

WORK SAFE. FOR LIFE.
WORKERS' COMPENSATION BOARD OF NOVA SCOTIA

Psychological Injuries:

Final Program Policy Decision and Supporting Rationale

March 25, 2013

I - Introduction:

Psychological injuries were identified as a high priority policy item by the Board of Directors in 2011. Since then, WCB staff have conducted extensive jurisdictional, legal, and background research on the various issues involved with workplace stress. In April, 2013 a draft program policy and accompanying background paper was mailed to individuals on the key stakeholder mailing list and posted to the WCB website for 6 months, with a deadline for submissions of October 31, 2013. The original period for consultation was 30 days, but this was extended to 6 months to accommodate requests from some employer stakeholders.

The WCB received 41 unique submissions from stakeholders offering input on the proposed draft new program policy. Submissions were received from injured worker representatives, employer representatives, individuals, and the Office of the Worker Counsellor, Workers Advisory Program, and Office of the Employer Advisor. In addition to the 41 unique submissions, the Office of the Employer Advisor submitted 66 letters from employers endorsing their submission.

Workplace stress is adjudicated differently for workers covered by the *Workers' Compensation Act* (the "Act") and Federal workers covered by the *Government Employees Compensation Act (GECA)*. The majority of workers in Nova Scotia are covered by the "Act" and are not entitled to compensation for gradual onset stress, whereas Federal workers covered by *GECA* may be entitled to compensation for injuries caused by exposure to certain gradual onset stressors. This difference means two separate policies are required in Nova Scotia to adjudicate psychological injury claims.

The Issues Clarification Paper and Policy Background Paper can be found on the WCB website at www.wcb.ns.ca.

The remainder of this report provides:

- key issues raised by stakeholders during Stage 2 consultation on the proposed new program policy;
- the rationale for why the WCB *did* or *did not* revise the draft new program policy "*Psychological Injuries*" and "*Compensability of Stress as an Injury Arising out of and In the Course of Employment - Government Employees Compensation Act (GECA)*" in response to stakeholder submissions received as a result of Stage 2 consultation; and
- the WCB's final policy decision as reflected in the final version of the program policy Appendix B.

II - Suggested Policy Changes/Issues Raised During Stage 2:

There were some significant issues raised by stakeholders about both the policies and the consultation process. The WCB is encouraged by the level of feedback and the obvious commitment by stakeholders and system partners to improve both policy and process. Many concerns were raised multiple times by different stakeholders; therefore the number of issues below does not reflect the number of submissions received by the WCB. Below is a listing of the

concerns raised and the rationales for why the WCB did, or did not, revise the proposed policies to reflect stakeholder concerns. The issues raised have been grouped together by theme in an attempt to address all issues without duplication. For a detailed overview of input received from stakeholders, please see Appendix A – Psychological Injuries: Stage Two Consultation Summary.

As discussed in the policy background paper, the new and revised psychological injury policies do not change the intent of the policy and are not expected to significantly alter the adjudication process. The new policy for workers covered by the “Act” was designed to codify current practice, while the revisions to the GECA policy were designed to respond to legal risks identified through recent court cases (i.e Plesner). The WCB appreciates the effort made by stakeholders to provide feedback in response to this consultation. However, some of the feedback received dealt with issues or topics that were outside the scope of the consultation, the Board of Director’s policy development authority, and some were based on different interpretation or understanding of our current practice. These issues include:

- Concerns about the WCB Consultation Strategy. The WCB Board of Directors understands some stakeholders have concerns about how recent consultations were implemented and will consider the feedback when launching future consultations.
- Requests for legislative or regulatory change. The Board of Directors recognizes the importance of engaging stakeholders in legislative/regulatory change considerations and will ensure stakeholder viewpoints are heard. For now, legislative and regulatory changes are beyond the Board’s policy authority.
- Concerns about the WCB compensating for psychological injuries in general or opening the door for gradual onset stress for workers who are covered by the “Act.” The WCB currently does compensate for psychological injuries, as per the legislative definition of accident, and does not compensate for gradual onset stress because of the same legislation.

After considering the feedback received, the Board of Directors has decided that further revisions and refinement to the draft Psychological Injuries Policy for workers covered by the “Act” are required to increase clarity of intent and language. Further, it has been determined that the Board will not pursue changes to the GECA stress policy at this time.

III – Summary of changes from Stage 2 “draft” policy language:

Based on stakeholder input, a number of changes have been made to the draft policy language included in the consultation paper “**Program Policy Background Paper: Compensability of Workplace Stress**” that was available for consultation from April – October 2013. The following is a high level summary of these changes; the final policy language is in Appendix – B.

- Removed the reference to a “cumulative response” to a traumatic event and replaced with an acknowledgement that an acute reaction to a traumatic event may include multiple traumatic events.
- Removal of the term “reasonably and objectively assessed” and replaced with an explanation of “objective standard” that a traumatic event must be assessed against.
- Removed reference to “incident(s) of extreme workplace harassment” in the list of examples of traumatic event.

- Determined that no changes will be made to the existing policy for Federal Workers covered under GECA. **(Policy 1.3.6 – Compensability of stress as an injury arising out of and in the course of employment – Government Employees Compensation Act (GECA))**

The following is a more detailed analysis and response to the feedback received from stakeholders on these changes.

IV – Stakeholder Feedback Analysis and Response:

◀Issues arising from WCB Consultation Process

#1: Multiple employers have expressed concern about the policy consultation process. Some employers have suggested that the approach that the WCB selected is disproportionate to the potential impacts of the proposed policy, and that the decision to proceed with only one stage of consultation emphasizes the disconnection between the WCB and business in Nova Scotia.

Analysis and Response:

The WCB is a public agency that is fully funded by employer premiums. It is essential for the WCB to have an open and transparent policy consultation process that meets the needs of employer and worker stakeholders and system partners. Any concerns about this process are taken very seriously by the WCB.

The WCB has a two stage consultation process. Stage 1 consists of a small working group of stakeholders and is intended to identify key issues to be addressed during the policy development process. Stage 2 is a public consultation where a draft policy, based on feedback from Stage 1, and accompanying background paper are mailed out to our key stakeholder list and posted on the WCB website for a minimum of 30 days. This is in line with policy consultation processes for WCBs in other Canadian jurisdictions; however, it is recognized that for more complex policy issues the 30 day minimum consultation period may not be appropriate.

As the issues pertaining to psychological injuries had already been defined by the legal system, the WCB felt it was a better use of stakeholders' time to proceed directly to Stage 2 and provide stakeholders and the public an opportunity to submit their feedback. However, it is clear that some employers felt this was not the right decision, and this feedback will be reflected in future consultations.

#2: The request was made from some employers for the WCB to implement consultation in alignment with WCB's Vision, Mission and Values which includes building confidence in the WCB by engaging workers and employers.

Analysis and Response:

It is the belief of the WCB that the current consultation process, in accordance with WCB Policy 10.3.11, is in alignment with the WCB's Vision, Mission and Values. It is clear that there were

concerns from some employers relating to this consultation period, and the WCB is taking steps to mitigate these concerns for future policy consultations.

#3: One employer submits that one month for consultation is insufficient to inform employers, elicit feedback, and provide a considered response. Meaningful consultation on a minor issue may require a 12-week time frame; longer for major issues.

Analysis and Response:

The WCB recognizes that it may not always be appropriate to adhere to the 30 day minimum consultation period set out in Policy 10.3.11. In light of this, WCB staff have done jurisdictional research to have a better idea of timelines utilized in other Canadian jurisdictions, and is considering alternative timelines for future minor and major policy consultations.

#4: Some employers have suggested that the WCB should broaden the purpose of policy consultation, because they may want to comment on the language of a policy draft, communicate possible unintended consequences, and provide feedback respecting implementation. In the case of psychological injury, if a policy is adopted by the Board of Directors, employers request an opportunity to engage in meaningful consultation respecting implementation.

Analysis and Response:

The WCB's current policy consultation process provides an opportunity for both key stakeholders and the general public to comment on the language of the draft policy, as well as possible unintended consequences.

All stakeholders and system partners play a role in the policy consultation process. The current "Policy Development and Consultation" process outlines the various ways stakeholders can provide input into the process. The specific details can be found on our Corporate Website under the Policy tab.

Once the Board of Directors approves any Policy, the WCB welcomes on-going feedback from all stakeholders and system partners on its implementation. Feedback on operational issues of implementation of policy can come in at any time and do not require a formal policy consultation for the WCB to consider these concerns.

#5: It was suggested by one large industry group that the WCB should work with the larger industries to understand the unique circumstances within each industry that may require further special policy considerations, and that large industries be part of the policy development process from the earliest possible point and engaged as a partner.

Analysis and Response:

Better understanding of workplaces' unique circumstances and challenges is a key part of the WCB's Service Delivery Model. In policy development, the WCB endeavors to address the concerns of all employers and workers, regardless of the size of workplace. While it is important to understand and consider the impacts of policy on particular groups, occupations, and

industries when developing policy, the Board of Directors does not believe it is appropriate to design policy for specific groups or industries. This can lead to different rules for different employers or workers. That being said, the WCB is pleased that stakeholders are engaged and eager to participate in policy consultations.

#6: Employers also stated that generally, the WCB ought to consider whether government is engaged in simultaneous consultation respecting issues relating to Occupational Health and Safety.

Analysis and Response:

The WCB will endeavor to take this into consideration for future consultations to ensure that unreasonable demands are not being made on stakeholder time.

◀ Concerns Regarding the Inclusion of “Cumulative” Traumatic Events

#7: One employer recommended that there be more focus and clarity around the importance of causation. Specifically, they question whether the test for causation of a “cumulative response” will be the same as that established in the jurisprudence related to “acute response” or whether the draft policy will be amended to provide a definition of “caused” that will have a different test.

#8: Concerns were also raised that the proposed policy is unclear regarding whether there is still a requirement for “an acute response” to a traumatic event or events. The third bullet under “Criteria” states: “the acute or cumulative response to the traumatic event(s)”. In addition, the second paragraph of the Policy Statement indicates that claims for compensation in respect of both an acute response to a traumatic event and cumulative responses to traumatic events will be considered. By contrast, the content in the Background Paper itself seems to imply that whether there is one event or multiple traumatic events there must still be a final traumatic event that leads to a response. Assuming that this response must still be an “acute” response, as required by the legislation, there is question surrounding what will be gained by the extension of the eligibility to the cumulative onset category and recommends that this ambiguity be clarified.

Analysis and Response:

In light of this feedback, the WCB has looked closely at the language in the draft policy to ensure that it is in keeping with the original intent. We agree that the language used in the draft policy was not clear. The intent was to clarify that an “event” may be single or several (each being traumatic) and resulting in an acute reaction. The purpose of clarifying this in policy was to ensure a consistent understanding/application of the policy. We have removed reference to “cumulative” and instead now speak solely to an “acute reaction” but allow for one or more traumatic events to be considered.

This policy approach to multiple traumatic events is in keeping with seven other Canadian jurisdictions and the intent of the *Act*. The Board believes that this approach will provide clarity on adjudication of claims that involve multiple events, while confirming the requirement for the events to meet the definition of traumatic, and exclude chronic stress from compensation.

#9: Stakeholders raised concerns that in their opinion the draft policy for workers covered by the “Act” is circumventing legislation via policy, and exceeds WCB authority. Where a policy adopted by the Board is inconsistent with legislation, appeal participants may avail themselves of s.183(5A) of the Act which states that a policy adopted by the Board is only binding on the Appeals Tribunal where the policy is consistent with the “Act”. Additionally, some stakeholders have suggested that changing the definition of accident through policy will result in high level of appeals by employers.

Analysis and Response:

In developing policy, including this one, the WCB does extensive legal analysis to make every effort to create policy that is in keeping with the legislation. Our belief is that the creation of a new provincial policy will provide greater clarity and consistency in adjudication and will minimize the need for appeal.

There are three other Canadian jurisdictions that have a similar definition of “accident” that also provide compensation for injuries caused by reactions to multiple traumatic events. The WCB is not aware of any current challenge to the policy approach followed by those other provinces.

This change is viewed by the WCB as clarifying current interpretation and practice, via policy, of the “Act,” not a change to the definition of accident.

◀ Necessity of Changes to Policy 1.3.6

#10: Employers who are governed by the GECA policy felt that the current issue before the Nova Scotia Court of Appeal concerns a worker covered under the provincial “Act” who is seeking leave to appeal the constitutionality of the statutory definition of “accident”. They suggested that this issue has no application to workers covered under the *Government Employees Compensation Act (GECA)*, and that cumulative reaction to traumatic events is already compensable under gradual onset stress because traumatic events, by definition, are “unusual” and “excessive”. Employers’ experience respecting the adjudication of gradual onset claims supports this conclusion. Therefore, they suggest that there is no need to revise Policy 1.3.6.

#11: The inclusion of “cumulative” and the change from “unusual and excessive” to “unusual or excessive” are not minor changes, and are not necessary.

Analysis and Response:

To clarify, the WCB was proposing changes to GECA in response to legal risks identified through recent court cases (i.e. Plesner). However, the WCB acknowledges the legal precedents related to the GECA policy in Nova Scotia and that stakeholders do not see the same risks. Therefore, the Board of Director’s has decided not to make any changes to Policy 1.3.6 at this time, but will continue to monitor it closely.

◀ A Number of Terms are not Defined

#12: The words "reasonably and objectively assessed" are not defined. It was recommended by multiple employers that the WCB should add language that requires unusual and excessive in comparison to the work-related events or stressors experienced by an average worker in the same or similar occupation.

Injured worker groups, on the other hand, also voiced concerns with "reasonably and objectively assessed," but suggested that the term was limiting because an individual's experience is unique to them and cannot be viewed objectively by another person.

Analysis and Response:

The "reasonable person standard" and the "objective standard" are well understood in law and have been referenced in the court cases below. The two standards are defined in Black's Law Dictionary, Ninth Edition, 2009, and can be summarized as follows:

Reasonable person – A hypothetical person used as a legal standard. A person who exercises the degree of attention, knowledge, intelligence, and judgment that society requires of its members for the protection of their own and others' interests. The reasonable person acts sensibly, does things without serious delay, and takes proper but not excessive precautions.

Objective standard – A legal standard that is based on conduct and perceptions external to a particular person. In tort law, for example, the reasonable-person standard is considered an objective standard because it does not require a determination of what the defendant was thinking.

By defining the standards in policy, the WCB is providing enhanced transparency in regards to the adjudicative approach to determining whether an incident satisfies requirements of "traumatic". Additionally, this provides enhanced direction to staff regarding the appropriate test for adjudicating traumatic events. The WCB is aware that the term is legal in nature and may add a level of complexity to the policy; however, we believe that the benefit of providing transparency and enhanced adjudicative direction outweighs any potential complications that may be caused by the inclusion of legal terms. Therefore, the terms will be added to the Policy.

The use of both the "reasonable person standard" and the "objective standard" have been supported in the Courts, in part, through the direction of the Nova Scotia Court of Appeal in the 2008 decision *Embanks vs WCAT*. Some of these Court findings are as follows:

- In *Embanks v. WCAT*, the Court agreed with the WCAT that the Policy sets out the better view of the law and should be taken as declaratory of the principles to be applied in this regard to "..... all claims under the GECA¹." The Court further agreed with WCAT in the finding that case law (rendered subsequent to the approval of the Policy) supported the conclusion that the existence of stressors must be viewed in the first instance objectively.
- In *D.W. v. Workplace Health, Safety and Compensation Commission and Via Rail*, Robertson, J.A. stated that "the test for assessing whether an event is traumatic must be

¹ *Embanks v. Nova Scotia (Workers' Compensation Appeals Tribunal)*, 2008 NSCA 28

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 injury².”

- In *Logan v. WCBNS*, Cromwell, J.A. stated “In my view, the words of the statute, read in their entire context, lead to the conclusion that whether an event is traumatic is to be assessed from an objective point of view – that of a reasonable person³.”

#13: It is not necessary to identify "extreme workplace harassment" as an example of a traumatic event. In the alternative, if WCB determines that the words "extreme workplace harassment" will be added to policy then the words should be defined. In the absence of a definition, decision-makers have no criteria to determine eligibility. One employer has suggested that this is a primary risk that is open to appeal interpretation, and recommends that the WCB either remove all references to "extreme workplace harassment," or adopt the definition of harassment used by WSIB Ontario. Another employer recommended that the definition of harassment be included in the policy, and that these claims would need to be adjudicated against the four elements included in the definition of “traumatic event” as set out in the policy.

Analysis and Response:

Initially the draft policy language consulted on included “extreme workplace harassment” in the list of examples of a traumatic event. This was included to acknowledge a situation that may be considered traumatic. However, based on stakeholder feedback this did not increase clarity or transparency and it was felt that “extreme workplace harassment” was already captured in existing examples. As a result the WCB has decided to remove “extreme workplace harassment” from the list of examples of a traumatic event.

Removing “extreme workplace harassment” from the list of examples is not anticipated to affect potential benefits that workers may be eligible to receive. If an incident of extreme workplace harassment meets the definition of a traumatic event, any resulting psychological injury would potentially be considered for compensation.

◀ Financial Issues

#14: Some employers believe that it is unreasonable to increase benefits while there remains a significant unfunded liability.

Analysis and Response:

One of the purposes of the policy consultation was to put in place a provincial policy for psychological injuries as one does not currently exist. It also was to provide clarity and transparency around the adjudication process of these claims. Today, these claims are adjudicated without a clear policy direction which can lead to inconsistency and appeals. It is

² *D.W. v. Workplace Health, Safety and Compensation Commission and Via Rail Canada Inc.*, 2005 NBCA 70

³ *Logan v. Workers’ Compensation Board (N.S.)*, 2006 NSCA 88

not the belief of the WCB that this policy increases benefits, but rather clarifies the legislated authority around the compensation of stress.

#15: Stakeholders pointed out that these policy changes could have a significant economic impact on Nova Scotia. Because rates are already highest in Canada, many employers voiced concerns about any changes that could result in increased rates and employee absence.

Analysis and Response:

The prevention of workplace injuries is a goal shared by all of us. The WCB strives to work with employers to ensure that prevention and education programs are in place to ensure a healthy workplace. It is the belief of the WCB that the proposed policy will clarify, not significantly change adjudication practices. This policy will simply put current practice into policy, and therefore employers will not see a significant change in their rates.

#16: Concerns were raised surrounding the lack of reliable cost estimate. These concerns reference the Morneau Shepell actuarial report, commissioned by the WCB, that stated they had low confidence in the results because it is difficult to predict injuries that have not been tracked to date and are not currently compensated for.

Analysis and Response:

The WCB acknowledges the challenges in estimating the potential financial impact, given the many issues with psychological injuries. In the Morneau Shepell report it clearly states, *“there is a risk that appeal and legislative decisions may significantly expand the scope of coverage beyond the original intent of the policy”*, if this occurs the report does caution that the cost impact would increase.

However, in costing only the proposed draft policy the report states, *“Based on our analysis we expect the proposed “Psychological Injuries” policy to increase the Board’s new accident costs by up to \$0.02 per \$100 of assessable payroll annually”*. The Board acknowledges that consulting on this issue and approving any new policy may lead to an increase in future claims being filed. However, the estimated potential financial impact of the proposed policy ranges from zero to two cents and is more related to a potential greater awareness of the compensability of stress and not due to any significant change in practice.

◀Issues Pertaining to Harassment and Bullying

#17: One stakeholder suggested that there is a need to include a provision for workers who have a disability and are forced to leave employment due to extremely stressful situations created by other employees, which should be considered bullying as opposed to interpersonal conflict.

Analysis and Response:

The draft policy is intended to deal with psychological injuries arising out of and in the course of employment. Extreme workplace harassment may be compensable if it meets the definition of a traumatic event, but this is not a harassment and bullying policy. That said, as it is today, if an

incident of workplace harassment causes a psychological injury as diagnosed by a psychologist or psychiatrist as per the entitlement criteria for a traumatic event set out in the policy, then that injury (caused by workplace harassment) may, as it is today, be considered as a potentially compensable injury. Because of this, it is not felt that changes need to be made to policy at this time to accommodate specific types of harassment.

#18: If these changes are not made to the policy, workers' remedy for bullying or harassment is to pursue legal avenues and delay the process and at additional cost to employers as they would not be protected from legal action by employees.

Analysis and Response:

The workers' compensation legislation provides benefits/services for workers who experience a workplace injury as set out in the *Act*/policy. Many events/activities that may occur at the workplace are not appropriately considered and/or addressed under the *Workers' Compensation Act* and the Province has in place other guiding legislation to consider these matters such as Labour Code, Human Rights Legislation, etc.

◀ Training and Education

#19: Numerous employers raised concerns around the training of adjudicators, suggesting that a specialized adjudication unit would help to ensure that these policies will be consistently adjudicated.

Analysis and Response:

Consistency of adjudication is a top priority at the WCB. Over the past year we have begun implementation of a new coaching model that is assisting in ensuring that all staff are receiving the same training, and have access to the resources they need to make clear, consistent adjudicative decisions.

◀ Standards

#20: Both employer and injured worker representatives noted a lack of reference in the policy to standards; one example provided was the voluntary standards that were released by the Mental Health Commission in January 2013. It is felt that employers need a clear and practical framework to understand what they can influence and what they do to reduce risk, and that additional legal clarity around consequences for neglect or carelessness would be helpful, as would a financial recognition model for preventative action.

Analysis and Response:

Policy provides adjudicative direction for all issues covered by the *Act*. The WCB agrees that voluntary standards are good and would encourage all workplaces to consider how to implement standards, like the one released by the Mental Health Commission, within their workplaces to improve safety and wellness of their employees.

Workplace safety and prevention are a top priority for the WCB and the WCB recognizes and rewards employers for preventative action, which results in a decrease in claims, through the WCB's rate setting model.

◀ **Constitutional Issues with Current "Act"**

#21: Stakeholders have suggested that the draft policies treat physical and psychological injuries differently, which is discriminatory. Their suggested remedy to this is to have the legislation changed to remove the exclusion for gradual onset stress from the definition of accident.

Analysis and Response:

Legislative change is outside the scope of the Board of Directors' policy making authority. Opening the *Act* is not at the discretion of the WCB, rather this is a decision that must be made by the Government of Nova Scotia.

The WCB Board of Directors is responsible for making recommendations to Government for any changes to legislation, and recognizes the importance of engaging stakeholders in any legislative/regulatory change considerations. Overtime the Board of Directors will be consulting with Government on the approach to the development of a legislative agenda as well as the timing of any legislative review process.

◀ **Labour Relations**

#22: Injured worker groups voiced the opinion that labour relations should not be excluded from the policy. Additionally, it was noted that the exclusion of non compensable work related events is too narrow and at minimum, the word "routine" should be added before "labour relations issues" to provide more clarity.

Analysis and Response:

There are labour relations exclusions in every jurisdiction in Canada and the draft policies are in keeping with these approaches. The word "routine" is currently in the policy in what the WCB believes is the appropriate place to clearly articulate the intent of the policy statement.

#23: It was suggested that there is a lack of distinction between what is considered to be a "traumatic event" and what is considered labour relations, and a concern that some small businesses don't have an HR department, which may open the door for employees to make fraudulent claims.

Analysis and Response:

In every claim filed, the WCB gathers information from both the worker and employer to ensure a complete understanding of the facts surrounding the situation before rendering a decision on entitlement. For small employers, this often requires the WCB to work directly with the business owner or their representative to ensure we understand the employer's perspective. We

continue to work at understanding the unique challenges of small/medium employers and how best to service them.

◀Concerns for Injured Workers

#24: Stakeholders are troubled by the attempt to limit the application of the program policy to new psychological injury claims after a certain date determined by the WCB, and question if this means that if the origins of a given injury precede that date, it would not be considered.

Analysis and Response:

It is standard practice with new and revised policies to provide an effective date. It is not unusual for there to be two policies for a given injury – one for injuries that precede the revised policy and one for injuries occurring after the policy is in place. In the case of the new provincial policy for psychological injuries, we are not changing the practice but rather providing clarity and consistency on adjudication of claims going forward.

#25: The concern was raised that the definition of "traumatic event" may exclude injuries where the worker's reaction is delayed, but otherwise it should be compensable.

Analysis and Response:

The proposed policy does not set out specific timelines; rather these are determined by the DSM diagnosis provided by the psychologist or psychiatrist.

26: It was suggested that the WCB needs to take into consideration the potential financial implications to an employee as an appropriate diagnosis is obtained and the claim remains in "pending" status.

Analysis and Response:

The WCB strives to render decisions in a timely manner on all files. We appreciate that during the period when the WCB is adjudicating entitlement that workers may be concerned about their financial security whether their claim is for a physical or psychological injury. The WCB makes every effort to minimize the impact on workers while also balancing the need to make well informed decisions.

#27: One individual stated that the term "average" worker is not an appropriate measure because tolerated thresholds may vary, and that the only fair measure of injury is the outcome that can be validated by medical practitioner/ ignores "thin skull" principle

Analysis and Response:

The term "average worker" is used to describe the type of situations that a worker could face; it is not used to describe the reaction that the worker has to the situation. The "thin skull" principle would be taken into consideration for psychological injury claims in terms of a worker's reaction.

For example, if two workers are involved in the same traumatic event, and only one makes a claim, that claim would be considered even though the other worker was not injured.

◀Diagnosis

#28: Concern that the diagnosis must be made by a psychologist registered with the Canadian Register of Health Service Providers in Psychology (CRHSP). Many psychologists in Nova Scotia are registered with the province, but not with CRHSP and are not required to do so. This may increase wait lists and make it difficult to find psychologists who qualify to diagnose, and may have a negative impact on existing workers who are already working with psychologists that are not registered with CRHSP.

Analysis and Response:

This requirement has been in the GECA Policy since its inception, and has not been found to delay treatment or care for injured workers. Participation in CRHSP is voluntary and participants must be registered as per their provincial legislation. Those who choose to participate meet a nationally common standard of education and experience in delivering psychological health service. As the WCB is not proposing changes to the GECA policy at this time this requirement will remain. Maintaining the standard is not anticipated to negatively impact workers or employers.

However, given that the WCB is creating a new policy for workers covered under the *Act*, it is reasonable to require that psychologists be registered as per the *“Nova Scotia Psychologists Act (2000)”*. In light of this, the requirement in the new Psychological Injuries policy will reflect that a clinically trained psychologist must be registered with the Nova Scotia Board of Examiners in Psychology, in order to diagnose the psychological condition.

#29: The WCB should update the version of the AMAs that is used, since policy requires use of the most current version of the DSM. Updating the AMA version would accurately reflect the whole person impairment rating being awarded, for the psychological injury.

Analysis and Response:

The WCB determines impairment for all injury types (post January 1, 2000) using the AMA 4th in accordance with Policy 3.3.4R - **Determining Permanent Medical Impairment Ratings using the *Guides to the Evaluation of Permanent Impairment (AMA Guides – 4th Edition) – Injuries on or after January 1, 2000*** . The policy outlines how the AMA 4th will be used to assess impairment, and also outlines how the WCB will rate the impairment. As a change of this magnitude has potential to have broader implications, it is a significant undertaking and considered to be outside of the scope of this policy change.

The relevant section of the policy is as follows:

4. The Board will use the method outlined in the AMA Guides – 4th Edition, “Chapter 14, Mental and Behavioural Disorder”, to assess the existence and level of a worker’s permanent medical impairment due to a compensable mental or behavioural

(psychiatric) disorder. The impairment classifications in Chapter 14 range from Class 1-No Impairment to Class 5-Extreme Impairment; a rating or percentage scale is not included. The Board will use the following rating scale, in conjunction with the AMA Guides – 4th Edition, to determine the worker’s permanent medical impairment rating:

Classification	Impairment Rating
Class 1 – No Impairment	None
Class 2 – Mild Impairment; impairment levels compatible with most useful functioning	10-20%
Class 3 – Moderate Impairment; impairment levels compatible with some, but not all, useful functioning	25-50%
Class 4 – Marked Impairment; impairment levels significantly impede useful functioning	55-75%
Class 5 – Extreme Impairment; impairment levels preclude useful functioning	>75%

It is important to note that the impairment classifications in the AMA Guides have not changed since the 4th edition; therefore there is no need to update the edition referenced in policy.

Appendix A

Psychological Injuries: Stage Two Consultation Summary

Introduction

Psychological injuries were identified as a high priority policy item by the Board of Directors in 2011. Since then, WCB staff have conducted extensive jurisdictional, legal, and background research on the various issues involved with workplace stress. In April, 2013 a draft program policy and accompanying background paper was mailed to individuals on the key stakeholder mailing list and posted to the WCB website for 6 months, with a deadline for submissions of October 31, 2013. The original period for consultation was 30 days, but this was extended to 6 months to accommodate requests from some employer stakeholders.

The WCB received 41 unique submissions from stakeholders offering input on the proposed draft new program policy. Submissions were received from injured worker representatives, employer representatives, individuals, and Office of the Employer Advisor. In addition to the 41 unique submissions, the Office of the Employer Advisor submitted 66 letters from employers endorsing their submission.

Injured workers' associations and labour stakeholders who provided comment were supportive of the proposed policies in concept/principal; however had some issue with the actual content of the policies. Both believed it was important to broaden coverage for psychological injuries, however felt that this policy for workers covered under the "Act" does not go far enough, and in fact could hinder workers ability to receive compensation because of the exclusion of gradual onset stress through the legislated definition of accident.

Employer stakeholders expressed varied views on the proposed policies.

Overview of Stakeholder Submissions

Outlined below is a summary of general comments submitted by stakeholders.

Injured Worker and Labour

- Injured Workers' Associations and Labour organizations:
 - The non-GECA draft policy does not clearly deal with stress resulting from bullying or harassment. Bullying and harassment are only raised as possible examples under the GECA draft policy, in the context of gradual onset stress.
 - In addition to threats to physical integrity, both policies should cover threats to emotional integrity. Emotional violence from such sources as cyber-bullying can be just as harmful as physical violence.
 - The recent amendment in BC's *Workers' Compensation Act* is a model for NS through a broader policy interpretation of what constitutes "an acute reaction to a traumatic event."
 - If stress issues are more broadly covered under workers' compensation, there is no concern about lawsuits against employers or co-workers because the bar to

civil actions in s.28 of the *Workers' Compensation Act* would apply. If stress is not covered, the worker's remedy is to pursue other legal remedies, including possibly a lawsuit.

- We are encouraged to see the WCB taking steps to recognize psychological injuries. This policy is a positive first step, but there are deficiencies that need to be addressed in order for NS workers to have fair access to compensation for workplace injuries.
- Objection to the use of the phrase “objectively assessed” as this creates unfair criteria for what a worker may perceive as a traumatic event.
- The use of the terms “frightening or shocking” are incongruent with an objective assessment. What an individual perceives as frightening or shocking will vary greatly depending on factors such as age, past experience, education, etc.
- The phrase “involving actual or threatened death or serious injury to oneself or others or threats to one's physical integrity” is consistent with the DSM definition of PTSD, but is less applicable to other anxiety disorders. This is overly restrictive and may deny injured workers fair access to compensation for workplace injuries.
- Disappointed to see no reference to the new national and provincial mental health and addictions strategies, particularly the voluntary national standard “Psychological health and safety in the workplace – prevention, promotion, and guidance to staged implementation.”
- Believe that the starting point for any WCB policy should be a statement of basic principles, specifically the “Principles of a Fair and Comprehensive Workers' Compensation System” as developed by CUPE and NSGEU.
- Troubled by the attempt to limit the application of the program policy to new psychological injury claims after a certain date determined by the WCB.
- Based on our concerns about the narrow definition of “accident” in the Act, and the limited broadening of the definition of “traumatic events” to either an acute response or a cumulative response and to the additional interpretation points provided, we believe the new program policies are at best, only a slight improvement over the current confusing and inadequate situation for the compensation of workplace stress and psychological injury.
- We believe that the proposed policies as written will be weak and ineffective with the potential to cause harm to applicants who believe they have a claim, and apply in good faith, but who are subsequently excluded by the wording. Worse still, they will exclude those who do not apply because the wording is obscure and therefore open to interpretation.
- It could be argued that the new policy is inconsistent with the Act.
- The exclusion of non-compensable work-related events is still too narrow in both proposed policies. At the very least, the word “routine” should be added before the words “labour relations issues” to give more clarity. It would also be helpful to define the word “routine” – that these issues are unusual or excessive in comparison to issues experienced by an average worker in the same or similar occupation.
- What is required is a change to the *Act*. Remove the provision limiting stress. There is then no need for two different policies.
- We believe the proposal to fix the current problem, without Legislative change, is piecemeal and short-sighted.

Employer

- Employer and employer organizations:
 - Unreasonable to bring NS in line with other provinces given the poor financial state of the WCB, including the unfunded liability and high assessment rates.
 - Gradual onset stress can't be clearly defined as an injury directly as a result of work.
 - Necessity of a specialized adjudication unit, and training and education of those adjudicating claims.
 - Needs to be a process to ensure that the medical community is well educated in workplace stress issues, clear diagnosis, and recovery plans.
 - Definitions of "acute" vs "cumulative" response must be crystal clear to ensure consistency in claim approval and to avoid opening the floodgates for performance issues and interpersonal issues.
 - Employers would require or have access to medical expertise to support or challenge this type of WCB claim.
 - Important to insure that standards, programs, and education are in place.
 - The intention of the policy is supportable. Its implementation, particularly if the policy is in any way vague, may prove challenging. We request that the WCB work closely with organizations to monitor this policy and to develop specific ways to ensure that it is enacted in an appropriate manner.
 - It is necessary to define the non-compensable work-related events. It is expected that within the scope of labour relations, the employer will need to make decisions that can potentially increase worker stress.
 - Updating of AMA Guides. The WCB should be using the newest version of the AMA Guides to more accurately reflect the most current understanding of the impact of psychological conditions on whole person impairment.
 - The recognition of mental health issues in the workplace is an important step forward. We are pleased to see the WCB updating its policies in recognition of this, and we likewise agree that how we handle future claims and compensation related to workplace psychological injury is an important step.
 - Need to take into consideration the potential financial implications to an employee as appropriate diagnosis is obtained and the claim remains in "pending" status.
 - The WCB is restricted to policy development that is consistent with the legislation, which this policy is not. As a result, any rulings under this policy would be subject to appeal by employers.
 - It is assumed that the words "reasonably and objectively assessed" found in the definition of "Traumatic Event" will be interpreted in light of the most recent case law (*Bishop v. Nova Scotia (Workers' Compensation Appeals Tribunal)*, 2012 NSCA 95). In that case, the Court upheld the decision of the WCAT finding that the traumatic event was to be assessed "in comparison to the work-related events or stressors experienced by an average worker in the same or similar occupation." This interpretation reinforces the fact that there will be certain jobs which have inherent risks that must be taken into account in the adjudication of claims of workplace-related traumatic events. Recommended that the WCB adopt wording such as New Brunswick's policy that states that "*the event must be unusual and excessive in comparison to events experienced by an average worker in a same or similar occupation.*"
 - If "extreme workplace harassment" remains as an example of a compensatory claim under this policy, it is recommended that a definition of harassment be

included in order to first determine if harassment has indeed been experienced. Secondly, “extreme workplace harassment” would need to be adjudicated against the four elements included in the definition of “traumatic event” as set out in the policy.

- Concern that the inclusion of compensation for “a cumulative response to traumatic events” creates greater challenges in determining causation and, therefore, increases the difficulty of adjudicating claims.
- Assuming that the response to a traumatic event or events must still be an “acute” response, as required by the legislation, it is questioned what will be gained by the extension of eligibility to the cumulative onset category and recommends that this ambiguity be clarified.
- There is no problem with the current Policy 1.3.6. There is no category of workers with psychological injuries who are not being compensated under the current Policy 1.3.6. Therefore, there is no need to revise the Policy.
- The proposed changes to Policy 1.3.6 will significantly change the way psychological injury claims are adjudicated.
- The Public Education system is a unique setting that involves a cross section of occupations that are covered by the WCB and some occupations are not covered by the *Act*, specifically teachers. There are concerns about the possible future implications that this policy could have on occupations that are not covered by the *Act*.
- Subtle changes to WCB policy can mean thousands of dollars in added expenses for small businesses, and as such we would like to see it clarified – in accordance with OEA’s recommendations – prior to proceeding.
- It is of great concern that the WCB is not able to provide a cost estimate of the potential impact of introducing a program policy on Psychological Injuries (Workplace Stress) in the province and more importantly in the public education sector.
- Temporary Earnings Replacement Benefits (TERB) will not be paid to an employee as long as an appropriate diagnosis is being determined. These claims will differ significantly from musculoskeletal injuries; often appropriately diagnosed after an initial physiotherapy assessment. An appropriate diagnosis of psychological injury may require more than an initial assessment with a qualified practitioner, resulting in the potential for the employee to experience financial hardship as TERB will not be issued until a final decision has been rendered by the WCB.
- Re: Policy 1.3.6: “cumulative traumatic events” are already compensable if they meet the criteria set out under “gradual onset stress.” Concern that the addition of another category of compensable injury will simply add an unneeded layer to the policy and introduce some grey area that may lead to inconsistent adjudication of claims. It also potentially nullifies the case law that has evolved to clarify these sensitive and often complicated claims.
- The fact that the analysts commissioned to produce a cost estimate of the proposed policy change concluded that they could only place “a low to moderate at best confidence in the[ir] results” is telling – and reinforces the small business community’s concerns over its potential impact.
- Recommendation to work with larger industries to understand the unique circumstances within each industry that may require further special policy considerations.
- On review of the policy document, it is unclear what, if any, alternatives were considered that might achieve the desired outcomes of all parties concerned. Our

recommendation is that WCB bring stakeholders together for a meaningful discussion on potential alternative models and/ or policies that protect workers and mitigate against the potentially negative impacts on employers that this policy in its current iteration will have.

- Office of the Employer Advisor:
 - Employers expressed concern about the policy consultation process. The approach WCB selected is disproportionate to the potential impacts of the proposed policy. Recommendation: The OEA recommends that the WCB build confidence with stakeholders by engaging in a process of dialogue that creates opportunities for understanding stakeholder concerns. As payers of the System, Employers want to be consulted.
 - i. Implement consultation in alignment with WCB's Vision, *Mission and Values* which includes building confidence in the WCB by engaging workers and employers.
 - ii. Timeframes for consultation should be proportionate to the impacts of a proposed policy. The OEA submits that one month for consultation is insufficient to inform employers, elicit feedback, and provide a considered response. Meaningful consultation on a minor issue may require a 12-week time frame; longer for major issues.
 - iii. WCB should broaden the purpose of policy consultation. Employers may want to comment on the language of a policy draft, communicate possible unintended consequences, and provide feedback respecting implementation. In the case of psychological injury, if a policy is adopted by the Board employers request an opportunity to engage in meaningful consultation respecting implementation.
 - iv. Generally, the WCB ought to consider whether government is engaged in simultaneous consultation respecting issues relating to Occupational Health and Safety.
 - The draft policy is proposing to broaden the definition of "accident." The words "acute reaction to a traumatic event" are unambiguous. "Cumulative reaction to multiple traumatic events" is inconsistent with the meaning of s.2(a). All policies adopted under the Act must be consistent with the Act and the regulations. Recommendation: Circumventing legislation via policy exceeds WCB authority and the OEA recommends that WCB reconsider the approach chosen to address this issue. Where a policy adopted by the Board is inconsistent with legislation, appeal participants may avail themselves of s.183(5A) of the Act which states that a policy adopted by the Board is only binding on the Appeals Tribunal where the policy is consistent with the Act.
 - The psychological injury issue before the Nova Scotia Court of Appeal does not concern GECA. The worker is seeking compensation under the provincial Workers' Compensation Act. Policy 1.3.6 has been reviewed by the Nova Scotia Court of Appeal and survived judicial "checks and balances." Recommendation: Leave Policy 1.3.6 alone.
 - The words "reasonably and objectively assessed" are not defined. All objective standards are not created equal. A jurisdictional scan indicates that WCB is an outlier. The majority of Boards include a qualifier in the definition of traumatic event - the traumatic event must be uncommon with respect to the inherent risks of the occupation. The words "unusual and excessive in comparison to the work-related events or stressors experienced by an average worker in the same or similar occupation" have survived judicial "checks and balances" in Nova Scotia.

Recommendation: Add language that requires unusual and excessive in comparison to the work-related events or stressors experienced by an average worker in the same or similar occupation.

- It is not necessary to identify "extreme workplace harassment" as an example of a traumatic event. In the alternative, if WCB determines that the words "extreme workplace harassment" will be added to policy then the words should be defined. In the absence of a definition, decision-makers have no criteria to determine eligibility. This is a primary risk - open to appeal interpretation. Recommendation: Remove all references to "extreme workplace harassment". In the alternative, adopt the definition of harassment used by WSIB Ontario:
 - Being the object of harassment includes physical violence or threats of physical violence (e.g. the escalation of verbal abuse into traumatic physical abuse)
 - Being the object of harassment that includes being placed in a life-threatening or potentially life-threatening situation (e.g. tampering with safety equipment; causing the worker to do something dangerous).

Interest Groups

- Harassment due to a disability is a Human Rights issue, but workers do not want to follow that route because it is very lengthy, taking up to three years to resolve, and usually ends up with the person losing employment or afraid to return to work. Stress stemming from harassment due to disability is not recognized within the DSM and is therefore excluded from the new policy.
- Policy is timely and in line with the Mental Health Commission of Canada's report.
- Although the definition of "traumatic events" appears reasonable, it may exclude a possibility that should be compensable. In particular, it is possible for a worker to be exposed to an event that in the moment is neither frightening nor shocking because its potential impact is underestimated at the time, but later realizes how traumatic it was.
- It may be problematic for the WCB to tie itself to the DSM.
- Concern that the diagnosis must be made by a psychologist registered with the Canadian Register of Health Service Providers in Psychology (CRHSPP), which requires their members to be doctoral level psychologists. A master's level degree is currently required to be registered in NS, and less than half of the members of the Association of Psychologists of Nova Scotia are doctoral level. This requirement would limit the number of psychologists in NS who are able to treat WCB clients and may have a negative impact on both wait times for diagnosis and current WCB clients who are in existing relationships with non CRHSPP registered psychologists.
- Currently in Canada, only NS, NL, and NB do not allow for psychological injury claims beyond an acute reaction to a traumatic event. The allowance of cumulative stress is a significant step toward parity and provides a transitional opportunity for the WCB, Health and Safety Systems and employers in Nova Scotia to prepare for a likely eventual expansion of the definition of compensable psychological injury in the Workers' Compensation Act in NS.
- Employers need a clear and practical framework to understand what they can influence, and what they can do to reduce risk. This includes support structures and clear access to expertise, and resources including training and communication for both employees and employers.

Individuals

- The requirement that the work-related events or stressors experienced by the worker are *unusual or excessive* in comparison to the average worker in a similar position encroaches upon the thin skull principle to be applied to workers compensation..... This requirement lead to psychological injuries being treated significantly differently than from physical injuries, leading to potential Charter of Rights issues.
- Even if a certain work circumstance has become “usual,” it is not necessarily safe.
- Some workers shared their personal stories of workplace psychological injuries.
- Illness resulting from workplace environment should be covered by sick leave and long term disability insurance, not by the WCB.

Appendix B

POLICY

NUMBER: 1.3.9

Effective Date: March 25, 2014

Topic: Psychological Injury

Date Issued: March 31, 2014

Section: Entitlement

Date Approved by Board of Directors: March 25, 2014

Subsection: General

PREAMBLE

The purpose of this policy is to establish criteria for the individualized adjudication of psychological injury claims under the *Nova Scotia Workers' Compensation Act*.

DEFINITIONS

1. The "DSM" is the most current edition of the Diagnostic and Statistical Manual of Mental Disorders, which is a compendium of psychiatric diagnoses produced by the American Psychiatric Association. The manual codes and describes all recognized psychiatric diagnoses and is regarded as the definitive work on the subject. (Source: The Canadian Health Care Glossary).

2. "Traumatic Event(s)" is defined as a direct personal experience of an event or directly witnessing an event that is:
 - Sudden;
 - Frightening or shocking;
 - Having a specific time and place; and
 - Involving actual or threatened death or serious injury to oneself or others or threat to one's physical integrity.

The "traumatic event(s)" must be assessed using an objective standard, which is a legal standard based on conduct and perceptions external to a particular person. The objective standard used is the reasonable person standard, which is considered an objective standard because it does not require a determination of what the individual was thinking. Rather it is based on a hypothetical person who exercises the degree of attention, knowledge, intelligence, and judgment that society requires of its members for the protection of their own and others' interests. The reasonable person acts sensibly, does things without serious delay, and takes proper but not excessive precautions⁴.

⁴ Black's Law Dictionary, Ninth Edition, 2009

Examples of Traumatic Events may include, but are not limited to:

- A direct personal experience of an event that involves actual or threatened death or serious injury;
- An actual or threatened violent physical assault;
- Witnessing or experiencing a horrific accident;
- Witnessing or being involved in a hostage taking; and
- Witnessing or being involved in an armed robbery.

POLICY STATEMENT

The WCB will consider claims for compensation under the Nova Scotia *Workers' Compensation Act* when the condition results from stress that is a reaction to one or more Traumatic Events and the specified criteria outlined below are satisfied.

More specifically, the WCB will consider claims for compensation in respect of:

An acute response to one or more Traumatic Event(s) which involves witnessing or experiencing a event(s) that is objectively traumatic. Due to the nature of some occupations, some workers, over a period of time may be exposed to multiple traumatic events. If the worker has an acute reaction to the most recent traumatic event, entitlement may be considered even if the worker may experience these traumatic events as part of the employment and was able to tolerate the past traumatic events. Possible examples would include a paramedic who develops Post Traumatic Stress Disorder after responding to a number of fatal traffic collisions, or a drugstore pharmacist after multiple robberies.

Criteria for Traumatic Onset Stress

Claims for psychiatric or psychological injuries resulting from Traumatic Events may be compensable if all of the following four criteria are satisfied:

- I. There must be one or more Traumatic Event(s) as defined herein;
- II. The Traumatic Event(s) must arise out of and in the course of employment;
- III. The response to the Traumatic Event(s) has caused the worker to suffer from a mental or physical condition that is described in the DSM; and
- IV. The condition is diagnosed in accordance with the DSM and by a health care provider being either a psychiatrist or a clinically trained psychologist registered with the Nova Scotia Board of Examiners in Psychology.

Non-Compensable Work-related Events

Mental or physical conditions are not compensable when caused by labour relations issues such as a decision to change the worker's working conditions; a decision to discipline the worker; a decision to terminate the worker's employment or routine employment related actions such as interpersonal relationships and conflicts, performance management, and work evaluation.

APPLICATION

This policy applies to all decisions made on or after March 25, 2014 pursuant to the *Nova Scotia Workers' Compensation Act*.

REFERENCES

Workers' Compensation Act (Chapter 10, Acts of 1994-95), Section 2.

The most current edition of the *American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders*

Executive Corporate Secretary