# UPDATE ON WORKERS COMPENSATION DEVELOPMENTS

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The last quarter of 2011 saw a number of important developments in workers compensation and occupational health and safety. Some developments will impact all employers in the province, while some will have particular impact on the maritime community. Regardless, all of the issues raised here will probably mean additional WCB-related costs for employers in the province.

## *Expanded Benefits for Mental Stress*

Perhaps the most important development in the latter part of 2011 is the proposed expansion of coverage for mental stress claims. These claims are made by workers suffering psychological or "mental stress" symptoms but not a physical condition or injury. Proposed amendments to the *Workers Compensation Act* expand the circumstances where workers can receive workers compensation benefits for such conditions.

Mental stress claims have been subject to many changes in the past 10 years. Following 2002 amendments to the *Workers Compensation Act*, mental stress claims were limited to "an acute reaction to a sudden and unexpected traumatic event arising out of and in the course of the worker's employment". The condition had to be a recognized mental or psychological condition identified in the most recent American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders and diagnosed by a physician or psychologist. Further, it could not be related to working conditions, changes in the worker's employment or discipline or termination of employment.

This approach meant no coverage for workers suffering the cumulative effect of smaller traumas, such as, for example, a slaughter house worker who suffered from post traumatic stress syndrome after 15 years of employment.[1] Claims by emergency workers would be rejected where they had successfully weathered major work-related traumas or stress but subsequently

[1] Workers Compensation Appeal Tribunal, 2008-03822

suffered a major psychological response to a minor incident. Although a delayed response was recognized in the psychological literature, the legislation required the reaction to be "acute", occurring quickly after the triggering incident. Similarly, there was no coverage for chronic stress conditions, such as "burn out".

In 2011, the WorkSafeBC Board of Directors changed the policy, partly as a result of a decision of the British Columbia Court of Appeal in *Plesner v. BC Hydro*[2] . That case arose from an unsuccessful claim by Mr. Plesner for post traumatic stress disorder. He had been in a training session with co-workers when he witnessed a plume of gas shooting from a ruptured pipeline at a neighbouring worksite. Over the next few weeks he developed symptoms that were subsequently diagnosed as post traumatic stress disorder. His claim was denied because his delayed reaction was not "acute" and the gas rupture was not a "sudden and unexpected event". The court found that this interpretation discriminated Mr. Plesner on the basis of a disability and therefore breached his equality rights under the *Charter of Rights and Freedoms*.

These developments led WorkSafeBC to expand the interpretation of "acute" to include certain delayed reactions to "an extreme degree of stress" and reactions to an "emotionally shocking event". The proposed legislative amendments will clarify this coverage and expand entitlement to include a reaction to "one or more traumatic events arising out of and in the course of the worker's employment", or "a significant work-related stressor, or a cumulative series of significant work-related stressors". Formerly, benefits would be paid only to those workers who suffered "an acute reaction to a sudden and unexpected traumatic event". The amendment means that the examples described above would have different outcomes: the slaughter house worker would qualify for benefits for the impact of accumulated stress and the emergency worker would qualify for benefits for a psychological condition following a relatively minor event, even though there had been no reaction to previous more serious incidents.

It is important to point out that the proposed changes to the *Workers Compensation Act* have no effect on how WorkSafeBC will treat claims for "mental stress" that are accompanied by a physical injury. An example of this includes the dog sled tour company employee who made a

[2] *2009 BCCA 188.*

claim for post traumatic stress after he killed 100 sled dogs. His claim for emotional stress was allowed as he had sustained injuries when one of the dogs attacked him.

The worker community has long complained about the restricted entitlement to compensation benefits for stress claims and whether or not the employer community supports expanded coverage, there is little doubt that the proposed legislative amendments (if they become law) will increase the benefits' costs must be covered by employer assessments. Administration costs (also paid for out of the accident fund funded by employer assessments) will also increase as mental stress claims require extensive investigation and are difficult to correctly adjudicate.

***Law Suits for Families of Deceased Fisheries Workers?***

The workers compensation system is the product of an historic compromise between workers and employers. Workers gave up their right to sue where they suffered a work-related injury, in exchange for the right to reduced benefits paid out on a no fault basis. In exchange for payment into the fund that pays for worker benefits (including administrative costs of the workers compensation boards which determine worker entitlement), employers cannot be sued. This leaves employers free to manage their business affairs without the worry of looming law suits; this is seen as the major advantage to employers of the system. Although workers compensation is a provincial responsibility and there are 10 separate systems across the country, the "bar" to litigation exists in all of them. A recent decision of the Newfoundland Court of Appeal deals with circumstances that may change this.

*Newfoundland (Workplace Health, Safety & Compensation Commission) v. Ryan Estate* resulted from the death of two fishers when their fishing vessel capsized off the coast of Newfoundland. The families of the deceased workers received compensation benefits from the Newfoundland Workplace Health, Safety and Compensation Commission. They also sued the designer and builder of the capsized vessel for negligence and breach of contract, and the Attorney General of Canada for negligent stability testing of the vessel by federal (Transport Canada) inspectors. Ordinarily, the families would be barred from suing under the applicable provincial workers compensation legislation but there is also a right to sue in negligence under federal legislation,

the *Maritime Liability Act*. According to the Newfoundland Court of Appeal in the *Ryan*, the right of the families to sue under federal law was not removed or barred by the provincial workers compensation act and an action for damages could continue in the courts.

The Attorney General (on behalf of the Transport Canada inspector) and the Workers Health, Safety & Compensation Commission have sought leave to appeal to the Court of Appeal decision to Supreme Court of Canada. As of the date this article was submitted for publication, the Supreme Court of Canada had not decided if it would hear the appeal.

The Newfoundland Court of Appeal ruling in *Ryan* does not determine the law in other provinces. The BC law has been decided by a 2003 decision of our Supreme Court in *Laboucane v. Brooks* which barred a law suit brought by a worker who was injured by the explosion of a vessel next to where he was working. However, *Ryan* is an indication of how the law may change in the future, and will become particularly important if the Supreme Court of Canada decides to hear the appeal. The bar to litigation would be debated once again, and the eventual decision of the Supreme Court of Canada would be binding across the country. Even if the Supreme Court of Canada declines to hear the appeal at this time, the families of deceased maritime workers in this province remain free to bring an action in the courts under the federal legislation as did the families in the *Ryan* case and the court hearing that claim could be persuaded by the rationale in the *Ryan* case. This means that cautious risk management would prepare for the possibility of a law suit for a work-related injury. Steps to mitigate this risk include monitoring the case law, especially the progress of the *Ryan* appeal through the Supreme Court of Canada, and a review of existing insurance coverage to determine whether it would cover damages for a work-related law suit.

***Possible Correction of Incorrectly Classified Firms***

After registering for coverage with WorkSafeBC, a firm will pay premiums, or assessments, based on its assessable payroll (salary, up to a maximum of $73,700 per worker) and classification unit (a risk classification based on the firm's industrial activities). Each classification unit is subject to a different rate and there can be significant differences between

rates paid by different classifications, despite similarities in operations. For instance, Consulting Engineering (CU763010) which includes engineering services to marine operations will pay $.22/$100 of assessable payroll whereas Marine Vessel Surveying (CU763034) will pay $.83/ $100 and Structural Repair of Marine Pleasure Craft (CU764051) $3.21/$100.

Where the operations could fall into more than one category or there is confusion at the registration stage about the nature of the firms operations or activities, the firm may have been placed in the wrong classification unit. As a result, the firm could pay more than it should, or less than it should, depending on the nature of the error. For many years, WorkSafeBC had the power to change earlier decisions so that it could correct errors or inequities in firm classification. This changed in 2002, however, when changes to the *Workers Compensation Act* limited the window for reconsideration of an earlier board decision to 75 days. Once a decision was made and 75 days had passed, WorkSafeBC was unable to change it.

WorkSafeBC policy attempted to dealt with this restriction in a number of ways but in 2008, a decision of the Workers Compensation Appeal Tribunal ('WCAT') determined that policy which permitted reconsideration beyond the 75 day period was patently unreasonable. To deal with the gap left by this decision, WorkSafeBC created the "Annual Classification Cycle" based on the idea that an employer's classification expired at the end of the year and that WorkSafeBC would make a new classification decision. The "Annual Classification Cycle" policy was also declared illegal by the WCAT in a series of decisions issued last year and referred to the WSBC Board of Directors in September. After considering submissions from members of the employer community, the Board of Directors concluded that the old policy was invalid but that section 37(2) of the *Workers Compensation Act* allows WorkSafeBC to correct errors by withdrawing an employer and transferring it to another class after the 75 day reconsideration period.

Policy that will allow correction of previously mis-classified firms will be introduced shortly. This means that misclassified firms will soon have an opportunity to correct this problem and to be placed in the same classification unit as their competitors.

***Workers Compensation or Human Rights?***

In October of 2011, the Supreme Court of Canada dealt with a complaint involving a physical disability that was dealt with by the workers compensation system and then in the context of human rights. *British Columbia (Workers' Compensation Board) v. Figliola* [2011] S.C.J. No. 52 began with a challenge to WorkSafeBC policy which limits workers suffering chronic pain to a functional pension of 2.5% of total disability and which restricts eligibility for a loss of earnings pension. This policy was attacked by three workers suffering from chronic pain in an application before the Review Division of WorkSafeBC, the first level of appeal within the workers compensation and a tribunal "internal" to WorkSafeBC. The Review Division upheld the 2.5% disability award but instead of appealing this decision to the WCATor seeking judicial review as would normally occur, the workers complained to the Human Rights Tribunal ('HRT') that the policy discriminated against them contrary to section 8 of the *Human Rights Code*.

The *Code* conferred discretion on the HRT to hear previously adjudicated matters. WorkSafeBC opposed the second hearing, arguing that the HRT lacked jurisdiction to rehear the matter or that the HRT should exercise its discretion to dismiss the complaints which had been appropriately dealt with by the Review Division. When the HRT refused the request and decided to adjudicate the human rights complaints, WorkSafeBC sought judicial review. The Supreme Court of British Columbia agreed with WorkSafeBC that the Human Rights Tribunal had failed to properly exercise its discretion. However, the British Columbia Court of Appeal agreed with the three workers, and concluded that the Tribunal had exercised its discretion reasonably. The Supreme Court of Canada agreed with the workers and the first judge, finding the Tribunal's decision to proceed was "patently unreasonable". In reaching this conclusion, the court emphasized the importance of finality in decision making and set out narrow parameters for re-litigating an issue.

It has only been 3 months since the decision was issued so that it is too early to predict, with certainty, what the impact will be. Nevertheless, it appears as if the courts are favouring finality so that firms may not have to defend multiple complaints in workplace and employment related matters.