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Mental Stress, Workplaces and Nigeria's Employees' Compensation Act

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Abstract

It has been over a decade since the Employees' Compensation Act (ECA) came into force, introducing, for the first time under Nigeria's employees' compensation scheme, mental stress as a basis for compensation. However, legal literature on salient aspects of Nigerian employees' compensation remains scant. This article seeks to bridge this gap and provide a source of legal scholarship to aid the adjudication of mental stress claims in Nigeria. The article discusses when and how work-related mental stress is compensable within the context of the ECA. It finds that, notwithstanding the subjective nature of mental stress and the possibility of feigning mental injury, the ECA establishes broad bases for compensating mental stress, increasing the risk that employees may manipulate the system and obtain benefits even when mental stress is not work-related. The article therefore articulates criteria to defeat fraudulent claims and ensure that only legitimate mental stress claims are compensated.

Keywords

Mental stress, Employees' Compensation Act, arising out of or in the course of employment, compensation, employee, Nigeria

INTRODUCTION

It is estimated that between 20 and 30 per cent of Nigeria's over 200 million people suffer from mental disorders.[1] Data for work-related mental disorders are unavailable, but the percentage is likely to be higher. Poverty, high unemployment, and poor social and welfare services in Nigeria create room for unhealthy and exploitative working conditions and, combined with a decrease in job security and demands for increased productivity, make workplaces minefields of mental stress. More problematic is the entrenched culture

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1 O Uchenunu-Ibeh "Stemming incidence of mental illness in workplace" (23 July 2019) *Leadership*, available at: <https://leadership.ng/stemming-incidence-of-mental-illness-in-workplace/> (last accessed 10 November 2021).

of suppressing mental health issues in workplaces, with at least 35 per cent of employees not seeking support for mental issues.[2]

Recognizing the need to address work-related mental disabilities, Nigeria's legislature enacted the Employees' Compensation Act (ECA),[3] replacing the Workmen's Compensation Act (WCA).[4] Among other reforms, the ECA admits, for the first time in Nigeria's statutory employees' compensation scheme, mental stress as a ground for compensation. However, administering compensation for mental injury in a system traditionally designed for physical disability cases is a complex matter. Questions such as when, how and for how long mental stress disabilities should be compensated within the confines of employee's compensation remain serious challenges to policy makers and administrators. As Neumann observes:

> "Mental stress cases raise several societal problems. First, the possibility of feigning an injury is often greater in the context of psychological injuries than in physical injury cases. Malingerers, those who feign injuries in order to avoid their employment responsibilities, present a danger to their employers, the workers' compensation system, and society as a whole. Secondly, the inherent suspicion as to the validity of psychological diagnosis is justified since many methods of detection and evaluation are relatively new. Third, considering that no two individuals maintain the same emotional strength, attempts to objectify an inherently subjective reaction will always present a problem. Finally, there is the long-standing fear of creating a life and health insurance system out of the Workers' Compensation Act. The central conflict underlying each of these arguments is the struggle between two important competing interests: the judiciary's recognition of legislative intent to liberally construe compensation statutes and the public's desire to impose limits on their application".[5]

This article critically examines the compensation regime for mental stress claims in the ECA, addresses some of the challenges that such claims raise and contributes to the scant literature on employees' compensation law in Nigeria. The research identifies two broad categories of mental stress claims created by the ECA: claims associated with a physical component (either a physical injury or event) and those that are not (mental-mental or pure stress claims), each with distinct features in the ECA. The article finds that the ECA

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2 L Olusola "Need for mental health awareness in workplace" (11 April 2019) *The Guardian*, available at: <https://guardian.ng/features/health/need-for-mental-health-awareness-in-workplace/> (last accessed 10 November 2021).

3 Cap E7A, Laws of the Federation of Nigeria 2010. The ECA came into force on 17 December 2010.

4 Cap W6, Laws of the Federation of Nigeria 2004.

5 LA Neumann "Workers' compensation and high stress occupations: Application of Wisconsin's unusual stress test to law enforcement post-traumatic stress disorder" (1993) 77/1 *Marquette Law Review* 147 at 163–64.

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establishes broad bases for awarding compensation for work-related mental stress, creating a risk that the frequency and / or volume of mental stress claims may overwhelm the financial viability of the employees' compensation scheme. This leaves the courts and the Nigeria Social Insurance Trust Fund Management Board with the daunting task of policing the floodgates of mental stress claims, to ensure that only legitimate claims are compensated and that the ECA's over-coverage of mental stress does not compromise the employees' compensation scheme as a whole.

This article has seven parts. After this introduction, the article gives an overview of the employees' compensation scheme established by the ECA. It then looks into the nature of mental stress and identifies some limitations on medicine and its ability to make findings of fact in an area as subjective as mental stress. The next part considers the categories of mental stress claims compensable under the ECA. Notably, the ECA requires that compensable mental stress arises out of or in the course of employment or is otherwise work-related. The article then sets out an inquiry into "work-relatedness" and examines what qualifies as work-related mental stress within the meaning of the ECA. It then discusses the scale of compensation where a mental stress disability occurs and finds that, unlike in cases of physical injuries and diseases, there is little guidance on the measure of compensation in mental stress cases. A conclusion follows.

THE EMPLOYEES' COMPENSATION SCHEME IN NIGERIA

The ECA seeks to create an open and fair system of guaranteed and adequate compensation for all employees or their dependants for work-related deaths, injuries, diseases or disabilities.[6] Consistent with this objective, compensation is generally payable to the employee or her dependant regardless of fault, provided the harm suffered is work-related. The ECA creates an Employees' Compensation Fund, into which employers are required to make contributions, and out of which compensation is paid to an employee or her dependant should a work-related disability occur.[7] The Nigeria Social Insurance Trust Fund Management Board (NSITF) is charged with administering the ECA and is responsible for formulating policies to guide its implementation.[8] The original jurisdiction to determine eligibility for or to award compensation under the ECA lies exclusively with the NSITF and appeals from a decision of the NSITF go to the National Industrial Court.[9]

6 ECA, sec 1(a).
7 Id, secs 33 and 56. An "experience account" is maintained for each employer, indicating the assessments levied and the cost of all claims chargeable to the employer: id, sec 41(1).
8 Id, secs 2(2), 31 and 32.
9 Id, secs 31(d), 32(d) and 55(4).

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In terms of scope, the ECA applies to all employers[10] and employees in both the public and private sector in Nigeria.[11] Section 73 defines an employee as: "[a] person employed by an employer under oral or written contract of employment whether on a continuous, part-time, temporary, apprenticeship or casual basis and includes a domestic servant who is not a member of the family of the employer, including any person in the Federal, State and Local Governments, and any of the government agencies and in the formal and informal sectors of the economy". This definition departs from the WCA, which excluded from its definition of a "workman", an "outworker"[12] and employees engaged in agricultural or handicraft work for an entity with fewer than ten employees, among others.[13] The broadened definition aligns with article 4(1) of the Employment Injury Benefits Convention 1964, which requires that national legislation in respect of employment injuries protects all employees in the public and private sectors. However, members of the armed forces are excluded from the ECA's coverage, unless they are employed in a civilian capacity.[14] The police are not part of the armed forces and can therefore benefit from the ECA, provided that, where a police officer has received compensation under the Police Act, that may preclude her from claiming under the ECA.[15]

The scheme of the ECA is an alternative remedy to any right of action, founded on statute, common law or otherwise, to which an employee is or may be entitled against an employer or co-employee.[16] An employee therefore

10 An employer "includes any individual, body corporate, Federal, State, or Local Government or any of the government agencies who has entered into a contract of employment to employ any other person as an employee or apprentice": id, sec 73.

11 Id, sec 2(1).

12 WCA, sec 41 defines an "outworker" as "a person to whom articles or materials are given out to be made up, cleaned, washed, altered, ornamented, finished, or repaired or adapted for sale in his own home or on other premises not under the control or management of the person who gave out the materials or articles".

13 See id, secs 1 and 2.

14 ECA, sec 3.

15 *Israel Membere v IGP* (1965) All NLR 485.

16 ECA, sec 12(1) states: "The provisions of this Act are in lieu of any right of action, statutory or otherwise, founded on a breach of duty of care or any other cause of action, whether that duty or cause of action is imposed by or arises by reason of law or contract, express or implied, to which an employee, dependant or member of the family of the employee is or may be entitled against the employer of the employee, or against any employer within the scope of this Act, or against any employee, in respect of any death, injury or disability arising out of and in the course of employment and where no action in respect of it lies." Legal practitioners have made different interpretations of this provision. One view is that the provision precludes an employee or her dependant from instituting an action against the employer or a co-employee independently of the ECA, with the exclusive remedy available to the employee being to proceed under the ECA. An opposing view, also held by the courts, is that the provision confers on the employee a right to elect whether to seek compensation under the ECA or to commence legal action. In *Amina Hassan v Airtel Networks Limited and Another* (2015) 58 NLLR (pt 201) 443 at 465–66, Adejumo J held: "the requirements of section 12(1) and (2) of the ECA

retains the option of electing whether to proceed under the ECA or to commence a common law action for damages.[17] An election to bring legal action did not bar compensation under the WCA until judgment was obtained for or against the employer; similarly, electing to proceed under the WCA did not preclude the employee (or her dependant) taking legal action until judgment was obtained in the WCA proceedings, whether for or against the employer.[18] In *Segun v West African Airways Corporation Ltd*,[19] the plaintiff had obtained compensation as a dependant from the deceased employee's employer pursuant to an action taken under the WCA. Later, as a personal representative, she sued the employer at common law alleging negligence. In dismissing her action, the court held that the compensation paid to her was a bar to a claim for damages at common law.[20] However, under the ECA, an election to commence legal action automatically precludes the employee from seeking compensation under the ECA, without having to wait and obtain judgment or compensation.[21] The choice of an election therefore becomes more important and an employee should only opt to sue, as against choosing guaranteed compensation under the ECA, where there is a strong prospect that the claim will succeed; otherwise she may be without compensation if the claim fails.

Under the WCA regime, the courts held the view that acceptance of compensation under the WCA is a bar to a common law claim for damages only

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… give the claimant a right of choice of approaching the court straight to ventilate her grievances once the action is connected with failure of duty of care on the part of the Defendant and arose in the course of work … Where the Claimant does not intend to pursue compensation under the Act and her action is based on common law simpliciter or negligence, and the injury in issue occurred during the course of work, the claimant is at liberty to institute an action directly against the tortfeasors without coming under the ECA". See also *Musbahu v Kano Electricity Distribution Company PLC* (unreported) suit no NICN/KN/42/2017, judgment delivered on 17 April 2018 by Isele J at the National Industrial Court of Nigeria, Kano Division. This author prefers the former view as one that is consistent with the historical intents and purposes of workers' compensation, hinged on the compromise that the employee would relinquish the right to bring a common law claim that may result in an unpredictable level of damages, while the employer assumes liability for employment-related injuries regardless of whether it is at fault. See ND Riley "Mental-mental claims: Placing limitations on recovery under workers' compensation for day-to-day frustrations" (2000) 65/4 *Missouri Law Review* 1023 at 1030.

17 Where the employee elects to claim compensation under the ECA instead of commencing legal action, the NSITF is subrogated to the rights of the employee or her dependant and may, at its sole discretion, maintain an action against the liable party. If the NSTIF commences such an action and damages are recovered that exceed the compensation paid to the employee / dependant under the ECA, the excess is paid to the employee or her dependant, less costs and administration charges: ECA, sec 12(6)(7).

18 WCA, sec 25(1). A Adeogun "Thirty years of Workmen's Compensation Act in Nigeria" (1971) 5 *Nigerian Law Journal* 57 at 71.

19 (1957) WRNLR 29.

20 See also *Perkins v Stevenson* (1940) 1 KB 56; *Young v Bristol Aeroplane Co* (1944) KB 178 CA.

21 *Hassan v Airtel*, above at note 16 at 464.

when the employee can be shown to have known or be deemed to have known that, by accepting compensation, she was waiving her right to damages.[22] This approach is likely to be retained in the ECA dispensation, in relation to the employee's right to make an election.

It seems that benefits may now be awarded even where mental stress results from the employee's deliberate fault. Section 3(4) of the WCA, which barred compensation "in respect of any incapacity or death resulting from a deliberate self-injury", was omitted from the ECA.[23] This omission, perhaps, evinces an intention to award compensation for self-inflicted injury.

A NOTE ON MENTAL STRESS

In the world of work, mental stress has been defined as "a state of being, resulting from the tension experienced by the imbalance between what is demanded and what is offered to meet that demand".[24] Experts agree that "healthy stress" is good for employees and motivates them. Problems arise, however, when stress rises to a level that it overwhelms the employee and, in those situations, the human body may react negatively, both mentally and physically.[25] Mental stress as used in this article refers to negative mental stress. It is the harmful mental and emotional response that occurs when there is conflict between meeting job demands and the control that the employee has over meeting those demands.[26] The term also includes where a work-related occurrence negatively impacts an employee's mental capacity. For the purposes of this article, "mental stress" is used generically to refer to mental disorders, mental disabilities and any psychological or psychiatric incapacity or injury.

The intangibility of mental stress has been a recurring source of challenge to adjudicators of mental stress claims. Medical science is much more able to recognize physical problems, as are lawyers and adjudicators. Patient response to physical pain and limitations is more readily identifiable by simple observation.[27] While medical experts may debate the exact source of a

22 *Ifere v Truffods Nigeria Ltd* (2008) WRN 30; *Famuyiwa v Falawiyo* (1972) All NLR (pt 2) 5 SC.

23 See *Ogunnsi v Lagos City Caretaker Committee* (unreported) suit no YB/26/69, decided on 28 May 1973 by Taylor CJ at the Lagos State High Court.

24 B Atilola and O Atilola "Compensation for mental stress under the new Employees' Compensation Act (2010): Implications for human resource management" (2011) 5/3 *Labour Law Review* 58 at 65.

25 LE Standryk "Mental stress in the workplace" (26 November 2004, Lancaster Brooks & Welch), available at: <http://www.lbwlawyers.com/publications/mental-stress-in-the-workplace/> (last accessed 10 November 2021).

26 JV Rao and K Chandraiah "Occupational stress, mental health and coping among information technology professionals" (2012) 16/1 *Indian Journal of Occupational and Environmental Medicine* 22, available at: <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3482704/> (last accessed 10 November 2021).

27 JO Skoppek "Stress claims in Michigan: Worker's compensation entitlement for mental disability" (15 September 1995, Mackinac Center for Public Policy), available at: <https://www.mackinac.org/S1995-07> (last accessed 10 November 2021).

physical injury or its severity, or the proper mode of treatment, such debate is engaged within fairly narrow confines as there is a reasonable degree of common knowledge among both medical experts and laymen in analysing physical injuries.[28] On the contrary, mental stress is unquantifiable and exists purely in the mind of the individual.[29] It manifests itself in patterns of behaviour and is entirely dependent upon the subjective explanations of the claimant / patient.[30] There is no test or diagnosis that can accurately measure mental stress or precisely determine its source.[31] Adjudicators and laymen in the employees' compensation system usually find themselves adrift in uncertainty, turning to psychiatric and psychological experts for guidance in mental stress cases.[32]

The challenge for the NSITF, the courts and employees will be how to prove that mental stress exists and, if so, whether it is work-related within the meaning of the ECA.

CATEGORIES OF MENTAL STRESS CLAIMS

Section 8 of the ECA provides:

> "(1) Subject to sub-section (2) of this section, an employee shall be entitled to compensation for mental stress not resulting from an injury for which the employee is otherwise entitled to compensation, only if the mental stress is -
>
> (a) an acute reaction to a sudden and unexpected traumatic event arising out of or in the course of the employee's employment; or
>
> (b) diagnosed by an accredited medical practitioner as a mental or physical condition amounting to mental stress arising out of the nature of work or the occurrence of any event in the course of the employee's employment.
>
> (2) Where the mental stress is caused as a result of the decision of the employer to change the work, the working conditions of work organization in such a way as to unfairly exceed the work ability and capacity of the employee thereby leading to mental stress, such situation shall be liable to compensation to the degree as may be determined under any regulation made by the Board".

Claims under section 8 may be classified into two categories, depending on their association with a physical stimulus. The first class involves claims with a physical component, either a physical event or a physical injury. In

28 Ibid.
29 Ibid.
30 Ibid.
31 Ibid.
32 Ibid.

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the second class, mental-mental or pure stress clams, mental stress occurs without a physical component.

Claims associated with a physical component

This category involves cases where physical stimuli result in disabling psychological repercussions (physical-mental cases) or where mental stress results in physical disabilities (mental-physical claims).[33] Under section 8(1)(b) of the ECA, compensation may be awarded for mental stress where it is "diagnosed … as a … physical condition amounting to mental stress". In addition, under section 8(1)(a), compensation may be awarded if the mental stress is "an acute reaction to a sudden and unexpected traumatic event". Section 8(1)(a) would cover cases where mental stress results from experiencing or witnessing a traumatic event, even though a physical injury does not arise. These provisions suggest that there are two subsets of mental stress claims associated with a physical component: claims that arise from a physical event and those that arise from a physical injury or condition. This article now examines each of these in turn.

Physical event

Section 8(1)(a) requires that mental stress occurs as "an acute reaction to a sudden and unexpected traumatic event arising out of or in the course of the employee's employment". This section discusses the meanings of an "acute reaction" and "a sudden and unexpected traumatic event". The requirement that the event arises out of or in the course of employment is discussed under "Establishing work-relatedness" below.

An acute reaction: Section 8(1)(a) of the ECA provides no definition for an "acute reaction". However, section 8(1)(a) is identical to section 5.1(1)(a) of the repealed British Columbia Workers Compensation Act.[34] Guidelines issued under the British Columbia provision (the BC Guidelines) note that: "[a]n 'acute' reaction means - 'coming to crisis quickly', it is a circumstance of great tension, an extreme degree of stress. It is the opposite of chronic. The reaction is typically immediate and identifiable. The response by the worker is usually one of severe emotional shock, helplessness and / or fear".[35]

The BC Guidelines further note that mental stress that develops as a result of a traumatic event may still be considered an acute reaction, even though the reaction is delayed.[36] What can be gleaned from the BC Guidelines is that an

33 *Rainbolt v Audrian Medical Center* (2013) MO WCLR Lexis 161.

34 Workers Compensation Act, RSBC 1996, cap 492, available at: <https://www.bclaws.ca/civix/document/id/consol17/consol17/96492_01#> (last accessed 10 November 2021). The extant workers' compensation law in British Columbia is the Workers Compensation Act 2020.

35 M Shain and C Nassar *Stress at Work, Mental Injury and the Law in Canada: A Discussion Paper for the Mental Health Commission of Canada* (revised 21 February 2009, Mental Health Commission of Canada) at 80, available at: <https://www.mentalhealthcommission.ca/sites/default/files/Workforce_Stress_at_Work_Mental_Injury_and_the_Law_in_Canada_ENG_0_1.pdf> (last accessed 10 November 2021).

36 T McKenna "Guide for filing WorksafeBC mental disorder claims" (15 May 2015,

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acute reaction would usually implicate immediacy and severity. Examples of acute reactions include severe emotional shock or fear and may be the result of witnessing a death or serious injury, personal assault or other violent crime. The requirement that the reaction is acute is important because the timing of the employee's reaction may be relevant in determining the causal connection between the mental stress and the traumatic event. Cases where the reaction is delayed may be problematic in their causal connection with a work-related event, given the possibility of intervening stressors. The reaction must be shown to have been triggered by a work-related "sudden and unexpected traumatic event". If the mental stress is a reaction to a non-work-related event, compensation should be denied.

Sudden and unexpected traumatic event: The ECA does not define a "sudden and unexpected traumatic event". Interpreting a verbatim phrase under the repealed British Columbia Workers' Compensation Act, the BC Guidelines note that the term denotes "an emotionally shocking event, which is generally unusual and distinct from the duties and interpersonal relations of a worker's employment".[37] The event should be unexpected for the type of employment concerned and generally accepted to be traumatic. The BC Guidelines further direct that this does not exclude an employee who, due to the nature of her occupation, is exposed to traumatic events on a regular basis.[38] However, in *Plesner v British Columbia Hydro and Power Authority*,[39] the Canadian Supreme Court held that an interpretation that the event be uncommon to the employment violates equality guarantees in the Canadian Charter, by requiring mental stress claimants to meet a higher standard than employees with physical injuries. It is unlikely that the equality concerns in *Plesner* apply to the ECA; therefore, an interpretation that the event be uncommon to the employment should be adopted in the ECA. Although the triggering event in section 8(1)(a) must be a sudden and unexpected traumatic occurrence, an evidently higher threshold than that required for physical injuries and diseases,[40] section 8(1)(b) allows an employee to recover compensation for mental stress even where the precipitating event is neither traumatic nor sudden and unexpected. An interpretation that the event in section 8(1)(a) should be uncommon to the employment would further distinguish claims under 8(1)(a) and 8(1)(b).

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Canadian Union of Public Employees) at 6, available at: <https://d3n8a8pro7vhmx.cloudfront.net/josho/pages/16250/attachments/original/1457451894/WCB_-_Guide_for_Filing_WorkSafeBC_Mental_Disorder_Claims.pdf?1457451894> (last accessed 10 November 2021).

37 Ibid.

38 Ibid.

39 (2009) BCCA 188.

40 To be compensable, physical injuries and diseases are only required to have arisen out of or in the course of employment, or otherwise be work-related. See ECA, secs 7, 9 and 10.

In determining what events are "sudden and unexpected", reference should be made to the hazards inherent in the employment and the question should be resolved on a case-by-case basis. Interpersonal conflicts with superiors, co-employees or clients are considered usual, standard workplace events, and do not generally constitute sudden and unexpected events unless they exceed the usual scope of work relations where, for example, they engender unusual, unacceptable behaviour such as aggressive and / or dangerous conduct.[41]

If the event is also required to be traumatic, by whose standard should this be judged? In *DW v Workplace Health, Safety and Compensation Commission and Another*,[42] the court reasoned that "the test for assessing whether an event is traumatic must be an objective one. If it were a purely subjective test or even a modified objective test, the most innocuous of management decisions could support a claim for psychological injury … The overly sensitive employee who is experiencing a severely stressful home or work life might well suffer an acute reaction to a critical management decision".[43] Similarly, an employee's tolerance of a past traumatic event should not bar a mental stress claim resulting from a similar subsequent traumatic event.[44] If the event is found to be objectively traumatic, that is, it would be considered traumatic to a reasonable person, then a subjective standard should be used to assess the employee's reaction to that event: that is, whether the employee in question had an acute reaction to the event.[45]

Section 8(1)(a) does not require an employee to have first-hand experience of the traumatic event. Would it suffice if the mental stress is an acute reaction to a co-employee's work-related traumatic event? One view is that compensation should be allowed only for those who were "active participants in the tragedy" and would feel some responsibility for it.[46] Another view is to require a direct connection between the event and the second employee before an award can be made.[47] These two approaches are not necessarily mutually exclusive, for an employee with no first-hand experience of an event, but

41 McKenna "Guide for filing", above at note 36. In *Shope v Industrial Commission* (1972) 17 Ariz App 23 (1972), the court reasoned (at 25) that: "The conflicts [with a customer] which the petitioner experienced were part of the usual, ordinary and expected incidents of his employment … [T]o grant petitioner his requested relief would literally open Pandora's Box permitting compensation to any disgruntled employee who leaves his job in a huff because of an emotional disturbance".

42 (2005) NBCA 70.

43 Ibid.

44 Policy EN-18 "Mental stress: Entitlement" in *Client Services Policy Manual* (2018, WorkplaceNL) at 2, available at: <https://workplacenl.ca/site/uploads/2019/06/policy-en-18-mental-stress-201810308.pdf> (last accessed 10 November 2021).

45 *St John's Transportation Commission v Newfoundland (Workplace Health, Safety and Compensation Review Division)* (2009) NLTD 102.

46 *International Harvester v Labour & Industry Review Commission* 116 Wis 2d 298 at 303 (1983).

47 "Mental disorder claims" (WorkSafeBC compensation practice directive C3-3, January 2013) at 2, available at: <http://www.worksafebc.com/regulation_and_policy/practice_directives/compensation_practices/assets/pdf/C3-3.pdf> (last accessed 10 November 2021).

who is nevertheless directly connected with it, may be an active victim of the tragedy. A hallucinated or anticipated event, which did not in fact occur, would not qualify as "a sudden and unexpected traumatic event" under the ECA. The wording of section 8(1)(a) suggests that the event must have actually occurred.[48] Thus, an employee on night shift who anticipates being robbed has not suffered a traumatic event; in contrast, a near miss scenario may qualify as a traumatic event.[49]

As noted above, where an employee suffers mental stress from a work-related event but her claim does not meet the requirements of section 8(1)(a), the employee can proceed under the less-stringent section 8(1)(b), which does not require an acute reaction or a sudden and unexpected traumatic event for mental stress to be compensable. The existence of a triggering event has the benefit of reducing the employee's burden to prove work-relatedness and, for the NSITF and the courts, decreases the possibility of fraudulent claims and provides a definitive standard in dealing with mental stress claims.[50]

Physical condition

Under section 8(1)(b), compensation may be awarded if the mental stress is "diagnosed … as a … physical condition amounting to mental stress arising out of the nature of work or the occurrence of any event in the course of the employee's employment". The term "physical condition" refers to the state of a person's physical health and would include bodily injuries and diseases.[51]

It seems that an employee may recover compensation for either the mental stress or the physical condition, but not for both. Section 8(1) provides that "an employee shall be entitled to compensation for mental stress not resulting from an injury for which the employee is otherwise entitled to compensation…". An injury includes bodily injuries or diseases and, in this way, includes a physical condition.[52] Section 8(1) implies that, where mental stress results from a physical condition that is compensable under the ECA, compensation for the mental stress is excluded. Secondly, where the physical condition is not compensable under the ECA, compensation is allowed only for the mental stress. If this argument is correct, it follows that an employee who suffers from a compensable physical condition may not additionally recover compensation for mental stress resulting from that condition.

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48 The Michigan workers' compensation statute is more express in this regard. It provides that "mental disabilities shall be compensable when arising out of actual events of employment, not unfounded perceptions thereof": Michigan's Workers' Disability Compensation Act 1969 (as amended), sec 401(2)(b).

49 "Mental disorder claims", above at note 47.

50 Riley "Mental-mental claims", above at note 16.

51 "Physical condition" in *The Free Dictionary*, available at: <https://www.thefreedictionary.com/physical+condition> (last accessed 10 November 2021).

52 See ECA, sec 73.

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Section 8(1) becomes problematic, however, if the initial compensation for a physical injury becomes insufficient to cater for an aggravated loss of earning capacity occasioned by subsequent mental stress. Would the NSITF or court refuse to award compensation for the mental stress because the physical condition is compensable? One approach to address this situation without violating section 8(1), is to treat the aggravation as a part of the physical condition and make an additional award on the basis of the physical condition alone. However, the provisions of the ECA would make such a review of compensation difficult. First, the ECA only provides for a review of the NSITF's decision based on an appeal by an "aggrieved person".[53] The Supreme Court has defined an aggrieved person as one "who has suffered a legal grievance, a man against whom a decision has been pronounced which has wrongfully refused him something or wrongfully affected his title to something".[54] It is doubtful if an employee seeking a review based merely on an aggravated loss of earnings (caused by subsequent mental stress) would qualify as an aggrieved person, since her grievance does not arise from the initial NSITF decision, but from the changed circumstances caused by the mental stress. Secondly, the employee must file the appeal within 180 days of the date of the decision or lose her right to appeal.[55] Since it would not be uncommon for several years to elapse between the date of the decision and the diagnosis of related mental stress,[56] the 180-day rule may deny an employee who suffers subsequent mental stress the benefit of an NSITF review and the employee may have to approach the National Industrial Court for a remedy. It is suggested that any future amendment of the ECA should confer on the NSITF an express power to review an award of compensation where there is an aggravated loss of earning capacity or where, due to altered circumstances, the initial compensation has become insufficient to meet the circumstances of the case.

There is no requirement in section 8(1)(b) that the physical condition continues throughout the mental stress disability. Therefore, an employee will not be denied compensation if her mental stress remains after the treatment or healing of the triggering physical condition. The requirements of section 8(1)(b) are conspicuously less stringent than those of section 8(1)(a) and increase the possibility of fraudulent mental stress claims. It is perhaps for this reason that section 8(1)(b) requires a diagnosis by an accredited medical practitioner that the physical condition has led to work-related mental stress. This obligation is absent if the mental stress is caused by a sudden and unexpected traumatic event; however, the NSITF may appoint a medical board of

53 Id, sec 55(1).

54 *Société Générale Bank (Nigeria) Ltd* v *Afekoro* (1999) 11 NWLR (pt 628) 521 at 524.

55 ECA, sec 55(3).

56 FJ Pompeani "Mental stress and Ohio workers' compensation: When is a stress-related condition compensable?" (1992) 40/1 *Cleveland State Law Review* 35 at 39.

inquiry to review the situation to determine whether the employee should receive compensation for mental stress.[57]

Unlike section 8(1)(a), which demands that mental stress results from a sudden stimulus, section 8(1)(b) contemplates the gradual build-up of mental stress disability. The physical condition in section 8(1)(b) must have arisen "out of [either] the nature of work or the occurrence of any event in the course of employment". These two limbs operate alternatively to ground a claim. While claims arising out of the nature of work would particularly imply a gradual process, the alternative "event in the course of employment" requirement may be met where a single event results in a physical condition that induces mental stress and may be the more frequent limb to ground a section 8(1)(b) claim.

This article now turns to the more contentious type of mental stress claims: mental-mental or pure stress claims.

Mental-mental or pure stress claims

It is this category of mental stress claims that has produced the greatest worry to employees' compensation policy makers. Mental-mental claims involve cases where mental stimuli or stress lead to a debilitating mental response. Professor Larson characterizes a mental-mental claim as "a liability for a mental stimulus producing a mental or nervous result, with no physical component in either the cause or the disabling consequence".[58] Many jurisdictions exclude mental-mental claims from employees' compensation schemes. The bases for such exclusion include the fear of fraudulent claims (as there is no visible proof of a disability caused by mental stress), the subjectivity of mental disabilities and the difficulty of determining if the mental stress is work-related or emanates from other factors in the employee's personal life. These problems make it difficult to screen out illegitimate claims, increasing the possibility that employees might abuse the system, with such claims ultimately jeopardizing the financial viability of compensation funds.[59]

These concerns notwithstanding, the ECA recognizes mental-mental claims and establishes two bases upon which compensation can be awarded for such claims. First, mental-mental claims are compensable where a work-related mental condition leads to mental stress. Secondly, mental stress arises where an employer changes the work or working conditions in such a way as to unfairly exceed the employee's work ability and capacity.

Mental condition

Under section 8(1)(b), benefits may be awarded for mental stress where it is "diagnosed by an accredited medical practitioner as a mental … condition

57 ECA, sec 8(3).

58 RJ Guite and A Rodeghiero "*Stratemeyer v Lincoln County*: Mental injuries and workers' compensation policy" (1994) 55/2 *Montana Law Review* 525 at 525.

59 JR Martin "A proposal to reform the North Carolina Workers' Compensation Act to address mental-mental claims" (1997) 32/1 *Wake Forest Law Review* 193 at 196–97.

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amounting to mental stress arising out of the nature of work or the occurrence of any event in the course of the employee's employment". A mental condition refers to the state of a person's mental health and would include any disease of the mind, mental illness or disorder.[60]

Section 8(1)(b) envisages that the mental condition that produces mental stress results from either the nature of the employee's work or a work-related event. It is more likely that, where the mental condition results from the nature of work, as opposed to a work-related event, there will be a gradual process culminating in mental stress. Gradual stress cases pose difficult challenges because they differ considerably from conventional employees' compensation claims. Previously, courts relied on the presence of a triggering event and / or a physically-evident disability to assure them that the mental disability was both bona fide and work-related.[61] In a gradual stress claim, such indicators are absent and courts have had to grapple with ways to determine if gradual mental stress is work-related and thus compensable.[62] The diagnosis required in section 8(1)(b) is one way of screening dishonest claims. The NSITF may, in addition, appoint a medical board of inquiry consisting of relevant specialists for the purpose of reviewing the situation to determine whether compensation should be paid.[63]

Would mental stress resulting from a pre-existing mental condition that is aggravated by the nature of work or a work-related event be compensable? The ECA does not answer this question, but it does not reject the possibility. Section 7(5) of the ECA, however, provides that:

> "Where an injury or disease is superimposed on an already existing disability, compensation shall be allowed only for the proportion of the disability following the personal injury or disease that may reasonably be attributed to the personal injury or disease, the measure of the disability attributable to the personal injury or disease shall, unless the contrary is shown, be the amount of the difference between the employee's disability before and disability after the occurrence of the personal injury or disease".

Although this provision relates to injuries and diseases, it provides guidance on how mental stress caused by an aggravated mental (or physical) condition should be treated under section 8(1)(b). Section 7(5) articulates the "lighting up" doctrine, a time-honoured rule that, if a pre-existing dormant or latent condition is activated or "lighted up" by a work-related injury or disease, the

60 "Mental condition" in *The Free Dictionary*, available at: <https://www.thefreedictionary.com/mental+condition> (last accessed 10 November 2021).

61 GM Troost "Workers' compensation and gradual stress in the workplace" (1985) 133/4 *University of Pennsylvania Law Review* 847 at 848, available at: <https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=4038&context=penn_law_review> (last accessed 10 November 2021).

62 Ibid.

63 ECA, sec 8(3).

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employee is entitled to compensation for the resulting disability.[64] The fact that an average employee might not experience any adverse effects from the same event or injury is immaterial: "[t]he issue is not whether a person of 'reasonable' or 'average' health would have been injured. It is whether a specific individual, regardless of pre-existing conditions, sustained an injury that arose out of, and in the course of employment".[65] The ECA may draw from this in relation to a work-induced aggravation of a mental condition that leads to mental stress; if it is established that an employee's employment was, in fact, the precipitating factor in the mental (or physical) condition that produced the mental stress, compensation should be awarded. With regard to the measure of compensation, compensation may only be awarded for the mental stress disability attributable to the work-related aggravation. As section 7(5) provides, compensation is "only for the proportion of the disability following the [aggravating] personal injury or disease that may reasonably be attributed to the personal injury or disease …".

It seems that work-related sexual harassment culminating in mental stress would be compensable under section 8(1), provided the claim meets the conditions in section 8(1)(a) or 8(1)(b). In determining if sexual harassment is work-related, the NSITF should consider whether the harassment: has an inherent connection with the employment; is inherently private; or is neither inherently employment-related nor private and thus neutral.[66] Inherently employment-related sexual harassment flows from "the duties of the job", while inherently private sexual harassment stems from the private affairs of the employee and is unrelated to her employment functions.[67] Sexual harassment is neutral if it originates in neither the employment functions nor private affairs of the employee but is instead attributable to sources that would have affected any person who happened to be in the employee's position at the time and place of the sexual harassment.[68] Sexual harassment that is inherently employment-related or neutral (to the extent that it occurs in the course of employment) should be considered work-related, while harassment that is inherently private should not.[69] The inquiry should transcend intentional acts and investigate if the motivation behind the sexual harassment is work-related.[70]

64 *McDonagh v Department of Labour & Industries* 845 P2d 1030 (1993).
65 *Gardner v Van Buren Public Schools* 445 Mich 23 (1994) at 48.
66 *Popovich v Irlando* 811 P2d 379 at 383 (1991).
67 Ibid.
68 Ibid.
69 Ibid.
70 RC Vance "Workers' compensation and sexual harassment in the workplace: A remedy for employees, or a shield for employers?" (1993) 11/1 *Hofstra Labor and Employment Law Journal* 141 at 188.

Changes in work / working conditions

Perhaps the most employee-centric basis for a mental stress claim is found in section 8(2) of the ECA, as almost all other jurisdictions exclude this type of claim from employees' compensation.[71] Under section 8(2):

> "Where the mental stress is caused as a result of the decision of the employer to change the work, the working conditions of work organization [sic] in such a way as to unfairly exceed the work ability and capacity of the employee, thereby leading to mental stress, such situation shall be liable to compensation to the degree as may be determined under any regulation made by the Board".

Although there is an inherent requirement that the change is work-related, it is limited to changes attributable to the employer or management only. Accordingly, compensation may not be awarded where an employee changes her work or working conditions of her own accord. This departs from the mental stress envisaged in section 8(1), which may result from factors unconnected with management. The provision also limits the notion that compensation may be awarded for an employee's deliberate self-injury, by the omission from the ECA of section 3(4) of the WCA (which barred compensation for deliberate self-injury), as mental stress arising from a self-inflicted change in work or working conditions would not be compensable.

The change in work or working conditions should assume some level of permanence or longevity in order to ground a successful mental stress claim. A short-term change would raise questions about the source of the mental stress; this is without prejudice to short-term radical changes that can cause mental stress. Atilola and Ige have submitted, correctly, that section 8(2) may ground a gradual stress claim,[72] supporting the argument that the new work or work conditions should not be too short-lived to sustain a claim.

In making a claim under section 8(2), the employee must show, in addition to the employer's decision, that her work ability or capacity was unfairly exceeded. The language of section 8(2) suggests that the determination of whether an employee's capacity or ability was unfairly exceeded should be made on an individual employee basis, not the capacity of an average employee, denoting a subjective test: "the decision of the employer to change the work, the working conditions of work organization [sic] in such a way as to unfairly exceed *the work ability and capacity of the employee* …".[73] Under this

71 See, for example, British Columbia's Workers' Compensation Act 2020, sec 135(1)(c), which expressly excludes compensation for mental stress "caused by a decision of the worker's employer relating to the worker's employment, including a decision to change the work to be performed or the working conditions, to discipline the worker or to terminate the worker's employment".

72 O Atilola and O Ige "Global best practices in mental health in the workplace: Focus on the Nigerian setting" (2013) 7/1 *Labour Law Review* 61 at 67.

73 ECA, sec 8(2) (emphasis added).

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approach, the nature of the new work or work conditions should be weighed against the personal ability or capacity of the employee involved, taking into consideration any disposition or inability of the employee. This is a sensible approach, as no two employees are the same, and the ECA's objective is to establish a guaranteed, no-fault compensation scheme, provided the disability is work-related. Using an objective approach (the capacity and ability of an average employee in that type of work) would have the disadvantage of excluding employees with pre-existing incapacities, even where the new work or working conditions exacerbate the pre-existing condition.

However, the ECA does not provide compensation for every mental stress where an employee's capacity or ability is exceeded; compensation is only payable where the employee's capacity was exceeded unfairly. What, then, is unfairness within the meaning of section 8(2)? Unfortunately, the ECA provides no guidance as to when an employee's capacity will be deemed to have been unfairly exceeded. The question should be resolved on a case-by-case basis. A change in work or working conditions that is unreasonable or discriminatory may be unfair, and the reasonableness of the decision may go to prove or disprove unfairness.[74] However, the language of section 8(2) suggests that it would not avail an employer to contend that the change in work or working conditions was a good faith personnel decision (a regular and routine employment decision carried out in a reasonable, non-discriminatory manner) if the employee's work capacity is actually exceeded unfairly, as the unfairness is tied to the excess of the employee's work ability and not to the employer's decision. Similarly, it should be immaterial that the employer had no knowledge of the employee's work ability or capacity if the employee's work ability was, in fact, unfairly exceeded.

Section 8(2) empowers the NSITF to determine, by regulation, the degree of compensation to be awarded in such cases. The NSITF may use the opportunity to maintain some balance between compensating section 8(2) claims and the need to ensure that mental stress claims do not overwhelm the financial viability of the employees' compensation scheme. Changes in work and working conditions are bound to occur. Employers must often regulate employee performance and respond to market forces, by taking actions disfavoured by employees and adjusting their workforce to the demands of an open market, such situations being generally beyond the employer's control.[75] Given that personnel decisions are regular features of work, regulations issued pursuant to section 8(2) should allow for compensation only in clear-cut cases where the change in work or working conditions is unfair; even so, the risk remains that section 8(2) opens the floodgates to claims that would overwhelm the NSITF.

74 AV Matsumoto "Reforming the reform: Mental stress claims under California's workers' compensation system" (1994) 27/4 *Loyola of Los Angeles Law Review* 1327 at 1361.

75 Ibid.

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ESTABLISHING WORK-RELATEDNESS

The preliminary step in assessing a mental stress claim demands clear evidence that a mental stress disability exists. Once this is established, the inquiry then proceeds to whether the mental stress is work-related. A recurring principle runs through the ECA: the prerequisite that a compensable disability arises out of or in the course of employment.[76] This requirement is seen in section 8(1) and, although section 8(2) does not explicitly use the language, it does require a causal connection between the employment and mental stress. The stipulation that disabilities arise out of *or* in the course of employment is a departure from the WCA, where a compensable injury should arise out of *and* in the course of employment.[77] The implication is that both limbs would operate alternatively, no longer conjunctively, to ground a claim. Nonetheless, both limbs are normally taken together to form a single standard known as "work-relatedness".[78]

The ECA does not say when a disability will be deemed to arise out of or in the course of employment. Judicial decisions however show that these phrases are neither theoretically nor empirically equivalent. The expression "arising out of employment" contemplates a causal relationship between the employment requirements and the action engaged in at the time an injury occurs.[79] A disability does not arise out of the employment unless it results from a risk reasonably incidental to the employment and unless there is, apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is being performed and the resulting disability.[80] Lord Shaw, in *Simpson v Sinclair*,[81] noted that the term "applies to the employment as such - to its nature, its conditions, its obligations, and its incidents. If by reason of any of these the workman is brought within the zone of special danger and so injured or killed, it appears to me that the broad words of the statute 'arising out of the employment' apply".

An injury or event occurs "in the course of employment" when it happens within the spatial and temporal boundaries of employment: the time, place and circumstances of the injury or event.[82] It is widely acknowledged that the course of employment includes periods when the employee arrives at her workplace and / or does something reasonably incidental to her

76 ECA, secs 7, 8, 10 and 11.

77 See WCA, sec 3(1). Regarding the WCA, Prof Uvieghara posits that: "There is a greater acceptance of the view that the phrase 'arising out of and in the course of employment' has two arms and that both arms must be satisfied for a claim to succeed": EE Uvieghara *Labour Law in Nigeria* (2001, Malthouse Law Books) at 256.

78 ECA, sec 73 states: "'work-related' in reference to a disability of an employee means a disability arising out of and in the course of employment of an employee".

79 Riley "Mental-mental claims", above at note 16.

80 *Novak v McAlister* 301 P 2d 234 (1956).

81 [1917] UKHL 267 at 272.

82 *R v Industrial Injuries Commissioner* (1966) 2 QB 31, per Lord Denning MR.

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employment.[83] The court in *Smith v Elder Dempster Lines Limited*[84] held that, under the WCA, even where an employee travelled in a vehicle provided by the employer, she was not in the course of her employment until she commenced actual work.[85] However, under section 7(2) of the ECA, an employee is entitled to compensation with respect to any accident sustained during the commute to: her workplace and place of residence and vice versa; the place where the employee usually takes meals; and the place where she usually receives remuneration, provided the employer has prior notification of that place. In addition, section 11 envisages that an injury that occurs outside the normal workplace is compensable, provided that: the nature of the employer's business extends beyond the normal workplace; the nature of the employment is such that the employee is required to work both inside and outside the workplace; or the employee has the employer's authority or permission to work outside their normal workplace. While these provisions are in relation to death, injury and disease, they provide guidance on when an event will be deemed to have occurred in the course of employment in respect of section 8.

Mental stress induced by the nature of work under section 8(1)(b) is unlikely to arise in the course of employment, as facts of where, when and how it occurred are unlikely to be easily proved. In any case, section 8 only requires that such claims arise out of the nature of work and only mentions "in the course of employment" in relation to mental stress-inducing events, as evidence of where, when and how an event occurred would be more easily established.

Establishing that mental stress is work-related is a formidable task. Mental stress claims associated with a physical component may be more readily accepted because of the existence of a palpable physical injury or event. The same may be said of a section 8(2) claim, since a change in work or working conditions is a recognizable occurrence that the courts and NSITF may more readily accept as triggering mental stress. On the other hand, the burden in a claim arising out of the nature of work would be more difficult to discharge, as the employee may be unable to attribute her mental stress to a specific work condition or event, a difficulty that may be amplified by the existence of non-employment stressors in the employee's personal life.

The NSITF must be satisfied that the mental stress arises out of or in the course of employment. To do so, the NSITF has the power to consider material presented to it by the employer, employee or other interested parties. This material enables the NSITF to determine the facts and circumstances in which the mental stress occurred, establish a link with work and decide

83 GG Otuturu "Employer's liability for personal injuries under the Workmen's Compensation Act" (2007) 1/4 *Labour Law Review* 1 at 5.

84 (1944) 17 NLR 145.

85 A similar decision was reached in *Nagakam v Strabag (Nigeria) Ltd* (1910) AC 498 and *Scandinavian Shipping Agencies v Ajide* (1994) 17 NLR 1.

whether the mental stress constitutes an employment disability. An expert physician's opinion or testimony on the relationship between the diagnosis and employment will not bind the NSITF, although great weight should be attached to such an opinion.[86] Considering the uncertainty that inheres in even the most competent psychiatrist's opinion, a claim backed solely by the opinion of a general medical practitioner should attract additional scrutiny.[87] Finally, unlike physical disability, mental disabilities may adversely impact the employee's mental functioning, motivation, drive, and social and organizational skills, making it difficult for the employee to make and prosecute a successful claim without robust assistance.[88] The NSITF and the courts should not overlook this reality when adjudicating a mental stress claim.

AMOUNT OF COMPENSATION

Payment of compensation under the ECA generally depends on the existence of a resulting disability (or death) and the measure of compensation depends on the nature of the disability. The ECA recognizes two broad types of disability, partial and total, either of which could be temporary or permanent.[89] While using the words "partial" and "total" in relation to disabilities, the ECA fails to define what these terms mean. The WCA used the term "incapacity" instead of "disability" and construed "partial incapacity" as a harm that reduces an employee's earning capacity, while "total incapacity" "incapacitates … [the employee] for any employment which he was capable of undertaking at the time of the accident resulting in such incapacity …".[90] The WCA distinction may be used to distinguish partial disability from total disability under the ECA.

Section 73 of the ECA defines both "permanent partial disability" and "permanent total disability" as "the physical functions or conditions, mental capacity or physiological health arising from and in the course of employment that cause a deviation for more than 12 months from the condition typical for the respective age which restricts participation in the life of society and includes disfigurement". This definition provides no guidance on when a disability will be deemed partial or total and focuses on the duration of the disability. Rather, it suggests that a disability will be considered "permanent" if it prevails for more than 12 months and any disability for a shorter period should be considered "temporary".[91]

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86 See *AO Obasuyi & Sons Ltd v Erumiawito* (1999) 12 NWLR (pt 630) 227.

87 DT Decarlo "New legal rights related to emotional stress in the workplace" (1987) 1/4 *Journal of Business and Psychology* 313 at 321.

88 Atilola and Atilola "Compensation for mental stress", above at note 24 at 73.

89 See ECA, secs 21–25.

90 WCA, sec 41.

91 The ECA also requires that compensation for temporary partial disability and temporary permanent disability are only payable in respect of a disability that lasts for a period not exceeding 12 months: ECA, secs 24(2) and 25(2).

The provisions for calculating compensation focus unduly on physical injuries and diseases without adequately addressing the different categories of mental stress disabilities envisaged in section 8. If mental stress results in permanent total disability, the employee is entitled to a monthly payment equivalent to 90 per cent of her remuneration[92] and, in the case of permanent partial disability, a periodic payment equal to 90 per cent of the estimated loss of earnings resulting from the disability, to be calculated in accordance with the second schedule to the ECA.[93] For a temporary total or partial disability, compensation will be a lump sum paid based on the degree of the disability, also in accordance with the second schedule.[94] It is thus clear that, except in cases of permanent total disability, the degree of compensation is determined in accordance with the second schedule to the ECA. Unfortunately, the second schedule only references physical injuries, not mental disabilities. The implication is that an employee who suffers a mental disability is unlikely to receive compensation under the second schedule unless the disability is associated with any of the physical injuries mentioned in that schedule, which automatically excludes mental disabilities triggered by an event and mental-mental claims. In addition, as argued above,[95] section 8(1) precludes compensation for mental stress claims arising from compensable injuries. Since the injuries listed in the second schedule are themselves compensable under the ECA, the possibility of recovering compensation for mental stress caused by those injuries is remote. Therefore, as it stands, except in cases of mental stress leading to permanent total disability (which is not tied to the second schedule), there is no guidance in the ECA for determining the measure of compensation for mental stress claims. Section 22(3) empowers the NSITF to revise or amend the second schedule by regulation published in the *Federal Gazette*. The NSITF may utilize this legislative jurisdiction to expand the second schedule and address comprehensively the measure of compensation for mental stress disabilities. The NSITF may, alternatively, make regulations independent of the second schedule for determining the degree of compensation payable in mental stress cases.[96]

It is instructive that the definition of "compensation" in the ECA includes rehabilitation.[97] The Employees' Compensation Fund is to be applied towards, among other things, the provision of rehabilitation to employees who suffer work-related disabilities.[98] In mental stress cases, rehabilitation may be particularly crucial in getting the employee back to work and helping her deal with any stigma that may arise due to her mental disability.

92 Id, sec 21.
93 Id, sec 22(1)(2).
94 Id, secs 24(1) and 25(1).
95 See the discussion under "Physical condition" above.
96 See ECA, secs 8(2) and 64.
97 Id, sec 73.
98 Id, secs 16(1) and 58(b).

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CONCLUSION

Addressing the challenges in this inherently complex field of law is a no easy task. A good starting point in addressing these challenges will be for the NSITF to provide guidelines that clarify the grey areas in section 8, including what qualifies as a "sudden and unexpected traumatic event", the amount of compensation payable in mental stress cases and when a change in work or working conditions would unfairly exceed the employee's capacity. In providing this guidance, the NSITF should balance the desire to compensate work-related mental stress and the need to ensure that mental stress claims do not overwhelm the financial viability of the Employees' Compensation Fund. The requirement that mental stress arises out of or in the course of employment ensures that work-related disabilities are redressed and, if properly administered, would limit compensation to legitimate claims.

Taking proactive measures to reduce mental stress in the workplace will be crucial to sustaining the integrity of the employees' compensation system. Although effective mental health services are multifaceted, the workplace is a suitable environment in which to educate employees about mental health and provide tools for the recognition, early identification and treatment of mental health problems.[99] Proactive strategies will reduce employee absenteeism, increase productivity and ultimately benefit all by reducing the socio-economic costs to society of mental stress claims.

CONFLICTS OF INTEREST

None

99 G Harnois and P Gabriel *Mental Health and Work: Impact, Issues and Good Practices* (2000, World Health Organization and International Labour Organization) at 3–4.

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