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**Mental stress under the WSIA:
A plain language guide to the transition rules**

In 2017, the Ontario government removed the bar against mental stress claims under the *WSIA*, replacing it with a new provision expressly allowing workers to claim benefits for mental stress injuries.

These amendments came into force on January 1, 2018, but they also have a limited retroactive effect. The government enacted a set of transition rules setting out how the WSIB and the WSIAT will deal with the claims and appeals of workers who suffered a mental stress injury before January 1, 2018.

The transition rules are written in dense technical prose. This paper is an attempt to untangle them and explain them in plain language.

Where you'll find the transition rules

While I hope this paper will be help you to understand the transition rules, it's only meant as a starting place for your own work. If you're advising or representing a client in a mental stress case, you should still have to read the new provisions yourself.

You'll find them set out in subsection 13.1 of the *WSIA*. I've reproduced the full text of s. 13.1 in Appendix A of this paper.

You should also read the WSIB's interpretation of the transition rule in its two mental stress policies, OPM #15-03-02, *Traumatic Mental Stress*, and #15-03-14, *Chronic Mental Stress*. I've reproduced the relevant paragraphs of the policies in Appendix B.

What happens depends on where the claim is in the system

Which transition rules apply, and how they effect an individual claim, depends on where the claim is in the system.

I've identified nine categories of claims to which different rules apply. I'll describe each category, and then explain the rules that apply. I'll give a few advocacy tips too.

For the sake of clarity, I'll discuss each category from the perspective of worker claims and appeals. At the end of the paper, I'll discuss how things differ for employer appeals.

If you're using the paper for guidance about an individual case, go through it using the numbered points describing each category as a checklist. When you get to the category where you can check off all the numbered points, you've found the transition rules that apply in your case.

Remember, **all of claims discussed in this paper involve mental stress injuries that arose *before* January 1, 2018.** You don't have to worry about the transition rules for injuries that occurred in 2018.

Category One: no claim ever filed

Category One comprises claims where:

- i. The worker suffered a mental stress injury, AND
- ii. The injury occurred on or after April 29, 2014, AND
- iii. The worker has never filed a WSIB claim for the injury.

Subsections 13.1(2), (4) and (5) apply to this category.

These provisions allow a worker who has never filed a claim for her mental stress injury to make a claim and have it adjudicated under the amended mental stress provisions of the *WSIA*. To make this possible, the usual time limit on making a claim under the *WSIA* (six months from the date of the injury) does not apply to these claims.

However, there are two important limitations to this rule.

First, it does not apply to all historical mental stress claims. Instead, it is limited to injuries that “occurred” on or after April 29, 2014. A couple of advocacy tips on this:

- In some cases, it will be obvious whether the claim escapes this limitation; in others it will not. To determine whether your client has a viable claim, you should review the OPM #11-01-04, *Determining the Date of Injury*, and examine your evidence carefully in light of the policy.
- Note that it’s the *injury* that must occur on or after April 29, 2014. In some cases, the stressor(s) will have begun or occurred before that date (for example, instances of harassment), but that doesn’t rule the claim out, so long as the *injury* didn’t manifest itself until April 29, 2014 (see e.g. *Decision no. 2157/09I* at para. 12).

Second, the claim must be filed “on or before July 1, 2018.” The importance of this time limit shouldn’t be underestimated, because (a) if you miss the time limit, the worker’s opportunity to make a claim will probably be lost forever, and (b) the worker’s remedies for mental stress in other forums, such as grievance arbitrations, are going to be seriously cut back now, whether a WSIB claim is filed or not.

Indeed, this time limit is so important, it’s worth repeating: **the deadline for filing a claim for 2014-2017 mental stress injuries is:**

July 1, 2018

The clock is ticking!

Category Two: Claim filed, but no operating level decision

Category Two comprises cases where:

- i. A claim was filed before January 1, 2018, AND
- ii. The operating level of the WSIB has not issued a decision on initial entitlement.

Subsections 13.1(6) and (7) apply to claims in this category.

The WSIB will adjudicate these claims under the amended mental stress provisions of the WSIA and the WSIB's new operational policies.

This is true regardless of when the injury occurred. (It's only *new claims* (my Category One) where you need to be concerned about whether the injury occurred before April 29, 2014.)

Category Three: Claim denied at operating level, worker met time limit to object

Category Three comprises cases where:

- i. The operating level of the WSIB denied initial entitlement to benefits, AND
- ii. The worker met the time limit to object to the decision.

Subsections 13.1(6) and (7) apply to claims in this category too.

The WSIB will send these claims back to the operating level, to be reconsidered under the amended mental stress provisions of the WSIA and the WSIB's new operational policies.

Category Four: Claim denied at operating level, worker did NOT meet time limit to object

Category Four comprises cases where:

- i. The operating level of the WSIB denied initial entitlement to benefits, AND
- ii. The worker did NOT meet the time limit to object to the decision.

Subsections 13.1(3), (6) and (7) apply to claims in this category.

These are claims where the worker missed the time limit to object to an operating level decision denying entitlement for mental stress.

These claims are likely at an end, for two reasons:

- The transition rules prevent a worker from refiling the claim to have it adjudicated under the amended legislation.
- The WSIB’s policy interpretation of the rules is that it can only reconsider an operating level decision if a “notice of objection” has been filed “within the appropriate time frame.” In other words, the WSIB won’t revisit claims where the worker missed the time limit.

The only way to advance these claims is to ask the WSIB for an extension of the time limit to appeal.

If the WSIB grants an extension, the claim would then be reconsidered under the amended mental stress provisions of the WSIA and the WSIB’s new operational policies.

Category Five: ARO decision issued less than six months ago, no appeal filed

Category Five comprises cases where:

- i. An Appeal Resolution Officer has denied initial entitlement to benefits, *AND*
- ii. The ARO’s decision was issued LESS than six months ago, *AND*
- iii. The worker has not filed a *Notice of Appeal* at the Tribunal.

Subsection 13.1(9) applies to claims in this category.

These are cases where the time limit to appeal to the Tribunal has not yet expired—so if a worker wants the benefit of the amended legislation, you need to file a *Notice of Appeal* before it’s too late!

Once the *Notice* is filed, the Tribunal will refer the claim back to the WSIB, who will reconsider it under the WSIA’s amended mental stress provisions and its new operational policies.

Category Six: ARO decision issued more than six months ago, no appeal filed

Category Six comprises cases where:

- i. An Appeal Resolution Officer has denied initial entitlement to benefits, AND
- ii. The ARO's decision was issued MORE than six months ago, AND
- iii. The worker has not filed a Notice of Appeal at the Tribunal.

Subsection 13.1(3) and (9) apply to claims in this category.

These are cases where the worker has missed the time limit to appeal to the Tribunal.

To move forward, the worker needs to file a *Notice of Appeal* as soon as possible and apply for an extension of time. The process for doing this is described in the *Practice Direction: Time Extension Applications*, which you can find on the Tribunal's website.

What happens next depends on whether the Tribunal grants an extension.

If the Tribunal grants the extension, it will refer the claim back to the WSIB, who will reconsider it under the WSIA's amended mental stress provisions and its new operational policies.

If the Tribunal denies the extension, the claim is at an end, for two reasons:

- The transition rules prevent a worker from refiling the claim to have it adjudicated under the amended legislation.
- In accordance with its policy, the WSIB won't reconsider a claim under the amended legislation if the worker failed to file a *Notice of Appeal* "within the appropriate time frame."

Category Seven: ARO decision issued, timely Notice of Appeal filed at Tribunal

Category Seven comprises cases where:

- i. An Appeal Resolution Officer has denied initial entitlement to benefits, AND
- ii. The worker filed a Notice of Appeal at the Tribunal within the six-month time limit to appeal (or it was late, but the Tribunal granted an extension of time), AND
- iii. The Tribunal has not issued a final decision in the appeal.

Subsection 13.1(8) applies to claims in this category.

The Tribunal will refer these claims back to the WSIB, who will reconsider them under the *WSIA*'s amended mental stress provisions and its new operational policies.

This is true even in cases where a hearing panel is seized, and the hearing is in process. Under similar transition rules in the past, the Tribunal referred to the WSIB appeals that were well advanced in the hearing process (e.g. in *Decision no. 919/05*, the Tribunal had already held a hearing, made findings of fact in an interim decision, and obtained a report from a Tribunal Medical Assessor, but still had to refer the claim back to the WSIB).

Category Eight: ARO decision issued, Notice of Appeal filed after time limit expired

Category Eight comprises cases where:

- i. An Appeal Resolution Officer has denied initial entitlement to benefits, AND
- ii. The worker filed a *Notice of Appeal* at the Tribunal after the six-month time limit expired, AND
- iii. The Tribunal has not yet considered a request for an extension of time.

Subsections 13.1(3) and (9) apply to claims in this category.

Again, these are cases where the worker has missed the time limit to appeal to the Tribunal.

A worker with a claim in this category will quickly receive a letter from the Tribunal advising them that they filed their *Notice of Appeal* late and giving them information about how to apply for an extension of time.

What happens next depends on whether the Tribunal grants an extension.

If the Tribunal grants the extension, it will refer the claim back to the WSIB, who will reconsider it under the WSIA's amended mental stress provisions and its new operational policies.

If the Tribunal denies the extension, the claim is at an end, for two reasons:

- The transition rules prevent a worker from refiling the claim to have it adjudicated under the amended legislation.
- In accordance with its policy, the WSIB won't reconsider a claim under the amended legislation if the worker failed to file a *Notice of Appeal* "within the appropriate time frame."

Category Nine: Tribunal has already denied the appeal

Category Nine comprises cases where

- i. The Tribunal has already denied an appeal because the worker's claim did not fall within the traumatic mental stress criteria set out in the old s. 13(4) and (5) of the WSIA.

These cases are at an end, because the transition rules prevent a worker from refiling the claim to have it adjudicated under the amended legislation.

Or maybe not...

You may want to consider making a Request for Reconsideration in a case where the evidence clearly supports entitlement under the amended legislation and new policies.

Obviously, you'd be up against it: the threshold test for reconsideration is extremely stringent, and you'd face the argument that you were attempting to use the reconsideration process to get around the transition rules as they're set out in the WSIA.

But on the other hand, in its public announcement of the enactment of the transition rules, the Ministry of Labour said:

Workers whose claims for mental stress entitlement were previously denied may wish to seek reconsideration of their claims by the WSIB and WSIAT.

What's that, if not official sanctioning of reconsideration by the Tribunal? And let's not forget, we're dealing with claims that were denied because of an unconstitutional law.

Employer appeals

In this paper, I've explained the transition rules from the perspective of worker claims and appeals. I did this for a couple of reasons: I suspect the great majority of cases dealt with under the transition rules will involve worker appeals, and it made my syntax clearer to refer to one party only.

But obviously employers will be affected by the transition rules too.

For the most part, the WSIA's transition rules are written in such a way that it makes no difference whether you're dealing with a worker or employer appeal. You can substitute worker with employer in my explanation, and the applicable rules will be the same.

There is an important exception, however: claims where a (timely) *Notice of Appeal* is filed at the Tribunal by an employer after January 1, 2018.

Curiously, the subsection that addresses appeals commenced at the Tribunal after January 1, 2018, is written in a way that seems only to apply to worker appeals:

(9) If, on or after January 1, 2018 and within the time limit set out in subsection 125 (2), *a worker or a survivor files a notice of appeal of a final decision of the Board made before January 1, 2018 regarding a claim for entitlement to benefits*

for mental stress with the Appeals Tribunal, the Appeals Tribunal shall refer the claim back to the Board and the Board shall decide the claim in accordance with subsection 13 (4) as it reads at the time the Board makes its decision, regardless of the date on which the worker's mental stress occurred [*italics added*].

So what happens in a case where the *employer* files the *Notice of Appeal*? Is the Tribunal obliged to refer the claim back to the WSIB? If not, can it refer the case back at its discretion? Or is the Tribunal obliged to hear the appeal itself, and if so, under what version of the legislation?

It's a strange legislative lacuna. I look forward to seeing how the Tribunal fills it in.

Appendix A: subsection 13.1 of the *WSIA*

Transition rules re mental stress

13.1 (1) The rules set out in subsections (2) to (9) apply for the purposes of determining entitlement to benefits under subsection 13 (4). 2017, c. 34, Sched. 45, s. 2.

New claim

(2) If a worker's mental stress occurs on or after April 29, 2014 and the worker has not filed a claim in respect of entitlement to benefits for mental stress before January 1, 2018, the worker or the worker's survivor may file a claim for entitlement to benefits for mental stress with the Board and the Board shall decide the claim in accordance with subsection 13 (4) as it reads at the time the Board makes its decision.

No refiling of claims

(3) Subject to subsection (9), if a worker filed a claim for entitlement to benefits for mental stress and the claim was denied by the Board or by the Appeals Tribunal before January 1, 2018, the worker may not refile the claim under this section.

Time limits

(4) The time limits in subsections 22 (1) and (2) do not apply in respect of a claim that is filed under subsection (2) that is made in respect of mental stress that occurred on or after April 29, 2014 and before January 1, 2018.

Same

(5) A claim filed under subsection (2) that is made in respect of mental stress that occurred on or after April 29, 2014 and before January 1, 2018 must be filed on or before July 1, 2018.

Pending claim

(6) If a worker or a survivor has filed a claim for entitlement for mental stress within the time limits set out in subsection 22 (1) or

22 (2), or pursuant to an extension of time granted by the Board under subsection 22 (3), and the claim is pending before the Board on January 1, 2018, the Board shall decide the claim in accordance with subsection 13 (4) as it reads at the time the Board makes its decision, regardless of the date on which the worker's mental stress occurred.

Same

(7) For the purposes of subsection (6), a claim is pending on January 1, 2018 if,

- (a) the Board had not yet made a decision in respect of the claim by that day; or
- (b) the Board had not yet made a final decision in respect of the claim by that day.

Pending appeal

(8) If a worker or a survivor has filed a claim with the Board for entitlement to benefits for mental stress within the time limits set out in subsection 22 (1) or 22 (2), or pursuant to an extension of time granted by the Board under subsection 22 (3), and the claim is pending before the Appeals Tribunal on January 1, 2018, the Appeals Tribunal shall refer the claim back to the Board and the Board shall decide the claim in accordance with subsection 13 (4) as it reads at the time the Board makes its decision, regardless of the date on which the worker's mental stress occurred.

Other appeal

(9) If, on or after January 1, 2018 and within the time limit set out in subsection 125 (2), a worker or a survivor files a notice of appeal of a final decision of the Board made before January 1, 2018 regarding a claim for entitlement to benefits for mental stress with the Appeals Tribunal, the Appeals Tribunal shall refer the claim back to the Board and the Board shall decide the claim in accordance with subsection 13 (4) as it reads at the time the Board makes its decision, regardless of the date on which the worker's mental stress occurred.

Appendix B: the WSIB's interpretation of the transition rules

The WSIB has set out its interpretation of the transition rules in its mental stress policies, OPM #15-03-02, *Traumatic Mental Stress*, and #15-03-14, *Chronic Mental Stress*.

Because it's set out in Operational Policy, the WSIB's interpretation is binding on the Tribunal, in accordance with s. 126 of the WSIA.

The interpretation set out in OPM #15-03-02, *Traumatic Mental Stress*, is as follows:

New claims (accidents on or after April 29, 2014)

If a worker has traumatic mental stress which occurs on or after April 29, 2014, and the worker has not filed a claim with the WSIB for the traumatic mental stress before January 1, 2018, the worker or the worker's survivor may file a claim for the traumatic mental stress with the WSIB, as long as such claim is filed on or before July 1, 2018.

Pending claims (as of January 1, 2018)

For the purposes of this policy, "pending claims" means claims for traumatic mental stress that are pending before the Workplace Safety and Insurance Board (WSIB) or the Workplace Safety and Insurance Appeals Tribunal (WSIAT) on January 1, 2018. For further clarity, these are claims in which, as of January 1, 2018,

- a traumatic mental stress claim has been filed, but the WSIB has not yet made a decision
- there is a right to file a notice of objection in respect of a traumatic mental stress claim following an initial entitlement decision and the notice of objection is or has been filed within the appropriate time frame
- there is a right to file a notice of appeal to the WSIAT in respect of a traumatic mental stress claim following a final decision of the WSIB, and the notice of appeal is or has been filed within the appropriate time frame, or
- the worker has filed a notice of appeal to WSIAT and a traumatic mental stress claim is pending before the WSIAT.

The WSIB applies this policy and makes a decision in all pending traumatic mental stress claims, regardless of when the worker's traumatic mental stress occurred.

The paragraphs in OPM #15-03-14 are identical, except that the word “traumatic” is replaced by “chronic.”