NOVA SCOTIA FEDERATION OF LABOUR, CLC

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To Nancy Stacey, Policy Analyst
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From The Nova Scotia Federation of Labour
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Policy Consultation - Work-related Mental Stress

Thank you for the opportunity to provide feedback on the Board's proposed Policy Psychological Injury – Claims for Gradual Onset and Traumatic Mental Stress.

The Nova Scotia Federation of Labour (NSFL) is chartered by the Canadian Labour Congress. We represent over 70,000 members of affiliated unions in every area of Nova Scotia's economy. The Federation also defends the rights of those who are non-unionized, speaking out for justice and dignity for all workers in the province.

The NSFL has operated the Worker Counsellor Program since 2008. In the last 15 years the Program has provided assistance, advocacy and education regarding workers compensation to thousands of Nova Scotians.

We are uniquely positioned to understand the needs of the worker stakeholders whom the workers' compensation system is meant to protect, and this submission stands for the voice of every worker we represent.

If you have questions or concerns or would like to discuss this submission further, please contact us at 902-454-6735 or joan@nslabour.ca.

Sincerely,

Danny Cavanagh
President, Nova Scotia Federation of Labour

UNIFOR

Nova Scotia Federation of Labour

Workers' Compensation Board of Nova Scotia

POLICY CONSULTATION SUBMISSION

Work-related Mental Stress

Contents

Statement of Support
Definition of Workplace Harassment and Bullying

The Draft Policy defines "Workplace Harassment and Bullying" as:

> *"objectional or unwelcome conduct, comment, bullying or action that, whether intended or not, humiliates, offends, degrades or threatens. It may be directed at a particular person or group, or directed at no person in particular but creates an intimidating or offensive work environment. It includes, but is not limited to, discrimination based on any of the protected characteristics as set out in the Nova Scotia Human Rights Act".*

We strongly support this definition of harassment and bullying.

The definition clarifies that harassment and bullying need not be intended to humiliate, offend, degrade, or threaten. This is essential - it is the impact of harassment and bullying that causes injury, not the intent.

The definition clarifies that harassment and bullying need not be directed at a particular person or group. Harassment and bullying often occurs in generalized, subtle and ambiguous ways. Whether or not they have been directly targeted, workers can be injured by harassment and bullying.

Finally, we are pleased the definition makes no requirement for a pattern of or repeated behaviours. A single episode of harassment or bullying can result in injury.

Our Recommendation

The Policy definition of Workplace Harassment and Bullying should not be changed.

**NOTE – Although we support the definition, we believe the Policy would benefit from the addition of examples of harassment and bullying whether in the definition section or elsewhere in the Policy. This is discussed later in the document.*

Statement of Support
Policy Scope

The Draft Policy outlines its scope as follows:

> *"This policy applies to initial entitlement of psychological injury claims resulting from work related mental stress. The policy does not apply to psychological injuries that are secondary injuries associated with an initial physical injury.*
>
> *Two types of work-related mental stress are eligible for compensation under the Act:*
>
> • *Gradual onset stress*
> • *Traumatic stress*
>
> *Notwithstanding the criteria in this policy, a claim for a psychological injury that is post-traumatic stress disorder (PTSD) by a frontline or emergency response worker will be adjudicated under Section 12A of the Act and Sections 40–45 of the Workers' Compensation General Regulations".*

We strongly support including statements that the Policy does not apply to

- secondary psychological injuries, and
- cases of PTSD among frontline or emergency response workers

Having these statements in the Policy will prevent common adjudicative errors when considering secondary injuries and psychological injuries.

> **Our Recommendation**
>
> **The Policy language regarding its Scope should not be changed, specifically that it does not apply to secondary psychological injuries or to presumptive PTSD claims.**

Definition - "Significant work-related stressor"

The legislation states,

> *"a worker is entitled to compensation under this Part for gradual onset or traumatic mental stress if the stress ... is wholly or predominantly caused by one or more significant work-related stressors or a cumulative series of significant work-related stressors".*

The Draft Policy defines a "significant work-related stressor" as:

> *"a work-related stressor that is generally considered excessive in intensity and/or duration in comparison to the normal pressures, tensions or events experienced by workers in similar circumstances. Examples of significant work-related stressors include, but are not limited to, personal experience of, or directly witnessing, a work-related traumatic event or experiencing workplace harassment or bullying".*

We are aware that this definition of "significant work-related stressor" has been borrowed from other jurisdictions. That doesn't make it right. As Sir William Meredith wrote, "*The question is not what other countries have done, but what does justice demand should be done*".

Nova Scotia can and must do better for its workers.

The language incorrectly interprets the word significant.

The Draft Policy suggests the word "significant' means "excessive". This is not consistent with the plain meaning or with the existing legal interpretation of the word.

Unless legislation explicitly defines a term, the rules of statutory interpretation require that it be given its ordinary meaning.

Merriam-Webster defines significant as "*having meaning*", "*having or likely to have influence or effect*", "*of noticeably or measurably large amount*" and "*caused by something other than mere chance*".

The Oxford English Dictionary defines significant as "*sufficiently great or important to be worthy of attention; noteworthy; consequential; influential*".

The term significant has been repeatedly interpreted in workers' compensation jurisprudence, and it is accepted to mean "more than trivial".

The Draft Policy definition of significant work-related stressor must be amended to be consistent with the plain meaning of the legislation and with existing understanding of the term significant.

The definition reintroduces the voluntary assumption of risk.

In his 1913 report which became the very foundation of workers' compensation in Canada, Sir William Meredith wrote,

> *According to the common law it is a term of the contract of service that the servant takes upon himself the risks incidental to his employment (popularly called the assumption of risk rule) ...*
>
> *The rule is based upon the assumption that the wages which a workman receives include compensation for the risks incidental to his employment which he has to run. That is, in my judgment, a fallacy resting upon the erroneous assumption that the workman is free to work or not to work as he pleases and therefore to fix the wages for which he will work, and that in fixing them he will take into account the risk of being killed or injured which is incidental to the employment in which he engages. ...*
>
> *In my opinion there is no reason why this objectionable doctrine should not ... be entirely abrogated.*

As Meredith recommended, every jurisdiction in Canada adopted no-fault values into their workers' compensation system, eliminating the assumption of risk rule.

By saying workers are not entitled to compensation if they are injured by stressors considered "normal" in their work, the Draft Policy brings that "objectional doctrine" back, and forces workers to assume the risks inherent to their employment.

Hazards exist and are tolerated in many workplaces. It is true that some jobs are more stressful than others, just as some jobs are more physically dangerous than others. We recognized over 100 years ago that accepting a hazardous job does not disentitle injured workers.

The Draft Policy definition of "significant work-related stressor" sets Nova Scotia back by a century and undermines any good this legislation might achieve.

The definition is discriminatory.

The Draft Policy definition of "significant work-related stressor" sets a different standard for psychological injuries than it does for physical injuries. Again, this undoes the very injustice the legislation was intended to address.

For physical injuries, it doesn't matter if the cause was "normally experienced" by workers in similar jobs. If an injury arises out of and in the course of employment, it is compensable. For example, a nurse is not prevented from claiming injuries associated with lifting patients. A labourer is not limited from claiming injuries associated with handling heavy materials.

The definition of work-related stressor in the Draft Policy sets a standard for psychological injuries that is higher than the standard for physical injuries.

The legislature has already added a higher test for psychological injuries, requiring that they be "predominantly caused" by work. It is outside of the Board's authority to introduce an additional standard – one that the legislature did not explicitly contemplate - into the Policy.

Our Recommendation

The definition of "significant work-related stressor" must be changed. There must be no requirement that a work-related stressor exceed stressors that are considered inherent to the work.

One possible definition of a "significant work-related stressor" is: ***any non-trivial event, force, or condition arising out of and in the course of employment that results in emotional tension or stress".***

Definition - "traumatic event"

The legislation states,

> "*a worker is entitled to compensation under this Part for gradual onset or traumatic mental stress if the stress ... is wholly or predominantly caused by one or more significant work-related stressors or a cumulative series of significant work-related stressors*".

The Draft Policy includes a definition of "traumatic event" as follows:

> *an event that:*
> - *is sudden;*
> - *is frightening or shocking;*
> - *is specific to a time and place; and*
> - *involves actual or threatened death, or serious injury, to oneself or others; or threat to one's physical integrity.*
>
> *Examples of traumatic events include, but are not limited to, the following:*
> - *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;*
> - *Witnessing or being involved in an armed robbery.*

The legislation no longer refers to traumatic events. The test for coverage of traumatic stress is the same as the test for gradual onset stress – the worker must experience a significant work-related stressor.

Yet the Draft Policy includes a definition of "traumatic event" that is borrowed from the former policy.

There is no reason to include any definition of "traumatic event" in the Policy. Decision makers will no longer have any reason to refer to it or to test an event against its definition. It is no longer relevant to the adjudication of claims for psychological injury.

Including this definition in the Policy serves only to confuse the implementation of the new legislation.

Our Recommendation

> **The definition of traumatic event should be removed from the Policy and should not be replaced.**

Criteria for compensable psychological injuries
Requirement to "identify" the event(s)

The Policy states,

> *"Claims for psychological injury in response to being to exposed to work-related mental stress are eligible for compensation when all of the following criteria are met ...*
>
> > *The WCB decision maker is able to identify the event(s) which are claimed to have caused the mental stress. This will be done by considering information from a variety of sources, including but not limited to, the worker, health care professionals, co-workers, and the worker's supervisory staff".*

Unlike the other criteria for compensable injuries outlined in this section of the Draft Policy, the requirement that the decision maker be able to "identify the event" is not taken from the legislation. It has been added without reference or explanation, and the intent is unclear.

If the requirement to "identify the event" is intended to distinguish between an event that actually occurred and an anticipated event, (for example, being held-up as opposed to fearing being held-up), then the Policy should simply state this clearly. The Policy must also be clear that a "near miss" can be considered an "identifiable event".

Further, the instructions for decision makers to "consider information" are unnecessary and confusing.

Decision makers regularly investigate and make findings of fact regarding the occurrence of reported accidents. They are accustomed to implementing the standard of proof of the balance of probabilities, and to resolving disputed possibilities. There is no need to advise a decision maker on what information to consider in their investigations. These instructions suggest there is a greater standard of proof for mental stress claims than there is for physical injury claims.

As it stands, this criterion is confusing and unclear, and its intent is uncertain. This criterion should be removed from the Policy. At a minimum, its intent must be made clear.

Our Recommendation

The criterion that the decision maker be able to identify the event(s) which are claimed to have caused the mental stress should be removed.

If the criterion is not removed, its intent must be clarified, and examples of "identifiable events" added.

Predominant cause

The legislation says,

> *"a worker is entitled to compensation under this Part for gradual onset or traumatic mental stress if the stress ... is wholly or predominantly caused by one or more significant work-related stressors or a cumulative series of significant work-related stressors".*

The Draft Policy states:

> *If a psychological injury resulting from mental stress is causally linked to multiple stressors (both work-related and non-work related), the significant work-related stressor(s) will be considered the predominant cause(s) when they outweigh all other stressor(s) combined (i.e 51%).*

The Draft Policy definition of "predominant cause" is inconsistent with the plain reading of the statute.

The Merriam-Webster dictionary defines predominant as "*having superior strength, influence, or authority; being most frequent or common*".

The Oxford English Dictionary defines predominant as "*the strongest or main element*".

The Workers Compensation Act of British Columbia has a "predominant cause" test for gradual onset psychological injuries. Their Practice Directive #C3-3 states,

> *"The work-related stressors need not be the sole cause.* ***Nor is it necessary that the work-related stressor(s) outweigh all other stressors combined****. It may be that the work-related stressor(s) was still the primary cause of the mental disorder even though the worker had a number of other stressors which, when considered together, were also significant in causing the mental disorder"* (emphasis added). (source https://www.worksafebc.com/en/resources/law-policy/compensation-practice-directives/mental-disorder-claims?lang=en)

Similar clarification should be included in the Nova Scotia Board's Policy.

Our Recommendations

> **The suggestion that the work-related stressor must outweigh all other stressors combined must be removed.**
>
> **Instead, the Policy should state, "*Predominant cause does not mean only cause. The workplace stressor need not outweigh all other stressors combined. It means that the work-related stressor must have the largest impact compared to each other stressor individually*".**

Predominant cause test for ongoing entitlement to compensation

The legislation says,

> *"a worker is entitled to compensation under this Part for gradual onset or traumatic mental stress if the stress ... is wholly or predominantly caused by one or more significant work-related stressors or a cumulative series of significant work-related stressors".*

The Draft Policy states:

> *To ensure consistency, the WCB will continue to use the predominant cause test when determining ongoing entitlement to compensation. As an example, Temporary Earnings Replacement Benefits (TERB) would continue to be paid as long as the evidence shows that the significant work-related stressor(s) is the predominant cause of the worker's inability to work.*

There is no legal basis to the Draft Policy statement that the predominant cause test will be applied when determining ongoing entitlement to compensation. This does nothing to ensure consistency, and in fact ensures the opposite. This statement is discriminatory, contrary to established workers' compensation law, and contradicts existing Policies.

When a worker passes the four part test to entitlement, they become eligible for other benefits under the Act. The tests for those benefits are entirely separate from the initial entitlement test.

The legislature did not alter any section of the Act relating to benefit entitlement. There is therefore no legal basis for the Board to enact a Policy that fundamentally alters the longstanding interpretation of other parts of the legislation.

It is firmly established in Nova Scotia law that there are there are three prerequisites for entitlement to earnings-replacement benefits. They are (i) a loss of earnings, (ii) as a result of the injury, and (iii) a worker under 65 years of age. A positive finding in response to each of these three points entitles a worker to earnings-replacement benefit. (see WCAT decision 99-1954-AD among others).

The Board's existing Policy **3.9.11R1 – Apportionment of Benefits** states,

> where, *"the loss of earnings is due in part to the compensable injury and in part to a non-compensable factor which developed post-injury, the WCB will assume full responsibility for TERB without apportionment as long as there are medical findings to substantiate that the compensable injury is contributing to some degree to the loss of earnings, even if a non-compensable factor(s) is prolonging recovery and/or loss of earnings".*

The Board does not have the authority to change this longstanding interpretation of law. If the Legislature wanted to change the law they would have done so.

Take the example of an injured worker receiving benefits who then suffers the loss of a close family member. Under the current Policy their benefit would be subject to termination on the basis that the work-related stressor is no longer the "predominant cause" of their disability.

By virtue of their compensable injury this worker likely has no access to other sources of income, such as bereavement leave or employment insurance. The outcome would be cruel and unjust.

How would this Policy statement be applied in the reverse? Is the above noted worker to have their benefits terminated while they grieve, and reinstated once their grieving is done? How would decision makers make that determination?

The Board has a Policy relating to Interruptions of Medical Treatment – Circumstances Outside a Worker's Control. This Policy addresses earnings replacement benefits in situations when a non-work related issue becomes a barrier to recovery. There is neither need nor justification for any additional tools to limit a workers' entitlement.

Our Recommendations

The statement that the predominant cause test applies to ongoing earnings replacement or other benefits must be removed.

Employer decisions or actions relating to the worker's employment.

The legislation says:

> *A worker is not entitled to compensation for gradual onset or traumatic mental stress if it is shown that the stress was caused by ... a decision or action of the worker's employer relating to the worker's employment, including a decision to*
> *(i) change the work to be performed or the working conditions of the worker,*
> *(ii) discipline the worker, or*
> *(iii) terminate the worker's employment.*

The Draft Policy says:

> *Actions taken by an employer relating to management of work and employees are considered a normal part of employment. A worker is not entitled to compensation if it is shown that a worker's psychological injury resulting from mental stress was caused by a decision or action of the employer relating to the worker's employment, including, but not limited to, a decision to:*
> - *change the work to be performed or the working conditions. Examples include: transfer to a new location, changes in working hours, productivity expectations, physical layout of the workplace, change of reporting structure.*
> - *discipline the worker. Examples include: demotion, probation, or suspension.*
> - *terminate the worker's employment. Examples include: lay-off (temporary or permanent),*
> - *termination for cause, or non-renewal of contract.*

The legislation clearly created an exclusion for decisions or actions of the employer relating to a worker's employment.

However, it must be clear that employers are not protected from the prohibition on harassment and bullying just because it takes place in the context of a "decision or action relating to the worker's employment". This approach has been confirmed many times in the jurisprudence of jurisdictions with the identical legislated exclusion.

It is essential that the Policy include a statement to this effect.

Our Recommendation

> **The Draft Policy should include the following statement:**
>
> **The exclusion of an employer's decisions or actions relating to employment is not limitless. Where an employer's decisions or actions amount to bullying, harassment, or abuse, even when they are related to employment, they may be considered work-related stressors.**

Additional guidance for decision makers

The Policy requires additional guidance for decision makers to ensure fair and consistent adjudication of work related mental stress injuries.

Pre-existing conditions

We anticipate misunderstandings among decision makers relating to their assessment of the causes of gradual onset or traumatic mental stress. Our primary concern is that decision makers will consider pre-existing psychological conditions as a “cause” of a claimed disorder.

Many workers have pre-existing psychological conditions that are well managed and are not disabling. The existence of those disorders cannot be considered the “cause” of another disorder. However, without guidance on this subject it is likely decision makers will consider pre-existing conditions a bar to claim.

The law is clear that pre-existing conditions are covered by the Board if they are aggravated, activated or accelerated by workplace incidents. This applies to psychological injuries as much as it applies to physical injuries.

The Policy must clarify that pre-existing conditions are not a consideration in the causation of a subsequent psychological injury, and that pre-existing conditions are not a bar to claim.

Examples of work related stressors

The Policy would benefit by the addition of examples to further guide decision makers in its implementation.

Specifically, examples of harassment and bullying will help decision makers and stakeholders to understand what conduct they should be considering when adjudicating these claims.

The Canadian Center of Occupational Health and Safety (CCOHS) offers the following examples of bullying and harassment on their website.

- Spreading malicious rumours, gossip, or innuendo.
- Excluding or isolating someone socially.
- Intimidating a person.
- Undermining or deliberately impeding a person's work.
- Physically abusing or threatening abuse.
- Withholding necessary information or purposefully giving the wrong information.
- Making jokes that are 'obviously offensive' by spoken word or e-mail.
- Intruding on a person's privacy by pestering, spying or stalking.
- Yelling or using profanity.
- Criticizing a person persistently or constantly.
- Belittling a person's opinions.
- Unwarranted (or undeserved) punishment.
- Tampering with a person's personal belongings or work equipment.

(source https://www.ccohs.ca/oshanswers/psychosocial/bullying.html)

The CCOHS also includes examples of behaviours that are not considered bullying, which may be helpful to include in the Policy.

- Expressing differences of opinion.
- Offering constructive feedback, guidance, or advice about work related behaviour.
- Reasonable action taken by an employer or supervisor relating to the management and direction of workers or the place of employment (e.g., managing a worker's performance, taking reasonable disciplinary actions, assigning work).

The Policy should also state clearly that retaliation for a complaint of harassment or bullying should be specifically mentioned in the Policy. Whether or not harassment or bullying is identified, any kind of retaliation against a worker for a complaint will be considered a work-related stressor.

Our Recommendation

The Policy requires a statement that pre-existing psychological conditions are not a bar to claim, and that decision makers must consider whether those conditions were activated, aggravated or accelerated by a significant work-related stressor.

The Policy should include examples of behaviours that do and do not constitute harassment and bullying. Retaliation for making a complaint of harassment or bullying must be included on that list.

SUMMARY OF RECOMMENDATIONS

Issue	Recommendation
Statement of Support - Definition of Workplace Harassment and Bullying	The Draft Policy definition of Workplace Harassment and Bullying should not be changed.
Statement of Support - Policy Scope	The Policy language regarding its Scope should not be changed, specifically that it does not apply to secondary psychological injuries or to presumptive PTSD claims.
Definition **"Significant work-related stressor"**	The definition of "significant work-related stressor" must be changed. There must be no requirement that a work-related stressor exceed stressors that are considered inherent to the work. One possible definition of a "significant work-related stressor" is: *any non-trivial event, force, or condition arising out of and in the course of employment that results in emotional tension or stress".*
Definition **"traumatic event"**	The definition of traumatic event should be removed from the Policy and should not be replaced.
Criteria for compensable psychological injuries **Requirement to "identify" the event(s)**	The criterion that the decision maker be able to identify the event(s) which are claimed to have caused the mental stress should be removed. If the criterion is not removed, its intent must be clarified, and examples of "identifiable events" added.
Predominant cause	The suggestion that the work-related stressor must outweigh all other stressors combined must be removed. Instead, the Policy should state, "*Predominant cause does not mean only cause. The workplace stressor need not outweigh all other stressors combined. It means that the work-related stressor must have the largest impact compared to each other stressor individually"*.
Predominant cause test for ongoing entitlement to compensation	The statement that the predominant cause test applies to ongoing earnings replacement or other benefits must be removed.

Employer decisions or actions relating to the worker's employment	The Draft Policy should state, The exclusion of an employer's decisions or actions relating to employment is not limitless. Where an employer's decisions or actions amount to bullying, harassment, or abuse, even when they are related to employment, they may be considered work-related stressors.
Additional Guidance for decision makers	The Policy requires a statement that pre-existing psychological conditions are not a bar to claim, and that decision makers must consider whether those conditions were activated, aggravated, or accelerated by a significant work-related stressor. The Policy should include examples of behaviours that do and do not constitute harassment and bullying. Retaliation for making a complaint of harassment or bullying must be included on that list.

Conclusion

The Nova Scotia Federation of Labour urges the immediate implementation of comprehensive policy and legislation to effectively address work-related mental stress.

We advocate for a future where workers are safeguarded against mental stress triggers and where they receive the necessary support when faced with such challenges.

Our collective commitment to nurturing a healthy work environment is integral to the prosperity of both individuals and organizations. The time to act is now to ensure every worker can thrive in their workplace, unburdened by the threat of work-related mental stress.

Together, let's foster an atmosphere of understanding, respect, and genuine care for the mental health of every worker in our community.

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