Scottish Hazards Annual Conference 29 February 2024

Ill Health, O.H.S. & Capability

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Chair

Introduction & background

- Workplace ILL health & capability issues have increased significantly
- Scrutinise the role of the Occupational Health provider
- Long Covid issues
- Challenge employer/OHP bad practice
- Long term & complex casework
- Implications re termination of contract on capability grounds

Key facts

Workers suffering from work-related ill health (new or long-standing) in 2022/23

Source: Estimates based on self-reports from the Labour Force Survey, people who worked in the last 12 months

Workers sustaining a workplace non-fatal injury in 2022/23

Source: Estimates based on self-reports from the Labour Force Survey

Working days lost due to work-related ill health and non-fatal workplace injury in 2022/23

Source: Estimates based on self-reports from the Labour Force Survey

Workers suffering from work-related stress, depression or anxiety (new or long-standing) in 2022/23

Source: Estimates based on self-reports from the Labour Force Survey, people who worked in the last 12 months

Work-related non-fatal injuries to employees reported by employers in 2022/23

Source: RIDDOR

Lung disease deaths each year estimated to be linked to past exposures at work

Source: Counts from death certificates and estimates from epidemiological information

Workers suffering from work-related musculoskeletal disorders (new or long-standing) in 2022/23

Source: Estimates based on self-reports from the Labour Force Survey, people who worked in the last 12 months

Workers killed in work-related accidents in 2022/23

Source: RIDDOR

Mesothelioma deaths in 2021, with a similar number of lung cancer deaths linked to past exposures to asbestos

Source: Counts from death certificates and estimates from epidemiological information

Annual costs of new cases of work-related ill health in 2021/22, excluding long latency illness such as cancer

Source: Estimates based on HSE Cost Model

Annual costs of workplace injury in 2021/22

Source: Estimates based on HSE Cost Model

Annual costs of workplace injury and new cases of work-related ill health in 2021/22, excluding long latency illness such as cancer

Source: Estimates based on HSE Cost Model

Key facts

Workers suffering from work-related ill health (new or long-standing)

Source: Averaged estimate based on self-reports from the Labour Force Survey for 2020/21 – 2022/23

Workers suffering from work-related musculoskeletal disorders (new or long-standing)

Source: Averaged estimate based on self-reports from the Labour Force Survey for 2020/21 – 2022/23

Workers suffering from work-related stress, depression or anxiety (new or long-standing)

Source: Averaged estimate based on self-reports from the Labour Force Survey for 2020/21 – 2022/23

Workers suffering from a new case of ill health

Source: Averaged estimate based on self-reports from the Labour Force Survey for 2020/21 – 2022/23

Working days lost due to work-related ill health

Source: Averaged estimate based on self-reports from the Labour Force Survey for 2020/21 – 2022/23

Annual costs of work-related injury and new cases of ill health, excluding long latency illness such as cancer

Source: Estimates based on HSE's Costs to Britain model 2021/22

Fatal injuries to workers reported in 2022/23

Source: RIDDOR

Non-fatal injuries to workers

Source: Averaged estimate based on self-reports from the Labour Force Survey for 2020/21 to 2022/23

Non-fatal injuries to employees reported by employers in 2022/23

Source: RIDDOR

Occupational lung diseases and cancer

If past workplace exposures carcinogens were similar in Scotland to the rest of GB then currently there are around 800 deaths and 1150 cancer registrations (excluding non-melanoma skin cancer) each year in Scotland where such exposures contributed.

Annual mesothelioma death rates were higher in Scotland than GB as a whole during the 1980s/1990s but started to reduce sooner and are now lower than GB.

There are currently around 180 mesothelioma deaths each year in Scotland, 7% of the 2,400 annual deaths in GB.

Around 7% of Industrial Injuries Disablement Benefit (IIDB) cases for mesothelioma were in Scotland, and around 11% of other asbestos-related IIDB cases were in Scotland.

Sources: HSE Burden of Occupational Cancer estimates applied to Scottish cancer deaths (2017-2021) and cancer registrations (2016-2020); HSE mesothelioma register, Industrial Injuries Disablement Benefit (IIDB) scheme.

Mesothelioma death rates per million per year in Scotland and GB by gender

Coronavirus pandemic

123,000

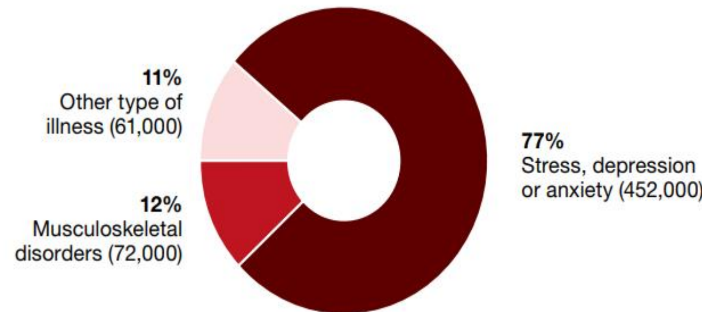
Workers suffering with COVID-19 in 2021/22 which they believe may have been from exposure to coronavirus at work (new or long-standing). Around 40% of those suffering were in human health and social work activities.

585,000*

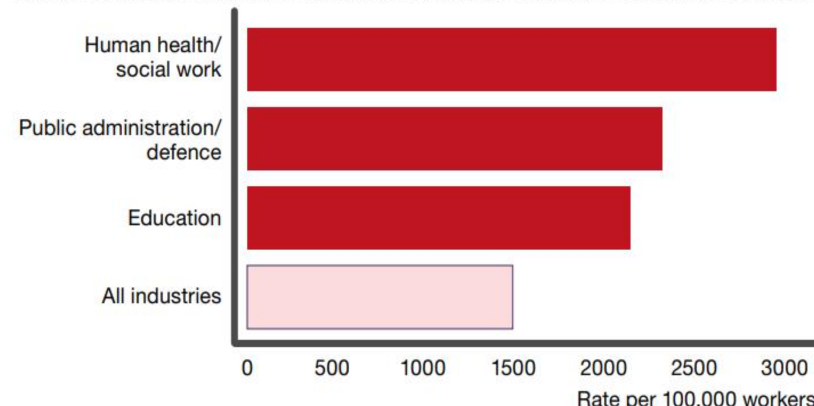
Workers suffering from a work-related illness caused or made worse by the effects of the coronavirus pandemic (new or long-standing) in 2021/22. Around a quarter of those suffering were in human health and social work activities.

* *Excludes the 123,000 workers in the first statistic*

New and long-standing cases of work-related ill health caused or made worse by the effects of the coronavirus pandemic by type, 2021/22



Industries with higher-than-average rates of new and long-standing work-related ill health caused or made worse by the effects of the coronavirus pandemic, 2021/22



These estimates are restricted to ill health in current or most recent job

Reliably identifying the source of exposure for COVID-19 that is widely prevalent in the community is difficult and self-reports may under or overestimate the true scale.

These estimates of numbers of workers who suffered ill health as a result of the coronavirus pandemic should not be subtracted from the overall estimate of work-related ill health. We cannot assume that those individuals would not have otherwise suffered a work-related illness in the absence of coronavirus.

More information about the measures and their limitations is available at www.hse.gov.uk/statistics/coronavirus-pandemic-impact.htm

Estimates based on self-reports from the Labour Force Survey (LFS)

To find out the story behind the key figures, visit http://www.hse.gov.uk/statistics/coronavirus/index.htm

Case study

- J Barnwell – Road sweeper
- Age – 56
- Employer – Glasgow City Council – EPS
- Commenced employment 14 October 1996
- Member of LG Pension Scheme

Absence Facts

- Condition – Chronic Fatigue Syndrome
- Absence commenced – May 2002
- Long term absence – 19 days or more
- Interviews with manager and H.R.
- Interviews with O.H.P. Bupa
- Appointments with G.P. & Specialists

Absence Facts

- G.P. supplied a medical report which expressed the view that it would be unlikely that Mr Barnwell would ever be able to work as a road sweeper again
- BUPA Wellness stated he did not meet the criteria for ill health retiral
- A BUPA report recommended alternative employment for Mr Barnwell within the Clerical & Administrative field
- Department made the decision to terminate his contract from 21 April 2003 on capability grounds

Appeal Process

- Stage 1 – Falkirk Council
- Stage 2 – Scottish Public Pensions Agency
- Stage 3 – The Pension Advisory Service
- Stage 4 – Pension Ombudsman

Stage 4 submission
Unison

- The decision of BUPA was insufficient to meet criteria of Regulation 96(9)
- The Council should have ensured decisions were made by a doctor qualified in occupational health medicine
- BUPA Wellness is not independent of the Council
- Unison’s own independent medical reports were ignored
- Should have been granted an unreduced pension under Regulation 30(5)

Stage 4 submission
Glasgow City Council

- BUPA Wellness is independent of the Council
- BUPA did not recommend Cognitive Behaviour therapy (CBT)
- It was not for the Council or BUPA to say what treatments Mr Barnwell should try
- The Assistant Cleansing area manager had authority to inform Mr Barnwell of the BUPA decision

Stage 4 submission Scottish Public Pensions Agency

- It is required by law to decide appeals within 2 months of receipt
- Because the individual had not received CBT they could not be said to be permanently incapacitated
- Given the 2 month timescale it cannot defer a decision until the result of treatment is known
- Waiting for the result of further treatment would be an unwarranted drain on the public purse £500 - £600
- Sometimes applicants refuse to undergo the recommended treatment
- An individual can apply for ill health retiral again & again

Ombudsman’s decision

- The appeal was upheld – 16 July 2007
- Found BUPA were not independent in the way required by the Regulations
- Found the BUPA advice of non-manual work as comparable work for a roadsweeper as unsound
- Critical of the Stage 1 decision maker who failed to seek an independent medical opinion
- Critical of the Stage 2 decision which cited cost as a major reason for not exploring the issue of treatment via CBT within reasonable timecales

Directions

- Within 56 days of the decision, SPPA were instructed to reconsider their decision made at Stage 2 of the process, taking account of further appropriate medical evidence
- If the decision is reversed then the Council should make arrangements for back payment of pension from 21 April 2003
- Within 28 days of the decision the Council instructed to make a payment of £250 to Mr Barnwell

Further information

- SPPA decided Mr Barnwell did meet the criteria for ill health retiral
- Received backdated pension rights amounting to a five figure sum
- UNISON received a report in May 2007 from a Consultant Psychiatrist which stated “ I can conclude that on the balance of probabilities in my view it is unlikely that Mr Barnwell will be fit for gainful employment now or in the foreseeable future ”

Long Covid

- Over 2.4 million people in the UK now diagnosed with Long Covid
- Over 180,000 in Scotland
- Acute COVID-19: signs and symptoms of COVID-19 for up to 4 weeks.
- Ongoing symptomatic COVID-19: signs and symptoms of COVID-19 from 4 to 12 weeks.
- Post-COVID-19 syndrome: signs and symptoms that develop during or after an infection consistent with COVID-19, continue for more than 12 weeks and are not explained by an alternative diagnosis.
- Post-COVID-19 syndrome may be considered before 12 weeks while the possibility of an alternative underlying disease is also being assessed

Long Covid symptoms

- Chest tightness, chest pain and palpitations
- Fatigue, Fever & Pain
- Cognitive impairment ('brain fog', loss of concentration or memory issues)
- Headaches & sleep disturbance
- Dizziness & Delirium (in older populations)
- Mobility impairment & visual disturbance
- Abdominal pain, nausea and vomiting
- Diarrhoea, weight loss & reduced appetite
- Joint pain and muscle pain
- Tinnitus and earache
- Sore throat, loss of taste and/or smell

S.O.M. Guidance, August 2022

- Equity of access to return-to-work services for people with Long COVID
- Continue to work with people living with Long COVID to co-produce solutions
- Education of doctors and health professionals in Long COVID
- Systems for timely referral to specialists (especially cardiac, respiratory, neurological)
- Occupational health availability to advise employers
- Organisations to review their absence management and flexible working practices to ensure that they are flexible and supportive. Line managers should receive training and guidance in sickness absence management and how best to support employees with long-term fluctuating health conditions like Long COVID
- Psychological support to help manage stresses of living with this illness.

Workplace Modification	Example
Altered timing	Of starts, finishes, and breaks
Altered hours	Shorter days, days off between workdays
Altered patterns	Pacing. Regular and/or additional breaks
Altered shifts	Consider suspending late or early shifts and/or night duty, so the individual works when at their best
Workload	Fewer tasks than normal within a timeframe More time to complete usual tasks Not being required to work to tight deadlines
Altered tasks	Temporary changes to duties or tasks
Support	Clear line of help Someone to ask or check with –'buddy' system Time off for appointments Not working in isolation 'Phone a friend' peer support
Location	Working from home Near a toilet
Aids	Voice recognition software, remote meeting software
Physical modifications	Advice and assessment should be taken from relevant occupational and workplace professionals

COVID-19 return to work guide For managers: 2021 The Society of Occupational Medicine.
https://www.som.org.uk/COVID-19_return_to_work_guide_for_managers.pdf

Capability Dismissals

- Potentially fair reason (s.98 ERA)
- 3 elements required
- Consultation with the employee?
- Medical investigation
- Scrutiny of medical reports
- Consideration of alternative employment/reasonable adjustments

Medical Investigation

- Employers have a duty to *'inform themselves of the true medical position'*
- Not a snapshot – one OH referral unlikely to satisfy the test.
- East Lindsey District Council v Daubney 1977 ICR 566
  - first medical opinion should be from employee's GP.
  - Cannot simply rely on third party opinion.

Conflicting Evidence?

- Make sure the right question is asked
- Make sure the evidence obtained answers the right question
- Check the qualifications of the person giving the evidence
- Ask for reasons why medical evidence is not being accepted from the person providing the conflicting evidence.
- Specialist or Consultant reports
- ESA & ADP award letters

Medical evidence

Pensions Ombudsman Service

- The view of the medical advisor
- Treatment options
- The question of permanency
- Seeing the medical evidence
- Date of the decision

What tends to go wrong?

- Medical evidence
  - Has the medical adviser applied the correct test?
  - Have they properly considered permanence?
  - Untried treatment
  - Conflicting medical evidence

- Procedure
  - Has the appropriate decision maker made a decision?
  - Has the member been given reasons for the decision and advised of their right of appeal?
  - If there is a procedural error, has it affected the outcome? If not, the decision may be valid (*Batt v Royal Mail*).

Conclusions

- Proved to be an extremely complex & demanding case
- Highlighted major flaws & unsound decision making within the statutory process
- Continue to challenge OHP/employer decisions
- Long Covid & long term casework increasing
- Appropriate medical evidence & reports are key to winning these cases
- Additional training for Stewards & Safety Reps through TUC & affiliates

Further information

- www.pensions-ombudsman.org.uk
- www.spfo.org.uk
- Long_COVID_and_Return_to_Work_What_Works_0.pdf (som.org.uk)
- www.glasgowcityunison.co.uk
- www.scottishhazards.co.uk
- www.hse.gov.uk

Questions ?