

Manitoba's Changes to Workers Compensation Legislation Regarding Post-Traumatic Stress Disorder: Analysis and Legislative Process

N O R A F I E N *

I. INTRODUCTION

Workers Compensation provides benefits to employees injured at work. Compensation is provided both for physical and psychological injuries, including Post-Traumatic Stress Disorder [PTSD]. In most jurisdictions, the onus is on the worker to show that their PTSD is work-related. Recently, a number of provincial governments and political parties have introduced bills to change that.

Several years ago, Alberta passed a bill that created a presumption that an emergency worker's PTSD was work-related, unless the contrary could be shown. Ontario just recently passed similar provisions. Since then, similar bills have been introduced in legislatures throughout the country. But last year, Manitoba went a step further and legislated the presumption for *all* workers covered by Workers Compensation.

Public awareness about mental illnesses like PTSD has been increasing, along with the recognition that stigma is a barrier to treatment. Political parties have presented presumption bills as a way to reduce stigma and speed access to treatment for work-related PTSD. These are of course admirable goals, so admirable in fact that the bills do not always receive much scrutiny from opposing parties. One can speculate that a political party does not want to appear unsupportive of emergency workers, who

* J.D. (2016).

are quite highly regarded by the public – certainly more so than the average politician.

Manitoba's legislature passed Bill 35, *The Workers Compensation Amendment Act (Presumption re Post-Traumatic Stress Disorder and Other Amendments)*¹ [Bill 35], into law last year. It received all party support, and sailed through first reading to Royal Assent in under a month. This paper will examine the legislative process of Bill 35, including stakeholder consultation both pre- and post- Bill 35's introduction, involvement of Manitoba's Workers Compensation Board [WCB], and the debate in the Legislative Assembly. The merits and deficits of the bill will also be examined.

Bill 35 is particularly interesting politically because a similar bill was introduced by the Opposition shortly beforehand. That bill will also be examined for its process and debate, and compared with Bill 35.

II. WORKERS COMPENSATION ACT

A. Generally

The Workers Compensation Act,² [WCA] is Manitoba's legislation for administering a system of compulsory no-fault insurance for workplace injuries.³ Benefits are provided to workers in the event of a work-related injury, illness, or death. Employers fund the system and in turn are protected from lawsuits by injured workers.⁴

The WCA covers a wide variety of employers and employees in Manitoba, in all industries except those excluded by Regulation 196/2005. Excluded industries and workers include: accounting and legal services, personal grooming and aesthetic services, elected officials, teachers, athletes, and entertainers.⁵ Covered employers and workers cannot

¹ Bill 35, *The Workers Compensation Amendment Act (Presumption re Post-Traumatic Stress Disorder and Other Amendments)*, 4th Sess, 40th Leg, Manitoba, 2015 (assented to 30 June 2015), SM 2015, c 13 [Bill 35].

² *The Worker's Compensation Act*, CCSM c W200 [WCA].

³ WCB, "Overview of the Workers Compensation System", (2014) online: WCB <<http://www.wcb.mb.ca/overview>>.

⁴ *Ibid.*

⁵ Man Reg 196/2005.

contract out of the WCA.⁶ The legislation sets out the compensation scheme, exceptions, required notices, benefits, calculation of compensation, duties of the Board, and administrative penalties.

Compensation is provided when a “...personal injury by **accident** arising out of and in the course of the employment is caused to a worker...”.⁷ The term “accident” is defined as follows:

‘accident’ means a chance event occasioned by a physical or natural cause; and includes

(a) a wilful and intentional act that is not the act of the worker,

(b) any

(i) event arising out of, and in the course of, employment, or

(ii) thing that is done and the doing of which arises out of, and in the course of, employment, and

(c) an **occupational disease**,

and as a result of which a worker is injured⁸

None of the above was altered by Bill 35.

B. Pre Bill 35

Following from part (c) of the definition of “accident” above, the term “occupational disease” was defined as follows:

‘occupational disease’ means a disease arising out of and in the course of employment and resulting from causes and conditions

(a) peculiar to or characteristic of a particular trade or occupation; or

(b) peculiar to the particular employment;

but does not include

(c) an ordinary disease of life; and

(d) stress, other than an acute reaction to a traumatic event⁹

Therefore, although PTSD was not specifically referenced in the WCA, part (d) of the “occupational disease” definition allowed PTSD to be compensated when it arose as an acute reaction to a traumatic event out of and in the course of employment.

⁶ WCA, *supra* note 2, s 15.

⁷ *Ibid*, s 4(1) [emphasis added].

⁸ *Ibid*, s 1(1) [emphasis added].

⁹ *The Worker’s Compensation Act*, CCSM c W200, s 1(1) as it appeared on 29 June 2015 (prior to the Bill 35, SM 201, c 13 amendment).

C. Presumptions Are Nothing New

Both before and after Bill 35, the WCA contained provisions that certain injuries to certain workers are presumed to be either an occupational disease, or to arise out of and in the course of employment.

If a firefighter suffers a listed injury, that injury “must be presumed to be an occupational disease the dominant cause of which is the employment as a firefighter..., unless the contrary is proven.”¹⁰ The listed injuries are all specific types of cancer.¹¹ A regulation sets out the minimum period of employment required.

There is also a presumption that if a firefighter “suffers an injury to the heart within 24 hours after attendance at an emergency response, the injury must be presumed to be an accident arising out of and in the course of the employment, unless the contrary is proven.”¹²

The initial provision regarding the cancer presumption for firefighters was added in 2002,¹³ and the provision for heart injury in 2005.¹⁴ Additionally, there is the following general presumption for all workers and all accidents:

Where the accident arises out of the employment, unless the contrary is proven, it shall be presumed that it occurred in the course of the employment; and, where the accident occurs in the course of the employment, unless the contrary is proven, it shall be presumed that it arose out of the employment.¹⁵

¹⁰ WCA, *supra* note 2, s 4(5.2).

¹¹ *Ibid.*

¹² *Ibid.*, s 4(5.6).

¹³ Bill 5, *The Workers Compensation Amendment Act*, 3rd Sess, 37th Leg, Manitoba, 2002 (assented to 23 May 2002), SM 2002, c 2, s 2 [Cancer Presumption Bill].

¹⁴ Bill 25, *The Workers Compensation Amendment Act*, 3rd Sess, 38th Leg, Manitoba, 2005 (assented to 9 June 2005), SM 2005, c 17, s 6(2).

¹⁵ WCA, *supra* note 2, s 4(5).

III. SUMMARY OF THE PROPOSED LEGISLATION AMENDING THE WCA

A. Bill 35

1. PTSD

Under Bill 35, PTSD is presumed to be caused by a worker's employment. The bill achieves this result by amending the definition section of the WCA and by adding two new sub-sections about the presumption. The presumption is not limited to certain occupations.

The definition of "occupational disease" in s. 1(1) is amended to the following (amendments in bold):

'occupational disease' means a disease arising out of and in the course of employment and resulting from causes and conditions

- (a) peculiar to or characteristic of a particular trade or occupation; or
- (b) peculiar to the particular employment; or
- (b.1) that trigger post-traumatic stress disorder;**

but does not include

- (c) an ordinary disease of life; and
- (d) stress, other than an acute reaction to a traumatic event¹⁶

The following presumption is added as s. 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* 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.¹⁷

The newly added s. 4(5.9) states that this presumption will apply to workers diagnosed with PTSD on or after the day the amendments come into force (here, a day fixed by proclamation,¹⁸ January 1, 2016). Thus the new presumption for PTSD is not retroactive to previous diagnoses.

¹⁶ Bill 35, *supra* note 1, s 2 [emphasis added].

¹⁷ *Ibid*, s 3.

¹⁸ *The Workers Compensation Amendment Act (Presumption re Post-Traumatic Stress Disorder and Other Amendments)*, SM 2015, c 13, Proclamation, proclaimed in force 1 January

Definitions of “Diagnostic and Statistical Manual of Mental Disorders” [Manual], “post-traumatic stress disorder”, and “psychologist”, were added to s. 1(1) to support the amendments.¹⁹

2. *Other Provisions*

Bill 35 adds a penalty for failure to post certain notices as required by the WCB.²⁰ It also extends the filing dates for the WCB’s annual reports and five year plan, as well as for the appeal commission’s annual report.²¹ These provisions will not be discussed further.

B. Bill 205

One of the interesting aspects of Bill 35’s legislative process is that a similar bill, Bill 205, *The Workers Compensation Amendment Act (Presumption re Post-Traumatic Stress Disorder)*,²² was introduced by a member of the opposition Progressive Conservatives [PC] earlier in the same session of the Legislature.

Bill 205 sought to amend the WCA to include a presumption that PTSD of an emergency response worker was an occupational disease caused by their employment, unless proven otherwise.²³ Bill 205 defined “emergency response worker” to be firefighters, emergency medical response technicians, and police officers.²⁴ The bill also added a definition of PTSD.²⁵

2016.

¹⁹ Bill 35, *supra* note 1, s 2.

²⁰ *Ibid.*, ss 4, 8.

²¹ *Ibid.*, ss 5–7.

²² Bill 205, *The Workers Compensation Amendment Act (Presumption re Post-Traumatic Stress Disorder)*, 4th Sess, 40th Leg, Manitoba, 2014 [Bill 205].

²³ *Ibid.*, s 2.

²⁴ *Ibid.*

²⁵ *Ibid.*

C. Direct Comparison of Key Provisions

Bill 35	Bill 205
<p>"post-traumatic stress disorder" means Posttraumatic Stress Disorder as that condition is described in the Diagnostic and Statistical Manual of Mental Disorders</p>	<p>"post-traumatic stress disorder" means an anxiety disorder that develops after exposure to a traumatic event or experience with symptoms that may include flashbacks, nightmares and intense feelings of fear or horror</p>
<p>If a worker</p> <ul style="list-style-type: none"> (a) is exposed to a traumatic event or events of a type specified in the Diagnostic and Statistical Manual of Mental Disorders as a trigger for post-traumatic stress disorder; and (b) is diagnosed with post-traumatic stress disorder by a physician or psychologist; <p>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</p>	<p>If a worker</p> <p>who is or has been an emergency response worker suffers from post-traumatic stress disorder,</p> <p>the disorder must be presumed to be an occupational disease the dominant cause of which is the employment as an emergency response worker, unless the contrary is proven</p>

In contrast to Bill 205, Bill 35 leaves the definition and diagnosis of PTSD up to the Manual. However, the definition may change with the Manual, so the Legislature will want to keep up to date in case of radical changes. The definition given by Bill 35 of "Diagnostic and Statistical Manual of Mental Disorders" is "the most recent edition of the Diagnostic and Statistical Manual of Mental Disorders published by the American Psychiatric Association".²⁶

²⁶ Bill 35, *supra* note 1, s 2(b) [emphasis added].

Bill 205's definition classifies PTSD as an anxiety disorder, when the Manual had actually been revised in 2013 to remove PTSD from the anxiety disorder chapter.²⁷

IV. LEGISLATIVE DEBATE

The 4th Session of the 40th Legislature ran from November 20, 2014 to November 5, 2015.²⁸

A. Bill 205

We will first walk through the legislative debate surrounding Bill 205 in order to provide context for some of the comments of the Members of the Legislative Assembly [MLAs or Members] during the Bill 35 debate which occurred later.

1. *First Reading*²⁹

Bill 205 had its first reading on December 4, 2014. Myrna Driedger (PC MLA) moved the bill. It was seconded by Mr. Goertzen (PC MLA). Mrs. Driedger briefly described the bill and the Assembly then adopted the motion for first reading.

2. *Second Reading*³⁰

The second reading occurred months later, over two different dates: May 21, 2015 and June 2, 2015.

On May 21, both PC and NDP Members spoke to the bill. Many discussed personal incidents of trauma, family and friends who were emergency response workers, and statistics about PTSD. They spoke of the

²⁷ American Psychiatric Association, "Posttraumatic Stress Disorder" (2013), online: American Psychiatric Association DSM-5 Development, online: <<http://www.dsm5.org/Documents/PTSD%20Fact%20Sheet.pdf>> [APA PTSD].

²⁸ The Legislative Assembly of Manitoba, 4th Sess, 40th Leg, online: <<http://web2.gov.mb.ca/bills/40-4/>>.

²⁹ Manitoba, Legislative Assembly, *Hansard*, 4th Sess, 40th Leg, No 11B (4 December 2014) at 367-368.

³⁰ Manitoba, Legislative Assembly, *Hansard*, 4th Sess, 40th Leg, No 34A (21 May 2015) at 969-978; Manitoba, Legislative Assembly, *Hansard*, 4th Sess, 40th Leg No 40A (2 June 2015) at 1363-1368 [*Hansard* 2 June 2015].

seriousness of PTSD, suicide rates, and the importance of amending the WCA to bring in a presumption that a worker's PTSD is an occupational disease caused by employment. Members agreed that this was not a partisan issue and that it should not matter who introduced such legislation.

The NDP explained that they were already planning to bring in broader legislation this session, because workers in every occupation can suffer from PTSD.³¹ The PCs suggested that the NDP amend Bill 205 in order to make it expedient.³²

On June 2, three NDP Members spoke on the bill. The tone was different from May 21. Dave Gaudreau (NDP MLA) led off by saying while the bill is a good idea, he had to point out that the PCs always vote against NDP worker-safety legislation. Mr. Gaudreau also attacked the PC's record from when they were in government, as well as the PC voting record, suggested hypocrisy, and touted NDP accomplishments in the area of safety.³³ The second speaker, Mr. Clarence Pettersen (NDP MLA) said more of the same and recounted a personal anecdote.³⁴

The third speaker, the Honourable Melanie Wight (NDP MLA and Minister of Children and Youth Opportunities) stated that only about 10% of the PTSD claims come from emergency workers, so to only cover emergency workers with this presumption would be "mistaken".³⁵ She also told a personal anecdote.

This was as far as Bill 205 travelled in the legislative process.

B. Bill 35

Bill 35 went from first reading on June 8, 2015 to Royal Assent on June 30, 2015.

³¹ *Ibid* (21 May) at 971.

³² *Ibid* (21 May) at 973.

³³ *Hansard* 2 June 2015, *supra* note 30 at 1363-1365 (Dave Gaudreau).

³⁴ *Ibid* at 1365-1367 (Clarence Pattersen).

³⁵ *Ibid* at 1367 (Hon Melanie Wight).

*1. First Reading*³⁶

Bill 35 had its first reading on June 8, 2015. It was introduced by the Honourable Erna Braun (NDP MLA). Ms. Braun is the Minister of Labour and Immigration, and also the Minister charged with the administration of the WCA. The bill was seconded by Sharon Blady (NDP MLA and Minister of Health). Ms. Braun briefly summarized the bill, and it was adopted by the Assembly for first reading.

*2. Second Reading*³⁷

Bill 35 had its second reading on June 16, 2015. Ms. Braun moved that the bill be read a second time and be referred to a committee. It was seconded by the Honourable Dave Chomiak (NDP MLA and Minister of Mineral Resources).

Ms. Braun again described the bill and summarized the reasoning behind it:

While PTSD claims are currently compensable under The Workers Compensation Act, the proposed presumption would enhance timely adjudication and access to treatment. It would help ensure that people with work-related PTSD seek the supports and services they need. It would be a step towards reducing the stigma attached to mental illness.³⁸

Reiterating what was said by her NDP colleague during the second reading of Bill 205, she stated that 90% of PTSD claims are from occupations other than emergency workers.³⁹

Dennis Smook (PC MLA) talked about PTSD, but also gave some examples of bills that the NDP “spoke down” like they had Bill 205.⁴⁰ He said that the NDP could have amended Bill 205, but that they instead wanted to “grandstand”, and that the day they announced Bill 35 they “had hundreds of people out in front of the Legislature ... making this a big deal”.⁴¹ Myrna Driedger (PC MLA), who introduced Bill 205,

³⁶ Manitoba, Legislative Assembly, *Hansard*, 4th Sess, 40th Leg, No 43 (8 June 2015) at 1612.

³⁷ Manitoba, Legislative Assembly, *Hansard*, 4th Sess, 40th Leg, No 47 (16 June 2015) at 1918–1924.

³⁸ *Ibid* at 1919 (Hon Erna Braun).

³⁹ *Ibid*.

⁴⁰ *Ibid* at 1920 (Dennis Smook).

⁴¹ *Ibid*.

questioned the NDP's motivation in not amending Bill 205 but instead bringing in their own bill, but she was still supportive of Bill 35.⁴²

The Honourable Jon Gerrard (Liberal MLA) also spoke to Bill 35. He discussed some of the science and history of PTSD, and encouraged an evidence and science-based approach to treatment. He also noted that people who do not work, such as children, or those suffering from PTSD from instances that are not work-related, need help too.⁴³ He was supportive of the bill.

The Honourable Sharon Blady (NDP MLA and Minister of Health) also spoke in favour of the bill.⁴⁴

*3. Standing Committee on Social and Economic Development*⁴⁵

At the committee stage, there was one written submission from the United Fire Fighters of Winnipeg, and seven presenters, representing the following organizations: Manitoba Government and General Employees' Union, Manitoba Federation of Labour, Manitoba Association of Fire Chiefs, Manitoba Nurses Union, Winnipeg Chamber of Commerce, United Food and Commercial Workers Local 832, Paramedic Association of Manitoba.⁴⁶

All were supportive except the Winnipeg Chamber of Commerce.⁴⁷ The Nurses Union suggested a number of amendments that would broaden the legislation.⁴⁸

Each clause of Bill 35 was passed.⁴⁹

⁴² *Ibid* (Myrna Driedger).

⁴³ *Ibid* at 1923 (Hon Jon Gerrard).

⁴⁴ *Ibid* at 1993-1924 (Hon Sharon Blady).

⁴⁵ Manitoba, Legislative Assembly, *Standing Committee on Social and Economic Development*, 4th Sess, 40th Leg, No 3 (18 June 2015) [Standing Committee].

⁴⁶ *Ibid*.

⁴⁷ *Ibid* at 70-71.

⁴⁸ *Ibid* at 66-70.

⁴⁹ *Ibid* at 82.

4. *Attempted Report Stage Amendment*⁵⁰

Just prior to Bill 35's third reading, PC MLAs attempted to make a report stage amendment. The amendment proposed to add the following to the bill:

Within three months after the end of each year, the board must prepare and submit to the minister a report that sets out

- (a) the number of cases in that year in which a worker has made a claim in respect of posttraumatic stress disorder; and
- (b) the number of claims in that year in which the board has applied the presumption in subsection (5.8) and awarded compensation on the basis that post-traumatic stress disorder is an occupational disease.⁵¹

The amendment also called for the minister to table a copy of the report as proposed in the Legislative Assembly within a certain time period.⁵²

Mrs. Driedger (PC MLA), who had moved the amendment, explained that she was now aware that there had not been sufficient consultation regarding the bill in the community and that keeping track of claims would answer some of the questions and concerns.⁵³ Mr. Smook (PC MLA) expressed a similar opinion.⁵⁴

Ms. Braun (NDP MLA) stated that she could not support the amendment because it singled out PTSD and would be unhelpful in destigmatizing PTSD. She noted that other presumptions for cancers and heart injuries do not have a reporting requirement.⁵⁵

The amendment failed to pass.⁵⁶

5. *Third Reading*⁵⁷

Ms. Braun spoke to the bill once more. She touted it as the first of its kind in Canada, and asserted that the bill would help to reduce stigma

⁵⁰ Manitoba, Legislative Assembly, *Hansard*, 4th Sess, 40th Leg, No 55 (30 June 2015) at 2286–2287 [Report Stage (*Hansard*)].

⁵¹ *Ibid* at 286.

⁵² *Ibid*.

⁵³ *Ibid* at 2286–2287 (Myrna Driedger).

⁵⁴ *Ibid* at 2287 (Dennis Smook).

⁵⁵ *Ibid* at 2287 (Hon Erna Braun).

⁵⁶ *Ibid*.

⁵⁷ *Ibid* at 2287–2289.

around PTSD “which is a barrier for workers coming to seek the supports they need.”⁵⁸

Mr. Gerrard (Liberal MLA) spoke in favour of the bill, saying that he had been convinced by the presentations at committee that covering all workers was the best way to go. He advised that the legislation should be monitored on an ongoing basis, but he did not foresee “runaway costs”.⁵⁹

Mr. Smook spoke in favour of the bill, but expressed disappointment that the report stage amendment was not passed.⁶⁰

The bill then passed third reading.⁶¹

6. Royal Assent⁶²

Bill 35 received Royal Assent on June 30, 2015.

V. OPINIONS: DOES THE SOLUTION FIT THE PROBLEM?

A. The PTSD Problem

The *Diagnostic and Statistical Manual of Mental Disorders* classifies PTSD as a trauma and stressor-related disorder.⁶³ PTSD “is a psychological reaction that can manifest itself after a traumatic event and which has been present for at least one month.”⁶⁴ Symptoms include “[c]ontinually reliving the traumatic event during the day or at night”, “[a]voidance - conscious or involuntary - of any trauma reminder”, and “[h]yperarousal in the absence of any imminent risk.”⁶⁵

While much research has been conducted on PTSD occurrence in military personnel and first responders, there are fewer available statistics

⁵⁸ *Ibid* at 2288.

⁵⁹ *Ibid* (Hon Jon Gerrard).

⁶⁰ *Ibid* at 2289 (Dennis Smook).

⁶¹ *Ibid*.

⁶² *Ibid* at 2298-2299.

⁶³ APA PTSD, *supra* note 27.

⁶⁴ Canadian Psychological Association, “Simple Facts about Traumatic Stress and PTSD” (2016), online: Canadian Psychological Association <<http://www.cpa.ca/aboutcpa/cpasections/traumaticstress/traumaticstressbasicinformation>>.

⁶⁵ *Ibid*.

on PTSD as it relates to other occupations. In general, lifetime prevalence of PTSD is approximately 7-12 percent.⁶⁶

There is no question that PTSD is a problem, that the disorder can have tragic consequences if left untreated, or that there is stigma associated with mental illness.

According to a report by the Mood Disorders Society of Canada “the largest problem hindering effective treatment of PTSD is the societal stigma surrounding the disorder.”⁶⁷ The report also comments that “...many healthcare providers, including physicians, have stigmatizing attitudes towards patients presenting with possible mental health problems including PTSD.”⁶⁸

While stigma can be associated with PTSD arising out of any circumstances, work-related PTSD presents some unique issues. It has been noted that “[t]rauma occurring in the workplace ... may be distinct from trauma in other settings due to the complicating factors of return to work, employer liability and worker compensation [footnotes omitted].”⁶⁹ One study found that a “significant proportion of individuals who experience work-related PTSD” were not able to return to work, “even in the absence of significant coexisting physical injury”.⁷⁰ Many of the

⁶⁶ Statistics Canada, “Health state descriptions for Canadians, Section B – Anxiety Disorders”, (27 November 2015), online: Statistics Canada <<http://www.statcan.gc.ca/pub/82-619-m/2012004/sections/sectionb-eng.htm#a6>>; Mood Disorders Society of Canada, “Post Traumatic Stress Disorder (PTSD) Facts”, online: Mood Disorders Society of Canada: <http://www.mooddisorderscanada.ca/documents/Advocacy/PTSD_Backgrounder_EN.pdf> at 2.

⁶⁷ Mood Disorders Society of Canada, “Post Traumatic Stress Disorder: Out of Sight, Not out of Mind”, (March 2012) online: Mood Disorders Society of Canada <http://www.mooddisorderscanada.ca/documents/Advocacy/PTSD_Report_EN.pdf> at 3.

⁶⁸ *Ibid* at 5.

⁶⁹ J. Hensel et al., “A descriptive study of a specialized worker's psychological trauma program” (December 2010) 60:8 *Occupational Medicine* 654 at 654.

⁷⁰ Heather A. MacDonald et al., “Posttraumatic Stress Disorder (PTSD) in the Workplace: A Descriptive Study of Workers Experiencing PTSD Resulting From Work Injury” (June 2003) 13:2 *J of Occupational Rehabilitation* 63 at 74.

employees who did return to work did not return to their previous employer.⁷¹

The NDP Government was undoubtedly hoping that Bill 35 would help combat some of these problems. The Government announced that the presumption would make it “much easier to access supports, treatment and compensation.”⁷² These are laudable goals, but does the presumption achieve them?

In the legislative debates, all Members discussed the high rates of PTSD and its devastating consequences, including suicide. However, it was not precisely discussed that there were any issues with the old system, where a worker had to prove their PTSD was an occupational disease caused by their employment. No one brought up that this may be difficult to prove, or that workers were not seeking treatment because they bore the onus.

B. Public Opinion and Media

Media coverage was largely positive as many of the unions and other stakeholders representing employees that were interviewed by the media spoke in favour of the legislation. It was hailed as the first in Canada.⁷³

Some business and employer stakeholders, such as the Canadian Federation of Independent Business [CFIB], provided more critical commentary in media interviews. The CFIB’s spokesperson said that the presumption could lead to a spike in claims and increased employer premiums, and that the financial costs had not been studied.⁷⁴ Given the difficulty with appearing to be unsupportive of attempts to combat mental illness, one could assume that criticisms were somewhat tempered.

⁷¹ *Ibid.*

⁷² Government of Manitoba, News Release, “Province Introduces Groundbreaking First-in-Canada Presumptive Post-Traumatic Stress Disorder Legislation” (8 June 2015), online: <<http://news.gov.mb.ca/news/index.html?archive=&item=35114>>.

⁷³ “Manitoba first in country to offer PTSD coverage to all workers”, *CBC News* (08 June 2015), online: CBC <<http://www.cbc.ca/news/canada/manitoba/manitoba-first-in-country-to-offer-ptsd-coverage-to-all-workers-1.3104409>>.

⁷⁴ *Ibid.*

C. Stakeholder Opinions

Prior to the introduction of Bill 35, the WCB put out a list of specific questions seeking feedback on a possible PTSD presumption. This Stakeholder Consultation Document⁷⁵ was provided to 55 stakeholders and experts, as well as posted on the WCB website from February 23, 2015 to May 1, 2015.⁷⁶

One of the questions posed was whether a presumption was “an appropriate method by which to improve the timeliness and consistency of adjudication in respect of claims based on PTSD”,⁷⁷ which clues us into the goals of Bill 35.

From the feedback, the WCB created a Report on Consultations document [Report].⁷⁸ “Overall, labour organizations and workers expressed support for presumptive legislation for PTSD”, while “employer organizations and employers were generally opposed to a PTSD presumption”.⁷⁹

The following table was compiled by surveying the 29 submissions posted on the WCB website:⁸⁰

⁷⁵ WCB, “Stakeholder Consultation Document: Amending the Workers Compensation Act to Provide Presumptive Coverage for Post-Traumatic Stress Disorder” (10 February 2015), online: WCB <<http://www.wcb.mb.ca/sites/default/files/files/Consultation%20Paper%20PTSD%20Feb%2010%202015.pdf>> [SCD].

⁷⁶ WCB, “Report on Consultations: Amending the Workers Compensation Act to Provide Presumptive Coverage for Post-Traumatic Stress Disorder” (5 June 2015) online: WCB <<https://www.wcb.mb.ca/sites/default/files/files/PTSD%20CONSULTATION%20REPORT%20June%202015.pdf>> at 2 [Report].

⁷⁷ *Ibid.*

⁷⁸ *Ibid.*

⁷⁹ *Ibid* at 3–4.

⁸⁰ Links to each submission can be found here: Workers Compensation Board of Manitoba, “Stakeholder Submissions Regarding WCB Coverage for Post-Traumatic Stress Disorder”, online: <<https://www.wcb.mb.ca/stakeholder-submissions-regarding-wcb-coverage-for-post-traumatic-stress-disorder>>.

Stakeholder	Support Presumption for All Workers	Support Presumption for Only Some Workers	Do Not Support Presumption
Canadian National Railway Company and Canadian Pacific			X
City of Brandon			X
City of Winnipeg			X
Compass Group Canada			X
Diagnostic Services Manitoba			X
Individual Submission #1	X		
Klinik Community Health Centre	X		
Manitoba Association of Health Care Professionals	X		
Manitoba Employers Council			X
Manitoba Federation of Labour	X		
Manitoba Government and General Employees' Union	X		
Manitoba Hydro			X
Manitoba Liquor & Lotteries			X
Manitoba Nurses Union		X	
Manitoba Psychological Society	X		
Northern Health Region			X

Stakeholder	Support Presumption for All Workers	Support Presumption for Only Some Workers	Do Not Support Presumption
Paramedic Association of Manitoba		X	
Prairie Mountain Health			X
Public Service Alliance of Canada	X		
Rycom Solutions Group		X	
Southern Health			X
Unifor	X		
Union of Canadian Correctional Officers	X		
United Fire Fighters of Winnipeg		X	
United Food & Commercial Workers Union - Local 832	X		
VIA Rail Canada			X
Winnipeg Chamber of Commerce			X
Winnipeg Police Association		X	
Winnipeg Regional Health Authority			X

VI. SIMILAR LEGISLATION IN OTHER JURISDICTIONS

It seems that many governments and political parties (and not just labour-aligned parties), think that presumptive PTSD legislation is good legislation. Taking the more cynical view, parties may at least see it as a way of attracting votes.

In 2012, Alberta's Progressive Conservative government introduced and passed legislation to bring in the PTSD presumption for first responders.⁸¹ In Alberta there were rallies held calling for the expansion of presumptive coverage to other (though not all) occupations.⁸²

Ontario passed a bill similar to Alberta's in April 2016.⁸³ That bill was introduced by the governing Liberals.

New Brunswick, under a Liberal government, brought in a PTSD presumption for emergency responders in a bill which received Royal Assent in June of 2016.⁸⁴

A PTSD presumption for emergency response workers was announced as a campaign promise by the Progressive Conservatives in Newfoundland and Labrador's 2015 election,⁸⁵ but the Liberals won the election.

In 2014, a private member's bill was introduced in Nova Scotia. It made it to second reading debate.⁸⁶ It covered emergency responders but had a definition that was broader - including Correctional Service workers, agents with Children and Family Services, nurses, and social workers.⁸⁷

In 2015, a private member's bill in the Yukon was introduced,⁸⁸ as was one in British Columbia in 2016.⁸⁹ Both have only reached first reading so far and apply to first responders.

⁸¹ Bill 1, *Workers' Compensation Amendment Act*, 1st Sess, 28th Leg, Alberta, 2012 (assented to 10 December 2012), SA 2012 c8.

⁸² "Alberta asked to expand PTSD coverage under new bill", *CBC News* (12 December 2012), online: CBC <<http://www.cbc.ca/news/canada/edmonton/alberta-asked-to-expand-ptsd-coverage-under-new-bill-1.1284219>>.

⁸³ Bill 163, *Supporting Ontario's First Responders Act (Posttraumatic Stress Disorder)*, 1st Sess, 41st Parl, Ontario, 2016 (assented to 6 April 2016), SO 2016 C4.

⁸⁴ Bill 39, *An Act to Amend the Workers' Compensation Act*, 2nd Sess, 58th Leg, New Brunswick, (assented to 28 June 2016).

⁸⁵ Progressive Conservative Party of Newfoundland and Labrador, News Release, "Care for Firefighters, Emergency Responders", (16 November 2015) online: <<https://www.pcparty.nl.ca/article/201511161/>>.

⁸⁶ Bill 11, *An Act to Amend Chapter 10 of the Acts of 1994-95, the Workers' Compensation Act*, 2nd Sess, 62nd Leg, Nova Scotia, 2014.

⁸⁷ *Ibid.*

⁸⁸ Bill 106, *An Act to Amend the Workers' Compensation Act, with Respect to Post-Traumatic Stress Disorder*, 1st Sess, 33rd Leg, Yukon, 2015.

⁸⁹ Bill M203, *Workers Compensation Amendment Act*, 5th Sess, 40th Parl, British

A private member's bill from an NDP MLA in Saskatchewan would apply a PTSD presumption to all workers,⁹⁰ like in Manitoba. This bill, introduced in June 2016, has passed only first reading.

VII. MERITS & DEFICITS OF BILL 35 & SOME ALTERNATIVE SOLUTIONS

A. Merits and Praise

In supporting the introduction of the presumption, labour organizations commonly expressed that removing the onus of proof from the worker would encourage more workers to make a claim and that the presumption would get a claim accepted more quickly, ensuring workers could get treatment faster.⁹¹ Both politicians and stakeholders were hopeful that the presumption would help reduce the stigma of mental illness as well.⁹²

The WCB explained that the presumption was being considered because, while PTSD was already covered by the WCB, "it is sometimes difficult to establish a causal link between workplace incidents and PTSD which can result in delay and inconsistency in adjudication. A presumption would speed up claim adjudication providing quicker access to treatment."⁹³ The same document also said that a presumption would help reduce the stigma associated with mental illnesses.⁹⁴

Many of the stakeholders who responded agreed with this, expressing that a presumption either for some, or all workers would help with timeliness, consistency, and result in better treatment for PTSD-affected workers.⁹⁵ The stakeholders in favour of the presumption were largely

Columbia, 2016.

⁹⁰ Bill 601, *An Act to amend The Workers' Compensation Act, 2013 to provide protection for workers suffering post-traumatic stress disorder*, 1st Sess, 28th Leg, Saskatchewan, 2016.

⁹¹ Report, *supra* note 76 at 3.

⁹² *Ibid.*

⁹³ SCD, *supra* note 75 at 1.

⁹⁴ *Ibid.*

⁹⁵ For example, see stakeholder submissions from: Manitoba Federation of Labour at 1, Manitoba Government and General Employees' Union at 2, Manitoba Nurses Union at 1, United Food & Commercial Workers Union - Local 832 at 3, Winnipeg Police

those representing employees, and many based their opinion on their experiences dealing with PTSD claims.⁹⁶

Though one criticism may be that Bill 35 means that workers suffering from work-related PTSD are now treated better than workers suffering from work-related physical injuries, the case of *Plesner v British Columbia Hydro and Power Authority*⁹⁷ suggests that it may put them on equal footing. In *Plesner*, a Hydro employee was diagnosed with PTSD and sought compensation under BC's Workers Compensation legislation. The court found that the requirement of a traumatic event, when read with the corresponding Workers Compensation policy document, breached s. 15(1) of the *Charter of Rights and Freedoms* because it discriminated between workers with different types of illness or injury.⁹⁸ The reasoning for this was that the traumatic event requirement meant that workers suffering from PTSD or other purely mental injuries had to meet a higher bar than those with purely physical injuries.⁹⁹ In order to receive compensation for mental stress under the legislation, *Plesner* had to meet the following two part test:

1. There must be an acute reaction to a sudden and unexpected traumatic event.
2. The acute reaction to the traumatic event must arise out of and in the course of employment.¹⁰⁰

However, those with physical injuries only had to establish the injury was work-related, assisted by the presumption that an accident that happens at work is work-related.¹⁰¹

While Manitoba had the "acute" requirement prior to Bill 35, Manitoba's corresponding WCB policy¹⁰² did not define traumatic events

Association at 4.

⁹⁶ Report, *supra* note 76 at 3-4. Also, for example, see stakeholder submissions from: Manitoba Government and General Employees' Union, Manitoba Nurses Union, United Food & Commercial Workers Union - Local 832, Winnipeg Police Association.

⁹⁷ 2009 BCCA 188, 2009 CarswellBC 1095 [*Plesner*].

⁹⁸ *Ibid* at para 96.

⁹⁹ *Ibid*.

¹⁰⁰ *Ibid* at para 107.

¹⁰¹ *Ibid* at para 128.

in the same way that was problematic for the Majority in *Plesner*. Manitoba's policy was repealed and replaced in 2012.¹⁰³ This change was perhaps made in response to the *Plesner* decision, which occurred three years earlier.

Therefore, even if Manitoba did not have the exact problem illustrated in *Plesner* before the enactment of Bill 35, the decision does highlight that there may be a higher bar for those suffering from PTSD compared to physical injuries, and that a presumption may help to balance this. One stakeholder explained they had found that professional diagnoses of PTSD get debated at adjudication, dragging the process on.¹⁰⁴ That never happens with a physical injury such as a broken leg.¹⁰⁵

Bill 35 may also have some positive domino effects. For example, a presumption may prompt employers to "evaluate their own internal programs for coping, safety and employee support".¹⁰⁶

As mentioned earlier, Alberta's legislation has been criticized for leaving out certain occupations. However, Bill 35 treats all workers with PTSD equally. It does not draw a distinction between occupations, thus not leaving out other high-risk occupations by restricting the presumption to emergency workers.

¹⁰² WCB, "Adjudication of Psychological Injuries: Policy 44.05.30" (November 2012) online: http://www.wcb.mb.ca/sites/default/files/files/44_05_30PsychologicalConditions.pdf.

¹⁰³ *Ibid* at 2.

¹⁰⁴ Winnipeg Police Association, "Re: Presumptive Legislation - WCB PTSD Claims", Stakeholder Submissions Regarding WCB Coverage for Post-Traumatic Stress Disorder, (7 April 2015), online: WCB <https://www.wcb.mb.ca/sites/default/files/files/WPA%20Association%20submission.pdf> at 3.

¹⁰⁵ *Ibid*.

¹⁰⁶ Compass Group Canada, "Stakeholder Consultation Document - Feedback Request Response", Stakeholder Submissions Regarding WCB Coverage for Post-Traumatic Stress Disorder, online: WCB <https://www.wcb.mb.ca/sites/default/files/files/Compass%20Group%20submission.pdf> at 2.

B. Deficits and Concerns

One of the concerns about Bill 35 is that a presumption will only speed up acceptance and not treatment. An employer stakeholder noted that in their experience, if anything, it was the availability of mental health care provider resources that delayed the process.¹⁰⁷ If this observation is astute, then the legislation on its own will fail to achieve the goal of faster access. Without an increase in resources, just because a worker's claim is accepted does not necessarily mean they will receive treatment in a timelier manner than before.

Another major criticism was the consultation process itself. The Winnipeg Chamber of Commerce went so far as to say that “the public consultation was window dressing on a decision already made.”¹⁰⁸ Some stakeholders noted there was insufficient evidence provided on the current state of affairs with respect to PTSD claims, such as statistics on adjudicative and treatment delays or denials of compensation, and how Bill 35 would change them.¹⁰⁹

It was questioned whether Bill 35 provides a solution to a problem that does not exist. No evidence was provided that there existed any issue with work-related PTSD compensation claims being denied,¹¹⁰ the very problem that this legislation on its face would appear to address. There were also no statistics provided or cost analysis done.¹¹¹ There is potential

¹⁰⁷ MB Hydro, “Re: Presumptive PTSD Coverage”, Stakeholder Submissions Regarding WCB Coverage for Post-Traumatic Stress Disorder, (1 May 2015), online: WCB <<https://www.wcb.mb.ca/sites/default/files/files/Manitoba%20Hydro%20submission.pdf>> at 4.

¹⁰⁸ Standing Committee, *supra* note 45 at 71 (Loren Remillard, Winnipeg Chamber of Commerce representative).

¹⁰⁹ For example, see stakeholder submissions from: Canadian National Railway Company and Canadian Pacific at 2 and 7, Manitoba Employers Council at 2, Winnipeg Chamber of Commerce at 2.

¹¹⁰ Winnipeg Chamber of Commerce, “Comment on WCB’s Proposal to Amend The Workers Compensation Act to provide Presumptive Coverage for Post-Traumatic Stress Disorder”, Stakeholder Submissions Regarding WCB Coverage for Post-Traumatic Stress Disorder, (30 April 2015), online: WCB <<https://www.wcb.mb.ca/sites/default/files/files/Winnipeg%20Chamber%20submission.pdf>> at 2.

¹¹¹ *Ibid*; Manitoba Employers Council, “Re: Post Traumatic Stress Disorder”, Stakeholder Submissions Regarding WCB Coverage for Post-Traumatic Stress Disorder, (30 April

for a spike in claims if Bill 35 works well, or if there is abuse of the system. In both instances, costs to employers and the WCB would go up.

The bill was also hailed for its ability to reduce stigma. The legislation certainly signals the government's recognition of PTSD as a real issue, which could help to change attitudes in the general public. However, this is only possible if the public is aware of the legislation, and the mere existence of the legislation is insufficient to achieve this. There was media coverage of the bill when it was brought in, and unions may communicate the information to their members (especially if they represent high risk occupations), but the average worker might only find out about the presumption once they have made a claim, and thus already overcome any stigma which could have prevented them from coming forward. Further on that point, a worker must still admit they need help and seek treatment, and a presumption that their PTSD is work-related does not make that any easier.¹¹²

The concerns are largely that Bill 35 simply will not solve the problem, or that it will work too well and increase costs. However, we should also be concerned that the bill could actually be harmful. As previously stated, evidence brought forward in the past was largely controlled by workers as they had the onus to prove the casual connection to their employment. Bill 35 now gives the onus to the employer or the WCB to prove the contrary. Thus, if an employer or the WCB wants to rebut the presumption, they will have to investigate to find other potential causes of the worker's PTSD, leading them to dig into the worker's life outside of work. This could be very invasive, especially to a worker who is already vulnerable and suffering from PTSD. Such an investigation could also prove difficult as employers have less access to the necessary information about the worker's private life, not only for obvious reasons, but also

2015), online: WCB
 <<https://www.wcb.mb.ca/sites/default/files/files/Manitoba%20Employers%20Council%20submission.pdf>> at 4.

¹¹² City of Brandon, "Subject: City of Brandon Response to the Workers Compensation Coverage for Post Traumatic Stress Disorder and Stakeholder Consultations", Stakeholder Submissions Regarding WCB Coverage for Post-Traumatic Stress Disorder, (30 April 2015), online: WCB
 <<https://www.wcb.mb.ca/sites/default/files/files/City%20of%20Brandon%20submission.pdf>> at 3.

because of privacy legislation.¹¹³ A worker is in a better position to meet the causal onus than their employer.

C. Alternative Solutions

A good addition to Bill 35 would have been the proposed report stage amendment that required reporting of statistics about the use of the presumption. Only one Member, the NDP's Ms. Braun, spoke against it. She argued that:

...I cannot support this amendment in that it singles out and highlights PTSD claims within the legislation on a different basis than any other type of injury. ... Our other presumptive cancers and heart injuries are not—there is no requirement to report on them. So I think that in our efforts to destigmatize the whole issue of PTSD amongst our workers, I think that this would be contrary to that particular philosophy.¹¹⁴

This argument is not that convincing given that Bill 35 itself singles out PTSD by making it the subject of a presumption that most other injuries and illnesses (other than certain cancers and heart attacks for firefighters) are not. A reporting requirement for a unique provision is reasonable. Also, Ms. Braun noted that there is no reporting requirement on the presumptive cancers and heart injuries for firefighters. This is true now, but was not always the case. The amendment that first brought in the presumption for cancer (i.e. if a firefighter suffers an injury that is a listed type of cancer, the injury shall be presumed to be an occupational disease the dominant cause of which is the employment as a firefighter, unless the contrary is proven) included a reporting requirement.¹¹⁵ The provision mandated that the board “conduct research to determine if the [listed cancers] are occupational diseases, the dominant cause of which is the employment” as a firefighter, and for the minister to report to the Legislative Assembly within a certain time period.¹¹⁶ This provision was later removed, and the same could have been done with a reporting

¹¹³ Southern Health, Stakeholder Submissions Regarding WCB Coverage for Post-Traumatic Stress Disorder, (30 April 2015), online: WCB <<https://www.wcb.mb.ca/sites/default/files/files/Southern%20Health%20%20Submission.pdf>> at 5.

¹¹⁴ Report Stage (*Hansard*), *supra* note 50 at 2287 (Hon Erna Braun).

¹¹⁵ Cancer Presumption Bill, *supra* note 13 (as enacted).

¹¹⁶ *Ibid*, s 2.

provision on the PTSD presumption. The reporting provision could have even had a set expiry of a number of years, thus making it clear that it is there to study how well a new provision works, rather than to single out PTSD in the way that concerned Ms. Braun.

Alberta and Ontario's approach is another option. They apply the PTSD presumption only to first responders. Manitoba could add other occupations to the list as well, such as nurses or correctional workers, though it may be difficult to determine where to draw the line.

While almost everyone can agree that goals such as reducing stigma and providing faster access to treatment are positive, they could be achieved in other ways, such as through funding research, education, campaigns, and increased recruitment and training of medical professionals who can treat PTSD. These are more traditional approaches, but stakeholders also came up with other innovative solutions, including establishing a specialized unit within the WCB to adjudicate psychological claims.¹¹⁷ This would create consistency and could be an expedited process.¹¹⁸ Another suggestion was to provide "investigational access" to treatment while claims were under investigation, instead of having the presumption.¹¹⁹ This would address the issue of fast access to PTSD treatment.

VIII. CONCLUSIONS

Even if we were to accept that the merits of Bill 35 outweigh the downsides and that it is a step in the right direction, more must be done to combat PTSD. Bill 35 alone will not eliminate stigma or spur research,

¹¹⁷ City of Winnipeg, "Re: Post-Traumatic Stress Disorder", Stakeholder Submissions Regarding WCB Coverage for Post-Traumatic Stress Disorder, (29 April 2015), online: [WCB <https://www.wcb.mb.ca/sites/default/files/files/City%20of%20Winnipeg%20submission.pdf>](https://www.wcb.mb.ca/sites/default/files/files/City%20of%20Winnipeg%20submission.pdf) at 3.

¹¹⁸ *Ibid.*

¹¹⁹ Canadian National Railway Company and Canadian Pacific, "Re: Presumptive Coverage for Post Traumatic Stress Disorder (PTSD)", Stakeholder Submissions Regarding WCB Coverage for Post-Traumatic Stress Disorder, (8 May 2015), online: [WCB <https://www.wcb.mb.ca/sites/default/files/files/Canadian%20National%20Railway%20Canadian%20Pacific.pdf>](https://www.wcb.mb.ca/sites/default/files/files/Canadian%20National%20Railway%20Canadian%20Pacific.pdf) at 3.

nor will it create more resources for PTSD treatment in Manitoba. PTSD affects the entire population, including those suffering from non-work-related PTSD.

Bill 35 would have benefited from more research and study. The bill went through the legislative process quickly. There was consultation beforehand, but a lack of cost analysis and statistics hampered evidence-based discussion. At the very least, it would have been beneficial to adopt the report stage amendment that would have mandated reporting on the new provision.

A significant difficulty with Bill 35 is the potential for invasive investigation into a worker's personal life when attempting to rebut the presumption. This could even have a chilling effect on PTSD claims. However, this did not appear to be raised by any politicians or stakeholders, which may reveal a challenge with "feel good" legislation that lacks careful scrutiny.

Given that presumptive PTSD bills are being read in Legislative Assemblies throughout the country, Manitoba, Alberta, and Ontario are unlikely to remain unique for long. Though Manitoba may continue to be the only province with the presumption in place for all workers, we will discover in the coming years whether the legislation achieves its laudable goals, or if we have to go back to the drawing board on tackling workers compensation for PTSD.