Injured Workers' Consultants Community legal clinic

Submissions to the WSIB Draft Mental Stress Policy Consultation

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Injured Workers' Consultants Community Legal Clinic has been assisting workers with their workers' compensation matter for over 40 years. We are pleased to provide the following submissions for consideration in the Mental Stress Policy Consultation.

As advocates who see workers with all types of injuries, we are heartened that the WSIB is taking steps towards compensating workers with mental health injuries in accordance with the *Canadian Charter of Rights and Freedoms* following the legislative enactment of Bill 127. We are especially pleased to see that the policy specifically incorporates the significant contributing factor test, as this is obviously the correct standard for entitlement.

However, we do have some significant concerns about the policy. We are particularly concerned with the unnecessary thresholds the policy sets out for a worker to simply have their case adjudicated, which in our view, continue to create barriers to entitlement for mental injuries compared to physical injuries, which may well be inconsistent with the Charter. We also have concerns with the narrow way some terms in the policy have been defined.

Before we lay out our concerns, we would like to offer our endorsement of the Ontario Federation of Labour's "Draft Mental Stress Policy Submission," which we feel offers a fulsome analysis of the policy as it is proposed. We fully endorse its recommendations.

Definitions Should be Broadened

Chronic Mental Stress defined too narrowly

We are concerned that the general definition of "chronic Mental Stress" on page 3 of the draft policy is overly restrictive. Our concerns centre on the statement that a worker will generally be entitled to benefits "if the mental stress is caused by a substantial work related stressor". The `caused by` statement sets a higher threshold than intended. The policy rightly adopts the significant contributing factor principle, and this should be reflected in this general statement as well. We suggest that instead of `caused by`, it should state: if the mental stress was significantly contributed to by a work related stressor`.

We also suggest adding additional examples beyond just "including workplace bullying and harassment". It would be useful for the policy to contain a bullet point list of the types of situations that would likely warrant entitlement. This should include stressful working conditions due to the type of work (such as working with children in foster care, as was the case in *Decision No. 665/10*), and due to conditions of work (such as antagonistic relations with management, as was the case in *Decision No. 1945/10*). We note that the "illustrative examples" added to the WSIB website are focused only on situations of bullying and harassment. It would be useful to include a broader list of examples in the policy, with the clear direction that the types of situations and examples offered are non-exhaustive.

Workplace bullying excessively narrow

The requirement that bullying "create a risk to health and safety" is unnecessary and will result in the wrongful denial of claims. This risk requirement is not part of the common definition of bullying and adds no value to the policy. Bullying can result in mental injury even if it is not a health and safety risk, such as by undermining a worker's self esteem and sense of self worth, creating a toxic work culture, or

leading to feelings of persecution. Restricting entitlement only where there is a health and safety risk will result in the improper denial of claims. We further suggest removing the requirement that there be a real or perceived power imbalance. We fear that including this statement will place an additional onus on workers that is simply not relevant to establishing that mental stress arose in the course of work.

Similarly, there is no good reason to exclude interpersonal relationships from entitlement. There may be more subtle situations in which there was workplace impersonal conflict that did not clearly meet the standard of bullying or harassment, but that nonetheless results in mental illness warranting compensation.

Thresholds will result in the unlawful denial of worker claims

The policy has several mechanisms which seem to have been included to add obstacles to the approval of mental stress claims. We are particularly concerned that the draft policy sets thresholds for the approval of mental health claims over and above what is required in the WSIB's policies on physical injury.

Substantial Work Relate Stressor Requirement is Discriminatory and Should be Removed

The substantial work related stressor requirement sets a higher bar for workers with mental injuries compared to workers with physical injuries, and is therefore discriminatory. There is no comparable requirement that the injuring process for a physical injury be substantial, or "excessive in intensity or duration."

We fear that as a result of this higher bar, many valid mental stress injuries will go uncompensated. There is no useful way to measure what might constitute excessive intensity or duration, and so we expect that if it is allowed to stand, all but the starkest and most extreme cases of mental stress will be denied.

It is notable that the substantial stressor requirement is also inconsistent with the thin skull doctrine. Decision 915 (as cited in Decision 1945/10 at para. 223) explains why the thin skull doctrine applies to workers compensation:

> The thin-skull doctrine also applies in Workers' Compensation cases and for two reasons. One reason is that permitting compensation to be denied or adjusted because of preexisting pre-disposing personal deficiencies would very substantially reduce the nature of the protection afforded by the compensation system as compared to the Court system for reasons that would not be understandable in terms either of the historic bargain or of the wording of legislation. The other reason is that in a compensation system injured persons become entitled to compensation because they have been engaged as workers. They have functioned as workers with any pre-existing condition they may have had. It seems wrong in principle that conditions which did not affect their employment as workers should be relied upon to deny them compensation as injured workers.

The fact that a worker has a more significant reaction to work related stress than might otherwise be expected should not bar entitlement to compensation. The thin skull doctrine has been properly incorporated into other WSIB policies and should be part of the policy governing mental health injuries as well.

A similar situation has arisen around the measurement of whether trauma is "objectively traumatic", as required under the current mental stress policy, wherein the Tribunal developed an "average worker" standard in an attempt to clarify what would qualify as objectively traumatic, or as some decisions put it, to determine whether there was a work injuring process. The average worker test has been the subject of much debate and inconsistency, and recently, it has been applied loosely or not at all, given its incongruence with the thin skull doctrine. Tribunal *Decision No. 1572/12* considered the case of a deaf worker who a history of childhood abuse, which made him a thin skull, and found that it was inappropriate to expect him have the same experience as an average worker. An average worker could hear the joking tone of the co-worker's remarks, for example. The fact that the worker had a more negative reaction to workplace events than might be expected of a worker who could hear and did not have a history of abuse did not bar his entitlement to compensation for traumatic mental stress, and his appeal was allowed.

Given the inconsistency with the thin skull doctrine, we expect that both the objectively traumatic and the substantial work related stressor requirements will be the subject of further Charter litigation, should they be retained in the policy, which is obviously not desired by anyone involved.

a. Diagnostic Requirement is an unnecessary and potentially harmful barrier

The draft policy's section on "Diagnostic requirements" states that:

> *Before any traumatic mental stress or chronic mental stress claim can be adjudicated, there must be a diagnosis in accordance with the DSM… The WSIB will accept a claim for adjudication if an appropriate regulated health care professional provides the DSM diagnoses.*

Advocates and health professionals have several concerns about the stringency of this requirement. These include: the difficulty of attaining a DSM diagnoses for complex chronic stress issues; the lag time it can take for diagnostically identifiable symptoms to arise, preventing early-intervention; and again, the creation of an additional barrier for adjudication that does not exist for physical injuries.

b. Diagnostic requirement is discriminatory and therefore not legal

The most serious concern with these diagnostic requirements for Mental Stress injuries is the establishment of additional requirements that do not exist for physical injuries. We believe this to be neither reasonable nor within the bounds of the law.

For example, a worker who sustains an arm injury on the job site does not require an immediate diagnosis in order to be adjudicated for initial entitlement. A diagnosis may eventually be required for ongoing entitlement, which WSIB's healthcare programs will often assist in acquiring.

A recent tort decision of the Supreme Court of Canada held that requiring claimants to provide a psychiatric diagnosis to prove mental injury where there is no requirement for physical injury is unequal:

> *It follows that requiring claimants who allege one form of personal injury (mental) to prove that their condition meets the threshold of "recognizable psychiatric illness", while not imposing a corresponding requirement upon claimants alleging another form of personal injury (physical) to show that their condition carries a certain classificatory label, is inconsistent with prior statements of this Court, among others. It accords unequal — that is, less — protection to victims of mental injury. And it does so for no principled reason (Beever, at p. 410) .*[1]

The Court further noted that adjudicators should focus on symptoms and their effects rather than diagnosis:

> *Confining compensable mental injury to conditions that are identifiable with reference to these diagnostic tools is, however, inherently suspect as a matter of legal methodology. While, for treatment purposes, an accurate diagnosis is obviously important, a trier of fact adjudicating a claim of mental injury is not concerned with diagnosis, but with symptoms and their effects.*[2]

WSIAT has made similar rulings in the past, most notably in *Decision No. 2157/09*, the pivotal Charter decision on chronic mental stress. The Panel made a number of comments about the legality and stigmatic/discriminatory effect of treating physical and mental injured differently. The Panel was clear that for the purpose of their decision, the appropriate comparator group for workers with mental injures is workers with physical injuries, and that there was no grounds for treating the two groups differently. They note that, in relation to section 15 (1) of the Charter of Rights and Freedoms, that "substantive inequality" can be demonstrated if it is shown that

> *…the disadvantage based imposed by law is based on a stereotype that does not correspond to the actual circumstances and characteristics of the claimant group.*

Later, they are clear that any policy that treats physical and mental injury differently does indeed constitute discriminatory practice.

> *The unsupported assumption that mental illness claims will place a greater and unwarranted financial strain on the workplace insurance system than physical disability claims perpetuates the notion that persons with mental illness are underserving of equal recognition under the workplace insurance scheme.*

Decision No. 2157/09 listed a DSM diagnosis as one of many factors to be considered in a multifactorial analysis; it was not a compulsory pre-condition for adjudication.[3]

Based on the above, it seems unlikely that the portion of the proposed Mental Stress policy that requires a DSM diagnoses before a claim can be adjudicated would be lawful.

[1] *Saadati v. Moorhead*, 2017 SCC 28 (CANLii) at para. 36
[2] *Ibid., at* para. 31
[3] At para. 276.

c. Access to care

Beyond the legal arguments, there are practical concerns about the way that this diagnostic requirement will artificially and problematically limit injured worker's access to necessary, appropriate, and sufficient care.

Our office has more than 45 years of experience working directly with injured workers, and in all of those years spent reviewing worker's claim files, it is extremely rare for us to see a full DSM diagnosis provided by a worker's primary caretaker (e.g. family doctor) for complex mental health issues.

Our experience is shared by mental health professionals. For example, Dr. Carol Parrott, a coordinator with Health Professionals for Injured Workers, told us unequivocally that, "in 35 years of practise I have never seen a G.P. provide a DSM diagnosis." This presents a major flaw in the proposed policy.

The concern here is that this creates a "catch 22" scenario: Workers with mental stress injures will need to somehow find access to a psychologist or psychiatrist in order to get a DSM diagnosis, in order to have their claim adjudicated by the WSIB, in order to get access to a physiologist or psychiatrist. There is currently a shortage of psychiatrists in Ontario, resulting in long wait times for appointments, even if a doctor accepting patients can be found. There is also a barrier to accessing psychological care since psychologists are not covered by OHIP. Without an accepted claim, a worker may be financially precluded from accessing the services needed to get a diagnosis.

This is of particular concern in more remote areas where psychological services are very difficult to access. There is substantial worry in the advocate and medical community that this diagnostic requirement will delay, limit, or prevent access to care, and increase the burden of a mental injury on the affected worker.

Finally, diagnoses do not always emerge clearly when a stress disorder develops. Requiring a diagnosis in advance of providing assistance will create a scenario in which workers will not be able to access benefits unless or until their symptoms have crystalized into a recognizable DSM diagnosis. This does not allow for a more preventative approach that may allow a worker experiencing traumatic or chronic mental stress to seek assistance from the WSIB before their condition worsens to an untenable and perhaps permanent state.

Employers decisions or actions relating to employment

The draft policy states that:

> *There is no entitlement for traumatic or chronic mental stress caused by an employer's decision or actions that are part of the employment function, such as*
> - *Terminations*
> - *Demotions*
> - *Transfers*
> - *Discipline*
> - *Changes in working hours*
> - *Changes in productivity expectations*

This once again creates an artificial threshold for adjudication and approval that does not relate to the actual causes and challenges of mental injury. Eliminating all management decisions as compensable work injuring processes will have the effect of improperly excluding many instances of bullying and harassment. This blanket bar ignores the fact that many instances of bullying and harassment are not explicit, but are instead couched as management decisions. In one case, an employer kept changing a worker's shift schedule after it had been posted without telling her, and then disciplined her for not showing up or being late for shifts that she did not know she had. Scheduling changes are management decisions, but in this case, they were used as a tool of harassment.

Additionally, the WSIBs exclusion of all employment decisions is inconsistent with other statues in the Province of Ontario. The *Occupational Health And Safety Act,* for example, provides an exemption for "reasonable" management decisions, but acknowledges that sometimes management decisions can go too far, and that actions relating to employment can be tools of harassment and bullying that are cause for legitimate complaint.[4]

The correct route for the WSIB to take is to match the thresholds set by other pieces of legislation that are designed to keep workers safe from mental and physical injury. There is no reasonable justification for the WSIB to set a higher threshold for what can be called harassment and bullying than that found in the OHSA.

Recommendations

We have outlined the barriers presented in the draft policy that should be removed.

In closing, we suggest that if nothing else, it is essential that the policy be revised to treat mental health injuries on par with the treatment of physical injuries. That is, all additional thresholds for mental stress claims should be removed.

[4] OHSA, s. 1(4).