

## DISCUSSION PAPER

### 1. TITLE

Recurrence of Mental Stress

### 2. ISSUE

At issue is a statement in the mental stress policy on recurrences of mental stress. The policy provides that if a worker's claim for mental stress was allowed prior to June 30, 2002, for a post June 30, 2002 recurrence of mental stress to be compensable, the claim must meet the new mental stress requirements of the *Workers Compensation Act* ("Act").

The Workers' Compensation Appeal Tribunal ("WCAT") Chair has advised the Policy and Research Division ("PRD") that this portion of the mental stress policy, which requires re-adjudication of entitlement under new legislative provisions, has been referred to her as a patently unreasonable interpretation of the *Act*.<sup>1</sup>

This review pertains strictly to the narrow issue of recurrence. A broader review of the mental stress policy is currently underway as part of a separate project on the rewrite of the Chapter 3, Personal Injury policies contained in the *Rehabilitation Services & Claims Manual* ("RS&CM"). In the near future, stakeholders will have an opportunity to respond to proposed policy changes.

### 3. BACKGROUND

#### 3.1 Law and Policy

On June 30, 2002, a number of legislative changes were implemented, including the introduction of provisions that address entitlement to compensation for mental stress.<sup>2</sup>

The new legislation provides 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 is an "acute reaction to a sudden and unexpected traumatic event arising out of and in the course of employment".

While the new legislation had the effect of enacting a test for entitlement, it is largely similar to the past adjudicative practice of WorkSafeBC ("WCB"), which

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<sup>1</sup> The referral to the WCAT Chair on recurrence of mental stress was made further to section 251 of the *Act*. The WCAT Chair has not yet made a determination on the matter.

<sup>2</sup> Section 5.1 of the *Act*, copy attached as Appendix A. The section was enacted by the *Workers Compensation Amendment Act, 2002* ("Bill 49") on June 30, 2002.

prior to June 30, 2002, accepted “traumatically induced” mental stress injuries as personal injury claims.

Transitional provisions were also enacted to explain how the *Act*, as amended by the June 30, 2002 legislation (“current provisions”), is to be applied. The specific transitional provision for recurrence of disability provides the following:

If a worker has, on or after the transition date [June 30, 2002], a recurrence of a disability that results from an injury that occurred before the transition date [June 30, 2002]...the WCB must determine compensation for the recurrence based on this *Act*, as amended by the *Workers Compensation Act, 2002*.<sup>3</sup>

This provision is interpreted by the mental stress policy as follows:

If a worker’s claim for mental stress was allowed prior to June 30, 2002, for a [post-June 30, 2002] recurrence to be compensable, the claim must meet the [new mental stress] requirements of...the *Act*.<sup>4</sup>

#### 4. DISCUSSION

At issue is the mental stress policy’s interpretation of the transitional provision for recurrence of disability, which directs that the WCB must *determine compensation* under the current provisions for a post-June 30, 2002 recurrence that results from a pre-June 30, 2002 claim.

The mental stress policy interprets this statement broadly to mean that the current provisions are applicable not only to the *calculation* of compensation, but also to the worker’s *entitlement* to compensation. Therefore, in order to receive additional benefits for a recurrence, entitlement must be established by re-adjudicating the claim under the new mental stress legislation. If those requirements are not met, existing benefits will not be affected, but additional compensation for the recurrence will not be granted.

In the alternative, a narrow interpretation of the transitional provision would mean that the current provisions are applicable to the calculation of compensation, but *not entitlement*. Under this interpretation, workers with a recurrence of mental stress would not have to meet the new mental stress requirements for entitlement. Some of the reasons in favour of this interpretation include the following:

- The plain meaning of the transitional provision’s phrase “determines compensation” may be viewed to support a narrow interpretation, such that it is applicable only to the calculation of compensation. Also, when

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<sup>3</sup> Section 35.1(8) of the *Act*.

<sup>4</sup> Policy item #13.30, *Mental Stress*, of Volume II of the *RS&CM*.

reading the phrase contextually as a whole with the other provisions which largely pertain to the calculation of benefits, a narrow interpretation may be implied.

- The policy's broad interpretation requires re-adjudication of the claim under a new entitlement test that was enacted on June 30, 2002, irrespective that it had been previously accepted under the former provisions. In some cases, a complete investigation of the circumstances that occurred prior to June 2002 may be compromised by the passage of time.

## **5. OTHER JURISDICTIONS**

Given that the transitional provision is unique to the British Columbia legislation, a jurisdictional comparison would not be of assistance.

## **6. OPTIONS AND IMPLICATIONS**

### **Option 1: Status quo**

#### *Implications*

- The mental stress policy would remain unchanged. In order to receive additional benefits for a recurrence, workers would be required to meet the section 5.1 mental stress entitlement provisions.
- The WCAT Chair would respond to the outstanding section 251 referral. If the policy is found to be patently unreasonable, a policy review under section 251 would be required.
- The Worker and Employer Services Division of the WCB advises that there are few instances of recurrences of mental stress. Furthermore, because the new mental stress provisions largely reflect the pre-June 30, 2002 adjudicative practice of the WCB, it is anticipated that in most instances, the new entitlement provisions would not be an insurmountable test to meet.

### **Option 2: Revise the mental stress policy to remove the sentence that addresses adjudication for recurrences of mental stress**

A draft copy of the proposed policy revision is attached as Appendix B.

### *Implications*

- Workers whose claims were accepted under the former provisions would no longer be required to meet the new entitlement requirements for mental stress in the event of a recurrence. The current provisions would be applicable to the calculation of benefits, but not for matters of entitlement.
- Given that the new mental stress provision largely reflects the WCB's past adjudicative practice, it is anticipated that the policy amendment would have minimal effect to the WCB system, as few claims would be impacted.

## **7. CONSULTATION**

Stakeholders are invited to provide feedback on the discussion paper, options, draft policy, and any additional comments that may be relevant to the issue. Stakeholder comments will be accepted until **February 23, 2007**. When responding, please provide your name, organization, and address.

Comments may be sent by mail, fax or e-mail to:

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WorkSafeBC's governing body, the Board of Directors, will consider the comments expressed by stakeholders before it adopts any amendments to the current policies.

Please note that all comments become part of the Policy and Research Division's database and may be published, including the identity of organizations and those participating on behalf of organizations. The identity of those who have participated on their own behalf will be kept confidential according to the provisions of the *Freedom of Information and Protection of Privacy Act*.

## APPENDIX A

Section 5.1 provides the following:

- s. 5.1(1) Subject to subsection (2), 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.
  - (b) is diagnosed by a physician or a psychologist as a mental or physical condition that is described in the most recent American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders at the time of diagnosis, 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.
- (2) The Board may require that a physician or psychologist appointed by the Board review a diagnosis made for the purposes of subsection (1)(b) and may consider that review in determining whether a worker is entitled to compensation for mental stress.
- (3) Section 56(1) applies to a physician or psychologist who makes a diagnosis referred to in this section.
- (4) In this section, "psychologist" means a person who is registered as a member of the College of Psychologists of British Columbia established under section 15(1) of the *Health Profession Act* or a person who is entitled to practice as a psychologist under the laws of another province.

## APPENDIX B

### #13.30 Mental Stress

The Board provides compensation for psychological impairment where the condition results directly from a compensable physical injury or occupational disease. [See policy items #13.20 and #22.33.]

A worker may be entitled to compensation for mental stress that does not result from a physical injury or occupational disease if the impairment is due to an acute reaction to a sudden and unexpected traumatic event.

“Mental stress” is intended to describe conditions such as post-traumatic stress disorder or other associated disorders. Mental stress does not include “chronic stress”, which refers to a psychological impairment or condition caused by mental stressors acting over time. Workers, who develop mental stress over the course of time due to general workplace conditions, including workload, are not entitled to compensation.

Section 5.1 of the Act provides as follows:

- (1) Subject to subsection (2), 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,
  - (b) is diagnosed by a physician or a psychologist as a mental or physical condition that is described in the most recent American Psychiatric Association’s *Diagnostic and Statistical Manual of Mental Disorders*, at the time of diagnosis, 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.
- (2) The Board may require that a physician or psychologist appointed by the Board review a diagnosis made for the purposes of subsection (1)(b) and may consider that review in determining whether a worker is entitled to compensation for mental stress.
- (3) Section 56(1) applies to a physician or psychologist who makes a diagnosis referred to in this section.

- (4) In this section, “psychologist” means a person who is registered as a member of the College of Psychologists of British Columbia established under section 15(1) of the *Health Professions Act* or a person who is entitled to practise as a psychologist under the laws of another province.

Under subsection 5.1(1)(a), the *Act* establishes a two-part test:

1. There must be an acute reaction to a sudden and unexpected traumatic event.
2. The acute reaction to the traumatic event must arise out of and in the course of employment.

An “acute” reaction means – “coming to crisis quickly”, it is a circumstance of great tension, an extreme degree of stress. It is the opposite of chronic. The reaction is typically immediate and identifiable. The response by the worker is usually one of severe emotional shock, helplessness and/or fear. It may be the result of:

- a direct personal observation of an actual or threatened death or serious injury;
- a threat to one’s physical integrity;
- witnessing an event that involves death or injury; or,
- witnessing a personal assault or other violent criminal act.

For the purposes of this policy, a “traumatic” event is a severely emotionally disturbing event. It may include the following:

- a horrific accident;
- an armed robbery;
- a hostage-taking;
- an actual or threatened physical violence;
- an actual or threatened sexual assault; and,
- a death threat.

In most cases, the worker must have suffered or witnessed the traumatic event first hand.

In all cases, the traumatic event must be

- clearly and objectively identifiable; and

- sudden and unexpected in the course of the worker's employment.

This means that the event can be established by the Board through information or knowledge of the event provided by co-workers, supervisory staff, or others, and is generally accepted as being traumatic. The "arising out of" determination is discussed in policy item #14.00.

In considering the matter of work-relatedness, the Board must determine if there is a connection between the employment and the resulting acute reaction. This requires consideration of personal factors in the worker's life, which may have contributed to the acute reaction. For compensation to be provided, the workplace circumstances or events must be of causative significance to the worker's mental stress. If there is no causal link to work-related factors, the worker's mental stress will not be compensable.

It is recognized that some workers, due to the nature of their occupation, may be exposed to traumatic events on a relatively frequent basis (e.g., emergency workers). If such a worker has an acute reaction to a sudden and unexpected traumatic event, compensation for mental stress may be provided even if the worker was able to tolerate past traumatic events.

In all cases concerning entitlement to compensation for mental stress, the worker's mental stress must be diagnosed by a physician or a psychologist as a mental or physical condition that is described in the most recent American Psychiatric Association's *Diagnostic and Statistical Manual of Mental Disorders*, at the time of diagnosis. A "psychologist" means a person who is a registered member of the College of Psychologists of British Columbia or a person who is entitled to practise as a psychologist under the laws of another province.

The Board may appoint a physician or psychologist to review a diagnosis of a worker's mental stress condition. When assessing all of the relevant medical evidence, the Board may consider that review in determining whether a worker is entitled to compensation for mental stress. A diagnosis of mental stress is not reviewed in every case. However, a review may be undertaken where, for instance, the Board receives medical evidence that conflicts with the diagnosis and which the physician or psychologist may not have possessed or been aware of when making the diagnosis.

There is no entitlement to compensation if the mental stress is caused by a labour relations issue such as a decision by 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.

Examples where there is likely entitlement to compensation for mental stress:

- A person commits suicide by jumping in front of a bus. The bus driver is not physically injured by the incident, but is unable to work due to mental stress arising from the event. The bus driver's physician or

psychologist confirms the driver is suffering from a condition described in the American Psychiatric Association's *Diagnostic and Statistical Manual of Mental Disorders*, and requires time off and professional counseling.

- A worker directly witnesses a very serious accident to a co-worker. The worker suffers no apparent symptoms for the first two weeks after the accident, but then calls in one morning to say he/she is unable to work because he/she is haunted by the images of the event. A diagnosis by a physician or psychologist confirms that the worker suffers from post-traumatic stress disorder as described in the American Psychiatric Association's *Diagnostic and Statistical Manual of Mental Disorders*.
- During a prison riot, inmates hold a guard hostage. The guard is subsequently diagnosed by a physician or psychologist as suffering from a mental condition described in the American Psychiatric Association's *Diagnostic and Statistical Manual of Mental Disorders*, and requires time off from work to recover.
- A female worker attends at work and is confronted by her male supervisor who sexually assaults her. As an immediate and direct result of the assault, the worker suffers an acute reaction and is subsequently diagnosed with a mental condition described in the American Psychiatric Association's *Diagnostic and Statistical Manual of Mental Disorders*. In addition to a potential claim for physical injury, the worker may be entitled to compensation for mental stress.

Examples where there is likely no entitlement to compensation for mental stress:

- 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.
- A worker in a machine shop characterized by high levels of sudden noise calls in one morning to say he/she is unable to work due to mental stress. The worker also cites impossibly high production quotas, machine-pacing of work and constant threats of termination by the foreperson as reasons for the mental stress.

~~If a worker's claim for mental stress was allowed prior to June 30, 2002, for a recurrence to be compensable, the claim must meet the requirements of section 5.1 of the Act.~~

**Effective Date:** December 31, 2003.

**Application:** On December 31, 2003, this policy item was amended to reflect the amendment of section 5.1(1) of the *Act*, to include a reference to a psychologist's diagnosis of mental stress,

and the introduction of sections 5.1(2) to (4) of the *Act*. The amended policy applies to acute reactions to traumatic events that occur on or after December 31, 2003.