

Roper Greyell Case Law Update – May 2009

B.C. Court of Appeal Rules Mental Stress Provisions Under Workers' Compensation Scheme to be Unconstitutional

On April 30, 2009, the B.C. Court of Appeal released its decision in *Plesner v. British Columbia (Hydro and Power Authority)*, [2009] B.C.J. No. 856 (C.A.). This case involved a constitutional challenge to the mental stress provisions found in section 5.1 of the *Workers Compensation Act*, R.S.B.C. 1996, c. 492 (the “Act”) and its accompanying policy, Policy 13.30.

Mental Stress Provisions Under Workers' Compensation Scheme

The following is an overview of the mental stress provisions under the *Act* and Policy 13.30 that were subject to the constitutional challenge:

- (a) Section 5.1 of the *Act* establishes no fault entitlement to compensation for workers who develop a mental stress condition following a “traumatic event” at work.
- (b) Policy 13.30 clarifies the circumstances under which a worker would be entitled to coverage under section 5.1 and the Policy, among other things, used to provide guidance on what qualifies as a traumatic event.
- (c) Policy 13.30 also used to state that only mental stress arising from “severely emotionally disturbing” events, including horrific accidents, armed robberies and hostage takings, was compensable.

Facts and Procedural History

On January 16, 2003, Peter Plesner, was at work at BC Hydro's Burrard Thermal Generating Station in Port Moody. While attending a training session with several co-workers, he witnessed a rupture of a natural gas pipeline. He gave evidence that he was fearful that the gas leak would result in an explosion, thus triggering a chain reaction.

Two weeks after the incident, Mr. Plesner visited his family doctor, who noted symptoms of stress and referred him to a psychiatrist. Mr. Plesner stopped working in February 2003, and his psychiatrist ultimately diagnosed him as having post-traumatic stress disorder (“PTSD”).

In October 2003, Mr. Plesner applied for coverage under the *Act*. His initial claim was denied on the grounds that his condition was chronic. He appealed the denial of his claim to the WCB's Review Division. The review officer accepted that Mr. Plesner was suffering from PTSD linked to the gas rupture, but ruled the circumstances of the gas rupture insufficient to qualify as a traumatic event within the meaning of the *Act*, as interpreted by Policy 13.30. In particular, the incident could not reasonably be described as "horrific", and Mr. Plesner's appeal was dismissed.

Mr. Plesner appealed to the Workers' Compensation Appeal Tribunal ("WCAT"). Again, the appeal was denied on the grounds that the gas rupture did not meet the statutory and policy requirements of being a traumatic event. WCAT noted that the incident was not, as required by Policy 13.30, "generally accepted as traumatic".

The WCAT decision went on judicial review before the B.C. Supreme Court. In brief reasons, the reviewing judge remitted the matter to WCAT on the grounds that the WCAT decision was internally inconsistent. The reviewing judge did not address a constitutional argument raised by Mr. Plesner under the *Canadian Charter of Rights and Freedoms*.¹

Before the Court of Appeal, Mr. Plesner focused on the *Charter* argument. In his submission, section 5.1 of the *Act*, when read together with Policy 13.30, violated his rights under section 15(1) of the *Charter*, which provides, in part:

Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on ... mental or physical disability.

B.C. Court of Appeal Majority Judgment

The Court of Appeal split two judges to one with regard to the constitutionality of the mental stress provisions found in section 5.1 of the *Act* and Policy 13.30.

The dissenting judge dismissed the constitutional challenge to section 5.1 of the *Act* and Policy 13.30 on the basis that there was no violation of section 15(1) of the *Charter*.

The majority held that the "traumatic event" descriptor under section 5.1 of the *Act*, when read in conjunction with Policy 13.30, breached section 15(1) of the *Charter* because it gave rise to substantive discrimination on the basis of mental disability. According to the majority, when compared to workers suffering from physical disability, workers similarly situated to Mr. Plesner were at a significant disadvantage in terms of entitlement to compensation. In the majority's view, while workers suffering from physical disability only have to show they suffered a work-related injury in order to receive compensation,

¹ The *Charter* argument, incidentally, was not raised before WCAT because that administrative tribunal does not have the jurisdiction to hear constitutional issues.

workers suffering from mental stress had to get over the additional hurdle of showing that the work-related injury was caused by a traumatic event, which Policy 13.30 qualified to be an event akin to “horrifying”.

The majority went on to hold that the breach of section 15(1) could not be saved under section 1 of the *Charter*. In terms of remedy, the majority allowed Mr. Plesner’s appeal, remitted the matter to WCAT for rehearing and, most significantly, struck out the portions of Policy 13.30 that offended the *Charter*.

Conclusion

It is noteworthy that not all of Policy 13.30 was declared to be of no force and effect. The *only* portions of the Policy that were struck out as unconstitutional are those that used to, first, provide guidance on what qualifies as a traumatic event and, second, state that only mental stress arising from “severely emotionally disturbing” events was compensable.

Those portions of the Policy that remain in force and effect and those portions that were struck out are identified in an appendix to the majority’s reasons for judgment, which can be found at <http://www.courts.gov.bc.ca/jdb-txt/CA/09/01/2009BCCA0188.htm>.

The bottom line after *Plesner v. British Columbia (Hydro and Power Authority)* is this:

- (a) Going forward, employers operating under this province’s workers’ compensation scheme will probably be faced with more mental stress claims.
- (b) Because the threshold in Policy 13.30 is now lower, there will likely be an increase in entitlement to compensation for workers who develop a mental stress condition following a traumatic event at work.
- (c) WCB will adjudicate future mental stress claims in a different light and, for such claims already in the system, WCB may well approach affected parties and seek further submissions regarding the impact of *Plesner v. British Columbia (Hydro and Power Authority)*.

If you have questions regarding the issues raised in this case law update and how they may affect you or your company, please do not hesitate to contact any lawyer at our firm.

Lawyer contact information can be obtained by contacting us at (604) 806-0922 or visiting our website at www.ropergreyell.com.

* Every effort has been made to ensure accuracy in respect of this case law update. The comments, however, are necessarily of a general nature. Clients and other interested parties are urged to seek specific advice on matters of concern and not to rely solely on the text of this case law update. *