SUBMISSION TO THE WORKERS' COMPENSATION BOARD

Workers' Compensation Board

WORKPLAN

2013-2015

BC BUILDING TRADES' POSITION

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Workers' Compensation Board Work Plan 2013–2015

BC BUILDING TRADES' POSITION

INTRODUCTION

In keeping with its mandate, the Workers' Compensation Board has released their *2013-2015 Compensation, Occupational Disease and Assessment Policy Priorities Workplan* discussion paper. Stakeholders were invited to provide feedback on the discussion paper and draft policy priorities. The BC Building Trades Council is recommending several additions to the Board's future work plan.

RECOMMENDED ADDITIONS

Selective/Light Employment (aka light duties) – RSCM Vol. II, Policy Item #34.11

While the BC Building Trades Council understands the utility of returning to work as soon as possible following a workplace incident, the Board's current RSCM Policy Item #34.11 respecting light duties frustrates the rehabilitation of construction workers. More often than not, the physical nature of construction work, the environment in which it is performed, and the skills, training, and aptitude of our members do not "mesh" with the Board's light duty regime. As a result, the policy needs to be amended to reflect the reality of the building and construction industry.

More specifically, there are a number of realities that should be understood and reflected in Policy Item #34.11.

First and foremost, building and construction craft workers are not "light duty workers". None of our employers/contractors seek to hire or retain workers for light duties. Only workers who can apply 100% of their physical and mental capacity in the execution of their crafts in the building and construction sector are sought and retained. All others will be laid-off, and usually sooner than later. It's nothing personal against the worker. The *job* simply demands it.

Secondly, while the criteria in the existing policy is allegedly there "to ensure that the early return-to-work is appropriate", the Board as well as the employer rarely adhere to the criteria. For example, according to the criteria "the work must be productive" and "token or demeaning tasks are considered detrimental to the worker's rehabilitation". Yet employers and the Board commonly threaten to terminate wage loss benefits when our craft workers oppose token and demeaning jobs. Given the strictness with which the Board and the employers apply the WCB law and policy when it works in their favour, it should be interpreted likewise when the worker's health, safety, and vocational skills are at stake.

Thirdly, and as suggested by the above comments, key terms such as "suitable employment", "reasonable limits" and "productive work" should be more definitively defined so as to provide much-needed guidance to the Board and employers. What is suitable and reasonable for some is apparently not suitable and reasonable for others.

Fourthly, selective duties that require our members to perform inappropriate tasks such as sweeping the office floor, reading reports, filing documents, and other basic administrative duties are short term, isolating, and commonly beyond their ability. About ninety percent (90%) of building and construction contractors/employers possess ten or less workers, that is to say, they are small firms with few, if any, meaningful and suitable light duties. When the basic short-term tasks run out, so, too, does the worker's and employer's patience. For the worker, this translates into boredom, stress, and frustration of their rehabilitation; for the employer, it means paying for a worker who doesn't pull his weight and a lay-off for that worker at the earliest opportunity. Moreover, typically the employer's light duties place the worker in an isolated location such as a back room of a portable office where he or she spends eight hours a day starring at the wall. Others too ashamed to admit their literacy and aptitude limitations (and employer's rarely ask them whether they can perform the required tasks or not) are left to struggle with challenging office duties and fake their way through the light duties to keep the money flowing.

Fifthly, in the macho world of construction workers, light duty workers are regularly subjected to bullying and harassment. There is, of course, never an excuse for bullying and harassment in the workplace, but the Board cannot turn a blind eye to the role it plays in facilitating this egregious behavior with its existing return-to-work regime.

Sixthly, craft workers who are compelled to undertake light duties to retain their wage loss benefits are regularly driven by their supervisors, peers, or their own self-will to perform physical tasks they are limited or restricted from by their medical advisors as well as the Board. This puts them at great risk and many workers have reinjured themselves as a result.

Seventhly, from a physical and mental standpoint, a worker who is less than "100% fit" has no place on a construction site. We should not need to remind the Board of this fact given its mandate. Yet the Board persistently steers workers back to the worksite before they are ready thereby raising further compensation issues and frustrating the worker's recovery.

Lastly, unique to the building and construction industry, pushing highly qualified craft workers to perform duties outside of their skill-set creates serious jurisdictional issues and confrontations for unions. These confrontations, in turn, can have a detrimental impact not only on workers and employers, but the provincial economy as a whole.

To remedy these shortcomings, the BC Building Trades Council strongly encourages the Board to spearhead a stakeholder consultation on light duties. As illustrated by our comments above, the unique nature of the building and construction industry (i.e., its workers and the environment in which they work) necessitates a new policy for our workers who are slowly recovering from a

workplace incident but not yet ready to return to the tools. It is our longstanding view that craft workers on the "recovery continuum" should be offered institutional training in health and safety during this period while on wage loss benefits. Such training is offered by myriad institutions throughout the province and would be beneficial for workers, employers, and the Board.

Penalties – Impose Significant Penalties

Section 196 of the *Workers' Compensation Act* enables the Board to impose administrative penalties up to $565,329.86. This is a heavy compliance hammer but the Board is reluctant to use it as it should. Instead, the general rule for the Board is to set penalties as low as possible.

Of course, the Council is aware that both the number and amount of the Board's administrative penalties have risen over the last five years. Specifically, although the number of penalties dropped precipitously in the first five years of the BC Liberals mandate, they grew in 2007 to 221, then dropped again in 2008, but continued their upward swing in 2009 to 211 penalties and to 256 in 2010. Penalty amounts grew as well: for the years 2006, 2007, 2008, 2009 and 2010, WCB generated $1,599,329, $4,256,516, $2,617,646, $4,454,347, and $3,136,898, respectively. These numbers, however, are meaningless if absented from their context: *the number and nature of the penalties.*

Every year the Board publishes its *Top 10 Enforcement Penalties* to showcase the high penalties the employers are paying for infringing the Act. For the period 2010, the top ten penalties averaged $86,673 and went as high as $145,046 (*Penfolds Roofing Inc.*). But, unfortunately, these top ten reports are more rhetorical than substantive; the substantial penalties they list are the exceptions, not the rule.

To begin with, while the Board gathered a sum of $3,136,898 in 2010 for infractions of the Act, this translates into an average penalty of only $12,254. This is not a lot of money for putting workers' lives at risk. And many of the penalties are far lower. Take, for example, the case of the construction company John Kenneth Sutton whose worker suffered a *fatal injury* by falling about 6 meters (20 ft) to the ground from the edge of an unguarded roof. Not only did Sutton fail to ensure his fall protection system was employed, it didn't provide the worker with the requisite safety information, instruction, training, or supervision. For these multiple, egregious infractions – contraventions that cost this worker his life - the Board penalized the company $3,250.

The Board's approach to penalties is operationalized by their *Prevention Policy D12-196-6* in general; and its focus on the employer's assessable payroll range (i.e., the viability of the firm and the degree to which it will be financially constrained by the penalty) in particular.

The table below shows the applicable quantum for penalties "where there is (i) a serious injury or illness or death; or (ii) high risk of serious injury or illness or death; or (iii) non-compliance was willful or with reckless disregard".

Assessable Payroll Range	Penalty Amount Range	Maximum Quantum
Up to $500,000	2.5% of payroll, or $2,500, whichever is greater.	$2,500-$12,500, whichever is greater.
$500,001 – $1,000,000	$12,500 + 2.25% of payroll over $500,000	$23,750
$1,000,001 - $1,500,000	$23,750 + 2.0% of payroll over $1,000,000	$33,750
$1,500,001 - $2,000,000	$33,750 + 1.75% of payroll over $1,500,000	$42,500
$2,000,001 - $2,500,000	$42,500 + 1.5% of payroll over $2,000,000	$50,000
$2,500,001 - $3,000,000	$50,000 + 1.25% of payroll over $2,500,000	$56,250
$3,000,001 - $3,500,000	$56,250 + 1.0% of payroll over $3,000,000	$61,250
$3,500,001 - $4,000,000	$61,250 + .75% of payroll over $3,500,000	$65,000
$4,000,001 - $4,500,000	$65,000 + .5% of payroll over $4,000,000	$67,500
$4,500,001 - $5,000,000	$67,500 + .25% of payroll over $4,500,000	$68,750
Over $5,000,000	$68,750 + .125% of payroll over $5,000,000, or $75,000, whichever is less.	$68,750 to $75,000, whichever is greater.

Given the above formula table, it is not surprising that penalties have been so low, historically. The table below illustrates just how low they have been within the *construction sector*.

Year Penalty Imposed	Total Penalties in Construction Sector	Penalties $5,000 or less
2000	135	105
2001	84	56
2002	63	39
2003	19	14
2004	44	26
2005	44	24
2006	40	27
2007	146	90
2008	93	45
2009	156	89
2010	195	117
	1,019	**632**

If the Board is serious about issuing penalties that will deter employers from risking workers' lives, the Board needs to change the current formula and implement a more holistic approach that takes all relevant issues, such as the resulting injury to the worker, into consideration.

The BC Building Trades Council would like the Board to undertake a comprehensive stakeholder consultation on this matter.

Mental Disorders – Policy Item C3-13.00 – Amended July 2012

Given the recent changes with respect to mental stress/disorders brought in by Bill 14 and Policy Item C3-13.00 which came into effect July 1, 2012, the Board may not have appetite for further consultation and/or changes. Be that as it may, there are serious problems with the new policy and the BC Building Trades Council would like to see further stakeholder consultation. The issues set out below are of particular concern to us.

Section 5.1(1)(c) Exclusions

Bill 14 created a new section 5.1(1)(c) which will serve to exclude many workers who are suffering from a mental disorder because it states that the disorder "must not be caused by a decision of the worker's employer relating to the worker's employment, including a decision to change the work to be performed or the working conditions, to discipline the worker or to terminate the worker's employment." The new policy embellishes this section, adding more examples to the list (e.g., workload, deadlines, evaluations, transfers, changes in job duties, etc.). The BC Building Trades Council opposes the embellishment of the existing exclusionary language in the Act.

Our reasons for so doing have been eloquently expressed by the BC Federation of Labour:

> The Federation is deeply concerned about this portion of the Policy, especially with the expansion of "examples" of exclusions. As discussed at the stakeholders meeting, we are very worried that adjudicators will come across a claim with one of the listed exclusions and will automatically deny the claim on that basis without digging further.
>
> It is paramount for the adjudicators to understand that harassment and bullying are often cloaked in decisions relating to the worker's employment. We have seen these situations exposed in countless harassment investigations where an employer has used one or more of the "excluded" decisions as part of the escalation of harassment or bullying tactics – changing work performed (more or less, etc.) or working conditions, disciplining, terminating, performance evaluations and management, transfers, demotions, reorganizations and the list goes on.
>
> It is absolutely necessary that the adjudicators perform a full investigation – dig deeper than what appears on the surface – in these cases, especially when there is supportive medical evidence. Again, sometimes these decisions equate to bullying and harassment in and of themselves.

The Federation suggested the insertion of a statement in the policy under this section advising decision-makers not to discount these claims and the BC Building Trades Council strongly supports this view.

Does the Worker have a DSM diagnosed mental disorder?

In addition, the policy states that "a DSM diagnosis generally involves a comprehensive, multi-axial and systematic clinical assessment of the worker". The BC Federation of Labour has argued that while they agree that there are cases where this is appropriate and necessary, it is their position that there are some cases where this is not necessary and will cause an undue delay in claim processing. To remedy this shortcoming they recommend that this be made more explicit in the policy, rather than simply being alluded to with the term "generally". The BC Building Trades Council echoes this suggestion.

Was there one or more events, or a stressor, or a cumulative series of stressors?

Current policy compels the Board to verify the relevant events or stressors through information or knowledge of the events or stressors provided by co-workers, supervisory staff or others. A worker's family, general practitioner and union steward(s) may also possess useful and dependable information and knowledge respecting the events or stressors leading to the mental disorder. Therefore, these individuals should be expressly noted in the policy language.

Was the event "traumatic" or the work-related stressor "significant"?

In the BC Federation of Labour's submission to the Board respecting Policy C3-13.00, dated June 18, 2012, it makes several comprehensive arguments respecting this section of the policy. Given our support for their position and reasoning on this matter, we have resolved to regurgitate their polemic verbatim below.

> Definition of "Significant"
>
> The proposed Policy defines a *"significant work related stressor"* as one that *"exceeds the intensity and/or duration expected from the normal pressures or tensions of the worker's employment".*
>
> This is contrary to the legally accepted definition of "significant" as defined by the Board in other aspects of Policy. For example, the Board Policy Item 14.00 – Arising Out of and in the Course of Employment defines the concept of "causative significance" as *"more than trivial or insignificant".*
>
> Further, the definition is not consistent with any common definition of the term. Merriam-Webster defines significant as *"having meaning"*, *"having or likely to have influence or effect"*, or *"probably caused by something other than mere chance"*. The Oxford Dictionary defines significant as, *"sufficiently great or important to be worthy of attention; noteworthy"*, *"having a particular meaning;*

indicative of something", or *"suggesting a meaning or message that is not explicitly stated".*

The accepted definition of "significant", therefore, is more consistent with the existing interpretation of "more than trivial or insignificant" rather than with the Board's contrived definition in the proposed Policy.

Certainly, the legislators have set a threshold in Law relatingto mental disorder that is not included in the Law surrounding physical injuries. There is no requirement in the Act for a physical accident to be "significant". However, the Board has developed Policy that does establish that a physical accident be "significant" to some extent. For example, Policy refers to natural body motions (i.e. movements that occur in day to day life), or injuries occurring over a period of time, or thresholds of force and repetition required for ASTD claims. The Board's Policy relating to mental disorder should be consistent with its present definitions of significant for physical injuries – anything less is discriminatory.

The Policy's current definition of significant is discriminatory because it sets a higher threshold to claim for a mental disorder that is set for physical injuries. And given the Board's contrived definition of significant, varying from what was clearly intended by the legislators, the Policy serves to limit claims more than was intended.

The Board has argued that there is a difference between the definitions of significant when it is applied to an initiating incident as in the legislation as opposed to when applied to causation as in the above Policy. This distinction doesn't appear to make any logical sense. In both cases, the meaning of the word "significant" must be the same.

"Normal Pressures or Tensions"

The amended ***Act*** makes no reference whatsoever to the matter of *"normal pressures or tensions of the worker's employment.* This, again is a test the Board is imposing in Policy that does not exist in the legislation.

It is difficult to understand how the Board is going to measure what pressures or tensions are "normal' for any given workplace. Would this be based off of anecdotal evidence from other workers and management? Again, this seems to fly in the face of the direction of the courts to consider the worker's subjective perception of the event or stressor. It is the Federation's position that if the worker is diagnosed with a mental disorder as a result of the incident or event, clearly their claim should be accepted, whether or not the stressors or tension were deemed "normal" by anyone else.

When investigating these situations, it is not uncommon to hear from co-workers, for example, that a particular situation is "normal" and that the other person should just "grow a thicker skin". I think it is commonly understood that not all people react equally to all situations and therefore, it is the Federation's position that whether stressors or tensions are "normal" is irrelevant and immeasurable. The appropriate test is the worker's subjective perception or psychological reaction to those stressors or tensions.

The suggestion that significant must exceed the "normal pressures" of a worker's job perhaps recognizes that some jobs are more stressful than others. For example, the job of a heart surgeon may be considered higher stress than that of a factory worker.

However, to suggest that the consideration should be of what is normal in a worker's job suggests, in some way, that a worker has "voluntarily assumed" the greater risk of that work, and is therefore limited from compensation. This would be similar to the mistake made in the previous policy that emergency workers' were exempt from a "traumatic event" as these were a "normal" part of their work and so they should be impervious to the effects of it.

I draw your attention to the Meredith Report of 1915, in which he stated:

> *According to the common law it* is a *term of the contract of* service *that the servant* takes *upon himself the risks incidental to his employment (popularly called the assumption of risk rule.) The draft bill* also *provides for the abrogation of the assumption of risk rule.*
>
> *The rule* is *based upon the assumption that the wages which a workman receives include compensation for the risks incidental to his employment which he* has *to run. That* is, *in my judgment, a fallacy resting upon the erroneous assumption that the workman* is *free to work or not to work* as *he pleases and therefore to fix the wages for which he will work, and that in fixing them he will take into account the risk of being killed or injured which* is *incidental to the employment in which he engages.*

Clearly, the requirement for a stressor to "exceed" the normal stressors of a job is a step back in time to the "assumption of risk rule" which was recognized a century ago as a fallacy. Moreover, it again sets a test that differs from that set for physical injuries. Specifically, in cases of physical injury, there is no consideration of the risk associated with a worker's "normal" job.

Characterization of significant

The proposed Policy includes the following statement:

> *Interpersonal conflicts between the worker and his or her co-workers or customers are not generally considered significant unless the conflict results in behavior that* is *considered* ***threatening or abusive.*** [Emphasis added]

The Federation takes serious issue with the implication that interpersonal conflict is a normal part of day to day life at work. This makes it sound as though the Board supports that a worker should expect and accept interpersonal conflict as a "normal" stressor in the workplace. The Oxford dictionary defines "conflict" as "a *serious disagreement or argument, typically a protracted one."* The Merriam-Webster dictionary defines it as follows:

> *2a: competitive or opposing action of incompatibles: antagonistic state or action* (as *of divergent ideas, interests, or persons)*
>
> *b: mental struggle resulting from incompatible or opposing needs, drives,* wishes, *or external or internal demands."*

It is our position that interpersonal conflicts should be taken very seriously and not simply accepted as "normal" in the workplace. In fact, it is our position that the Employer should be obligated to prevent or at least minimize any interpersonal conflicts in the workplace. It is our position that this is in keeping with the Employer's responsibility to protect workers under the Board's existing violence and workplace conduct regulation.
Further, the Federation's position is that using the terms *"threatening or abusive"* to further characterize "significant" is arbitrary and discriminatory. The Law makes no statement limiting stressors to those that are only threatening or abusive. In fact, it specifically includes bullying and harassment, which in many cases can be prolonged but subtle incidents that would not be characterized as "threatening or abusive".

In the Merriam-Webster dictionary, "threat" is defined as *"an expression of intention to inflict evil, injury, or damage.* "Abusive" is defined as *"using harsh insulting language" or "physically injurious".* In the Oxford dictionary, "threatening" is defined as *"having a hostile or deliberately frightening quality or manner', "showing an intention to cause bodily harm"* or *"causing someone to feel vulnerable or at risk".* "Abusive" is defined as *"extremely offensive or insulting."*

The dictionary definitions for "threatening" and "abusive" should be given grave consideration – behaviour that could be described as "threatening or abusive" would sit at the highest level of the violence continuum. There is no doubt that workers exposed to behaviour **below** the level of "threatening and abusive" could develop a mental disorder that is compensable.

Clearly, in using this wording, the Board is repeating the legal error that was addressed by the *Plesner* decision. In this decision, the BC Court of Appeal found the Board's Policy was discriminatory because it set a requirement for a traumatic event that imposed a high causation test that was discriminatory when compared to physically injured workers.

Further, the Court of Appeal in *Plesner* concluded that when considering whether an event is "traumatic" the Board was required to consider not the Board's objective examples, but the worker's subjective perspective. The event must still be "objectively verifiable" – as in not a figment of a claimant's imagination - but it is the subjective impression rather than the Board's characterization that must be considered.

The proposed policy is again making the error of creating an arbitrary measure of "significant" that does not allow for a worker's subjective experience. The Policy should not limit claims to an extent that was not intended by the legislators.

The existing legislative thresholds to the acceptance of a work-related stressor(s) - that it is significant (not trivial), it arises out of and in the course of employment, it does not involve willful misconduct, and it is the predominant cause of a mental disorder - are more than sufficient. It is the Federation's position that the Policy cannot (and should not) create a higher bar to claims than already exists in the legislation.

Again, the BC Building Trades Council supports the position of the BC Federation as set out above.

Was the Mental Disorder a Reaction to one or more Traumatic Events?

The standard of proof for finding "causative significance" is on a balance of probabilities, that is to say, more likely than not. Medical diagnoses are not pure mathematics; they are oftentimes speculative, ill-defined, and "best guess scenarios". As a result, it serves no purpose to state, as the Board does, that "a speculative possibility that the one or more traumatic events contributed to the mental disorder is not sufficient". This language should be deleted from the policy.

Was the Mental Disorder Predominantly caused by a Significant Work-related Stressor?

Section 5.1(a)(ii) of the Act introduces the "predominantly caused by" test which offends the *Canadian Charter of Rights and Freedoms* section 15(1). This new section is also contrary to

the British Columbia Supreme Court decisions in *Schulmeister* v. *BC Workers Compensation Appeal Tribunal* and *Chima* v. *BC Workers Compensation Appeal Tribunal*. Furthermore, it undermines myriad decisions by the Workers' Compensation Appeal Tribunal. As a result, the BC Building Trades Council will continue to oppose this legislative provision and, therefore, the policy.

Vocational Rehabilitation Formal Training – C11-88.50

Current policy and practice respecting the provision of Vocational Rehabilitation Services for injured workers are problematic.

Policy

To begin with, the standard duration for a program – whether for full-time or part-time trades, technical or academic programs – is less than 26 weeks. And programs of more than 26 weeks duration must be approved by a vice-president or the director of Vocational Rehabilitation Services. More often than not 26 weeks or less does not provide sufficient time for a worker to acquire new skills and certification that will return him or her to their previous income level. This, of course, is not new news.

Prior to the legislative amendments promulgated by BC Liberals in 2002, and the introduction of a Volume 2 of the *Rehabilitation Services Claims Manual* (RSCM) related thereto, Volume 1 of the RSCM did not limit educational plans to 26 weeks or less. In fact, no reference whatsoever was made regarding a standard duration of training.

Instead, Policy Item 88.51 stated that the "Board should provide the cost of any formal training program considered reasonably necessary to overcome the effects of any residual disability." Within this reasonable context, the primary guideline respecting the level of support was "that the Board should, where practical, support a program sufficient to restore the worker to an occupational category comparable in terms of earning capacity to the pre-injury occupation. And the secondary guideline was "that the gravity of the residual disability is a relevant factor [and] the Board should go to greater lengths in cases where the residual disability is serious than in cases where it is minor."

While the Council is aware that the aforementioned primary and secondary guidelines remain unchanged in the RSCM Volume 2, the deletion of the introductory sentence directing the Board to "provide the cost of any formal training considered reasonably necessary to overcome the effects of any residual disability" as well the egregious decision to limit programs to a standard 26 weeks empties the current primary and secondary guidelines of any meaningful content as it relates to the provision of reasonable vocational training. For, again, 26 weeks is simply not enough time to overcome the effects of any residual disability.

To remedy this problem the BC Building Trades Council recommends deleting the current 26-week formal training policy and reintroducing the policy as written in volume 1 of the RSCM.

Practice

From a practical standpoint, the culture that holds sway on the Board in general, and in the Vocational Rehabilitation Services in particular, strongly encourages consultants to push workers into training programs and vocations that do not serve their short or long term interests.

This compulsion is grounded in law and policies such as the limited 26-week standard training policy, but also the misconceived focus on getting workers back to work within the shortest period of time. And despite the policy repeatedly stating that the "rehabilitation process emphasizes ongoing consultation with the worker, the employer and, where applicable, the union, in order to maximize and maintain all opportunities for suitable re-employment", the consultation goes only so far. In situations where the worker fails to accept the grand design of the vocational consultant, the requisite Rehabilitation Plan is *deemed* appropriate by the Board, and the worker's wage loss benefits are terminated forthwith if he or she does not acquiesce.

Many of the current practices of Vocational Rehabilitation Services must be changed if the Board's mission of providing "quality rehabilitation" is to be met. To facilitate this process, the BC Building Trades Council strongly encourages the Board to undertake a comprehensive stakeholder consultation to review the policy and practices of the Vocational Rehabilitation Services.

CONCLUSION

The BC Building Trades Council looks forward to the upcoming stakeholder consultations and policy reviews as noted in the Board's 2013-2015 work plan priorities. We also appreciate the opportunity to provide additional priority feedback to your future work plan.