

# WSIB CHRONIC MENTAL STRESS POLICY CONSULTATION SUMMARY

## Introduction

On May 17, 2017 the Ontario Government passed the *Stronger, Healthier Ontario Act (Budget Measures), 2017* (Bill 127) which amended several provisions of the *Workplace Safety and Insurance Act, 1997* (WSIA), including those governing the circumstances in which workers are entitled to benefits as a result of mental stress (WSIA ss. 13(4) and (5)). These amendments take effect on January 1, 2018.

Prior to Bill 127, s. 13(4) of the WSIA excluded benefits for workers who were suffering from mental stress, unless such stress was an acute reaction to a sudden and unexpected traumatic event arising out of and in the course of the employment.

After Bill 127, workers will be entitled to benefits for both traumatic and chronic mental stress that arises out of and in the course of the employment.

On May 4, 2017 the WSIB released draft policy 15-03-14, Traumatic or Chronic Mental Stress (Accidents on or After January 1, 2018) for consultation. Following this release, the WSIB held several stakeholder sessions with key worker and employer stakeholder groups to answer questions, address concerns and receive feedback. The WSIB also met with the medical community to discuss the diagnostic requirements of the policy and how the WSIB can best support diagnoses. Stakeholder submissions were accepted until July 7, 2017. During the consultation period, the WSIB received 92 submissions from a wide variety of stakeholders including workers, employers, health care professionals and lawyers/paralegals.

Following review of stakeholder feedback, the WSIB has decided to have two stand-alone policies covering Traumatic Mental Stress and Chronic Mental Stress. The WSIB has amended [Operational Policy 15-03-02, Traumatic Mental Stress](#) to align with a newly created Operational Policy 15-03-14, Chronic Mental Stress (Accidents on or after January 1, 2018). The new Chronic Mental Stress policy was approved by the WSIB's Board of Directors on September 21, 2017 and will come into force on January 1, 2018,

The sections below identify the central themes that emerged during the policy consultation, and the WSIB's responses.

## 1.0 Application Date

### 1.1 Stakeholder Feedback

Worker stakeholders felt that, since the previous policy was based on what they consider to be unconstitutional legislation, the revised policy should be retroactive to either January 1, 1998 or 2014 when the Workplace Safety and Insurance Appeals Tribunal (WSIAT) first found the mental stress provisions of WSIA to conflict with the Canadian Charter of Rights and Freedoms.

Employer stakeholders supported the application date and opposed any retroactive application of the draft policy to accident dates before January 1, 2018, including cases where the claim is made after January 1, 2018, but the accident or triggering event(s) occurred prior to that date.

## **WSIB Response**

The amendments to the WSIA made by the Ontario Legislature stipulate that the chronic mental stress provisions apply to accidents that occur on or after January 1, 2018. The WSIB's policy must be consistent with the legislation. In the absence of express language in the legislation indicating that the amendments are to apply retroactively, the WSIB cannot impose retroactive application by policy.

## **2.0 Substantial Work-related Stressor (SWS)**

### **2.1 Stakeholder Feedback**

Both worker and employer stakeholders requested that the WSIB adopt the OHSA definition of harassment and specify that such a definition include bullying.

#### **WSIB Response**

The WSIB will be adopting the definition of harassment set out in the *Ontario Occupational Health and Safety Act* (OHSA) with minor amendments to reflect the WSIB context.

### **2.2 Stakeholder Feedback**

Many worker stakeholders and a health care provider submitted that the SWS criteria creates a threshold in addition to the requirements of work-relatedness and therefore violates the "thin skull principle".<sup>1</sup>

#### **WSIB Response**

Section 13 of the WSIA requires that a worker be entitled to benefits if there is an "accident" or "injuring process." These requirements exist to reflect the fact that WSIA establishes a scheme that is intended to compensate Ontario workers for accidents and injuries that are caused by the work. The SWS requirement recognizes that all workplaces can cause stress, but that the WSIA is not intended to compensate for that stress absent unusual events or occurrences, or particularly high-stress occupations, that could be said to constitute an "injuring process." The SWS requirement is consistent with the "thin skull principle."

### **2.3 Stakeholder Feedback**

Some worker stakeholders are of the view that the SWS criteria have the effect of setting a higher standard for mental injuries as compared to physical injuries and are thus not consistent with the Canadian Charter of Rights and Freedoms (the Charter) or the *Ontario Human Rights Code* (OHRC).

#### **WSIB Response**

The SWS criteria are:

- consistent with the requirement that there be an "accident" or "injuring process" in order for there to be entitlement under section 13 of the WSIA; and
- similar to the criteria adopted in other Provinces, e.g., British Columbia and Alberta.

<sup>1</sup> The "thin skull principle" provides compensation for the full extent of a workplace injury regardless of whether a different worker, or the average worker, might not have been injured in the event.

## 2.4 Stakeholder Feedback

Many worker stakeholders felt that the definition of bullying or harassment, as set out in the draft policy, had to be met in order for there to be an SWS and thus entitlement for chronic mental stress (CMS).

### WSIB Response

The intent of the draft policy is not to limit entitlement to cases of bullying/harassment but rather to include bullying/harassment as examples of the larger category of SWS. The policy has been revised to remove any confusion on this point.

## 2.5 Stakeholder Feedback

Some employer stakeholders suggested that the draft policy adopt an “average worker test.”

### WSIB Response

The SWS criteria are consistent with the requirement that there must be an “accident” or “injuring process” in order for there to be entitlement under the section 13 of the WSIA. The SWS test is similar to the average worker test but more attuned to individual worker circumstances that may have relevance for decision-makers., Examples include the type of job or occupation, the nature of the work and the associated work environment, the size of the employer, or particular industry standards.

## 2.6 Stakeholder Feedback

Several employer stakeholders had concerns regarding overlapping investigations of harassment under the WSIA and under OHSA.

### WSIB Response

The WSIB is required by law to gather and consider all relevant facts and circumstances in every claim that comes before it. In this context, the findings of an employer’s harassment investigation may be one piece of relevant evidence gathered by the WSIB, but will not be the only evidence gathered by the WSIB.

## 2.7 Stakeholder Feedback

Many employer, health care and legal stakeholders asked for more clarity around the concept of SWS, including a definition, additional criteria and/or examples.

### WSIB Response

The concept of an SWS and its description in the initial draft policy is similar to what is used by other workers’ compensation boards across Canada that compensate for chronic mental stress. In response to stakeholder feedback, the final policy includes additional guidance on what is meant by jobs with a high-degree of routine stress.

## 3.0 Standard of Proof/Causation

### 3.1 Stakeholder Feedback

Stakeholders expressed diverging views on the standard of causation that WSIB should use to evaluate claims for chronic mental stress. Workers favoured the use of a test that asked whether

the workplace stressor made a “significant contribution” to the chronic mental stress, while employers preferred a “predominant cause” test.

### **WSIB Response**

The WSIB reviewed the use of these two causation tests and considered the feedback received from all stakeholders. The WSIB determined that the predominant cause test was more appropriate for dealing with the inherent complexity of chronic mental stress claims. Because of the pervasive nature of mental stress, both in and out of the workplace, it can be difficult to assess whether the workplace is a “significant” contributing factor to the injury. The use of the predominant cause test is also consistent with other workers’ compensation boards across Canada that also compensate for chronic mental stress.

## **3.2 Stakeholder Feedback**

Several employer stakeholders raised questions around burden of proof and what proof would be required to establish causality and the role that employers and health professionals would play in this determination.

### **WSIB Response**

As detailed in the standard of proof and causation section of the draft policy, the WSIB decision-maker must be satisfied, on a balance of probabilities, that the substantial work-related stressor was the predominant cause of the CMS.

As with all other claims, employers will be given a full opportunity to provide relevant information. However, the duty to determine work-relatedness, and to make all related inquiries, falls on the WSIB adjudicator, not the employer or health professional. Employers retain the right, as in all other claims, to require the worker to undergo a health examination by a health professional selected and paid for by the employer.

## **4.0 Pre-existing Conditions**

### **4.1 Stakeholder Feedback**

Stakeholders sought clarification on how pre-existing conditions would be addressed within the context of CMS claims.

### **WSIB Response**

The draft policy contains a cross-reference to the [Pre-existing Conditions policy \(OPM document 15-02-03\)](#) which applies to mental stress claims the same way it applies to all other claims with respect to initial entitlement and applying the “thin skull” principle. The exception is in ongoing entitlement decisions when determining whether the pre-existing psychological condition has “overwhelmed” the work-related mental stress injury. In such cases, the WSIB decision-maker ensures that the causation test used to determine initial entitlement in the claim is consistent with the causation test used to determine ongoing entitlement.

## **5.0 Diagnostic Requirements**

### **5.1 Stakeholder Feedback**

Generally, stakeholders had divergent views on the diagnostic requirements. Some workers requested the requirement for a *Diagnostic and Statistical Manual of Mental Disorders* (DSM)

diagnosis be removed from the policy, while worker representatives appreciated that this diagnosis could be completed by a family physician. Employers, health care providers, and legal professionals were concerned with family physicians providing the DSM diagnosis. They also wanted to ensure that the WSIB would inform family physicians of its expectations in providing these diagnoses. Stakeholders recommended that the WSIB develop a specialized cognitive function form similar to the WSIB's existing Functional Abilities form (FAF) in order to optimize the quality and timeliness of diagnosis and reporting.

### **WSIB Response**

The WSIB has been engaging with the medical community on this topic. Together, we are working to develop enhanced tools, including forms and training protocols, that will facilitate the exchange of more complete supporting information in the mental stress context. The focus of the new program will be to ensure that diagnosis and treatment are not delayed so that workers can be treated and return to work as soon as possible. However, the diagnostic requirements set out in the draft policy have been revised to note that a diagnosis by a psychologist or a psychiatrist may be required to determine initial or ongoing entitlement in complex cases.

## **6.0 Employer's Employment Decisions or Actions**

### **6.1 Stakeholder Feedback**

Some worker stakeholders say that there is no meaningful distinction between work-related stressors flowing from employers' decisions regarding the nature or circumstances of their employment and those that do not. They cited as examples the impact of increasing workloads or employer harassment. Therefore, the worker stakeholders urged that the employer decisions exception be removed.

Stakeholders also requested additional examples of employer decisions and actions that would and would not lead to entitlement for CMS in the draft policy.

### **WSIB Response**

The draft policy includes the exclusions mandated by the legislation. However, there is no exception for employment decisions or actions that are not part of the employment function. As a result, there is no exception for harassment or any abusive or egregious conduct or work demands on the part of the employer. The final policy has been amended to further clarify this position.

## **CONCLUSION**

The WSIB thanks all stakeholders who participated in the Work-Related Chronic Mental Stress Policy Consultation. The feedback provided has been instrumental in finalizing the Chronic Mental Stress Policy and establishing its service delivery approach. The key themes discussed in this document are the topics raised by multiple stakeholders in their submissions. While it does not capture every individual issue raised by every stakeholder, all feedback submitted by stakeholders was reviewed and carefully considered by the WSIB.