

WCB CONSULTATION

Submission on the Proposed
2019 - 2021 Policy Workplans

February, 2019




Authority

This document is respectfully submitted on behalf of the Executive Officers of the BC Federation of Labour and represents the views of more than 500,000 affiliated members from across the province of British Columbia.



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Submission on the WCB proposed 2019-2021 policy workplans

The BC Federation of Labour (BCFED) represents more than 500,000 unionized workers in all industries across BC. However, the BC Federation of Labour is a longstanding major stakeholder at the Workers' Compensation Board (WCB), recognized as being the voice for all workers in the province. The BCFED advocates for the health and safety of all workers in BC and full compensation for injured workers and their surviving dependents.

The BCFED appreciates the opportunity to provide our submission with respect to the WCB's proposed Policy Workplans for 2019-2021.

This submission is done in consultation with our affiliated unions and advocacy community.

1. Chronic Pain – Item C3-22.20 and #39.02 of the Rehabilitation Services & Claims Manual, Volume II

The BCFED considers a review of the chronic pain policy as a high priority due to the number of workers who are being inadequately compensated by the current policy. The Petrie recommendation #28 to have policy #39.02 amended to direct that a worker suffering with chronic pain be addressed under 23(3) is insufficient.

In 2003, a Supreme Court of Canada decision recognized that chronic pain despite lack of objective evidence, is a disability that is real and to not consider it as such is contrary to Section 15 of the *Charter of Rights and Freedoms*. The BCFED has lobbied government and the WCB for a legislative review and one of the necessary amendments to the *Workers Compensation Act* (WCA) is to recognize that chronic pain is a disability to be assessed and compensated like any other disability. Without this recognition it is difficult to construct rational treatment or policy.

The BCFED recommends the rating schedule of percentages of impairment in section 23(2) will

include a range of percentages of impairment of earn capacity due to chronic pain and not be fixed at 2.5 %. This limitation has had a profound impact on injured workers with an expectation that they are forced to return to work even when they are totally disabled by their pain condition.

Until the government commits to a full legislative review the BCFED supports the Policy Regulation and Research Division (PRRD) proposal to establish an expert panel to review recent medical developments in the diagnosis and treatment of chronic pain.

2. Psychological disability awards

The BCFED considers this matter a high priority and supports the review of the adjudication guidelines and the role of the Psychological Disability Awards Committee (PDAC). We agree the PDAC has overstepped its original mandate as an adjudicative body to provide “expert opinion” on degree of disability and apportionment of causes in worker claims.

The BCFED recommends the PDAC be eliminated and that psychological disability awards are assessed in the same manner as physical Permanent Partial Disability (PPD). This is a long outstanding issue and the WCB needs to proceed with their review and amendments.

3. Mental Disorder Policies C3-13.00 and Section 55

The BCFED considers this a priority issue.

The workplan identifies the following issues identified in the CPR recommendations #39 and #40 be considered:

- the definition of significant work-related stressor;
- the application of section 5.1(1)(c) of the Act;
- the definition of bullying and harassment.

As Petrie rightly says, “in a worker-centred compensation system, board policy should not raise the bar to compensation higher than the legislation provides.” He properly identifies that the legislation does not itself exclude “normal work” from being qualified as a traumatic event or

significant stressor. There is an expectation that workers assume the risk in “normal work” because this work is deemed non-compensable.

Section 5.1(1) requires a comprehensive review to ensure that psychological injuries are treated with the same merit criteria as physical injuries. The labour relations exclusion which, coupled with poor policy, has effectively eliminated the acceptance of claims for one of the key “significant stressors”—bullying, harassment and similar behaviour in the workplace. The policy change recommended by Petrie will not remedy this, but it will be a small step to softening the application of this exclusion.

The BCFED strongly supports reviewing the definition of bullying and harassment, particularly critical is the discrepancy between the definition in the Bullying and Harassment Policy and the definition applied in policy # C3-13.00.

Definition in policy C3-13.00

“Interpersonal conflicts between the worker and his or her supervisors, coworkers or customers are not generally considered significant unless the conflict results in behavior that is considered threatening or abusive.”

Definition in the Bullying and Harassment Policy

“includes any inappropriate conduct or comment by a person towards a worker that the person knew or reasonably ought to have known would cause that worker to be humiliated or intimidated”

“excludes any reasonable action taken by an employer or supervisor relating to the management and direction of workers or the place of employment”

The definition in the Bullying and Harassment Policy uses the word “person,” a broad and inclusive term. The policy prohibits all parties at the workplace from engaging in bullying and harassment and refers to the general duties under the WCA Division 3, Sections 115, 116 and

117 #C3-13.00 diminishes the seriousness of bullying and harassment by referring to interpersonal conflicts as generally insignificant.

The prevalence of bullying and harassment at workplaces is born out in the prevention statistics: in 2017 there were 809 complaints of bullying and harassment and 890 inquiries.¹

The definition in the bullying and harassment policy must be used when considering mental disorder claims.

4. Vocational Rehabilitation – CPR Recommendations #5-#15

The BCFED considers a review and changes as recommended by Petrie as a high priority.

Petrie stated that “restoring an injured worker to suitable employment with the injury employer at the level of his or her pre-injury earnings is at the heart of a worker-centred approach”

The vocational rehabilitation policies are in dire need of reform to achieve this desired result and Petrie’s recommendations should be implemented immediately.

Petrie also pointed out that BC is the only jurisdiction in Canada that does not have legislation requiring employers to rehire injured workers. A legislative amendment to remedy this is necessary—the duty to accommodate is an important human rights principle that should be recognized within the WCB system.

However, any changes regarding the concept of “early return to work” must be approached cautiously to ensure that workers are not forced to return to work prematurely, which often ends up exacerbating their injury or re-injuring them.

¹ <https://www.worksafebc.com/en/resources/about-us/annual-report-statistics/2017-stats?lang=en>

5. Merits and Justice – CPR Recommendations #1

The BCFED regards merits and justice as the first priority and fully supports the review.

Merits and justice are foundational to the concept of a worker-centered approach.

Getting this principle established should come first on the priorities for implementing Petrie's recommendations.

The changes made to the *Workers' Compensation Act* sections 99 & 250 in 2001, requiring adjudicators to apply a policy of the board—fundamentally undermined the entire process of adjudicating claims. It imposes a near impossible standard of having to both apply policy and consider merits and justice. However, this standard has been made truly impossible by how the board has developed policy in the last 17 years.

Compensation policy is overly detailed, essentially creating a prescriptive framework to determine what merits may or may not be considered, and how. The role of policy under s. 99(2) of the Act has effectively evolved into being a substitute decision-maker.

Therefore, a reform of policy item #2.20 alone, even if it were very broad and progressive, would likely not change much about how other policies were applied by adjudicators. To meet the true spirit and intent of this recommendation, a policy by policy assessment would also need to be done, to measure each policy against the merits and justice standard in the reformed #2.20 and the Act and amend those that are not consistent with it. In addition, significant (re)training of the adjudicators is required to ensure that intent of the changes is applied in practice.

For example, often workers' claims are denied due to alleged insufficient evidence to support that the injury "arose out of and in the course of employment," ignoring the obligation under policy item #97.00 to gather and properly weigh the necessary evidence to make a sound decision. A worker-centered approach would apply the principles outlined in numerous court decisions regarding evidence, such as *McKnight v. Workers' Compensation Appeal Tribunal*,

2012 BCSC 1820, to ensure a broad and common-sense consideration of the evidence based on the merits and justice of the case.

Although amending #2.20 and other policies would help in shifting the culture of board adjudication to a worker-centered approach, the only thing that would really fix the disparate direction (standard) in the Act is to amend section 99(2) to remove the requirement to apply policy and, therefore, reinstate the discretionary power that allows adjudicators to truly consider the merits and justice of a case in their decision-making.

6. Activity Related Soft Tissue Disorders (ASTDs) CPR

Recommendations #34-37

Change to the ASTD policy would have an immediate and consequential impact for claim acceptance. ASTDs represent the largest component of injured worker claims and similar to mental disorder claims have an extremely high rate of suspensions and denials—clogging up the review and appeal systems.

In terms of overall importance, due to the number of claims involved, ASTDs should rank after merits and justice and apply that principle to new policy.

The BCFED agrees with Petrie that the policy must recognize the risk factors laid out in the ergonomic requirements of the OHS regulation. Again, there is a disconnect between compensation policy and OHS legislation.

These changes should be a high priority, especially considering that due to the scientific nature of these policies, it will take some time to gather relevant evidence and undergo comprehensive consultations.

7. Mental Disorders -Section 55

See #3 for comments.

8. Schedule D, Non-traumatic Hearing Loss

The BCFED is not opposed to the review but does not consider it a priority given all the other important work that needs to be completed.

9. Statutory Revision of the *Workers Compensation Act*-assessment Manual, Prevention Manual, and RS&CM Volume II

The BCFED submits the statutory revision is inadequate and superfluous and we continue to lobby government and the WCB for a full review of the WCA, both compensation and health and safety.

10. Evidence and Decision-Making -CPR Recommendation #32

Petrie noted the principles from the key court decisions as follows:

- *British Columbia (WCA) v. Fraser Health Authority* 2016 SCC 25 found that “the law in Canada requires a broad approach to the evidence, which, together with a pragmatic, common sense consideration of the evidence, enables inferences of causation to be drawn even though scientific proof is lacking.”
- “The Supreme Court of B.C. in *McKnight v. Workers’ Compensation Appeal Tribunal* 2012 BCSC 1820 found that “diagnosis” is a finding of fact and the adjudicator must apply a legal standard, not a medical standard, for a finding regarding a diagnosis. Under the Act, the legal standard is “as likely as not” under section 99(3), which may be different than a medical standard.”

The BCFED considers it is imperative that the principles outlined in these decisions be incorporated into board policy therefore this recommendation must be given high priority.

11. Cost Relief -CPR Recommendations #16 & #19

See comments in #4 Vocational Rehabilitation. The BCFED considers a successful return to work for an injured worker a matter of human rights and more important than employers getting a cost relief.

12. PDES Annual Review (2018, 2019, 2020)

The BCFED supports the ongoing review of the Permanent Disability Evaluation Schedule (PDES). In 2019, the review should focus on determining whether the PDES measures impairment of earning capacity as required by section 23(1) of the Act and RSCM Policy Item #39.00.

13. Newly Recognized Occupational Diseases-Section 55 of the Act and Policy Item#32.58 of the RS&CM

The BCFED supports this review given the emerging scientific research on workplace exposures but given the other high priority items that remain outstanding, it is not a priority.

14. PDES- Range of Motion (ROM) Method and Disabilities of the Spine

This is a roll over from workplan 2018-2020.

The BCFED reiterates our support for the review of this item as a high priority and strongly recommends that it should be expanded to include ROM for limbs. The methods used to determine the impairment of earning capacity has a significant impact on injured workers' lives and should be based on sound and up-to-date science.

The BCFED submits that the review of this policy should be expedited for completion in 2019.

15. Surveillance -CPR Recommendation #41

This policy review has been completed and the WCB now has a policy for covert surveillance which adheres to the requirements of *Freedom of Information and Protection of Privacy Act* and the *Canadian Charter of Rights and Freedoms*.

The BCFED is pleased the new policy reflects changes recommended by the BCFED and our affiliates.

16. Additional Benefits for Severely Disabled Workers

The BCFED supports a review of Item C10-84.00 to ensure that these injured workers are receiving adequate supports and benefits in order to successfully achieve physical, economic, social and vocational rehabilitation.

Monitoring

These are policy items that have been removed from the current workplan and will be monitored over the next two years.

1. Average Earnings, Chapter 9 of the RS&CM

The BCFED recommends that this should be a higher priority. It is critical that the policy gives clear direction to ensure average earnings and wage rates are calculated correctly.

Injured workers who work longer shifts are most impacted by the lack of clarity and consistency.

2. Overpayments-Policy Item #48.41 of the RS&CM

This is not a priority item for the BCFED given the other high priority items.

3. Diverting Pension Benefits to Pay for Worker's Maintenance

The BCFED supports the review of this item. However, considering the number of other high priority items that remain unresolved since the 2018-2020 workplans (or prior), this should be a lower priority.

Appendix B Assessment Policy Workplan

1. Workplace Status

The Federation fully supports the review of this item as a high priority as it has a significant impact for both worker and employer stakeholders. The BCFED submits that the review of this policy should be expedited for completion in 2019. Particularly at issue is volunteers and how they are treated.

2. Instalment Model for Quarterly Reporting

The consultation on this item has been completed. The BCFED supported these amendments in our submission with the recommendation that the changes be monitored over the next year and a report be submitted to Policy and Practices Consultation Committee (PPCC).

3. Section 4 of the WCA and Fishing Industry

The BCFED has provided feedback on the new guidelines for the fishing industry, and as a result of this review, a number of policies were put into the guidelines.

4. Personal Option Protection

5. Evidence and Adjudicative Framework (Assessment Manual);

6. Treatment Dividends Paid to Principals

The BCFED generally supports these assessment reviews but does not consider them a priority.

Monitoring

The following have been placed on the assessment workplan for 2019-2021 for monitoring:

- Allocation of claims costs
- Transfer of ER between firms – Item AP1-42-3
- Experience rating -Item Ap1-42-1
- Minimum annual assessment

The BCFED generally supports the above-mentioned items be placed on the monitoring list for the 2019-2021 Assessment Workplan.

Appendix C: Occupational Health and Safety Policy Workplan

1. Discriminatory Action Policy Review

The BCFED generally supports this review as there is a need to clarify the process for proceeding with a complaint with the WCB when a union has declined to pursue a grievance.

2. Bullying & Harassment Policy Review

The BCFED recommended in our submission on the 2016-2018 regulatory workplan amending the Violence in the Workplace Regulation, Section 4.27-4.31. In early 2017 the BCFED submitted

proposed amendments to this regulation. The proposed amendments included moving the requirements of the workplace bullying and harassment policy into the regulation where it rightly belongs. Also added to the amendments were requirements to prevent family and relationship violence (formerly called domestic violence). Since then the BCFED has had no response from the WCB on the proposed amendments.

The BCFED considers a comprehensive review of the Workplace Conduct Regulation, Violence Prevention Regulation and the Bullying and Harassment Policy a high priority and recommends that it be added to the 2019-2020 regulatory workplan. Simply, reviewing the bullying and harassment policy will not provide an effective regulatory framework to protect workers against incidents of violence. Workers across many industries are at daily risk of being bitten, hit, punched, sworn at, bullied and harassed. Those most at risk work in health care, including elder care, social services, retail, transportation, and education.

The federal government has passed Bill C-65 amending the *Canada Labour Code* to strengthen the existing framework for the prevention of harassment and violence, including sexual harassment and sexual violence, in the workplace. This legislation was acted upon as a result of an on-line survey and consultations across Canada that showed 60% of survey participants had experienced harassment, 21% had experienced violence and 3% had experienced sexual violence.²

A recent study by the BC Teachers' Federation found that 90% of teachers face violence on the job.³

² <https://www.canada.ca/en/employment-social-development/services/health-safety/reports/workplace-harassment-sexual-violence.html>

³ <https://www.thestar.com/vancouver/2018/07/10/bc-teachers-alarmed-as-survey-shows-90-face-violence-on-the-job.html>

3. Occupational Exposure Limits (OELs)

The Federation supports this addition to the workplan. The BCFED previously recommended a technical, multi-stakeholder committee be formed to review hazardous substances on an ongoing basis.

4. Biennial Review of Formaldehyde;

5. Biennial Review of Styrene

The BCFED fully supports the ongoing review of these chemicals as a high priority. Formaldehyde exposure causes nasopharyngeal cancer, leukemia, asthma and contact dermatitis. It also has mutagenic properties.⁴ Styrene has been classified as a possible carcinogen by the International Agency for Research on Cancer.⁵ (IARC)

When the WCB adopted the American Conference for non-Governmental Industrial Hygienists (ACGIH) list of exposure limits the lower levels of exposure for formaldehyde and styrene were not adopted. Employers stated that the costs of eliminating these dangerous chemicals was too high. The BCFED strongly supports the adoption of the lower ACGIH exposure levels for formaldehyde and styrene.

6. Policies of Part 24 of the OHSR - Diving, Fishing and Other Marine Operations

Review Completed

⁴ <https://monographs.iarc.fr/wp-content/uploads/2018/06/mono100F-29.pdf>

⁵ <https://monographs.iarc.fr/wp-content/uploads/2018/06/mono82-9.pdf>

Monitoring

1. Residential Demolition and Asbestos Industry

The Federation fully supported the addition of this item as a high priority in our submission on the 2016-2018 Regulatory workplan. The BCFED is disappointed to see this issue is still on the monitoring list for the new workplan. In light of the federal government's comprehensive ban of asbestos and in the recommendations from the ministry of labour's report "Keeping Workers, the Public and the Environment Safe from Asbestos,"⁶ the BCFED recommends this review be placed on the list as a priority. In addition, and more importantly, exposure to asbestos continues to be the greatest cause of worker deaths. It is imperative that the board work with all levels of government and stakeholders to develop a multi-pronged approach to more effectively prevent workers' exposure to this deadly substance.

Conclusion

The Federation recommends that the board of directors seriously consider this submission and revise their proposed 2018-2020 workplans accordingly, in support of healthier and safer workplaces and work activities, and fair and equitable compensation for all workers.

⁶ <https://engage.gov.bc.ca/app/uploads/sites/121/2018/12/6493-Asbestos-Report-2018-Final.pdf>