Ontario

WORKPLACE SAFETY AND INSURANCE APPEALS TRIBUNAL

DECISION NO. 2157/09

BEFORE:	R. McCutcheon	: Vice-Chair
	B. Wheeler	: Member Representative of Employers
	M. Ferrari	: Member Representative of Workers
HEARING:	May 28-29, 2013; June 11-12, 2013 at Toronto Oral hearing	
DATE OF DECISION:	April 29, 2014	
NEUTRAL CITATION:	2014 ONWSIAT 938	
DECISION UNDER APPEAL:	WSIB Appeals Resolution Officer (ARO) J. Cantwell dated May 5, 2006	
APPEARANCES:		
For the worker:	J. A. Donaldson, Lawyer T. Sadoway, Union Representative	
For the employer:	Not participating	
For the intervener, the Attorney General of Ontario:	M. Horner, Lawyer	
Tribunal counsel:	C. Zimmermann, Lawyer	

Contents

REASONS

(i) Introduction

[1] The appellant worker was employed as a nurse with the same hospital for 28 years. She enjoyed her job and was described by co-workers as a caring, competent nurse. From 1990 to 2002, the worker was subject to ill treatment by a doctor who worked with her. This included yelling at the worker and making demeaning comments in front of both colleagues and patients. Concerned co-workers brought this mistreatment to the attention of the team leader in the spring of 2002; no action was taken and the doctor's behaviour continued. This ongoing mistreatment culminated on June 13, 2002, when the worker attempted to carry out her duties in the hospital clinic where she worked, but the doctor continually and repeatedly interrupted her history-taking with patients, told her to "shoo," and closed the door on her heels. The worker felt that the doctor was interfering with her ability to perform her job and brought her concerns to the team leader the next day. In response, the team leader advised the worker that her responsibilities would be significantly reduced. The worker was effectively demoted, although her job title and classification under the collective agreement would not change.

[2] The worker was unable to continue working after June 14, 2002. She sought medical and psychiatric treatment. The worker described feeling "pushed around, battered, humiliated, and discredited." The worker was diagnosed with an adjustment disorder with mixed features of anxiety and depression, which her treating health practitioners attributed to workplace stressors.

[3] The worker filed a claim for mental stress with the Workplace Safety and Insurance Board (WSIB). The claim was denied as the worker did not have "an acute reaction to a sudden and unexpected traumatic event" as required by subsections 13(4) and (5) of the *Workplace Safety and Insurance Act, 1997*, S.O. 1997, c. 16, Sch. A (the "WSIA") and Document No. 15-03-02 of the WSIB's *Operational Policy Manual* (OPM), "Traumatic Mental Stress" (the "TMS Policy").[1]

[4] The worker appealed the denial of her claim. For the reasons set out in *Decision No. 2157/09I*, this Panel concluded that the worker would have entitlement for mental stress under the WSIA, but for subsections 13(4) and (5) of the WSIA.

[5] The worker submits that subsections 13(4) and (5) of the WSIA and the TMS policy violate the equality guarantee of section 15 of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, Schedule B to the *Canada Act, 1982* (U.K.) 1982, c. 11 (the "*Charter*") and are not justified by section 1 of the *Charter*.

[6] The Ministry of the Attorney General takes the position that the impugned statutory and policy provisions are not discriminatory, as they are consistent with the purposes of the WSIA, specifically, its purpose to provide compensation only for injuries caused by personal injury by accident arising out of and in the course of employment. Counsel for the Attorney General argued that there are no valid and reliable clinical methods for evaluating work-relatedness in individual mental stress cases.

[7] The worker swore an affidavit for the purpose of the *Charter* proceedings. The worker was not cross-examined on her affidavit. Each party also called an expert witness; both expert

[1] Published: 12 October 2004.

witnesses filed reports and were cross-examined on their reports. Tribunal counsel also attended the hearing, assisted with questioning the witnesses, and made legal submissions.

(ii) Issues and decision

[8] The worker asserts that subsections 13(4) and (5) of the WSIA and the TMS Policy violate the equality guarantee provided by subsection 15(1) of the *Charter*, which states:

> ...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 race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

[9] Section 1 of the *Charter* states:

> 1. The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

[10] Therefore, the *Charter* questions to be answered in this appeal are as follows:

1. Do subsections 13(4) and (5) of the WSIA and/or the TMS Policy infringe section 15(1) of the *Charter*?
2. If so, is the infringement a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society under section 1 of the *Charter*?
3. If the impugned statutory provisions and/or policy infringe section 15 of the *Charter*, and that infringement is not justified under section 1 of the *Charter*, what is the appropriate remedy?

[11] The onus is on the claimant to establish an infringement of her equality rights. In the event that the first question is answered in the affirmative, the onus of proving that a limitation on any *Charter* right is justified under section 1 rests upon the party seeking to uphold the limitation, in this case, the Attorney General of Ontario.[2]

[12] The *Charter* challenge in this proceeding pertains to the provision of subsection 13(5) which limits entitlement to mental stress that is "an acute reaction to a sudden and unexpected traumatic event arising out of and in the course of employment." Subsection 13(5) also excludes entitlement for a worker's mental stress "caused by his or her employer's decisions or actions," but that provision of the subsection is not before the Tribunal in this appeal. Where this decision refers to the impugned statutory provisions, or subsections 13(4) and (5) of the WSIA, it does not refer to the exclusion of entitlement for mental stress caused by an employer's decisions or actions contained in subsection 13(5) of the WSIA.

[13] For the reasons set out in this decision, the Panel finds that the impugned statutory provisions and related policy create a distinction based upon the ground of mental disability that is substantively discriminatory, thereby violating the equality guarantee provided by section 15(1) of the *Charter*. We also find that the impugned statutory and policy provisions are not justified under section 1 of the *Charter*. The remedy is that the Panel will not apply the

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[2] "It is for the citizen to establish that his or her *Charter* right has been infringed and for the state to justify the infringement." Per McIntyre J. in *Law Society of British Columbia* v. *Andrews*, [1989] 1 S.C.R. 143; quoted with approval by Iacobucci J. in *Law* v. *Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497 at paragraph 81.

impugned statutory provisions and the TMS policy to this appeal. Accordingly, the worker's appeal is allowed.

(iii) The history of workers' compensation regimes and the legislative framework

[14] Recent jurisprudence has emphasized the importance of considering the larger social, political, and legal context in order to situate the section 15 *Charter* analysis.[3] Accordingly, we will begin with a brief overview of the history and purpose of workers' compensation as well as a review of the broader statutory context.

[15] In *Pasiechnyk* v. *Saskatchewan (Workers' Compensation Board)*, [1997] 2 S.C.R. 890, Sopinka J., for the majority, provided an overview of the history and purposes of workers' compensation schemes in Canada (at paras. 24-27):

> In Canada, the history of workers' compensation begins with the report of the Honourable Sir William Ralph Meredith, one-time Chief Justice of Ontario, who in 1910 was appointed to study systems of workers' compensation around the world and recommend a scheme for Ontario. He proposed compensating injured workers through an accident fund collected from industry and under the management of the state. His proposal was adopted by Ontario in 1914. The other provinces soon followed suit. Saskatchewan enacted *The Workmen's Compensation Act, 1929*, S.S. 1928-29, c. 73, in 1929.
>
> Sir William Meredith also proposed what has since become known as the "historic trade-off" by which workers lost their cause of action against their employers but gained compensation that depends neither on the fault of the employer nor its ability to pay. Similarly, employers were forced to contribute to a mandatory insurance scheme, but gained freedom from potentially crippling liability.
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> [...]
>
> Montgomery J. also commented on the purposes of workers compensation in *Medwid v. Ontario* (1988), 48 D.L.R. (4th) 272 (Ont. H.C.). He stated at p. 279 that the scheme is based on four fundamental principles:
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> (a) compensation paid to injured workers without regard to fault;
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> (b) injured workers should enjoy security of payment;
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> (c) administration of the compensation schemes and adjudication of claims handled by an independent commission, and
>
> (d) compensation to injured workers provided quickly without court proceedings.
>
> I would note that these four principles are interconnected. For instance, security of payment is assured by the existence of an injury fund that is maintained through contributions from employers and administered by an independent commission, the Workers' Compensation Board. The principle of quick compensation without the need for court proceedings similarly depends upon the fund and the adjudication of claims by the Board. The principle of no-fault recovery assists the goal of speedy compensation by reducing the number issues that must be adjudicated. The bar to actions is not ancillary to this scheme but central to it. If there were no bar, then the integrity of the system would be compromised as employers sought to have their industries exempted from the requirement of paying premiums toward an insurance system that did not, in fact, provide them with any insurance.

[3] See, for example, *Ermineskin Indian Band and Nation* v. *Canada*, [2009] 1 S.C.R. 222.

[16] The Supreme Court of Canada has recognized the importance of work to an individual's sense of self-worth. In *Nova Scotia (Workers' Compensation Board)* v. *Martin*, [2003] 2 S.C.R. 504, Gonthier J., speaking for the Court, observed:

> Our Court has consistently emphasized the crucial importance of work and employment as elements of essential human dignity under s. 15(1) of the *Charter*. Indeed, in the words of Bastarache J., "work is a fundamental aspect of a person's life" (*Lavoie*, *supra*, at para. 45).

[17] Dickson C.J. also expressed this concept in *Reference Re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313, paragraph 91 (dissenting): "Work is one of the most fundamental aspects in a person's life, providing the individual with a means of financial support and, as importantly, a contributory role in society."

[18] It is against that social and historical backdrop that we turn to the nature and purposes of the statutory scheme. Section 1 of the WSIA states the purpose of the Act as follows:

> **1.** The purpose of this Act is to accomplish the following in a financially responsible and accountable manner:
>
> 1. To promote health and safety in workplaces and to prevent and reduce the occurrence of workplace injuries and occupational diseases.
> 2. To facilitate the return to work and recovery of workers who sustain personal injury arising out of and in the course of employment or who suffer from an occupational disease.
> 3. To facilitate the re-entry into the labour market of workers and spouses of deceased workers.
> 4. To provide compensation and other benefits to workers and to the survivors of deceased workers.

[19] Section 96 establishes the responsibility of the WSIB to maintain the insurance fund. In Ontario, the workplace insurance scheme is funded through premiums paid by employers covered by the Act. The industries subject to the WSIA are listed in Schedule 1 and Schedule 2 of *Ontario Regulation 175/98*. Employers under Schedule 1 pay premiums calculated based upon their payroll and the premium rate set by the WSIB (subject to rebates and surcharges which are generally based upon claims cost experience). Schedule 2 employers (primarily governments and governmental agencies) are individually liable to pay the benefits under the insurance plan respecting their injured workers (section 90).

[20] The WSIA sets out the following principles of decision:[4]

> **124(1)** The Appeals Tribunal shall make its decision based upon the merits and justice of a case and it is not bound by legal precedent.
>
> **(2)** If, in connection with a claim for benefits under the insurance plan, it is not practicable to decide an issue because the evidence for or against it is approximately equal in weight, the issue shall be resolved in favour of the person claiming benefits.

[21] In summary, the workers' compensation regime is distinct from an action in tort in several important respects:

- The system guarantees security of payment regardless of the employer's financial solvency.

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[4] The WSIB is subject to the same principles of decision, pursuant to section 119 of the WSIA.

- It is unnecessary for a worker to establish an employer's fault in order to qualify for benefits. A worker is entitled under the WSIA when the entitlement criteria are met, regardless of an employer's fault or whether or not an employer could have prevented the injury from occurring.[5]
- The WSIA is also unique in that any agreement between a worker and his or her employer to waive or forego any benefit to which the worker or his survivors are or may become entitled under the insurance plan is void (section 16). This precludes a worker and employer from enforcing the terms of a settlement agreement in which a worker agrees not to pursue a workplace injury claim in exchange for payment by the employer. This distinguishes the workplace insurance scheme from both an action in tort and a labour arbitration proceeding, among other remedies.[6]
- The standard of proof is the balance of probabilities; however, where the evidence is approximately equal in weight, the benefit of the doubt is resolved in favour of the claimant (WSIA sections 119; 124).
- The WSIA also creates a number of presumptions which apply to specific types of claims or accidents, such as Schedule 3 and 4 occupational diseases.
- Section 41 imposes an obligation on employers to re-employ injured workers when certain conditions are met. Section 42 provides that workers are entitled to labour market re-entry services when the employer is unable to offer suitable work.
- The WSIB has a broad investigatory, decision-making, and policy-making authority. Therefore, in contrast with an action in tort, the WSIB has an investigatory role and may assist in the gathering of evidence. This Tribunal is required to apply Board policy pursuant to section 126 of the WSIA.
- It creates a relatively simple administrative scheme that is less time consuming and less formal than the courts. Strict rules of evidence do not apply: the WSIB and this Tribunal may admit such evidence as considered proper, whether or not it would be admissible in a court (WSIA section 132).
- This Tribunal also has the power to request an independent medical opinion and undertake investigation as appropriate in deciding an issue.[7] This Tribunal has held that it has an inquisitorial mandate and the proceedings are non-adversarial.[8]

(iv) The legal framework for entitlement to benefits under the WSIA for claims other than "mental stress"

[22] The WSIA defines the term "accident" in subsection 2(1):

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[5] In limited circumstances, the WSIA does provide for the transfer of costs between Schedule 1 employers (section 84) based upon a finding of negligence. A finding of negligence, however, has no impact on a worker's entitlement to benefits.
[6] This Tribunal has held that the limitation on the right to sue does not extend to a worker's right to pursue a grievance. See for example: *Decision Nos. 53/87* (1987), 5 W.C.A.T.R. 97 and *307/00*, (2000), 55 W.S.I.A.T.R. 91.
[7] Section 134 confers upon the Tribunal the jurisdiction to establish a roster of medical experts.
[8] See, for example, *Decision Nos. 99/91A* (1991), 21 W.C.A.T.R. 79 and *293/88* (1991), 20 W.C.A.T.R. 1.

"accident" includes,

(a) a wilful and intentional act, not being the act of the worker,

(b) a chance event occasioned by a physical or natural cause, and

(c) disablement arising out of and in the course of employment; ("accident")

[23] Until 1963, the definition of "accident" contained in the legislation listed only two types of circumstances: "a wilful and intentional act, not being the act of the workman" and "a fortuitous event occasioned by a physical or natural cause." The term "disablement" was not formally added to the definition of accident until legislative amendments in 1963, although gradual-onset conditions were recognized in practice prior to the formal change to the definition of accident. The 1963 legislative amendment to the definition of accident thereby codified a practice already in place.[9]

[24] WSIB Operational Policy also addresses the definition of accident. According to OPM Document No. 15-02-01, entitled "Definition of an Accident," an accident by "disablement" includes "a condition that emerges gradually over time" and "an unexpected result of working duties."

[25] Section 13 of the WSIA sets out the preconditions for entitlement to benefits under the Act and states in part:

> **13(1)** A worker who sustains a personal injury by accident arising out of and in the course of his or her employment is entitled to benefits under the insurance plan.
>
> **(2)** If the accident arises out of the worker's employment, it is presumed to have occurred in the course of the employment unless the contrary is shown. If it occurs in the course of the worker's employment, it is presumed to have arisen out of the employment unless the contrary is shown.

[26] Occupational disease is specifically addressed in section 15, which provides that in claims for occupational disease, the worker is entitled to benefits under the insurance plan as if the disease were a personal injury by accident and as if the impairment were the happening of the accident. Subsections 15(3) and (4) of the WSIA, together with Schedules 3 and 4 of *Ontario Regulation 175/98*, also create rebuttable and irrebuttable presumptions of entitlement for certain work processes and occupational diseases. Recent amendments to the WSIA have added certain presumptions of entitlement for firefighters.[10]

[27] Subsection 13(1) establishes compensation for personal injury by accident "arising out of" and "in the course of" employment. The presumption created in subsection 13(2) does not apply to an injury by way of disablement, as this branch of the definition of accident states: "disablement arising out of and in the course of employment." As such, in the case of claims for injury by accident by way of disablement, it is necessary to establish that the injury occurred in the course of employment and that it arose out of the employment. The "arising out of" test involves establishing a causal relationship between the work activity and the injury. This Tribunal has adopted principles of legal causation from the courts in determining causation. We will be discussing these principles in more detail later in these reasons.

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[9] See, for example, *Decision No. 940/03*, 2003 ONWSIAT 1281.

[10] WSIA sections 15.1 and 15.2, 2007, c. 3, section 2 and *Ontario Regulation No. 253/07*.

[28] The categorization of claims for psychiatric conditions warrants further explanation. When addressing mental conditions in the workplace insurance context, a distinction is made between so-called "physical-mental" and "mental-mental" claims. The impugned statutory provisions and the TMS policy apply to so-called mental-mental claims. A physical-mental claim is a claim for a psychiatric condition by a worker whose claim for a workplace physical injury has already been recognized. Such claims are not subject to subsections 13(4) and (5) of the WSIA, but rather, are governed by WSIB policy, OPM Document No. 15-04-02, "Psychotraumatic Disability." That policy provides that a worker is entitled to benefits when disability/impairment results from a work-related personal injury by accident. Disability/impairment includes both physical and emotional disability/impairment. The policy goes on to note:

> If it is evident that a diagnosis of a psychotraumatic disability/impairment is attributable to a work-related injury or a condition resulting from a work-related injury, entitlement is granted providing the psychotraumatic disability became manifest within five years of the injury, or within five years of the last surgical procedure.

[29] Therefore, a worker may be granted entitlement for a psychiatric condition where it is shown to be causally related to a workplace physical injury; the limitations on entitlement for "mental stress" do not apply to physical-mental cases.

(v) The statutory and policy framework for "mental stress" claims

[30] For accidents occurring on or after January 1, 1998, subsections 13(4) and (5) of the WSIA introduced pre-conditions for entitlement in "mental-mental" claims, that is, claims for "mental stress":

> (4) Except as provided in subsection (5), a worker is not entitled to benefits under the insurance plan for mental stress.
>
> (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. 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.

[31] As noted above, the exclusion of employment decisions or actions found in subsection 13(5) and the TMS policy is not being challenged in this proceeding.

[32] The predecessor versions of workers' compensation legislation in Ontario did not contain specific provisions addressing entitlement for mental stress. Such claims were decided under the general entitlement provisions and principles of causation, discussed above.

[33] The Panel notes that "mental stress" is not a psychiatric diagnosis. Rather, the WSIA uses a lay term understood in this context to encompass a range of psychiatric conditions that may be attributed to stressful work conditions. The scientific literature on the record and the experts who testified used the term "mental disorder," a general term that includes a range of psychiatric diagnoses, such as major depressive disorder, anxiety disorder, and adjustment disorder. In this decision, we will use the terms "mental stress" and "mental disorder" interchangeably in the lay sense, unless indicated otherwise. The experts agreed that phrases such as "job burnout" lack precision and are unhelpful when reviewing the scientific evidence.

[34] The effect of subsections 13(4) and (5) of the WSIA is that the general definition of accident does not apply to mental stress claims. Subsections 13(4) and (5) do not permit a claim for mental stress that occurs by way of disablement, whereas a "disablement" is specifically included in the definition of "accident" that applies to physical injuries. In claims which are not disablements, subsections 13(4) and (5) set out further requirements governing the type of injuring process which is eligible for entitlement under the WSIA. The event must also be "traumatic," "sudden," and "unexpected" in the worker's line of work, which is not a requirement for physical injuries.

[35] The TMS Policy provides further detail on the adjudication of mental stress claims and states in part:

> **Policy**
>
> A worker is entitled to benefits for traumatic mental stress that is an acute reaction to a sudden and unexpected traumatic event arising out of and in the course of employment.
>
> A worker is not entitled to benefits for traumatic mental stress that is a result of the employer's employment decisions or actions.
>
> **Guidelines**
>
> **Sudden and unexpected traumatic event**
>
> In order to consider entitlement for traumatic mental stress, a decision-maker must identify that a sudden and unexpected traumatic event occurred. A traumatic event may be a result of a criminal act, harassment, or a horrific accident, and may involve actual or threatened death or serious harm against the worker, a co-worker, a worker's family member, or others.
>
> In all cases, the event must arise out of and occur in the course of the employment, and be
>
> - clearly and precisely identifiable
> - objectively traumatic, and
> - unexpected in the normal or daily course of the worker's employment or work environment.
>
> This means that the event
>
> - can be established by the WSIB through information or knowledge of the event provided by co-workers, supervisory staff, or others, and
> - is generally accepted as being traumatic.
>
> Sudden and unexpected traumatic events include
>
> - 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 harassment that includes physical violence or threats of physical violence (e.g., the escalation of verbal abuse into traumatic physical abuse)
- being the object of 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).

The worker must have suffered or witnessed the traumatic event first hand, or heard the traumatic event first hand through direct contact with the traumatized individual(s) (e.g., speaking with the victim(s) on the radio or telephone as the traumatic event is occurring).

[36] The TMS policy also provides guidance on the interpretation of an "acute reaction":

An acute reaction is a significant or severe reaction by the worker to the work-related traumatic event that results in a psychiatric/psychological response. Such a response is generally identifiable and must result in an Axis I Diagnosis in accordance with the Diagnostic and Statistical Manual of Mental Disorders (DSM-IV).

An acute reaction is said to be immediate if it occurs within four weeks of the traumatic event.

An acute reaction is said to be delayed if it occurs more than four weeks after the traumatic event. In the case of a delayed onset, the evidence must be clear and convincing that the onset is due to a sudden and unexpected traumatic event, which arose out of and in the course of the employment.

Workers who develop mental stress gradually over time due to general workplace conditions are not entitled to benefits.

[37] The TMS policy sets out diagnostic requirements for entitlement. The diagnosis may include, but is not limited to

- acute stress disorder
- post-traumatic stress disorder
- adjustment disorder, or
- an anxiety or depressive disorder,

[38] The TMS policy also addresses entitlement for mental stress due to "cumulative effect":

Due to the nature of their occupation, some workers, over a period of time, may be exposed to multiple, sudden and unexpected traumatic events resulting from criminal acts, harassment, or horrific accidents. If a worker has an acute reaction to the most recent unexpected traumatic event, entitlement may be in order even if the worker may experience these traumatic events as part of the employment and was able to tolerate the past traumatic events. A final reaction to a series of sudden and traumatic events is considered to be the cumulative effect.

The WSIB recognizes that each traumatic event in a series of events may affect a worker psychologically. This is true even if the worker does not show the effects until the most recent event. As a result, entitlement may be accepted because of the cumulative effect, even if the last event is not the most traumatic (significant).

In considering entitlement for the cumulative effect, decision-makers will rely on clinical and other information supporting that multiple traumatic events led to the worker's current psychological state. Also, there may be evidence showing that each event had some effect or life disruption on the worker, even if the worker was not functionally impaired by the effect or life disruption.

[39] The TMS Policy thereby clarifies that the mental stress provisions of the WSIA encompass mental stress conditions attributed to exposure to multiple traumatic events, but exclude chronic stress arising from events of a non-traumatic nature. It is still necessary for a claimant to establish exposure to sudden and unexpected traumatic events, but, pursuant to the TMS policy, the claimant may still be granted entitlement if the mental stress condition arises after a series of sudden and unexpected traumatic events.

[40] The Tribunal's decision on the merits of this appeal in *Decision No. 2157/09I* discusses how the subsections 13(4) and (5) of the WSIA and the TMS policy have been interpreted by this Tribunal and provides an example of their application to a claim for mental stress.[11]

(vi) Overview of the evidence on the *Charter* issue

[41] The Attorney General called Dr. William Henry Gnam, psychiatrist, fellow of the Royal College of Physicians and Surgeons of Canada.[12] He is an Assistant Professor of the Department of Psychiatry of the University of Toronto and formerly a Clinician-Scientist and Staff Psychiatrist at the Centre for Addiction and Mental Health (CAMH) in Toronto. His scientific qualifications include a Master's Degree in Clinical Epidemiology and a PhD in Health Economics from Harvard University. His clinical and research work has focused on the relationship between mental disorders, disability, and labour market outcomes, as well as the scientific basis for clinical decision-making. At the time of the hearing, Dr. Gnam had recently accepted a position with the City of Toronto as an on-site psychiatrist. Dr. Gnam's relevant publications include a book chapter addressing mental stress and workers' compensation.[13] Counsel for the Attorney General filed an affidavit sworn by Dr. Gnam on March 9, 2012, and an additional affidavit sworn on April 3, 2013, which attached an Addendum Report dated October 25, 2012.

[42] The worker's representative called Dr. Stephen Alfred Stansfeld, Professor of Psychiatry at the Wolfson Institute of Preventive Medicine Barts and the London School of Medicine and Dentistry, and Honorary Consultant Psychiatrist, East London and the City NHS Trust, specializing in psychiatric rehabilitation.[14] He has a longstanding interest in work and health, particularly work and mental health. He worked with Professor Sir Michael Marmot in setting up the longitudinal Whitehall Study II of UK Civil Servants. He was co-director of the Whitehall II Study and has carried out a number of studies examining the effects of the psychosocial work environment on health. Dr. Stansfeld has written many papers from the Whitehall II Study involving work and mental health and work and sickness absence, as outlined in his *curriculum vitae*. Counsel for the worker submitted a report prepared by Dr. Stansfeld, dated August 3, 2012. Dr. Stansfeld based his report upon a review paper he published in 2006,[15] as well as a literature search of relevant articles on the psychosocial work environment and mental health.

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[11] See *Decision No. 2157/09I*, at paragraphs 61-71.

[12] Although the claimant bears the burden of establishing the *Charter* violation, the parties agreed that Dr. Gnam would testify first, due to the schedule of availability of the worker's expert witness. The Panel had previously permitted the request of counsel for the worker to file reply evidence in response to Dr. Gnam's report, including an expert report.

[13] Gnam WH. Psychiatric Disability and Workers' Compensation in *Injury and the New World of Work*. UBC Press 2000. Edited by Terrence Sullivan. (Also referred to as "Dr. Gnam's book chapter").

[14] Dr. Stansfeld testified via teleconference upon the consent of the parties.

[15] Stansfeld SA and Candy B. Psychosocial work environment and mental health – a meta-analytic review. Scand J Work Environ Health 2006; 32 (6, special issue): 443-462. ("Stansfeld and Candy 2006.")

[43] Both witnesses were cross-examined on their affidavit/report. Representatives for both parties sought to undermine the credentials or background of the opposing witness. For example, counsel for the Attorney General suggested that Dr. Stansfeld's clinical practice is currently limited and counsel for the worker suggested that few of Dr. Gnam's publications addressed causation and his practice at CAMH was largely comprised of WSIB referrals (implying a lack of objectivity in WSIB matters). The Panel finds that these points did not significantly undermine the credibility or objectivity of either of the witnesses. In the Panel's view, both experts are well-qualified to testify regarding the epidemiological evidence of the causal role of the workplace in the development of mental disorders, the diagnosis of mental disorders, and the ability of clinicians to determine causation of a patient's mental disorder. We note, however, that Dr. Stansfeld has published more extensively and more recently on the association between various types of mental disorders and the workplace.

[44] The expert evidence and testimony focused on two key points:

- The strength of the association between "job strain" and the development of mental disorders, as demonstrated in the epidemiology; and
- Whether clinicians are able to accurately determine whether a patient's mental disorder is attributable to workplace stress.

[45] As Dr. Gnam stated during his testimony, he and Dr. Stansfeld agree for the most part; they do agree that the epidemiology demonstrates an association between job strain and mental disorders, although they disagreed as to how to characterize the strength of the association. There was also a difference of opinion as to whether clinicians are able to accurately determine whether a patient's mental disorder is causally related to workplace stressors.

[46] Much of the literature addressed in the evidence before us focused on the association between "job strain" and the development of mental disorders. "High job strain" refers to work which involves a combination of high psychological demands and low decision latitude.[16] The job strain model is based upon an earlier work by Karasek.[17] "Effort-reward imbalance" is another term used in the scientific literature. Effort-reward imbalance is described as follows:[18]

> In this model, work offers opportunities for the self to gain esteem, efficacy, and integration. If there is an imbalance in this expected exchange and workers do not receive esteem, efficacy, and integration, then psychological distress occurs with physiological arousal. Thus the combination of putting in high effort at work, which may be both intrinsic effort including innate competitiveness and hostility, together with high extrinsic work demands, similar to Karasek's job demands, and receiving, by implication, in return, little reward in terms of salary, promotion, or esteem is a powerful risk factor for ill health.

[47] The Panel notes that the individual case before us and the majority of mental stress claims which have come before this Tribunal do not necessarily fit within the parameters of job strain or effort-reward imbalance, as these terms have been defined in the literature. Many mental stress claims, such as the instant case, involve some element of hostile interactions in the

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[16] See, for example, Stansfeld and Candy 2006, at p. 443.
[17] Karasek RA. Job demands, decision latitude, and mental strain: implications for job redesign. Admin Sci Q 1979; 24:285-309. This work was referenced in several of the reports in the evidence before the Panel.
[18] Stansfeld and Candy 2006, at p. 444.

workplace or alleged harassment. There is some literature in this area, which we will address later in these reasons.

(a) Dr. Gnam's evidence

[48] In his affidavit, Dr. Gnam referred to his book chapter, in which he concluded that credible scientific evidence suggests that disabling mental conditions may arise from workplace factors, but the practical uncertainties involved in clinical adjudication of individual claims, including the risk of erroneously concluding that work-related factors have contributed to the condition, imply that restrictions on the compensability of stress claims are necessary. Dr. Gnam provided background to clinical evaluation, and noted that the categorization of mental stress claims used by workers' compensation boards only loosely corresponds to terminology used by most psychologists and psychiatrists. The most commonly used classification system for diagnosis is the Diagnostic and Statistical Manual of Mental Disorders, fourth edition (DSM-IV), published by the American Psychiatric Association (1994).[19]

[49] In his affidavit, Dr. Gnam reviewed the scientific literature released since the publication of his book chapter in 2001. Dr. Gnam reported that the robust scientific evidence published during that period "suggests that the contribution of workplace factors to the genesis of major depression is minor." Dr. Gnam relied primarily upon two long-term studies of twins in support of this conclusion: "Kendler 2002"[20] and "Kendler 2006"[21] (referred to together as the "Kendler twin studies"). Dr. Gnam reported that these studies have demonstrated that the maximum causal proportion of major depression attributable to adverse work exposures is low, and that the majority of causal weight is attributable to numerous other factors, such as genetic risk, past history of depression, lifetime trauma, marital problems in the preceding year, or exposure to numerous other stressful life events (apart from adverse work exposures) in the preceding year. Dr. Gnam notes that these scientific results are representative of the population of adult males and females, but they do not facilitate or allow the identification of relevant causal factors for any individual.

[50] In Dr. Gnam's opinion, the risk of over-valuing work-related causal factors is heightened by the fact that work factors may be more readily reported by the patient to the clinician, whereas more important genetic and other factors, which often are unknown or not reported, may not be directly discerned by the evaluating clinician. In Dr. Gnam's view, there are two limitations when clinicians are asked to opine upon causation for chronic stress. The first is that there is a lack of standardization of terms, such as "burnout" or mental stress. The second limitation is that there are no "reproducible and valid clinical methods to adjudicate the relative causal importance of multiple factors that might be relevant for any specific individual who has developed a disabling mental disorder."[22] Dr. Gnam states that treating mental stress claims in the same manner as physical claims "would place upon the employer-funded insurance plan the costs of some impairments that they could not act in good faith to prevent."[23]

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[19] The Panel notes that the DSM 5 has since been released.
[20] Kendler KS, Gardner CO, Prescott CA. Toward a Comprehensive Developmental Model for Major Depression in Women. Am J Psychiatry 159:7, July 2002.
[21] Kendler KS, Gardner CO, Prescott CA. Toward a Comprehensive Developmental Model for Major Depression in Men. Am J Psychiatry 163:1, January 2006.
[22] Gnam affidavit, para. 20.
[23] Gnam book chapter, *supra*, at p. 323; Gnam affidavit, para. 23.

[51] Dr. Gnam distinguishes chronic mental stress claims from mental disability arising from acute mental stress, reporting that there is robust scientific evidence that exposure to traumatic events can precipitate mental disorders such as Post-Traumatic Stress Disorder.

[52] Dr. Gnam testified that there is no dispute on the existence of a relationship between workplace stress and mental disorder, but with regard to the strength of the relationship. There is a weak association and the studies are flawed in ways that cannot be prevented, particularly with regard to selection bias. Selection bias is the process whereby workers who are more susceptible to mental disorders either chose or were assigned to jobs with higher strain.[24] In Dr. Gnam's view, selection bias undermines the strength of the results of the studies which show an association between job strain and mental disorders.

[53] Dr. Gnam testified that he did not agree with Dr. Stansfeld's conclusion, based upon Stansfeld and Candy 2006, *supra*, that there was evidence of "robust" relationships for job strain and common mental disorder based upon two studies. In Dr. Gnam's view, one study did not conclude that there was any association and the null hypothesis was not disproved; in the other, the increased risk found was derived from combined data of two studies, a pooled meta-analysis. Dr. Gnam also discussed the literature cited by Dr. Stansfeld and his view that the magnitude of the association was not strong; the strength of the association found was further undermined by wide confidence intervals in the results. In his opinion, the evidence of an association between job strain and mental disorder was not robust.

[54] With regard to the studies that found a strong relationship between workplace bullying and mental disorders,[25] Dr. Gnam testified that the way the exposure was defined could not rule out an acute traumatic event.

[55] Referring to the Kendler twin studies, Dr. Gnam noted they showed that 9% of overall adverse events were work-related. There was a high risk of depression after traumatic events, on the scale of five to ten orders of magnitude; therefore, the association with workplace events was relatively low by comparison.

[56] Dr. Gnam testified that clinicians are not trained to answer questions of causation and this is not how treatment decisions are made. Treatment decisions have nothing to do with causation; causation is rarely important to treatment decisions. Clinicians do not have a sound basis to reach conclusions about causation.

[57] Dr. Gnam discussed the strength of the association between acute traumatic events and the onset of mental disorder at some length. For example, there is a 30-fold risk of mental disorder after an assault. In Dr. Gnam's words, the science is "airtight."

[58] Dr. Gnam's Addendum Report (p. 5) notes that "epidemiological estimates of population attributable risk cannot be used in the adjudication of an individual case." During his testimony, he agreed that this statement would apply to all epidemiology, not just as it relates to mental disorders.

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[24] Gnam book chapter, *supra*, at p. 316.

[25] For example, Kivimäki M, Virtanen M, Vartia M *et al.* Workplace bullying and the risk of cardiovascular disease and depression. Occup Environ Med 2003; 60: 779-783. ("Kivimäki 2003")

[59] Dr. Gnam's affidavit (paragraph 20) addresses what he identifies as the second limitation in the adjudication of chronic stress claims: "no reproducible and valid clinical methods have been developed to adjudicate the relative causal importance of the multiple causal factors that might be relevant for any specific individual who has developed a disabling mental disorder." In his view, "once the list of candidate factors is identified, there is no accepted or validated method for assigning attribution among the factors, and the typical approach is to assume that all identified factors are significant." Dr. Gnam was asked whether this statement also held true for other, non-mental conditions. In response, Dr. Gnam acknowledged that this was outside his expertise. He did not want to do injustice to other fields by speculating as it was so variable.

[60] Dr. Gnam was questioned about the following passages from his book chapter, *supra*, (at pp. 316-317):

> Job strain has also been studied as a risk factor for the development of mental disorders (and the disability induced by mental disorders). Using nationally representative samples of the male workforce in Sweden and the United States (Karasek 1979), and large samples of male and female workers in Germany and Finland (Braun and Hollander 1988; Kauppinen-Toropainen and Hanninen 1981), mental disorders such as depression were reported to occur much more frequently in jobs with high strain. These three studies share some results and design features that suggest a causal relationship between job strain and mental disorder. They all reported a strong association (relative risk [RR] of 1.5 or greater) between job strain and mental disorder and some evidence of gradient (higher reported job strain was associated with higher rates of mental disorder). Moreover, the psychiatric diagnostic instruments used were adequate to define mental disorders using non-professional interviewers. However, these studies also share one critical limitation in establishing causation. None of them adequately controlled for selection bias – the process whereby workers more susceptible to mental disorders either chose or were assigned to jobs with higher strain. Multivariate regression analyses are inadequate controls for bias when selection occurs on the basis of respondent characteristics that were unobserved by the study. In studies involving psychiatric disorders, selection on the basis of unobserved characteristics appears very plausible.
>
> Job strain predicted short-term absence due to mental disorder in the Whitehall II study of English civil servants (Stansfeld et al. 1997; Fletcher 1988). This study also found that lower decision authority, lower work skill discretion, higher work demands and lower levels of social support were all associated with higher levels of mental disorder. Conflicting work demands, and the threats of job loss or position change were also associated with higher levels of mental disorder. The Whitehall II study shares the favourable design features noted in the three studies above. A further desirable feature is longitudinal follow-up, which allows the temporal sequence of job strain and mental disorder to be determined. A plausible temporal sequence is supportive of causal relation (and in the Whitehall II study "exposure" to various job characteristics clearly preceded the occurrence of mental disorder), but the Whitehall II study did not address the problem of selection bias described above.
>
> These studies are mutually consistent and add some scientific credibility to the hypothesis that chronic non-traumatic workplace stress causes mental disorders. The strength of the evidence is not completely conclusive, mainly because these studies fail to account for selection bias in their analyses.

[61] Specifically, Dr. Gnam was asked about the statement that the studies observed a "strong association" between job strain and mental disorders. Dr. Gnam testified that the studies recorded it as a strong association using relative risk, which is different from an odds ratio.

[62] During his testimony, Dr. Gnam's attention was drawn to the following statement in his book chapter (p. 318):

> In summary, scientific research from several sources strongly supports the view that certain mental aspects of the workplace may lead to medical illness, mental disorder, and other disabling mental conditions. Collectively, the studies cited above provide as strong or stronger evidence of workplace causation than exists for several industrial diseases.

[63] Dr. Gnam testified that there is a consistent relationship and a sufficient number of studies establish causation. The magnitude of the association is how much of the disorder is related to the exposure. Dr. Gnam testified that he still stands by this statement.

[64] Dr. Gnam's chapter states that the evidence does not necessarily assist in the evaluation of work-related causation for any individual mental disability claim. Dr. Gnam was asked whether it was still possible to make such a determination. Dr. Gnam testified that an increase in risk does not translate to an individual case; it does not prove causation for any individual, which is the complicated part. It also does not rule out a workplace events as a causal factor. The difficulty is that there is no way to rule out genetic and other factors, which are relevant in the development of depression, and cannot be measured. It makes it harder to make definitive statements about causation.

[65] Dr. Gnam estimated that the odds ratio for the association between job strain and mental disorder was in the range of 1.0 to 1.5 or 1.8. In his view, the numbers are too high due to selection bias. Selection bias did not invalidate the association, but weakens the relationship. Dr. Gnam's attention was drawn to Dr. Stansfeld's report stating that there was robust evidence of an association between job strain and mental disorder. In Dr. Gnam's view, "robust" means a lot of evidence. He felt that Dr. Stansfeld's conclusion (Stansfeld and Candy 2006, *supra*) was optimistic because it was only based upon two studies. In one of the studies, the null hypothesis was not disproved. The odds ratio of 1.82 was based upon the pooled results in the meta-analysis. Lamontagne *et al.* 2008 also used that figure in the Australian study.[26]

[66] During his testimony, Dr. Gnam's attention was drawn to the studies of the association between workplace bullying and mental disorder, such as Kivimäki 2003, *supra*. That study described the measures used to identify bullying (p. 779):

> Bullying was measured by the following question:
>
> "Workplace bullying refers to a situation where someone is subjected to social isolation or exclusion, his or her work and efforts are devalued, he or she is threatened, derogatory comments are made about him or her in his or her absence, or other negative behavior that is aimed to torment, wear down, or frustrate the victim occur. Have you been subjected to such bullying?

[67] The Kivimäki 2003 study found an odds ratio of 4.2 (95% CI 2.0 to 8.6) for the association between prolonged bullying and incident depression, after adjustment for sex, age, and income. Dr. Gnam felt that the way the exposure was measured could not rule out acute traumatic exposure; he felt that some of the association was related to acute traumatic exposure. Dr. Gnam characterized bullying as a single or recurrent episode of intimidating behaviour. Dr. Gnam testified that the bullying literature talks about physical bullying as one kind of bullying. Dr. Gnam also felt that selection bias applied to the bullying studies because the individuals who are prone to mental disorders may also be perceived as weak and vulnerable, implying that they are more likely to be bullied.

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[26] Lamontagne AD, Keegel T, Vallance D, *et al.* Job strain-attributable depression in a sample of working Australians: Assessing the contribution to health inequalities. BMC Public Health 2008; 8:181. ("Lamontagne *et al.* 2008")

[68] Dr. Gnam acknowledged that there is a risk of underinclusion in limiting mental stress entitlement to acute traumatic events based upon the epidemiology. There could be individual cases that do not meet the statutory requirement where the workplace is an important cause of a mental disorder. Usually the cases are complicated and there are multiple causative factors. Clinicians may employ psychometric tests or pencil and paper tests for the diagnosis of mental disorders, but there is no objective test relevant to causation.

(b) Dr. Stansfeld's evidence

[69] Dr. Stansfeld stated in his report that there have been a considerable number of papers on different aspects of work and mental health which have greatly added to the evidence base for the contribution of psychosocial work factors to mental health, including a paper he co-authored (Stansfeld and Candy, 2006, *supra*) as well as one by Netterstrom and colleagues in 2008.[27] Dr. Stansfeld reported that his review of prospective longitudinal epidemiological studies of psychosocial work characteristics and mental health found robust relationships for job strain and common mental disorder and effort reward imbalance and common mental disorder.

[70] Dr. Stansfeld observed that one notable omission from the evidence is the impact of violence and bullying at work on mental health, although there is one study in health care workers that shows a dose-response relationship between the number of occasions of bullying and the subsequent onset of depression (Kivimäki 2003, *supra*); these results were confirmed in another study (Rugulies 2012).[28]

[71] With regard to the Kendler twin studies cited by Dr. Gnam, Dr. Stansfeld noted that they are important papers marshalling the evidence on genetics and a wide range of potential environmental factors on depression across the lifecourse separately in women and men. In Dr. Stansfeld's view, this approach was "broad brush" and cannot be considered to do justice to the impact of work on health. The twin studies in both men and women included measures of stressful life events and difficulties in the last year. Among these events they include job loss and a category called "serious difficulties at work." The independent effects of work were not measured as the results were presented in terms of difficulties in the last year reflected in the sum of all stressful events experienced in the year prior to the interview. The Kendler 2002 paper goes on to say quantitatively, "the three strongest risk factors were dependent and independent stress life events in the last year and neuroticism." Thus, according to Dr. Stansfeld, rather than a minor component, the Kendler twin studies suggest that last year life events have an important relationship with the onset of depression. Nevertheless, they do not refer to the separate impact of work-related events. Dr. Stansfeld also pointed out limitations in the methods used, which were acknowledged by the authors.

[72] In his report, Dr. Stansfeld stated his disagreement with Dr. Gnam's opinion that the "maximum causal proportion of major depression attributable to work exposures is low." While acknowledging that there were few studies that attempted to assess the contribution of work stressors to mental health in a systematic fashion, Dr. Stansfeld referred to a study of working Australians (Lamontagne *et al.* 2008, *supra*), in which recognized measures used in epidemiological analyses to measure the population attributable risk were used to estimate the

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[27] Netterstrom B, Conrad N, Bech P *et al.* The Relation between Work-related Psychosocial Factors and the Development of Depression. Epidemiol Rev 2008; 30: 118-132. ("Netterstrom 2008")

[28] Rugulies R, Madsen IE, Hjarsbech PU *et al.* Bullying at work and onset of a major depressive episode among Danish female eldercare workers. Scand J Work Environ Health. 2012;38(3):218-227.

proportion of depression in the population sample that could be attributed to job strain. This was based on an adjusted odds ratio of 1.82[29] for job strain in relation to depression obtained from a published meta-analysis and combined with exposure prevalence data from the Australian state of Victoria. Their findings suggested that the population attributable risk for depression in relation to overall job strain was 13.2% for males (95% CI, 1.1-28.1) and 17.2% for females (95% CI, 1.5-34.9).

[73] Dr. Stansfeld addressed the issue of selection bias in the studies, which means that workers who are more susceptible to mental disorder either choose or are assigned to jobs with higher job strain; selection bias may mean that any association observed between job strain and mental disorder is likely to be due to a prior history of psychiatric disorder and thus a spurious association. Dr. Stansfeld and his colleagues had an opportunity to test this hypothesis in analyses using the British 1958 Birth Cohort.[30] They had access to measures of psychological distress in childhood and youth at ages 7, 11, and 16, and in early adulthood at 23 and 33 years. They were thereby able to test the associations between work characteristics and psychological disorder at age 45 and then adjust for psychological disorder at earlier stages in the lifecourse. Even after adjustment, the odds ratios for work stressors remained highly significant, suggesting that selection processes do not explain the association of work stressors and psychiatric disorder.

[74] Dr. Stansfeld's report also cited other studies which used different methods to minimize the effects of selection bias. The Whitehall II Study[31] examined changes in work stressors and risk of sickness absence and found that adverse changes in work characteristics were associated with increased levels of sickness absence. Additionally, another study found that changes from employment with low job strain to employment with high job strain in Canadian data were associated with an increased risk of major depression.[32] According to Dr. Stansfeld, the results of this study would not be undermined by selection bias as it examined the results of a change in the nature of employment.

[75] Dr. Stansfeld reported that one aspect of the research that had not been certain until more recent studies was the relative magnitude of risk of work-related factors compared to non-work related factors in the aetiology of anxiety and depressive disorders. One study suggested that "both stress at work and outside of work contribute to the anxiety and depressive disorders experienced by healthcare staff."[33] In a nationally representative study of the adult population, Dr. Stansfeld and his colleagues found that job strain, high effort reward imbalance and lower levels of social support at work were independent predictors of common mental disorder in multivariate models taking into account non-work stressors.[34]

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[29] Although Dr. Stansfeld's report states a figure of 1.282, we understand this to be a typographical error, as Stansfeld and Candy 2006 and Lamontagne *et al.* 2008 cite a figure of 1.82; this is also the figure that Dr. Stansfeld referred to in his testimony.

[30] Stansfeld SA, Clark C, Caldwell T, *et al.* Psychosocial work characteristics and anxiety and depressive disorders in midlife: the effects of prior psychological distress. Occup Environ Med 2008; 65:634-642. ("Stansfeld and Clark 2008").

[31] Head J, Kivimäki M, Marikainen P, *et al.* Influence of change in psychosocial work characteristics on sickness absence: the Whitehall II study. J Epidemiol Community Health 2006; 60:55-61. ("The Whitehall II Study").

[32] Wang J, Schmitz N, Dewa C *et al.* Changes in Perceived Job Strain and the Risk of Major Depression: Results from a Population-based Longitudinal Study. Am J Epidemiol 2009;169:1085-1091. ("Wang *et al.* 2009").

[33] Weinberg A, Creed F. Stress and psychiatric disorder in health care professionals and hospital staff. The Lancet; Feb 12, 2000;355,9203; ProQuest Research Library, p. 533 (at p. 533). ("Weinberg and Creed 2000").

[34] Clark C, Pike C, McManus S *et al.* The contribution of work and non-work stressors to common mental disorders in the 2007 Adult Psychiatric Morbidity Survey. Psychological Medicine (2012), 42, 829-842. ("Clark 2012").

[76] Dr. Stansfeld disputed Dr. Gnam's suggestion that psychiatric clinicians are not taught to provide judgments about the causation of psychiatric disorders. Dr. Stansfeld stated in his report that psychiatric training at both undergraduate and postgraduate levels gives a lot of attention to learning about the causes of mental disorders, as it may aid in determining rational treatments. If environmental factors are implicated in causation, then there may be scope for modifying those environmental factors or removing exposure to potentially harmful exposures in order to treat the disorder or remove exposure to factors that could be maintaining a disorder. He states that psychiatrists are taught to take careful histories of their patients' current conditions and life histories in order to make a formulation of the case, a diagnosis, and management plan. Estimates of the magnitude of the risk attributable to work stress cannot be applied directly to individual cases where the relative weighting of individual susceptibility and work and non-work related factors may differ, but they can be used as a guide to suggest the impact of work-related factors may not be trivial. In Dr. Stansfeld's view, the relative weight placed on different potential causal factors by the clinician depends partly on the research evidence of the likely contribution of each factor to the causation of psychiatric disorder and partly on the experience and judgment of the clinician.

[77] During cross-examination, Dr. Stansfeld was questioned about suggested weaknesses in the various studies he cited, such as the number of studies used in the meta-analyses and the wide confidence intervals. Dr. Stansfeld stated that the small number of studies was reflected in the wider confidence interval, but it still showed a statistically significant effect of job strain and effort-reward imbalance. He disagreed with the suggestion that selection bias could create a spurious association. Although selection bias may explain some of the relationship, there was still an association between job strain and mental disorder. Selection bias was less likely to be a factor in longitudinal studies where the effects were measured out ahead of time. Dr. Stansfeld maintained his view that clinicians are capable of attributing causation. Dr. Stansfeld testified that the strength of the association between job strain and the onset of mental disorders was moderate, and resisted the suggestion that it was something less than moderate due to selection bias or other factors.

(vii) Summary of the submissions

(a) The worker's position

[78] Both Mr. Donaldson and Ms. Sadoway made submissions on behalf of the appellant worker. Mr. Donaldson delivered the submissions addressing the worker's position on the interpretation of the *Charter* jurisprudence and how it applies to this case. Ms. Sadoway made submissions reviewing Tribunal jurisprudence and the evidence in this worker's case.

[79] Mr. Donaldson framed the issue as how the WSIA treats persons with mental disabilities. He submitted that they are treated differently from persons with physical disabilities through subsections 13(4) and (5) and the TMS Policy. The impugned statutory provisions and the TMS policy create a burden that only applies to those without physical disabilities.

[80] The worker's representative reviewed the relevant jurisprudence on the interpretation of section 15 of the *Charter*. He submitted that the jurisprudence cautions against being overly formalistic in the section 15 *Charter* analysis, as noted in *R.* v. *Kapp*, [2008] 2 S.C.R. 483 ("*Kapp*") and *Withler* v. *Canada (A.G.)*, [2011] 1 S.C.R. 396 ("*Withler*").

[81] The worker's representative submitted that the circumstances of this case were comparable to *Plesner* v. *British Columbia Hydro and Power Authority*, 2009 BCCA 188 (CanLII) ("*Plesner*"). In that case, a majority of the British Columbia Court of Appeal concluded that a policy adopted by the British Columbia Workers' Compensation Board was discriminatory in that it limited entitlement for mental stress to cases such as hostage-taking, robbery, and death threats. Mr. Plesner suffered a mental stress reaction to a potential gas leak in his workplace. In the result, it was found that his claim was not excluded by the statutory requirement that the mental stress must be an "acute reaction to a sudden and unexpected traumatic event arising out of and in the course of the worker's employment," but rather, the related policy provisions, which listed examples of traumatic events including a horrific accident; an armed robbery; a hostage-taking; an actual or threatened physical violence; an actual or threatened sexual assault; and, a death threat. In the circumstances of Mr. Plesner's case, it was unnecessary for the Court to consider the "chronic stress" provisions (paragraph 163) as the Court did not have evidence regarding chronic stress in that case. Mr. Donaldson submitted that, in this case, the evidence shows that there is an association between chronic stress and the onset of mental disorders. Counsel for the worker submitted that Dr. Stansfeld's evidence was more persuasive than that of Dr. Gnam. It was submitted that the evidence shows that all claims can be treated equally and adjudicated reliably and credibly.

[82] The WSIA excludes mental stress claims from entitlement in subsection 13(4), and then creates an exception to the exclusion in subsection 13(5). Subsection 13(5) allows entitlement only for mental stress claims which are an acute reaction to a sudden and unexpected traumatic event arising out of and in the course of employment. On behalf of the worker, it was submitted that this creates an extra hurdle for persons with mental disabilities and creates a risk of no benefits at all.

[83] In the worker's representative's submission, the WSIA reinforces negative stereotypes and further marginalizes persons with disabilities. There is a heightened suspicion of the reality of their conditions and how they occurred. The worker's representative submitted that this additional burden creates a distinction which violates the equality guarantee of section 15 of the *Charter*. Such a distinction can only be justified if it does not perpetuate disadvantage or stereotyping. On their face, these provisions create a direct distinction. The only justification is the implication that it is impossible to prove causation with certain mental injuries, as suggested by the Attorney General. The Attorney General suggests that a mental disability cannot be attributed to the workplace unless there is a traumatic event as defined by policy.

[84] The worker's representative submitted that there were problems with this justification. This distinction is only justified if it is impossible to show that there is a causal connection, but it has only been shown that it is difficult, rather than impossible. Dr. Gnam agreed that the statutory provision creates a risk of underinclusion; therefore, the law denies benefits to those who are deserving.

[85] The worker's representative submitted that the Attorney General's argument regarding the difficulty of proving causation was not valid, as the causation of both physical and non-physical disabilities can be difficult and complex to establish. Yet, only one group is denied entitlement: those with mental disabilities.

[86] The literature establishes a relationship between acute traumatic events and mental disorders; the evidence also establishes a causal relationship between chronic stress and mental disorder. A careful review of Dr. Gnam's evidence indicates that this is not in dispute.

[87] The worker's representative submitted that subsections 13(4) and (5) of the WSIA do not meet the needs, capacities and circumstances of persons with mental disabilities. Their needs include access to workers' compensation and all related benefits; they do not need an additional hurdle to prove entitlement. The availability of alternative remedies, such as litigation, does not reduce discrimination. The historic trade-off established not only compensation for workplace injuries, but also access to the specific scheme. Another feature of the scheme is that a worker does not have to prove fault to qualify for benefits. In foregoing higher compensation, the worker also has access to an expert Tribunal, security of payment, and a simpler process.

[88] The WSIA and Board policy constitute direct discrimination on the basis of mental disability which cannot stand. The violation of section 15 is not saved by section 1 of the *Charter*.

[89] By way of remedy, the worker seeks a declaration that subsections 13(4) and (5) of the WSIA and the TMS policy are invalid and do not apply to her claim. As noted above, the focus of the argument is on the restriction of mental stress entitlement to "an acute reaction to a sudden and unexpected traumatic event." The restrictions on entitlement for mental stress attributed to employer decisions or actions are not before the Tribunal in this appeal. The worker seeks a decision granting initial entitlement for mental stress.

[90] Counsel for the worker cited Professor Hogg's constitutional law text on the meaning of substantive equality, which encompasses both direct and indirect discrimination.[35] Here, there is direct inequality, rather than adverse effect discrimination. *Withler* creates a two-step test for establishing an infringement of section 15:

- A distinction based upon an enumerated or analogous ground;
- Substantive discrimination: does the distinction create a disadvantage by perpetuating disadvantage or stereotyping?

[91] Counsel for the worker submitted that Professor Hogg expressed the view that the "human dignity" factor introduced in *Law* v. *Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497, is problematic in that it is vague, confusing, and burdensome to equality claimants. It was described as confusing as it is unclear whether it leaves any work for section 1 of the *Charter*.[36]

[92] Counsel for the worker submitted that, until recently, the focus was on identifying the right comparator. The comparator should be the same as the claimant group except for the personal characteristic alleged as the basis for discrimination. For example, in *Granovsky* v. *Canada (Minister of Employment and Immigration)*, [2000] 1 S.C.R. 703, the identification of a comparator was considered crucial.

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[35] P.W. Hogg, *Constitutional Law of Canada*, vol. 2, Fifth Edition Supplemented (Toronto: Carswell, 2007) at pp. 55-15 to 55-16.
[36] *Ibid.*, at p. 55-29.

[93] Counsel for the worker characterized *Auton* v. *British Columbia (Attorney General)*, [2004] 3 S.C.R. 657 ("*Auton*"), as marking a high point in the jurisprudence employing a comparator analysis. In *Auton* (at paras. 51-53), the Court summarized three key principles from *Hodge* v. *Canada (Minister of Human Resources Development)*, [2004] 3 S.C.R. 357:

1. The identification of the correct comparator is crucial to the section 15 analysis because it permeates every stage of the analysis.
2. While the starting point is the comparator chosen by the claimants, the Court must ensure that the comparator is appropriate and should substitute an appropriate comparator where the choice of the claimants is found to be unsuitable.
3. The comparator group must mirror the characteristics of the claimant or claimant group relevant to the benefit or advantage sought, except for the personal characteristic related to the enumerated or analogous ground raised as the basis for the discrimination.

[94] In *Withler*, the Court placed less emphasis on a comparator analysis, cautioning against the use of a narrow and single comparator. Counsel for the worker submitted that a comparator is still important in drawing a distinction for the purposes of section 15.

[95] In *Hodge*, Binnie J. for the Court, referred to "the universe of people potentially entitled to equal treatment in relation to the subject matter of the claim must be identified." It was submitted that, here, the universe was that of persons with workplace injuries potentially entitled to benefits under the WSIA.

[96] Counsel for the worker submitted that the circumstances in *Plesner* were a bit different from this appeal, but the judgment was instructive nonetheless. The majority adopted the comparator of workers with physical injuries. Counsel for the Attorney General submitted that the mirror comparator group is persons with mental disabilities due to acute traumatic events, which draws a distinction based upon the method of injury. In *Plesner*, the majority of the British Columbia Court of Appeal rejected a similar argument. The claimant group must be compared to those who do not have an additional burden.

[97] The worker's representative reviewed a number of authorities on the appropriate analysis of substantive discrimination. In this case, the focus is on the issue of correspondence or lack thereof. It was submitted that the impugned law does not correspond to the needs and circumstances of the claimant group.

[98] Ms. Sadoway began by reviewing the process by which *Decision No. 2157/09I* was rendered, and submitted that the Panel had ample evidence upon which to base its findings. The medical opinions did not make a direct statement about causation, not because the causal pathways are not known, but rather, because that is a legal question, not a scientific one.

[99] Ms. Sadoway reviewed a number of Tribunal decisions on causation in support of her argument that the difficulty in proving causation is present in both physical and mental injury cases and there is a lack of a valid and reliable objective method for determining causation in many physical injury claims. She discussed the following decisions of this Tribunal as examples:

- *Decision No. 1386/03* (2004), 71 W.S.I.A.T.R. 95: That decision addressed a worker's claim for entitlement for Hepatitis C, which the worker attributed to his work in a group home. There were a number of possible ways in which the worker might have contracted Hepatitis C. It could have been related to some forgotten exposure in his personal life or from his father, who had a history of alcohol abuse. There was, however, no evidence in the medical records of the father having been infected. The other possible source was the worker's place of employment. He did not sustain any needle stick injuries but he had been scratched many times and bitten at least once. The worker had been exposed to Hepatitis in several of the residents; an expert indicated that there was a higher likelihood that the resident population had been exposed to Hepatitis C than the general population. Applying a robust and pragmatic approach to the evidence, the Panel granted entitlement, finding, or in the alternative, inferring, a causal relationship between the workplace exposures and the worker's Hepatitis C.
- *Decision No. 1804/09*, 2012 ONWSIAT 906: The worker attributed the development of Parkinson's to his occupational exposure at a chemical plant where he was employed from 1970 to 2004. The worker was diagnosed with Parkinson's disease at age 61. Upon review of the evidence, including an independent assessor's report, the Panel denied the worker's appeal, noting in particular the age at onset and the extent of the worker's exposure did not support a causal connection. Ms. Sadoway referred in particular to the summary of general principles to consider in weighing scientific and epidemiological evidence (paras. 67-72).
- *Decision No. 47/91*, 1992 CanLII 5249 (ON WSIAT): The worker attributed his condition of chronic obstructive lung disease to work in a foundry from 1960 to 1984. He was also a light smoker. The Panel noted that scientific evidence is not determinative of an issue, and quoted from the 1983 report of Professor P. Weiler to the Minister of Labour, which emphasized the importance of distinguishing between scientific and compensation perspectives. Professor Weiler cautioned that in the compensation context, "the fact that the scientific evidence is unclear or debatable no more supports the negative than it does the positive conclusion on the issue." The Panel also cited *Laferrière* v. *Lawson*, [1991] 1 S.C.R. 541, in which Gonthier J. noted that a judge will be influenced by expert scientific opinions which are expressed in terms of statistical probabilities or test samplings, but he or she is not bound by such evidence. The Panel noted that the medical evidence in the case suggested two possible causes for the worker's chest condition: exposure to dust and fumes at work and/or cigarette smoking. In view of the evidence, the Panel concluded that it was more probable than not that the worker's exposure to dust and fumes during his 24 years of employment at a foundry was a significant contributing factor to the development of his chronic obstructive lung disease. Smoking was also a contributing factor, but the Panel found that it was unlikely that the smoking alone, without the work exposure, would have caused the current level of the worker's disability.
- *Decision No. 473/91* (1994), 32 W.C.A.T.R. 14: The Panel allowed the estate's appeal from a denial of the claim for the deceased worker's liver cancer. The estate attributed the worker's liver cancer to occupational exposure to dioxane. The Panel noted that there was a lack of epidemiological evidence that dioxane caused liver cancer in humans, although there was evidence in animals. The Panel reviewed the authorities on the appropriate legal standard of causation, including *Snell* v. *Farrell*, [1990] 2 S.C.R. 311, in particular on the question of when it is appropriate to draw an inference of causation. The Panel applied a

five-part framework for evaluating causation in occupational disease cases: 1) latency period; 2) level of exposure; 3) the presence of non-occupational contributing factors; 4) physiological signs consistent with any proposed causal relationships; 5) the presence of predictive factors consistent with the suggested causal factors. The net result of the weighing process led the Panel to conclude that the evidence established a causal relationship between the occupational exposure and the disease, on a balance of probabilities.

- *Decision No. 795/95*, 1995 CanLII 7731 (ON WSIAT): The Panel considered the worker's claim for an eye condition for which no specific toxin or irritating agent in the workplace could be identified. When the worker was out of the workplace, the eye irritation gradually cleared. In the absence of conclusive medical evidence, the Panel concluded that the temporal connection was so clear that there was a probable causal link to the employment.
- *Decision No. 809/88*, 1988 CanLII 1494 (ON WSIAT): This decision denied a worker's claim for lung cancer which he attributed to his employment. That decision referred to the policy that applied to claims for lung cancer in asbestos workers. That policy requires a clear and adequate history of at least 10 years of occupational exposure to asbestos and a 10-year latency period between the first exposure and the onset of the disease. The Panel concluded that the worker had only sporadic exposure to high levels of asbestos and the undisputed history of smoking could not be discounted. The Panel stressed that it was necessary to evaluate the evidence on the balance of probabilities in evaluating causation in occupational disease cases. The Panel concluded: "In all but the most extraordinary cases, a panel will have to ask itself, based on the limited evidence available, 'is it more probable than not that this condition arose from the worker's workplace, or is it more probable that it was caused by a non-occupational factor?'"

[100] The worker's representative submitted that these cases illustrate that there is a lack of valid and reliable clinical methods for determining work-relatedness in a wide variety of physical injury claims; the challenge is not limited to mental stress claims. Complex cases are capable of being adjudicated based upon the legal standard of causation. It is always open to the Tribunal to find that the legal standard of causation is not met in the individual case. It was submitted that the class of claimants with psychological disabilities is being treated differently, which reinforces negative stereotyping and disadvantage.

[101] Ms. Sadoway also referred to the decision of the Supreme Court of Canada in *Laferrière* v. *Lawson*, *supra*. In that case, the respondent, the testamentary executor of the late Mrs. Dupuis, consulted the appellant about the presence of an abnormal lump in her breast. The respondent performed a surgical breast biopsy and excision of the lump of the right breast. The pathology report showed that the lump was cancerous. Mrs. Dupuis attended a follow-up appointment with her doctor, but she was not informed that the lump in her breast was cancerous and no long-term follow-up was arranged from 1971 to 1974. In 1975, another doctor looked more closely at her history and discovered the 1971 diagnosis of breast cancer. Gonthier J., for the majority, found that the independent recognition of the loss of chance analysis was not appropriate at least where the death or sickness had already occurred. In such case, the classical principles of causation are sufficient and essential in order for individual liability to attach.

[102] The worker's representative also disputed the premise that it is not possible to determine work-relatedness in mental stress claims other than acute mental stress. In this regard, reference was made to the reports of this worker's treating physicians. For example, Dr. A. Solomon, the worker's treating psychiatrist, reported that the worker had flashbacks about the painful experiences leading up to her leaving the workplace. He had also observed her shaking, legs moving, head bobbing as she talked, expression of fear in her eyes, tears, voice changing, and altered breathing. Although the diagnosis was not post-traumatic stress disorder, Dr. Solomon observed features in the worker that linked the worker's condition to the workplace events.

[103] Mr. Donaldson submitted that the WSIA creates a distinction between physical and mental disabilities which places an additional burden on persons with mental disabilities. This distinction constitutes substantive discrimination in that it is based upon stereotyping and perpetuates historical marginalization of persons with mental disabilities.

[104] In summary, the worker seeks a finding that subsections 13(4) and (5) of the WSIA and the TMS policy violate section 15 of the *Charter*; the violation is not saved by section 1; that the Tribunal decline to apply the impugned provisions and grant initial entitlement in the worker's claim.

(b) The Attorney General's position

[105] Counsel for the Attorney General submitted that there are no established methods to reliably assess the work-relatedness of non-traumatic mental disorders. Under the WSIA, entitlement is limited to personal injury by accident arising out of and in the course of employment. Subsections 13(4) and (5) therefore establish an objective proxy for determining work-relatedness.

[106] The impugned provisions are consistent with the available evidence and the purposes of the Act. The Attorney General submits that the WSIA does not discriminate on the basis of disability and does not promote disadvantage by perpetuating prejudice or stereotyping. It is not arbitrary. The available evidence and the experience of this and other jurisdictions establish that objective criteria are required to determine the work-relatedness of mental disorders. The Legislature has chosen a standard consistent with the evidence and the purposes of the Act. Other proposed standards are not supported by the evidence. It is consistent with section 15 of the *Charter*.

[107] The submissions of the Attorney General were divided into three parts:

- The evidence clearly demonstrates that there is some debate regarding the association between job strain and mental disorder. The studies do not propose a method to reliably assess the work-relatedness of non-traumatic mental disorders in the individual case.
- A review of the purpose of the WSIA and the place of subsection 13(4) and (5) in the regime show that it is consistent with the purpose to ensure compensation only for work-related conditions.
- The relevant *Charter* jurisprudence shows that there is no distinction in this case and no substantive discrimination within the meaning of section 15 of the *Charter*.

[108] Counsel for the Attorney General submitted that the evidence establishes three uncontroverted facts:

- There are no established methods for clinicians to validly and reliably assess the work-relatedness of non-traumatic mental disorders in the individual case.
- The strength of the epidemiological association between job strain and mental disorder is moderate to low.
- Other standards are not supported by the evidence and do not provide a better means than the impugned provisions, for example, the average worker test or the predominant cause test.

[109] Counsel for the Attorney General reviewed Dr. Gnam's credentials and submitted that he was uniquely qualified to assess the epidemiological evidence and draw upon his extensive experience in the assessment of workers with mental disorders. Dr. Gnam and Dr. Stansfeld agreed on many facts. Dr. Gnam acknowledged that there may be cases where mental disorder may be caused by chronic work stress, but in his clinical experience, cases do not usually present that way and there are a myriad of factors at play.

[110] There are no valid and reliable clinical methods for evaluating work-relatedness in individual mental stress cases, and Dr. Gnam's affidavit highlighted the risks, particularly that work factors may be over-emphasized and clinicians rely upon a patient's self-report. Counsel for the Attorney General submitted that Dr. Stansfeld confirmed that there were no such clinical methods for determining work-relatedness. There are no studies to support such methods. There were no studies showing "strict criteria" for attribution to chronic work stressors.

[111] Counsel for the Attorney General submitted that this factor alone, the lack of a valid and reliable clinical method for determining the work-relatedness of mental disorders, supports that subsections 13(4) and (5) and the TMS policy are consistent with the evidence, the purposes of the WSIA, and with section 15 of the *Charter*.

[112] Counsel for the Attorney General went on to review the evidence and submit that the epidemiological evidence of an association is moderate to low. Dr. Gnam's opinion is that the maximum causal proportion attributable to workplace factors is low. Dr. Stansfeld agreed that selection bias could reduce the associations that were found in the studies. There was also the effect of publication bias that could limit the strength of the observed associations. Publication bias refers to the tendency to publish studies which find an association more frequently than studies which do not show an association between any given factor and a particular outcome.

[113] With regard to the two papers which addressed bullying and the onset of mental disorders, counsel for the Attorney General submitted that these studies may have included consideration of exposure to traumatic events, which may be compensable under subsections 13(4) and (5) of the WSIA. Therefore, these studies should not be relied upon to reach any conclusions about the connection between non-traumatic bullying and mental disorders. In summary, it is the Attorney General's position that the epidemiological evidence is not strong enough to draw an inference about causation in the individual case.

[114] Counsel for the Attorney General submitted that the question is not whether to draw the line regarding claims for mental stress, but rather, where to draw the line. Most other Canadian common law jurisdictions have consistently adopted an objective standard for mental stress

claims through either the applicable legislation or policy. For example, in Nova Scotia, the definition of accident "does not include stress other than an acute reaction to a traumatic event."[37] In Alberta, applicable policy permits entitlement for "chronic onset stress" if specific criteria are met and it is shown that the work-related events or stressors are the "predominant cause of the injury."[38] Counsel for the Attorney General referred to Tribunal decisions which adopted an "average worker test" in claims for mental stress, in particular, *Decision Nos. 422/96* and *826/94*. Dr. Gnam's evidence supported that subsections 13(4) and (5) of the WSIA draw the line appropriately and the WSIA's traumatic mental stress provisions are preferable to other options, such as the average worker test or the predominant cause test.

[115] According to counsel for the Attorney General, the clinical adjudication of acute mental stress avoids these limitations due to the robust scientific evidence of an association and the close temporal association which allows clinicians to determine the relationship. The strength of the association between acute traumatic events and mental disorder is orders of magnitude stronger than the association between job strain and mental disorder. There was uncontroverted evidence from Dr. Gnam that other objective standards were less reliable than the standard adopted in the WSIA.

[116] Counsel for the Attorney General referred to a paragraph of Dr. Gnam's affidavit which suggested that applying general legal principles of causation to mental stress claims "might well result in blanket coverage of all mental conditions, work-related or not" because work is always a significant contributing factor.

[117] In regards to the purposes of the WSIA, counsel for the Attorney General submitted that the impugned provisions are consistent with the compensatory purposes of the Act; consistent with the approaches taken in other jurisdictions; and consistent with the broader historical purposes, including the historic trade-off. He submitted that causation is key to subsections 13(4) and (5) of the WSIA and cited a statement made by the then Minister of Labour in 1997 relating to the introduction of the WSIA. The evidence continues to show that there is no scientific evidence of clinical methods to establish work-relatedness of mental disorders except in an acute reaction to traumatic mental stress.

[118] In the submission of counsel for the Attorney General, the Tribunal decisions cited by the worker's representative apply different objective proxies. In his submission, the worker's representative's argument that the provisions are discriminatory by creating a different process for entitlement is unfounded on its face because there is no established clinical method for assigning work-relatedness in an individual claim for mental stress.

[119] Counsel for the Attorney General argued that subsections 13(4) and (5) do not preclude recovery in other forums. He referred to *Pasiechnyk, supra*, which described the historic trade-off and the no-fault nature of workers' compensation schemes. He submitted that this case demonstrates that other routes may be taken. In this case, the worker agreed to a settlement of approximately $50,000.00. This was in settlement of the worker's grievance and allegations of harassment.

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[37] *Workers' Compensation Act*, SNS 1994-95, c. 10, section 2.
[38] Alberta Workers' Compensation Board Policies & Information, Policy: 03-01, Part II.

[120] In summary, it was the Attorney General's position that there are no established methods to validly and reliably establish work-relatedness of mental disorders except in the case of acute mental stress. The objective approach adopted by the WSIA is corroborated by objective methods applied in other jurisdictions and this Tribunal. The requirements set out in subsections 13(4) and (5) are consistent with the evidence. If a worker has a legitimate claim, the worker is not excluded from a remedy in the courts or other forums.

[121] Counsel for the Attorney General submitted that the decisions of the Supreme Court of Canada in *Kapp* and *Withler* set out the appropriate framework for the analysis under section 15 of the *Charter*. In his submission, the decision in *Quebec* v. *A*, [2013] 1 S.C.R. 61, did not alter the section 15 analysis. He also submitted that the decision of the British Columbia Court of Appeal in *Plesner* was distinguishable, in that the majority did not address the chronic stress provisions.

[122] It was submitted that there was no distinction on the basis of an enumerated ground and no substantive discrimination. In accordance with *Withler,* the application of section 15 must be understood in the context of the legislation's purpose. In this case, it is part of a larger no-fault scheme. The purposes of the WSIA include accomplishing its objectives in a fair, efficient, equitable, and financially responsible and accountable manner. Entitlement must be limited to work-related conditions.

[123] In response to the cases cited by the worker's representative, counsel for the Attorney General submitted as follows:

- There was no evidence that the circumstances in those cases were directly comparable. There was no evidence regarding established methods for determining work-relatedness. The burden is on the claimant to provide evidence. It should be more than cases showing that there are complex etiological pathways. There was no evidence that these cases were comparable. This falls into the trap of mirror comparators which *Withler* cautions against.
- To the extent that the cases cited by the worker's representative suggest that causation is being determined without reference to an objective standard, they merely indicate that benefits are being granted in in a manner inconsistent with the WSIA. The *Charter* does not require that poor policy be replicated to achieve equality.
- The worker's representative's submission is based upon a misconception that the Attorney General has argued that scientific certainty is required to establish causation for mental stress. It is consistent with the purposes of the Act to establish an objective proxy for causation. In the case of claims for mental stress, the objective evidence does not allow for reliable conclusions to be made on the balance of the probabilities; as such, mental stress is distinguishable from the cases cited by the worker's representative.
- The fact that occupational disease claims may be granted on a broad interpretation does not imply that the objective standard applied to mental stress claims is unconstitutional. Perfect correspondence is not required and the government may draw lines based upon informed generalizations.

[124] Counsel for the Attorney General referred to *Withler* and *Kapp* and submitted that a mere difference in treatment is not sufficient to show an infringement of section 15 of the *Charter*. The claimant must show substantive discrimination with reference to the relevant considerations,

specifically, historical disadvantage and correspondence. Perfect correspondence to the claimant group's needs is not required.

[125] The Attorney General does not dispute that persons with mental disorders suffer from historical disadvantage, but that alone is not sufficient to ground the *Charter* challenge. The benefit scheme is designed to assist injured workers, all of whom suffer some degree of historical disadvantage. The impugned law does provide benefits to the historically disadvantaged group, namely claimants with mental disorders related to physical injuries and claimants with mental disorders related to an acute reaction to a traumatic event. In those cases, work-relatedness can be reliably assessed as a cause. Nothing suggests that subsections 13(4) and (5) of the WSIA are grounded in the view that mental disorders are not taken seriously or promote prejudice and stereotyping. The key factor here is correspondence to the needs and circumstances of persons with mental disorders.

[126] Counsel for the Attorney General referred to the decision in *Gosselin* v. *Quebec (Attorney General)*, [2002] 4 S.C.R. 429, in which Ms. Gosselin, a welfare recipient under the age of 30, challenged provisions which reduced the amount of social assistance benefits for persons under the age of 30 to approximately one-third of that for persons over 30. Persons under 30 in receipt of social assistance could, however, substantially increase the amount of their benefit if they participated in one of three work or education experience programs. Ms. Gosselin claimed that the provisions violated both section 7 and section 15(1) of the *Charter*. At paragraph 37, McLachlin C.J., for the majority, discussed the factors to consider in whether there was a relationship between the grounds for discrimination and the claimant group's characteristics:

> The second contextual factor we must consider in determining whether the distinction is discriminatory in the sense of denying human dignity and equal worth is the relationship between the ground of distinction (age) and the actual characteristics and circumstances of the claimant's group: *Law*, at para. 70. A law that is closely tailored to the reality of the affected group is unlikely to discriminate within the meaning of s. 15(1). By contrast, a law that imposes restrictions or denies benefits on account of presumed or unjustly attributed characteristics is likely to deny essential human worth and to be discriminatory. Both purpose and effect are relevant here, insofar as they would affect the perception of a reasonable person in the claimant's position: see *Law*, at para. 96.

[127] Counsel for the Attorney General submitted that the impugned law in this case is closely tailored to the circumstances of the affected group noting that it is consistent with the evidence regarding mental disorders; perfect correspondence is not necessary; there are other remedies available to the affected group. With regard to correspondence, it was submitted that, even if there are some unique situations in which a claimant could show work-relatedness, perfect correspondence is not necessary. It is constitutionally permissible for the Legislature to act upon informed generalizations. The statements from the Minister of Labour regarding the introduction to the WSIA explain that the purpose of the provisions was related to evidence of causation. In *Withler*, at paragraph 67, the Court noted that it will consider the purposes of the impugned provision and it will ask whether the lines drawn are generally appropriate, having regard to the circumstances of the persons impacted and the objects of the scheme. In *Martin* at paragraph 82, the Court noted that there is a permissible margin of error. The onus is on the worker to prove the case. There is a need for an objective standard. Some line must be drawn. This Tribunal applied a different objective standard for mental stress claims prior to the introduction of the WSIA, demonstrating that some form of objective test is necessary. The impugned provisions

simply reflect the reality that an objective proxy is necessary and subsections 13 (4) and (5) are consistent with that.

[128] Counsel relied upon *Martin* for the proposition that one of the main benefits of a workplace insurance scheme is that it is a quick and simple no-fault regime. Therefore, the Legislature must necessarily establish a number of criteria. It is different from a court and requires lines be drawn on the basis of the best evidence available. The Legislature is owed a margin of deference.

[129] Even if the impugned provisions exclude some work-related claims, such claimants are allowed to pursue other remedies, which is fundamentally distinguishable from *Martin*.

[130] Counsel for the Attorney General relied upon these arguments in regard to the application of section 1 of the *Charter*. Counsel for the Attorney General also relied upon several authorities in support of the proposition that the courts adopt a position of deference in the section 1 analysis where the impugned provisions involve a balancing of interests.

(viii) The Panel's findings on the expert evidence

[131] As noted earlier, the experts agreed that the epidemiological evidence demonstrates that there is an association between job strain and the onset of mental disorders, but their opinions differ on the strength of the association. They also disagreed on whether clinicians are able to accurately determine the causation of a patient's mental disorder.

[132] The Panel has two observations before turning to the analysis of the expert evidence. First, for reasons we will discuss later in this decision, we find that the determination under section 15 of the *Charter* does not turn on the strength of the epidemiological evidence and whether it supports granting entitlement in individual claims for mental stress. Instead, it is necessary to consider whether the evidence on the work-relatedness of mental disorders is distinguishable from physical injury claims to the extent that it warrants different treatment from claims for physical injuries and diseases. Both experts agreed that the evidence demonstrates an association between job strain and the onset of mental disorders.

[133] Secondly, the scientific evidence presented in this appeal focused on "job strain," (and "effort-reward imbalance," to a lesser degree), although this worker's claim was not attributed to such factors; furthermore, these studies do not necessarily reflect the nature of the majority of the claims for non-traumatic stress under the WSIA. Tribunal appeals frequently consider situations where there is some element of hostility or harassment in the workplace or where there is a dispute about whether an event is "sudden," "unexpected," and "traumatic" in the worker's occupation. We will also discuss this further in our analysis of the application of section 15 to these facts.

(a) The Tribunal's approach to epidemiological evidence

[134] The determinations of causation in the workplace insurance context often require consideration of epidemiological evidence. *Decision No. 600/97* (2003), 66 W.S.I.A.T.R. 1, is the leading decision of this Tribunal on the interpretation of epidemiological evidence in determining causation. That decision summarized the following principles for the evaluation of the role of epidemiological evidence in determining causation:

- Epidemiological studies provide evidence of an "association" between a particular exposure or risk factors and a particular condition, rather than causation.

- An epidemiological study may justify an inference that a statistical association reflects a causal link. Nonetheless, since epidemiology studies populations, not individuals, it cannot prove that a particular worker's condition was caused by the studied exposure.
- Although an epidemiological study cannot prove causation, the "Bradford Hill criteria"[39] are important considerations when deciding whether an inference can be drawn that there is a causal link.
- The term "statistical significance" refers to the likelihood that the results of the study were due to chance, rather than the strength of the association. The size of the sample being studied is an important factor in determining statistical significance.
- The strength of the association is demonstrated through the excess risk associated with the exposure or the risk factor which is expressed through a standardized incidence ratio (SIR) or odds ratio (OR). An SIR of 100 indicates that the number of cases observed in the studied population is the same as that expected (based on the incidence rates in the comparison population). Anything significantly in excess of 100 is described as "excess risk." The "excess risk" may sometimes be expressed as a percentage. For example, an SIR of 125 means the actual number of cases observed was 25% higher than expected. An SIR of 200 means that twice as many cases of cancer were observed in the studied population (the "exposed" population) than were expected based on cancer incidence rates in the comparison population (the "non-exposed" population).
- Evidence that a disease would not have occurred when it did "but for" the employment exposure suggests that the employment did make a "significant contribution" to the development of the disease. On the other hand, evidence that the injury/disease would have occurred when it did regardless of any employment exposure suggests to the Panel that employment was not a necessary contributing cause of the disease. If employment was not a necessary contributing cause, it is unlikely to be seen to have made a "material contribution" or to be a "significant" contributing factor in the development of the disease.

[135] *Decision No. 600/97* addressed a claim that a deceased worker's colorectal cancer was caused by his employment as a nickel miner for 30 years. The epidemiological evidence in that case established an SIR of 161 for colorectal cancer and nickel mining of that duration. The Panel framed the question as follows: "what is the probability that an individual worker is one of those who would not have developed cancer "but for" the occupational exposure (i.e., what is the probability that an individual worker is one of the 61 "excess risk" cases)?" The Panel reviewed the evidence and concluded that, using the SIR of 161, that probability would be 61/161 x 100 = 38%. Using this interpretation of the SIR, the Panel concluded that it would not be until there was an SIR of about 200 that it would be as probable as not that any worker in the group was one of the workers who would not have developed their cancer "but for" occupational exposure. In cases with an SIR less than 200, it is necessary to evaluate whether there are any special factors in the case which distinguish the worker's risk from the group risk.

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[39] Sir Austin Bradford Hill. "The Environment and Disease: Association or Causation?" Proceedings of the Royal Society, Section of Occupational Medicine. Vol. 58 (1965), pages 295-300. In this paper, Sir Bradford Hill proposed nine factors to consider in determining whether the most likely interpretation of the association is causation: strength of the association, consistency of the association, specificity, temporal relationship, dose-response relationship, biological plausibility, and coherence, experimental evidence, analogy.

[136] Thus, when evaluating causation, an SIR of 200 (or an odds ratio of 2) or more supports an inference of causation. Where the SIR is lower, the Tribunal considers whether there are any special factors in the individual case in determining whether there is sufficient evidence to support drawing an inference of causation.

(b) The strength of the association between job strain and mental disorder

[137] Turning then to the evidence, the experts disagreed on the strength of the association between job strain and the onset of mental disorders and the robustness of the evidence. Dr. Stansfeld characterized the evidence for such an association as robust, whereas Dr. Gnam felt that it was weak and maintained that the maximum causal proportion of major depression (and other mental disorders) attributable to work exposures is low.

[138] We understand Dr. Stansfeld's opinion that there is "robust evidence" of an association to mean that there have been numerous studies which have shown a statistically significant increased risk. This is distinct from the strength of the association. As noted above, the term "statistically significant" refers to the likelihood that the result is due to chance. Dr. Stansfeld testified that the strength of the association is appropriately characterized as "moderate."

[139] Counsel for the Attorney General argued that Dr. Stansfeld conceded during his cross-examination that the strength of the association between job strain and mental disorder was low, because it was something less than moderate. We note that Dr. Stansfeld did not in fact agree with that assertion when it was put to him; in response, he maintained that the association was moderate. Counsel for the Attorney General relied upon Dr. Gnam's evidence that the strength of the association between job strain and mental disorder is diminished by selection bias.

[140] The Panel notes that there is no dispute that numerous studies have shown an association between job strain and the onset of mental disorders, such as depression. Dr. Gnam acknowledged this in his book chapter; Dr. Stansfeld cited several more recent studies in his report. The primary point of contention for Dr. Gnam was that the studies did not account for selection bias. In lay terms, this is the effect that people who are depressed are more likely to report job strain or select employment with job strain characteristics. Dr. Gnam testified that this may result in "reverse causation."

[141] In response, Dr. Stansfeld referred to the methodology of several studies which accounted for selection bias and still showed an association.

[142] As we noted earlier, we accept that both experts are qualified to give opinions, although Dr. Stansfeld has published more extensively in this area. Upon consideration of the evidence as a whole, we prefer Dr. Stansfeld's opinion on the strength of the association, as it supported by several publications, which were put into evidence before this Panel. Some of the studies acknowledged the difficulty of selection bias (for example, Netterstrom 2008, *supra*), but our attention was not drawn to any study that directly supports Dr. Gnam's opinion that the maximal causal proportion of job strain to mental disorder is low or that the association between job strain and mental disorder, such as depression, is weak. In most papers, including Dr. Gnam's book chapter, the association is described as moderate or strong.

[143] For example, in Netterstrom 2008, *supra*, the authors stated:

> Psychological strain at work seems to be associated with future depression. Moderate evidence for a relation between psychological demands in the job and development was

> found. The relative risk estimates were approximately 2.0. However, indication of publication bias weakens the evidence. [...]
>
> Even if this literature study has identified work-related psychosocial factors that in high-quality epidemiologic studies predict depression, we still need studies that assess in more detail the duration and intensity of exposure needed for developing major depression.

[144] Although the authors indicated that further study is needed, they do state that psychological strain at work seems to be associated with further depression.

[145] We prefer Dr. Stansfeld's opinion on the role of selection bias in the interpretation of the epidemiology. As outlined above, Dr. Stansfeld cited several studies which reduced the effects of selection bias by using longitudinal follow-up or by evaluating the effects of changes in working conditions. Dr. Gnam asserted that the methodology used to account for selection bias in Stansfeld and Clark 2008, *supra*, was "crude," but we note that the findings were published in a peer-reviewed journal; our attention to any published criticisms of the methodology employed. The abstract states the conclusions of the authors:

> Childhood and early adulthood psychological distress predict work characteristics in mid-adulthood but do not explain the associations of work characteristics with depressive episode and generalised anxiety disorder in midlife. Work stressors are an important source of preventable psychiatric diagnoses in midlife. Psychological distress may influence selection into less advantaged occupations with poorer working conditions that may increase the risk of future depressive and anxiety disorders.

[146] Dr. Gnam and Dr. Stansfeld had a difference of opinion about whether Lamontagne *et al.* 2008, *supra*, supported their respective positions. Dr. Gnam argued in his Addendum Report that this study cited by Dr. Stansfeld in fact supports his conclusion that the maximum causal proportion of major depression (and other mental disorders) attributable to work exposures is low. We note that the text of the article states that the purpose of the study was to assess the contribution of job strain to mental health inequalities by (a) estimating the proportion of depression attributable to job strain (low control and high demands jobs); (b) assessing variation in attributable risk by occupational skill level, and (c) comparing numbers of job strain-attributable depression cases to numbers of compensated mental stress claims. The study used standard population attributable risk (PAR) methods to estimate the proportion of depression attributable to job strain. PAR is defined as the proportion of disease cases attributable to the exposure in question, or the fraction of the disease cases that would not have been observed if the exposure was non-existent. The authors explained that the PAR estimates presented were conservative in several ways. The authors also acknowledged the need for further study of job strain and job strain in relation to mental health outcomes due to various inconsistencies in the results of the studies, although the majority of the studies of job strain showed positive associations. The abstract to Lamontagne *et al.* 2008 states the results and conclusion as follows:

> **Results:** Overall job strain-population attributable risk (PAR) for depression was 13.2% for males [95% CI 1.1, 18.1] and 17.2% [95% CI 1.5, 34.9] for females. There was a clear gradient of increasing PAR with decreasing occupational skill level. Estimation of job strain-attributable cases (21,437) versus "mental stress" compensation claims (696) suggest that claims statistics underestimate job strain-attributable depression by roughly 30-fold.
>
> **Conclusions:** Job strain and associated depression risks represent a substantial, preventable, and inequitably distributed public health problem. The social patterning of job-strain attributable depression parallels the social patterning of mental illness, suggesting that job strain is an important contributor to mental health inequalities. The

> numbers of compensated "mental stress" claims compared to job-strain attributable depression cases suggest that there is substantial under-recognition and under-compensation of job strain-attributable depression. Primary, secondary and tertiary intervention efforts should be substantially expanded, with intervention priorities based on hazard and associated health outcome data as an essential complement to claims statistics.

[147] In the Panel's view, the abstract and content of the article appear to be more consistent with Dr. Stansfeld's statement of the conclusion that "job strain and associated depression risks represent a substantial, preventable, and inequitably distributed health problem." Dr. Gnam cites this study in support of his opinion that the maximum causal proportion of major depression (and other mental disorders) attributable to work exposures is low, whereas the authors do not appear directly endorse this view. We find Dr. Stansfeld's opinion is more consistent with the abstract and text of the article, which noted that the PAR estimate is conservative and identified job strain and associated depression risks as a substantial, preventable, and inequitably distributed health problem. Dr. Gnam also stated that the risk estimates in Lamontagne *et al.* 2008 are too large, whereas the authors stated that their estimates were conservative. Although the authors referred to inconsistencies in the epidemiology in the area, they still concluded that there is good evidence for taking a preventive approach and developing intervention strategies at work to reduce job strain. The authors found that the comparison of job strain-attributable depression estimates to compensated "mental stress" claims showed that the scale of the problem is "grossly underestimated" by workers' compensation statistics in Australia.

[148] We also prefer Dr. Stansfeld's opinion regarding the interpretation of the Kendler twin studies, *supra*. The measures of stressful life events and difficulties in the last year included serious difficulties at work, but the Kendler twin studies were not designed to analyse the role of job strain or other work-related stress in the development of depression.

[149] Dr. Stansfeld also cited two studies which examined the relative magnitude of risk of work-related factors compared to non-work related factors and found that stressful situations at work contributed to the development of mental disorders.[40] While the Kendler twin studies demonstrate that depression is multifactorial in origin, the evidence shows that work-related stressors also independently cause or contribute to the onset of depression.

[150] Furthermore, we question whether the inferences Dr. Gnam drew from Lamontagne *et al.* 2008 and the Kendler twin studies are relevant to the question of whether the evidence supports treating mental stress claims differently from physical injury claims. These studies looked at population attributable risk, which, according to Dr. Gnam, is a statistical measure of the global proportion of causation that can be attributed to a factor in a disease or disorder. Dr. Gnam draws from this study that the "significant majority of causal factors responsible for mental disorders are not related to work,"[41] but it is unclear to the Panel how this statistic is relevant in the workers' compensation context. For example, the population attributable risk for back pain or lung cancer related to workplace causes is not usually the focus of adjudication under the WSIA; these conditions occur in the general population and may be caused by a variety of work and non-work-related factors. Nevertheless, these conditions are adjudicated under the WSIA on an individual basis, without any additional restrictions.

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[40] Weinberg 2000, *supra*; Stansfeld and Clark 2012, *supra*.
[41] Gnam Addendum Report, p. 4.

[151] In summary, we accept that the evidence demonstrates that the strength of the association between job strain and mental disorders is moderate. The increased risk has been expressed in an odds ratio of 1.82 (for example, Stansfeld and Candy 2006, *supra*; Lamontagne *et al.* 2008, *supra*). The results have been statistically significant, meaning that it is unlikely that the association is due to chance. As we will discuss later in these reasons, the focus on the job strain evidence as the basis for the impugned provisions fails to recognize the wide variety in the nature of non-traumatic stress claims that may be made under the WSIA.

(c) The ability of clinicians to give reliable opinions about the causation of a patient's mental disorder

[152] Dr. Gnam expressed the opinion that clinicians are not capable of giving reliable opinions on causation of mental disorders, whereas Dr. Stansfeld testified that clinicians are capable of making such determinations based upon careful history-taking; indeed, it is important to do so, as the causation of the mental disorder may affect treatment decisions.

[153] Dr. Gnam's evidence was that no reproducible and valid clinical methods have been developed to adjudicate the relative causal importance of the multiple causal factors that might be relevant for any specific individual who has developed a disabling mental disorder. Dr. Gnam conceded in his testimony that it was outside his expertise to comment upon whether valid and reliable objective methods for determining work-relatedness were available for physical injuries.

[154] Although Dr. Stansfeld agreed that clinical methods for determining work-relatedness have not been the subject of published studies, he testified that clinicians are qualified and trained to give opinions on causation. Dr. Stansfeld testified that clinicians often consider the causation of a patient's mental disorder to determine appropriate treatment. In Dr. Stansfeld's words, "if causation can be better understood then rational treatments can be decided upon." If environmental factors are implicated in causation then there may be scope for modifying those environmental factors or removing exposure to potentially harmful exposures in order to treat the disorder or remove exposure to factors that could be maintaining a disorder. Dr. Stansfeld gave the opinion that the same criteria and the same critical-evaluative approach taken to acute traumatic stress could be applied to chronic stressors and outcomes such as depressive disorders, anxiety disorders, and adjustment disorders. We prefer Dr. Stansfeld's opinion that clinicians are qualified and trained to provide opinions on the causation of a patient's mental disorder. As he explained, causation is important to the determination of the appropriate treatment in many cases. As such, clinicians are often required to consider the causation of a patient's mental disorder.

[155] In Dr. Gnam's view, the strength of the association between traumatic events and mental disorder provided reliable evidence upon which clinicians may rely in determining causation of the patient's condition. He also testified that there is a clearer temporal connection in such cases. We note, however, that temporality may also be considered in situations in which the triggering event or events were non-traumatic. For example, in this case, the worker was unable to continue working the day after a culminating event of harassment in the workplace.

[156] We prefer Dr. Stansfeld's opinion that the temporal sequence of the stressor and the mental health effects can be ascertained by careful history taking from the subject and other informants. We note that Dr. Stansfeld's opinion regarding the practice of clinicians in determining causation is in accord with the specific evidence in this case. Dr. Solomon, the worker's treating psychiatrist, provided an opinion on the causal factors involved in the

development of this worker's condition. In addition, Dr. Suddaby, who conducted an independent medical psychiatric evaluation, was asked to comment upon precipitating and perpetuating factors in the worker's condition and provided an opinion in this regard. This evidence undermines Dr. Gnam's view that clinicians do not have a sound basis to reach conclusions about causation. Neither of these qualified psychiatrists declined to give an opinion about causation on the basis that they did not have adequate training or clinical experience to reliably answer the question of causation that there was a lack of scientific evidence to draw conclusions about causation.

[157] In the section 15 *Charter* analysis, however, we find it is more important to consider whether the lack of epidemiological evidence of clinical methods for assessing the work-relatedness of chronic mental stress claims is distinguishable from the evidence regarding the vast majority of physical claims attributed to disablement or occupational disease. In his Addendum Report, Dr. Gnam cited the following as examples: the validity and reliability of using simple clinical rules in order to decide whether x-rays are required in order to exclude musculoskeletal injuries; in psychiatry, there is extensive literature regarding the reliability and validity of using risk assessment instruments to predict behaviours and the reliability and accuracy of clinicians in making diagnoses using normal clinical methods when compared against labour-intensive research methods that are considered to be an independent gold standard. The Panel notes that these examples do not cite any epidemiological studies on the reliability and accuracy of determining the work-relatedness of any physical injury or disease. In our view, this is a limited set of examples that do not pertain to workplace causation of physical injuries. These examples do not support the conclusion that a "gold standard" for determining work-relatedness is generally available for the vast majority of physical injury claims attributed to disablement or occupational disease. We will consider this evidence further in our analysis of the application of section 15 of the *Charter* to this case, below.

(ix) Analysis

(a) The equality claim pursuant to section 15 of the *Charter*

(1) Overview of the authorities

[158] This overview focuses on recent jurisprudence which will guide our analysis of the concept of substantive inequality, which was the primary point of contention in this appeal.

[159] In *Kapp*, *supra*, Chief Justice McLachlin and Justice Abella, speaking for the Court on this issue, described *Law Society of British Columbia* v. *Andrews*, [1989] 1 S.C.R. 143 ("*Andrews*") as a template for the Supreme Court's approach to section 15, "a template which subsequent decisions have enriched but never abandoned." The Court acknowledged that difficulties had arisen from the attempt in *Law*, *supra*, to employ human dignity as a legal test, although there was no doubt that human dignity is an essential value underlying the section 15 equality guarantee.

[160] In *Kapp*, the Court formulated the appropriate test for discrimination as follows:

> The template in *Andrews*, as further developed in a series of cases culminating in *Law* v. *Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497, established in essence a two-part test for showing discrimination under s. 15(1): (1) Does the law create a distinction based on an enumerated or analogous ground? (2) Does the distinction create a disadvantage by perpetuating prejudice or stereotyping? These were divided, in *Law*, into three steps, but in our view the test is, in substance, the same.

[161] In the *Kapp* decision, the Court noted that the factors in *Law* should not be interpreted as legislative dispositions, but rather, as a way of focusing on the central concern of section 15: "combating discrimination, defined in terms of perpetuating disadvantage or stereotyping." (para. 24).

[162] The focus on substantive equality and a corresponding move away from a formalistic approach continued in *Withler* v. *Canada (A.G.)*, [2011] 1 S.C.R. 396. Speaking for the Court, McLachlin C.J. and Abella J. emphasized that the focus of the inquiry is whether the impugned law results in substantive inequality. Their reasons affirm a move away from a rigid, formalistic, comparative approach of "treat likes alike" in favour of a substantive contextual approach. McLachlin C.J. and Abella J. observed that, "when the Court has made comparisons with a similarly situated group, those comparisons have generally been accompanied by insistence that a valid section 15(1) analysis must consider the full context of the claimant group's situation and the actual impact of the law on that situation." (para. 43).

[163] With reference to McIntyre J.'s reasons in *Andrews*, the Court in *Withler* viewed discrimination through the lens of two concepts:

- The perpetuation of prejudice or disadvantage to members of a group on the basis of personal characteristics identified in the enumerated and analogous grounds. Perpetuation of disadvantage typically occurs when the law treats a historically disadvantaged group in a way that exacerbates the situation of the group. Judges have noted that historic disadvantage is often linked to section 15 discrimination.
- Stereotyping on the basis of these grounds that results in a decision that does not correspond to a claimant's or group's actual circumstances and characteristics. In this regard, McLachlin and Abella J. observed that it is conceivable that a group that has not historically experienced disadvantage may find itself the subject of conduct that, if permitted to continue, would create a discriminatory impact on members of the group. If it is shown that the impugned law imposes a disadvantage by stereotyping members of the group, section 15 may be found to be violated even in the absence of proof of historic disadvantage.

[164] In *Withler*, the Court suggested that the relevant factors to consider may be open-ended and dependent on the nature of the case, and went on to provide examples of the types of factors to consider in a substantive discrimination analysis:

> Without attempting to limit the factors that may be useful in assessing a claim of discrimination, it can be said that where the discriminatory effect is said to be the perpetuation of disadvantage or prejudice, evidence that goes to establishing a claimant's historical position of disadvantage or to demonstrating existing prejudice against the claimant group, as well as the nature of the interest that is affected, will be considered. Where the claim is that a law is based on stereotyped views of the claimant group, the issue will be whether there is correspondence with the claimants' actual characteristics or circumstances. Where the impugned law is part of a larger benefits scheme, as it is here, the ameliorative effect of the law on others and the multiplicity of interests it attempts to balance will also colour the discrimination analysis.
>
> Both the inquiries into perpetuation of disadvantage and stereotyping are directed to ascertaining whether the law violates the requirement of substantive equality. Substantive equality, unlike formal equality, rejects the mere presence or absence of difference as an answer to differential treatment. It insists on going behind the facade of similarities and differences. It asks not only what characteristics the different treatment is predicated

> upon, but also whether those characteristics are relevant considerations under the circumstances. The focus of the inquiry is on the actual impact of the impugned law, taking full account of social, political, economic and historical factors concerning the group. The result may be to reveal differential treatment as discriminatory because of prejudicial impact or negative stereotyping. Or it may reveal that differential treatment is required in order to ameliorate the actual situation of the claimant group.
>
> It follows that a formal analysis based on comparison between the claimant group and a "similarly situated" group, does not assure a result that captures the wrong to which s. 15(1) is directed — the elimination from the law of measures that impose or perpetuate substantial inequality. What is required is not formal comparison with a selected mirror comparator group, but an approach that looks at the full context, including the situation of the claimant group and whether the impact of the impugned law is to perpetuate disadvantage or negative stereotypes about that group.
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> [Paras. 38-40]

[165] The Court also cautioned against the application of a narrow comparator approach:

> The Court's s. 15(1) jurisprudence has consistently affirmed that the s. 15(1) inquiry must focus on substantive equality and must consider all context relevant to the claim at hand. The central and sustained thrust of the Court's s. 15(1) jurisprudence has been the need for a substantive contextual approach and a corresponding repudiation of a formalistic "treat likes alike" approach. This is evident from *Andrews*, through *Law*, to *Kapp*. When the Court has made comparisons with a similarly situated group, those comparisons have generally been accompanied by insistence that a valid s. 15(1) analysis must consider the full context of the claimant group's situation and the actual impact of the law on that situation. In *Lovelace v. Ontario*, 2000 SCC 37, [2000] 1 S.C.R. 950, for example, Iacobucci J., for the Court, having found "that the whole context of the circumstances warrants a refinement in the identification of the comparator group", stated: "I find that the s. 15(1) inquiry must proceed on the basis of comparing band and non-band aboriginal communities" (para. 64). However, he emphasized that "we must ask whether the impugned law, program or activity has a purpose or effect that is substantively discriminatory."
>
> [para. 53]

[166] In *Withler*, the appellants, the representative plaintiffs in two class actions, were widows whose federal supplementary death benefits were reduced because of the age of their husbands at the time of death. The legislation provided federal civil servants and members of the Canadian Forces and their families with a suite of work-related benefits, including a supplementary death benefit, which was reduced by 10% for each year by which the plan member exceeded a prescribed age. In denying the appeal, the Chief Justice and Justice Abella identified the central consideration as the purpose of the impugned provision in the context of the broader pension scheme. In particular, "where the impugned law is a broad-reaching benefits scheme, comparison with multiple other groups who together compose the universe of potential beneficiaries will be necessary." (para. 72). It was also noted that "perfect correspondence is not required." (para. 67).

[167] In *Quebec* v. *A.*, *supra*, the Supreme Court of Canada considered whether the provisions of the *Civil Code of Québec*, S.Q. 1991, c. 64, dealing with various aspects of family property and spousal support infringed section 15(1) of the *Charter* because their application was limited to private legal relationships between married spouses and civil union spouses. Abella J., speaking for the majority on this issue, concluded that the provisions did infringe section 15 of the *Charter*. Abella J. dissented in the result, finding that the infringement of section 15 was not

justified by section 1. In delivering the reasons of the majority on the infringement of section 15 of the *Charter*, Abella J. explained: "A claimant need not prove that a law promotes negative *attitudes*, a largely unquantifiable burden." (para. 322; emphasis in original).

[168] McLachlin C.J. concurred with Abella J. that the provisions infringed section 15 of the *Charter*, but concluded that the infringement was justified by section 1. McLachlin C.J. summarized the framework for the section 15 analysis:

> Most recently, this Court has articulated the approach in terms of two steps: (1) Does the law create a distinction based on an enumerated or analogous ground? (2) Does the distinction create a disadvantage by perpetuating prejudice or false stereotyping?: *Kapp*, at para. 17; *Withler*, at para. 30. While the promotion or the perpetuation of prejudice, on the one hand, and false stereotyping, on the other, are useful guides, what constitutes discrimination requires a contextual analysis, taking into account matters such as pre-existing disadvantage of the claimant group, the degree of correspondence between the differential treatment and the claimant group's reality, the ameliorative impact or purpose of the law, and the nature of the interests affected: *Withler*, at para. 38; *Kapp*, at para. 19.
>
> [para. 418]

[169] The Chief Justice went on to explain the importance of the distinction between section 15 and section 1 of the *Charter*:

> [...] [I]t is important to maintain the analytical distinction between s. 15 and s. 1. While the public policy basis for legislation has a limited relevance to the s. 15 analysis, it is central to the s. 1 inquiry: see *Andrews*, at pp. 177-78. This flows from the two-stage model of constitutional review inherent in the *Charter*. As Aharon Barak, former President of the Supreme Court of Israel, puts it:
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> > . . . what is the case when the legal system has adopted a two-stage model [of constitutional review], such as in Germany, Canada, South Africa, and Israel? . . . Should public interest considerations be included in the first stage or the second or in both stages? Should public interest considerations affect the determination of the right's scope, or should consideration of these interests be postponed to the stage of . . . the discussion regarding proportionality?
> >
> > . . .
> >
> > The proper location for public interest considerations is in the second stage of the constitutional review, as part of the discussion of the justification of the limitation on the constitutional right.
>
> (Proportionality: Constitutional Rights and their Limitations (2012), at pp. 75-76)
>
> [Para. 421]

[170] In summary, to determine whether the impugned statutory provisions and policy infringe section 15 of the *Charter*, the following questions must be considered:

- Step one: Do subsections 13(4) and (5) of the WSIA and the TMS policy create a distinction based upon an enumerated or analogous ground? In considering this question, the Panel will identify relevant comparators as an aid to the analysis, while bearing in mind the caution in *Withler* against a strict comparative approach.
- Step two: Is the distinction substantively discriminatory, in that it perpetuates disadvantage or stereotyping? In this inquiry, the Panel will consider the pre-existing disadvantage of the claimant group, the ameliorative impact or purpose of the law, the nature of the

interests affected, and the degree of correspondence between the differential treatment and the claimant group's reality.

[171] Our analysis will focus upon the impugned statutory provisions (subsections 13(4) and (5) of the WSIA), rather than the TMS policy, as it is the operation of the statutory provisions that precludes the granting of this worker's claim. For the reasons set out in the interim decision, we have concluded that the worker's case does not meet the requirements of subsections 13(4) and (5) to establish "an acute reaction to a sudden and unexpected traumatic event." Instead, her claim is related to 10 years of mistreatment in her workplace with which she could no longer cope. As such, it is unnecessary to consider the TMS policy in particular detail as it is based upon the impugned statutory provisions; if the impugned statutory provisions contravene section 15 of the *Charter*, then it follows that the TMS policy violates the *Charter* as well.

[172] As noted above, the worker is not challenging the restriction on mental stress entitlement attributed to an employer's decisions or actions. Accordingly, this evaluation is focused on the following provision of subsection 13(5) of the WSIA:

> 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.

[173] In the remainder of this decision, where we refer to subsection 13(5), we refer to only the foregoing passage of the subsection.

(2) Application to the facts

Step one: Adverse distinction based upon an enumerated or analogous ground

[174] As discussed above, more recent *Charter* jurisprudence has signaled a shift away from a rigid comparator analysis in favour of a contextual approach to substantive equality. In *Withler*, the Court also noted that there may be more than one comparator group. Accordingly, our analysis will not focus narrowly on the identification of a comparator group, but we will refer to comparators as necessary to highlight the relevant factors in the substantive discrimination analysis.

[175] The decision in *Auton*, *supra*, stands for the proposition that the comparator group must mirror the characteristics of the claimant or claimant group relevant to the benefit or advantage sought, except for the personal characteristic related to the enumerated or analogous ground raised as the basis for the discrimination. In *Hodge*, *supra*, the Court emphasized the importance of maintaining focus on the enumerated or analogous ground (at para. 33):

> If the claim to equality is to succeed, the ground has to be a personal characteristic enumerated or analogous to those listed in s. 15(1). This too is occasionally lost sight of. In *Martin*, the excluded chronic pain sufferers at one point attempted to compare themselves to another group of chronic pain sufferers who had suffered workplace injuries at an earlier date. The earlier group had obtained greater benefits under the *Workers' Compensation Act* than the later group of sufferers, but in the interim the benefit the earlier group had received had been terminated and the group grandfathered. Gonthier J. rejected the group of earlier sufferers as a relevant comparator group because what differentiated them from the claimants was not the type of disability but simply the *date* of their respective workplace accidents, which was not a prohibited ground of discrimination.

[176] In this case, the enumerated ground asserted as the basis for the distinction is mental disability. The worker's representative submitted that the appropriate comparator is the group of workers who are subject to the WSIA who have suffered a work-related physical disability. Where the analysis of this claim is aided by reference to a comparator, we accept the worker's representative's identification of the group of claimants subject to the WSIA who sustain physical injuries; for the purposes of the analysis, this may be further refined to consider the comparator group of workers subject to the WSIA with claims for gradual-onset physical injuries or conditions such as occupational disease. This is a comparator group that closely resembles the claimant group while highlighting a difference based upon an enumerated ground, namely, mental disability.

[177] The Attorney General submits that the effective distinction in the legislation is between injuring processes (traumatic versus non-traumatic), and that this is not a prohibited ground of discrimination. We do not find it appropriate to employ a comparator defined as the group of claimants with mental disorders attributed to an acute traumatic event, as it does not highlight the difference based upon an enumerated analogous ground, in this case, mental disability. Instead, it highlights a distinction based upon method of injury, which is not an enumerated or analogous ground.

[178] We find that the majority decision in *Plesner* is pertinent to this appeal in its approach to the identification of the comparator group.[42] The majority of the Court of Appeal agreed with the claimant's identification of the comparator group as "those workers who suffer physical injuries arising out of and in the course of their employment, whether or not those physical injuries are accompanied by mental stress injuries." In accepting this comparator, Prowse J.A., for the majority, rejected the comparator identified by the WCB: "those who suffer purely mental stress but who are able to satisfy the description of a 'traumatic event' under the legislation," reasoning as follows:

> This group [identified as the comparator by the WCB] is also disadvantaged in relation to those who suffer work-related physical injuries and fall under s. 5(1), because they, too, have to satisfy the burdensome criteria of an acute reaction to a sudden and unexpected "traumatic event" in s. 5.1(1)(a), as further defined under Policy 13.30, in order to obtain compensation. I do not read any of the decisions to which counsel have referred as requiring that the claimant choose as a comparator group a group which is arguably equally disadvantaged, while ignoring an obvious comparator group which receives the benefits the claimant is seeking. As stated in *McIvor*, (at para. 76), "all the complainant must show, in order to pass the first stage of analysis of a s. 15 claim, is that there is at least one appropriate comparator group which is afforded better treatment than the one to which he or she belongs."
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> [Para. 121]

[179] We find this approach is fitting in these circumstances as well. We prefer this analysis to that of the dissent in *Plesner*, which focused on the injuring process, which is not an enumerated or analogous ground.

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[42] We agree with the submission made by counsel for the Attorney General that the analysis in *Plesner* does not necessarily apply to the circumstances of this appeal, since the findings of the majority were limited to the provisions of the mental stress policy at issue in that case, rather than the statutory provisions that are analogous to the statutory provisions which operate to exclude this worker's claim. That decision did not address the limitation of entitlement for "chronic stress." We do find, however, that the analysis in *Plesner* on the identification of a comparator is still persuasive authority.

[180] We also find *Martin* to be instructive in the identification of an appropriate comparator. In *Martin*, the Court considered a challenge to the provisions of the workers' compensation legislation in Nova Scotia which operated to limit benefits for chronic pain disability to a fixed amount. The Supreme Court held in *Martin* that the restrictions on chronic pain entitlement infringed the claimants' right to equality under section 15 of the *Charter* and the infringement was not saved by section 1. In that case, the Court concluded that the appropriate comparator group for the section 15(1) analysis was the group of workers subject to the Act who do not have chronic pain and are eligible for compensation for their employment-related injuries (paragraph 71).

[181] In summary, where reference to a comparator is required for the analysis, we find that the appropriate comparator group is workers with claims for physical injuries. In some cases, this may be further refined as the group of workers with claims for gradual-onset physical injuries, whether by disablement or occupational disease. Subsections 13(4) and (5) also exclude those who experience an acute mental stress reaction to an event which is otherwise traumatic, but is not unexpected in that line of work (for example, emergency workers). Subsection 13(5) requires that the traumatic event be both "sudden" and "unexpected." We will also refer to this group in our analysis. References to non-traumatic stress are intended to include workers whose mental disorders do not meet the eligibility requirements of subsection 13(5) of the WSIA, which only allows entitlement for mental stress where there is an acute reaction to a sudden and unexpected traumatic event arising out of and in the course of employment.

[182] The enumerated ground in this case is mental disability. Section 15 of the *Charter* provides that every individual has the right to the equal protection and equal benefit of the law without discrimination upon enumerated grounds, which include "mental or physical disability."

[183] The courts have recognized that, in claims of discrimination on the basis of disability, an argument may be made that the impugned law or government action discriminates against a particular sub-type of disability. This was illustrated, for example, in *Martin*, in which the Supreme Court concluded that the impugned provision of the Nova Scotia workers' compensation legislation (and the regulation) discriminated against workers with chronic pain disability, as opposed to other types of disability. Gonthier J., speaking for the Court, observed: "This Court has long recognized that differential treatment can occur on the basis of an enumerated ground despite the fact that not all persons belonging to the relevant group are equally mistreated." In reaching this conclusion, Gonthier J. relied in part upon the decision in *Battlefords and District Co-operative Ltd.* v. *Gibbs*, [1996] 3 S.C.R. 566 (para. 31). In that case, Sopinka J., for the majority, recognized the particular historical disadvantage faced by persons with mental disabilities.

[184] *Plesner* provides another example, in which the majority of the British Columbia Court of Appeal found that certain portions of a policy discriminated against workers with mental stress claims vis-à-vis other types of disabilities. Prowse J.A., for the majority, noted: "Despite considerable efforts on the part of many mental health groups and others, mental illness of any kind continues to carry a stigma in our society."

[185] Counsel for the worker also presented evidence that persons with mental illness, as a group, are subject to historical disadvantage and stereotyping through stigma and discrimination.[43,44] The worker's affidavit in this case also provided her personal account of the impact of her mental disability as well as her perception of how she was treated by the WSIB, her family, and friends in relation to her mental disability.

[186] Having identified the relevant comparator group, the Panel turns to the question of whether subsections 13(4) and (5) of the WSIA and the TMS policy create a distinction based upon an enumerated ground: namely, mental disability. In our view, the impugned provisions do create such a distinction, as the effect of the provisions is to preclude workers with mental stress disabilities from establishing claims for an injury by accident by way of disablement, in contrast to workers with physical disabilities, whose claims are not limited in this manner. Workers with physical disabilities may pursue claims based upon an injury by way of accident due to a chance event, a wilful and intentional act (not being the act of the worker), or a disablement. Claims by workers with physical injuries or conditions are not limited to a narrow set of circumstances in which entitlement may be granted. Certain types of acute onset mental disabilities are also excluded: for example, where a worker is exposed to events which would generally be seen to be traumatic, but are not "unexpected" in that particular line of work, such as police officers and paramedics.

[187] The distinction created by subsections 13(4) and (5) may be further illustrated by examples. A worker with a back strain is not required to show that the injury was caused by a traumatic physical injury to the back, such as a fall from a height, but may also be entitled to benefits where the back injury arises gradually over time due to the nature of the work they performed. [45] Claims by workers with carpal tunnel syndrome are not precluded from consideration on the basis of a gradual onset attributed to repetitive use of a particular tool in their job duties.[46] Workers with physical injuries are also not required to prove that the event that caused their injury was "unexpected" in their line of work. Workers with physical injuries are entitled to have their claims adjudicated based upon the evidence in their individual cases, rather than the method by which the injury occurred.

[188] In contrast, pursuant to subsections 13(4) and (5) of the Act, a worker is not entitled to benefits under the insurance plan for mental stress, except where it is attributed to a specific type of injuring process: "an acute reaction to a sudden and unexpected traumatic event."

[189] In summary, we find the impugned provisions and the TMS policy create a distinction based upon the enumerated ground of mental disability.

Step two: Substantive inequality

[190] In accordance with the decision of the Supreme Court in *Withler*, it must be shown that the law has a discriminatory impact in terms of prejudice or stereotyping in the sense expressed in *Andrews* (para. 34). Substantive inequality may be established in one of two ways:

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[43] Canadian Mental Health Association: "Understanding Mental Illness."
[44] Health Canada. A Report on Mental Illnesses in Canada. Ottawa, Canada 2002.
[45] See, for example, *Decision No. 24/97*, 1997 CanLII 14006 (ON WSIAT).
[46] See, for example, *Decision No. 232/97*, 1997 CanLII 14001 (ON WSIAT).

- By showing that the impugned law, in purpose or effect, perpetuates prejudice and disadvantage to members of a group on the basis of personal characteristics within section 15(1).
- By showing that the disadvantage imposed by the law is based on a stereotype that does not correspond to the actual circumstances and characteristics of the claimant group. This was the focus of the submissions in this case.

[191] Whether the section 15 analysis focuses on perpetuating disadvantage or stereotyping, the analysis involves looking at the circumstances of members of the group and the negative impact of the law on them. The analysis is contextual, not formalistic, and grounded in the actual situation of the group and the potential of the impugned law to worsen their situation (*Withler*, paragraph 37).

[192] In this case, the evidence and argument emphasized the second approach, in particular, whether the impugned law corresponds to the actual circumstances and characteristics of the claimant group. For the following reasons, we find that the impugned provisions are substantively discriminatory both in perpetuating prejudice and disadvantage and failing to correspond to the actual circumstances and characteristics of the claimant group.

(1) Pre-existing disadvantage of the claimant group and the nature of the interest affected

[193] Perpetuation of disadvantage typically occurs when the law treats a historically disadvantaged group in a way that exacerbates the situation of the group. The focus is on the potential of the impugned law to worsen the situation of the group. Relevant factors to consider include evidence that goes to establishing a claimant's historical position of disadvantage or to demonstrate existing prejudice against the claimant group, as well as the nature of the interest that is affected (*Withler*, para. 38).

[194] As discussed above, the historical disadvantage faced by persons with mental disabilities has been accepted by the courts. In *Martin*, Gonthier J. observed: "This Court has consistently recognized that persons with mental disabilities have suffered considerable historical disadvantage and stereotypes..." (para. 90).

[195] The nature of the interest affected informs the analysis of the potential of the impugned law to worsen the situation of the historically disadvantaged group. Upon consideration of the evidence and the distinct features of the workplace insurance system, we find that the nature of the interest affected is a significant one. There are at two groups affected: workers with gradual-onset mental stress claims and workers with acute mental stress attributed to traumatic events that are not "unexpected" in their type of employment. While counsel for the Attorney General acknowledged persons with mental disabilities have been subject to historical disadvantage, he suggested that the nature of the interest affected was not significant since workers who are excluded from coverage under the WSIA pursuant to subsections 13(4) and (5) may retain the right to sue.[47] As such, they are not at a disadvantage.

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[47] The Panel notes that this proposition may be in doubt based upon experience in other jurisdictions. See, for example, *Downs Construction Ltd.* v. *Workers' Compensation Appeal Tribunal*, 2013 BCCA 392 (CanLII).

[196] We find, however, that the impugned provisions significantly affect interests of these mental stress claimant groups by depriving them of the benefit of the historic trade-off. As noted earlier in these reasons, the benefits of the historic trade-off were identified by Montgomery J. in *Medwid* v. *Ontario*, and cited with approval by the Supreme Court of Canada in *Pasiechnyk*. These decisions recognized that the workers' compensation scheme is based upon four fundamental principles:

- compensation paid to injured workers without regard to fault;
- injured workers should enjoy security of payment;
- administration of the compensation schemes and adjudication of claims handled by an independent commission; and
- compensation to injured workers provided quickly without court proceedings.

[197] The impugned provisions thereby exacerbate the disadvantage faced by persons with mental disability by reducing their options to a tort remedy that involves increased complexity and costs, the requirement to prove negligence, and lack of security of payment. This is an additional burden on workers with mental stress disabilities that is not placed on workers with physical injuries.

[198] Additional considerations lend further support to the Panel's finding that the nature of the interest affected is significant. As noted in *Martin*, an action in tort is only available where negligence is alleged; therefore, the pursuit of a civil action is not universally available to workers with non-traumatic mental stress claims (para. 72). Furthermore, the Court in *Martin* concluded (para. 104) that the nature of the interest was not purely financial, in that the claimant group was deprived of other benefits under the workers' compensation scheme, such as vocational rehabilitation services, medical aid, and a right to accommodation, "which would clearly assist them in preserving and improving their dignity by returning to work when possible."

[199] Counsel for the Attorney General argued that the removal of certain mental stress claims from coverage under the WSIA does not preclude other remedies. In this case, the worker received a monetary settlement negotiated by her union. We find that is an incomplete answer to the exacerbation of disadvantage created by the distinction drawn by the impugned provisions.

[200] Firstly, not all workers with non-traumatic mental stress claims are employed in unionized environments governed by collective bargaining agreements, and such remedies may not be available to them. Furthermore, it is well-established that settlements for wrongful dismissal, severance pay, and other forms of recompense for the termination of an employment relationship are distinct from damages or benefits payable for personal injury incurred in the course of employment. The nature of the breach in an action for wrongful dismissal is distinguishable from an action for personal injury, in that the party seeks damages in lieu of lawful notice prior to termination. Therefore, the right to bring an action for wrongful dismissal is generally not removed by the WSIA.[48]

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[48] See, for example, *Decision No. 237/03* (2003), 64 W.S.I.A.T.R. 276. This was also noted in *Decision No. 2157/09* at paragraph 33.

[201] Secondly, the limitation on the right to sue does not extend to bar a worker's right to pursue a grievance.[49] As such, the settlement the worker received through the collective agreement neither displaces her entitlement to benefits under the WSIA, nor is it a substitute for such entitlement. This was specifically recognized in the minutes of settlement in this case, which stipulated that "nothing in this paragraph prohibits the grievor from continuing with her WSIB appeal."[50]

[202] Counsel for the Attorney General further submitted that nothing suggests that subsections 13(4) and (5) of the WSIA are grounded in the view that mental disorders are taken less seriously or that the provisions are meant to promote disadvantage or stereotyping. We find this argument to be unpersuasive for two reasons. First, we note that the equality analysis does not require proof of a stereotypical attitude, as Abella J. observed in *Quebec* v. *A.*:

> We must be careful not to treat *Kapp* and *Withler* as establishing an additional requirement on s. 15 claimants to prove that a distinction will perpetuate prejudicial or stereotypical attitudes towards them. Such an approach improperly focuses attention on whether a discriminatory *attitude* exists, not a discriminatory impact, contrary to *Andrews*, *Kapp* and *Withler*.
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> [Para. 327; emphasis in original]

[203] Secondly, the promotion of disadvantage may be implied rather than explicit. For example, in *Martin*, Gonthier J., for the Court, considered the nature of the interest affected by the impugned chronic pain disability provisions and concluded:

> Thus, far from dispelling the negative assumptions about chronic pain sufferers, the scheme actually reinforces them by sending the message that this condition is not "real", in the sense that it does not warrant individual assessment or adequate compensation. Chronic pain sufferers are thus deprived of recognition of the reality of their pain and impairment, as well as of a chance to establish their eligibility for benefits on an equal footing with others. This message clearly indicates that, in the Nova Scotia legislature's eyes, chronic pain sufferers are not equally valued as members of Canadian society.
>
> [Para. 105]

[204] We find the foregoing passage from *Martin* is equally applicable to the mental stress provisions in the WSIA. While the Legislature may have been attempting to bring clarity to mental stress claims, the unfortunate effect is the exclusion of many types of mental disability claims from coverage under WSIA, sending an implicit message that mental disability is not "real" in the sense that it does not warrant an individual assessment of work-relatedness.

[205] The formulation of the question in *Granovsky* is also instructive as a template for the inquiry: Do the impugned provisions, in purpose or effect, perpetuate the view that persons with mental disabilities are less capable or less worthy of recognition or value as human beings or as members of Canadian society? (para. 54). In consideration of this line of inquiry, we note that the evidence relied upon by the Attorney General describes the controversies surrounding claims for mental disability in part as follows:

> ...[T]he subjective nature of medical and psychiatric evaluation in mental-mental claims may create incentives for fraudulent claims ...[51]

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[49] *Decision Nos. 53/87*, *supra*, and *307/00*, *supra*.
[50] Minutes of Settlement between the employer and the worker, July 7, 2005. The Arbitration Award of R.O. MacDowell, July 8, 2005, contained a similar provision.
[51] Gnam, *supra*, p. 308.

[206] The foregoing passage is premised on the notion that mental stress claimants are more prone to be fraudulent than physical injury claimants. This suggests an underlying assumption that claims for mental conditions are less deserving of merit and should be regarded more suspiciously than physical injuries. This parallels the observations of the Court in *Martin*, and, to adapt the language from *Granovsky*, perpetuates the view that persons with mental disabilities are less worthy of recognition or value as human beings or as members of Canadian society than persons with physical disabilities.

[207] The evidence before the Panel indicates that the stigma against persons with mental illness includes the stereotype that mental illness is caused by a personal weakness and that persons with mental illness are weak, lazy, or lacking in willpower.[52] The unsupported assumption that mental illness claimants will place a greater and unwarranted financial strain on the workplace insurance system than physical disability claimants perpetuates the notion that persons with mental illness are undeserving of equal recognition under the workplace insurance scheme.

[208] Therefore, we find that the application of the reasoning in authorities such as *Martin*, *Plesner*, and *Granovsky*, supports a conclusion that the impugned provisions are substantively discriminatory by perpetuating the historical disadvantage of the claimant group.

(2) Ameliorative purpose

[209] Where the impugned law is part of a larger benefits scheme, the ameliorative effect of the law on others and the multiplicity of interests it attempts to balance will also colour the discrimination analysis (*Withler*, para. 38).

[210] In this case, the evidence submitted in support of the Attorney General's position states that compensation for work disability from mental stress "is widely predicted to result in skyrocketing costs."[53] The majority reasons in *Plesner* are relevant in the consideration of similar arguments regarding the alleged costs associated with mental stress claims:

> As in *Martin*, there is no identifiable ameliorative purpose which these provisions are designed to serve. The most that can be said is that, in limiting the potential for successful claims for purely mental injuries which are work-related by setting a high threshold for recovery not mandated for those suffering from physical injuries, the provisions may have reduced costs, thereby making more money available to those who are already favoured under the legislation, or for other purposes under the Act. Cost saving of this kind is not the type of ameliorative purpose or effect contemplated by *Law*.
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> [Para. 38]

[211] Similarly, we find the arguments raising the spectre of "skyrocketing costs" to be unpersuasive. There was little evidence regarding the costs of mental stress claims in Ontario and their impact on the WSIA insurance fund in Ontario. As such, it appears that one of the assumptions underlying the impugned provisions is that persons with mental stress claims will place a greater and unjustified burden on the workplace insurance system than physical injury claims. This assumption also serves to exacerbate the historical disadvantage faced by persons with mental disabilities as it is based upon the assumption that they are undeserving of benefits and place a burden on society.

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[52] Canadian Mental Health Association, *supra*.
[53] *Ibid.*

[212] The Attorney General suggested that the exacerbation of disadvantage created by the impugned provisions is ameliorated by the fact that the benefit is designed to assist injured workers, all of whom suffer some degree of historical disadvantage and that the impugned law does provide benefits to the historically disadvantaged group of persons with mental disability due to a physical injury or an acute traumatic event. In *Martin*, Gonthier J., for the Court, addressed analogous arguments as follows:

> They rely on *Corbiere* v. *Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203, for the proposition that the appellants must demonstrate prejudice or stereotyping that is distinct from that experienced by the comparator group. In *Corbiere*, this Court considered a s. 15(1) challenge to a provision of the Indian Act, R.S.C. 1985, c. I-5, which provided that only band members ordinarily resident on the reserve were entitled to vote in band elections. While both McLachlin and Bastarache JJ., writing for the majority, and L'Heureux-Dubé J., writing for a minority of four, recognized that off-reserve Aboriginal band members had been subject to particular historical disadvantage compared to those living onreserve, nowhere can the suggestion be found that such relative disadvantage is a necessary condition for the first contextual factor to point towards discrimination. This point was eloquently made by Iacobucci J. in *Lovelace* v. *Ontario*, [2000] 1 S.C.R. 950, 2000 SCC 37, at para. 69, where he stated that "this enquiry does not direct the appellants and respondents to a 'race to the bottom', i.e., the claimants are not required to establish that they are more disadvantaged than the comparator group". See also *Granovsky*, supra, at para. 67. Thus, while a finding of relative disadvantage may in certain cases be helpful to the claimant, the absence of relative disadvantage should in my view be seen as neutral when, as is the case here, the claimants belong to a larger group — disabled persons — who have experienced historical disadvantage or stereotypes.
>
> ...
>
> It can be no answer to a charge of discrimination on that basis to allege that the particular disability at issue is not subject to particular historical disadvantage or stereotypes beyond those visited upon other disabled persons. Indeed, the contrary position could potentially relieve the state from its obligation to accommodate or otherwise recognize many disabilities that, despite their severity, are not subject to widespread stereotypes or particular historical disadvantage. Such a result would run contrary to the very meaning of equality in that context and cannot be condoned.
>
> [Para. 88]

[213] Similarly, we find that the exacerbation of the disadvantage and the adverse effect on the claimant group's interests are not mitigated by the fact that a group of mental stress claimants may be entitled to benefits under the WSIA in the narrowly defined circumstances of subsections 13(4) and (5), or as a result of physical injury. Counsel for the Attorney General emphasized the evidence that there is a strong association between exposure to trauma and the onset of mental disorders, usually PTSD. There was no dispute regarding the strength of this evidence. There is, however, no evidence in the record showing that the physical conditions for which workplace injury claims are filed are generally supported by evidence that is comparable to the strong evidence of an association between traumatic incidents and the onset of mental disorders. This argument does not justify excluding a group of claimants from coverage under the Act when the epidemiological evidence supporting their claims is "as strong or stronger evidence of workplace causation than exists for several industrial diseases."[54] For the reasons discussed above, the appropriate comparator group is workers with claims for physical injuries,

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[54] Gnam, *supra*, at p. 318.

which highlights the enumerated ground, rather than method of injury. We have rejected the notion that the claimant group's situation ought to be compared to other mental stress claimants with a different method of injury.

(3) Perpetuation of false stereotyping

[214] Where the claim is that a law is based on stereotyped views of the claimant group, the issue will be whether there is correspondence with the claimants' actual characteristics or circumstances (*Withler*, para. 38). Perfect correspondence is not required (*Withler*, para. 71). The evidence and the argument in this case focused on whether the impugned provisions correspond with the actual characteristics and circumstances of the claimant group, that is, workers with mental stress claims that do not meet the entitlement requirements of the WSIA.

[215] The Attorney General's position is that the impugned provisions create an objective proxy for determining the work-relatedness of mental disorders. To address this argument, it is necessary to review the methods of determining legal causation for physical disability claims. We have further subdivided the reasons into six headings to structure the analysis:

- the purpose of the impugned provisions within the broader purposes of the statutory scheme;
- principles of causation for physical disability claims under the WSIA;
- degree of correspondence: objective proxy for causation;
- degree of correspondence: the epidemiological evidence regarding job strain and mental disorders;
- degree of correspondence: the focus on "job strain" vis-à-vis the reality of the claimant group; and
- the importance and scope of line-drawing in a benefit scheme such as the WSIA.

The purpose of the impugned provisions

[216] A central consideration in the substantive equality analysis is the purpose of the impugned provision in the context of the broader scheme (*Withler*, paragraph 71). According to section 1 of the WSIA, one of the purposes of the statute is to provide compensation and other benefits to workers and to the survivors of deceased workers in a financially responsible and accountable manner. Section 13 establishes that workers are entitled to benefits for personal injury by accident arising out of and in the course of employment. In addition, as noted above, the WSIA contains special features, such as the benefit of the doubt provision and the obligation upon the WSIB and this Tribunal to make a decision based upon the merits and justice of a case (sections 124; 119).

[217] The Attorney General asserts that the purpose of the impugned provisions is to facilitate meeting the primary aim of the WSIA: to compensate only for workplace-related conditions. In order to meet this statutory purpose, counsel for the Attorney General argued that there must be an objective clinical method for accurately determining whether a worker's mental stress injury is work-related. In this regard, counsel for the Attorney General relies upon Dr. Gnam's opinions. For example, Dr. Gnam's book chapter states that "research to validate clinical

assessment techniques is difficult in the absence of a 'gold standard' to which comparisons can be made."[55]

[218] In other words, mental stress claims are treated differently from physical disability claims because there is no gold standard for determining whether mental stress conditions are work-related, except in the case of traumatic events associated with acute mental disorders. The argument is that the impugned provisions thereby create an "objective proxy" for causation in that acute mental stress due to a sudden and unexpected traumatic event is the "gold standard" for establishing a causal relationship in claims for mental disorders. The impugned provisions are premised upon Dr. Gnam's opinion that no reproducible and valid clinical methods have been developed to adjudicate the relative causal importance of the multiple causal factors that might be relevant for any specific individual who has developed a disabling mental disorder.

Principles of determining causation of workplace injury claims

[219] Since the purpose of the impugned provisions is to establish an objective proxy for causation, a brief review of the general principles of causation is in order to evaluate the argument that the impugned provisions correspond with the needs of persons with non-traumatic mental stress claims under the WSIA.

[220] To determine whether an injury arises out of the employment, this Tribunal has adopted principles from the courts, relying upon authorities such as *Athey* v. *Leonati*, [1996] 3 S.C.R. 458 (S.C.C.), *Laferrière* v. *Lawson*, *supra*; *Snell v. Farrell*, *supra*; and *McGhee v. National Coal Board*, [1972] 2 ALL ER 1008 (HC), for the proposition that scientific certainty is not required to establish causation. To determine causation, this Tribunal generally considers whether the workplace injuring process made a "significant contribution" to the development of the injury or condition. If there is no applicable statutory presumption, the standard of proof is the balance of probabilities, subject to the statutory benefit of the doubt (WSIA s. 124).

[221] The approach to causation in the workplace insurance context was summarized by WSIAT Chair Strachan in *Decision No. 2035/06* (2008), 86 W.S.I.A.T.R. (online):

> For benefits to flow to a claimant under section 13(1), the injury or disability must be causally related to the worker's employment. This means that a Panel or Vice-Chair should find that there was an injuring process associated with the employment, which led to the disability. When examining the evidence relating to an injuring process associated with the employment, a certain degree of flexibility may be required since the causation test must fit the circumstances in each claim or appeal. When considering whether any injury occurred "in the course of" employment, Panels traditionally focus on the time and place of the injuring process. When considering the "arising out of" aspect, Panels usually focus on the activity and whether it was work-related. For the injury to "arise out of" the employment, there must be a demonstrated workplace association, which would allow a Vice-Chair or Panel to logically conclude that the workplace relationship is objectively capable of causing the injury or disability for which benefits are claimed.
>
> For the work to cause the injury or disability, it is not enough that there is a temporal relationship (i.e., the onset occurred during working hours), or a geographical relationship (i.e., it occurred on the employer's premises); the worker's injuring activity must also be work-related and there should be an objectively identifiable workplace injuring process. In cases of a pre-existing condition, there should be something about the workplace which added to the worker's pre-existing condition in a material way to establish a causal connection. This issue has been discussed in Tribunal decisions such

[55] Gnam, *supra*, p. 318.

> as *Decision Nos. 280, 1519/04* and *430/06*. For example, a person with a chronic heart condition may have a heart attack at home or upon arrival at the workplace premises. Since the heart attack may be a spontaneous event, entitlement to benefits depends upon evidence that the workplace activity was a significant contributing factor to the onset of the heart attack. A "material contribution" or "significant contributing factor" is a factor of considerable effect or importance, or one which adds to the worker's pre-existing condition in a material way to establish a causal connection with the ultimate disability;
>
> While the subsection 13(2) presumption applies where the heart attack occurs at the workplace, it may be rebutted where there is no identifiable injuring process and the worker is subject to other significant personal risk factors.
>
> Similarly, a degenerative joint may give rise to a spontaneous collapse, either at home or on the workplace premises. Again, the geographic location is not the determining factor in establishing a causal relationship; rather, the Panel must objectively find that the workplace activity made a material contribution to the collapse.
>
> The basic test which the Tribunal has employed in most appeals to determine a causal relationship is a "significant contributing factor" test, which is essentially the "material contribution" test developed by the Courts in civil litigation cases. In these civil litigation cases, the initial test, which most Courts use in negligence claims, is a "but for" test – i.e., but for the negligent act, would the Plaintiff have suffered the particular harm described in the Statement of Claim?
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> In some circumstances, the Courts find that this "but for" test is not particularly helpful or appropriate; in these situations, Judges usually rely upon the less rigorous "material contribution" test to ask whether the particular negligent act made a material contribution to the injury or disability (or harm) as alleged by the Plaintiff. So, in a medical malpractice action, the Court may ask: "Did the negligent treatment make a material contribution to the infection/complication/disability/death?"

[222] *Decision No. 1472/05R*, 2010 ONWSIAT 1496 (CanLII), also addressed the Tribunal's approach to causation in light of the more recent jurisprudence from the courts, in particular, *Resurfice Corp.* v. *Hanke*, [2007] 1 S.C.R. 333. In *Decision No. 1472/05R*, the Vice-Chair noted that in *Resurfice*, the Court confirmed the use of the "but for" test for causation in civil litigation. This Tribunal had employed a "significant contributing factor" test, based on *Athey*, and earlier jurisprudence, and not the "but for" test *per se*. Upon consideration of the authorities, the Vice-Chair concluded that *Resurfice* may be important in the workplace insurance context because it confirms that, except in specific cases of narrow facts involving evidentiary difficulties, the results of the two tests will be the same. The Vice-Chair found further support for this interpretation in the decision of the Ontario Court of Appeal in *Monks* v. *ING Insurance Co. of Canada* (2008), 90 O.R. (3d) 689. The "but for" concept of causation was also considered in *Decision No. 600/97*, *supra*, in which the Panel concluded that, if employment was not a *necessary* contributing cause, it is unlikely to be seen to have made a "material contribution" or to be a "significant" contributing factor in the development of the disease (para. 135).

[223] This Tribunal has adapted other common law principles to the workplace insurance context, for example, the "thin skull" principle. In tort law, this means that the defendant is fully liable for the full extent of the damage caused by his or her negligence even if the plaintiff victim had a particular susceptibility to the injury suffered. In *Decision No. 915* (1987), 7 W.C.A.T.R. 1 at 136, the Tribunal concluded that this principle applies to workers' compensation, explaining in part:

> Early in the development of personal-injury law in the Courts it was argued that if the plaintiff victim had a particular susceptibility to the injury suffered, the negligent defendant ought not to be liable for the full extent of the damage. The classic illustration of this issue was the so-called "thin skull". The question, in effect, was this: if I negligently strike a person in the head in a fashion which in a normal person would have produced only a bruise, but the person I happen to hit has an egg-shell skull and it fractures, must I be liable for the fractured skull? The answer the Courts have given to that question is clearly yes; you must take your victim as you find him.
>
> The thin-skull doctrine also applies in Workers' Compensation cases and for two reasons. One reason is that permitting compensation to be denied or adjusted because of preexisting pre-disposing personal deficiencies would very substantially reduce the nature of the protection afforded by the compensation system as compared to the Court system for reasons that would not be understandable in terms either of the historic bargain or of the wording of legislation. The other reason is that in a compensation system injured persons become entitled to compensation because they have been engaged as workers. They have functioned as workers with any pre-existing condition they may have had. It seems wrong in principle that conditions which did not affect their employment as workers should be relied upon to deny them compensation as injured workers.

[224] This Tribunal has also distinguished between the thin skull and the "crumbling skull" principles. In *Decision No. 826/94* (1995), 36 W.C.A.T.R. 102, for example, the Panel noted: "One's skull may be thin or one's personality may be an egg-shell without affecting entitlement to workers' compensation benefits, but neither the skull nor the personality can have been known to be crumbling." In the workplace insurance context in Ontario, the crumbling skull principle is reflected in cases which limit entitlement on an "aggravation basis:" where the worker has a symptomatic pre-accident impairment which was temporarily worsened by a workplace injury, entitlement may be limited to the period of time that the injury "aggravated" the pre-accident impairment.[56] Similarly, *Decision No. 280* (1987), 6 W.C.A.T.R. 27, held that a pre-disposition may be so overwhelming a factor in causing disability that it reduces that role of the workplace accident to insignificance. In that case, workplace causation is not established and entitlement does not flow.

[225] Counsel for the Attorney General submitted that the "average worker" test applied by this Tribunal to assess mental-mental stress claims supports the argument that a different approach is required to these claims. In this regard, we note that the Tribunal's decisions have generally interpreted the so-called average worker test as a tool for identifying a workplace injuring process, rather than the application of a different standard of causation. This was explained, for example, in *Decision No. 871/99*, 2003 ONWSIAT 2030 (CanLII), in which the Panel discussed the "average worker test," as it was developed in the Tribunal's jurisprudence and concluded as follows:

> But these questions do not create a new legal requirement for entitlement. The "thin-skull rule" continues to apply. If it is found that there was an employment-related injuring process, the disability from the resulting psychological injury is compensable, even if that disability is, because of some pre-existing vulnerability, greater than it would be for the average worker.

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[56] See WSIB Operational Policy Manual Document No. 11-01-10, "Aggravation Basis."

[226] This was the prevailing approach adopted in the Tribunal jurisprudence and was followed in several decisions.[57] *Decision No. 2416/03* (2008), 87 WSIATR (online),[58] reinforces this interpretation:

> We have applied the Tribunal's average worker test as previously determined. We emphasize, in so doing, that our references to the "average worker" as contemplated in that test are for the purpose of determining whether there is a sufficient employment nexus for entitlement. As has been discussed in other Tribunal decisions, the average worker test is not intended to displace the thin skull rule. However, when a worker's subjective perception of workplace events is significantly different from what would be expected of the average worker, that fact may indicate that the injuring process is the distorted perception, rather than the actual workplace events. In that case, there may be insufficient employment nexus to satisfy the requirements for a disablement under the Act.

[227] We find that the application of the average worker test was not intended to create a different standard for entitlement for mental stress claims. Even if the average worker test were interpreted to create a more stringent standard for mental stress entitlement, this would not necessarily support a conclusion that the impugned provisions are not substantively discriminatory. The average worker test does not create an exclusion for non-traumatic mental stress claims independent from a review of the worker's individual circumstances.

Degree of correspondence: objective proxy for causation

[228] For the reasons set out earlier, we have preferred Dr. Stansfeld's evidence that clinicians are capable of making reliable determinations about causation. In the debate over the epidemiological evidence, however, it is important to maintain the focus on the section 15 inquiry: do the impugned provisions correspond with the needs and circumstances of the affected group in a way that is consistent with the distinction in treatment created?

[229] The Attorney General submits that the impugned provisions are not substantively discriminatory because they create an objective proxy for determining causation which is consistent with the WSIA's objectives. Our preliminary observation regarding the justification for the impugned provisions is that our attention was not drawn to any significant evidence showing that the causation of physical injuries and diseases for which claims are made under the WSIA are generally capable of being determined by scientifically proven and reliable objective methods of determining work-relatedness. We were also not directed to any statutory or other legal principle which would require such an objective proxy. The worker's representative cited several Tribunal decisions which demonstrate that, where there is a lack of an objective and scientifically proven method for determining the work-relatedness of physical injuries and occupational diseases under the WSIA, causation is determined based upon the relevant evidence and the application of the appropriate legal principles and Board policy.

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[57] See, for example, *Decision Nos. 1402/09*, 2010 ONWSIAT 1625 (CanLII), *1945/10I*, 2012 ONWSIAT 771 (CanLII), and *2157/09I* (the interim decision in this worker's appeal).

[58] *Decision No. 2416/03* is also of interest for its consideration of the role of common law concepts such as reasonable foreseeability in the no-fault workplace insurance scheme, particularly in light of the decision of the Supreme Court of Canada in *Mustapha* v. *Culligan of Canada Ltd.*, [2008] 2 S.C.R. 114. In that case, the Panel accepted legal submissions from Tribunal counsel that, as a result of the historic bargain, many of the concepts in negligence law were no longer relevant in workers' compensation, which created a no-fault scheme. These included duty of care, breach of the duty of care, contributory negligence, and voluntary assumption of risk.

[230] Counsel for the Attorney General relied upon Dr. Gnam's evidence that there may be cases where mental disorder is caused by chronic work stress, but in his clinical experience, it does not usually present this way, but rather, there are usually a myriad of factors at play. The Tribunal's decisions, as well as jurisprudence from the courts, demonstrate that determining causation is also complex and multifactorial in cases involving physical injury and disease. In *Athey, supra*, Major J., speaking for the Court, encapsulated the difficulty presented in determining causation (at paragraphs 16-17):

> In *Snell* v. *Farrell, supra*, this Court recently confirmed that the plaintiff must prove that the defendant's tortious conduct caused or contributed to the plaintiff's injury. The causation test is not to be applied too rigidly. Causation need not be determined by scientific precision; as Lord Salmon stated in *Alphacell Ltd.* v. *Woodward*, [1972] 2 All E.R. 475, at p. 490, and as was quoted by Sopinka J. at p. 328, it is "essentially a practical question of fact which can best be answered by ordinary common sense". Although the burden of proof remains with the plaintiff, in some circumstances an inference of causation may be drawn from the evidence without positive scientific proof.
>
> It is not now necessary, nor has it ever been, for the plaintiff to establish that the defendant's negligence was the sole cause of the injury. *There will frequently be a myriad of other background events which were necessary preconditions to the injury occurring.* To borrow an example from Professor Fleming (*The Law of Torts* (8th ed. 1992) at p. 193), a "fire ignited in a wastepaper basket is . . . caused not only by the dropping of a lighted match, but also by the presence of combustible material and oxygen, a failure of the cleaner to empty the basket and so forth". As long as a defendant is part of the cause of an injury, the defendant is liable, even though his act alone was not enough to create the injury. There is no basis for a reduction of liability because of the existence of other preconditions: defendants remain liable for all injuries caused or contributed to by their negligence.
>
> [Emphasis added]

[231] The foregoing passage highlights that multifactorial causation presents difficulty with respect to physical injuries and conditions in a manner similar to mental conditions. The impugned provisions are intended to create a "clear, objective test" for entitlement for mental stress, whereas it is evident that a clear, objective test for causation is lacking for many physical injuries and diseases.

[232] The Panel agrees that one of the primary purposes of the Act is to provide compensation to workers with work-related conditions and injuries. As such, the causation of a worker's condition is a determination of central importance. Determining causation is often difficult due to the multifactorial nature of many conditions (from carpal tunnel syndrome to lung cancer), the lack of conclusive epidemiological evidence on the particular exposure or working conditions in issue, and the possibility of inaccurate or incomplete history-taking by clinicians. The unreliability of a worker's subjective perceptions is a matter for evaluation in both physical injury claims and mental stress claims alike. For example, a worker with a back injury may report a fall from a height of six feet, but when describing the event to a specialist a year later, the worker honestly but mistakenly recalls a fall from 20 feet. Similarly, a worker with a repetitive strain injury may report handling 10,000 pieces a day, whereas there is other evidence indicating that the process required handling 1,000 pieces per day. As such, the challenges of establishing a work-related injuring process are encountered when considering the causation of both physical and mental conditions. In claims for both mental and physical injuries, it is necessary to consider the evidence surrounding the workplace events in question.

[233] We will expand upon these concepts through further examples to explore the argument being urged upon us by counsel for the Attorney General: that the impugned provisions are not substantively discriminatory since there is no objective clinical method for determining the work-relatedness of mental disorders in the individual case. The evidentiary challenges with determining work-relatedness were considered in *Decision No. 1386/03*, *supra*, in which the Panel allowed the worker's claim for Hepatitis C entitlement:

> In cases where it is impossible to know with certainty whether an exposure is actually the cause of a worker's illness, the Panel must weigh the different possible causes of the worker's condition and decide what is more probable than not. Some conditions may result from non-work related factors. Some conditions occur themselves. Some conditions are work-related. The issue of causation may be complicated, as it is in this case, by a lack of clear evidence as to what, exactly, the worker was exposed to, or when, or how often. Following the Supreme Court in *Lawson* v. *Laferrière*, [1991] 1 S.C.R. 541, *Snell v. Farrell* [1990] 2 S.C. R. 311, and *McGhee v. National Coal Board*, [1972] 2 ALL ER 1008 (HC) as adopted by tribunal jurisprudence (see *Decision No. 549/95I2*, for example) we note that an extremely high standard of virtual scientific certainty is not required before resolving these issues. *It is not essential that the medical or scientific experts opine firmly in favour of the work-related cause(s). Rather, a Panel must be satisfied, on the balance of probabilities, that the work exposure is a significant contributing factor in the worker's condition.* An inference may, in certain cases, support such a conclusion. That said, a causation theory must have some evidence to support it: it cannot be speculative. See *Decision Nos. 795/95*; *1558/98*; and *549/95I2*.
>
> The Tribunal must decide the case on a balance of probabilities. The Panel is required to weigh the possible theories of entitlement to determine if it is more probable than not that the disease resulted from the workplace exposure. If the evidence for and against the issue is approximately equal in weight, section 4(4) of the pre-1997 Act provides that entitlement is to be allowed. This reflects the policy goals of the Act.
>
> We note also *Decision No. 473/91*, in which the Panel stated:
>
> > As we noted above, determination of this kind of issue requires a decision one way or the other, based on a balancing of the evidence presented. The panel has weighed the evidence in this case to determine probability, not certainty. The panel does not have the luxury of deferring a conclusion pending greater scientific certainty. The panel must base its conclusion on whatever evidence has been presented.
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> [Paras. 32-34; emphasis added]

[234] Claims for lung cancer provide another example. Lung cancer occurs in the general population as well as the working population. Epidemiological evidence has established a strong association between cigarette smoking (generally a non-occupational causal factor) and lung cancer. There is also a well-established association between lung cancer and asbestos exposure (usually an occupational causal factor). In recognition of the evidence supporting an association between asbestos exposure and lung cancer, the WSIB developed a policy entitled, "Lung Cancer – Asbestos Exposure."[59] That policy sets out an occupational exposure requirement of 10 years and an appropriate latency period. Nonetheless, the experts do not agree on whether the development of lung cancer in the absence of asbestosis may be causally attributed to asbestos exposure.[60] The presence of asbestosis may be characterized as an objective proxy, a so-called

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[59] *Decision No. 809/88*, *supra*, provides an example of the application of this policy.

[60] See, for example, *Decision No. 2990/01*, 89 W.S.I.A.T.R. (online), in which an independent expert selected by the Tribunal gave the opinion that a worker's lung cancer was unlikely to be related to asbestos exposure since there was no asbestosis.

"gold standard," for attributing lung cancer to occupational asbestos exposure. If a gold standard were required to establish causation for physical injuries and diseases, as the Attorney General's argument implies, then it would be equally appropriate to exclude entitlement for lung cancer attributed to asbestos exposure in the absence of asbestosis. Yet, the Act does not exclude claims for lung cancer in the absence of asbestosis. Furthermore, the Act does not preclude claims for lung cancer attributed to less well-established exposures, such as diesel fumes.[61] Accordingly, these claims may be assessed upon their individual merits and the strength of the evidence with reference to the legal standard of causation.

[235] These examples demonstrate that entitlement for many physical conditions and claims may be decided in the absence of "reproducible and valid clinical methods to adjudicate the relative causal importance of the multiple causal factors." We are not persuaded by the argument that the cases cited by the worker's representative merely show that entitlement is inappropriately being granted for physical conditions or disabilities. Leading authorities from the courts, such as *Snell*, *supra*, and *Athey*, *supra*, stand for the proposition that scientific certainty is not required to establish causation. Our attention was not drawn to any provision of the WSIA, Board policy, or jurisprudence from the courts, which suggests that causation must be established by means of "reproducible and valid clinical methods to adjudicate the relative causal importance of the multiple causal factors."

[236] Through the application of the impugned provisions, claimants with non-traumatic mental stress claims are deprived of the opportunity to have their individual circumstances weighed and considered. The legislative "objective proxy" for entitlement, an acute reaction to a sudden and unexpected traumatic event, sets a standard for which the scientific evidence of association is "airtight" to use Dr. Gnam's term. In the Panel's view, this objective proxy sets a standard equivalent to, or approaching, scientific certainty for causation; this distinction is substantively discriminatory since the WSIA does not apply an analogous standard to physical injury and disease claims. The effect of the impugned provisions is to impose an exacting threshold standard that does not apply to any other type of claim. The examples discussed above are analogous to gradual-onset stress claims in that there is a lack of an objective and reliable clinical method for determining causation in the individual case; yet, mental stress claims are singled out for removal from adjudication on their individual merits, in favour of an exclusion based upon the nature of the disability (mental illness rather than physical injury).

[237] Dr. Gnam conceded in his testimony that it was outside his expertise to comment upon whether valid and reliable objective methods for determining work-relatedness were available for physical injury claims. In his Addendum Report, Dr. Gnam cited the following as examples: the validity and reliability of using simple clinical rules in order to decide whether x-rays are required in order to exclude musculoskeletal injuries; in psychiatry, there is extensive literature regarding the reliability and validity of using risk assessment instruments to predict behaviours; and the reliability and accuracy of clinicians in making diagnoses using normal clinical methods when compared against labour-intensive research methods that are considered to be an independent gold standard. In our view, this limited set of examples is insufficient to support a conclusion that a "gold standard" or "objective proxy" for determining work-relatedness is generally available for the vast majority of physical injury claims attributed to disablement or occupational disease. Our attention was not drawn to any evidence of proven methods for

[61] See, for example, *Decision No. 1117/09*, 2009 ONWSIAT 2327 (CanLII).

reliably and accurately determining the work-relatedness of many physical injuries or diseases and the case law demonstrates that such objective methods of determining causation are not available for a wide variety of physical injuries and diseases.

[238] In summary, the adjudication of physical injuries and diseases presents challenges with multifactorial causation and the lack of an objective method for determining causation. The lack of a reliable objective clinical method for establishing causation in individual cases does not preclude entitlement under the WSIA, but rather, physical injury and disease claims under the WSIA are considered based upon general definition of accident, which includes a disablement, the legal test for causation, and the standard of proof on a balance of probabilities, subject to the statutory benefit of the doubt. Claimants with such physical injuries and diseases are not deprived of the opportunity to have their claims decided on their individual merits. In contrast, claims for mental stress disability may not be considered on the basis of a disablement and must fall within narrow parameters defined in subsection 13(5) before being considered for entitlement.

Degree of correspondence: the job strain literature

[239] As we noted above, the evidence and argument presented focused on the epidemiological evidence of the association between "job strain" and the onset of mental disorders. This evidence does not necessarily correlate to the circumstances of the worker in this case or of mental stress claimants under the WSIA in general. We will consider the significance of this later in these reasons, but here we will address the evidence regarding job strain.

[240] As discussed above, the studies presented in the evidence before us expressed the increased risk for mental disorder in workers with job strain with an odds ratio in the range of 1.82.[62] For the reasons discussed earlier, we accept that the evidence demonstrates a moderate increased risk for the development of mental disorders associated with "job strain." Considering this evidence in light of the analysis of epidemiological evidence in *Decision No. 600/97*, *supra*, it is fair to say that an individual claim for mental stress attributed to "job strain" would not be granted on the basis of this epidemiological evidence, in the absence of special factors supporting causation in the individual case. While the epidemiological evidence is helpful in understanding the context of the impugned provisions and the *Charter* challenge, the crucial inquiry remains: do the impugned provisions correspond with the needs and circumstances of persons with mental disability?

[241] In words that are germane to the impugned provisions in this case, Gonthier J. expressed the Court's view in *Martin* that the impugned chronic pain provisions perpetuated stereotyping and did not correspond to the claimants' needs (at paragraph 99):

> In my view, it simply cannot be said that the regime as it stands sufficiently corresponds to the needs and circumstances of injured workers suffering from chronic pain for the second contextual factor to point away from discrimination. The separate regime set up for chronic pain under the Act thus stands in sharp contrast to the one upheld by this Court in *Winko*, supra. In that appeal, this Court held that s. 672.54 of the *Criminal Code*, R.S.C. 1985, c. C-46, which provided that, following a verdict declaring an accused not criminally responsible on account of mental disorder, a court or Review Board could direct that the accused be discharged (with or without conditions) or detained in a hospital, did not infringe the s. 15(1) rights of mentally impaired criminal defendants. In that case, the key to the finding of non-discrimination was the

[62] See, for example, Lamontagne *et al.* 2008, *supra*, Stansfeld and Candy 2006, *supra*.

combination of individualized assessment and adequate treatment provided by the *Criminal Code*. As McLachlin J. stated, at paras. 88-89:

> The essence of stereotyping, as mentioned above, lies in making distinctions against an individual on the basis of personal characteristics attributed to that person not on the basis of his or her true situation, but on the basis of association with a group: *Andrews*, *supra*, at pp. 174-75; *Law*, *supra*, at para. 61. The question is whether Part XX.1 in effect operates against individual NCR accused in this way. In my view, it does not. At every stage, Part XX.1 treats the individual NCR accused on the basis of his or her actual situation, not on the basis of the group to which he or she is assigned. Before a person comes under Part XX.1, there must be an individual assessment by a trial judge based on evidence with full access to counsel and other constitutional safeguards. A person falls under Part XX.1 only if the judge is satisfied that he or she was unable to know the nature of the criminal act or that it was wrong. The assessment is based on the individual's situation. It does not admit of inferences based on group association. More importantly, the disposition of the NCR accused is similarly tailored to his or her individual situation and needs, and is subject to the overriding rule that it must always be the least restrictive avenue appropriate in the circumstances. Finally, the provision for an annual review (at a minimum) of the individual's status ensures that his or her actual situation as it exists from time to time forms the basis of how he or she is to be treated.
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> This individualized process is the antithesis of the logic of the stereotype, the evil of which lies in prejudging the individual's actual situation and needs on the basis of the group to which he or she is assigned. [Emphasis added.]

See also: *British Columbia (Superintendent of Motor Vehicles)* v. *British Columbia (Council of Human Rights)*, [1999] 3 S.C.R. 868; *British Columbia (Public Service Employee Relations Commission)* v. *BCGSEU*, [1999] 3 S.C.R. 3.

On the contrary, the treatment of injured workers suffering from chronic pain under the Act is not based on an evaluation of their individual situations, but rather on the indefensible assumption that their needs are identical. In effect, the Act stamps them all with the "chronic pain" label, deprives them of a personalized evaluation of their needs and circumstances, and restricts the benefits they can receive to a uniform and strictly limited program.

[242] We find that the impugned provisions in this case treat all persons with mental stress claims with the same broad strokes in a manner analogous to that described in *Martin*. In particular, we note that, when considering the universe of potential claims under the WSIA, the epidemiological evidence regarding job strain is not readily distinguishable from that available for other types of claims. The epidemiological evidence for physical injury claims varies widely, from weak and inconclusive to strong and well-established in the scientific community.

[243] The two experts agreed that numerous studies over the years have shown an increased risk for mental disorders in workers with job strain. In this regard, we would note Dr. Gnam's observation in his 2001 book chapter:

> In summary, scientific research from several sources strongly supports the view that certain mental aspects of the workplace may lead to medical illness, mental disorder, and other disabling mental conditions. *Collectively, the studies cited above provide as strong or stronger evidence of workplace causation than exists for several industrial diseases.*
>
> [Emphasis added]

[244] The evidence that the association between job strain and mental disorder is at least as strong as it is for occupational disease undermines the argument that the mental stress provisions correspond with the circumstances of the claimant group. *Decision No. 565/04* (2009), 89 W.S.I.A.T.R. (online), provides an example of the evaluation of causation where the worker had a physical disease that was multifactorial in origin and the epidemiological evidence demonstrated an SIR below 200. The worker had 30 years of occupational exposure as a nickel miner, as well as a number of non-occupational risk factors. The evidence in that case established an SIR for individuals with 25 years of more employment as underground miners in the same mine was 174. This was suggestive of a link to occupational exposure but not probative. In addition, the Panel found that the worker's exposure was greater than the average worker, considering his exposure to both asbestos and oil mists. The Panel found that the worker's exposure in the course of his 30 years of employment as an underground miner was substantial and significant. The Panel evaluated causation with reference to a five-point framework established in earlier Tribunal decisions, such as *Decision No. 473/91*, *supra*. In the result, the Panel concluded in *Decision No. 565/04* that the worker's occupational exposure was a significant contributing factor to the development of his laryngeal cancer. This example is important in demonstrating the role of individualized adjudication of work-relatedness in claims for physical injuries and diseases under the WSIA. The evidence of the association between job strain and mental disorder is moderate, but mental stress claimants are deprived of any individualized assessment of their claims if they do not meet the entitlement criteria set out in the impugned provisions.

[245] The Board may decide to adopt policy to assist in the adjudication of complex issues, as it has for the adjudication of claims for heart attacks, lung cancer and asbestos exposure, psychotraumatic disability, and chronic pain, for example. Policy guidelines provide a useful framework for consistent adjudication while permitting consideration of the individual merits and justice of each case in accordance with the WSIA (sections 124 and 119).

[246] The evidence from the Attorney General's expert indicates that the impugned provisions do not correspond with the needs of persons with mental stress disabilities, since Dr. Gnam acknowledged that the impugned provisions are underinclusive and that the epidemiological evidence for job strain and mental disorder is stronger than that available in occupational disease claims. There was also significant evidence from Dr. Stansfeld supporting that there is a moderate association between job strain and the development of mental disorders. Claims for physical injuries and diseases are subject to similar weaknesses in the epidemiological evidence; as such, there is no logically sound basis for the differential treatment of mental stress claims.

[247] Given the evidence of a moderate association between job strain and mental disorder, the impugned provisions are underinclusive: they will exclude mental stress claimants from entitlement under the WSIA, whether or not their mental disability can be shown to be work-related. In our view, a provision that is underinclusive in recognizing entitlement for mental disorders runs counter to the overarching purposes and special features of the WSIA, in particular:

- Where the evidence for and against the claimant is approximately equal in weight, the benefit of the doubt is resolved in favour of the claimant;
- Decision-making is based on the merits and justice of the case, and the Board and the Tribunal are not bound by legal precedent;

[248] In contrast to these statutory principles which apply to physical injury claims, the impugned provisions create narrow rules for mental stress entitlement, and the evidence is undisputed that they likely result in the exclusion of mental stress claims which would otherwise meet the eligibility requirements of the WSIA.

[249] The rationale for singling out mental stress claims from other physical injuries and conditions is not supported by the evidence, particularly when the evidence indicates that the association between job strain and mental disorders is comparable to the nature of the evidence in many claims for occupational disease. This epidemiological evidence does not necessarily support granting entitlement in an individual case, but this is true of epidemiological evidence generally, whether it relates to mental stress conditions, repetitive strain injuries, or occupational disease: epidemiology does not prove or disprove causation in an individual case.[63]

[250] Despite the epidemiological evidence of an association between job stress and the onset of mental disorders, the WSIA subjects mental stress claims to differential treatment, and imposes a strict code for entitlement to which no physical injury or disease claim is subject. The case examples discussed throughout this decision demonstrate that claims for workplace injuries encompass a broad range of potential conditions, most of which occur both in the general population and the working population. These conditions may range from back strain and carpal tunnel syndrome, to lung cancer and non-Hodgkin's lymphoma, to Parkinson's disease and Hepatitis C, to cite but a few. Correspondingly, the epidemiological evidence supporting the work-relatedness of physical conditions and diseases varies widely. Unless there is an applicable Board policy or statutory presumption, claims for these and other physical conditions are adjudicated on an individual basis applying general legal principles of causation.

[251] In summary, the epidemiological evidence demonstrates a moderate association between job strain and the onset of mental disorders; as such, the impugned provisions exclude from coverage persons with chronic stress claims which are attributable to work, regardless of the strength of the evidence supporting the individual claim. In addition, by requiring that the event be "unexpected," the impugned provisions potentially exclude other claims by those who are expected to deal with traumatic incidents in the course of their jobs and who would also not meet the requirements of sections 13(4) and (5). Such claims are potentially excluded from entitlement regardless of whether the evidence shows that their mental stress conditions are work-related. Therefore, we find that the evidence does not support a finding that the impugned provisions correspond with the actual needs and circumstances of the claimant group.

Degree of correspondence: the focus on "job strain" vis-à-vis the actual circumstances of the claimant group

[252] As noted above, the Court's decision in *Martin* emphasized the importance of considering whether the impugned law considers the individual's needs and circumstances. Quoting from *Winko*, it was noted that an "individualized process is the antithesis of the logic of the stereotype, the evil of which lies in prejudging the individual's actual situation and needs on the basis of the group to which he or she is assigned." (para. 99). In *Martin*, the Court concluded that the chronic pain provisions deprived workers with chronic pain of a personalized evaluation of their needs and circumstances.

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[63] This was explained in detail in *Decision No. 600/97*, *supra*.

[253] Similarly, in this case, we find that the evidence presented demonstrates that the impugned provisions do not take into account the individual needs and circumstances of mental stress claimants. As discussed above, the evidence supports an association between job strain and the onset of mental disorders, but the WSIA excludes all such claims without consideration of the individual circumstances of the claimant. The impugned provisions also create an objective proxy for entitlement based upon a "gold standard" that is not imposed on claims for physical injury or disease.

[254] Furthermore, most of the scientific literature that was the subject of dispute in this appeal examined the potential association between "job strain" or "effort-reward imbalance" and the onset of mental disorders; however, there was no evidence that this type of mental stress claim is prevalent, or even common in the workplace insurance scheme in Ontario. The Panel notes that the instant case is not based upon general job strain or effort-reward imbalance, but rather, the worker attributed her mental condition to ongoing hostile and demoralizing treatment by a staff member in a position of power: that is to say, bullying, in the colloquial sense of the word.

[255] There is evidence for a stronger association between "bullying" and the onset of mental disorders,[64] although this evidence has to be interpreted with caution, as it may include physical bullying as well as psychological bullying.[65] Nevertheless, we observe that the "job strain" model which was the primary focus of the debate in the expert evidence also does not accurately capture the nature of this worker's case. This worker's case may be seen as representative of the affected group of mental stress claimants; therefore, to justify the mental stress provisions based upon the job strain studies does not correspond with the affected group's needs, as it focuses on assumptions which may be dissimilar from their individual circumstances. Rugulies 2012, *supra* (at p. 218), noted: "Humiliating experiences, such as becoming the target of bullying, will likely contribute to this inability [to hold good thoughts] and humiliation has indeed predicted onset of MDE [major depressive episode] ..." The authors observed further that "being bullied might evoke a feeling of helplessness, which has been discussed for a long time as an important social psychological contributor to MDE." (p. 219).

[256] In this case, the worker attributed her mental disorder to treatment in the workplace that could be fairly characterized as humiliating, in that the doctor insulted her and undermined her professional integrity in front of both colleagues and patients. In fact, in the medical evidence in this case, the worker described that she felt "pushed around, battered, humiliated, and discredited." As such, we find that the focus on the "job strain" model does not correspond with this worker's circumstances, nor does it necessarily reflect the circumstances of many claims for mental stress under the WSIA.

[257] There is another aspect of the evidence that was overlooked in the debate over the strength of the association between job strain and mental disorder. A few of the studies highlighted the role of a lack of support from management and interpersonal difficulty at work as potential risk factors for developing mental disorders. These are factors that were at play in this worker's case in that she had interpersonal difficulty with a doctor who was in a position of power and she was not supported when she brought her concerns to her team leader. In this

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[64] Kivimäki 2003, *supra*; Rugulies 2012, *supra*.

[65] We accept the Attorney General's position that it may not be appropriate to extrapolate these numbers with respect to this worker's case or to chronic stress generally, since both experts agreed that these studies may overstate the association in that they may have encompassed physical bullying, thereby treading into the territory of acute stressors.

regard, we note, for example, a case control study of staff at a large hospital looked at both non-work and work-related stressors and concluded that even after the effects of personal vulnerability to psychiatric disorder and ongoing social stress outside of work had been taken into account, stressful situations at work contributed to anxiety and depressive disorders (Weinberg and Creed 2000, *supra*). Six of the individual work problems were experienced significantly more often by the cases than the controls. According to the paper, "The most striking difference reflected lack of support from [a] manager." (p. 535). Interpersonal difficulty with a supervisor was also among the list of the six individual work problems experienced significantly more often by the cases than the controls (p. 536).

[258] This study provides further support for the proposition that a wide range of work-related factors may cause or contribute to the development of mental disorders. The Panel cites this study only as an example; it is not meant to imply that this or any other study is determinative of causation, but rather, it illustrates that the impugned provisions subject mental stress claims to a single, narrow test for entitlement without regard for the epidemiological evidence that is relevant to a claimant's individual circumstances. The impugned provisions treat mental stress claimants as a homogeneous group in a manner that is inconsistent with the evidence, which shows that a variety of work-related factors may play a role in the development of mental illness, beyond job strain or effort-reward imbalance.

[259] These examples of different forms of workplace stressors associated with mental disorder add further support to the finding that subsections 13(4) and (5) of the WSIA presume that the needs and circumstances of mental stress claimants are identical, without regard for their individual characteristics and circumstances. This lack of individualization does not correspond with the needs of the claimant group and is analogous to the chronic pain provisions that the Court found to be discriminatory in *Martin*.

[260] For all of the above reasons, we find that the impugned provisions are substantively discriminatory, as the effect is to deprive gradual-onset mental stress claimants of the opportunity to present evidence regarding their individual circumstances in a manner that does not correspond to the actual characteristics and circumstances of the claimant group. The impugned provisions treat workers with gradual onset mental stress claims as a monolithic whole: they provide no opportunity for consideration of the nature of their claims, their health history, or the medical evidence in their particular case. We find that the evidence does not support that the impugned provisions correspond with the actual needs, characteristics, or circumstances of the claimant group.

The scope of line-drawing in a benefit scheme such as the WSIA

[261] In *Withler* (paragraph 67), the Court emphasized that the larger benefit scheme must be considered in the substantive discrimination analysis and that it should be recognized that benefit programs are designed to benefit a number of different groups and necessarily draw lines on factors such as age. In reaching the above conclusions, we are mindful that the WSIA creates a broad and complex benefit scheme, and that the Legislature is entitled to a certain degree of latitude in balancing competing interests to achieve the best results for the greatest number of persons covered by the scheme. Counsel for the Attorney General emphasized the following passage from *Martin*, *supra*, at paragraph 82:

> ...government benefits or services cannot be fully customized. As a practical matter, general solutions will often have to be adopted, solutions which inevitably may not respond perfectly to the needs of every individual. This is particularly true in the context of large-scale compensation systems, such as the workers compensation scheme under consideration. Such systems often need to classify various injuries and illnesses based on available medical evidence and use the resulting classifications to process the claims made by beneficiaries. This approach is necessary, both for reasons of administrative efficiency and to ensure processing large numbers of claims. In addition, the beneficiaries themselves benefit from the reduced transaction costs and speed achieved through such techniques, and without which large-scale compensation might well be impossible. The state should therefore benefit from a certain margin of appreciation in this exercise.

[262] This Tribunal has also recognized that, in a benefits scheme such as the WSIA, there is scope for permissible line-drawing in situations comparable to the facts addressed by the Court in *Withler*. For example, in *Decision No. 681/10*, 2012 ONWSIAT 1019, the Panel considered a challenge to the use of the American Medical Association's *Guides to the Evaluation of Permanent Impairment* (3rd Edition Revised) (the "AMA Guides") where a worker had a prior work-related permanent impairment. The AMA Guides call for the combination (rather than the addition) of ratings for pre-existing work-related impairments when rating a current work-related impairment through the use of the Combined Values Chart (CVC). The worker alleged that the impugned Board policy, by requiring the use of the CVC, discriminated against workers on the basis of disability, by reducing the quantum of the permanent impairment assessment. The Panel concluded that the impugned policy was not discriminatory, as the distinction is based on the neutral and rationally defensible policy goal of assessing permanent impairments in accordance with the prescribed rating schedule and was not discriminatory on the basis of disability. Even if the policy did create a distinction, the Panel concluded that it was not substantively discriminatory since the non-economic loss (NEL) benefit is tailored to the individual worker, whether there is one injury or more than one being rated. The application of the CVC was found to meet the needs of the worker group of providing compensation for permanent impairments from workplace injuries, using the neutrally based rating schedule, and providing ratings on a whole person basis in a holistic manner. The application of the CVC to the rating of a permanent impairment did not affect the worker's entitlement to other benefits, for example, loss of earnings benefits, health care, and labour market re-entry services.

[263] *Decision No. 512/06*, 2011 ONWSIAT 2525, addressed a *Charter* challenge to section 43 of the WSIA, which provides that workers aged 63 and over at the time of the injury are entitled to loss of earnings (LOE) benefits for a period of up to two years following the injury.[66] The majority of the Panel concluded that the impugned statutory provision was not discriminatory in the substantive sense. The two-year period for the payment of benefits to workers age 65 or over would not serve every individual, but did not disadvantage the group as a whole. In that case, the majority of the Panel concluded that the provision of two years of LOE benefits reflected an appreciation for and understanding of older workers who continue to work past the expected retirement age of 65. In that case, the majority of the Panel held that the two-year period allows a worker to reach full recovery and make arrangements for a transition into retirement or return to work. The limitation was effective in meeting the actual needs of the group as a whole and was consistent with the overarching aims of the legislation. We note that the two-year limitation on LOE benefits after age 63 does not preclude eligibility for other benefits under the WSIA,

[66] A reconsideration request was dismissed in *Decision No. 512/06R*, 2013 ONWSIAT 2621.

including health care, NEL awards, and labour market re-entry services. As such, *Decision Nos. 512/06* and *512/06R* are distinguishable from the case before us, which precludes entitlement to any benefits under the WSIA.

[264] In the circumstances of this case, however, the evidence persuades us that the impugned provisions do not correspond to the actual needs and circumstances of the affected group; accordingly, the mental stress provisions do not constitute permissible line-drawing nor do they represent the equitable use of scarce resources. In this regard, it is important to make reference to Gonthier J.'s conclusions in *Martin*, at paragraph 82:

> The state should therefore benefit from a certain margin of appreciation in this exercise, but it cannot be exempted from the requirements of s. 15(1) of the *Charter*. The distinction made will not be allowed to stand when it, intentionally or not, violates the essential human dignity of the individuals affected and thus constitutes discrimination.

[265] We find that the distinction created by the impugned provisions is not analogous to the circumstances addressed by the Supreme Court of Canada in *Withler*, in which the impugned provision involved an age-related reduction in one benefit that was part of a suite of benefits available to federal civil servants and members of the Canadian Forces and their families. In this case, the impugned provisions do not affect the quantum of one benefit within a larger scheme, but rather, they exclude any form of entitlement under the WSIA for workers with non-traumatic mental stress claims that do not meet the requirements of subsections 13(4) and (5); such claims are denied access to the scheme altogether. As we discussed earlier, the effect of the impugned provisions is to deprive the claimant group of the benefit of the historical trade-off inherent in the workplace insurance regime.

[266] In *Withler*, the Court noted that, in the context of a challenge to a benefit scheme, the inquiry should consider: "Whom did the legislature intend to benefit and why?" In this case, it was suggested that the Legislature intended to benefit workers with acute mental stress disorders attributed to sudden and unexpected traumatic events, although it has not been shown why other mental stress claimants ought to be excluded from entitlement to benefit claimants with acute mental stress. As we discussed above, subsections 13(4) and (5) exclude eligibility for a group of claimants, persons with non-traumatic mental stress disabilities, for whom it has been shown that the epidemiological evidence supporting their claims is as strong as, or stronger than, many occupational diseases. There is no evidence that the exclusion of non-traumatic mental stress claims achieves any benefit for acute mental stress claimants.

[267] *Withler* stands for the proposition that perfect correspondence is not required and legislative policy goals may be matters to consider in the assessment of a discrimination claim. For the foregoing reasons, we find that the impugned provisions do not constitute appropriate line drawing, nor do they approximate the needs of the claimant group. We are not persuaded that any legitimate legislative policy goals are served by treating mental stress claimants in a differential manner: they result in the exclusion of non-traumatic mental disorders and acute onset disorders which do not meet the section 13(4) and (5) criteria from coverage under the WSIA, whether or not they are work-related.

[268] Although we noted that the mental stress provisions and policy addressed in *Plesner* were distinguishable from this appeal, we find the majority reasons in *Plesner* regarding the line-drawing argument to be instructive (paragraphs 122-123):

> Nor am I persuaded by the Attorney General that the impugned provisions do not draw a distinction between workers like Mr. Plesner and others based on one or more personal characteristics (namely, mental disability). Counsel for the Attorney General submits that s. 5.1(1)(a) merely establishes an objective test for causation which is required because of the relative difficulty in proving purely mental injuries as compared with physical injuries. Counsel says that it is the nature of the event, rather than any personal characteristic of the worker, or the nature of the injury, which is the relevant distinction raised by s. 5.1(1)(a). She submits that this distinction is simply an exercise in legitimate line-drawing by the Legislature designed to assist the tribunals in determining whether mental injuries are work-related.
>
> I agree that the Legislature and WCB are entitled to establish laws and policies, respectively, to assist those who have to administer the Act, but they must do so in a manner which is not discriminatory within the meaning of s. 15. To say that the impugned provisions are merely about causation and line-drawing by government is, with respect, to sidestep the purpose of the analysis, which is to determine whether in drawing lines and setting tests for causation for those with purely mental injuries, the Legislature and policy makers have discriminated against some of the very persons for whose benefit the compensation scheme was designed, namely workers who have suffered a mental disability arising out of and in the course of their employment.

[269] The Court also noted in *Withler* that the allocation of resources may be a relevant consideration. The context in *Withler* involved a benefit scheme which provided a suite of benefits, including benefits to the claimants. In this case, no substantial evidence was presented regarding the allocation of resources and why it would be necessary to achieve the stated legislative objectives by targeting mental illness claims, rather than through some alternative method.

[270] We are not persuaded by the submission on behalf of the Attorney General that, in the case of claims for mental disorders, it is not a question of whether to draw a line, but where. The fact many other Canadian jurisdictions have implemented limitations on mental stress claims does not necessarily establish that they were not animated, at least in part, by inaccurate assumptions about mental illness. As we discussed earlier, there is evidence that such assumptions include the notion that there is a greater tendency towards fraudulent claims for mental disability or that mental disability claimants would place an underserving burden on the workplace insurance system.

[271] Counsel for the Attorney General relied upon a passage contained in Dr. Gnam's affidavit and his book chapter, in which he opined that to treat mental-mental claims no differently from physical injury claims "might well result in blanket coverage of all mental conditions, work-related or not." The authority for this proposition was a book chapter[67] that was not entered into evidence. Our attention was not drawn to any direct evidence that applying the principles of legal causation in mental stress claims in Ontario is likely to result in blanket coverage of all mental conditions, regardless of their work-relatedness; as such, this observation is speculative. Dr. Gnam's statement suggests a possibility, rather than a likelihood of this outcome. In view of the evidence of a moderate association between job strain and mental disorder, and the lack of direct evidence to support this speculative comment, we are not persuaded that the risk of "blanket coverage" is any greater for mental stress claims than it would

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[67] Pryor, E.S. 1997. "Mental Disabilities and the Disability Fabric." In *Mental Disorder, Work Disability and the Law*, ed. R.J. Bonnie and J. Monahan. Chicago and London: University of Chicago Press.

be for physical injury or occupational disease claims. We note that "blanket coverage" was not evident in this Tribunal's case law under the pre-1997 legislation.

[272] It is worthwhile in this regard to reproduce the paragraph in which Dr. Gnam addresses the policy option of treating mental-mental claims no differently from physical injury claims:

> For physical impairment scenarios, the claimant must show that the employer is a significant contributing factor in causing his or her injury. Moreover, in the case where the claimant has a pre-existing or pre-disposing condition, the general rule is that the employer or insurance system "takes the employee as it finds her," and the worker still receives compensation. To apply the same principles to mental conditions might well result in blanket coverage of all mental conditions, work-related or not (Pryor 1997). The evidence suggests that employment to some degree probably does aggravate many mental impairments in ways the employer cannot prevent, or cannot be expected to prevent given the current limitations in knowledge. This approach would place upon the employer-funded insurance plan the costs of some impairments that they could not act in good faith to prevent. If, as seems likely, some mental impairments are not preventable by anyone, then the significant contributing factor rule would in effect become an employer mandate to provide disability insurance to all mental impairments suffered by workers (Pryor 1997).

[273] The Panel finds that the above-quoted passage is based in part on Dr. Gnam's interpretation of the legal standard of causation, which exceeds the area of expertise in which Dr. Gnam was qualified to give evidence. Furthermore, we must consider the comments about preventability in light of the no-fault nature of the workplace insurance scheme. A worker is entitled to compensation for a personal injury by accident arising out of and in the course of employment, regardless of the employer's fault and regardless of whether the employer could have prevented the injury. There are many types of injuries which may not be preventable, but that does not have an impact on a worker's entitlement in a no-fault scheme. The prevention of injuries is identified in section 1 of the WSIA as one of the legislative purposes, and it is certainly a worthwhile and laudable goal, but this goal is not tied to a worker's entitlement to compensation for any physical injury or disease.

[274] Additionally, we are not persuaded by the suggestion that the thin skull principle, which undisputedly applies to physical injuries, would result in "blanket coverage" if it were applied to mental stress claims. In our view, the application of the crumbling skull principle (with reference to the "Aggravation Basis" policy in the workplace insurance context, discussed above) would operate to prevent widespread granting of entitlement in all mental stress claims. The application of the thin skull and crumbling skull principles depends on the nature of the pre-existing condition and the injuring process in the individual case; we are not persuaded that the principles of legal causation would extend unlimited entitlement for workplace mental stress. The general principles of causation would preclude entitlement if the evidence indicates that non-workplace factors overwhelm the causal significance of the alleged workplace events. In summary, we are not persuaded that it is likely that equal treatment of mental-mental claims would result in "blanket coverage" regardless of whether the mental disorders were work-related or not.

[275] Finally, we note that Dr. Gnam's opinions are premised upon his view that no reproducible and valid clinical methods have been developed to adjudicate the relative causal importance of the multiple causal factors that might be relevant for any specific individual who has developed a disabling mental disorder. As discussed above, we prefer Dr. Stansfeld's

evidence that clinicians are capable of assessing the contribution of work stressors to mental disorders.

[276] In view of the apparent, though speculative, concerns about "blanket coverage," the Panel notes that many conditions which the Tribunal and Board must adjudicate are multifactorial and require a careful analysis of the evidence and the applicable legal principles. The Tribunal's jurisprudence in the area of mental stress indicates that a multifactorial approach to determining causation may include the following lines of inquiry:

- Is there a DSM diagnosis of the worker's condition? In order to be eligible for a "personal injury by accident" under the WSIA, a disabling mental reaction is necessary: a transitory emotional response is not compensable.[68]
- Was there a "workplace injuring process"? This involves careful consideration of the nature of the workplace events that are alleged to have caused the mental disorder and the evidence surrounding the alleged events.[69] A workplace injuring process is not established if the mental disorder arises solely from the worker's misperception of events.[70]
- Are there co-existing or prior non-work stressors present that may have caused or contributed to the onset of the mental disorder? How significant are they in comparison to the workplace stressors?
- Does the worker have any prior psychiatric history or predisposing personality features that are relevant to the question of causation? If so, is it in the nature of a "thin skull" or a "crumbling skull"? In other words, is it a case in which it is appropriate to consider entitlement on an "aggravation basis"?
- Is there a temporal connection between the events and the onset of the mental disorder? If not, is there a credible explanation for any delay?
- Do the medical professionals who comment upon causation have a complete and accurate understanding of the workplace events, the worker's psychiatric history, relevant family history, prior or co-existing stressors, and any other relevant factors?[71] Do they provide a reasoned explanation for their opinions on causation?
- What is the worker's employment history? In some cases, it may be appropriate to draw inferences in this regard. For example, a long and stable employment history may suggest that the worker had been able to cope with "normal" stressors in the past.

[277] This is a non-exhaustive list of factors which may be relevant to consider in the adjudication of mental stress claims. In the Panel's view, the consideration of these questions, as well as any other factors relevant to the individual case, in conjunction with the applicable legal

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[68] See, for example, *Decision No. 2599/01*, 2001 ONWSIAT 3995.

[69] An impartial inquiry into the alleged events does not connote an "objective" test, but rather, reflects that it is necessary to ascertain the nature of the accident; this is analogous to the examination of a worker's job duties in a claim for a repetitive strain injury. *Decision No. 2035/06*, *supra*, which addressed a physical injury claim, noted: "the worker's injuring activity must also be work-related and there should be an objectively identifiable workplace injuring process."

[70] See, for example, *Decision Nos. 1354/07*, 2013 ONWSIAT 360 and *2416/03*, *supra*.

[71] We note that this factor is relevant in evaluating the medical evidence in both physical and mental injury claims. For example, if an orthopaedic surgeon gives an opinion upon the causation of a worker's back injury based upon an inaccurate understanding of the accident and the worker's prior history of back pain, then the opinion is less persuasive than a medical opinion based upon an accurate understanding of the facts.

principles of causation, address concerns about the risk of "blanket coverage" for mental stress claims.

[278] In summary, we find that the impugned provisions are substantively discriminatory: the lines drawn are not consistent with the evidence and the impugned provisions do not represent a reasonable or equitable approach to the identified purpose of establishing the work-relatedness of mental disorders.

(b) Justification under section 1 of the *Charter*

[279] Section 1 of the *Charter* states:

> 1. The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

[280] The decision of the Supreme Court of Canada in *R.* v. *Oakes*, [1986] 1 S.C.R. 103, established the test for determining whether a limit is reasonable and demonstrably justified pursuant to section 1. Dickson C.J., speaking for the Court on this issue, stated the test as follows (at paras. 69-70):

> To establish that a limit is reasonable and demonstrably justified in a free and democratic society, two central criteria must be satisfied. First, the objective, which the measures responsible for a limit on a *Charter* right or freedom are designed to serve, must be "of sufficient importance to warrant overriding a constitutionally protected right or freedom": *R. v. Big M Drug Mart Ltd.*, *supra*, at p. 352. The standard must be high in order to ensure that objectives which are trivial or discordant with the principles integral to a free and democratic society do not gain s. 1 protection. It is necessary, at a minimum, that an objective relate to concerns which are pressing and substantial in a free and democratic society before it can be characterized as sufficiently important.
>
> Second, once a sufficiently significant objective is recognized, then the party invoking s. 1 must show that the means chosen are reasonable and demonstrably justified. This involves "a form of proportionality test": *R. v. Big M Drug Mart Ltd.*, *supra*, at p. 352. Although the nature of the proportionality test will vary depending on the circumstances, in each case courts will be required to balance the interests of society with those of individuals and groups. There are, in my view, three important components of a proportionality test. First, the measures adopted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair or based on irrational considerations. In short, they must be rationally connected to the objective. Second, the means, even if rationally connected to the objective in this first sense, should impair "as little as possible" the right or freedom in question: *R. v. Big M Drug Mart Ltd.*, *supra*, at p. 352. Third, there must be a proportionality between the effects of the measures which are responsible for limiting the *Charter* right or freedom, and the objective which has been identified as of "sufficient importance".

[281] In *Alberta* v. *Hutterian Brethren of Wilson Colony*, [2009] 2 S.C.R. 567 (para. 37), McLachlin C.J., for the majority, explained that deference to the Legislature is appropriate in the analysis of a complex regulatory response to a social problem:

> If the choice the legislature has made is challenged as unconstitutional, it falls to the courts to determine whether the choice falls within a range of reasonable alternatives. Section 1 of the *Charter* does not demand that the limit on the right be perfectly calibrated, judged in hindsight, but only that it be "reasonable" and "demonstrably justified". Where a complex regulatory response to a social problem is challenged, courts will generally take a more deferential posture throughout the s. 1 analysis than they will when the impugned measure is a penal statute directly threatening the liberty of the

> accused. Courts recognize that the issue of identity theft is a social problem that has grown exponentially in terms of cost to the community since photo licences were introduced in Alberta in 1974, as reflected in the government's attempt to tighten the scheme when it discontinued the religious exemption in 2003. The bar of constitutionality must not be set so high that responsible, creative solutions to difficult problems would be threatened.

[282] Counsel for the Attorney General also cited *R.* v. *Edwards Books and Art*, [1986] 2 S.C.R. 713, in which Dickson C.J. observed that the courts were "not called upon to substitute judicial opinions for legislative ones as to the place at which to draw a precise line." The Panel has kept these principles in mind in considering whether the impugned provisions are justified under section 1 of the *Charter*.

(1) Pressing and substantial legislative objective

[283] The first branch of the *Oakes* test requires consideration of the legislative objective of the impugned provisions. In this case, the asserted purpose of the provisions is to ensure that, consistent with the broader purposes of the legislation, no-fault compensation is provided for injuries that "arise out of and in the course of employment." In this regard, the Attorney General relies upon the statement of the then Minister of Labour:[72]

> We want to restore the system to its original mandate as a workplace accident insurance plan. Bill 99 addresses the fact that in recent years the system has moved beyond its original mandate. In the past number of years, compensation has been paid for conditions whose connection to the workplace is often difficult to determine. Chronic mental stress is an obvious example. That is why compensation will be provided for stress, in the future, when the bill is passed, when it results from a traumatic workplace incident.

[284] We accept that this is a sufficiently pressing and substantial objective. The WSIA creates an employer-funded insurance scheme which is intended to cover workplace injuries and facilitate a return to work. It is not a universal disability scheme; therefore, we recognize the importance of provisions and policies which are aimed at limiting entitlement to work-related conditions.

[285] The submissions on behalf of the Attorney General imply that financial considerations also underlie the impugned provision, as it was suggested that the provisions are intended to compensate workers of different ages, salaries and injuries is in a fair equitable, financially responsible and accountable manner. Although the financial considerations have not been identified as the sole objective of the impugned provisions, the Panel finds it appropriate to consider the jurisprudence on the role of financial considerations in the section 1 analysis. In *Newfoundland (Treasury Board)* v. *N.A.P.E.*, [2004] 3 S.C.R. 381, 2004 SCC 66, Binnie J., speaking for the Court, considered the relevant authorities and concluded:

> The result of all this, it seems to me, is that courts will continue to look with strong scepticism at attempts to justify infringements of *Charter* rights on the basis of budgetary constraints. To do otherwise would devalue the *Charter* because there are *always* budgetary constraints and there are *always* other pressing government priorities. Nevertheless, the courts cannot close their eyes to the periodic occurrence of financial emergencies when measures must be taken to juggle priorities to see a government through the crisis.

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[72] Ontario Legislative Assembly, *Official Report of Debates*, April 24, 1997 at 9662. (Second Reading)

[286] Unlike the *Newfoundland (Treasury Board)* case, we were not presented with evidence that the WSIA insurance fund is in crisis or was in crisis at the time that the impugned provisions were passed. We were also not provided with evidence that mental stress claims were the cause of any such crisis. To the extent that financial concerns are an implicit secondary purpose of the impugned provisions, we find the analysis of similar arguments in *Martin* to be apt:

> The first concern, maintaining the financial viability of the Accident Fund, may be dealt with swiftly. Budgetary considerations in and of themselves cannot normally be invoked as a free-standing pressing and substantial objective for the purposes of s. 1 of the *Charter*: see *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 S.C.R. 3 ("*P.E.I. Reference*"), at para. 281; see also *Schachter v. Canada*, [1992] 2 S.C.R. 679, at p. 709. It has been suggested, however, that in certain circumstances, controlling expenditures may constitute a pressing and substantial objective: see *Eldridge*, *supra*, at para. 84. I find it unnecessary to decide this point for the purposes of the case at bar. Nothing in the evidence establishes that the chronic pain claims in and of themselves placed sufficient strain upon the Accident Fund to threaten its viability, or that such claims significantly contributed to its present unfunded liability. Admittedly, when a court finds the challenged legislation to be supported by another, non-financial purpose, budgetary considerations may become relevant to the minimal impairment test: see *P.E.I. Reference*, at para. 283.
>
> [Para. 109]

[287] In summary, we accept that ensuring the work-relatedness of eligible claims granted under the WSIA is a sufficiently pressing and substantial legislative objective. At the same time, however, we would observe that the goal of establishing the work-relatedness of conditions and injuries for which compensation is granted is equally important for both physical and mental injuries. There is inadequate evidence regarding the effect of mental stress claims on the WSIA insurance fund to justify a conclusion that any implied financial or budgetary purpose of the impugned provisions is sufficiently pressing and substantial.

(2) Proportionality of means used to achieve the legislative objective

[288] Turning then to the second branch of the test, we find that the Attorney General has not discharged its burden of showing that the limit imposed is proportionate to the extent of the infringement of the claimant's group's right to equality. To meet this requirement, the government must show that the means chosen of achieving the objective

- is rationally connected to the objective of the legislation;
- is reasonably considered to minimally impair the right in question; and
- affords a proportionality between any harmful effect of the measure and its salutary objective.

[289] Counsel for the Attorney General relied upon the evidence of Dr. Gnam and many of the arguments advanced in the section 15 analysis for the purposes of section 1 of the *Charter*. Given our conclusions on this evidence, set out above, we find that the evidence does not support that the impugned provisions are rationally connected to the stated purpose, that is, to ensure the work-relatedness of claims granted entitlement under the Act. There is moderate evidence of an association between job strain and mental disorders; therefore, there is a lack of a rational connection between the mental stress provisions and their stated purpose. We have also accepted the evidence that clinicians are able to give reliable opinions on the causation of mental disorders. The approach adopted in subsections 13(4) and (5) is not rationally connected to the

objective, as there was no substantial evidence that the epidemiological evidence regarding gradual-onset mental stress claims was distinguishable from many types of physical disablement and occupational disease claims which are not subject to strict entitlement criteria, but rather, are permitted consideration on the basis of their individual merits.

[290] The strength of the association between traumatic incidents and mental disorder does not support an exclusion of all of other forms of mental stress claims and this justification is not rationally connected to the objective. This is analogous to excluding all claims for lung cancer except those attributed to asbestos exposure or excluding entitlement for all back injuries except those caused by a fall from a height. We find this logic to be flawed as a proposed justification for the impugned provisions. Accordingly, we find that there is a lack of a logical and rational connection between the "objective proxy" for entitlement and the evidence of a moderate association between job strain and mental disorders.

[291] Furthermore, as we discussed above, the evidence demonstrates that workplace stressors are not limited to "job strain," but rather, there are many other types of non-traumatic workplace stressors that may be associated with mental disorders, including bullying, lack of managerial support, interpersonal conflicts, and humiliating events. The use of the job strain evidence as the foundation for the discriminatory provisions further undermines the rationality of the connection between the objective and the means employed to achieve that objective as it fails to recognize the broad scope of mental stress claims brought under the WSIA.

[292] Even if we were to accept that the there is a rational connection between the objective proxy for entitlement and the stated legislative objective, we find that the provisions do not impair the protected *Charter* right as little as possible. To show minimal impairment, it is sufficient to establish that the limit on the right is "reasonably tailored to the pressing and substantial goal put forward to justify the limit."[73] The Panel recognizes that a deferential approach is appropriate at this stage and throughout the section 1 analysis: the standard is whether the limit on the right is reasonably tailored, rather than precisely tailored.

[293] Counsel for the Attorney General referred to *McKinney*, *supra*, in support of the argument that the fact that a legislature in another jurisdiction has taken a different approach proves only that the legislature there adopted a different balance to a complex set of values (para. 123). While we accept that such comparisons are not determinative of the issue, the jurisprudence suggests that they may still be relevant. In *Quebec* v. *A.*, *supra*, McLachlin C.J. noted that the minimum impairment test is informed by the values of federalism and explained that the question at the minimum impairment stage is whether the limit goes too far in relation to the goal the legislature seeks to achieve (paras. 440-442):

> In addition, the minimum impairment test is informed by the values of federalism. "The uniformity of provincial laws that would be entailed by a stringent requirement of least drastic means is in conflict with the federal values of distinctiveness, diversity and experimentation": P. W. Hogg, *Constitutional Law of Canada* (5th ed. Supp. (loose-leaf)), vol. 2, p. 38-39; see also *R.* v. *Advance Cutting & Coring Ltd.*, 2001 SCC 70, [2001] 3 S.C.R. 209, at para. 275. The test must not be applied in a manner that amounts to identifying the Canadian province that has adopted the "preferable" approach to a social issue and requiring that all other provinces follow suit.
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> A argues that the Quebec dual regime approach does not minimally impair the equality right of de facto spouses. She argues that choice and autonomy can be respected without

[73] See, for example, *Hutterian Brethren*, *supra*, at paragraph 53.

> excluding de facto spouses entirely from the mandatory regime applicable to married and civil union spouses. She points to other provinces, where aspects of the mandatory regime apply to de facto spouses, unless they have formally opted out of that regime. Under such schemes, de facto spouses are denied protection only if they have agreed to that result. Unlike A, they are not effectively left unprotected because their partner did not consent to marriage. She also argues that a scheme that allowed for judicial intervention where property division and/or support are warranted would be less impairing of her equality right than the current scheme.
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> There is no doubt that schemes can be conceived — and indeed have been adopted in other provinces — that impair the equality right of de facto spouses to a lesser degree than the Quebec scheme. However — and this is the important point — such approaches would be less effective in promoting the goals of the Quebec scheme of maximizing choice and autonomy for couples in Quebec. The question at the minimum impairment stage is whether the limit imposed by the law goes too far *in relation to the goal the legislature seeks to achieve*. "Less drastic means which do not actually achieve the government's objective are not considered at this stage": *Hutterian Brethren*, at para. 54...

[294] We have also considered the reasons of Justice Abella (speaking for the minority on this issue) in *Quebec* v. *A.*, at paragraph 370. Abella J. cited *Martin* (paragraph 112) in support of the proposition that it is relevant to consider the approaches taken in other jurisdictions to consider whether other options are available. While acknowledging that the province of Quebec was not obliged to replicate the policy approaches taken by other provinces, Abella J. observed that such evidence "can be helpful in determining that there *is* a less impairing way to fulfill the objective of preserving freedom of choice." In *Martin*, the Court found that the prevention of fraudulent claims was the most persuasive of the several objectives that were identified. In finding that chronic pain provisions were not justified by section 1 of the *Charter*, Gonthier J. observed (paras. 111-112):

> There can be no doubt that, by excluding all claims connected to chronic pain from the purview of the Act and, in the case of workers injured after February 1, 1996, providing strictly limited benefits in the form of a four-week Functional Restoration Program, s. 10B of the Act and the FRP Regulations virtually eliminate the possibility of fraudulent claims based on chronic pain for all other types of benefits.
>
> The same reasoning, however, makes it patently obvious that the challenged provisions do not minimally impair the equality rights of chronic pain sufferers. On the contrary, one is tempted to say that they solve the potential problem of fraudulent claims by preemptively deeming all chronic pain claims to be fraudulent. Despite the fact that chronic pain may become sufficiently severe to produce genuine and long-lasting incapacity to work, the provisions make no effort whatsoever to determine who is genuinely unable to work and who is abusing the system. As the respondents correctly point out, the government is entitled to a degree of deference in its weighing of conflicting claims, complex scientific evidence and budgetary constraints, especially given the large unfunded liability of the Accident Fund. In other words, it is not sufficient that a judge, freed from all such constraints, could imagine a less restrictive alternative. Rather, s. 1 requires that the legislation limit the relevant *Charter* right "as little as is reasonably possible" (*R.* v. *Edwards Books and Art Ltd.*, [1986] 2 S.C.R. 713, at p. 772, *per* Dickson C.J.). However, even a brief examination of the possible alternatives, including the chronic pain regimes adopted in other provinces, clearly reveals that the wholesale exclusion of chronic pain cannot conceivably be considered a minimum impairment of the rights of injured workers suffering from this disability...

[295] Based upon the foregoing authorities, we conclude that it may be relevant to consider legislation adopted in other provinces, but the analysis at the minimum impairment stage must

focus on the goal the legislature seeks to achieve: less drastic means which do not actually achieve the government's objective are not considered at this stage. (*Quebec* v. *A*, *supra*, per McLachlin C.J., citing from *Hutterian Brethren*).

[296] Accordingly, in this analysis, we have borne in mind that the Legislature's purpose is to ensure that compensation is granted for injuries that arise out of and in the course of employment. In this case, the evidence of policy alternatives for mental stress claims includes Dr. Gnam's book chapter and affidavit as well as the policy and legislation from other provinces. Dr. Gnam's book chapter reviews alternative policy approaches to chronic mental stress claims, including the following:

- Treating mental stress claims no differently from physical injury claims. In this regard, Dr. Gnam notes the "but for" test for causation as well as the thin skull principle that the employer "takes the employee as she finds her." Dr. Gnam subsequently refers to this as the "minimal causation rule" and notes that this approach could place upon employers the costs of some impairments that they could not act in good faith to prevent. In Dr. Gnam's view, the minimal work causation rule would in effect become an employer mandate to provide disability insurance to all mental impairments suffered by workers.
- Fortifying the minimum causal test by requiring that employment caused some specified degree of the resulting impairment, such as a "substantial degree." Dr. Gnam notes that asking clinicians to specify a percentage of causation would not produce valid and reliable numerical estimates; however, it is far more reasonable to expect that clinicians can offer reasoned opinions about whether the workplace made a "substantial" contribution to the mental condition. California had at that time adopted a policy that the workplace be responsible for at least 51% of the impairment. The California policy did not solve the limitations inherent in clinical assessment techniques; as such, Dr. Gnam stated that it could not be judged whether the current policy represented any improvement in comparison to its predecessor beyond containing costs.

[297] Counsel for the Attorney General relied upon Dr. Gnam's evidence that the substantial or predominant cause test is not suitable, but this conclusion was based upon Dr. Gnam's opinion that clinicians are not capable of providing accurate opinions about relative causal contributions of multiple factors in the development of mental disorders. In this regard, the Panel has preferred Dr. Stansfeld's opinion that clinicians are capable of providing accurate opinions on causation. We find that the predominant or substantial cause test provides an example of an approach that would address the Legislature's concerns about limiting entitlement to work-related injuries while providing a less restrictive approach that impairs the rights of claimants with mental illness to a lesser degree. The Panel recognizes that a deferential approach is in order in the section 1 analysis, but the foregoing evidence persuades us that less-impairing policy options are available that would not require a precisely tailored legislative solution. These options are reasonably tailored to meet the Legislature's objectives of establishing causation and represent a less drastic restriction of the equality rights of WSIA claimants with mental disabilities.

[298] The Attorney General produced the relevant legislation and/or policy provisions from the common law provinces and territories. From this evidence, we note that some Canadian jurisdictions have adopted restrictive approaches that are analogous to the impugned provisions of the WSIA; nonetheless, at least two jurisdictions have addressed the evidentiary and causation issues associated with mental stress claims through the enactment of more flexible policy provisions. For example, the Workers' Compensation Board of Alberta implemented mental stress provisions through policy, which allows for individual consideration of the circumstances as well as the exercise of discretion in an individual case.[74] The policy allows for entitlement for "chronic onset psychological injury or stress" when certain criteria are met. The policy notes that, "as with any other claim, the WCB investigates the causation to determine whether the claim is acceptable." The policy states that chronic onset psychological injury or stress is compensable when it is an emotional reaction to the following:

- An accumulation, over time, of a number of work-related stressors that do not fit the definition of traumatic incident;
- A significant work-related stressor that has lasted for a long time and does not fit the definition of traumatic or,
- Both of the above together, and
  - There is a confirmed psychiatric diagnosis as described in the DSM;
  - The work-related events or stressors are the predominant cause of the injury;
  - The work-related events are excessive or unusual in comparison to the normal pressures and tensions experienced by the average work in a similar occupation, and
  - There is objective confirmation of the events.

[299] In the Panel's view, the Alberta policy reflects an approach that permits flexibility and consideration of the needs and circumstances of the claimant group. The multifactorial approach is more directly aimed at establishing causation and impairs the equality rights of persons with mental disability to a much lesser degree. There are two features of the Alberta policy which arguably create a distinction from physical injury claims: (1) the "predominant cause" test; and (2) the workplace events must be "excessive or unusual," but these policy provisions are less restrictive than the legislative provisions at issue in this case. Similarly, the policy of the Saskatchewan Workers' Compensation Board provides an example of a policy approach that allows for the consideration of chronic stress claims in certain circumstances.[75] In our view, the approaches taken in these two jurisdictions provide further evidence of approaches to mental stress claims that are consistent with the purpose of ensuring that the entitlement is limited to work-related injuries in a manner that is less restrictive and is more respectful of the equality rights of persons with mental disabilities.

[300] *Newfoundland (Treasury Board)*, *supra*, provides an example of the type of approach that the Court considered to impair the claimant's group's *Charter* right to a minimal degree. In that case, there was a challenge to Newfoundland's government's decision to defer payment under pay equity legislation and eliminate the arrears for a specified period as a measure to avert a

[74] Alberta WCB Policies & Information, Policy : 03-01 Part II, Application 6: Psychiatric or Psychological Injury.
[75] Saskatchewan Workers' Compensation Board Policy Manual, Document 3.1.4, Injuries Psychological (POL 01/2009), dated March 10, 2009.

budgetary crisis. It was among many other measures taken to address the fiscal crisis. While the action did infringe the *Charter* equality rights of the claimants, the Court unanimously held that it was justified under section 1. In finding that the measure to postpone payment for two years minimally impaired the claimant group's equality right, the Court noted that, despite the scale of the fiscal crisis, the government proceeded to implement the pay equity plan, albeit at a slower pace. In addition, the government initiated a consultation process with the union to find alternative measures. In contrast, in this case, there is no evidence of such alternative measures being explored.

[301] In reaching this conclusion, we are mindful that, where a complex regulatory response to a social problem is challenged, the courts will generally take a more deferential posture throughout the section 1 analysis than they will when the impugned measure is a penal statute directly threatening the liberty of the accused: *Hutterian Brethren*, per McLachlin C.J. In *Hutterian Brethren*, the claimant group challenged the requirement to submit to a photo for obtaining a driver's license, as it was contrary to their sincerely held religious beliefs. The photo requirement challenged in *Hutterian Brethren* was directed at preventing the growing problem of identity theft. In that case, the majority of the Court found that the requirement to take a photograph for a driver's license was capable of interfering with the religious belief or practice of the claimants, but the infringement was justified under section 1of the *Charter*. The majority of the Court found that to issue driver's licenses without requiring a photograph would undermine the efficacy of the program to prevent identity theft and fraud. Therefore, there was a tension between the competing legislative objective and the religious right asserted by the claimant group. McLachlin C.J., speaking for the majority, explained the competing interests at stake in those circumstances (at paras. 35-36):

> This Court has recognized that a measure of leeway must be accorded to governments in determining whether limits on rights in public programs that regulate social and commercial interactions are justified under s. 1 of the *Charter*. Often, a particular problem or area of activity can reasonably be remedied or regulated in a variety of ways. The schemes are typically complex, and reflect a multitude of overlapping and conflicting interests and legislative concerns. They may involve the expenditure of government funds, or complex goals like reducing antisocial behaviour. The primary responsibility for making the difficult choices involved in public governance falls on the elected legislature and those it appoints to carry out its policies. Some of these choices may trench on constitutional rights.
>
> Freedom of religion presents a particular challenge in this respect because of the broad scope of the *Charter* guarantee. Much of the regulation of a modern state could be claimed by various individuals to have a more than trivial impact on a sincerely held religious belief. Giving effect to each of their religious claims could seriously undermine the universality of many regulatory programs, including the attempt to reduce abuse of driver's licences at issue here, to the overall detriment of the community.

[302] We find that the circumstances of this case are not analogous to the regulatory provision addressed by the Supreme Court of Canada in *Hutterian Brethren*. This case does not present a direct tension between the rights of persons with mental disabilities and the identified legislative objective or other public policy goals that is analogous to that in *Hutterian Brethren*. As we noted earlier, the Panel acknowledges the evidence of a strong association between traumatic events and the onset of mental disorder, but the interests of this group of claimants are not advanced by excluding other types of mental stress claims. For the reasons set out earlier in these reasons, the evidence does not support that the equal treatment of mental stress claimants

will result in "blanket coverage" and there is little substantial evidence that to suggest that the adjudication of mental stress claims in accordance with the principles of legal causation will have a systemic impact on the workplace insurance scheme that would directly affect the rights of other injured workers or undermine the legislative objective to limit entitlement to work-related injuries.

[303] In considering the third branch of the *Oakes* test, proportionality, McLachlin C.J. observed (concurring in the result): "Ultimately, the infringement of a protected right must be proportionate to the benefits of pursuing the state objective, having regard to the impact of the law on the exercise of the right and the broader public benefits it seeks to achieve." (*Quebec* v. *A*, *supra*, para. 448).

[304] Counsel for the Attorney General submitted that if subsections 13(4) and (5) of the WSIA were eliminated, workers with mental disabilities would likely be indemnified for injuries beyond those that arose out of and in the course of their employment. In turn, this would require that either benefits be reduced or premiums be raised in order to pay for what, in the majority of cases would amount to overcompensation. We find that the evidence does not substantiate this argument. Firstly, there was no evidence of the financial impact of mental stress claims on the WSIA insurance fund. As noted above, there is little evidence regarding resource allocation issues which may be served by the limitations on mental stress entitlement. Dr. Gnam indicated that treating mental stress injuries in the same manner as other injuries "may very well result in blanket coverage," but there was no direct evidence that such a result was likely, nor was this point explored in any detail in the expert testimony or submissions. The workplace insurance system is funded by employer premiums and there was no direct evidence regarding the effect of mental stress claims on the assessment of premiums. Secondly, as set out in *Martin*, discussed above, financial implications do not provide a free-standing justification for the infringement of a *Charter* right.

[305] It is necessary to identify the deleterious effect of the legislation on the claimant group in evaluating the proportionality of effects. We find that the Attorney General has understated the deleterious effects of the legislation on the claimant group. Counsel for the Attorney General suggests that the harmful effects on the claimant group are not substantial since they are free to attempt to establish a claim for their injuries in a different forum. We find, however, that the negative effect of the impugned provisions on the group of persons with mental stress claims is substantial in view of the following:

- Many mental stress claimants will not have recourse to the courts as it may be difficult or impossible to establish fault as required in a tort case. They are thereby deprived of the no-fault compensation scheme offered by the WSIA.
- Many such claimants may lack the financial, physical, and mental resources to pursue litigation.
- Many are not employed in unionized environments and do not have recourse pursuant to terms of a collective agreement.
- Such claimants are deprived of the return to work and labour market re-entry services available under the WSIA. They also lose the benefit of the re-employment protection provided by the WSIA.

- Lastly, but equally importantly, the limitation of entitlement for mental stress claims perpetuates the view that such claims are fraudulent and less worthy of recognition and individual consideration, as we discussed above.

[306] When weighing the deleterious effects of the impugned provisions against their salutary benefits, we find that there is an imbalance between the substantial harmful effects on the claimant group and the speculative net benefit created by the impugned provisions for the workplace insurance system. In reaching this conclusion, we have considered the reasons of McLachlin C.J. in *Quebec* v. *A*, *supra*, in which the Chief Justice concluded that the impugned law was justified under section 1. In finding that the deleterious effects of the impugned law did not outweigh the salutary benefits, McLachlin C.J. observed that the discriminatory effects of the impugned law in that case were attenuated in the modern era, noting that there was no longer any stigma of *de facto* relationships (para. 449). In contrast, in this case, there is evidence that persons with mental illness continue to be stigmatized and subject to discrimination and stereotyping. This reinforces our conclusion that the deleterious effects of the impugned provisions are significant and outweigh their potential salutary effects.

[307] Accordingly, we conclude that the Ontario government has not discharged its burden of showing that the infringement of the claimant's right to equality under section 15 is a reasonable limit prescribed by law that can be demonstrably justified in a free and democratic society.

(c) Remedy

[308] Subsection 52(1) of the *Constitution Act, 1982* provides that the Constitution is "the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect."

[309] In *Martin*, the Court considered the scope of an administrative tribunal's jurisdiction with regard to a *Charter* challenge. If a tribunal has jurisdiction to consider the constitutionality of the provisions under section 15(1) of the *Charter*, a tribunal may disregard the impugned provisions if it finds them to be unconstitutional. Since the remedy arises from section 52 of the *Constitution Act, 1982*, it is unnecessary to consider whether the administrative tribunal is a "court of competent jurisdiction" within the meaning of section 24(1) of the *Charter* (paragraph 65). *Martin* also stands for the proposition that "the constitutional remedies available to administrative tribunals are limited and do not include general declarations of invalidity."

[310] In this case, we have found that subsections 13(4) and the portion of 13(5) of the WSIA that restricts entitlement to an acute reaction to a sudden and unexpected traumatic event (and the related TMS policy) infringe the worker's right to equality under section 15 of the *Charter*, and that infringement is not justified under section 1 of the *Charter*. Accordingly, through the application of section 52(1) of the *Constitution Act, 1982*, we decline to apply subsections 13(4) and (5) of the WSIA and the TMS policy in this appeal.

[311] This Panel had previously concluded in *Decision No. 2157/09I* that the worker's appeal would succeed but for subsections 13(4) and (5) of the WSIA and the TMS policy; therefore, the worker's appeal is allowed.

DISPOSITION

[312] The appeal is allowed. We find as follows:

1. Subsections 13(4) and (5) of the WSIA and the related TMS policy infringe the worker's right to equality as guaranteed by section 15(1) of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, Schedule B to the *Canada Act,1982* (U.K.) 1982 c. 11 (the "*Charter*"). This finding applies to subsection 13(4) and the portion of subsection 13(5) of the WSIA which reads: "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."

2. The infringement of section 15(1) is not justified by section 1 of the *Charter*.

3. Accordingly, by operation of section 52(1) of the *Constitution Act, 1982*, we decline to apply subsections 13(4) and (5) of the WSIA and the TMS policy to this appeal. Therefore, the worker's claim for initial entitlement for mental stress is granted. The nature and duration of benefits flowing from this decision will be returned to the WSIB for further adjudication, subject to the usual rights of appeal.

DATED: April 29, 2014

SIGNED: R. McCutcheon, B. Wheeler, M. Ferrari