February 9, 2023 |

Briefs

Submission to the BC Government with respect to Psychological Injuries and Presumption

A pdf of the complete submission can be found here(473 KB).

Background

A history of restrictive legislation based on stigma and employer's fear of costs.

On June 30, 2002, the Liberal government amended Section 5.1(1) of the *Workers Compensation Act* (WCA) allowing workers to file claims for mental stress. The provisions allowed for benefits only where the mental stress was caused by a sudden and unexpected traumatic event or flowing from a compensable physical injury but did not provide coverage for chronic stress conditions arising from everyday personal and workday life.

In 2009 the BC Court of Appeal struck down the restrictive application and interpretation of the mental stress claims in Section 5.1(1) in the case *Plesner v. British Columbia Hydro and Power Authority et al.*

Plesner suffered post- traumatic stress disorder (PTSD) resulting from the rupture of a natural gas pipeline at his workplace. The Workers' Compensation Appeal Tribunal (WCAT) found that although

Plesner's injury was work-related, his claim for workers' compensation was denied because his "mental stress" injury was found to be non-compensable as his injury was not an acute reaction to a sudden and unexpected "traumatic event." Plesner sought judicial review.

The Court of Appeal found WCA Section 5.1(1) together with the WCB policy as discriminatory under the *Canadian Charter of Rights and Freedoms* (the Charter). The court found those who were suffering from mental disability were treated differently than those suffering physical disability and the differential treatment constituted discrimination under Section 15 of the Charter. The court left it to the WCB to review the policy and the government to consider amending WCA Section 5.1(1).[1]

Responding to the Court's decision, the government introduced Bill 14, *Workers' Compensation Amendment Act*, 2011, on November 3, 2011. Bill 14 amended Section 5.1 of the Act by establishing a broader entitlement for claims for mental disorders.

The changes in the legislation continued to discriminate against workers with mental disorders or psychological injuries, setting the causation barrier higher and limiting compensation. Faced with the stigma, proof of causation and limited payments, many workers do not file claims, leaving them with no assistance to recover and get back to work.

On May 17, 2018, the *Workers Compensation Amendment Act* added mental disorder presumption to the WCA for workers who are or have been employed in an eligible occupation. Initially, coverage was given to correctional officers, emergency medical assistants, firefighters, police officers and sheriffs.

In 2019 the government expanded coverage to include nurses, health care aides, wildland firefighters and dispatchers.

The current discussion paper proposes to expand presumptive coverage to other occupations.

Submission

What is presumptive coverage?

Presumptive coverage is applied to those mental health claims made under WCA Section 135 (2):

2. If a worker who is or has been employed in an eligible occupation

a. is exposed to one or more traumatic events arising out of and in the course of the worker's employment in that eligible occupation, and
b. has a mental disorder that, at the time of the diagnosis under subsection (1) (b), is recognized in the manual referred to in that subsection as a mental or physical condition that may arise from exposure to a traumatic event, the mental disorder must be presumed to be a reaction to the one or more traumatic events arising out of and in the course of the worker's employment in that eligible occupation, unless the contrary is proved.

Presumptive coverage means that once a worker in a designated occupation files a claim and receives a diagnosis, they do not have to prove the injury happened at their workplace. It is presumed to be caused by work. Presumptive coverage does not impact claim benefits.

Presumptive coverage does not provide workers suffering from psychological injury with easy access to benefits. The requirements of WCA Section 135 (1)(2) have set requirements that must be met by all psychological injury claims, including those from an occupation with presumptive coverage.

a. A reaction to one or more traumatic events arising out of and in the course of the worker’s employment; or
b. Predominately caused by a significant work-related stressor, including bullying or harassment or a cumulative series of significant work-related stressors arising out of and in the course of the worker’s employment;
c. A diagnosis from the Diagnostic and Statistical Manual of Mental Disorders (DSM) by a medical professional.

The positives of presumptive coverage

- Removes barriers to claims process for workers in designated occupations.
- The worker does not have to prove the injury was caused by work.

- Reduces the stigma and stress for workers filing mental disorder claims.
- Workers are more likely to file claims and receive help.
- In BC includes a broad group of “mental disorders” described in the DSM.
- Increases the number of mental disorder claims accepted.

Presumption is a good thing…. But it’s a good thing for a small number of occupations.

- Limited to certain occupational groups who are more likely to experience a traumatic event or events as part of their regular work.
- Recent WCB data shows workers across all sectors suffer psychological injuries and yet most are not covered under the legislation.
- WCB claims reports from 2017-2021 show all sectors reported claims for mental disorders.
- In 2021, 29% of accepted claims were adjudicated under WCA Section 135(2) while 71% were not.
- A rebuttable presumption presumes the injury is caused by work and the onus is on the employer or the WCB to prove otherwise.
- The rebuttable process can add stress to the injured worker as the employer or the WCB digs into the worker’s work and personal medical history.
- Legislation requires all workers filing a claim for mental disorders to have a DSM diagnosis from a psychologist or a psychiatrist which:
    - Creates a huge barrier at the beginning of the claims process.
    - While workers wait for a diagnosis, they do not receive any benefits.
    - Out paces the availability of these medical professionals.
    - Adds to stigma and extra stress for workers.

Comparing jurisdictions

All provinces in Canada have legislation for presumptive coverage but there are differences. The province of Alberta was the first province to offer presumptive coverage followed by other provinces.

Workers covered

- Saskatchewan, Manitoba, Newfoundland and Prince Edward Island have presumptive coverage for all workers.
- BC, Alberta, Ontario, Nova Scotia and New Brunswick cover certain occupations only.

Types of psychological injuries

- BC, Saskatchewan, Newfoundland and Prince Edward Island cover a broad group of psychological injuries.
- Manitoba, Alberta, Nova Scotia and New Brunswick cover PTSD only.

Diagnosis

- Alberta, Manitoba: General practitioner or psychologist.
- BC, Saskatchewan, Prince Edward Island, New Brunswick: psychiatrist or psychologist.
- Ontario: psychiatrist, psychologist or clinical social worker.
- Nova Scotia: prescribed diagnostician.
- All provinces require a DSM diagnosis.

Most progressive legislation is Saskatchewan

- All workers and all diagnoses described in the DSM.
- Most inclusive and equitable system.
- Recognizes that any worker can be exposed to traumatic events at work and seeking help can be daunting.

Proposed criteria for expanding presumption to other eligible occupations

1. Workers in the proposed occupation are exposed to traumatic events *because of the nature of their work in that occupation*. Evidence for such exposure may come from at least one of the following:
    a. The proposed occupation is associated with the work of first responders, the direct health care team, or other occupations already eligible for presumption.

b. Statistical or other evidence shows that exposure to traumatic events is linked to the work performed by the occupation. For example, data could indicate that an occupation has a high acceptance rate for trauma-related workers' compensation claims, which indicates that trauma is indeed, more likely than not, connected to the occupation's work. Other data could also demonstrate the link.

Criteria A

Concepts of psychological injury have evolved and continue to evolve. The first legislation recognized the prevalence of traumatic events was most common to police, emergency responders and firefighting occupations. Presumptive coverage was limited to those occupations.

Many provincial jurisdictions have recognized current research-based evidence that all workers can experience traumatic events at work and suffer psychological injury. [2]

Many workers personally face or witness dangerous, threatening, violent and/or traumatizing situations.

For example, the impact on workers' mental health of increased incidents of workplace violence. In a 2022 media release, the WCB expressed concern at the rise in workplace violence related claims from 2018-2022, from 2,292 to 2,868, an increase of 25%.

The WCB stated in the media release, "Workplace violence can have a significant impact on the physical and psychological health and safety of workers" recognizing the psychological injury that can be caused by traumatic workplace violence events.

They listed the top ten Sectors filing acts of violence related claims.

Acts of Violence by sector: (2013-2022) Rank Industry Subsector Claim Count

1. Health Care and Social Services 13,889

2. Education 2,638

3. Other Services (not elsewhere specified) 1,333

4. Public Administration 1,166

5. Retail 1,073

6. Transportation and Related Services 1,002

7. Tourism and Hospitality 853

8. General Construction 221

9. Business Services 205

10. Wood and Paper Products 92[3]

The BCFED is very concerned that some of these occupations are unlikely to meet the first criteria in that they are not associated with the occupations that are currently included in presumption. The proposed criteria will leave out thousands of workers in retail, construction, education, tourism, manufacturing, factories and agriculture.

In her paper “A Slaughterhouse Nightmare: Psychological Harm Suffered by Slaughterhouse Employees and the Possibility of Redress through Legal Reform,” Jennifer Dillard documents the psychological trauma inflicted on slaughterhouse workers. Not only do the employees face serious physical health hazards, but they also view, daily, large-scale violence and death.[4]

The criteria discounts traumatic events experienced by workers in non-traumatic occupations. For example, with the Kelowna crane collapse that killed five workers, the co-workers who observed the deaths would not be considered for presumptive coverage.

Criteria B

According to the second criteria proposed, the government will rely upon statistical data and other evidence to show that exposure to traumatic events is linked to the work performed by the occupation.

As previously mentioned, there is data available showing the potential exposure to trauma is widespread throughout occupations.[5]

Reliance upon WCB claim data alone will not tell the full story of the potential risk associated with an occupation. The nature of the work and the potential risk faced by workers must be accounted for.

Many workers who suffer a psychological injury will not file a claim, and of claims filed, a significant number are suspended. The WCB 2021 statistical report showed that from 2017 to 2021, a total of 25,532 claims for mental disorders were filed and of those 6,751, or 26%, were suspended. The footnotes explain: *Suspended claims are often those where the worker does not respond to a request for additional information or withdraws the claim. Suspended claims may proceed at a future date.**[6]***

The BCFED opines workers are suspending their claims mainly because of the onerous requirements of the legislation.

- Legislation that requires a DSM diagnosis from a psychiatrist or psychologist before a claim is accepted;
- No benefits paid until the claim is accepted;
- In non-presumptive occupations the onus is on the worker to prove the predominant cause of the mental disorder was the workplace; and
- The exclusion of injuries caused by employer decisions.

The already fragile worker suffering with a mental disorder must deal with stigma, added stress and no financial or treatment support.

2. The proposed occupation can be clearly defined to designate the workers who are exposed to traumatic events due to the nature of their work.

- The intent is to capture workers who risk being exposed to traumatic events due to the nature of their work.
- If exposure to traumatic events varies across an occupational group, the presumption should be restricted to the segment of the occupation for which trauma is a work-related risk, if such

segmentation is possible.

The BCFED is curious as to the government's need to go to such an extent to exclude workers who are in the same occupation. Perhaps the intent is to stem a flood of mental disorder claims? To alleviate the employers' concerns about increasing costs of mental disorder claims?

When presumptive coverage legislation was first introduced, in all jurisdictions there was an increase in claims for psychological injuries. But these claims in BC at 4.5% in 2021 are a small percentage of overall claims.[7] The number of submitted claims has increased since presumptive coverage was introduced in 2018. See chart.

Year	Allowed	Disallowed	No adjudication required	PEnding	Rejected	Suspended	Total reported
2017	1,351	1,093	280	4	15	1,191	3,934
2018	1,516	937	282	381	20	1,268	4,404
2019	2,310	1,346	108	286	31	1,359	5,440
2020	2,218	1,310	240	335	20	1,278	5,402
2021	2,325	1,380	270	680	31	1,655	6,352
2017–2021	**9,720**	**6,070**	**1,187**	**1,686**	**118**	**6,751**	**25,532**

The 2022 report of the Provincial Auditor of Saskatchewan, Chapter 7, Saskatchewan Workers' Compensation Board-Administering Psychological Injury Claims, found that although the duration of psychological injury claims are longer than for other types of injuries, the average claim cost is less. [8] See chart.

Figure 1—Saskatchewan WCB Claim Statistics

	2021	2020	2019	2018	2017	2016
Number of Workers Insured by WCB[A]	392,813	402,306	433,622	410,600	423,527	420,279

Total Claim Costs (in millions)	$336.2	$319.6	$281.0	$278.2	$230.2	$286.8
Total Number of all Claim Types Received by WCB	25,751	23,746	28,865	29,140	28,952	29,953
Average Duration in Days for All Claims[B]	40	45	42	42	40	43
Average Claim Costs for all Claims	**$18,802**	**$17,833**	**$13,100**	**$12,451**	**$10,355**	**$12,291**
Number of Psychological Injury Claims Received by WCB[C]	578	613	744	537	467	395
% of Psychological Injury Claims to All Types of Claims Received	2.2%	2.6%	2.6%	1.8%	1.6%	1.3%
Number of Psychological Injury Claims Accepted[C]	238	274	307	264	174	109
% of Psychological Injury Claims Accepted	41.2%	44.7%	41.2%	49.2%	37.3%	27.6%
Average Duration in Days for Psychological Injury Claims[B,C]	61	65	65	74	78	76
Average Claim Costs for Psychological Injury Claims[C]	**$15,667**	**$14,600**	**$11,999**	**$12,045**	**$9,242**	**$8,129**

Source: Saskatchewan Workers' Compensation Board 2021 records and 2020 Annual Report, pp. 8 and 54.

[A] Full-time equivalent (FTE) workers based on Statistics Canada average wage and WCB payroll information as of December 31. Does not include workers for self-insured employers.

[B] Total days of time loss divided by the number of claims during the year.

[C] From Saskatchewan Workers' Compensation Board records.

Saskatchewan is a model for BC to follow providing presumptive coverage for all workers and for all diagnoses listed in the DSM.

Conclusion

> "*The work the BCFED is doing on psychological health and safety and WCB coverage for psychological injury claims is tremendously important to me and my colleagues. The direct and vicarious trauma that we experience in our work, sadly unites us. We provide outreach services to people with mental health needs, homelessness and addiction. We love our work and our clients. But we have suffered psychological injuries caused by the daily traumatic events we experience in our work*."
>
> Community Mental Health Worker

The responsibility is on this government to recognize the universal yet unique needs of all workers for compensation for psychological injury.

In 2020, the BCFED and our affiliates lobbied the government on psychological injuries and presumption.

The solution/action to the concerns outlined in this submission require an end to the discrimination against workers with psychological injuries.

The BCFED and our affiliates urge the government to make the following legislative amendments:

- Amend WCA Section 135 to replace "mental disorders" with "psychological injury" so it covers a full range of injuries.
- Amend WCA Section 135 to eliminate the higher standard that workers must meet to show their psychological injury is work related. Remove "predominate cause."

- Limit the grounds for excluding psychological injuries resulting from employer decisions to direct reactions to legitimate employment-related decisions.
- Amend the WCA to extend presumptive coverage to all workers who experience a traumatic workplace event or events.

The BCFED and our affiliates remain steadfast in strongly urging the NDP government to implement our recommendations.

The BCFED and our affiliates are committed to beginning work with the WCB and the employers to develop a health and safety regulation requiring employers to ensure prevention of psychosocial hazards at BC workplaces.

Currently there are no requirements.

It is an anomaly that psychological injuries are accepted as claims and there are no requirements to prevent these injuries. A new regulation will be an important step in improving workplace mental health for all workers in BC and preventing psychological injuries.

[1] https://www.lexology.com/library/detail.aspx?g=d680501b-e728-4458-806c-33c38ac07492

[2] https://www.nape.ca/wp-content/uploads/2018/06/NAPE-Preumptive-Legislation-Position-Paper-FINAL-V.52018.pdf

[3] https://www.worksafebc.com/en/resources/about-us/news-and-events/backgrounders/violence-workplace?lang=en

[4] https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1016401

[5] https://www.nape.ca/wp-content/uploads/2018/06/NAPE-Preumptive-Legislation-Position-Paper-FINAL-V.52018.pdf

[6] https://www.worksafebc.com/en/resources/about-us/annual-report-statistics/2021-stats/2021-stats?lang=en

[7] Ibid.

[8] https://auditor.sk.ca/pub/publications/public_reports/2022/Volume%201/2022%20Report%20V1_Full%20Rep