

Ontario Nurses' Association

Submission on proposed Operational Policy: "Traumatic or Chronic Mental Stress (Accidents on or after January 1, 2018)", Document Number: 15-03-14

To the Workplace Safety and Insurance
Board WSIB Consultation Secretariat
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July 4, 2017



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INTRODUCTION

The Ontario Nurses' Association (ONA) is the Union representing 64,000 registered nurses and health-care professionals – as well as almost 16,000 nursing student affiliates – across the province, who are the frontline of health care in Ontario, working in hospitals, public health, community health centres, home care, family health teams, long-term care and clinics.

On behalf of our members, ONA has contributed to and participated in every major legislative and policy consultation process in Ontario, the outcome of which affects the ability of our members to continue to provide high-quality health care in every sector in which they serve. These efforts included the recent committee hearings on Bill 127, to which we made written and oral submissions concerning the changes to the *Workplace Safety and Insurance Act, 1997* (the Act).

ONA also has many years' experience representing our members in appeals before the Worker's Compensation and Workplace Safety and Insurance Boards (WCB and WSIB), as well as before the Worker's Compensation Appeals and the Workplace Safety and Insurance Appeals Tribunals (WCAT and WSIAT). Most importantly, for the purposes of this Policy Consultation, is our experience from leading the first successful Charter Challenge to the Section 13 provisions of the Act that limits entitlement to mental injuries that are "*an acute reaction to a sudden and unexpected traumatic event*" (WSIAT Decision No. 2157/09).

WSIAT Decision 2157/09 is the most comprehensive discussion of the issues surrounding the adjudication of mental stress injuries/claims versus physical injuries/claims providing extensive analysis of expert testimony, scientific, epidemiological literature as well as case law and legal argument. Its authority on the whole issue of the treatment and adjudication of mental stress injuries in the worker's compensation system is confirmed by: the widespread analysis and discussion of its findings in every legal and policy publication in Ontario, if not in the country, that covers worker's compensation issues; the fact that the Attorney General of Ontario did not appeal or seek judicial review of the decision in the Courts and withdrew their participation in the subsequent WSIAT hearings of similar cases; and by the adoption of its findings in whole or in part by the subsequent WSIAT panels dealing with the issue. We strongly assert that consideration of Decision 2157/09, as well as subsequent Decision No.'s 1945/10 and 665/10 is crucial for developing guidelines and policy for both Chronic and Traumatic Mental Stress (CMS and TMS) to avoid the discriminatory effect of the current Act, and the perpetuation of the inequality inherent in treating workers with work-related mental disability differently from workers with work-related physical disability.

The single most important finding or principle conveyed in all of these decisions and which forms the basis of our comments in this submission is that: there is no practical, principled, legal or public policy reason for imposing limitations or special rules and tests for entitlement based on the type of injury (physical or mental/psychological). Doing so in legislation or in policy, contravenes the equality provisions of the Charter as well as long-standing legal and adjudicative principles on which the worker's compensation system is based, most importantly: each individual case must be adjudicated according to its own merits and justice.

GENERAL COMMENTS

Before addressing the Guidelines for CMS and TMS, we wish to make the following general observations and recommendations regarding the Draft Policy and the process going forward:

First of all, we are greatly encouraged to see that the WSIB has maintained/adopted the same standards of proof and causation in the Draft Policy for both CMA and TMS consistent with WSIAT jurisprudence: the balance of probabilities and significant contributing factor or cause versus predominant cause.

Secondly, we strongly approve of a specialized team of adjudicators for CMS and TMS cases as we are fully cognizant of the complexity and difficulty of these cases. By the same token, we are concerned that the Draft Policy as written would make the adjudication of these cases even more complicated and we fear beyond the scope of training, time, resources and understanding of most front-line decision-makers.

As we hope will become clearer below, by adopting the same principles and guidelines to the adjudication of chronic mental stress as are applied to physical injury/disablement cases, not only will the WSIB be most likely to avoid the discriminatory effect of the current *Act* and policy, but WSIB decision-makers will not have to be trained to understand and apply a whole new set of concepts and principles that are extremely vague and ill-defined in the proposed policy.

CHRONIC MENTAL STRESS (CMS)

While we believe that the ONA member, and workers in similar circumstances to hers, whose case was the subject of Decision 2157/09 would likely have been entitled to compensation under the CMS section of the Draft Policy, we are not at all confident that the vast majority of workers with work-related chronic mental stress would be entitled to compensation under the policy as written.

Our view is based on the fact that the main criteria or starting point for considering entitlement in the draft policy is not the individual injured worker's experience in relation to a workplace stressor or injuring process, but rather the experiences of others, third parties, an "average worker" in similar circumstances. The wording of the draft policy is quite the opposite of an approach based on the individual merits of a case, because of:

1. The requirement that an event or events that a worker reports or identifies as causing or significantly contributing to her/his chronic mental stress must be corroborated by "*co-workers, supervisory staff or others*" before entitlement can be considered.
2. The requirement that a work-related stressor be "substantial" meaning "*it is excessive in intensity and/or duration in comparison to the normal pressures and tensions experienced by workers in similar circumstances.*"

These criterion – if enacted – would make more, not less difficult, the adjudication of cases that are already complex, likely multi-factorial and require detailed investigation and analysis to arrive at just decisions. Moreover, they impose additional requirements or tests on workers with mental disabilities that are neither necessary nor justified.

ONA also believes that these criterion are an invasion to the privacy of workers with mental injuries who could have many legitimate reasons for not sharing with or reporting certain events

in the workplace to their co-workers, supervisors or anyone else other than their treating health professionals. Many of these workers will not file claims because of these additional reporting and evidentiary requirements when they should be entitled to having their case heard on its merits in the same way as workers with physical injuries and illnesses.

Simply put, the additional criteria would have the same effect as the existing discriminatory section 13 (4) and (5) provisions of the Act; namely: *"that the general definition of accident does not apply to mental stress claims"* and would not *"permit a claim for mental stress that occurs by way of disablement, whereas a "disablement" is specifically included in the definition of "accident" that applies to physical injuries"* (Decision No. 2157/09, para. 34).

Establishing work-relatedness for physical injuries is challenging, especially for Disablement-type injuries, when there are no witnesses to a specific incident or complaints to the employer or other workers about incidents and ongoing symptoms. None of this is a bar to entitlement if the evidence is sufficient to establish on the balance of probabilities that the injury as reported by the worker to her treating professionals arose out of and in the course of employment.

The substantive discrimination of these additional tests for mental injuries is illustrated in the analysis by the panel in Decision No. 665/10 in which they considered the facts of the case they were deliberating as a physical disability case. They note that the worker's job in which he had worked for seven years was accepted as being stressful; that there were no other personal reasons outside of employment to account for his mental disability and no evidence of a pre-existing condition or contributory family history. All of the worker's treating professionals *"stated unequivocally that the workplace stressors significantly contributed to the worker's psychological problems"* (para. 38).

The panel stated: *"if we thought of this case as a physical disablement, all the boxes would be checked for entitlement."* To require additional so-called "objective" tests in this case as in all mental stress cases is to perpetuate *"the notion that mental disabilities are not real,"* thereby undervaluing *"the myriad psychological assessment tools that exist to reliably assist clinicians in reaching a proper diagnosis of a psychiatric condition"* and *"confusing the specific difficulty of adjudication with the general extending of entitlement"* (para. 39, 40).

The first issue regarding the notion that mental injuries are not real and the devaluation of the reliability of the assessments of clinicians dealing with these injuries, was dealt with by the Panel in Decision No. 2157/09 in response to the Attorney General's argument that treating mental injuries the same as physical injuries/disablements would lead to "blanket coverage" or "overcompensation," a concern for which no evidence was provided and which the panel found to be without basis. Their findings from the expert testimony and analysis of the scientific evidence were that: *"clinicians are able to give reliable opinions on the causation of mental disorders"* (para. 289); that the treating professionals of workers with mental disabilities are no less able to discern and provide objective findings and opinions than those of workers with physical injuries, who also have to rely on the "subjective" reports of their patients.

Most importantly, as the panel in Decision No. 665/10 explained:

A failure to conduct a proper and thorough examination can result in misdiagnosed, undiagnosed or under diagnosed physical ailments as much as with psychological

conditions. Adjudicators are trained to evaluate medical reports – the reliable and the unreliable. The reliability of a medical report per se does not lie in the disability – it lies in the doctor's capability, and the accurate history of onset (para. 40).

Secondly, the level of difficulty or complexity of a case does not justify establishing additional rules or tests on CMS cases. As the Tribunal found in 2157/09, the existing rules and principles of causation are equally applicable to mental stress cases as they are to physical injury or occupational disease cases of which the Tribunal routinely adjudicates, and which are no more difficult than mental injury cases. Just as there are no requirements for or possibility of identifying a scientifically certain method of determining causation in physical injuries/illness claims, nor should scientific certainty or higher standards of causation be required for mental disability cases (para. 236 through 248).

Rather than imposing additional tests to determine what types of injuries should be included and excluded from entitlement (which is what is proposed in the Draft Policy), the panel in Decision No. 2157/09 outlined a series of questions to ask or elements to consider in adjudicating a chronic (or traumatic) mental stress claim that parallel or mirror what is required in the investigation of multi-factorial physical disability/disablement claims and which are appropriate within the established principles and rules of causation. These are presented in paragraph's 276 through 278 and include:

Is there a DSM diagnosis of the worker's condition? In order to be eligible for a "personal injury by accident" under the WSIA, a disabling mental reaction is necessary: a transitory emotional response is not compensable.

Was there a "workplace injuring process?" This involves careful consideration of the nature of the workplace events that are alleged to have caused the mental disorder and the evidence surrounding the alleged events. A workplace injuring process is not established if the mental disorder arises solely from the worker's misperception of events.

Are there co-existing or prior non-work stressors present that may have caused or contributed to the onset of the mental disorder? How significant are they in comparison to the workplace stressors?

Does the worker have any prior psychiatric history or predisposing personality features that are relevant to the question of causation? If so, is it in the nature of a "thin skull" or a "crumbling skull?" In other words, is it a case in which it is appropriate to consider entitlement on an "aggravation basis?"

Is there a temporal connection between the events and the onset of the mental disorder? If not, is there a credible explanation for any delay?

Do the medical professionals who comment upon causation have a complete and accurate understanding of the workplace events, the worker's psychiatric history, relevant family history, prior or co-existing stressors, and any other relevant factors? Do they provide a reasoned explanation for their opinions on causation?

What is the worker's employment history? In some cases, it may be appropriate to draw inferences in this regard. For example, a long and stable employment history may suggest that the worker had been able to cope with "normal" stressors in the past.

One could easily insert "physical" in place of mental, psychological or emotional in the above questions as they are equally applicable and already within the scope of WSIB decision-makers in investigating or adjudicating gradual-onset physical injuries or disablements. As the panel in Decision No. 665/10 stated:

Chronic mental stress cases where the evidence does not support a finding that the work made a significant contribution to the mental disability should not succeed, any more than physical injury claims which are not supported by the evidence should succeed. The threshold should not be whether one has a physical disability or a mental disability; the threshold should be whether the worker had an accident as set out in the legislation. Persons with mental disabilities should not be asked to meet two thresholds and they should not be turned away at the outset (para. 42).

We believe that the proposed rules outlined in the Draft Policy will have exactly the effect that the discriminatory section 13 provisions have: namely, turning workers with work-related mental disabilities away at the outset.

Our recommendation with respect to this part of the CMS guidelines would be, as a first step:

1. Entirely remove the requirement that an event or events that a worker reports or identifies as causing or significantly contributing to her/his chronic mental stress must be corroborated by "co-workers, supervisory staff or others" before entitlement can be considered.
2. Remove any reference to "substantial" in relation to a work stressor as well as third parties, average workers or "workers in similar circumstances." In other words, remove entirely the requirement that a work-related stressor be "substantial," meaning "it is excessive in intensity and/or duration in comparison to the normal pressures and tensions experienced by workers in similar circumstances".

EMPLOYER DECISIONS

The third element of greatest concern to ONA in the CMS guidelines of the Draft Policy is the exclusion of entitlement for employer decisions or actions related to changes in working hours or changes in productivity expectations. We anticipate that the exclusion of mental injuries that are due to employers' decisions relating to employment will instigate further charter challenges to the legislation. We believe, however, that the policy could be clearer if the analysis above with respect to physical disablement cases is applied to defining what constitutes an employer decision that would warrant exclusion of these injuries from entitlement. The fact remains that workers who are physically injured due to the nature of their job duties, including increased workload (productivity expectations), are not excluded from entitlement and the same principles and investigative elements should be applied to these gradual onset mental injuries.

A substantial population of ONA members would continue to be excluded under the policy as written for both traumatic and chronic mental stress claims. For example, in the Long-Term-Care Sector, many ONA members experience what might be considered under the policy as a "high

degree of routine stress" in caring for patients and residents with mental illness or dementia. These workers are often subject to verbal and physical abuse from patients or residents (knowingly and unknowingly) as part of their daily routine. Caring for these patients means being regularly yelled or cursed at, spat upon, pinched, grabbed or slapped as they carry out their regular job duties, and these workers who develop mental stress or illness even after years or decades of this kind of routine "daily grind" would not be entitled to compensation under this policy.

Similarly, nurses who work in emergency departments, outpatient clinics, forensic and psychiatric units of hospitals are also subject to varying degrees of verbal and physical abuse from patients, ranging from being sworn or yelled at on a daily basis to being violently assaulted with hands, legs and feet, fists as well as objects, including phones, pens or anything else within reach of an agitated, angry or uncooperative patient. The Draft Policy will continue to exclude many of these workers from entitlement because there is no consideration provided for the individual circumstances or subjective experience of the worker in relation to the category or definition of type of job and type of "stressor."

Of particular concern to ONA is the lack of a meaningful distinction between those work-related stressors that involve the employers' decisions relating to employment and those that do not is the impact of increasing workloads due to cutbacks in staffing and resources, which is a growing problem for workers in the health-care sector. ONA members are increasingly overburdened by concerns about being able to provide the level of care that their patients need and deserve. This is a constant source of anxiety for ONA members and they are often at greater risk for mental and physical injuries by having to work longer hours and additional shifts, missing their breaks, or having to care for a greater number of patients during their shifts because the employer has a "no-replacement" policy for nurses who call in sick (or because of overall staffing cutbacks, none are available to call in). An example from our case load illustrates the grave shortcomings in this proposed policy:

A nurse in a Labour and Delivery/Mother and Baby unit comes to work on her usual shift (she only works day shifts to accommodate a medical condition) to find out that on the next schedule, she is assigned a regular shift rotation of 12-hour day and night shifts. This has been done by the employer to accommodate a change in the unit – the transfer of the "high-risk" or critical care part of the unit to another site. From now on, the critical care "function" will consist of an Observation role which, on night shift, is staffed by only one RN. Despite the relatively benign sound of this, the Observation RN is responsible for responding to any changes in the status of newborns, including performing life-saving interventions and making all arrangements for transferring critical patients to the new site (and accompanying them in transport); she must also be prepared for and attend any deliveries that are "borderline" or potentially high risk. Initially this nurse manages by trading as many of her night shifts as possible to "accommodate" her medical condition. Because of the lack of sufficient staff in the role, especially on the night shifts, the job is increasingly stressful, the fear of making a mistake, or "missing something" intense. The nurse becomes increasingly anxious and at greater risk of causing injury to herself or others. She reaches a "breaking point" around the same time as a newborn dies in the unit and an investigation by the College of Nurses of Ontario and other regulatory bodies is begun. Eventually, her doctor refers her to a psychiatrist who diagnoses her with acute traumatic stress disorder. The WSIB denies the claim because there was no specific traumatic event (or event outside of the regular and

expected events of her job) and because the shift change was an employment-related decision of the employer.

In every case of physical disablement, the nature of the work, changes in the work and workload are primary considerations in adjudicating the claim. There should be no difference for mental injuries where the "daily grind" or the reduction in staff and increased workload can be shown to be a significant contributing factor to or cause of the injury. There is no reason to exclude these cases up front.

TRAUMATIC MENTAL STRESS (TMS) GUIDELINES

We are disappointed to see that other than the removal of "sudden and unexpected" from the definition of a "traumatic event," there are no substantive changes proposed to the Traumatic Mental Stress Guidelines from the TMS Policy 15-03-02; ONA hopes that the WSIB will take this opportunity to revamp the whole mental stress policy to remove the most problematic (and discriminatory) elements for traumatic mental stress. These are the same or similar to our concerns with the CMS guidelines; namely:

1. The retention of additional tests for defining accidents in the course of employment and for proving work-relatedness for mental injuries that are not required for physical injuries.
2. The requirement that a worker with work-related traumatic mental stress must have her/his account of an accident/injury corroborated by others over and above what is necessary in establishing a physical injury claim.
3. No changes or additions to the list of examples of traumatic events.

We submit that the inclusion of the criteria that the event(s) must be ***"clearly and precisely identifiable, and objectively traumatic"*** meaning that the event(s) ***"can be established by the WSIB through information or knowledge of the event(s) provided by co-workers, supervisory staff, or others, and is/are generally accepted as being traumatic"*** is not only redundant and unnecessary, but as with the CMS guidelines, an infringement on the equality and privacy rights of workers with mental injuries, thereby excluding these workers from entitlement up front.

In practice, it is our experience that the phrase "generally accepted as being traumatic" is a "fail safe" for the WSIB to deny traumatic mental stress claims, even though all of the evidence supports entitlement. There is no measuring stick here and no guidelines for determining what is "generally accepted" as traumatic. For example, one measure of "general acceptance" might be that an event or action perpetrated against a worker in the course of employment constitutes a criminal act under the *Criminal Code*. ONA has represented members who have been sexually assaulted (as defined in section 271 of the *Criminal Code*) in the workplace, who have been diagnosed with PTSD and whose treating professionals have unequivocally opined that the PTSD is due to the sexual assaults and provided all the objective clinical findings necessary to determine the compatibility. The WSIB has invoked the statement that the sexual assaults are not "generally accepted as being traumatic" to deny the claims and/or redefine the criminal acts as not physically threatening (even though the unconsented physical contact has already taken place), as minor acts of harassment or "unprofessional conduct."

Our recommendations on the TMS guidelines in the Draft Policy are first, to remove from the bottom of page 1 to the top of page 2:

In all cases, the event(s) must arise out of and occur in the course of the employment, and be

- *Clearly and precisely identifiable, and*
- *Objectively traumatic.*

This means that the event(s)

- *Can be established by the WSIB through information or knowledge of the event(s) provided by co-workers, supervisory staff, or others, and*
- *Is/are generally accepted as being traumatic.*

And replace it with: *"In all cases, the event(s) must arise out of and occur in the course of the employment."*

Second, with respect to the list of examples, it is our experience that despite the non-exhaustive language of the list, the WSIB usually applies a narrow interpretation, denying claims for traumatic mental stress that do not involve significant physical violence and physical injury. This was the case for our members who were on the frontline of the SARS epidemic and who suffered significant mental stress conditions, including PTSD, from witnessing and caring for their colleagues as well as patients suffering and dying from the disease. This was also the case for some of our members who suffered traumatic mental stress after and due to witnessing the brutal and fatal stabbing of their colleague, Lori Dupont, as well as those who were themselves harassed by her killer.

The Board continues to deny traumatic mental stress claims of ONA members who have been diagnosed with PTSD and other mental illnesses after and due to witnessing (sudden and unexpected) horrific events during the course of their "regular job duties." While ONA would prefer to see in the guidelines a guarantee that the list is to be interpreted broadly and inclusively according to the individual merits of each case, at the very least the WSIB should add to the list "sexual assault as defined in the *Criminal Code of Canada*."

CONCLUSION

In closing, ONA requests that the WSIB carefully review the implementation of this important policy and include in the final draft a plan for an additional stakeholder consultation process after a year or two years of experience with the new policy. We also suggest that the WSIB consult with its stakeholders about revising and updating its forms, especially the Functional Abilities Form (FAF) which needs to provide tick boxes for mental/psychological as well as physical abilities and restrictions without the need for disclosure of diagnosis.

All of our recommendations in this submission stem from our firm belief, derived from ONA's extensive experience in representing our 64,000 members, that any legislative or policy reforms that include or suggest the differential treatment of physical and mental disabilities for the purposes of adjudicating claims are unwarranted and discriminatory.

There is no place in a democratic system for the requirement that workers with work-related mental disabilities have to have third-party proof or corroboration of the injuring processes and injuries before being entitled to have their cases considered for compensation.

We urge the WSIB, therefore, to remove the additional tests and standards of causation and proof that are implied and explicit in the guidelines for Chronic and Traumatic mental stress and commit to the reinforcement of the established principles derived from WSIAT jurisprudence that protect the right of all injured workers to have their claims adjudicated according to their own individual merits and justice.