



# **Return to Work Programs Mental Disorders in the Work Place**

Presented by:

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# Overview of Presentation

With the passage of Bill 14, mental disorders in the workplace present challenges and opportunities to Unions and Employers.

This presentation briefly reviews Return To Work (“RTW”) plans and how they intersect with mental disorder WCB claims and leaves.



# Overview of Presentation Cont'd

- What is the impact of mental disorders in the workplace?
- What legislation exists?
- What is a RTW plan?
- When is a RTW Required
- Who Participates?
- Questions to be Asked
- What about Employee Privacy?

# Overview of Presentation Cont'd

- Restrictions, Limitations and Capabilities
- Overlap of WCB
- Overlap of Duty to Accommodate
- Barriers to returning employees to work
- Getting medical evidence
- Final thoughts
- **Questions?**
- Additional Resources





# Impact of Mental Disorders in the Workplace

- ❖ 30% of disability claims are due to mental health
- ❖ Up to 44% of employees report mental health issues
- ❖ 26% of mental disorder claims came from health care and social assistance Employers
- ❖ Only 15% of WCB claims were allowed
- ❖ 60% of claims were traumatic in nature i.e. PTSD

Sources: Conference Board of Canada (2014), WorkSafeBC (2014).



# Impact of Mental Disorders in the Workplace Cont'd

- ❖ One third of people will experience a mental stress / duress in their lifetime
- ❖ One quarter to one fifth of people will experience a diagnosable mental disorder in their lifetime
- ❖ For each person who commits suicide, 20 others attempt it.
- ❖ Rates of mental disorders double after emergencies.
- ❖ Depression and anxiety are the most common diagnoses.

Sources: World Health Organization (2014), Canadian Mental Health Association (2014).



# What Legislation Exists?

There are many different areas of law that affect RTW and mental disorders.

- Human Rights law i.e. the Human Rights Code.
- Duty to Accommodate jurisprudence such as the Meiorin case. (*British Columbia (Public Service Employee Relations Commission) v. British Columbia Government Service Employees' Union* [1999] 3 S.C.R. 3, 1999 SCC 48)

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# What Legislation Exists Cont'd?

- Collective Agreement language
- Section 12 of the BC Labour Relations Code
- WorkSafeBC legislation and policy:
  - ❑ Section 5.1 of the *Workers Compensation Act*
  - ❑ C3-13.00 of RSCM II Policy
  - ❑ C3-3 of the Practice Directives
  - ❑ D3-115-2 of the Prevention Manual
  - ❑ GD3-115(1) - 3 of the Occupational Health and Safety Guidelines

# What is a RTW Plan?

- ❖ Can be formal, informal or part of a multi-party process.
- ❖ Goal is to return employee back to work part time or full time.
- ❖ Can start from the first day after injury or years later.
- ❖ Can be part of a Duty to Accommodate.
- ❖ Can be done by the Employer, WCB or LTD.

# What is a RTW Plan Cont'd?

- ❖ Usually starts when an employee's condition stabilizes. Employers often start sooner.
- ❖ Case by case – fact pattern dependent.
- ❖ Is governed by the forum you are using, but **ALWAYS** must consider the Collective Agreement.





# When is a RTW Required?

- Is never formally “required” unless the insurance carrier, WCB, employee or Employer via WCB insist on it.
- Employers may request a RTW under the WCB RSCM II Selective / Light Employment Policy.
- RTWs can arise out of WCB claims, ICBC claims, sick leave, chronic illnesses, Chronic Pain, LTD claims and Duty to Accommodate (“DTA”) situations.
- An LTD carrier may have very different Plan policies i.e. 2 year definition for return to employment, than WCB Policy or Collective Agreement language.
- RTWs are most often initiated by WCB and LTD.



# When is a RTW Required Cont'd?

- Employers, Co-Workers and the Union may notice changes in:
  - ☐ Physical health
  - ☐ Quality of work
  - ☐ Amount of socialization
  - ☐ Tardiness or absenteeism
  - ☐ Personal appearance
  - ☐ Anxiety
  - ☐ Tearfulness
  - ☐ Reaction to changes in workload or new duties

# Who Participates?

- Who participates depends on numerous factors, such as:
  - Type of absence e.g. WCB vs. sick leave
  - Presence of a DTA?
  - Unionized or non-Unionized environment
  - Wording of Collective Agreement language



# Who Participates? (Continued)

- Employee
- Union (if it is a unionized workplace)
- Human Resources
- WCB, as applicable
- Employee's supervisor, as applicable (and subject to the need for maintaining strict confidentiality and privacy)



# Questions to be Asked

- Is this a WCB claim related RTW? Are they involved?
  - Are there overlapping DTA issues?
  - Is there a Collective Agreement that applies?
  - Are there different requirements for sick leave, short term disability, medium term disability, long term disability, WC, CPP, EI Sick Leave, OH&S issues, safety issues, Duty to Accommodate, etc.
- Each case is unique!



# Questions to be Asked (Continued)

- How do we protect employee privacy?
- How do we get the best medical evidence?
- What is the RTW Plan? Where are we in six (6) months or a year? Is there a plan?
- Does the Employer have multiple job descriptions for RTWs already prepared?
- Has a Job Demands Analysis or Functional Capacity Evaluation been done?

# Questions to be Asked (Continued)

- Are employees aware that there is a RTW plan available?
- Who is offering the best RTW plan?
- Does it comply with the Collective Agreement?
- Is the Union involved at every stage?
- What is the disability management contract provider's involvement?



# Restrictions vs. Limitations

- **Restrictions** are duties that should not be performed.
- **Limitations** are tasks that cannot be performed.
- **Capabilities** are tasks that can be performed.
- These need to be reviewed every 30 days
- If no full return to work after 30 days, is a case management meeting needed?





"Life itself is the most wonderful fairy tale."

- Hans Christian Andersen



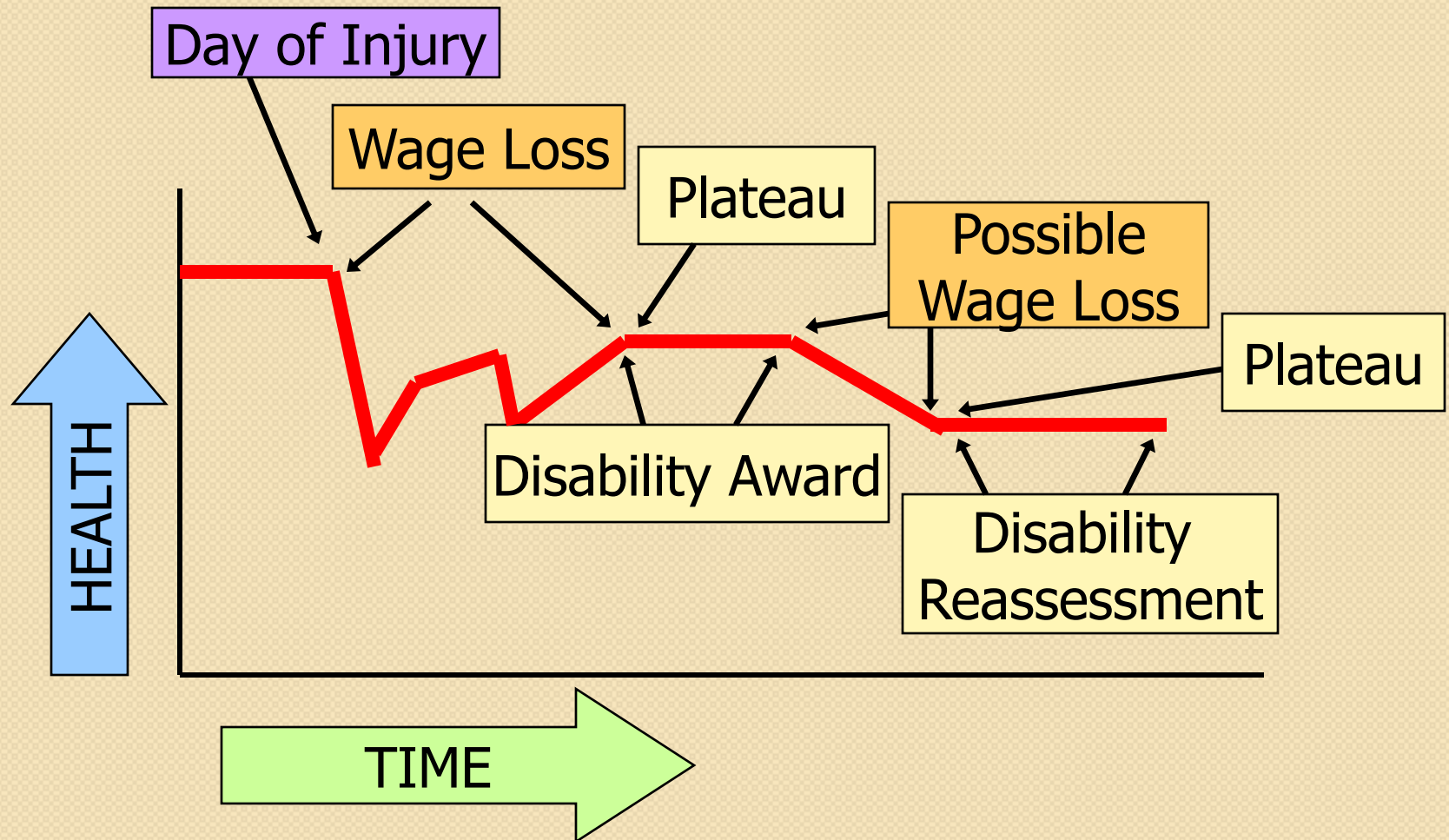
# Restrictions vs. Limitations (Continued)

- While the WCB looks primarily at limitations, both need to be addressed.
- Both subjective and objective evidence should be included in the assessment and equal weight afforded to each.
- Multiple psychiatric opinions may be needed.



Disability is **NOT** Inability

# Life of a WCB Claim – Where Does RTW Fit In?



# Life of a Claim – Where Does RTW Fit In?

- A RTW can occur anywhere in the lifecycle of a WCB claim.
- What if an employee is receiving Vocational Rehabilitation (“VR”) by the WCB?
- Does the Employer still have to act?

**WORK INJURY  
CLAIM FORM**

**1 WORKER'S PERSONAL DETAILS**

Title  Family Name

Given names

Other known or previous legal names eg Maiden name

Date of birth  Gender ☐ Male ☐ Female

What area of the worksite were you working in when you were injured?

What is the street address where the incident occurred?

Suburb

State

# What if WCB Sponsored Vocational Rehabilitation is Occurring?

- VR is not a bar to RTW programs occurring. They should be coordinated though.
- Phase I is the most common time when RTW occur.
- Make sure the Union and Employer are involved.







# 5 Steps to the Vocational Rehabilitation Process – At What Stage Can An RTW Commence?

**Phase 1** – return to same job with same employer

**Phase 2** – modified or different job, same employer

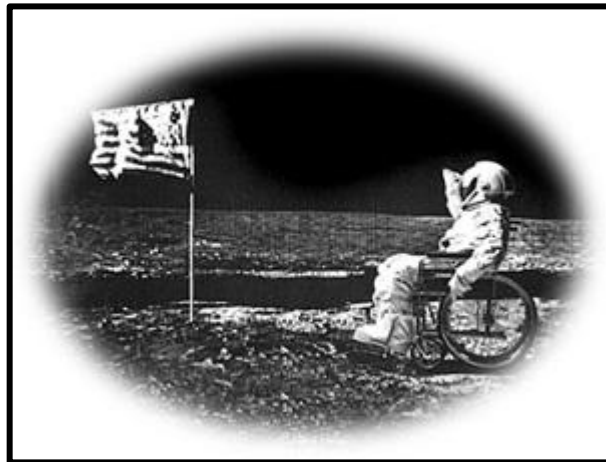
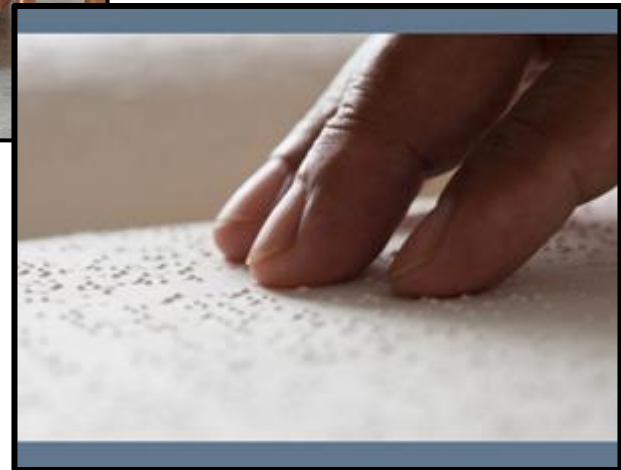
**Phase 3** – different job, new employer, same industry

**Phase 4** – different job, new employer, all industries

**Phase 5** – consider new occupational skill development

# Duty to Accommodate and RTW

- DTAs are unique considerations.
- Always ask if a DTA is required.
- Does the employee have a disability?
- Is the employee experiencing adverse treatment?
- Is the adverse treatment connected to the disability?



# Duty to Accommodate and RTW (Continued)

- Adverse treatment can take many forms.
- A person with a mental disorder may perceive adverse treatment differently.
- It may be a demotion, change of job duties, change in schedule or denial of overtime.
- DTA = RTW? They are not always the same.
- A RTW may be part of the DTA process.

# Duty to Accommodate and RTW (Continued)

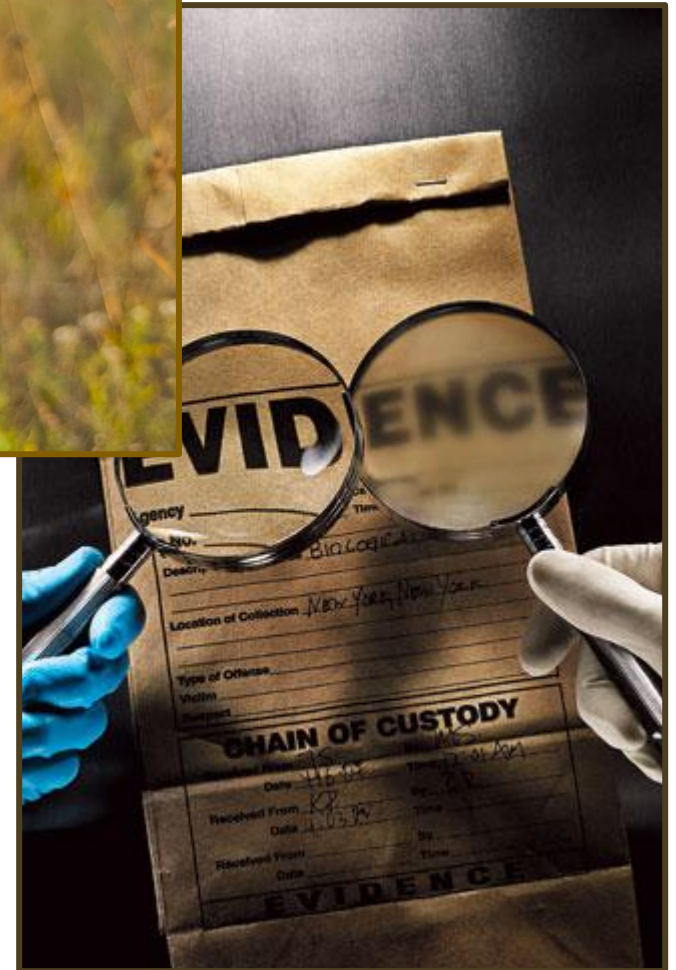
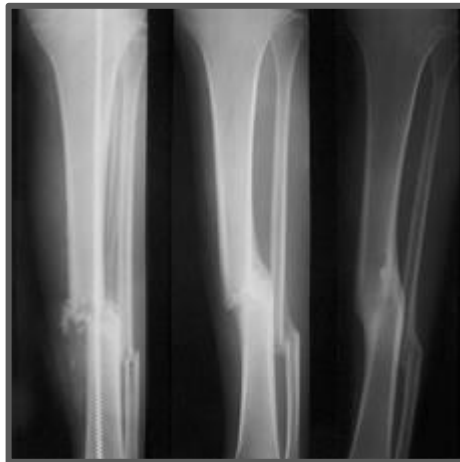
- The Employer has a duty to inquire.
- There may be safety issues.
- Any discipline that arises out of mental disorder cases should be very carefully investigated and grieved.
- An accommodation, like a RTW, has to be individualized.
- The Employer has to accommodate to the point of undue hardship. The process is grievable.

# Duty to Accommodate and RTW (Continued)

- Like RTWs, DTAs include some of these:
  - Training / Re-training
  - Assistive devices
  - Bundling of duties
  - Modifying duties
  - Changing hours or days of work
  - Ergonomic or physical layout changes

*Have you investigated the facts??*





# Obtaining Medical Evidence – What is Needed?

Employers often request medical evidence for:

1. An authorization for paid or unpaid sick leave e.g. El Sick Benefits or Collective Agreement obligations.
2. To determine eligibility for income replacement.
3. For DTA processes, RTW programs,
4. To ensure the safety of employees.
5. To address addictions or mental disorder issues.

# Obtaining Medical Evidence – What is Needed?

- ❖ Where the Employer has **reasonable** grounds, they **may** ask for **progressively** more detailed information. The test is what is “**reasonably necessary**”.
- ❖ “reasonably necessary” is determined using a matching analysis.
- ❖ It changes depending upon the circumstances e.g. sick leave versus duty to accommodate.
- ❖ Open access to employee information should not occur.

***Privacy, privacy, privacy!***

# Obtaining Medical Evidence – What is Needed?

- **Diagnosis?**

- ✓ May be required for DTA and RTW
- ✓ Safety issues is another exception.
- ✓ Each case will be determined upon its facts and what the Collective Agreement states. **Read your Collective Agreement.** Talk to your National Representative. Investigate facts.





# Obtaining Medical Evidence – What is Needed?

- **Prognosis?**
  - ✓ Employers are often entitled to a general prognosis such as the expected date of return to work.
  - ✓ Balancing act between the privacy interests and the Employer's legitimate interest . The key term is “reasonably necessary”.



# Obtaining Medical Evidence – What is Needed?

- **Treatment?**
  - ✓ The details of treatment **may** have to be disclosed later, **but not initially**.
  - ✓ **Balancing** between the employee's **privacy** and the Employer's **legitimate** operational concerns.
  - ✓ It is not the Employer's role to dictate what the treatment should be in RTW.
  - ✓ Employers should not contact the employee's physician.

# RTW and Independent Medical Evaluations (“IMEs”)

- The use of IMEs should be extremely limited. In BC, Employers are increasingly attempting to use IMEs.
- More common for mental disorders and addiction issues.
- Can be very invasive and detailed.
- The worker should have the choice of their physician, not an insurer or Employer.
- IMEs negatively impact privacy.

# RTW and Independent Medical Evaluations (“IMEs”) Cont’d

- IMEs must always take employee privacy into account; there has to be a **balancing of privacy interests**.
- A refusal to participate in an IME may result in a paid or unpaid suspension.
- Where a threat of violence exists, a Violence Threat Assessment may be required.
- Always contact your National Representative where an Employer requests an IME.



## Forms & Releases – What Can Be Used?

- ❑ Consulting companies are now being used by Employers. The goal includes reducing sick leave, reducing or shortening claims and getting employees back to work sooner.
- ❑ Consultants often ask employees to sign very general, broad Releases or Forms which sign away the privacy rights of employees.
- ❑ Employers should not send forms or Releases to physicians, barring Collective Agreement language.
- ❑ There should not be direct contact between the Employer, the Employer's consultant and the employee's physicians.

A close-up photograph of a "HEALTH INSURANCE CLAIM FORM". The form contains various fields for personal information, including "MEDICARE", "TRICARE", "CHAMPUS", "Supplemental", "First Name", "Middle Initial", "Last Name", "First Name", "Middle Initial", "Last Name", "Street", "City", "State", "Zip", "Phone", "Fax", "Email", "Date of Birth", "Date of Admission", "Date of Discharge", "Date of Death", "Date of Transfer", "Date of Admission", "Date of Discharge", "Date of Death", "Date of Transfer". A silver calculator is positioned to the right of the form, and a blue pen is resting on the bottom left corner of the form.



# Forms & Releases – What Can Be Used?

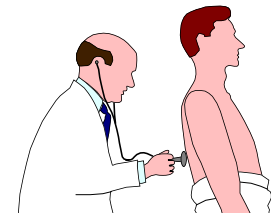
## Cont'd

- Physician Chart Notes should not be given to the Employer or their consultant. Chart notes should have all non-relevant information redacted / removed / blacked out. **Relevance is a key consideration.**
- There should not be distribution or disclosure of information to third parties. Releases often allow for this. Define “third party”.
- Forms and Releases should be time limited and have a clause allowing the employee to terminate the Release.
- Forms and Releases should not be general in nature and should define the purpose they are to be used for, in a particular forum.
- Past medical history should not be disclosed generally.
- Forms and Releases should comply with the Collective Agreement.
- Forms and Releases should be vetted by the National Representative.



# Obtaining Medical Evidence – Role of Union Advocates

- When corresponding with the physicians, include an authorization form signed by worker.
- Include the worker's name and WCB claim number as applicable.
- Identify yourself.
- Clearly explain the issue(s) and why the opinion is required. The letter may be sought by the Employer in an arbitration.
- **Know which forum you are acting in!**

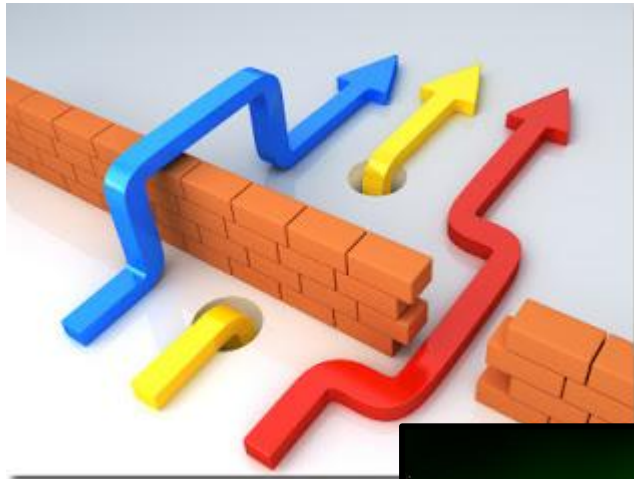


# Obtaining Medical Evidence Cont'd

- Provide a brief background. Outline issues.
- List questions.
- Attach relevant medical reports.
- Confirm price and method of payment.
- Thank the practitioner in advance.
- Physicians cannot act as advocates.

**PRIVACY, PRIVACY, PRIVACY!**





# Key Barriers to the RTW Process

*Stigma – 50% of Employers would refuse to hire a person  
with a mental disorder*

## **Fear of re-injury**

Presence of sufficient medical information

*Presence and quality of alternative duties*

## **Supervisor buy in**

Co-worker buy in

*Morale in general*

Size of Employer





# Key Barriers to the RTW Process

- The overlap of multiple processes:
  - WCB Discriminatory action
  - WCB Prevention
  - WCB Claims
  - Human Rights
  - Collective Agreement
  - LTD
  - Employment Insurance
- Caution regarding conflicting medical evidence

# Key Barriers to the RTW Process

- Attendance Management Programs – these often compel early / premature return to work (CUPE AMP materials / courses are available through the Education Department).
- Privacy concerns – 25% of WCB mental disorder claims are suspended due to employee concerns over privacy
- Secondary conditions (comorbidities) often go unrecognized and delay return to work.



# RTW and Forced Participation

- Workers are at risk of re-injury, secondary absences and new claims where they are forced to participate in a RTW.
- Insurance carriers can compel RTW prematurely as they can terminate benefits.  
**Remember which forum you are in. There may be several.**
- 13% of workers had a second absence when forced to participate in a RTW.

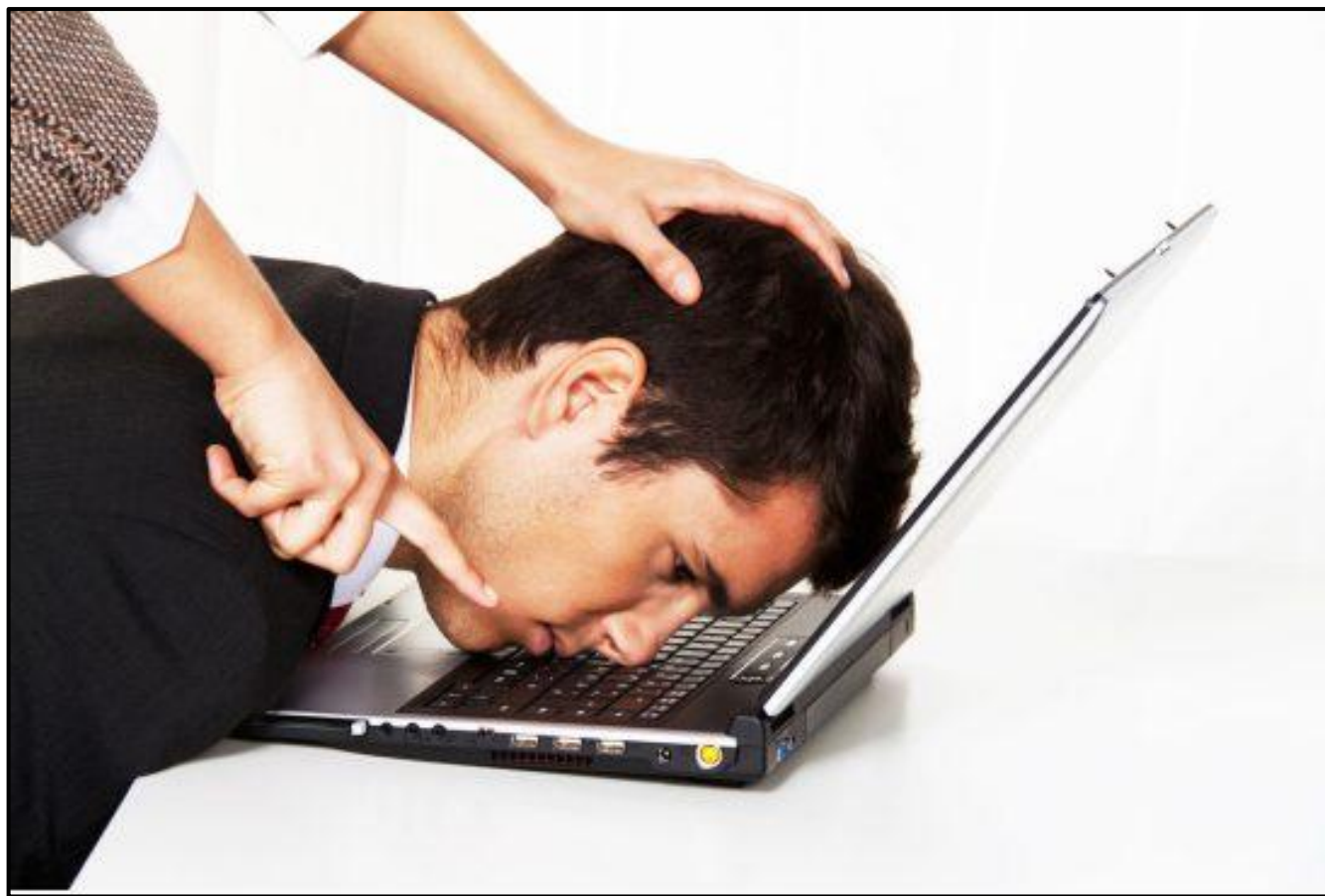






# RTW and Forced Participation Cont'd

- Employees can be forced back to work under the WCB RSCM II Selective / Light Employment Policy.
- Commonly used by Employers now i.e. Air Canada
- Here are some defenses:
  - The wording of the Policy is “generally”.
  - The diagnosis may not be known or confirmed.
  - Further testing may be needed.
  - The limitations, restrictions and abilities may not be known.
  - Within “reasonable” “limits” the worker must agree to the arrangement.

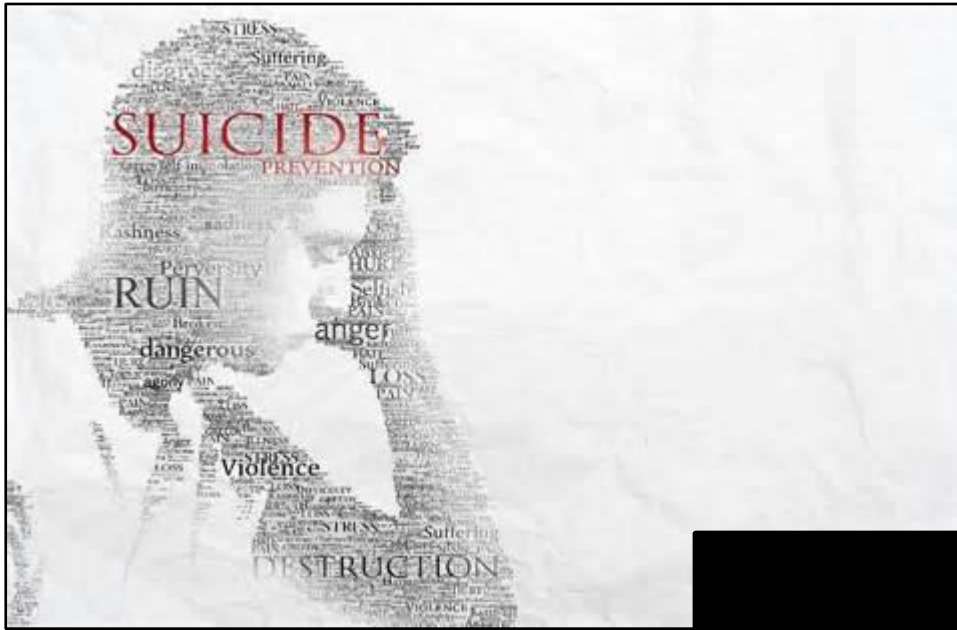


# RTW and Forced Participation Cont'd

- The RTW arrangement is not time defined.
  - The work must be safe.
  - The work must not slow recovery.
  - The work must not harm the employee.
  - The arrangement is not a one time event and is subject to review. Multiple RTWs may have to occur.
  - The arrangement occurs / may occur along with DTA obligations. They are not mutually exclusive.
- Careful of re-injuries – may mean a whole new claim or RTW plan.

# RTW & Factors for Success

- Having the right people present
- Ensuring **privacy**
- Identifying **medically appropriate job duties**
- Knowing the employee's **changing** restrictions, limitations and capabilities
- Having **ongoing** sufficient medical evidence
- Physician's **familiarity with the proposed job duties and old job duties**
- **Quality and extent** of ongoing communications
- Knowing your role as a Union representative – **what forum(s) are you in at each stage?**



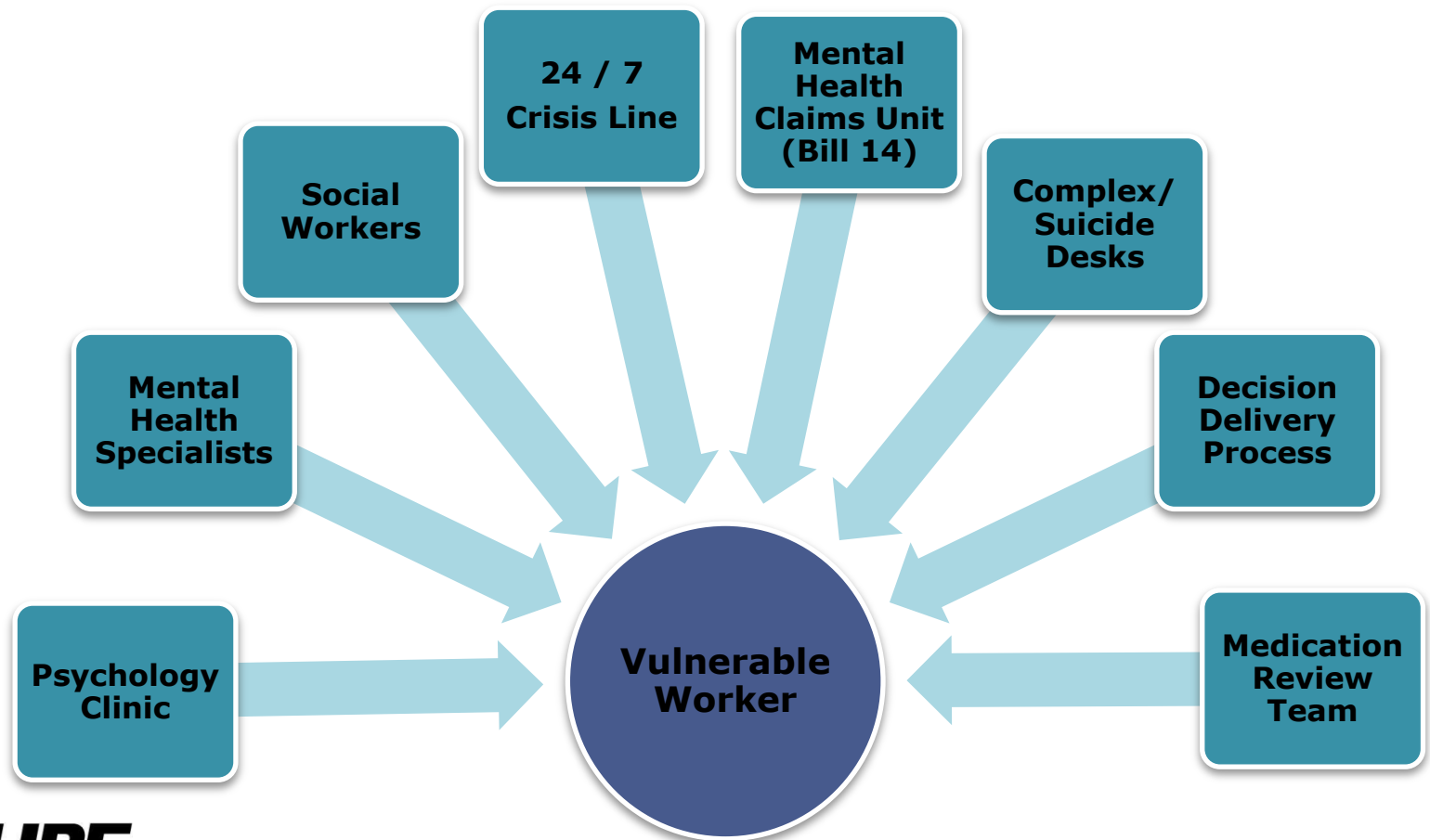
# Self Harm and Risk to Others

When an employee makes a threat to their own safety or that of others immediate action must be taken.

- **Call 911 if applicable**
- Are there any Employer policies? Is EAP involved?
- Is this a WCB claim? If so, contact the Special Care Services Department
  - [http://worksafebc.com/claims/services\\_seriously\\_injured\\_workers/special\\_care\\_services/default.asp](http://worksafebc.com/claims/services_seriously_injured_workers/special_care_services/default.asp)
  - [http://www.worksafebc.com/regulation\\_and\\_policy/practice\\_directives/compensation\\_practices/assets/pdf/C12-9.pdf](http://www.worksafebc.com/regulation_and_policy/practice_directives/compensation_practices/assets/pdf/C12-9.pdf)
  - [http://www.worksafebc.com/health\\_care\\_providers/Assets/PDF/2009-23WorkingWithSuicidalClaimants\\_ReportingRequirements.pdf](http://www.worksafebc.com/health_care_providers/Assets/PDF/2009-23WorkingWithSuicidalClaimants_ReportingRequirements.pdf)
  - [http://www.worksafebc.com/regulation\\_and\\_policy/practice\\_directives/compensation\\_practices/assets/pdf/C12-8.pdf](http://www.worksafebc.com/regulation_and_policy/practice_directives/compensation_practices/assets/pdf/C12-8.pdf)
- Contact the WCB Case Manager responsible for the claim



# WCB Supports for Psychologically Fragile Workers







# Conclusion

- Disability and privacy law changes **frequently**.
- Each case requires a **factual analysis**.
- Be careful when using templates.
- Be “big picture” oriented – **many processes** may be underway with outcomes that take **years**.



Questions?





# Additional Resources

Here are just some of the **CUPE Guides and Templates**:

- Guide for CUPE BC Members – Filling Out Form I0D90 – Mental Disorder Claim Interview Questionnaire
- Guide for Filing WorkSafeBC Mental Disorder Claims
- Guide for CUPE BC Members – Obtaining Medical Evidence & Reports for WorkSafeBC Claims & Appeals

There are dozens more. They are updated annually.

**Make sure you have the most current version.**

# Additional Resources Cont'd

Here are some **non-CUPE resources and links**:

- DSM V (Diagnostic and Statistical Manual of Mental Disorders):

<http://www.dsm5.org/Pages/Default.aspx>

- Ontario WSIB Return to Work templates:

<http://www.safetygroups.ca/northern/downloads/Downloads/RTWSelfAssessment.pdf>

[http://www.employeradviser.ca/en/documents/document/en\\_guide\\_rtw\\_policy.pdf](http://www.employeradviser.ca/en/documents/document/en_guide_rtw_policy.pdf)

# Additional Resources Cont'd

**CUPE offers many courses.** They can be customized for Locals or Sectors. Here are a few examples:

- ❑ Duty to Accommodate – 1 to 5 days (Conni Kilfoil)
- ❑ Attendance Management Programs – 1 to 2 days (Tom McKenna)
- ❑ Filing a Mental Disorder Claim – 1 day (Tom McKenna)
- ❑ Return to Work Programs – 1 to 3 days (Tom McKenna)
- ❑ Workers Compensation – 1 to 5 days (Tom McKenna)
- ❑ Bullying & Harassment – 1 to 5 days (Vanessa Wolff)
- ❑ Facing Workplace Stress & Mental Health Issues – 1 day (Vanessa Wolff)

# Additional Resources Cont'd

## Contact information for various agencies:

- ❑ WorkSafeBC (Mental Disorders)  
<http://www.worksafebc.com/claims/MentalDisorders/default.asp>
- ❑ WorkSafeBC (Return to Work programs)  
[http://www.worksafebc.com/health\\_care\\_providers/related\\_information/understanding\\_return-to-work/default.asp](http://www.worksafebc.com/health_care_providers/related_information/understanding_return-to-work/default.asp)
- ❑ WorkSafeBC (Vocational Rehabilitation)  
[http://www.worksafebc.com/claims/rehab\\_and\\_rtw/vocational\\_rehabilitation\\_services/default.asp](http://www.worksafebc.com/claims/rehab_and_rtw/vocational_rehabilitation_services/default.asp)
- ❑ Canadian Mental Health Association  
<http://www.cmha.ca/>
- ❑ BC Municipal Safety Association  
<http://www.bcmsa.ca/resources/physical-job-demand-analysis/>

# Thanks for participating!

With an aging workforce, increased work load, deregulation, and privatization – mental disorders in the workplace are projected to increase.

Unions are more important  
than ever.

*You can make a difference!*



**KEEP  
TALKING  
ABOUT  
MENTAL  
HEALTH**



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