February 16, 2016

Via Fax & Mail

Hon. Kevin Flynn, MPP
Minister of Labour
400 University Avenue, 14th Floor
Toronto ON
M7A 1T7

Re: Post Traumatic Stress Disorder
Amendments to the *Workplace Safety and Insurance Act*

On behalf of the Schedule 2 Employers' Group, we would like to take this opportunity to comment specifically on the suggested amendments to the *Workplace Safety and Insurance Act, 1997*, ("the WSIA") with respect to Post Traumatic Stress Disorder and presumptive entitlement.

The Schedule 2 Employers' Group represents the interests of diverse large and small employers classified under Schedule 2 of the WSIA. Our member employers include the provincial government and Crown agencies, municipalities, school boards, federally regulated employers, and employers covered by the federal Government Employees Compensation Act (GECA). As Schedule 2 employers pay the actual costs of claims for as long as benefits are paid, rather than premiums based on experience ratings, our members and their stakeholders (including taxpayers and investors) have a long-term financial interest in how the WSIB adjudicates claims and applies its policies.

On Monday February 1, 2016, it was reported that your comments during and after your speech to the Ontario Professional Firefighters Association hinted that first-responders may not have to "prove their illness was caused by the job".[1] In other words, and as we understand it, whether in the form of Bill 2 "An Act to amend the Workplace Safety and Insurance Act, 1997 with respect to post-traumatic stress disorder" or otherwise, the amendments under consideration would provide a presumptive right to compensation for Post Traumatic Stress Disorder ("PTSD") under the WSIA for first-responders, who would not be required to prove their PTSD was triggered by the job. The Toronto Star article notes that the proposed legislation comes "seven years after New Democrat MPP Cheri DiNovo first proposed a private member's bill that would add PTSD to the list of conditions – such as cancers for firefighters – recognized as a workplace illness."

In our opinion, the issue is not whether first-responders can "prove their illness was caused by the job" but rather the fact that first responders, and others, have not traditionally been entitled to

[1] Rob Ferguson, "Ontario legislation aims to cut barriers to PTSD treatment for first-responders", *The Toronto Star* (1 February 2016)

PTSD coverage as the WSIA essentially excludes certain types of psychological conditions or reactions from receiving benefits.

We do not wish to create the impression that we do not respect the jobs performed by first-responders, we believe however that providing them with preferential treatment is not in the spirit or intent of the legislation, including the *merits and justice* provisions. In our view, the amendments under consideration would render non-first-responders as second class of citizens, by placing first-responders who develop work related PTSD or Traumatic Mental stress in a better position than the all other workers in the province. Some workers will receive the benefit of these amendments, while other workers in the province will not.

In fact, it could be argued the exclusion of other workers in the province would be discriminatory, on the basis of the differential treatment. Effectively, the province would be swinging the pendulum from workers being discriminated against because of their exclusion from entitlement, to discriminating against other workers.

The presumption in our view does not appear to be "fair" or "balanced" to all workers in the province, and is not a necessary amendment in light of the current legislative framework, as interpreted by the Tribunal.

Further, this approach will result in a significant financial impact on employers, including Schedule 2 employers (e.g. Ontario Public Service) in particular who directly pay the costs of benefits, the WSIB, which has a well-documented Unfunded Liability, and ultimately tax payers, who support the costs borne by municipalities through their taxes. While questions will undoubtedly be asked of the government as to the actual financial impact on employers, including direct costs for Schedule 2 employers and the potential premium increases for Schedule 1 employers, and how increased costs will impact the Unfunded Liability, quantifiable answers appear to date to be absent with respect to the exact same questions with respect to the financial implications of Bill 109. We submit there should be greater dialogue and discussion on the potential impact of these costs to the employers and general public.

In our opinion, the current legislative framework, as interpreted by the Tribunal, which allows for benefits when a worker can demonstrate that their work duties was a significant contributing factor to their condition, strikes the most appropriate, and fairest balance of interests.

Alternatives

In the alternative, we submit that consideration should be given to a number of alternatives that provide a fairer and equitable response and we would be pleased to engage in further discussion of some of these options at your earliest convenience.

However, should, despite the concerns noted above, the government proceed with presumptive entitlement for stress claims, we submit that consideration should be given to the presumptive entitlement approach adopted in Manitoba, which applies to all workers (i.e. not just first responders).

Essentially, under *The Workers Compensation Act*, all that is required for the presumption to apply is to have a PTSD diagnosis made under the most current DSM by a physician or

psychologist (presumably licensed by their respective regulatory bodies to make such diagnoses). The presumption is a simple rebuttable presumption that reads as follows:

> 4(5.8) If a worker
>
> (a) is exposed to a traumatic event or events of a type specified in the Diagnostic and Statistical Manual of Mental Disorders [the DSM] as a trigger for post-traumatic stress disorder; and
>
> (b) is diagnosed with post-traumatic stress disorder by a physician or psychologist;
>
> the post-traumatic stress disorder must be presumed to be an occupational disease the dominant cause of which is the employment, unless the contrary is proven.[2]

While in Manitoba the presumption may make entitlement decisions faster, the worker must still provide evidence that there was a traumatic event, such as direct exposure to the stressor (threatened death, actual or threatened serious injury, or actual or threatened sexual violence), or repeated or extreme indirect exposure to aversive details of the events usually in the course of work (first responders).

Further, in Manitoba, the presumption provision uses the dominant cause standard as opposed to the significant cause standard adopted in Ontario. In other words, the worker must show that work was the dominant cause, as opposed to a significant cause. In our view, applying a "dominant cause" standard is a more equitable and balanced approach to entitlement than the "significant cause" standard in the context of presumptive legislation. Therefore we submit that if consideration is given to amending the WSIA to provide for presumptive entitlement, consideration should also be given to amending the WSIA to provide for a "dominant cause" standard.

We thank you for the opportunity to provide a position on some of the amendments to the *Workplace Safety and Insurance Act, 1997* under consideration. Please feel free to contact us should you have any questions or would like to discuss these important issues further.

Yours truly,

Laura Russell, B.Sc., C.R.S.P., Licensed Paralegal
Chair, Schedule 2 Employers' Group

cc. Mr. Mark Tyler, Senior Policy Advisor (*via email*)

[2] *The Workers Compensation Act*, CCSM c W200, s 4(5.8)