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Briefs

Submission to the WCB with respect to the Draft Policy Concerning Mental Disorder Claims

A pdf of the complete submission can be found here.

Authority

Thank you for the opportunity to provide our submission with respect to the Workers' Compensation Board's ("WCB" "Board") draft policy (the "Draft Policy") concerning mental disorder claims. This a joint submission from the BC Federation of Labour (the "Federation" the "BCFED"), and the Community Legal Assistance Society (the "CLAS").

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The BC Federation of Labour

The Federation represents more than 500,000 members of our affiliated unions, from more than 1,100 locals working in every aspect of the BC economy. The Federation is recognized by the Workers' Compensation Board (the "Board" the "WCB") and the government as a major stakeholder

in advocating for the health and safety of all workers in BC and full compensation for injured workers.

About CLAS

The CLAS is a non-profit law firm that has served the people of British Columbia since 1971. We provide legal assistance and work to advance the law to address the critical needs of those who are disadvantaged or face discrimination. The CLAS pursues this mandate through a range of direct legal services, strategic litigation and law reform activities.

The CLAS's Community Law Program ("CLP") is a multidisciplinary centre of legal expertise that uses, advances and reforms the law to protect the critical needs of those facing poverty. We envision a society where everyone can secure their critical needs with dignity and autonomy. CLP uses the law when it protects the critical needs of those facing poverty and works to change the law when it does not. CLP lawyers have represented clients in dozens of WCB-related court cases and have contributed to numerous WCB-related law reform projects.

Overview

The Draft Policy is an improvement on the existing policy; however, there are still significant barriers and inconsistencies that inappropriately suppress mental disorder claims.

The term "significant" in the context of work-related stressors is still given an onerous and restrictive meaning that is inconsistent with how the term is used anywhere else in compensation policy. The Draft Policy also continues to use a comparative approach to assessing "significance" that is inconsistent with how the Board assesses significance in other contexts. Changing the baseline comparator from the worker's specific employment to employment generally is an improvement, but a better solution is to eliminate this comparative approach altogether.

The Draft Policy governing the labour relations exclusion undermines key policy goals of the workers' compensation system. Most importantly, it undermines and conflicts with the Board's prevention goals

relating to the creation of psychologically safe workplaces. The Draft Policy allows claims to be excluded based on an employer's failure to follow occupational health and safety laws, provided the breach does not rise to the level of "egregious." It also continues to deploy language surrounding the "unavoidable and inherent nature of stress" that may create a false impression among employers that they can do nothing to improve psychological safety in the workplace. Lastly, the Draft Policy contains no guidance on the key issue of how causation is to be assessed in the context of the labour relations exclusion.

Assessing whether workplace stressors are significant

a)Eliminate the comparative approach to assessing whether a workplace stressor is "significant."

Changing the baseline comparator for assessing significance from the worker's particular employment to employment generally is a positive improvement. However, a better approach is to eliminate the comparative approach altogether.

The Draft Policy continues the pattern of using inconsistent definitions in order to restrict mental disorder claims. The word "significant" in the context of workplace stressors is given a meaning that is not used anywhere else in compensation policy. The word "significant" should simply be given the same definition as elsewhere, meaning "more than trivial or insignificant," as found in the following policies: Rehabilitation Services and Claims Manual, Volume II: C3-14.00, C3-15.00, C3-17.00, C3-18.00, C3-23.20, C4-25.20, C4-27.20, C4-31.00, and 97.00.

Importantly, this does not mean that a comparative analysis would be eliminated entirely from the process. The legislation specifically invites a comparative analysis in the context of the "predominant cause" test. The Board must determine whether the workplace stressors were a greater cause of the mental disorder than non-occupational factors. If there is going to be a comparative analysis, this is the appropriate stage.

There are inherent problems with using a comparative approach to assess the significance of workplace stressors. Stressors can be significant even if they are unfortunately all too common in the workplace. For example, suppose a worker were to file a claim for a mental disorder due to constant exposure to homophobic rhetoric in the workplace, not necessarily targeted directly at the worker. Would the result of the claim turn on whether the Board accepts that homophobic language is actually unusual in the workplace? If the Board accepts that homophobic language is not unusual, would the claim be denied because the stressors are not significant? This is not a sensible framework to assess the issues. A stressor can be very significant even if it is unfortunately common in the workplace.

b)Eliminate the requirement that to be significant, an interpersonal dispute must rise to the level of “abusive or threatening.”

Again, the “abusive or threatening” standard adopts a definition of “significant” that is far more onerous and restrictive than anywhere else in compensation policy. It is also inconsistent with other elements of the Draft Policy and ultimately unnecessary. It is inconsistent because the sentence immediately below confirms that bullying and harassment is a significant workplace stressor. And bullying and harassment does not necessarily have to be “abusive or threatening.” It is also unnecessary because the Draft Policy already directs the Board to consider both subjective and objective factors when assessing significance. The Board is not necessarily obligated to accept a worker’s purely subjective view that they have been bullied or harassed or experienced significant workplace stressors.

The Labour Relations Exclusion

The Draft Policy correctly notes that the labour relations exclusion is not absolute. The Board can and should make policy to define the boundaries of the exclusion. However, the boundaries currently set out in the Draft Policy are inconsistent with the purpose of the labour relations exclusion, the purpose of the *Workers Compensation Act* more generally, and even other elements of the Draft Policy.

The stated purpose of the labour relations exclusion in the Draft Policy is to ensure employers “remain able to manage their workplaces.” If that is the goal, then the exclusion should only apply to

decisions that are reasonably necessary to achieve that goal.

a)Confirm that an identifiable decision by the employer is required.

The Draft Policy is internally inconsistent. When assessing the presence of significant workplace stressors for the purposes of accepting a claim, the policy requires that the stressors be specifically identifiable. But when assessing whether to exclude the claim under the labour relations exclusion, the Draft Policy says: “Decisions of the employer are not limited to specific decisions and include circumstances related to the worker’s employment over which the employer has control.” One is left with the impression that the Board is taking an unbalanced approach by adopting a restrictive view on matters relating to claim acceptance and a very broad view on matters relating to claim exclusions.

This element of the Draft Policy appears to be adopted from the *Pickering v. Richmond School District No. 38* 2021 BCSC 1497 decision. Care must be taken when assessing previous court decisions to avoid getting stuck in an administrative law circle. On judicial review, courts apply the extremely deferential “patently unreasonable” standard. This is out of respect for the expertise and function of the Board and other decision-makers in the system. A finding by the court that a particular policy interpretation is not patently unreasonable does not mean that it is the best option, or even correct. The court’s role is limited to assessing whether a particular policy interpretation is unsustainable on the most deferential standard known to law. In contrast, the Board’s role is to create the best policy possible. When courts point to the Board as the experts, the Board cannot just point back and treat the court’s review for patent unreasonableness as an endorsement of the policy.

b)Confirm that employer decisions that are inconsistent with occupational health and safety requirements will not be captured by the labour relations exclusion.

The Draft Policy should reinforce and harmonize with the Board’s prevention policies, rather than undermining them. The Draft Policy should confirm that employer decisions that are inconsistent with occupational health and safety requirements will not be captured by the labour relations exclusion, irrespective of whether the conduct rises to the level of “egregious.” The stated goal of ensuring that employers “remain able to manage their workplaces” is surely not intended to allow employers to

manage their workplace in an unlawful or illegitimate way. The safety requirements set out in regulation and policy exist to prevent injury. It is difficult to conceive of any policy rationale for saying that a claim should be denied based on an illegitimate decision by the employer so long as it does not rise to the level of “egregious.”

c)Remove the references to “negligence” and “bad judgement.”

These qualifiers should be removed, along with the reference to “egregious.” If the Draft Policy construes the purpose of the labour relations exclusion as ensuring that employers “remain able to manage their workplaces,” the enquiry should simply be whether the decision reflects a good-faith effort by the employer to do just that. If the decision is not a good faith attempt to manage the workplace, the exclusion should not apply irrespective of how egregious the employer’s conduct is. The reference in the Draft Policy to “bad judgment or negligence” not being enough is confusing. It clarifies nothing yet creates confusion by introducing fault-based concepts that have no place in a no-fault system.

d)Remove the suggestion that the labour relations exclusion is designed to address the “unavoidable and inherent nature of stress.”

The Draft Policy identifies a secondary purpose behind the labour relations exclusion, which is to recognize the “unavoidable and inherent nature of stress.” Similarly, the discussion paper states: “The intention of the labour relations exclusion is to exclude compensation for stress that a worker experiences in the normal course of business.”

This is false. The exclusion does not deal with stress generally. The exclusion deals only with employer decisions. It has no application to the myriad of other sources of stress in the workplace including coworkers, clients, contractors or suppliers. The purpose of a provision that speaks to one subset of stressors – employer decisions – cannot be overstated and generalized as somehow acknowledging the “unavoidable and inherent nature of stress” more generally.

This overgeneralization cuts right at the very foundations of the system. The system has always covered risks that are unavoidable and inherent in the workplace. We would never say that it is

impossible to eliminate all back injuries in manual labour, so we just will not cover them. Indeed, when a risk is inherent in a particular occupation, the system frequently reacts favourably by extending a presumption to facilitate claim acceptance rather than hindering it. Nor is it at all relevant that the same risk factors for a back injury – such as lifting – are also widespread outside the workplace.

The reference to the “unavoidable and inherent nature of stress” also creates the impression that there is nothing employers can do to create psychologically safe workplaces because stressors are totally unavoidable. This undermines the Board’s prevention efforts. We know that there is a great deal that employers can do to create psychologically safer workplaces. Rather than focusing on the fact that some stressors are unavoidable, the Board should create policy that reinforces and supports its goal of encouraging employers to make decisions that promote psychological safety at work.

While there can be no doubt that the legislature sought to restrict coverage for mental disorders caused by certain management decisions, this has nothing to do with acknowledging the “unavoidable and inherent nature of stress” more generally.

e)Confirm that the labour relations exclusion applies to decisions that cause the mental disorder, but not decisions that simply expose the worker to other, non-excluded workplace stressors.

The Draft Policy provides little guidance on a key issue arising from the labour relations exclusion: how causation should be assessed. Specifically, the Draft Policy needs more guidance on the necessary proximity or connection between the employer’s decision and the mental disorder.

Everything that happens in a workplace is controlled at some level by decisions of the employer. Taking the labour relations exclusion to a logical extreme would exclude virtually every claim. The Draft Policy must differentiate between decisions of the employer that cause a mental disorder – which may be excluded - and decisions of the employer that have the effect of exposing the worker to other workplace stressors or trauma, which are not excluded.

For example, suppose an employee is told they are being transferred to a new position with new job duties. If learning of the transfer causes the employee to develop anxiety or depression, these diagnoses may be excluded on the basis that the mental disorder was caused by the actual decision of the employer to change the work to be preformed. But suppose the worker happily accepts the new position and is subsequently harassed by a coworker working in the new department. That claim should not be excluded on the basis that the mental disorder was caused by the decision of the employer to transfer the worker. The employer's decision did not cause the mental disorder. It merely exposed the worker to other, non-excluded workplace stressors.

As another example, suppose an employee who reports a sexual assault later develops a mental disorder because their employer decides to use an investigator who conducts the investigation in a disrespectful and demeaning way. Again, the worker is not harmed by the actual "decision of the employer" to hire that investigator. The worker was harmed by the disrespectful and demeaning conduct of the investigator. The employer's decision simply exposed the worker to those stressors.

The failure to make the important distinction between employer decisions that cause a mental disorder and employer decisions that expose the worker to other, non-excluded, workplace stressors is particularly important when discussing workload. A mental disorder resulting from excessive workload is generally not caused by the employer's decision. It is caused by the work-related stressors to which the worker is subsequently exposed.

The BCFED and the CLAS thank you for the opportunity to provide feedback on this important policy consultation.