The mental stress amendments to the *WSIA:* what they are, and why labour lawyers need to know about them

Antony Singleton
www.asingletonlaw.ca

Changes to the *Workplace Safety and Insurance Act*[1] are usually peripheral to the work of labour lawyers, so unless you also have a workers' compensation practice, there's little incentive to master their details.

The recent mental stress amendments are different. Labour lawyers need to know about them because they go to the heart of an arbitrator's remedial jurisdiction in a common type of case: grievances alleging bullying, harassment or a poisoned work environment.

In this paper, I summarize the mental stress amendments to the *WSIA* and the WSIB's policies interpreting those amendments. I also point you to the key resources you need to understand the details.

Then I give my take on the nascent case law addressing the effect of the amendments on labour arbitrations. The seminar organizers asked me to address the question "What type of remedies are available at arbitration for chronic mental stress?" I'll attempt an answer, but the question contains an assumption which unions (and their lawyers) would do well to examine. The *WSIA* amendments pose a more basic question: "What should unions do now to enforce employers' duty to keep the workplace free of harassment?" I'll give you my thoughts on that too.

But first, by way of background, I'll briefly explain how the *WSIA* affects the scope of a labour arbitrator's remedial jurisdiction, what "mental stress" is, and the history of the mental stress amendments to the *WSIA.*

[1] *Workplace Safety and Insurance Act, 1997*, S.O. 1997, c. 16, Sched. A, as amended ("*WSIA*").

A. BACKGROUND

a. The *WSIA's* restrictions on workers' rights of action apply to labour arbitrations

A defining feature of our workers' compensation system is a trade-off, made in 1914, known as the "historic compromise."

In exchange for the protection of no-fault insurance for workplace injuries and illnesses, the legislation takes away workers' right of action against their employer "in respect of the worker's injury or disease."[2] Workers are entitled to benefits under the *WSIA's* insurance plan "in lieu of all rights of action (statutory or otherwise)" that a worker has against their employer "for or by reason of an accident happening to the worker or an occupational disease contracted by the worker while in the employment of the employer."[3] The word "accident" is broadly defined, and includes "a willful and intentional act, not being the act of the worker," a "chance event occasioned by a physical or natural cause," and a "disablement arising out of and in the course of employment."[4]

It's settled law that the provisions removing workers' rights of action apply to grievance arbitration. Grievances alleging that a worker was injured because of an employer's breach of the *Occupational Health and Safety Act* or the collective agreement are arbitrable, and arbitrators can award non-monetary remedies, such as declaratory relief**. However, an arbitrator cannot award to a grievor damages whose source is, ultimately, the accident.**[5]

---

[2] *WSIA*, s. 28. The provisions dealing with workers' rights of action are set out in sections 26-31. In addition to the worker's own employer, the WSIA takes away the worker's right of action against a director, executive officer or worker employed by their employer and—in the case of workers employed by a Schedule 1 employer—any other Schedule 1 employer and its directors, officers and workers.

[3] *WSIA*, s. 26(2).

[4] *WSIA*, s. 2

[5] The leading case is *Ontario Public Service Employees Union v. Ontario (Community Safety and Correctional Services and Ministry of Children and Youth Services),* 2010 CanLII 28621 (ON GSB) (Gray), aff'd *OPSEU v. Ontario et al,* 2012 ONSC 2348 (CanLII), 2013 ONCA 406 (CanLII). See also: *Society of Energy Professionals v. Ontario Power Generation,* [2007] O.L.A.A. No. 685 (Burkett) (QL); *Elementary*

This is so, regardless of whether the grievor actually files a WSIB claim, and regardless of whether the claim is approved or denied. What's determinative is "whether an injury or illness of the sort alleged by the grievor would be or would have been compensable under the [*WSIA*], *if proven*."[6]

b. What is "mental stress"?

Workers' compensation law divides psychological injuries into two broad categories.

One category comprises psychological injuries that are secondary to a physical injury—that is, cases where a worker develops a mental disorder as a result of psychological trauma from their physical accident, or as a consequence of the physical injury and its effects on their life. In workers' comp, we call these injuries "psychotraumatic disabilities." They have long been compensable under the *WSIA*, and we are not concerned with them in this paper.

The other category comprises psychological injuries that are *not* preceded by a physical injury, but rather result from psychological stressors in the workplace (such as harassment from a co-worker or supervisor). These injuries are known in workers comp as "mental stress injuries," and until recently they were largely excluded from coverage under the *WSIA*. It's these injuries that my paper is about.[7]

Teachers' Federation of Ontario v. Greater Essex County District School Board, [2010] O.L.A.A. No. 597 (Brent) (QL); *Amalgamated Transit Union Local 113 v. Toronto Transit Commission,* 2012 CanLII 97799 (Howe).

[6] *Ontario Public Service Employees Union v. Ontario (Community Safety and Correctional Services and Ministry of Children and Youth Services),* 2010 CanLII 28621 (ON GSB) (Gray), at para. 111.

[77] There's an important sub-category of mental stress cases that are dealt with separately under the *WSIA*, namely claims for post-traumatic stress disorder that are made workers in a select group of occupations listed in s. 14(2) of the *WSIA*. Since the passing of Bill 163 in April 2016, if a worker in one of the listed occupations develops PTSD, their PTSD is presumed to be work-related, and the worker is entitled to benefits under the *WSIA*, "unless the contrary is shown" (s. 14(3)). (*Supporting Ontario's First Responders Act (Posttraumatic Stress Disorder),* 2016, S.O. 2106, c. 4.) **These PTSD-specific provisions fall outside the scope of this paper.**

c. The WSIA used to bar claims for mental stress injuries

For two decades, from January 1, 1998, to January 1, 2018, the *WSIA* expressly barred claims for mental stress injuries. Section 13(4) set out a general exclusionary rule:

> Except as provided in subsection (5), a worker is not entitled to benefits under the insurance plan for mental stress.

There was a narrow exception to this general rule, set out in s. 13(5):

> A worker is entitled to benefits for mental stress that is an acute reaction to a sudden and unexpected traumatic event arising out of and in the course of his or her employment.

Each element of this exception to the general exclusion ("acute reaction," "sudden… event," "unexpected… event," "traumatic event") was narrowly construed, both in WSIB policy and the Workplace Safety and Insurance Appeals Tribunal's case law, and together they formed a stringent set of entitlement criteria that excluded the vast majority of mental stress injuries from coverage under the insurance plan.

For example, "traumatic" was interpreted by the WSIB and WSIAT to mean "objectively traumatic," which in turn meant that the event had to be one of—or similar in nature to—the WSIB's list of events that are "generally accepted to be traumatic":

- witnessing a fatality or a horrific accident
- witnessing or being the object of an armed robbery
- witnessing or being the object of a hostage-taking
- being the object of physical violence
- being the object of death threats
- being the object of 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)
- being the object of **workplace harassment** that includes physical violence or threats of physical violence (e.g., the escalation of verbal abuse into traumatic physical abuse), and

- being the object of **workplace harassment** that includes being placed in a life-threatening or potentially life-threatening situation (e.g., tampering with safety equipment; causing the worker to do something dangerous).[8]

Leaving aside the other elements of the test, the extreme nature of the events required to meet the "objectively traumatic" criterion resulted in the exclusion of even apparently gross cases of workplace harassment. For example, in *Decision No. 1660/13*, the worker's supervisor repeatedly made racist remarks and on two occasions ran his hands through the worker's hair; these "events" were "improper and offensive but not objectively traumatic for the purposes of the Board's policy."[9] In *Decision No. 2157/09I*, a nurse was subjected by a doctor to verbal abuse, including demeaning comments and behavior in front of her colleagues and patients, for twelve years; again, bad but not "objectively traumatic."[10]

Section 13(5) also contained an exception-to-the-exception, namely that a worker could not make a claim for traumatic mental stress arising from an employer's actions relating to the worker's employment:

> However, the worker is not entitled to benefits for mental stress caused by his or her employer's decisions or actions 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 employment.

Although this sentence imposed another formal restriction to entitlement, it hardly made a difference in practice, because the exception to the general rule barring claims was already so narrow. It's hard to imagine an event that could be both "objectively traumatic" and a legitimate exercise of management rights.

Indeed, so few claims got through this screen that employers apparently never thought to challenge a grievance arbitrator's remedial jurisdiction in workplace bullying and harassment

---

[8] WSIB, Operational Policy Manual document #15-03-02, *Traumatic Mental Stress* (emphasis in the original).

[9] *Decision No. 1660/13,* 2013 ONWSIAT 2152 (CanLII) at para. 25

[10] *Decision No. 2157/09I,* 2010 ONWSIAT 2729 (CanLII)

grievances until 2016, after two workers had successfully challenged the constitutional validity of the bar on mental stress claims at the WSIAT—a story I'll discuss below.

d. The WSIAT rules the bar to mental stress claims breaches the *Charter*

Workers with mental stress injuries challenged s. 13(4) and (5) of the *WSIA*, arguing that the bar to mental stress claims discriminated against them on the grounds of mental disability, thereby breaching their right to equal treatment under s. 15 of the *Charter*.

The Workplace Safety and Insurance Appeals Tribunal agreed with them. In April 2014, the WSIAT ruled that s. 13(4) and (5) were of no force and effect because they violated the appellant's worker's *Charter* rights, and so granted her entitlement to benefits under the insurance plan.[11] Three more decisions with the same result followed in 2015, 2016 and 2017.[12]

As an administrative tribunal, of course, the WSIAT does not have the authority to make general declarations of invalidity. For over three years, the Ontario government neither sought judicial review (which would have resulted in a definitive decision on the constitutional validly from court), nor showed any intention of amending the legislation. The impugned provisions remained in place, and the WSIB continued denying claims for mental stress with undiminished vigor. Any worker who wanted to claim benefits for mental stress had to launch a fresh *Charter* challenge in their individual case.

e. Three years later… the government amends the *WSIA*

In the face of pressure from worker groups, the government finally responded to the WSIAT's decisions and amended the *WSIA* to expressly allow claims for mental stress injuries.

---

[11] *Decision No. 2157/09,* 2014 ONWSIAT 938 (CanLII)

[12] *Decision No. 1945/10*, 2015 ONWSIAT 223 (CanLII); *Decision No. 665/10,* 2016 ONWSIAT 997 (CanLII); *Decision No. 119/16,* 2017 ONWSIAT 1636 (CanLII)

In fact, the government amended the legislation twice last year.

The first set of amendments, in Bill 127, removed the bar on mental stress claims and replaced with a provision allowing claims for "traumatic and chronic mental stress." The new provisions came into force on January 1, 2018, and, under Bill 127, were originally going to be *prospective* only.[13]

Dismayed by the lack of retroactive effect of Bill 127, the Ontario Network of Injured Worker Groups filed a Rule 14 Application challenging the constitutional validity of the bar on mental stress claims.[14] To avoid the (now inevitable) embarrassment a court decision would cause, the government settled the Application by agreeing, among other things, to enact transition rules that gave the substantive amendments to the *WSIA* limited retroactive effect. These transition rules, which were enacted through Bill 177,[15] will be discussed in more detail below.

B. THE NEW MENTAL STRESS PROVISIONS IN THE *WSIA* AND WSIB POLICY

a. The new substantive provisions in the WSIA

The amendments to the *WSIA* repealed the bar on mental stress claims and its exception for "sudden and unexpected traumatic" events, replacing them with the provisions expressly allowing claims for both "chronic" and "traumatic" mental stress:

> 13(4) Subject to subsection (5), a worker is entitled to benefits under the insurance plan for chronic or traumatic mental stress arising out of and in the course of the worker's employment.
>
> 13(4.1) The worker is entitled to benefits under the insurance plan as if the mental stress were a personal injury by accident.

---

[13] Bill 127, *Stronger, Healthier Ontario Act (Budget Measures),* 2017

[14] *ONIWG et al v. Ontario,* Court File No. CV-17-578030

[15] Bill 177, *Stronger, Fairer Ontario Act (Budget Measures),* 2017

If there was any doubt, the language of s. 13(4.1) makes clear that mental stress claims are subject to the right of action provisions in sections 26 and 28 in the same way as physical injuries and occupational diseases.

The new provisions leave in place the "employer action" provision that was included in the original s. 13(5). It still bars claims for mental stress arising from an employer's legitimate exercise of its management rights:

> 13(5) A worker is not entitled to benefits for mental stress caused by decisions or actions 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 employment.

While this provision may have been otiose under the old mental stress regime, it's likely now to become the focus of litigation, as the parties argue about whether employer actions that harmed a worker were a *bona-fide* exercise of management rights or were disguised instances of bullying or harassment.

b. The WSIB's new chronic mental stress policy

The WSIB has published two operational policies setting out detailed eligibility criteria under the new legislation:

- A slightly revised version of existing traumatic mental stress policy, #15-03-02, *Traumatic Mental Stress*, and
- A new policy dealing specifically with chronic mental stress claims, #15-03-14, *Chronic Mental Stress.*[16]

[16] There is also a policy dealing with the presumptive PTSD claims, which are beyond the scope of this paper: #15-03-13, *Posttraumatic Stress Disorder in First Responders and Other Designated Workers.*

Both policies are available on the WSIB's website, and labour lawyers should make themselves familiar with their details—especially the chronic mental stress policy, the relevant parts of which I will summarize now.[17]

The chronic mental stress policy sets out a general test for entitlement, and then gives details about how each element of the test will be interpreted and applied. The general test is:

> A worker will generally be entitled to benefits for chronic mental stress if an appropriately diagnosed mental stress injury is caused by a substantial work-related stressor arising out of and in the course of the worker's employment.

For the purposes of this paper, the most important element if this test is the requirement that the injury be caused by "a substantial work-related stressor," because the policy also states that **"workplace harassment will generally be considered a substantial work-related stressor"** (emphasis added). The policy gives workplace harassment the same definition as the *Occupational Health and Safety Act*, namely:

> Workplace harassment occurs when a person or persons, while in the course of the employment, engage in a course of vexatious comment or conduct against a worker, including bullying, that is known or ought reasonably to be known to be unwelcome.

The policy also states that "interpersonal conflict" does not count as a substantial work-related stressor, unless it rises to the level of harassment or is otherwise objectively "egregious or abusive":

> Interpersonal conflicts between workers and their supervisors, co-workers or customers are generally considered to be a typical feature of normal employment. Consequently, such interpersonal conflicts are not generally considered to be a substantial work-related stressor, unless the conflict
> - amounts to workplace harassment, or
> - results in conduct that a reasonable person would perceive as egregious or abusive.

---

[17] Alternatively, you can download the policies from my blog, *Just Compensation,* along with a large collection of the WSIB's internal documents giving its decision-makers direction about adjudicating claims under the new policies (obtained through a freedom of information request in May 2018): https://justcompensation.ca/2018/05/15/wsib-internal-mental-stress-docs/

Thus the WSIB's policy leaves no room for doubt: (a) psychological injuries caused by workplace bullying and harassment are intended to be compensated under the *WSIA's* new mental stress provisions, and (b) as the mental stress claims are subject to the *WSIA's* right of action provisions, psychological injuries caused by bullying and harassment are subject to the right of action provisions too.

c. The mental stress transition rules—and a limitation date you need to know!

The transition rules for the new mental stress provisions are set out in s. 13.1 of the WSIA. They're complex. I've published a plain language guide to them on my blog, which you can find at: https://bit.ly/2y1FIjX.[18] My guide takes readers through nine different categories of cases, and the different transition rules that apply to them.

For our purposes of this paper, there are two aspects of the transition rules that labour lawyers need to know.

First, the transition rules require the WSIB to re-adjudicate any decision that is currently alive in the WSIB and WSIAT's adjudicative system under the new provisions, regardless of the date that the injury arose. This applies even to claims that were denied many years ago at the lowest level of the WSIB's adjudicative system, provided that the worker protected their right to appeal by registering their "intent to object."

Therefore, if you are representing a grievor in a harassment grievance who filed a WSIB claim and was denied benefits, you should advise the grievor to find out whether they met the time limit to object, and if so, to consider reviving their claim.

[18]The full URL for the guide to the transition rules is: https://justcompensation.ca/2018/05/21/a-plain-language-guide-to-the-mental-stress-transition-rules/

Second, the transition rules allow a worker who has never filed a claim for their mental stress injury to make a claim and have it adjudicated under the new provisions. 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.

i. It does not apply to all historical mental stress claims. Instead, it is limited to injuries that "occurred" on or after April 29, 2014. Note that it's the *injury* that must occur on or after that date. In some cases, the stressor(s) will have begun or occurred before then (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.[19]

ii. The new 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 WSIB claim will probably be lost forever, and (b) as I will discuss below, the worker is unlikely to obtain a monetary remedy in a grievance arbitration, whether a WSIB claim is filed or not.

Therefore, if you are representing a grievor who paid for health care or lost time from work as a result of a workplace harassment, you should urgently advise them about filing a WSIB claim. "Urgently" is the key word here: to repeat, **the deadline for filing a claim for 2014-2017 mental stress injuries is:**

July 1, 2018

[19] See e.g. *Decision No. 2157/09I,* 2010 ONWSIAT 2729 (CanLII), at para. 12. April 29, 2014, is the date that the Tribunal released its first *Charter* ruling, *Decision No. 2157/09,* 2014 ONWSIAT 938 (CanLII).

C. THE EFFECT OF THE NEW MENTAL STRESS PROVISIONS ON ARBITRATORS' REMEDIAL JURISDICTION

As noted above, there's no doubt now that mental stress injuries are subject to the *WSIA's* right of action provisions, just like physical injuries and occupational diseases. Therefore, we can anticipate arbitrators will conclude that their remedial jurisdiction is limited in the same way: they no longer have the authority to award damages whose source is, ultimately, the mental stress injury.

Case law to this effect emerged as soon as the WSIAT issued its first *Charter* ruling in 2014—that is, at a time when the government was refusing even to comment on whether it would amend the legislation.[20] *OPSEU (Patterson) v. Ontario (MCSCS)* was a grievance alleging harassment that began in 2008, and for which the grievor first started receiving medication in 2014.[21] The employer argued that the WSIAT's *Charter* rulings in *Decision no. 2157/09 and 1945/10* were enough for the arbitrator to conclude that the grievor's injury was compensable under the *WSIA* all along, notwithstanding the *WSIA's* express provisions to the contrary, and that the arbitrator therefore did not have the authority to award damages.

The Grievance Settlement Board agreed, primarily on the basis of the WSIAT's second *Charter* ruling (*1945/10*, issued in January 2015), which Arbitrator Briggs felt indicated the Tribunal would find the bar on mental stress claims unconstitutional in future cases. She therefore ruled that the grievor had "an injury or illness of the sort that would be or would have been compensable under" the *WSIA*, so she did not have the authority to award the grievor damages.

The subsequent amendments to the *WSIA* made the outcome of this decision good law.

---

[20] You can read my correspondence from the Minister of the Labour in May 2016 about this issue on my blog, *Just Compensation*, at https://justcompensation.ca/2016/05/24/chronic-mental-stress-the-minister-speaks/. The government did not announce it would amend the mental stress provisions until April 2017, when it tabled *Bill 127, supra*.

[21] *Ontario Public Service Employees Union (Patterson) v Ontario (Community Safety and Correctional Services),* 2017 CanLII 25459 (ON GSB, Briggs) (CanLII)

However, it was extraordinarily harsh at the time.

Recall that: the alleged harassment started in 2008, six years before the WSIAT's first *Charter* decision was issued in April 2014; the injury may have occurred before the first *Charter* decision (Ms. Patterson started receiving treatment in 2014) and certainly occurred before the WSIAT issued its second *Charter* ruling, *Decision no. 1947/10,* on which Arbitrator Briggs relied; at all material times the government, through s. 13(4) of its statute, was telling Ms. Patterson that "a worker is not entitled to benefits under the insurance plan for mental stress"; and the government did not even announce it would amend the *WSIA* until after Arbitrator Briggs issued her decision.

Labour lawyers, how do you know when your tribunal has become completely untethered from the reality of the lives of the individuals to whom it is supposed to administer justice? It's when an arbitrator effectively says, several years after the fact, that if an individual wanted a remedy, she should have filed a WSIB claim that would certainly have been denied because of the clear wording of the statute, and then commenced a *Charter* challenge to the legislation (because constitutional litigation is so cheap and easy!). Arbitrator Briggs could quite reasonably have relied on the wording of the statute (at the time of both the injury and her decision) to maintain her remedial jurisdiction. But she chose not to, and as a result, poor Ms. Patterson was left with no remedy at all.

In any event, the reasoning in the *Patterson* grievance was followed in at least three more grievances where alleged employer wrongdoing of some kind resulted in a mental stress injury that arose *before* the *WSIA* was amended.[22] In the most recent decision, *OPSEU (Rosati) v Ontario (MCSCS),* the grievor had filed a WSIB claim, which was denied, and was under appeal at the WSIAT when the grievance was heard. Although the injury occurred before the *WSIA* was amended, the grievance was heard after the amendments took effect. Arbitrator Anderson

[22] *AMAPCEO (Wilson) v. Ontario (MNRF)*, 2017 CanLII 71789 (ON GSB, Dissanayake); *OPSEU (Grievor) v Ontario (MCSCS),* 2017 CanLII 92683 (ON GSB, Carrier); and *OPSEU (Rosati) v Ontario (MCSCS),* 2018 CanLII 7264 (ON GSB, Anderson).

relied in part on the transition rules in determining that the grievor's claim for damages arose from an injury that, if proven, is compensable under the *WSIA*. Although he misunderstands precisely how the transition rules apply to the grievor's case,[23] Arbitrator Anderson's reasons highlight the need for labour lawyers to advise grievors with mental stress cases about filing a WSIB claim—and in particular about the deadline of July 1, 2018, to file new claims for mental stress.

The case law is still nascent, but it's clear that, under the amended legislation, arbitrators will treat mental stress injuries in the same way as physical injuries and occupational diseases. In grievances where there is work-related psychological injury—including grievances alleging workplace bullying, harassment, or a poisoned work environment—arbitrators will not award damages whose source is, ultimately, the mental stress injury. This will likely be the outcome regardless of whether the grievor does, in fact, file a WSIB claim, and regardless of whether the WSIB approves or denies the claim.

So what remedies are available at arbitration for chronic mental stress?

There's still declaratory relief (which unions and grievors may consider to be of limited value). And in the right circumstances, arbitrators may direct the employer to make changes in the workplace to ensure the workplace is free of harassment, and/or properly accommodate the grievor's mental disability.

---

[23] Arbitrator Anderson says:

> [If proved, the grievor's injury] is a compensable disability under new section 13(4) of the WSIA if the date of that mental stress is on or after April 29, 2014. To the extent that the mental stress predates April 29, 2014, and would otherwise be excluded old section 13, I find that section unconstitutional and inoperative….

However, because the grievor's WSIB claim was under appeal at the WSIAT, the transition rules require the WSIB to re-adjudicate her claim under the new mental stress provisions, regardless of her date of injury. (See my discussion of the transition rules, above).

However, I suspect damages of any kind will be hard to come by, because it will be difficult to characterize them in way arbitrators will accept makes them truly independent of the injury.

One type of damages has not been ruled on yet (and so which in theory may still be available) is damages for an employer's breach of the *Human Rights Code*, which might be claimed in grievances where the employer's alleged wrong-doing is related to one of the *Code's* protected grounds. There is one reported case where the employer raised a preliminary objection to the arbitrator's authority to award such damages, *OPSEU (Schultheis) v Ontario (CSCS)*, but Arbitrator Wacyk ruled that she would not hear argument on the issue as a preliminary matter, but would deal with it in the normal course of the arbitration.[24]

We await Arbitrator Wacyk's final decision, but it seems likely that the employer's objection will ultimately succeed. One of the cases the employer is relying on is *Béliveau St.-Jacques v. Féderation des Employées and Employés de Services Publics Inc.,* a case in which the Supreme Court of Canada considered the intersection of the Quebec *Charter* and the provincial workers' compensation statute. The reasoning in the Supreme Court's decision makes it likely that arbitrators will rule that the ultimate source of human rights damages is the mental stress injury too. The worker brought a civil claim for compensatory and exemplary damages under the *Charter* against her employer for workplace harassment and sexual harassment. She also received workers' compensation benefits for a psychological injury that arose from the same incidents. The majority ruled that the worker's *Charter* claim for both compensatory and exemplary damages was barred because, *inter alia*, it would undermine the "historic compromise" instantiated in the workers' compensation legislation.

But who knows—an enterprising union lawyer with the right set of facts might be able to convince an arbitrator they can award human rights damages, or some even some new form of damages, as a remedy for the breach of the collective agreement that is independent of the

[24] *Ontario Public Service Employees Union (Schultheis) v Ontario (Community Safety and Correctional Services),* 2018 CanLII 33081 (ON GSB, Wacyk)

worker's injury. New forms of relief do develop in the arbitral jurisprudence, typically in response to extraordinary facts—think about the cases in which arbitrators took upon themselves the authority to award aggravated and punitive damages, for example.

But such a case may take years to appear, if it appears at all. In the meantime, unions should ask themselves whether grievance arbitration is still the best, or only the only way, to protect their members and enforce employers' duty to keep the workplace free of harassment. Or is there an alternative?

D. UNIONS SHOULD SUPPORT THEIR MEMBERS' WSIB CLAIMS FOR MENTAL STRESS

We all have a tendency to view the world through our immediate frame of reference, and the danger for unions and their lawyers is that they will continue to assume that the best method of dealing with workplace problems that result in mental stress is through the grievance procedure.

My frame of reference is that of a workers' compensation lawyer, and it seems to me that there's a natural response for unions to the reduction in arbitrators' remedial authority: unions should support their members' WSIB claims and appeals!

Unions should be highly motivated to support their members' WSIB claims and appeals and, in my view, put the same resources into them that they would a grievance arbitration, for several reasons:

- Successfully establishing a WSIB claim is, at present, the most immediately viable way to make their member whole (well, 85% of whole). With a well-directed, active approach to the WSIB claim, that making-whole will occur in many cases *much faster* than a grievance arbitration would have done.

- The cost of the claim to the employer—which could be significant, especially for Schedule 2 employers—should have an admonitory effect similar to paying damages under a grievance settlement agreement or an arbitrator's order.

- Once the claim is established, the WSIB will become involved in return to work arrangements. The union needs to be actively involved in this, both to protect the member's interests, and as the steward of accommodation process under the collective agreement. Plus, the WSIB has statutory powers in the return to work process that an actively involved union can try to leverage to their member's advantage while the process is ongoing (and therefore can have the greatest effect—rather than trying to get an arbitrator's order that to remedy a failure to accommodate months or years after the fact).

E. CONCLUSION

The new mental stress provisions in the *WSIA* were a victory for working people, putting an end to some egregious discrimination that caused severe hardship for many workers with work-related mental disabilities over the years.[25]

One of the consequences of that victory was the curtailing of arbitrators' remedial authority in grievances that relate to mental stress injuries. That's going to be discomforting to a lot of unions.

My advice to those unions: you need to embrace this new situation. Give your wholehearted (and material) support to your members' WSIB claims, and you may find you can help your members far more than you would have through the grievance procedure.

[25] There's still work to be done: the WSIB's chronic mental stress policy contains limitations on entitlement that some worker advocates believe are discriminatory, and will challenge them on that basis. But nonetheless, the new provisions are real and substantial progress.