

Workers' Comp Insider

Lynch Ryan's weblog about workers' compensation, risk management, business insurance, workplace health & safety, occupational medicine, injured workers, insurance webtools & technology and related topics



September 07, 2005

Gradual Onset Stress: A New Diagnosis Heading South?

There are some interesting developments impacting workers compensation stress claims in our neighbour to the north, Canada. Here in the States, comp stress claims are very difficult to prove. Most states require that the "predominant cause" of stress in the claimant's life must be work related. This tough standard leads directly to a defense strategy of aggressive discovery: every aspect of the employee's private life is fair game. Whatever the causes of stress at work, they must exceed the stressors at home. For most of us, that might be difficult to prove -- and too embarrassing to risk.

In the lovely Canadian Province of Nova Scotia, government employees are now explicitly covered for two types of stress claims: post-traumatic stress and gradual onset stress. While we are all pretty familiar with the former, the latter is something new. Unlike traditional "traumatic stress" -- which involves a single event -- "gradual onset stress" is a reaction to unusual and excessive work-related stressors acting over time. (Keep in mind that these new protections are limited to government employees.)

Policy wonks can view the policy [here](#). A detailed discussion is available [here](#).

Setting the Bar

Nova Scotia has taken some prudent steps to limit the application of the new diagnosis. Claims for psychological or psychiatric injuries resulting from gradual onset stress may be compensable if *all of the following four criteria* are satisfied:

- i. The work-related events or stressors experienced by the worker are unusual and excessive in comparison to the work-related events or stressors experienced by an average worker in the same or similar occupation;
- ii. The worker is diagnosed with a mental or physical condition that is described in the DSM IV;
- iii. The mental or physical condition is caused by the work-related events or stressors; and
- iv. The condition is diagnosed in accordance with the DSM IV by a health care provider being either a psychiatrist or a clinically trained psychologist registered with the Canadian Register of Health Service Providers in Psychology.

In addition, government employees may not site ordinary employment actions (performance evaluation, demotion, termination) as "gradual stressors."

Nova Scotia has set a reasonably high standard of proof. For example, the stressors must be unusual and excessive for the work. In other words, in confronting daily situations of violence and stress, police and prison employees might have a difficult time proving that the stressors were unusual and excessive. (We discuss just such a situation below.) On the other hand, workers in normally sedentary jobs would have an easier time meeting the standards.

Not covered by Comp: You can Sue!

At first impression, those of us who monitor comp developments might assume that in establishing the gradual onset diagnosis, Nova Scotia has opened the door to a rash of new claims. It's important to keep in mind, however, that by recognizing that stress might occur over time, the province has actually insulated itself against lawsuits. In Nova Scotia, an employee suffering from what may be gradual onset stress would have to pursue a remedy through the comp system. On the other hand, across the water in Newfoundland, the opposite is true: because their comp statute omits any reference to gradual onset stress, employees can go outside of the comp system (under which you cannot sue your employer) and file a lawsuit.

Here's [a real-life example](#):

A jail guard in an Royal Canadian Mounted Police (RCMP) lockup in Grace Harbour, Newfoundland, sued the federal government for damages suffered from severe harassment at the hands of his supervisor. The harassment began after the guard gave a damaging statement during a force investigation into conduct by his supervising corporal. The guard understood that the statement would remain confidential; in fact, it was disclosed to the supervisor during disciplinary proceedings, which culminated with a dismissal or withdrawal of all allegations against the supervisor. After returning to work, the supervisor retaliated against the guard with repeated verbal threats, aggression and intimidation. RCMP officials were aware of the harassment, but did not assist the guard and a 1999 harassment investigation conducted by the force dismissed the complaint for lack of corroborating evidence.

As a result of the harassment, the guard gradually became anxious, insecure and, ultimately, suicidal, eventually being diagnosed with post-traumatic stress disorder (perhaps more accurately, with gradual onset stress disorder). In 2000, he commenced a court action against the supervisor and the RCMP. One of the issues was whether the guard could sue in the courts or was barred from suing because he was entitled to workers' compensation benefits.

The trial judge concluded that the guard's emotional condition was not covered by the Newfoundland comp legislation. The condition was not recognized by the comp system. As a result, he was entitled to file a lawsuit. The judge found the guard's psychological condition to be "extremely" disabling and awarded almost \$500,000 damages, including \$376,000 for loss of income, \$90,000 for pain and suffering and \$30,000 aggravated damages.

Keep Employees in the Comp System

There is in all of this a valuable lesson for state legislatures. It's usually best to recognize and contain all employee injuries within the comp system. Maintain comp's role as the "exclusive remedy" for employees. To be sure, comp can be idiosyncratic and expensive, but awards are limited to medical bills, lost wages and loss of function payments. With its "no fault" premise, workers comp does not recognize pain and suffering or loss of consortium. Had Newfoundland incorporated the Nova Scotia standards for gradual onset stress into its statute, the injured guard would have been limited to a workers comp remedy.

Some might fear that in creating the new diagnosis of "gradual onset stress" that Nova Scotia has thrown open the door to dubious claims. I don't think so. They have recognized that work-related stress might not occur just in response to a single event. In doing so, they have extended the safety net for government workers and at the same time, limited their exposure to lawsuits. Not a bad move -- and one which I expect will gradually move southward, one state at a time.

Here is a real life example:

Compensation watch - Employers beware!

July 2005

Author: **Lorna Pawluk**

Harassment can be costly

A recent decision of the Newfoundland Court of Appeal may assist employers in understanding their obligations under the Workers' Compensation Act of British Columbia or applicable legislation in their province.

A jail guard in an RCMP lockup at the force's Grace Harbour, Newfoundland detachment sued the federal government for damages suffered from severe harassment at the hands of his supervisor. The harassment began after the guard gave a damaging statement during a force investigation into conduct by his supervising corporal. The guard understood that the statement would remain confidential; in fact, it was disclosed to the supervisor during disciplinary proceedings which culminated with a dismissal or withdrawal of all allegations against the supervisor. After returning to work, the supervisor retaliated against the guard with repeated verbal threats, aggression and intimidation. RCMP officials were aware of the harassment, but did not assist the guard and a 1999 harassment investigation conducted by the force dismissed the complaint for lack of corroborating evidence.

As a result of the harassment, the guard gradually became anxious, insecure and, ultimately, suicidal, eventually being diagnosed with post-traumatic stress disorder. In 2000, he commenced a court action against the supervisor and the RCMP. One of the issues was whether the guard could sue in the courts or was barred from suing because he was entitled to workers' compensation benefits.

Workers' compensation coverage for federal employers including the RCMP is governed

by the federal Government Employees Compensation Act (GECA). This legislation provides all federal workers with workers' compensation benefits "at the same rate and under the same conditions as are provided under the law of the province where the employee is usually employed." GECA also prohibits an employee from suing the employer where "an accident happens to an employee in the course of his employment and under such circumstances as entitle him or his dependents to compensation." This prohibition of lawsuits against the employer is a common feature in all jurisdictions in Canada.

In Newfoundland, where the guard was usually employed, the provincial workers' compensation legislation excluded claims due to gradual onset stress by workers regulated by that legislation. If the guard had been a provincially regulated employee, his condition would have been excluded from coverage, but it was unclear whether this exclusion applied to federal employees in Newfoundland.

The trial judge concluded that the guard's lawsuit could proceed as the guard's emotional condition was not covered by the Newfoundland legislation, therefore a federal worker in Newfoundland was also precluded from making such a claim and thus could sue. The trial judge found the guard's psychological condition to be "extremely" disabling and awarded almost \$500,000 damages, including \$376,000 for loss of income, \$90,000 for pain and suffering and \$30,000 aggravated damages.

The Court of Appeal reversed the trial judge's ruling, concluding that the guard could not sue his employer. The appellate court concluded that the guard's entitlement to benefits was determined by GECA alone (which allowed cumulative stress claims) and that once the worker qualified for under GECA, the amount he received would be set by the Newfoundland legislation. Since the guard should have applied for WCB benefits, there was no basis for a civil action and the judgment for damages was reversed.

What does this have to do with employers in British Columbia and other provinces? Even though the trial judge and Court of Appeal disagreed on the type of benefits available to federal government employees, they all agreed on one important point: gradual onset stress due to workplace harassment constitutes an "accident" in all legislation providing workers with such coverage unless excluded by other provisions of the Act. Since the definition of "accident" in the B.C. Act (and that of other provinces) is the same as the definition in both pieces of legislation considered by the court, a worker suffering from emotional distress due to workplace harassment in B.C. is suffering from an "accident" for which workers compensation benefits may be paid, unless there is something in the Act which specifically excludes such a claim.

Such exclusion may be found in Section 5.1 of the Workers Compensation Act of B.C. and in other provincial legislation. Section 5.1 severely restricts stress claims to those associated with a physical injury or some unexpected trauma or event. It also specifically excludes labour-relations disputes. Accordingly, it is highly unlikely that similar claim would succeed in B.C. or in provinces with similar legislation. It also follows that a provincial worker suffering similar harassment at the hands of a co-worker or supervisor

could sue in the courts. While the B.C. Courts have yet to consider section 5.1, the analysis would likely follow the pattern discussed in the Newfoundland decision.

Consequently, employers should be prepared for litigation where a worker is claiming psychological injury due to workplace harassment, or some other causative factor not covered by the Workers' Compensation Act. The prudent employer should ensure that a proper harassment policy is in place with provision for an harassment investigation and workplace policy to deal with other forms of work-related stress. A prudent employer would also check insurance coverage to be sure there is coverage for those harassment complaints not accepted by the WCB, not prevented by workplace policy and not resolved through investigation.

Finally, it is unclear whether special treatment of stress related claims could withstand a challenge under the Charter. The Supreme Court of Canada invalidated parts of the Nova Scotia Workers Compensation Act that provided special treatment for chronic pain in *Martin v. Nova Scotia (Workers' Compensation Board)*, 2003 SCC 54. The court found that the special provisions for chronic pain discriminated against the workers thereby infringing the Charter's equality provisions. If the stress provisions in B.C.'s legislation are found to be discriminatory, gradual onset stress claims could once again be included in workers compensation coverage, but until then, the prudent employer takes all possible steps to prevent or minimize the impact of litigation on the operation of the business.

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