

--SUMMARY--

Decision No. 1945/10

27-Jan-2015

J.Moore - B.Davis - A.Grande

- Stress, mental
- Charter of Rights (equality rights) (discrimination) (mental disability)

In Decision No. 1945/10I, the Panel found that the worker suffered a stress-related disablement injury in 2005 that arose out of and in the course of employment, but that the worker was not entitled to benefits under the WSIA because of the provisions of s. 13(4) and (5).

In this decision, the Panel considered the constitutional challenge of s. 13(4) and (5) of the WSIA.

Prior to oral argument on the constitutional challenge, the Tribunal issued Decision No. 2157/09 on the same issue. Decision No. 2157/09 declined to apply s. 13(4) and (5), and the Board policy issued under those provisions, because to do so would infringe the worker's right to equality under the Charter of Rights.

The Panel was persuaded by the reasoning and analysis of the evidence in Decision No. 2157/09, as supported by the evidence and submissions in this case and, in the absence of contrary submissions (as the Attorney General withdrew from the case and the employer made no submissions on the constitutional challenge), the Panel followed the analysis and findings of Decision No. 2157/09. In particular, the Panel found that the purpose of s. 13(4) and (5) was to exclude certain types of injuries from entitlement, that the intent was to treat a claim for chronic stress injury resulting in mental disability differently from a gradual onset physical injury and from an acute onset mental injury, that the provisions thereby created a distinction between workers who suffer a work-related mental disability and those who suffer a work-related physical disability, that the distinction creates a disadvantage by perpetuating prejudice of stereotyping because it assumes that the work-relatedness of a gradual onset mental disability cannot be reliably established, that the distinction has no ameliorative purpose and that there is no reasonable degree of correspondence between the differential treatment and the reality of individuals with mental disability.

The Panel concluded that s. 13(4) and (5) of the WSIA infringed s. 15(1) of the Charter and that the provisions were not saved by s. 1 of the Charter. It was not necessary to address specific provisions of Board policy. The Panel declined to apply s. 13(4) and (5). Having previously found that the worker would have entitlement but for those provisions, the worker had entitlement for mental stress. As also noted in Decision No. 2157/09, the Panel was not considering the portion of s. 13(5) dealing with an employer's decisions or actions relating to a worker's employment.

The appeal was allowed.

12 Pages

References: Act Citation

- WSIA 13(4), 13(5)

Other Case Reference

- [w1015s]
- BOARD DIRECTIVES AND GUIDELINES: Operational Policy Manual, Document No. 15-03-02
- CROSS-REFERENCE: Decisions No. 1945/10I, 1945/10I2, 1945/10I3
- OTHER STATUTES CONSIDERED: Canadian Charter of Rights and Freedoms, R.S.C. 1985, App. II, No. 44, s. 15(1)
- TRIBUNAL DECISIONS CONSIDERED: Decision No. 2157/09, 2014 ONWSIAT 938 apld

Style of Cause:

Neutral Citation: 2015 ONWSIAT 223



WORKPLACE SAFETY AND INSURANCE APPEALS TRIBUNAL

DECISION NO. 1945/10

BEFORE:

J. P. Moore : Vice-Chair
B. Davis : Member Representative of Employers
A. Grande : Member Representative of Workers

HEARING:

October 14, November 4, and November 5, 2014 at Toronto
Oral

DATE OF DECISION:

January 27, 2015

NEUTRAL CITATION:

2015 ONWSIAT 223

DECISION UNDER APPEAL:

WSIB Appeals Resolution Officer (“ARO”) decision dated
November 14, 2006

APPEARANCES:**For the worker:**

C. Flood and M. Giroux, Lawyers

For the employer:

P. Dailleboust, Lawyer
D. Hogaboam, Injury and Illness Management Representative

For the Attorney General of Ontario: Not participating

For the Office of the Worker Adviser: A. Singleton, Lawyer

For the Tribunal Counsel Office: C. Zimmermann

Interpreter:

Not applicable

Workplace Safety and Insurance
Appeals Tribunal

505 University Avenue 7th Floor
Toronto ON M5G 2P2

Tribunal d’appel de la sécurité professionnelle
et de l’assurance contre les accidents du travail

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REASONS

(i) Introduction

- [1] This decision addresses the question of whether portions of section 13 of the *Workplace Safety and Insurance Act, 1997* (“WSIA”) should not apply in the present case because to do so would violate the equality guarantee of section 15 of the *Canadian Charter of Rights and Freedoms*¹ (the “Charter”), or the *Human Rights Code* of Ontario.²
- [2] The appellant worker is seeking entitlement to benefits from the Insurance Plan for mental stress. On April 11, 2012, this Panel issued an interim decision, *Decision No. 1945/10I*, in which the Panel found that the worker had suffered a stress-related disablement injury in 2005 that arose out of and in the course of his employment. However, the Panel also found that the worker was not entitled to benefits from the Insurance Plan because of the entitlement exception set out in subsections 13(4) and (5) of the WSIA.
- [3] In anticipation of such a finding, the worker had issued a Notice of Constitutional Challenge regarding those provisions of the WSIA, arguing that the provisions violated both the *Charter* and the *Human Rights Code*. Notice of the challenge was given to the Attorney General of Ontario and the Attorney General of Canada. The Attorney General of Ontario (“AGO”) elected to participate in the proceedings. The AGO joined the employer in filing evidence and submissions in opposition to the constitutional challenge. Intervener status was given to the Office of the Worker Adviser (“OWA”), which provided evidence and submissions in support of the worker's constitutional challenge.
- [4] Prior to hearing oral argument on the constitutional challenge, another Panel of the Tribunal issued a decision on the same issue. *Decision No. 2157/09* (April 29, 2014) declined to apply subsections 13(4) and (5) of the WSIA, and the policy issued under those provisions because to do so in that case would infringe the worker's right to equality under the *Charter*. We note that *Decision No. 2157/09* specifically did not consider that portion of subsection 13(5) that deals with an employer's decisions or actions relating to the worker's employment. There is also no issue in the present hearing with respect to that portion of subsection 13(5) and we make no comment on it.
- [5] After the release of *Decision No. 2157/09*, the AGO withdrew from participation in this case. The employer continued to participate but chose not to make any submissions on the constitutional challenge, although some submissions were made with respect to the disposition of the appeal in the event that the constitutional challenge was allowed by this Panel.
- [6] The Panel heard evidence on the constitutional challenge on October 14, 2014. We then heard oral argument on the constitutional challenge and the *Human Rights Code* issue on November 4 and 5, 2014. What follows is the Panel's decision on those issues.

¹ Part I of the *Constitution Act 1982*, Schedule B to the *Canada Act, 1982* (U.K.) 1982, c.11

² R.S.O. 1990, c.H. 19

(ii) The issues

[7] The issues in this appeal are:

1. whether the application to the present case of subsections 13(4) and (5) of the WSIA (excluding those provisions relating to employers' decisions noted above), and the policy developed under those provisions, would infringe subsection 15(1), and not be saved by section 1, of the *Charter*;
2. whether the application to the present case of subsections 13(4) and (5) of the WSIA, and the attendant policy, would infringe the *Human Rights Code* of Ontario; and
3. if so, the appropriate remedy.

(iii) The decision

[8] On the evidence and submissions presented to us, the Panel is persuaded that application of subsections 13(4) and (5) to the present case would result in substantial discrimination against the worker, violating the equality guarantee provided by subsection 15(1) of the *Charter*. We are also persuaded that the impugned statutory and policy provisions are not justified under section 1 of the *Charter*. The Panel will not apply the impugned statutory provisions and the Board's policy under those provisions to this appeal. Accordingly, the worker's appeal is allowed and the worker is entitled to benefits from the Insurance Plan for a stress-related disablement.

(iv) Analysis**(a) A summary of the facts**

[9] This appeal arises out of a claim by the appellant worker that he developed a mental stress condition in the course of and as a result of his employment as a corrections officer. At paragraphs 7-10 of *Decision No. 1945/10I*, this Panel described its findings regarding the worker's claim:

[7] Prior to January 1, 2005, the worker experienced several incidents that left him with the impression that the employer disregarded his health and wellbeing. These events also left the worker with the impression that the employer was targeting him.

[8] In 2004, the worker became the Union President at his work location. Incidents that occurred afterwards, including the incident of January 1, 2005, increased the worker's belief that he was a target of discrimination within the workplace as a result of his Union activities. As a result, the worker developed a stress condition that led to psychological injury.

[9] The incident of January 1, 2005 was part of the continuum of events that contributed to the worker's stress condition. However, it was not, in and of itself, a traumatic event that caused traumatic injury.

[10] The worker did, therefore, sustain a personal injury by accident arising out of and in the course of his employment, pursuant to subsection 13(1) of the WSIA. However, subject to reading down subsections 13(4) and (5) of the WSIA, the worker is not entitled to benefits for that mental stress condition.

[10] At paragraph 125 of *Decision No. 1945/10I*, the Panel stated:

[125] We find that the worker suffered a disablement injury arising out of and in the course of his employment, for which he would be entitled to benefits under subsection 13(1) of the WSIA, but for the exception set out in subsection 13(4), an exception from which the worker is not exempted by the provisions of subsection 13(5).

[11] On that ruling, the worker pursued a constitutional challenge to the application of subsections 13(4) and (5), as well as a challenge under the Ontario *Human Rights Code*.

(b) The submissions

[12] The submission made by the worker, and supported by the OWA, was that subsections 13(4) and (5) of the WSIA, and the policy developed by the Board under those provisions, infringed the equality provisions in subsection 15(1) of the *Charter*. Specifically, in the present case, the provisions discriminated against the worker on the basis of disability, an enumerated ground under subsection 15(1) of the *Charter*. Mr. Flood submitted, on behalf of the worker, that subsections 13(4) and (5) of the WSIA created a different and more restrictive test for entitlement for a person claiming a gradual onset work-related mental disability when compared with a person claiming a gradual onset work-related physical disability. Mr. Flood argued that the distinction in the legislation was discriminatory under 15(1) of the *Charter* and did not constitute a “reasonable limit” under section 1 of the *Charter* so as to save the provision. The worker also submitted that the provisions in issue, and the policy under those provisions, violated the Ontario *Human Rights Code*.

[13] Mr. Singleton, on behalf of the OWA, supported the worker's submissions. Mr. Singleton also asked the Panel to rule on the constitutional validity of certain portions of the Board's policy, as that policy interpreted subsections 13(5) of the WSIA. Mr. Singleton was particularly concerned with the provisions in the policy that interpret the word “unexpected” in subsection 13(5). He submitted that the policy interpretation was discriminatory in a way that violated the *Charter*.

[14] As noted above, the employer made no submissions on the constitutional validity of subsections 13(4) and (5) of the WSIA. However, the employer took the position that, in the event that the Panel found these provisions to be contrary to the *Charter*, it was not necessary, on the facts of the present case, to address particular elements of the Board's policy since the worker's claim was not denied by the Board on the basis of elements within the policy but on the basis that the worker did not meet the threshold for entitlement under the legislative provisions.

[15] The employer also submitted that, if the Panel confirmed the constitutional invalidity of subsections 13(4) and (5) of the WSIA under the *Charter*, a ruling under the Ontario *Human Rights Code* would be redundant and unnecessary.

(c) The relevant law and policy

[16] The foundation of the system for compensating workers injured in the course of their employment is what has been described in jurisprudence as a “historic trade-off” whereby injured workers gave up the right to take legal action against their employers or other employers whose negligence may have given rise to the worker's injury. In place of the right to take legal action, legislation was created that provided insurance coverage to workers injured in the course of their employment. That coverage is intended to apply to “accidents” under the WSIA.

[17] The WSIA defines the term “accident” in subsection 2(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;

[18] WSIB operational policy also addresses the definition of accident. According to *Operational Policy Manual* (“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.”

[19] 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.

[20] The Board’s policy recognizes that an injury by accident can result in a “mental” disability. Document No. 15-04-02 of the Board’s OPM addresses entitlement for a “Psychotraumatic Disability.”

[21] The equivalent of these legislative and policy provisions was part of the pre-1998 legislation and policy. With the enactment of the WSIA on January 1, 1998, provisions were added to the legislation which were not present in the prior legislation regarding “mental stress” claims.

[22] 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.

[23] As noted above, a previous Tribunal decision, *Decision No. 2157/09*, found against the constitutional validity of subsections 13(4) and (5) of the WSIA. In this decision, we will be referring frequently to that decision. At this point, we note the Panel’s summary of the effect of the addition of subsections 13(4) and (5) of the WSIA to the legislation, at paragraph 34:

[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.

[24] The Board developed policy to implement the legislative changes. That policy is found in OPM Document No. 15-03-02, entitled “Traumatic Mental Stress” (“TMS”). The policy confirms the limited entitlement set out in subsections 13(4) and (5) of the WSIA and sets out criteria for establishing entitlement within that restricted scope of entitlement.

[25] We note that, in the present case, the worker’s entitlement was not reviewed and denied under the Board’s policy but, rather, under legislation. That is, the Board concluded that the worker did not meet the threshold for consideration of entitlement for a mental stress injury and his claim was not, therefore, subject to assessment under the criteria in the Board’s policy.

(d) Decision No. 2157/09

[26] In their submissions, the worker and the OWA submitted that the present Panel should accept the analysis and come to the same conclusion as was reached by the Panel that issued *Decision No. 2157/09*. The worker presented evidence that was intended to agree with and support evidence presented to the *Decision No. 2157/09* Panel on the constitutional validity of subsections 13(4) and (5). We note that, in the present case, neither the employer nor the AGO presented arguments regarding *Decision No. 2157/09* and the *Charter* issues.

[27] *Decision No. 2157/09* also set out, in detail, the legal framework for a *Charter* challenge. We note the following summary of that jurisprudence, found in paragraph 170 of *Decision No. 2157/09*:

[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*³ 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.

[28] Applying that test to the impugned provisions, *Decision No. 2157/09* made the following findings regarding subsections 13(4) and (5):

- The provisions created a distinction between workers with physical disabilities and workers with mental disabilities.
- Mental disability is an enumerated ground in section 15 of the *Charter*.
- The provisions discriminate against workers who suffer a gradual onset work-related mental disability by imposing additional restrictions on entitlement that are not applied to workers with gradual-onset work-related physical disabilities.

³ *Withler v. Canada (C.G.)* [2011] 1 S. C. R. 396

- The distinction created by the legislation is substantively discriminatory because the distinction perpetuates prejudice and disadvantage and does not correspond to the actual circumstances and characteristics of the claimant group. The provisions have the effect of depriving mental stress claimants of the benefits of the historic trade-off.
- The purpose of the legislative amendments was to bring “clarity” to mental stress claims but the effect is to exclude many types of mental disability based on an assumption that the disability is not “real” and does not warrant individual assessment of work relatedness.
- There are no similar restrictions or hurdles for entitlement to physical injuries, notwithstanding the fact that many physical injuries present similar challenges to those encountered when assessing a mental stress claim.

[29] We note, in particular, paragraphs 259 and 260 of *Decision No. 2157/09*:

[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.

[30] The Panel also cited and relied on evidence that controverted the assumption that underlay the enactment of subsections 13(4) and (5) of the WSIA - that it was not possible to reliably determine causation of a mental stress injury. The Panel noted evidence from an expert suggesting that fair and reproducible protocols existed for assessing the validity of a mental stress claim. The Panel went on to note that both the Tribunal and the Board have protocols for assessing causation of a claimed work-related condition. We note paragraph 276 from *Decision No. 2157/09*:

[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.
- 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. A workplace injuring process is not established if the mental disorder arises solely from the worker's misperception of events.

- 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? 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.

[31] Finally, *Decision No. 2157/09* addressed the question of whether the impugned provisions constituted "reasonable limits" that could be "demonstrably justified in a free and democratic society," so as to save the provisions pursuant to section 1 of the *Charter*. The Panel found that the section 1 test was not met.

[32] In the present case, the Panel was not presented with any evidence/argument on section 1. We also note that the parties were given an opportunity to address the conclusions of the Panel in *Decision No. 2157/09* on that question. While the Panel in that decision accepted that the asserted purpose of the provisions - to ensure that compensation is limited to injuries arising out of and in the course of employment -.was a pressing and substantial objective, the Panel also found that the limits imposed were not proportionate to the extent of infringement of the equality right. The Panel found that there was a lack of rational connection between the mental stress provisions and their stated purpose. Even if there was a rational connection, the *Decision No. 2157/09* Panel found that the provision did not impair the Charter right as little as possible, as there were policy alternatives evidenced by the policy and legislation from other provinces. The Panel concluded that the harmful effects of excluding the claimant group significantly exceeded the speculative benefit to the Insurance Plan.

(e) Should the present Panel follow *Decision No. 2157/09*?

[33] In his submissions on this issue, Mr. Flood, supported by Mr. Singleton, argued that the present Panel should follow the analysis and findings in *Decision No. 2157/09*. Mr. Flood and Mr. Singleton presented evidence to support the evidentiary conclusions in *Decision No. 2157/09*. That evidence included testimony from an expert, Dr. G. Young, a clinical psychologist, professor at York University, and author of a text entitled *Malingering, Feigning, and Response Bias in Psychiatric/Psychological Injury* (2014). Dr. Young testified on his agreement with the evidence cited by the Panel in *Decision No. 2157/09* to support its conclusion. Specifically, Dr. Young testified that:

- There is a causal link between chronic stress and mental disability.
- Competent and qualified clinicians have the capacity to make a determination regarding a causal link between mental disability and work-related stress.
- There is no material difference between the causality of chronic mental stress, not allowed under the legislation, and acute mental stress, which is allowed under the legislation.
- Medical literature shows persuasively that there is a “moderate” causal relationship between job stress and mental illness with an odds ratio that approaches two.
- Medical literature found in the documentary evidence filed by the worker showed increasing support for such a link.
- A competent clinician is aware of the importance of discerning between work-related factors and personal factors in determining causation and has assessment tools available to make such a distinction.
- Medical literature does not persuasively justify a blanket exclusion of gradual onset mental stress injuries from coverage under the Insurance Plan.

[34]

The present Panel is persuaded, by the reasoning and the analysis of the evidence in *Decision No. 2157/09*, as supported by the evidence and submissions presented to us, and in the absence of contrary submissions, that the analysis and findings in *Decision No. 2157/09* should be followed in the present case. In particular, we are persuaded of the following:

- The purpose of subsections 13(4) and (5) of the WSIA was to exclude certain types of injuries from entitlement to benefits under the Insurance Plan.
- The intent of the legislation was to treat a claim for a chronic stress injury resulting in mental disability differently from a gradual onset physical injury, and differently from an acute onset mental injury.
- The provisions thereby created a distinction between workers who suffer a work-related mental disability and those who suffer work-related physical disability.
- The provisions exclude from the historical trade-off workers who suffer a mental disability as a result of gradual-onset work related stress by either excluding them entirely from entitlement to benefits from the Insurance Plan or subjecting them to entitlement criteria that implies that their injury/disability is not “real”.
- This distinction creates a disadvantage by perpetuating prejudice or stereotyping because it assumes that the work-relatedness of a gradual onset mental disability cannot be reliably established.
- It also implies that such claims have less veracity.
- Individuals with a mental disability are at a historical disadvantage, a fact not challenged in the present case.

- The distinction has no ameliorative purpose nor is there a reasonable degree of correspondence between the differential treatment and the reality of individuals with mental disability.
- The distinction is, therefore, substantively discriminatory against injured workers who develop a mental disability.
- Mental disability is an enumerated ground in subsection 15(1) of the *Charter*.
- Subsections 13(4) and (5) of the WSIA therefore infringe subsection 15(1) of the *Charter*.
- The provisions of subsections 13(4) and (5) of the WSIA are not saved by section 1 of the *Charter* as a reasonable limit demonstrably justified in a free and democratic society.

(f) The remedy under the *Charter*

[35] With respect to the remedy in the present case, the Panel follows and applies the analysis used by the Panel in *Decision No. 2157/09*, which is set out at paragraphs 308-311:

[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.

[36] As noted above, the worker and the OWA argued that the Panel should also declare certain specific provisions within the Board’s policy on TMS to be contrary to the *Charter*, particularly the provisions that interpret the word “unexpected” in subsection 13(5). While the Panel acknowledges that the issue of the constitutionality of the policy was raised in the present case, no specific elements of the policy were relevant to the adjudication of the worker’s claim. The basis for denying the worker’s claim was that his claim was barred by subsection 13(4) and not saved by subsection 13(5). We note again our ruling in *Decision No. 1945/10I*, at para. 125:

[125] We find that the worker suffered a disablement injury arising out of and in the course of his employment, for which he would be entitled to benefits under subsection

13(1) of the WSIA, but for the exception set out in subsection 13(4), an exception from which the worker is not exempted by the provisions of subsection 13(5).

[37] The Panel agrees that it is not necessary to address the specific provisions of the policy since the worker's claim was not denied on the basis of the policy, but under subsections 13(4) and (5). Having found that the provisions violate the Charter, the supreme law of the land, they are invalid to the extent of the inconsistency. It is on that basis that the worker has entitlement. The Panel prefers the carefully reasoned approach of the Panel in *Decision No. 2157/09* in applying a remedy in the present case.

(g) The Human Rights Code

[38] The worker and the OWA argued that this Panel should also make a determination that the provisions of subsections 13(4) and (5) of the WSIA contravened the *Human Rights Code* of Ontario. Ms Giroux, on behalf of the worker, argued that the *Human Rights Code* was "supervising" legislation under which the provisions of the WSIA ought to be scrutinized for consistency with that legislation.

[39] While, on the evidence presented with respect to the *Charter*, it is also arguable that there is inconsistency between subsections 13(4) and (5) and the *Human Rights Code*, the Panel is of the opinion that the present appeal can be resolved by way of a remedy under the *Charter*. We have found that subsections 13(4) and (5) violate the *Charter* and are of no force and effect in the present case. On that finding and the findings in *Decision No. 1945/10I*, the worker is entitled to benefits from the Insurance Plan. Consequently, it is not necessary to consider whether the provisions are inconsistent with the Ontario *Human Rights Code*.

DISPOSITION

[40] The worker's appeal is allowed:

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." The Panel makes no finding with respect to the remainder of subsection 13(5).
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. Since *Decision No. 1945/10I* previously found that the worker would have had entitlement but for those provisions, 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: January 27, 2015

SIGNED: J. P. Moore, B. Davis, A. Grande