “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
Issue #6 – Definition of “accident”

- No changes to the definition, per WCB

- Under s.183(2) of the Act, the WCB Board of Directors may adopt policy that is consistent with the Act
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.
- WCB objective - to introduce policy as a “fix” at the CA
Proposed Policy
Psychological Injury (WCA)
Proposed Policy Psychological Injury (WCA)

- 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 #7 – 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
Issue #7 – 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”.
Issue #7 - 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**
**Issue #7 - 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 #8 – 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

- “Extreme harassment” is an example of a traumatic event therefore it is a traumatic event
Issue #8 – 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 proposes inclusion but does not define or describe the words “extreme harassment”
Issue #9 – Harassment is not Defined

- 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”
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).
Proposed Changes
Psychological Injury
GECA
Issue #10 – Setting Up a New Difference

- Currently 2 categories of stress under GECA:
  - acute reaction
  - gradual onset
- Proposed policy creates 3 categories:
  - Acute reaction
  - Cumulative reaction
  - Gradual onset
Issue #10 – Setting Up a New Difference

- WCB explicitly articulating a difference between psychological injury compensation for provincial employees (2 categories) and federal employees (3 categories)

- Future Charter challenge for provincial employees: “the policy imposes differential treatment upon injured workers who have a mental disability which is not an acute or cumulative reaction to traumatic event(s)”
Issue #11 – Changing Adjudication Criteria

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

- Changing the adjudication criteria for this group of claims
  - From: “unusual and excessive in comparison to an average worker in the same or similar occupation”
  - To: “reasonably and objectively assessed”
Issue #11 – Changing Adjudication Criteria

- “Unusual and excessive” changed to “unusual or excessive”
- Lowers the requirements for the determination of compensability
Options
Options

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

2. Proposed alternate language and/or adoption of current GECA policy
Option #1

- Given the unfunded liability WCB should remain committed to no change the 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

- Propose alternate language 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 considering the merit of intervenor status
- June 12, 2013 working group to discuss strategy
- Waiting for a response from WCB respecting an extension until October