LIMITING THE SCOPE OF INFORMATION SHARING IN PSYCHOLOGICAL INJURY CLAIMS

An Argument for the Ethical Handling
of
Psychologically Injured Workers' Personal Health Documents
under
An Employer's Right to Access Information

Authors: Jennifer Chouinard, B.A., B.S.W., M.P.P., Ph.D. (c)
David Samuel Spec. Hons. B.A., J.D.

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RELEVANT STATUTES:

The Workers' Compensation Act, 2013, section 28.1
The Workers' Compensation Act, 2013, section 174
Freedom of Information and Protection of Privacy Act, section 21

PREAMBLE

With devastating rates of PTSD and suicide among public safety personnel, it is imperative that government institutions such as Saskatchewan Workers' Compensation Board (WCB) strive - with serious intent - to support workers when they suffer psychological harm as the result of their service to our community. All too often, we consider the traumatic exposure that occurs as part of these jobs to be the most psychologically damaging. Unfortunately, in many instances, research shows that the psychological harm caused by an unsupportive employer or unsupportive compensation system further exacerbates and compounds the effects of the initial traumatic exposure.[1] Meaning, systemic improvements are also imperative in addressing these alarming rates of posttraumatic stress disorder (PTSD) and suicide. A significant aspect of the problem is that the majority of WCB's legislation, policy, and procedures are based on *physical* injuries, which are poorly contextualized to adequately address *psychological* injuries. Therefore, the claims process itself can cause harm, despite that one of its purposes is to prevent further harm.

In this proposal, we focus on claims accepted under section 28.1 of *The Workers' Compensation Act, 2013, "*Presumption of Psychological Injury." This presumption addresses how a psychologically injured worker enters the compensation system but not the policies and procedures the worker is subject to once his/her claim is accepted. By offering this presumption, we surmise the legislature chose to relieve psychologically injured workers from the previous burden of proof, given their inherent vulnerability, and the corresponding lack of capacity to effectively handle such a burden. Accordingly, we offer follow-up measures regarding to information sharing with the employer.

Under section 174 of *The Workers' Compensation Act, 2013*: "Employers' Access to Information,*"* the board is required to share information pertaining directly to the acceptance of a claim, with the employer. Employers are only entitled to evidence of facts about an injury that formed the basis of the decision. All personal and irrelevant information must be withheld. Section 28.1 explicitly states the criteria for acceptance:

> (2) Unless the contrary is proven, if a worker or former worker is diagnosed with a psychological injury by a psychiatrist or psychologist, that injury is presumed to be an injury that arose out of and in the course of the worker's employment.

Given this presumption and the evidentiary burden it functions to unshackle the worker from, this section correspondently limits the scope of evidence relied on in both claim acceptance and employers' access to information. Further, due to the nature of psychological injuries, the documentary evidence supporting these claims is invariably deeply personal. The question also becomes a matter of what might be too personal to share with the employer.

When personal health information is shared, workers' mental well-being must be adequately considered. According to *The Saskatchewan Workers' Compensation Boards' Policy and Procedure Manual* (2021), information sharing must be "advantageous" for the worker as well as the WCB and the employer (See POL 05/2017 "Privacy of Information," Number 11). Similarly, section 21 of *Freedom of Information and Protection of Privacy Act* (FOIP), speaks directly to the risk of psychological harm that may result when personal information is shared; this section grants government institutions the authority, and quite arguably the responsibility, to refuse access where such a risk is present. In this policy review, we propose a narrow scope of information sharing under section 174 in order to neither offend nor threaten the psychological safety of the injured worker.

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[1] For a full review of the relevant literature and a case study from Saskatchewan, please see Jennifer Chouinard' thesis "Paramedics and the Chance of a Better Outcome: Employer Liability and Psychological Health and Safety in the Workplace." Accessible at https://harvest.usask.ca/handle/10388/13005

LEGISLATION

Under section 174 of *The Workers' Compensation Act, 2013* – "Employers' Access to Information," employers are to be provided:

> (a) the facts of the situation in which the injury occurred.

What are facts in cases of psychological injury? Facts are taken to be truths, when proven by the corresponding evidence. The fact of a worker's attendance with a psychologist or psychiatrist may be proven by statements found in medical notes indicating, for example, that: "[The worker] attended counselling sessions on [dates] with [mental health professional] and discussed work-related events." "Facts" are the diagnoses and/or therapeutic intervention provided by the psychiatrist or psychologist. "Facts" are the corresponding commentary that place the worker at work, exposed to traumatic events. "Facts" are not hypothesis or speculations. They are neither feelings nor opinions surrounding the traumatic work-related event(s) in question. Those engagements are highly interpretive, personal, and subject to the many complicating factors involved in emotional processing. "Facts," for the purpose of medical treatment are, by their very nature, objective.

Much of a worker's private mental health appointment notes are inappropriate for release due to the inherent capacity to inflict further harm if shared. Seeking professional help for the emotional processing of work-related trauma is a deeply personal and profound experience. Any lack of confidentiality in this process undermines its own purpose. Therefore, confidentiality is paramount both to encourage workers to seek help and to protect their safety once they do. It is one of the most important commitments made by helping professionals to the people they serve. Mental health sessions of any kind are among the most sensitive, personal, and protected spaces in contemporary society. At best, failing to protect these records when section 174 is invoked creates a critical disincentive to accessing support services and undermines all attempts to encourage injured workers to ask for help. At worst, it inflicts further trauma and increases the risk of suicide.

We argue that no psychologically injured worker should endure the threat of the contents of their personal mental health sessions being shared with an employer under section 174. This can be accomplished by applying section 21 of *Freedom of Information and Protection of Privacy Act* (FOIP), "Danger to Health and Safety" which states:

> 21. A head may refuse to give access to a record if the disclosure **could** threaten the safety or the physical or mental health of an individual. (Emphasis added).

The language in the legislation is instructive. Notably, the word "could" in this context necessarily entails that the threshold of denying access is satisfied so long as *it is possible* that granting access to the impugned records entails the mere possibility of threatening the mental health of an individual. The choice of the word, "threaten," adds a further layer of protective discretion. This is so because a "threat," on its face, implies a lack of certainty. To threaten or be threatened, relates to the possibility of an event, rather than its degree of certainty. Further, section 21 of FOIP does not say (and it very well could have) that a head may refuse access to records when disclosure of the same *is* likely to threaten the mental health of the individual; or when the disclosure will *certainly* cause mental harm. The head may refuse to give access to a record so long as the head reasonably apprehends the mere possibility of harm.

Taking the language together, FOIP confers a head with the authority to deny access to records *when there is merely a possibility, that there will be a further possibility that* disclosing the impugned records will cause mental harm. The legislation in its own words is incredibly protective of workers. The

problem is not with the legislation or the legislators; it is clear that in enacting FOIP, the legislature intended workers to be protected. The problem then is not in poor theory, but in poor practice.

In addition to this protection outlined in FOIP, Saskatchewan's Workers' Compensation policy and procedure is well-positioned to support an appropriately narrow scope of information sharing under such conditions. We explain this in the next section.

POLICY & PROCEDURE

In *The Saskatchewan Workers' Compensation Boards' Policy and Procedure Manual* (2021), PRO 06/2017 "Authority for Disclosure" states:

> (2) Workers, employers, and in certain cases, primary health care providers must receive a written explanation of the reasoning leading to a decision.
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> > b. The employer at time of injury is entitled to know **the reasons for a claim decision**, and therefore a separate letter outlining the decision and reasoning must be sent to the employer, but the explanation provided to the employer and/or health care provider should be communicated in such a manner as to convey the basis for the decision **without disclosing the specific personal and/or personal health information used in making the decision**. Where there are multiple claims with separate employers, each employer will receive a separate letter of explanation. (Emphasis added).

"Personal health information" in cases of psychological injury requires different considerations than for physical injuries. Workers' private reflections of traumatic events they respond to on the job are *profoundly personal*. Therefore, it is implied here that the scope of information sharing in such cases ought to be quite narrow.

It may be argued that said personal information is "relevant" as per the definition outlined in POL 05/2017:

> **Relevant** means having some reasonable connection with, and some value or tendency to prove or disprove a matter of fact significant to the decision. It is the evidence's tendency to prove or disprove a matter of fact that is related to an issue in dispute in the case. What is relevant will be determined by the writer of the decision, on a case-by-case basis. **The relevant documents will directly relate to the evidence used to make the decision as expressed in the decision.** (Emphasis added).

That the documents must "directly relate to the evidence used to make the decision as expressed in the decision" further supports a narrow scope of information sharing because claims accepted under section 28.1 are only accepted based on a specific diagnosis. By this standard, all other personal health documentation (e.g., counselling sessions, medical visits, and personal correspondence, etc.) must be omitted. This further functions to alleviate a substantial evidentiary burden upon workers, that would otherwise fall to them to legally prove the connection between their employment and their psychological injury.

To reiterate, documents shared with the employer need only "convey the basis of the decision" (PRO 06/2017). If the basis of the decision is always contingent on the requirements stipulated in section 28.1, then no other documentation needs to be shared under section 174.

It is also worth noting that, where WCB has developed a definition for "relevant" information in workplace injury claims, it has not developed a clear definition for what is "personal" or "sensitive" in psychological injury claims. Any documentation where public safety personnel discuss traumatic events on the job ought to be considered as sensitive personal information for the following reasons:

(1) The events of frontline public safety work are often extremely traumatic in nature. It is not always knowable how personal the recollection of such events will be for any individual worker.

(2) Workers' disclosures of these events happen in confidential therapeutic settings, often long before the WCB is involved, meaning at the time of disclosure, the worker is unaware of how many others may end up reading the file notes in the future.

(3) Disclosures of work-related traumatic events in professional settings contain information about clients' and patients' life events. This information also requires a level of confidentially.

Where there is much overlap between "relevant" and "personal," there is no clear distinction for the purposes of information sharing. Instead, it has been left open to a supervising agent's interpretation according to PRO 06/2017 "Authority for Disclosure":

> 15. Where there are concerns as to the sensitivity of information, staff should consult their supervisor.

This calls into question the trauma-informed training a supervisor is given to ethically navigate the disclosure of sensitive personal information in psychological injury cases. To date, this process lacks transparency and appears arbitrary. The WCB has not clearly demonstrated how information sharing under section 174 maybe be advantageous to or protective of the injured worker, nor how supervisors develop competency in navigating the overlap in relevance and sensitive personal information. It is ethically imperative that the WCB be able to acknowledge the inherent risk a disclosure under section 174 imposes on a psychologically injured worker. Developing competency here, means clearly articulating how this risk is addressed without causing harm or offense to the worker.

Endorsing the narrowest scope of information sharing in psychological injury cases should form the basis of policy development. Equally as important, is providing an inclusive, trauma-informed process to injured workers. Reviewing, redacting, and consenting to a proposed release of sensitive personal mental health information is an arduous task. It means revisiting traumatic events and risks causing further harm to the worker if adequate support is not provided. Therefore, we also recommend:

(1) The provision of psychological support for the review of a proposed disclosure where WCB seeks consent for release under section 174.

(2) Extended timelines to allow the injured worker time to access proper care and engage in reasonable emotional and mental processing.

IMPLICATIONS & FURTHER RECOMMENDATIONS

COMING FORWARD

This status quo has serious implications for how public safety personnel access support. If it were to be commonly known or accepted that the WCB releases detailed private records of mental health sessions, would workers willingly, openly disclose what ails them to professionals? Knowing this, would they come forward to the board and apply for compensation when injured? Cause for hesitation is clearly identifiable here. In cases of PTSD, hesitation is a barrier to asking for assistance that increases the risk of suicide.

RETURN TO WORK

A narrow scope of information sharing under section 174 for psychological injury cases supports the return-to-work process as well. Returning to health and full meaningful employment is the primary goal of the relationship between the worker, the employer, and the WCB. In this view, how successful is a return-to-work process likely to be if the contents of a worker's private mental health sessions are shared with their employer under potentially contentious conditions?