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Briefs

WCB consultation: Submission on addition of communicable viral pathogens to Schedule 1 of the Workers Compensation Act

A PDF of the complete submission can be found here.

Introduction

The BC Federation of Labour ("Federation," "BCFED") appreciates the opportunity to provide our submission with respect to adding a presumption for infections caused by communicable viral pathogens (including COVID-19) to the list of occupational diseases in Schedule 1 of the *Workers Compensation Act* (WCA, Act).

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 (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 and their surviving dependents.

This submission was prepared in consultation with our affiliates.

The COVID-19 pandemic

The pandemic has rapidly changed life in BC from the first confirmed case of COVID19 at the end of January to the declaration of a provincial state of emergency on March 18, 2020. Many businesses were required to close, and the government identified a list of “essential industries” that remained open. These are services that protect life, health, public safety and basic societal functioning. They are the services British Columbians have come to rely on in their daily lives. Thousands of our members as well as non-unionized workers performed this essential work, placing them at high risk of exposure to the virus, SARS-CoV-2. They were unable to work from home. It is alarming to hear that in some industries essential hand washing facilities were unavailable, and maintaining physical distancing from co-workers, patients, residents, customers was difficult if not impossible. Essential workers were at high risk because COVID-19 response preventative measures were not immediately implemented.

From the outset of the COVID-19 pandemic, the BCFED and our affiliates were committed to ensuring workers who developed the illness and filed a WCB claim would not have to jump through unnecessary hoops to prove their illness was work-related.

The BCFED strongly believed the route to easing this burden on workers was to push for the inclusion of COVID-19 as an occupational disease in Schedule 1 of the *Workers Compensation Act*. Once included in Schedule 1, it is presumed in individual cases that fit the disease and process/industry description that the cause was work-related. This is the highest level of designation or recognition. The presumptive designation makes it is easier to advance a worker’s compensation claim for COVID-19 related illness.

According to Section 137(2) of the *Workers Compensation Act*,

> *If, on or immediately before the date of the disablement, the worker was employed in a process or industry described in column 2 of Schedule 1 opposite the occupational disease that has resulted in the disablement, the occupational disease must be presumed to have been due to the nature of the worker’s employment unless the contrary is proved.[1]*

The BCFED is pleased with the recent WCB Board of Directors (BOD) motion that adding diseases caused by infectious pathogens including COVID-19 will be added to Schedule 1 of the *Workers Compensation Act within six months instead of the usual 18 to 24 months. We believe that workers who are fighting this disease need coverage now. As of May 27, 2020, there were 514 COVID-19 illness claims. The highest claims are in health care and social services, public sector, agriculture, food processing and construction.*

Submission

The BCFED's submission on the WCB discussion paper and the proposed options follows.

As described in the WCB discussion paper, the *Workers Compensation Act*, Section 136(1) provides compensation for occupational diseases where certain requirements are met: That the worker has an "occupational disease" and the disease is due to the nature of the worker's employment.

Section 136(1)

1. *Compensation is payable under this Part in relation to an occupational disease, as if the disease were a personal injury arising out of and in the course of a worker's employment, if*
2. *(a) as applicable, (i) the worker has an occupational disease that disables the worker from earning full wages at the work at which the worker was employed, or (ii) the death of the worker is caused by an occupational disease, and (b) the occupational disease is due to the nature of any employment in which the worker was employed, whether under one or more employments.*

An occupational disease is defined in the WCA Division 1, Section 1 Definitions:

> "*occupational disease" means a disease, including a disablement resulting from exposure to contamination, that is*
>
> *(a) a disease identified in Schedule 1 [Presumption of Occupational Disease Related to Specific Process or Industry] of this Act,*

(b) a disease designated or recognized by regulation under section 138 (2) [Board regulation of general application],

(c) a disease designated or recognized by order under section 138 (3) [Board order in specific case],[2]

Schedule 1 presumption

As explained in the WCB discussion paper section 6.2.1, if the worker's occupational disease is identified in Schedule 1 and the worker was employed in the corresponding process or industry described in the schedule, the work causation is presumed unless it is proved otherwise.

An occupational disease covered under Schedule 1 is accepted even though there may be no specific evidence of work causation; however, the presumption is rebuttable if evidence is produced to show the worker's employment did not cause the occupational disease.

In the absence of presumption, a COVID-19 claim is adjudicated as an occupational disease by order as per WCA, Section 1 (c) in each specific case and work causation is determined based on the facts of each case. In other words, on a case-by-case basis.

In sections 6.3-6.3.3 of the WCB discussion paper, the WCB provides an overview of the rapid review process looking at medical and scientific research to determine if workers in any occupation are at greater risk of COVID-19 infection. Given that COVID-19 is a new disease and the research is limited, they also did a rapid review on SARS and H1N1. Much of the research focused on health care workers and not on other occupations.

Even with their own admission that solid research is lacking, the WCB has determined:

Based on the limited analytic research currently available, the Rapid Reviews generally conclude there is no strong evidence of a consistent association between workers in a specific occupation and a significantly greater risk of COVID-19, SARS and H1N1 infection.

The BCFED is very concerned that the results of the Rapid Review of limited research has informed the WCB descriptors in Schedule 1.

- Column 1, the description of the disease, and
- Column 2, the description of the process or industry for the worker's employment

Column 1 description of the disease

The Policy, Regulation and Research Division (PRRD) is proposing to amend Column 1 of Schedule 1 to describe the disease as an infection that is,

1. Caused by communicable viral pathogens and,
2. The subject of one or more of the following:
    a. A public health emergency where notice is given under section 52(2) of the *Public Health Act,*
    b. A state of emergency declared under section 9(1) of the *Emergency Program Act,*
    c. A state of local emergency declared under section 12(1) of the *Emergency Program Act, and*
    d. An emergency declared under section 173 of the *Vancouver Charter.*

The intent of the proposed presumption is to include diseases caused by communicable viral pathogens and these microbes are most likely the cause of widespread outbreaks similar to COVID-19. Indeed, viruses have historically been the cause of global pandemics.

The risks from viruses is examined in the 2019 study "Global Catastrophic Biological Risks" that reviewed the literature on global outbreaks.

> *Among currently studied viruses, the influenza A viruses are widely judged to pose the greatest pandemic risk based on historical outbreaks and viral characteristics (Silva et al. 2017; Imai et al. 2017). Analysis of influenza risks is made in the Centers for Disease Control and Prevention (CDC)'s Influenza Rapid Assessment Tool (IRAT) which ranks H7N9 as the most concerning influenza virus strain (Centers for Disease Control and Prevention 2017).*

There are several viral groups other than the orthomyxoviruses (which include the H7N9 strain of influenza A) that are spread by respiratory routes, possess RNA genomes, and merit enhanced attention: paramyxoviruses (especially these three genera: respirovirus, henipavirus, and rubulavirus), pneumoviruses, coronaviruses, and picornaviruses (especially these two genera: enterovirus and rhinovirus). Based on our analysis and their inherent characteristics, these viral groups are the most likely source of a GCBR-level threat.[3]

The BCFED supports the proposed description of the disease in Column 1 because it sets a broad framework applicable to any other communicable viral pathogens beyond the current COVID-19. We are satisfied that this description of the disease, applicable to any communicable viral pathogen, will provide a mechanism to deal more easily with workers who develop an illness and file a claim.

The second proposal in Column 1 requires a state of emergency for presumption to apply. As explained in the WCB discussion paper, the proposed Schedule 1 presumption is in “response to the exceptional circumstances brought about by the COVID19 outbreak in BC.” The current state of emergency declared in response to COVID-19 is an historic event. Declaring a BC state of emergency for an infectious disease recognizes that there is a serious risk of infection and only then is presumption applicable.

The limitation to exceptional circumstances means that other infectious outbreaks such as the common cold would be assessed on the usual case-by-case basis.

The BCFED accepts this limitation but is concerned that it will exclude workers who may develop an infectious viral disease either prior to the declaration of any of the listed emergencies or after the emergency is lifted.

Workers may be exposed to serious, novel or new viruses before a state of emergency is formally declared. There may also be novel viruses that pose a serious threat to workers that do not rise to the seriousness of declaring a state of emergency. In these cases, the presumption should apply if the virus is presumed present in the worker's workplace. (Column 2)

Recommendation:

Therefore, the BCFED is recommending adding:

3. “a novel virus” to the requirements describing the disease, and importantly, without it being subjected to the emergency declarations required for other infectious viral disease. The rationale is simple: a novel virus, by definition, poses excessive risk to workers exposed as there is no established immunity, no vaccine, nor likely nor tested treatments as it is a “new “pathogen.

Column 2 description of the process or industry

The PRRD is proposing to amend Column 2 to include the following requirements for the description of the process or industry,

a. There is a risk of exposure to a source or sources of infection significantly greater than the public at large;
b. The risk of exposure occurs during the applicable notice or emergency under Column 1; and
c. The risk of exposure occurs within the geographical area of the applicable notice or emergency under Column 1.

The BCFED is strongly opposed to the requirement for a “significantly greater risk” of exposure than the public at large. The addition of "significantly" greatly restricts the situations to which the presumption would apply. This is completely unnecessary as Column 1 already limits the presumption to a declared state of emergency - a very rare event. The BCFED opines that this requirement nullifies the whole purpose of the presumption and in fact is purposefully designed to do exactly that. The addition of “significantly” places a heavy burden of evidence for the worker’s case. Our members were denied the opportunity to work remotely after the SARS-CoV-2 was declared a pandemic.

During a state of emergency, when some workers can protect themselves by staying whereas others cannot, this reinforces inequity within our society. People working outside the home are at a greater risk of contracting the virus than people working from home. Workers who work outside the home during a state of emergency should therefore receive the benefit of a presumption. The requirement

that there be evidence showing that the worker was at significantly greater risk of exposure than the public at large undermines a key purpose of the presumption, which is to simplify the evidentiary obstacles to accepting a claim. The presumption will most often apply to novel viruses for which there is little data or evidence to prove relative risk. It is with confidence that we can say in the case of a communicable disease that workers who continue to work outside their homes for the benefit of society are at greater risk than those who isolate at home.

Recommendation:

The BCFED is recommending that presumption should be simplified to apply to all workers working outside the home during a state of emergency.

The World Health Organization declared COVID-19 a pandemic on March 12, 2020. The government of British Columbia declared a Public Health Emergency on March 12, 2020. This was followed by the declaration of a province-wide state of emergency under the *Emergency Program Act.* The first COVID-19 case in BC was confirmed on January 28, 2020, and the first WCB COVID-19 claim was filed on March 12, 2020.

Workers were developing the disease prior to the declarations of the public health and the province-wide states of emergency.

Currently, the provincial state of emergency is being extended on a two-week by two-week time frame. It is uncertain how long the state of emergency will continue, and it may depend on the number of infections that result as of BC’s staggered phases of re-opening.

We are also concerned for those workers who may be infected by a serious novel virus before a state of emergency is formally declared. Furthermore, there may be a novel virus that poses a serious threat to workers that never rises to the seriousness of declaring a state of emergency.

Recommendation:

The BCFED recommends in these cases the presumption should apply if the virus is presumed to be present in the worker's workplace.

The final requirement is for the exposure to occur within the geographical area of the applicable emergency.

The BCFED is concerned about this requirement and the depth of our concern can be best illustrated in the following example:

A worker from BC attends a conference in another province prior to directives encouraging no unnecessary travel, returns to BC and becomes symptomatic. Further cases are confirmed amongst conference attendees. The worker has been exposed to the virus outside of the geographical area of the declared emergency and develops the infectious disease--it will not be considered presumptive. We believe this is unfair and propose the following amendment to Column 2.

Recommendation:

The BCFED recommends Column 2 recognize a geographic area in a jurisdiction outside British Columbia that was at the time subject to a state of emergency with respect to the communicable viral pathogen under the law applicable to that jurisdiction.

Options

Option 1: Status Quo.

The BCFED believes this is not an option as the WCB Board of Directors has directed that viral pathogens be included in Schedule 1.

Option 2 Amend Schedule 1 and add a presumption.

Option 2 needs to be revised, as we have recommended previously in the submission, in order for workers to be covered by the presumption when they become ill or infected by communicable viral pathogens due to their employment.

The BCFED's recommendations are summed up as follows:

Column 1

1. Disease caused by communicable viral pathogens and,
2. The subject of one or more of the following:
    a. A public health emergency where notice is given under section 52(2) of the *Public Health Act,*
    b. A state of emergency declared under section 9(1) of the *Emergency Program Act,*
    c. A state of emergency local emergency declared under section 12(1) of the *Emergency Program Act, and*
    d. An emergency declared under section 173 of the *Vancouver Charter.*

Or,

3. Disease caused by a novel viral pathogen (without the emergency declaration limitations above).

Column 2

1. All workers working outside the home during a state of emergency, or in a geographic area in a jurisdiction outside British Columbia that was at the time subject to a state of emergency with respect to the communicable viral pathogen under the law applicable to that jurisdiction.
2. The virus is presumed to be in the worker's workplace.

The PRRD seems to be concerned that BC will be the only jurisdiction in Canada with presumption for communicable viral infections. The BCFED believes this critical change needs to be made at this unprecedented time in our history. The presumption is a forward-thinking preventative measure which can be instrumental in preparing for future novel viruses.

It is both promising and admirable that the WCB Board of Directors is leading the country on applying a presumption for viral infections. This change informs workers that they will be supported and can be confident that the workers' compensation system recognizes the risks they face at work.

We agree with the PRRD that presumption will increase awareness for both employers and workers.

Understanding barriers are removed will reassure workers the process of filing a claim will not be onerous.

The BCFED urges the PRRD to work with the stakeholders to develop guidance and policy on the changes to Schedule 1.

Conclusion

The BCFED urges the WCB Board of Directors in the strongest terms to implement our recommendations for communicable viral pathogens, including COVID-19, into Schedule 1. Workers who have had to continue to work and now those who are returning to work do not fully understand the risks of developing COVID-19. The medical experts do not fully understand this virus and change directives and requirements frequently as they gain experience, for example, the issue of wearing or not wearing masks as PPE. Workers are very concerned for their health, of losing their income and their jobs. By adopting presumption for this occupational disease, the WCB Board of Directors sends a clear message to workers that if you have to go to work and you become ill, you can expect your claim will be accepted.

[1] https://www.worksafebc.com/en/law-policy/workers-compensation-law/workers-compensation-act

[2] [2] https://www.worksafebc.com/en/law-policy/workers-compensation-law/workers-compensation-act

[3] https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7122301/