



WorkSafeBC Handling of Workplace Sexual Harassment Claims

Presented by

Jenn Stevens, Client Services Manager – Mental Health Adjudication,
and Ben Parkin, Director, Law and Policy,
WorkSafeBC

SHARP
WORKPLACES

Sexual Harassment Advice,
Response, and Prevention for
Workplaces

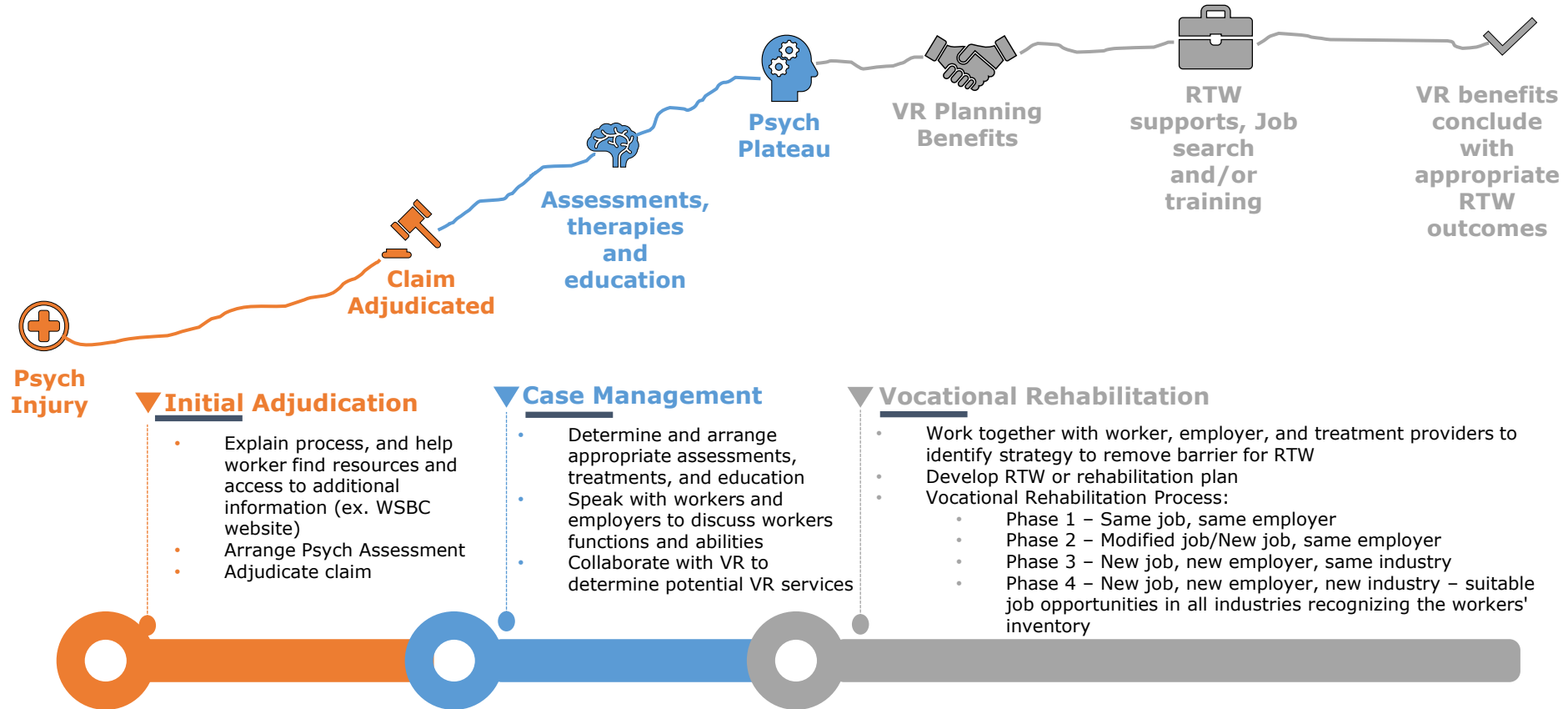
Life of a Mental Health Claim

An overview of the mental health and sensitive claims process at WorkSafe BC

January 20th, 2022

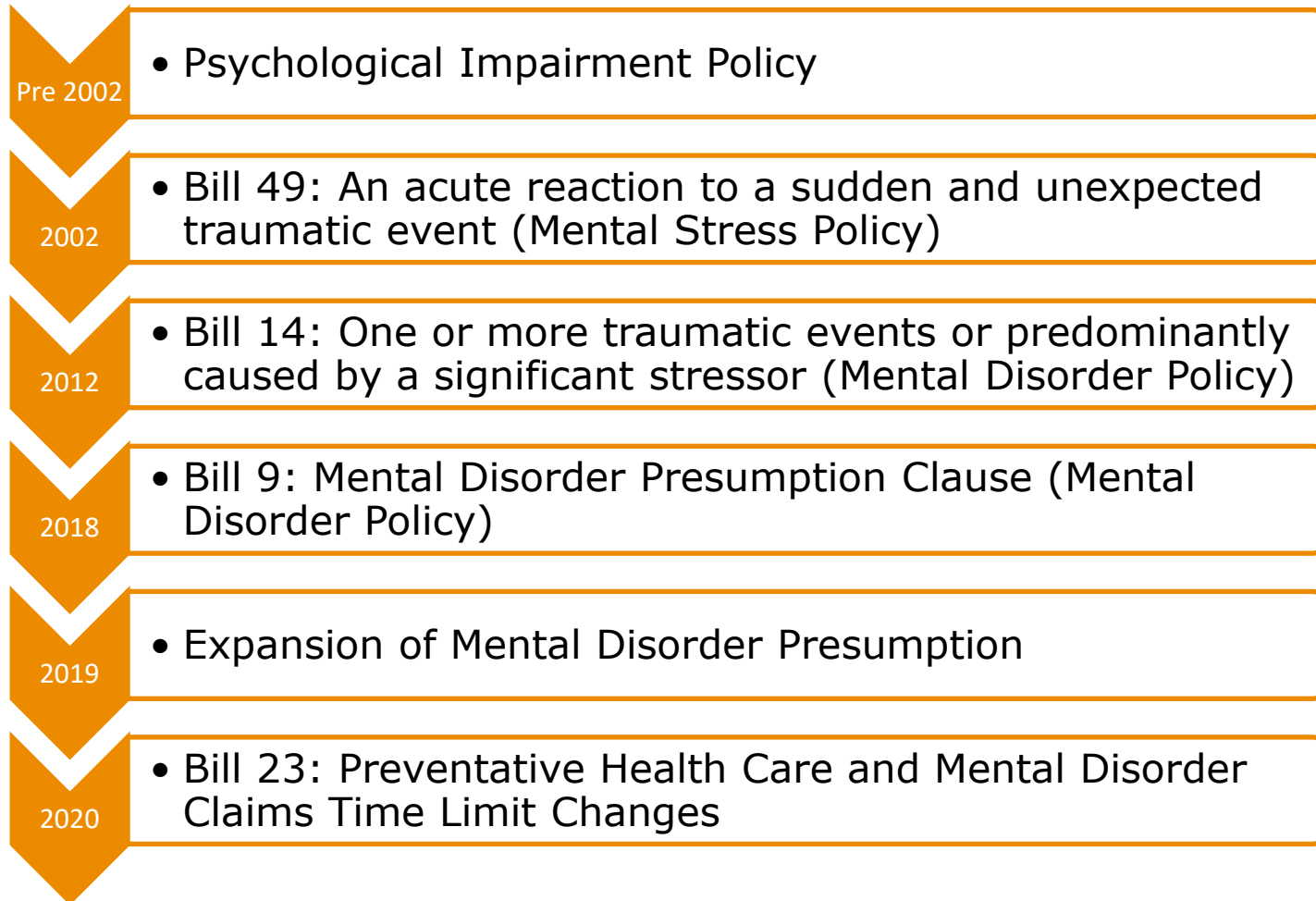
Jenn Stevens

Life of a Mental Health Claim



Mental Health

Legislation & Policy History



**Mental Health Adjudication Unit
(MHAU)**

MHA Roadmap

1. Initial Claim Review (ICR)
2. Worker and Employer Contact
3. Investigation
4. Weighing of Evidence – Part 1
5. Psychological Assessment
6. Weighing of Evidence – Part 2
7. Making the decision
8. Transfer Memo



Date of Psychological Change and Section 151 of the Act

- The date of the mental disorder is the date the worker first experiences a psychological change as a result of exposure to a work-related traumatic event or significant stressor.
- Section 151(3) sets out the one-year time frame for filing an application for compensation for a mental disorder.



Section 135 of the Act

A worker is entitled to compensation only if the mental disorder;

- a) either
 - i. is a reaction to one or more traumatic events
 - ii. is predominately caused by a significant work-related stressor, including bullying or harassment
- b) is diagnosed by a psychiatrist or psychologist
- a) is not caused by a decision of the worker's employer relating to the worker's employment

Section 135(2) of the Act - Presumption

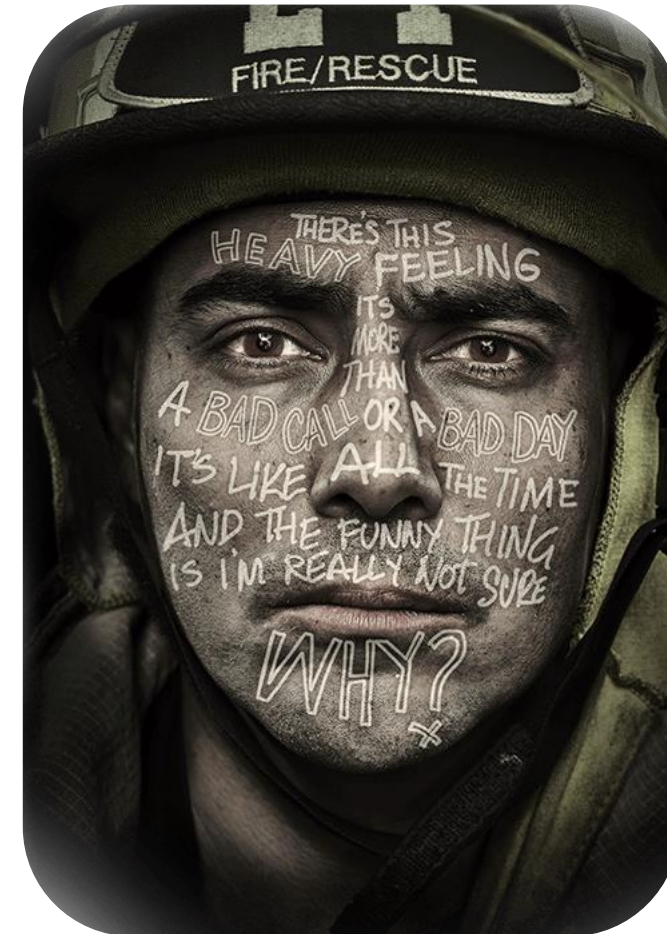
If a worker who is or has been employed in an eligible occupation:

- Firefighters, police officers, emergency medical assistants, sheriffs, correctional officers, emergency response dispatchers, health care assistants and nurses.
 - (a) is exposed to one or more traumatic events
 - (b) is diagnosed by a psychiatrist or psychologist
- No causation required, we presume it is related to work.



Examples of Traumatic Events

- Witnessing a death
- Being robbed at gun point
- Attending a gruesome MVA
- Attending a drug overdose
- Treating an aggressive psychiatric patient who approaches you with a weapon
- Witnessing inmates in a fight while being in close proximity
- Receiving a 911 call and hearing gunshots in the background



Bullying and Harassment

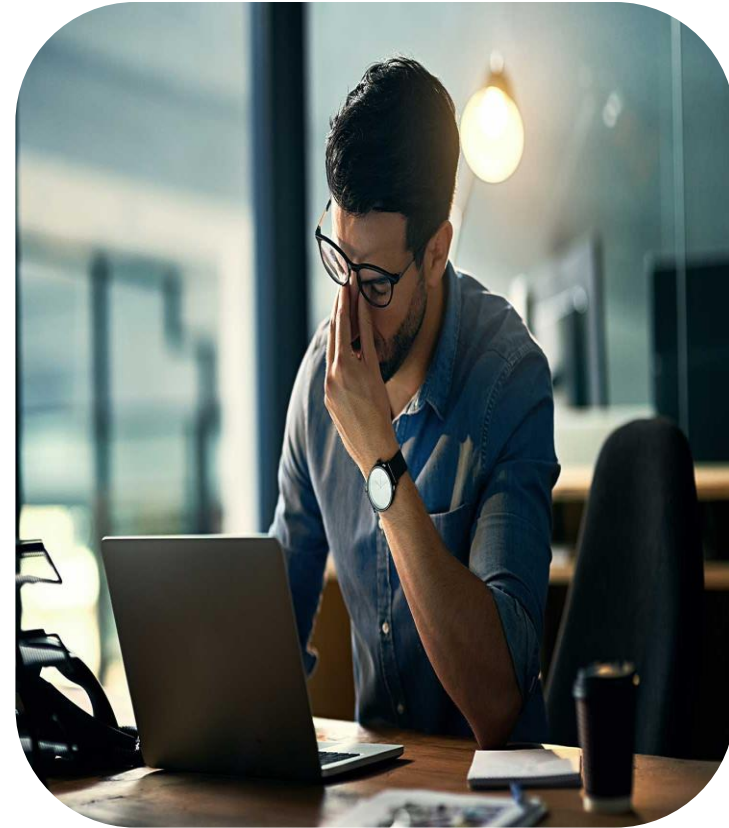
Bullying and harassment are events that are considered **threatening** or **abusive**.

- Conduct that is intended to, or should reasonably have been known would, intimidate, humiliate or degrade an individual.
- Interpersonal conflicts between the worker and their supervisors, co-workers or customers are **not** generally considered significant.



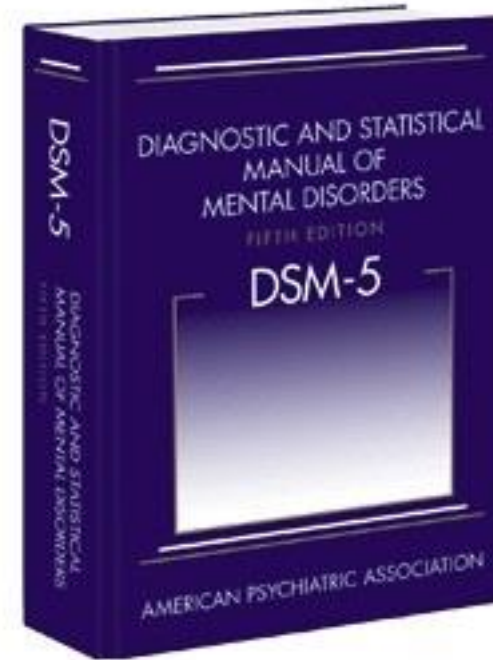
Exclusion - Decisions of the Employer

- An event can be determined to have met criteria for a significant stressor but it can be excluded if it is a decision of the employer.
- There is no entitlement to compensation if the mental disorder is caused by a decision of the worker's employer relating to the worker's employment.



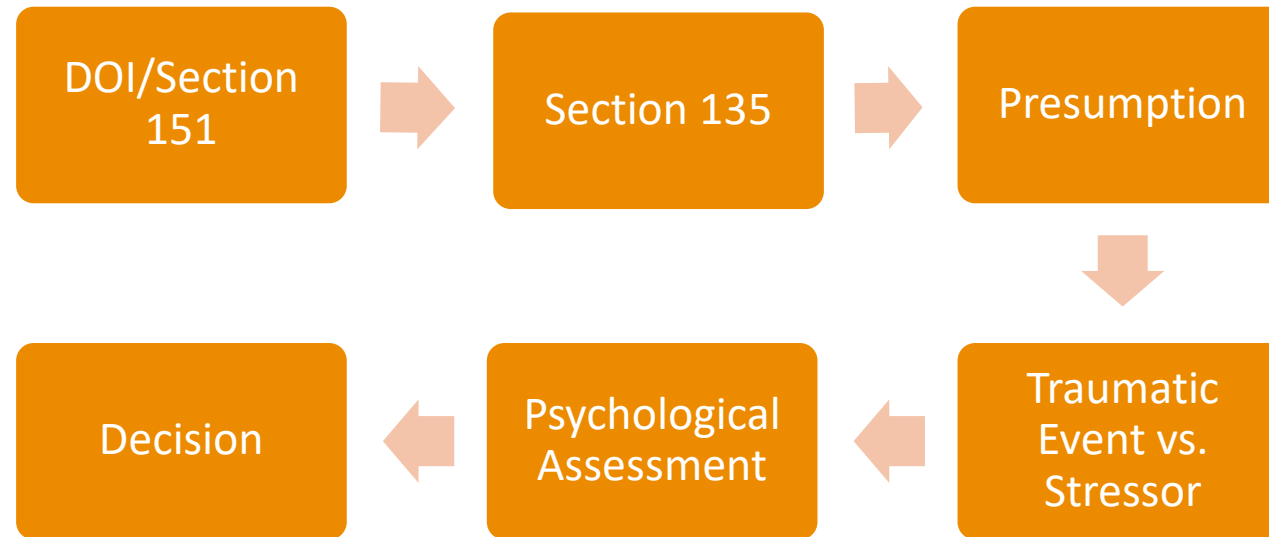
Psychological Assessment

- There are **two** types of psychological assessments used in the MHAU.
- **Brief** – is for diagnosis only, where causation does not need to be addressed.
- **Comprehensive** – speaks to causation, including predominant cause as well as diagnosis.



Mental Disorder

Recapping the Adjudicative Path



Sensitive Claims

Sensitive Claims Registration

CSR's contact the worker similar to other MH claims

Limits of confidentiality and mental health claims process explained

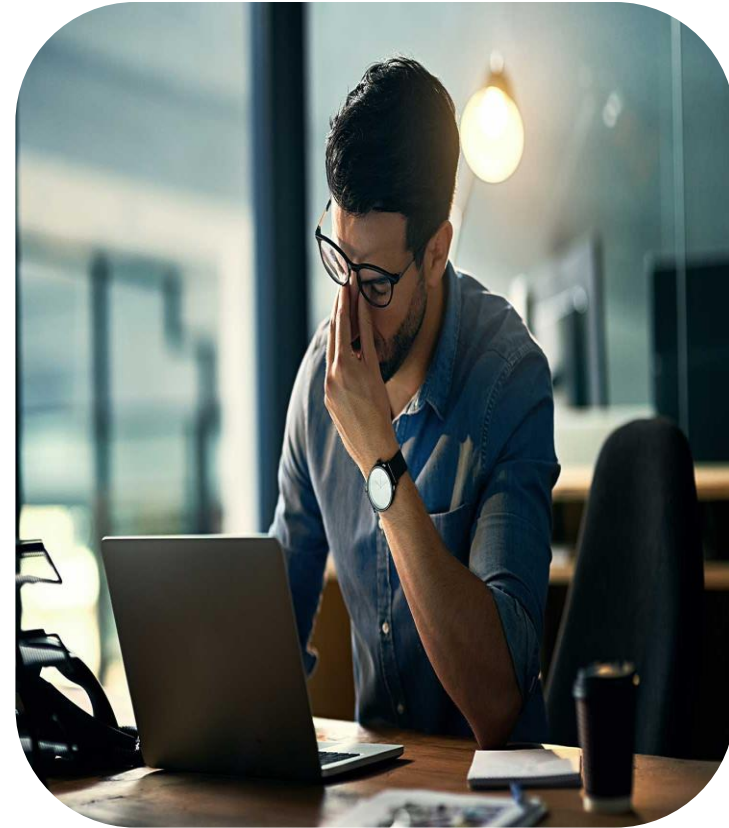
Some brief details about the work event, time loss and employer information may be gathered

No contact with employer is made



Restricted Portal Access

- When the claim is registered by the CSR, employer portal access is restricted
- If the claim is allowed, the claim owner can remove the employer portal restriction if appropriate
- If the claim is disallowed or suspended, the restrictions remain



Sensitive Claims Investigation

1. Employer's Report of Injury (F7) – sent in most cases, up to Officer's judgement
2. Determine if Employer is assailant
3. Specialized assignment of Wage Rate Officer
4. Usually require Comprehensive Psychological Assessments
5. Decision Delivery with Mental Health Specialists if required



Mental Health Claims Unit (MHCU)

Mental Health Claims Unit

- Created in 2012 the Mental Health Claims Unit is a specialized unit within Special Care Services.
 - Entitle and hold (2012-2016)
 - Entitle and route within MHCU (2016-2018)
 - Entitle in MHAU. MHCU is now recovery & RTW focused (2019-Current)
- The Mental Health Claims Unit is staffed by Case Managers, Service Coordinators and Clinical Occupational Therapists who work closely with Medical Advisors and Psychological Advisors
- Strong network of internal and external partners in health care to support recovery and return to work for clients with a mental health injury.
- Provincial model allows for consistent approach to mental health return to work and provides us the opportunity to build and strengthen relationships

Mental Health Treatment



- CIR / Supportive Counselling
- Modified RTW
- Psychological Treatment
- Occupational Trauma Response/Trauma Recovery Services
- PTSD Treatment Programs
- Concurrent Disorder Treatment Programs

Work-Focused CBT

Cognitive-Behavioural Strategies

Behavioural Activation

RTW Planning and Implementation

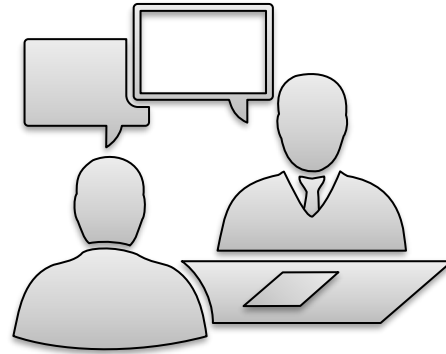
Job Site Visits

Education

GRTW Support

Exposure Therapy

What if I Disagree with the Decision?



Recap



What is a Mental Health Claim



Mental Health Claims Process



Supports and Benefits



Disagree with a Decision

Legal Process – subrogated actions arising from sensitive claims

Ben Parkin

Director – Litigation, Law and Policy

WorkSafeBC

January 20, 2022

Subrogated Actions Arising From Sensitive Claims

Board has right of action if compensation is claimed

130 (1) If a worker or dependant applies to the Board claiming compensation under the compensation provisions, neither the making of the application nor the payment of compensation under those provisions restricts or impairs any right of action against the party liable.

(2) In relation to every claim referred to in subsection (1), the Board is subrogated to the rights of the worker or dependant and may maintain an action in the name of the worker or dependant or in the name of the Board.

(3) The Board has exclusive jurisdiction to determine whether to maintain an action under this section or compromise the right of action, and the Board's decision is final and conclusive.

(4) If, by an action under subsection (2), more is recovered and collected than the amount of the compensation to which the worker or dependant would be entitled under the compensation provisions, the amount of the excess, less costs and administration charges, must be paid by the Board to the worker or dependant.

Subrogated Actions Arising From Sensitive Claims

130 (1) If a worker or dependant applies to the Board claiming compensation under the compensation provisions, neither the making of the application nor the payment of compensation under those provisions restricts or impairs any right of action against the party liable.

The tort action remains unaffected by the compensation claim – there is no reduction in tort entitlement because benefits are received.

The compensation claim is, similarly, unaffected by the tort action. The worker is entitled to benefits based on their adjudicated entitlement regardless of the success or failure of the tort action.

Workers who elect compensation get benefits right away and the tort claim remains intact which may generate excess funds.

Subrogated Actions Arising From Sensitive Claims

(2) In relation to every claim referred to in subsection (1), the Board is subrogated to the rights of the worker or dependant and may maintain an action in the name of the worker or dependant or in the name of the Board.

Once the worker has elected benefits the right to pursue the tort action passes to the Board.

We try to make workers aware of this through our pamphlet and election form.

But often workers or their counsel do not appreciate the scope of the subrogation: this is not a common law subrogation. The action passes entirely to the Board: *Partridge v. Wanek*, 1997 CanLII 3752.

Subrogated Actions Arising From Sensitive Claims

(3) The Board has exclusive jurisdiction to determine whether to maintain an action under this section or compromise the right of action, and the Board's decision is final and conclusive.

There has been litigation on this issue in the context of motor vehicle accidents - sometimes workers object to the manner in which the action is handled or proposed settlement amounts.

Courts have held that the Board is entitled to manage the action as it sees fit and to require co-operation by the worker: *Snell v. WCB* 1987 CanLII 2574; *Beveridge v. WCB* 2014 BCSC 2145 and *Public Guardian and Trustee v. WCB* 2010 BCSC 1486.

We treat the sensitive claims differently though. We do not force workers to participate. We get clear direction from them before commencing proceedings. And we allow them to stop participating if they wish.

Subrogated Actions Arising From Sensitive Claims

(4) If, by an action under subsection (2), more is recovered and collected than the amount of the compensation to which the worker or dependant would be entitled under the compensation provisions, the amount of the excess, less costs and administration charges, must be paid by the Board to the worker or dependant.

There has also been litigation regarding this provision: courts have held the worker only receives an excess after the Board's expenses have been repaid in full out of the tort recovery: *Snell*, supra.

If there is a liability split (in a motor vehicle action) or difficulty with collection (in an uninsured case such as assault) the worker may well receive no excess.

We advise workers of this reality before we commence proceedings. This can be a significant disincentive to proceeding in uninsured assault cases.

Subrogated Actions Arising From Sensitive Claims

Common Issues:

Re-election: once worker has elected benefits Board is subrogated. Worker can only “re-elect” and pursue tort action herself with consent of Board. Board will require repayment of it’s expenses.

If Board, or worker, hires outside counsel to pursue action, the legal fees and Board’s expenses must be paid before any excess is payable to worker. Board does not pay fees out of it’s interest: *Snell, Beveridge, supra*.

Health care expenses paid by Board are expressly recoverable in tort action: s. 133(1)(a) WCA. Otherwise the tort action is what it is – the court may make different awards for wage loss, future capacity, etc. than Board did in adjudicating compensation.