



Yukon Teachers' Association

**Submission to the
Yukon Workers' Compensation Health & Safety Board**

**Review and Modernization of the
Workers' Compensation Act
January 16, 2020**

Key Recommendations

Where legislation/regulation prohibits certain conduct, and that conduct gives rise to illness or injury, that illness or injury, whether physical or psychological, should be compensable.

The *Workers' Compensation Act* should be amended to:

- remove the exclusion of coverage for “disablement of mental stress or disablement caused by mental stress”;**
- specify coverage for diagnosed psychiatric and psychological injury or illness which arise out of, or in the course of employment, unless the conduct giving rise to the illness or injury was reasonable management action taken in a reasonable way; and**
- expressly state:**

- a) harassment,**
- b) bullying, or**
- c) abuse of authority,**

are not normal work pressures, or a normal part of employment, and will not be considered reasonable management action.

Mental Injury – As Real As Physical Injury

Contemporary Canada ordinarily recognizes people can, and do, suffer from mental injury or illness in their day to day lives. As with physical injury or illness, mental injury or illness varies in severity and duration.

Workers suffer from physical injuries arising out of, or in the course of their employment. Generally, all forms of physical injuries arising out of, or in the course of their employment, minor and major, are compensable to the extent of the loss suffered by the worker.

The current workers' compensation regime in the Yukon must evolve to reflect a modern understanding of injury and illness, specifically, that injury includes mental injury and should be compensated no differently than physical injury.

Facts

Workers suffer physical injury at work.

Physical injuries, minor and major, which occur at work arising out of, or in the course of, employment and result in loss are compensable under the Yukon WCB Act.

Workers suffer mental injury or illness.

Most employees are at the workplace for 30% - 40% or more of their waking lives; it is statistically impossible that all mental injuries occur during non-work time.

Workplace stressors are the cause of as much as 95% of work-related mental illness or injury.¹

Genesis of Workers Compensation – Physical Injury Recognized

In the early 20th century, Workers' Compensation legislation was introduced in response to employees winning more and more workplace liability and negligence claims against employers. Employees were increasingly resorting to civil suits and increasingly more successful in proving employers liable for the injuries sustained in their employment.

Provincial workers' compensation schemes were enacted as a way of eliminating employer's liability arising from physical injuries to workers in the course of their employment.

The Workers' Compensation scheme is insurance for both employees and employers to protect each from the costs associated with workers sustaining an injury in the course of their employment.

The Perfect Legal Storm

A perfect legal storm is brewing in the area of mental health protection at work. This storm brings with it a rising tide of liability for employers in connection with failure to provide or maintain a psychologically safe workplace.²

Over the past decade, no less than seven branches of law have been converging to create a high liability risk for employers with regard to mental injury in the workplace. There is an emerging, implied duty for employers to provide a psychologically safe and healthy workplace.³ Failure to comply with that duty can trigger a civil suit. Few employers seem to be aware of this emerging trend until they come face to face with it.

47% of working Canadians consider their work to be the most stressful part of daily life. Psychological health problems and illnesses are the number one cause of disability in Canada. They cost the Canadian economy \$51 billion per year; \$20 billion of which results from work-related causes⁴.

The number of civil suits in mentally injurious conduct are increasing steadily and the sums of damages are increasing significantly.

Awards for mental injury at work have increased in size over the last five years by as much as 700%.⁵

¹ Profile: Work-related Mental Disorders Office of Industrial Relations, Queensland, Australia

² Tracking the Perfect Legal Storm (May 2010, Martin Shain)

³ *ibid*

⁴ Canadian Centre for Occupational Health and Safety, Mental Health, 2016 as quoted in Psychological Health in the Workplace, Employment and Social Development Canada

⁵ Stress at Work. Mental Injury and the Law in Canada: A Discussion Paper for the Mental Health Commission of Canada (August 15, 2008, Martin Shain)

This situation parallels the circumstances in the early 20th century when provincial workers' compensation schemes were enacted as a way of eliminating liability exposure to employers in the realm of physical safety and injuries at work.

The only way to avoid the inevitable prospect of more and more common law claims of employer liability for mental injury to workers, is to make psychological injuries and illness compensable under a no-fault liability regime, like workers' compensation for physical injuries.

Current State – Limited Recognition of Mental Illness or Injury and Compensation

A general duty of care (GDC) clause exists in all Occupational Health and Safety (OHS) legislation in Canada in one form or another. It requires employers to take reasonable measures to ensure the health and safety of workers employed by that employer. The most significant emerging issue in OHS is: should the GDC cover psychological safety as well as physical safety?

Recent changes to OHS legislation in several jurisdictions address that issue. At this time provinces that, by explicit legislative provisions or by policy directive, include psychological safety in the GDC are British Columbia, Alberta, Saskatchewan, and Manitoba⁶.

The Canada Labour Code⁷ also acknowledges psychological injury or illness can and does occur in the workplace and ought to be prevented. The purpose of Part II of the Code is to "*prevent accidents, occurrences of harassment and violence and physical or psychological injuries and illnesses... occurring in the course of employment*" [our emphasis added].

Promised Protection – But No Compensation

In 2019, the Yukon Government (YG) sought public input on preventing violence and harassment in Yukon workplaces.⁸ YG stated an amendment was made to the *Occupational Health and Safety Act* in 2017 to enable the development of regulations aimed at preventing workplace psychological injuries. Jeanie Dendys, the Minister responsible for the Yukon Workers' Compensation Health and Safety Board (YWCHSB) stated:

*No Yukon worker should be exposed to violence or harassment in their workplace. These important changes to the Occupational Health and Safety Regulations will address serious health and safety concerns and further support employers in improving both the physical and the psychological safety of Yukon workers.*⁹

These promises are hollow if workers are not compensated for mental injury arising from such prohibited conduct.

⁶ [Getting Ahead of the Perfect Legal Storm](#) (August 2019, Martin Shain)

⁷ Part II amended in 2018

⁸ Yukon Government [News release # 19-131](#) June 10, 2019

⁹ *ibid*

Causation of Mental Illness or Injury – But No Compensation

Several factors are recognized to cause mental injury and illness in contemporary legislation. The Yukon lags behind national standards and most western provinces, in providing compensation for the injury arising from those causes.

CAUSATION OF MENTAL INJURY	YUKON WORKER PROTECTION
The National Standard confirms mental injury can arise from the way work is organized ¹⁰	No compensation for workers suffering mental injury arising from an abuse of power when assigning work or excessive workload
“occurrences of harassment and violence” ¹¹	No compensation if represented as reasonable management action or not resulting in P.T.S.D.
“caused by a significant work-related stressor, including bullying or harassment” ¹²	Mental injury or illness substantially caused by bullying and harassment not expressly acknowledged as compensable
“or a cumulative series of significant work-related stressors” ¹³	No compensation or protection
“Traumatic event means a single or series of events or incidents” ¹⁴	YWCHSB policy EN-09 is restrictive and excludes series of events

Key Recommendation

Where legislation/regulation prohibits certain conduct, and that conduct gives rise to illness or injury, that illness or injury, whether physical or psychological, should be compensable.

Many current provincial/territorial thresholds, for compensable psychological injuries and illnesses, greatly limit workers’ access to compensation for injury which arose out of or in the course of a worker’s employment.

The exceptions are British Columbia, Alberta, Saskatchewan, and Ontario which all allow claims for psychological injuries arising from chronic stress.

In the Yukon, the *Workers’ Compensation Act* compensates only for PTSD, and specifically excludes mental stress or an injury, disablement, or disorder that results from stress. Workplace stressors are the cause of as much as 95% of work-related mental injury.¹⁵

In YWCHSB policy EN-09, policy statement #3 says the Board will consider a claim for “*other psychological injuries*” under specific circumstances. Statement #4 lists several normal employment

¹⁰ Weathering the Perfect Legal Storm (2014, Martin Shain)

¹¹ Canada Labour Code, Part II, s. 5.1(1)

¹² B.C. Workers’ Compensation Act, s. 5.1(1)

¹³ *ibid*

¹⁴ Saskatchewan WCB Policy and Procedure Manual, POL 02/2017

¹⁵ Profile: Work-related Mental Disorders Office of Industrial Relations, Queensland, Australia

expectations and states that such normal pressures and tensions of employment are excluded from compensation.

Behaviour that constitutes harassment/bullying/abuse of authority while giving effect to a management decision/action must not be considered reasonable management action. The law should not deprive a worker compensation on the basis that an employer is permitted to justify behaviour, that constitutes bullying/harassment/abuse of authority, under a veil of “management decision/action”.

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Increased Violence = Increase in Mental Illness or Injury Claims

Recent employee surveys in Ontario show a significant increase in reported workplace violence. In a 2005 study of Ontario school teachers, 7% reported experiencing violence at some point in their careers. In a 2018 survey of Ontario elementary educators, that rate had ballooned to 54% in a single year.¹⁶

Workplace violence can have serious health implications beyond a physical injury. Research, employee surveys, and case law all indicate there is a correlation between violence in the workplace and mental illness.

As stated earlier in this submission, the number of civil suits in mentally injurious conduct is increasing steadily and the sums of damages are increasing significantly. Workers and employers need a compensation scheme which manages this risk and cost.

¹⁶ [Facing the Facts: The Escalating Crisis of Violence Against Elementary School Educators in Ontario](#) Chris Brucker and Darcy Santor, University of Ottawa

Good Business with No Floodgates

The National Standard of Canada on Psychological Health & Safety in the Workplace affirms that employers who successfully implement a psychologically healthy and safe workplace strategies benefit from:

enhanced employee productivity and engagement;

higher profit margins;

positive reputations;

more innovative work;

a reduction of negative workplace factors (e.g., conflicts, grievances, turnover, disability, injury and absenteeism); and,

greater cost effectiveness because of decreased absenteeism, sick leave and use of disability benefits.¹⁷

The workers' compensation regime must align with, and support, these outcomes by ensuring robust and reasonable compensation having regard to the nature of the cause of the injury.

Finland and Australia have regimes that compensate psychological injuries and illness arising out of work; coverage has not opened the floodgates to claims.

In Australia, data shows the overall trend between 2000/01 and 2012/13 was a slight increase in the number of claims and a slight decrease in the incidence rate.¹⁸

¹⁷ As reported in [Current Issues in Mental Health in Canada: Psychological Health and Safety in the Workplace](#) Library of Parliament

¹⁸ [Work-Related Mental Disorders Profile](#) (2015, Safe Work Australia)