

THERE'S NO NEED TO RUSH: The need to monitor the impact of recent changes to Mental Stress Policy

Submission to WorkplaceNL Review of PTSD Coverage
in Worker's Compensation Legislation

NL EMPLOYERS' COUNCIL SUBMISSION TO WORKPLACENL REVIEW OF PTSD COVERAGE IN WORKER'S COMPENSATION LEGISLATION

Background and Fundamental Position

The NL Employers' Council supports a modernized approach to work-related mental health in worker's compensation legislation in Newfoundland & Labrador (NL). Mental health is a serious issue in our province that deserves focus and attention. Promoting mental wellness, increasing efforts to prevent mental illness due to workplace stressors, and providing support for any worker struggling with mental health concerns are in the best interest of workers, employers, and the province as a whole. For these reasons, we supported the majority of changes to Policy EN-18, Mental Stress, which broadened coverage for mental stress claims to include workers who experience traumatic events as an inherent risk of their occupation (such as first responders), recognized the cumulative reaction to traumatic events, broadened the definition of a traumatic event, and the types of resulting mental health issues that are compensable.

While we supported the broad strokes of the policy change, employers have serious concerns about the capacity and preparedness of WorkplaceNL to adjudicate and appropriately manage an increase in mental stress claims, and the impact these changes will have on the cost and duration of claims in NL. In addition to these changes, government recently increased the income replacement rate for injured workers from 80 to 85 per cent of net earnings. Combined, these changes represent a significant increase in cost that is concerning to employers, in particular if these changes are not implemented appropriately. Before the review of Policy EN-18 was completed, government announced its intention to further review Post Traumatic Stress Disorder (PTSD) coverage in the workers' compensation legislation. It is clear the goal of this review is to expand legislation to extend worker's compensation benefit for PTSD to first responders, and perhaps workers in other occupations, without evidence or investigation of work relatedness.

Employers in this province want to ensure that workers diagnosed with a mental health condition due to a traumatic incident in the workplace receive every appropriate treatment and support. **The Employers' Council submits, however, that given these recent changes to Mental Stress policy, providing presumptive coverage for PTSD right now is hasty and unnecessary.** Recent updates to Policy EN-18 allow access to worker's compensation for all workers diagnosed with a mental health condition due to traumatic workplace incident(s). The ability for first responders to access worker's compensation for work related mental health issues has been improved dramatically, and will be no more difficult than any other claim. The worker's compensation system already provides the benefit of the doubt to the worker, and approximately 98% of all claims are accepted by Workplace NL. Legislating presumptive coverage before the recent Mental Stress Policy changes have been procedurally implemented will not improve access to prevention or supports, and is not in the best interest of the worker's compensation system. To maintain the integrity of the Worker's Compensation system and ensure that those most in need of supports continue to be able to avail of them, it is essential that changes to Workplace NL are affordable, manageable and sustainable. There is a need to progress incrementally. The needs and interests of all stakeholders must be given due consideration.

Employers' Council position on PTSD coverage:

The responsible action with regard to PTSD coverage in NL's worker's compensation system is to allow the recent changes to EN-18 to take effect, and to ensure in procedure the appropriate and timely adjudication and management of PTSD claims, that adequate supports are provided to PTSD claimants, and to monitor the impact these changes have on the cost of the system, claim frequency and duration, and on the wellbeing of workers before making any additional changes.

Why pursuing presumptive coverage is hasty and unnecessary

Presumptive Coverage Contradicts the Principles of Worker's Compensation

While we support modernization and improvements to Mental Stress policy, the Employers' Council is fundamentally opposed to the implementation of a *presumptive* clause in any case. The worker's compensation system is built upon a historic trade-off — injured workers gave up the right legal action in exchange for no-fault insurance for work-related injuries or illness, paid for by employers. Injuries and illnesses that do not arise out of the course of employment are legally non-compensable. Presumptive clauses provide benefit without evidence or investigation to ensure a work related cause. This creates the possibility for provision of benefits in cases where an injury/illness is not work related, or where pre-existing conditions, or other non-work related factors have contributed. This contradicts the aim of worker's compensation and erodes the relationship on which the system is built.

Workers compensation is an insurance system. Benefits provided must be reasonable, directly related to work, and balanced with employers' ability to pay, now, and in the future. Deviations from this principle jeopardize the sustainability of the system and therefore all worker benefits. We stand behind our previous position that presumptive coverage constitutes preferential treatment for one group of workers or one class of injury to the potential detriment of other workers in the system. This raises serious issues of fairness. **To ensure the integrity of the worker's compensation system, all claims should be subject to the same due diligence in determining a proven work related cause.**

Awareness, prevention and increased support are not addressed through presumption

PTSD in workers inherently and repeatedly exposed to trauma is a serious issue. Employers' of workers inherently exposed to trauma as an occupational risk are increasingly focused on prevention and front-end supports to mitigate the psychological impact of incidents when they occur. Presumptive legislation extends worker's compensation benefit for PTSD without evidence or investigation of work relatedness. It does not directly facilitate or assist with awareness, prevention, and front-end supports such as trauma counselling, peer support groups, Employee Assistance Programs (EAP), and workplace mental health training and first aid. These can and should be addressed without presumptive legislation, and the impact of the expanded Mental Stress policy already creates impetus for employers, unions, government, and WorkplaceNL to do so.

WorkplaceNL already covers services provided by mental health professionals in the community where treatment is recommended and approved for mental stress claims, including PTSD. **The Employers' Council has seen no evidence to support the assertion that coverage for PTSD being "presumptive" will increase the timeliness or access to appropriate treatments and support, or that issues with timeliness or access to support will exist once changes to EN-18 have been implemented.**

WorkplaceNL is currently reviewing whether additional mental health services/supports will be required due to the expanded policy and/or presumptive legislation. **We respectfully suggest that appropriately implementing Mental Stress policy changes to ensure workers get the intervention they need, when they need it, should take priority over presumptive legislation.**

Uncertainty Regarding Implementation of EN-18 Policy Changes

Employers continue to have concerns with how mental stress claims will be adjudicated and managed under the expanded Mental Stress policy, EN-18. Mental health conditions are complex. A variety of factors within a person's work and personal life as well as pre-existing conditions may impact their reaction to acute or

prolonged stress. DSM-informed diagnosis is based on self-reports by patients with diverse backgrounds, and on clinicians' understanding of psychiatric terms or observation of behavior, and is therefore inherently more subjective than diagnosis of physical injury. This does not make these conditions any less real or deserving of compensation, but it does call for a different approach to adjudication and claims management than is currently practiced at WorkplaceNL.

There is uncertainty about the ability of Workplace NL to make fair adjudication decisions based on the available information, and if and how they will determine if the workplace stressor was the significant or predominant cause of the mental illness. It will be exceptionally difficult for a physician or nurse practitioner to fully determine the “cause” of a mental illness. A policy requiring minimal evidence to establish a workplace connection will force employers to engage in more intrusive and adversarial appeals or rebuttals if a non-workplace cause is suspected to have contributed. This is in no one's best interest. Increasing the level of clarity and certainty an adjudicator must have regarding the severity of the incident and the causal significance of work-related stressors is warranted given the pervasive nature of stress in and out of the workplace, and the subjective nature of reactions to stressors and diagnosis. Implementation and communication of clear diagnostic requirements that establish work relatedness, updated forms, and other procedures are necessary.

There are also concerns about the management of mental stress claims, and that extending current practices for claims management will not be sufficient or appropriate in facilitating recovery for complex cases of work related mental stress such as PTSD. Diagnosis and treatment from a practitioner with sufficient training in managing mental illness, early participation in return to work, and appropriate communication between the employer, employee and treating practitioner regarding accommodation will be essential – not just to prevent an undue increase in claim duration and cost, but also to ensure the well-being of the worker and to aid in recovery. It is commonly known that early and safe return to work provides the best outcome for the injured worker in overcoming symptoms. Attachment to the workplace is vital to full recovery in any claim, but in particular in a workplace related mental stress claim. In particular for PTSD, avoidance of environments related to the traumatic event is a key symptom. Employees who have experienced a traumatic incident in the workplace often have difficulty returning to their place of employment. However, employees who are not able to return to work also experience more persistent PTSD symptoms. **There is significant research to show that early exposure to the work site and graduated approach to work activities is the most effective treatment of avoidance symptoms, and that conventional treatment methods without are not as successful in overcoming the disorder** (Alden, 2012). It is extremely important that policies and practices reflect this challenge.

The worker, employer and health care provider have an obligation under the Worker's Compensation Act to participate in Early and Safe Return to Work (ESRTW). However, in current practice if the health care provider deems the worker “unable to work” in any capacity, WorkplaceNL commonly does not enforce the worker and/or health care provider's obligation to communicate and to provide appropriate and updated functional abilities to facilitate ESRTW, even if appropriate accommodations are available. This form of claims management will not be appropriate for mental stress claims. Participation from appropriate health care practitioners in clarifying diagnoses, and more importantly, determining and communicating functional capability as it pertains to work, must be enforced. Cooperation from all parties in rehabilitation is in the best interest of the worker, and best practices in claims management must be developed to ensure appropriate supports are available and participation in treatment and recovery is emphasized by case managers. Many

employers of first responders currently provide additional supports through private health disability insurance, EAP programs, peer support groups, etc. If the attachment to the workplace is not maintained, there are concerns the worker will not be receiving or availing of these supports. The crossover between EAP, disability insurance, and Worker's Compensation may also complicate the process of availing of supports, in particular if communication between all parties is not maintained.

These concerns were raised in consultation on policy EN-18, but were not addressed in the response by Workplace NL. The Employers' Council suggests that, if they have not done so already, WorkplaceNL consult with other worker's compensation boards and private insurers more experienced in managing mental stress claims to develop appropriate best practices and procedures and communicate these with stakeholders. **Without confidence and clarity for employers that best practices and procedures will be developed to support recent changes to policy EN-18, legislation that *presumes* a PTSD diagnoses constitutes a work related illness seems hasty and unbalanced.**

Impact on Cost and Duration of claims in NL

For more than two decades NL had the most expensive worker's compensation system in the country. Between 2000 and 2010 the gap between what employers in NL were required to pay versus the Canadian average ranged from 33% to 89% more. Despite these high premiums, the worker's compensation system was underfunded for two decades. Only very recently (since 2013) has the system reached a funded position and the worker's compensation board been able to bring the cost of employer premiums down. They still remain the third highest of any province in Canada. As demonstrated by [Dr. Morley Gunderson](#), excessively high worker's compensation insurance premiums have contributed to making NL an uncompetitive place to do business, impacting our economy, jobs and business investment.

Since 2005 NL has also had the highest average claim duration in Canada, the length of time it takes an injured worker to return to full pre-injury duties. Attempts to reduce claim duration over the years have had minimal impact. In 2006, average composite claim duration in NL, as reported by the Association of Worker's Compensation Boards of Canada (AWCBC), was 121 days. In 2016 it was 117 days. This compared to 77 days in the average of the other jurisdictions reported on by the AWCBC. That is 52% higher than the Canadian average.

Employer advisors, employers and business groups in other provinces report significant increases in mental stress claims in provinces with presumptive PTSD coverage, in particular in provinces with a broad range of workers included (ie. all workers in Manitoba). The City of Winnipeg alone reported more than a doubling of psychological injury claims. This includes claims that are adjudicated and denied, resulting in significant resources on the part of the worker's compensation board and the employer. There are also reports of a significant increase in costs, in particular health care costs. More than 30% of disability claims are attributed to mental health disorders (Pomaki, 2017). Local employers have reported that they have multiple disability claims that would not have qualified for worker's compensation under the old policy but that will under changes the revised EN-18. One large employer estimated that for every one worker's compensation claim linked to one traumatic incident under the old legislation, they have about 4 workers currently on LTD due to cumulative impact. These claims also are known to be the most complex and difficult to manage. Employers did not object to the expansion of the Workplace Mental Stress policy, however: **there are serious concerns about the impact these changes will have on the cost and duration of claims in NL, given the historical challenges Workplace NL has faced in managing both.**

We reiterate our fundamental position:

Employers' Council position on PTSD coverage:

The responsible action with regard to PTSD coverage in NL's worker's compensation system is to allow the recent changes to EN-18 to take effect, and to ensure in procedure the appropriate and timely adjudication and management of PTSD claims, that adequate supports are provided to PTSD claimants, and to monitor the impact these changes have on the cost of the system, claim frequency and duration, and on the wellbeing of workers before making any additional changes.

Despite this position, we have reason to believe that government will proceed with presumptive legislation. It will be difficult for the Employers' Council to support such a move for the reasons outlined above.

If government chooses to proceed with presumptive legislation, however, the Employers' Council recommends the following provisions as a means to protect the integrity of the worker's compensation system.

Crucial recommendations:

- 1) The clause must be rebuttable, as per all other provinces with presumptive PTSD legislation.**
- 2) Presumption must include DSM diagnosis of PTSD only, from a psychologist or psychiatrist, as in all other provinces.**

There is concern about the qualifications of a nurse practitioner or general practice physician without additional or specialized training in mental illness to diagnose mental illnesses as “caused” by a workplace incident, and to provide appropriate information to facilitate accommodations for early and safe return to work. These concerns were raised in consultation on policy EN-18, but dismissed due to a concern about access to psychologists and psychiatrists in NL. Improving access to support and treatment for mental health issues is a serious concern for our province, for which the responsibility lies squarely with government. With respect, we recommend that government take steps to improve access within the health care system to the benefit of all citizens, before removing safeguards to ensure worker's compensation mental stress claims are work related at the sole expense of employers. Technology and other means of efficiently improving access should be considered. It is inappropriate to provide presumptive coverage based on diagnosis from a practitioner that is not adequately qualified to provide that diagnosis.

- 3) First responders, specifically firefighters, police, and emergency medical technicians/paramedics must be the only occupations included under presumption.**

Presuming psychological injuries such as PTSD are work related in all cases would unduly off-load provincial liability and costs for mental health onto employers. While it may be safe to presume that a work related incident is the predominant cause of PTSD when diagnosed in a first responder, it is not fair or reasonable to

presume the same for other occupations. The impact of recent changes to EN-18 providing coverage for diagnosed mental health conditions in workers who witness traumatic incidents as an inherent risk of their job has yet to be determined. While we recognize that other provinces have expanded coverage into other occupational groups, given our history of excessive cost and claim duration implementing presumptive coverage for any occupational group other than first responders in NL would be drastic. There is a need to progress incrementally to monitor the impact and ensure the integrity of the system. The Employers' Council also suggests that Workplace NL include an appendix defining/ restricting what each occupation covered entails as per Ontario.

4) In the interest of fairness, limits should be placed on how far back the presumption will apply.

The Employers' Council recommends the presumption be effective only for new claims after date of implementation or with transitional provisions allowing no more than 2 years retroactivity to seek compensation as per Ontario. Also, as per Ontario legislation reconsideration of previously denied claims should only occur upon provision of new information and clarification should be provided surrounding pending claims.

An employer investigation will be necessary if there is a need to rebut presumption that the mental condition was predominantly caused by work. An employer cannot effectively investigate a historical incident. Documentation regarding traumatic incidences that occurred at a time when their impact was not compensable would unlikely be available. Allowance of historical incidents to be included in a claim *presumed* to be work related is unfair. Reducing the ability to effectively investigate and rebut claims given the cumulative nature of mental stress has the potential to be very impactful on employers in inherently stressful occupations with an aging workforce and long tenured employees. Claims including historical incidents should be subject to investigation. Given the recent changes to EN-18 reconsideration of previously denied claims and pending claims will be complicated. These claims should not be presumed to be work related and should be subject to investigation.

Other recommendations:

- 5) The legislation/ policy must provide clarity as to how these claims will be adjudicated and managed to ensure employers' issues of concern are addressed and that workers receive proper treatment and supports. Given the subjective nature of mental illness diagnoses and determining severity of the incident and work relatedness, legislation should include control over diagnostic requirements. **The Employers' Council suggests following the Alberta model of accepting claims under medical investigation.**

The Alberta legislation requires that the PTSD diagnosis fulfill certain criteria, including documentation of the traumatic incident(s), documentation of specific symptoms, and documentation that differential diagnosis and other medical conditions. A properly formulated test for entitlement and ESRTW policies that respect the inherent uniqueness of mental stress cases will provide confidence to employers and greatly assist in avoiding intrusive and costly adjudication and appeals. Appropriate physician forms/screening tools that encourage provision of appropriate functional abilities and how they relate to work will aid recovery and improve claims management.

6) Who bears the responsibility of cost for this enhanced benefit must be considered.

The expansion of worker's compensation coverage through changes to EN-18 places an additional cost on all employers in the province to provide a benefit for workers who experience psychological injury due to an inherent risk of their occupation. In exchange for extending this benefit, it is imperative that appropriate safeguards are in place to ensure the legitimacy of claims. If not, the entire trust and integrity of this contract and the stability of the system is brought into question. It would seem fair that cost sharing models be considered if government proceeds with presumptive legislation. The Employers' Council suggests that MCP continue to cover health care costs of these claims (as is the case in the firefighter's cancer presumptive clause) so as not to unduly jeopardize the financial position of Workplace NL to the benefit of one group of employers/ workers over another.

7) Legislation and/or policy should include a Non-Compensable Psychological Injuries clause(s).

As per policy EN-18 and consistent with Ontario and Manitoba, legislation/ policy should outline that employer actions like discipline, demotions, transfers and burnout are not compensable claims and outline other exclusions.

8) Given the new cumulative nature of PTSD/ mental stress claims, clarification should be provided regarding second injury relief and proportionment in cases where more than one employer is/may be involved in a claim, or a pre-existing injury or pre-employment incident contributed to the diagnosed mental illness.

9) Effective policies and practices to manage these changes and the increase in claims and costs will be essential. Employers would appreciate assurance from Workplace NL as to what these policy and practice changes will be, and the ability to meaningfully consult on such changes.

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