

IN THE NEWS

*Ontario Workers' Compensation:*  
**Improvements Or Uncertainty?**

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BENEFITS AND PENSIONS  
**MONITOR**

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November 2017 Issue



## *Ontario Workers' Compensation:* **Improvements Or Uncertainty?**

**B**y its very nature, workers' compensation (WC) law is remedial. Changes to the law pertaining to coverage, entitlements, and the respective policy applications should be consistent, predictable, and reliable. It is well known that changes to the system tend to be slow

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and painstaking. In Ontario, the Workplace Safety and Insurance Board (WSIB) is about to implement, after much debate and consultation, two major changes:

- ◆ The first change, with an expected implementation January 1, 2018, will be WSIB's broadening of the definition of compensable mental health claims, from Post-Traumatic Stress Disorder and trauma related claims only, to now include chronic mental (workplace) stress. The Ontario Workplace Safety and Insurance Appeals Tribunal (Tribunal) issued a significant decision (Decision 2157/09) regarding entitlement to benefits for chronic mental stress. It found that parts of the Workplace Safety and Insurance Act, which limit entitlement to mental stress that "arises from an acute reaction

to a sudden and unexpected event," violate the equality guarantee in section 15 of the Canadian Charter of Rights and Freedoms and are, therefore, unconstitutional.

- ◆ The second change with an expected implementation of January 1, 2020, was initiated approximately five years ago from a review of the sustainability of the WC system. It involves a complete revamping of the funding of the system from reducing the number of employer rate groups (the risk or premium rates assigned to a business) to the elimination of the current experience rating plans (NEER and CAD-7). Ultimately, the financial impact for Ontario employers is to improve the overall funding of the system and ensure that employers are paying and contributing to the real costs of the system.

We would suggest these changes are improvements, but, until fully launched and clarified, they will create uncertainty and anxiety for employers across the province. Let us look at both and identify what is most likely to occur.

### **Mental Stress Claims**

Since the release in April 2014 of decision 2157/09 from the tribunal, which gave rise to a statutory amendment in May 2017, the WSIB embarked on a consultative process on how to adjudicate chronic mental stress claims. It has stated "good mental health is key to having healthy and productive workplaces in Ontario." It wants anyone suffering from work-related chronic mental stress "to get the support and help they need to return to work."

There is no denying the WSIB's objective to foster a healthy workplace, but how will it adjudicate chronic mental stress claims? The treatment of chronic mental stress in other provincial jurisdictions all require that the workplace stress is the predominate cause (primary or main cause) of the claimed condition. This approach differs from the Ontario approach, as it is understood, in that the employment must be a significant contributing factor on the balance of probabilities. In other words, the depth of analysis will not be as rigorous in Ontario as the other provinces.

Under the board's draft policy, entitle-

Figure 1

NEW INDUSTRY CLASSES

Industry Class	Industry Sector
CLASS A	Agriculture
CLASS B	Mining, quarrying, and oil and gas extraction
CLASS C	Utilities
CLASS D	Governmental and related services
CLASS E	Manufacturing
CLASS F	Transportation and warehousing
CLASS G	Construction
CLASS H	Wholesale
CLASS I	Retail
CLASS J	Information and culture
CLASS K	Finance, management, and leasing
CLASS L	Professional, scientific, and technical
CLASS M	Administration, services to buildings, dwellings, and open spaces
CLASS N	Non-hospital health care and social assistance
CLASS O	Leisure and hospitality
CLASS P	Other services

ment to a chronic mental stress claim will be based on the ability to satisfy these conditions:

- ◆ An appropriate regulated health professional, such as a family physician, provides a diagnosis based on the Diagnostic and Statistical Manual of Mental Disorders (DSM)
- ◆ The person has experienced a substantial work-related stressor(s), like workplace bullying or harassment
- ◆ The work-related stressor(s) must have caused or significantly contributed to the chronic mental stress\*
- ◆ Other workplace stressors are not limited to ‘job strain,’ but rather, include mental disorders such as bullying, lack of managerial support, interpersonal conflicts, and humiliating events
- ◆ A claim of mental stress cannot arise solely from an employment decision, such as termination, demotion, transfer, or disciplinary action

There will also be important exclusions like shift schedule changes, lack of

adherence to company safety rules, upset, and issues with an employer’s decision not to offer permanent employment.

New mental health claims can lead to complex adjudications and difficulty in particular with dealing with pre-existing conditions. Employers must ensure the WSIB secures a proper history as these types of claims are subjective so that an accurate and fair determination of entitlement is made. Consistency in the WSIB adjudication approach will be the most challenging for both workers and employers.

Employers may also expect to see a rise in WC claims for chronic mental health stress as currently they would be accepted under the employer’s STD/LTD plan, if applicable. Insurance carriers when faced with chronic mental stress claims will likely require the employer/employee/member to register a WSIB claim. When WC claims are allowed there is potential for other re-employment obligations being triggered, notwithstanding the financial impact to an employer’s premiums.

Immediate action by an employer about an employee’s complaints of harassment may avoid the inherent difficulty in managing these sensitive claims. Employers should assess the workplace for stressors and review their current practices, policies, and procedures, promoting a healthy and safe work environment. Employers should ensure that they are protecting themselves to the extent possible from potential mental stress claims. This means having an active mental health strategy for the business and adopting and enforcing policies against illegal discrimination and sexual harassment. Employers need to ensure access to mental health training and understand workplace related emotional distress and its implications. The voluntary Standard for Psychological Health and Safety in the Workplace, published by the Canadian Mental Health Commission in collaboration with Bureau de normalisation du Quebec, is a good guide and resource.

**Funding Approach**

Workers’ compensation in Ontario has had a significant unfunded liability since the 1980s, placing the system in

financial jeopardy. The current classification scheme is fraught with complexity and issues.

The experience rating system has been hard to understand for both internal and external stakeholders. In response to all of this, the overarching approach to change included the following principles:

- ◆ A simplified, transparent, and modernized classification system, aligned to an accepted national standard
- ◆ A fair process that prospectively sets premium rates, reflecting the individual employers’ claims experience relative to their industry
- ◆ Considerations for a reasonable transition path to ensure employers can gradually adjust to the new premium rate setting process

There are three main changes to the new funding model that can be expected.

First, there will be a reduction in the number of rate groups or classes for determining insurance premiums. There are currently 155 rate groups in Ontario and this will be reduced to 34 classes or rate groups based on their predominant business activity. This approach aligns with the Ontario economy and remains respectful of the principle of collective liability. Predominance will be determined by the allocation (size) of the payroll. *Figure 1* outlines the new classes or rate groups.

Multiple rates will be allowed where the employer can demonstrate distinct and independent business purposes. Conversely, associated employers, where control is exercised between legal entities, would form an ‘integrated operation’ and be considered a single employer for classification and rate setting.

The next change will be establishing new class level or industry rate setting formulas. The board would use four components to determine the class average rate for the proposed 34 industry classes: legislative obligations (OHSA, Safety Associations); overhead (WSIB administration costs); past claims costs; and new claims costs. Note that individual employers will not be limited to this premium rate, but premium rates will be adjusted based on experience.

The third change will be establishing the new experience rating program or the prospective setting of an employer’s

premium rate based upon performance. Factors that will be considered are:

- ◆ Insurable earnings/number of claims /actual claims costs
  - ◆ Predictability scale: based on the size of the employer
  - ◆ Graduated per claim limit: based on an employer's actuarial predictability, protects smaller employers from overly onerous costs; individual firm limits will be based on where they land on the risk band scale
  - ◆ The proposed risk bands are a hierarchical series of divisions within each class (premium rate increments of five per cent); an employer would face a maximum increase or decrease of premium limited by three risk bands (up to 30 per cent of premium) claims costs with comparison to the average or base line cost
  - ◆ six year weighted window of claim costs: 1/3 (first three years) and 2/3 weighting (last three)
- The board is planning to imple-

ment these funding changes in January 2020, with transition rules yet to be determined. This means that claims from 2013 onwards will be used to calculate the 2019 premium rate. Where employers' premiums will land in the new model is not known and we encourage employers to reach out to the WSIB for answers. There will be winners and losers.

Everything organizations are doing today will influence premium rates with the new rating system. It is best that organizations need to be fully aware of their current risks and opportunities. Organizations should secure predictive modeling to best position themselves for the new rating system.

#### Integrated Strategy

An integrated/aligned strategy is required to optimize an organization's ability to mitigate and manage absence cost and risk. This is key to increasing health, safety, and productivity. Ultimately,

a total workforce health approach is needed to reduce claims, manage risks, and create healthy respectful workplaces. With changes to the WC system, employers need to understand their current risks, the new risks they may face, and creative ways to mitigate them. **BPM**



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