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Ontario Workers' Compensation Report

Workers' Compensation and Workplace Violence: Exploring the Protective Umbrella of the No-Fault Scheme

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You've probably seen them by now. Those public service announcements from the Workplace Safety and Insurance Board which feature, through graphically realistic portrayals, the serious types of accidents, which comprise the bulk of workers' compensation claims. A slip, explosions, falls, burns, electrocutions and amputations: these are the injuries that typically come to mind when we consider the remedial purpose of workers' compensation. But what about workplace violence? What about violent acts perpetrated by co-workers? Can that type of conduct be considered an "accident" under the *Workplace Safety and Insurance Act, 1997*? Can acts of aggression be dealt with under this no-fault scheme? If so, would workers' comp be a complete bar to any other remedy?

It is well established that workers' compensation is available to workers that suffer injury due to violent acts, harassment, fighting, and even horseplay in the workplace. A recent case also reveals that, contrary to the standard rule that workers' compensation removes all rights of action, receiving benefits for injury due to violence does not necessarily mean other relief is barred.

Traumatic Mental Stress

A worker who witnesses a traumatic event or is harmed by actual or threatened violence in the workplace can seek benefits for traumatic mental stress under *the Workplace Safety and Insurance Act,* 1997 (the "WSIA"). WSIB Operational Policy Manual (OPM) Document #15-03-02 "Traumatic Mental Stress" provides a broad list of example events that would be covered. They include:

- physical violence
- death threats
- threats of physical violence where the worker believes the threats are serious and harmful to self or others (e.g., bomb threats or confronted with a weapon)
- harassment that includes physical violence or threats of physical violence (e.g., the escalation of verbal abuse into traumatic physical abuse)
- harassment that includes being placed in a life-threatening or potentially life-threatening situation (e.g., tampering with safety equipment)

The policy is limited by various qualifications. The event must be "sudden and unexpected", result in an "acute reaction" and be "objectively traumatic". Despite these restrictions, it is clear that a broad spectrum of aggressive behaviour in the workplace can fall within the scope of entitlement. Recent case law from the Workplace Safety and Insurance Appeals Tribunal has been instructive in the application of the Board's policy. These cases confirm that the protective umbrella of workers' compensation reaches far beyond the typical scenario of failing to follow safety procedures or failing to wear required protective equipment. In the view of the Tribunal, WSIB coverage can extend to some situations of verbal and physical harassment.

Decision No. 2391/06[1] is one example. In this case a worker was employed as a Lab Technician in a metal casting company. He suffered from cerebral palsy and was harassed by two co-workers with the initials DH and RB. DH and RB persistently yelled at the worker, verbally insulted him and mimicked the way he walked. On one occasion, RB stated, "If I owned this place I would make sure you were the first dead beat I would send to the unemployment office" and "If I saw this a-hole on the street I wouldn't even stop to piss on him". On another occasion, RB held a 45-gallon drum over the worker as he walked by and said, "Don't stop cuz I'll drop this right on your f-king head". The worker suffered depression and paranoia. A WSIB claim was denied on the basis that, although the worker was harassed, there was no traumatic mental stress. An Appeals Resolution Officer upheld the decision. On further appeal, the Tribunal applied a twofold test:

> 1) Is it reasonable that workers of average mental stability would perceive the workplace events to be mentally stressful?
>
> 2) If so, would such average workers be at risk of suffering a disabling mental reaction to such perceptions?

The Tribunal answered both questions in the affirmative. The worker was entitled to 100% LOE benefits for the 10 months he was unable to work due to mental stress. In the Tribunal's words:

[1] [2006] O.W.S.I.A.T.D. No. 2880 (QL)

> DH and RB's persistent yelling use of expletives and verbal insults were well known in the workplace and went well beyond that which can be reasonably ascribed to the culture of the workplace. Their behaviour was unacceptable not only to the worker, but to others in the workplace. Together, DH and RB behaved like schoolyard bullies taking delight in each other's ability to torment and ridicule the worker and be a general nuisance to people around them.[2]

Decision No. 1527/05,[3] also illustrates the broad application of the mental stress policy to acts of workplace aggression. Here, a health care aide was working alongside a Registered Nurse ("RN") at a long-term care facility. When the aide asked about a new medication for one of the residents the RN became angry and began punching the aide in the shoulder, saying: "You don't know everything." The aide suffered extreme stress as a result. She applied for WSIB benefits but was denied on the grounds that the incident was not traumatic. An Appeals Resolution Officer denied her appeal. On further appeal, the Tribunal concluded that being yelled at, berated and humiliated in front of co-workers, while being aggressively poked (or punched), constituted a traumatic event. The language used by the nurse was degrading and belittling and intended to "put her in her place". In addition, the Tribunal reasoned that because the RN was an authority figure, her actions would reasonably be perceived as threatening. Under all the circumstances the Tribunal concluded she was entitled to LOE benefits for the three-month period she was away from work.[4]

These decisions reveal that the Tribunal will apply an objective standard ("the average worker test") to assess whether or not a worker has been sufficiently threatened to be eligible under the policy. If the "average worker" does not view the conduct as mentally stressful then there will be no entitlement to benefits. While a medical diagnosis will be critical to a claim for mental stress, the actions of the aggressor and whether a worker of average mental stability would be traumatically affected by those actions will be a vital part of the analysis. Decision No. 2391/06 also recognizes that an acute reaction can be the result of the cumulative effect of a number of traumatic events rather than a single unexpected event and this is also explicitly stated in the policy language.

It is interesting to note that the Tribunal appears to be applying a more purposive approach to mental stress claims. All of the above referenced claims had been denied by the WSIB and were not approved through the Board's internal appeal process. Employers should appreciate that there is a significant risk that the Tribunal may grant entitlement for

[2] It is important to note that, in this case, the worker had a pre-existing psychological condition, but even that was not a bar to entitlement. Applying the "thin-skull rule" the Tribunal concluded that a work related psychological injury is compensable, even where there is a pre-existing vulnerability.

[3] 2006 ONWSIAT 302

[4] Also see *Decision No. 2056/03,* 2004 ONWSIAT 489. The worker (a health care aide) developed aphonia as a result of workplace stress resulting from "overzealous scrutiny" and harassment from a manager. The Panel concluded that the word "includes" in the list of traumatic events suggests that there might be other types of harassment other than the life-threatening type.

mental stress claims even where initial entitlement has been denied by the Board. The approach of the Tribunal gives workers a great incentive to pursue appeals in mental stress claims.

Fighting, horseplay and larking

Workplace violence under the workers' compensation scheme is also addressed by WSIB Operational Policy Manual (OPM) Document **#**15-03-11 *Fighting, horseplay and larking*. The policy states that workers who sustain a personal injury as a result of participating in a fight, horseplay or larking at work are generally not entitled to WSIB benefits. The policy is qualified however by allowing compensation if the fight results solely over work and the injured worker is an innocent bystander, i.e. did not provoke the fight.

This policy affords another avenue of relief for workers exposed to workplace violence. There is no requirement under Policy 15-03-11 to show an acute psychological reaction to a traumatic event. The focus is on physical harm. The aggressor is not compensable on the grounds that they have removed themselves from the course of employment by acting willfully and intentionally to produce harm. However, even where a worker does something intentional which would disentitle him or her from compensation under the policy, the worker may still fall within the exception under section 17 of the WSIA. Section 17 states:

> If an injury is attributable solely to the serious and willful misconduct of the worker, no benefits shall be provided under the insurance plan **unless the injury results in the worker's death or serious impairment.**

The policy was explored in detail in *Decision No. 245/90.*[5] In this case a worker was returning to his workstation while carrying a cup of coffee when a co-worker pushed him. He fell and injured his back. The Board disallowed the worker's claim for compensation on the basis that he had participated in a fight. On appeal, the Tribunal reversed the Board's decision on the grounds that the assault was, "a wilful and intentional act, not being the act of the worker" and so fell within the definition of "accident" under the WSIA. The aggressor represented a workplace hazard from which other employees had to be protected.

> "The presence in the work environment of an unusually aggressive co-worker, unconcerned with the consequences of committing physical violence, can be considered a formal workplace hazard under a no-fault compensation system. Given the definition of "accident" set out in the act (i.e. willful and intentional act of someone other than the worker), it appears to the panel that the aggressive co-worker was, in a sense, an "accident" waiting to happen."

The intent of the policy is to exclude workers who form the intent to commit violent acts while protecting workers who become involuntarily implicated in fighting or horseplay that is related to work. As noted above however, the workers' compensation scheme will compensate for willful acts where there is serious injury or death. This is consistent with the

[5] [1990] O.W.C.A.T.D. No. 290 (QL)

general "no fault" approach of the WSIB system.

The Pros and Cons of a Violence = Accident Regime

Workers may be attracted to remedial relief under the no-fault scheme for various reasons. Under this system for example, relief is available to a worker where the aggressor is judgment proof. Even if a worker was successful in a lawsuit in court, the worker may not be able to collect from the aggressor if s/he is bankrupt. Under the no-fault scheme this is not a concern since the source of relief is insurance. A no-fault system also means relief where the victim does not have sufficient resources to fund litigation.

From the employer's perspective there are both advantages and disadvantages to insisting that any and all injuries resulting from workplace violence be dealt with under the workers' comp scheme. On the minus side, more claims equals hirer premiums. Moreover, aggressors in a no fault system may feel immune to civil liability and consequently continue to carry out acts of aggression in the workplace.

On the plus side, employers could be protecting themselves from hefty awards in a civil suit or human rights complaint in some instances. Unlike the civil court system or the human right's regime, there is, generally speaking, no risk of vicarious liability under workers' comp legislation. Injuries caused by workers will fall within the insurance system provided policy requirements are met. Given the specific wording of the policies described above however, the WSIB or the Tribunal may find that particular incidents of workplace violence do not fall within the scope of entitlement either because the actions of the perpetrator are not work related or because members of management have breached a fundamental aspect of the employment relationship. Employers should be aware that they are not completely immune from claims arising out of their own actions in dealing with the employment relationship. For example, the policy on traumatic mental stress explicitly states:

> There is no entitlement for traumatic mental stress due to an employer's decisions or actions that are part of the employment function such as:
>
> - terminations
> - demotions
> - transfers
> - discipline
> - changes in working hours, and
> - changes in productivity expectations[6]

The scheme clearly offers the employer no protection from claims alleging mistreatment in the managing of the employment relationship, which, in the civil context might result in a constructive dismissal claim or a wrongful dismissal claim alleging damages for bad faith conduct. When considering the actions of management, it is only once actions or decisions are removed from the employment function (i.e. violence or threats of violence) that the no fault scheme kicks into effect.

Is Worker's Compensation a Complete Bar to Other Remedies in the Case of Workplace Violence?

In *Charlton v. Ontario (Ministry of Community Safety and Correctional Services)*[7] the question of whether or not

[6] Also see section 13(5) of the *WSIA*.
[7] (2007), 162 L.A.C. (4th) 71 (OPSGB)

workers' compensation is a complete bar to other remedies was addressed. This case represents an exception to the general rule that entitlement to benefits is in lieu of all rights of action (statutory or otherwise).

In this case, the Grievor was a Black woman of African Descent working as an Operations Manager at the Toronto jail. She received anonymous hate mail at her personal residence, which threatened physical violence.

The Grievor was severely traumatized by this letter. She took a medical leave of absence and began collecting WSIB benefits for mental stress. The Grievor brought a grievance before the Ontario Public Grievance Settlement Board (the Board) for loss of income, damages for mental distress and requesting reinstatement to a comparable position. When it came to the question of whether or not WSIB benefits acted as a bar to other remedies, the Board concluded it did not. In its view, "while the worker's compensation scheme has exclusive jurisdiction over injury to an employee's health, that jurisdiction does not bar a claim for loss of income or injury to dignitary interest."

The Grievor was awarded the difference between her WSIB benefits and the salary she was earning before the harassment occurred up to the point of reintegration to an equivalent position. Recognizing that there had been a breach of the contractual guarantee of freedom from racial harassment in the workplace, the Board also awarded $20,000 for injury to dignitary interest.

This decision confirms that a workers' comp claim for acts of violence or harassment will not, in all circumstances, bar a claim for other relief. In this case, the Board recognized that the workers' compensation system fell short because it did not address injury to the victim's dignitary interest. In the Board's view:

> "What occurred here was much more than an "accident" as defined by the Workplace Safety and Insurance Act, 1997. It was a vicious and hurtful racial slur that not only affected the grievor's health but also caused substantial injury to the grievor's dignitary interests."

As more cases involving workplace violence arise in the workers' compensation context the relationship between WSIB compensation and other available remedies, whether they are civil remedies, remedies arising form a collective agreement or human rights remedies will be explored. In the meantime, employers should be aware that in cases of workplace violence or harassment, the customary bar to further relief available under the WSIA might not always apply. That is, the fact that a worker's injury is treated as an accident arising in and out of the course of employment may not preclude all further relief. The Tribunal has yet to comment on the impact of the *Charlton* decision on civil actions.

Conducting Stress Free Investigations

If the employer's investigation of a violent event was a particularly stressful experience for a worker, could the investigation itself be considered either an aggravating factor or the last traumatic event in a long line of cumulative events under the mental stress policy? It is doubtful that a claim would be successful if it arose solely out of the manner in which an investigation was conducted. However, it should be noted that, in many

of the reported cases, the Tribunal closely scrutinizes the manner in which an employer carries out an investigation. There is no doubt that when it comes to incidents of workplace violence, the quality of an investigation will dramatically impact whether or not a worker is entitled to benefits. In light of this, employers should adopt the following practices whenever carrying out an investigation into incidents of violence and harassment:

- Take the allegations seriously and immediately commence an investigation.
- Separate the complainant and the alleged aggressor, either with a voluntary transfer or leave of absence.
- Have the investigation committee in your workplace conduct the investigation, or if there is none, hire an external investigator trained for the task.
- Interview the complainant and the alleged aggressor as well as all relevant witnesses that would have knowledge of the events.
- Take down written statements.
- Have the witnesses date and sign their statements.
- Ask the investigating committee or external investigator to submit a report to you. (Provide a reasonable deadline for the report)
- Have a member of management meet separately with the complainant and the aggressor to discuss the outcome of the investigation.
- Provide them with a copy of the report or a letter of findings.

Conclusion

Canadian statistics reveal that workplace violence is becoming more pervasive in Canadian workplaces. The numbers also illustrate that acts of aggression dealt with under the WSIB system are on the rise. According to the Workplace Safety and Insurance Board, lost time claims for assault, harassment and violent acts increased by 40% since 1995. In 2006 there were over 2,100 such claims.[8]

One can hypothesize on the myriad causes for the increase in workplace violence: our economy is driven primarily by the service sector, which means lots of public contact and more vulnerability to acts of aggression. The workforce is becoming increasingly diverse, fostering within it a melting pot of norms, cultural cues and values which may, at times, conflict. Whatever the reason for the dramatic rise in aggression, one thing is clear – employers need to seriously consider their approach to workplace violence and have in place the proper policies, procedures and training to prevent and reduce the risk of violence to workers. Workers affected by violence in the workplace will have, at their disposal, a number of avenues for relief including workers' compensation.

As the cases we discussed above indicated, WSIB policies are being interpreted broadly with a view to compensating workers for injury caused by workplace aggression. How far exactly the system will go in providing relief for

[8] Ontario Workplace Safety and Insurance Board, *Statistical Supplement to the Annual Report 2006,* Available online: <www.wsib.on.ca>

workplace violence injuries including psychological injury is still to be determined. Certain actions and circumstances will take a worker outside the course of employment effectively removing him or her from the scope of the WSIA. Moreover, the extent to which employers can rely on the no-fault scheme to provide total relief from civil liability for workplace accidents needs clarification in the violence context. One thing is for sure: the no-fault scheme does provide a viable remedy to workers who experience workplace violence in the course of their employment.

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There's An OH&S Inspector At The Door!

How to Respond to OH&S Accident Investigations, Search Warrants and Routine Inspections

Presenters: Ryan J. Conlin & Landon P. Young

A safety related inspection or accident investigation could result in prosecution, high fines and fine surcharges. In the age of unprecedented enforcement of OH&S laws, it has become more complicated to strike the right balance between cooperating with the inspector and protecting your rights post-accident. This session will help you (a) act decisively and appropriately when there's a knock on your door and (b) develop an Accident Response Plan.

You Will Learn:

- How to deal with the difficult or heavy-handed MOL inspector
- What powers inspectors have during routine inspections and new search warrant powers for accident investigations
- The balance between cooperation and self-incrimination
- Strategies for responding to requests for statements from supervisors, managers, officers and directors
- The difference between confidential company accident reports and reports required by law
- How to shield third-party consultants' reports or internal accident reports from disclosure
- The importance of post-accident steps
- How to develop a proper Accident Response Plan

The Program Will Cover:

Successfully Dealing With the Inspector: Routine Inspections and Investigations

- Working to avoid orders, stop work orders
- Working with the inspector to "get the order right" and ensure adequate compliance time
- Managing the balance between cultivating a relationship and co-operative stance, versus self-incrimination
- Appeals without repercussions
- Officially induced error: can the inspector erroneously approve an unsafe situation

You've Had a Serious Accident. There's An Inspector at the Door! The Balance Has Shifted

- Anatomy of a Ministry of Labour accident investigation - what to expect
- Powers of the inspector upon investigation: are they different from routine inspections?
- What a warrant can authorize the inspector and others to do
- The Ontario experience with search warrants
- Why change the law? Past problems with Ministry of Labour investigations

Making the Best of A Bad Situation: Initial Handling of the Accident Investigation

- Statutory obligation to preserve scene, cooperate
- Notification requirements and accident reports-statutory obligations
- Obstruction charges
- Establishing positive and informed point of contact for Ministry of Labour investigator
- Importance of point of contact maintaining privileged and confidential files and materials

Your Accident Report and Third Party Reports

- Ministry of Labour orders for expert advice
- Initiating your own investigation - key steps
- What if the Ministry of Labour asks for your internal report?
- Protecting confidentiality and privilege respecting your internal accident report and expert reports
- Getting expert advice about causation and corrective steps
- Successful strategies for putting the best of your report and expert advice to Ministry of Labour
- Reports to the joint health and safety committee
- Solicitor client privilege and protection of confidential reports

Statements From Supervisors and Senior Management

- Is there a right to remain silent given the obligation to cooperate?
- Practical strategies for providing information but not signed statement
- Importance of cooperative stance for supervisors and senior management
- Can a search warrant be used to require a supervisor or senior manager to put equipment in motion and provide incriminating information?

Searches With Warrant and Without Warrant

- What to do if the Ministry of Labour arrives with a warrant
- Seizure of company policies, procedures, training records
- Handling attempts to seize privileged and confidential reports and files, internal investigation, expert reports
- Searches without warrant: can you refuse to co-operate or refuse entry?

- Strategies to protect rights while providing information and documents
- Preserving right to make arguments respecting search and seizure violations at trial

Developing a Proper Accident Response Strategy

- Incorporating key post accident steps into your accident response strategy
- Distributing a written Accident Response Plan to supervisors and managers
- Key contacts within Accident Response Plan
- Precedent Accident Response Plan

Register Here:

There's an OH&S Inspector at the Door! – April 25th – Thunder Bay

There's an OH&S Inspector at the Dorr! – May 15th - Barrie

There's an OH&S Inspector at the Dorr! – May 29th - Toronto