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Ms. Sheena Clarkson
Senior Policy and Legal Advisor
Policy, Regulation and Research Division
Workers' Compensation Board
P.O. Box 5350, Station Terminal
Vancouver, British Columbia
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Dear Ms. Clarkson:

RE: Application of Section 55 of the *Workers' Compensation Act* to Mental Disorder Claims

The BC Building Trades appreciates the opportunity to provide the Workers' Compensation Board with input on the proposed changes to section 55 of the *Workers' Compensation Act* respecting the limitation period for filing a mental disorder application.

The BC Building Trades Council represents over 35,000 unionized building and construction workers throughout British Columbia and the Yukon Territories working in a wide range of trades including professional glaziers, ironworkers, electricians, piledrivers, operating engineers, cement masons and sheet metal fabricators. Every tradesperson within our ranks, whether an apprentice or a Red Seal journeyperson, whether male or female, is at risk of sustaining a mental disorder during their careers. The prevalence of mental disorders in the Canadian workforce are nothing short of alarming: one in five Canadians are diagnosed with a mental disorder annually; a third of the population will experience mental health disorder symptoms (which may include a mental disorder) during their lifetime; and a quarter of the population have a mental disorder every year according to the best estimates of the National Alliance on Mental Health. Simply put, mental disorders in the workplace are ubiquitous. It is, therefore, not only essential that the Workers' Compensation Board's law and policies squarely address all matters related to mental disorders, but that they do so in a way that is attuned to the fragility of the injured worker and the complex and sometimes speculative nature of the condition.

Decision-makers who are faced with adjudicating a mental disorder claim must be granted the necessary latitude and discretion to consider all the relevant evidence when applying section 55 of the *Workers' Compensation Act*. In other words, the *merits and justice of the case must be paramount* when deciding whether an applicant who suffers from a mental disorder is captured by the Act. The limitation period that should apply when filing an application for a mental disorder must grant the most liberal standard to ensure fairness

and equity, the loadstars of the Workers' Compensation System. This should not be viewed by the Board or the employer community as "a bridge too far"; on the contrary, section 8 of British Columbia's *Interpretation Act* which applies generally to all provincial statutes specifies that "[e]very enactment must be construed as being remedial, and must be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects." Surely the "object" of the Act when dealing with adjudication of mental disorders must be to serve the best interests of the injured worker in keeping the Meredith Principles and a worker-centred approach. I will return to this point again in a more fulsome manner after setting out the Board's proposed limitation periods for mental disorder applications.

Currently, section 55 of the Act does not prescribe a limitation period for filing an application for compensation for a mental disorder. Instead, the existing policy directs decision-makers to apply section 55 to mental disorder claims in the same way it applies to claims for injuries under section 5. Under section 5, which relates to personal injuries arising out of, and in the course of, employment, the limitation period for filing an application for compensation commences on the date of injury or death of the worker. The date of injury generally refers to the date of the specific incident resulting in the injury. Where the worker's condition results from a series of injuries, policy requires the application for compensation be filed within one year of the last injury in the series.

In practice, as noted in the discussion paper, "this means where the mental disorder is a reaction to a traumatic event, the limitation period commences on the date of the event. Similarly, if the mental disorder is predominantly caused by a significant stressor, the limitation period commences on the date of the stressor. Where the mental disorder is a reaction to more than one traumatic event or is caused by a series of significant stressors, the application must be filed within one year of the last event or stressor."

While these standard limitation periods usually apply, exceptions to this general rule are allowed when special circumstances prevent or hinder a worker from filing an application in a timely manner. In such cases, the Board may pay compensation from the date of injury, death or disablement from an occupational disease, provided the application is filed within three years of those dates. Where an application is filed more than three years after those dates, compensation is only payable from the date the application was filed.

As revealed by the Board's Policy, Regulation and Research Division ("PRRD") research, all the other Canadian provinces and territories have legislation respecting limitation periods for filing applications for compensation which range from three months to two years. As well, their research indicates that appellate decisions show an inconsistent approach to determining when the limitation period under section 55 should commence.

In an effort to strike a balance between ensuring impaired workers' applications are not barred from compensation and employers have a modicum of certainty with respect to future costs and timelines, the PRRD has proposed six options regarding when the one-year limitation period to file an application for compensation for a mental disorder under section 55. The options are:

(a) The date of the traumatic event or significant stressor resulting in the mental disorder;
(b) The date of the worker's first period of disablement;
(c) The date the worker is first diagnosed by a psychologist or psychiatrist;
(d) The date of the worker's first period of disablement or the date the worker is first diagnosed by a psychologist or psychiatrist, whichever is earlier;
(e) The date the worker receives treatment; or
(f) The date the worker has reason to believe there was a link between their psychological change and the work-related traumatic event or significant stressor.

The fact that the proposed list of limitation periods for filing an application for a mental disorder is so long is revealing. Among other things, it reveals that the circumstances giving rise to a late application for compensation by someone suffering from a mental disorder are limitless and complex. This, of course, is the reason why so many appellate decisions have employed different criteria - whether the "reasonable person test" or the date the worker had *reason to believe* there was a link between their psychological condition and their exposure to a work-related traumatic event or significant stressor - when resolving what limitation period should apply to mental disorder claim applications. Fortunately, the complexity of potential options guides us to the best option, namely, enabling decision makers to consider the circumstances giving rise to a late application for a mental disorder in the most fulsome and comprehensive manner with the merits and justice of the case providing the guiding light.

For, the fact is none of the six proposed options will ensure consistency, and much more importantly, fairness and equity in every case. Nor will any singular option provide fairness and equity for workers in the majority of cases. Routinely applying the "reasonable person test" or what I will call the "reason to believe" test which is the current flavour of the month at the Workers' Compensation Appeal Tribunal, will not ensure the best interests of workers are served. *Consider:* If workers with mental disorders are oftentimes prevented from identifying their mental impairment because of symptoms such as a loss of concentration, confusion, forgetfulness, debilitating headaches, insomnia, avoidance, forgetfulness, feelings of futility and guilt, and suicidal ideation, how, then, can the Board apply a test of reason? Clearly, the test of reason cannot be applied with fairness upon those whose capacity to reason has been compromised.

If fairness and equity for the worker is the goal, the merits and justice of the case in all its complexity must be fully and exhaustively analyzed and considered by decision-makers. What this means in policy terms is that decision-makers must be empowered to choose among the six proposed options. And more than just this is required. First, the limitation periods under all the options should be extended to three years. And, secondly, the policy should expressly direct decision-makers to employ the option that best serves the injured worker in keeping with the Meredith Principles, the merits and justice of the case, and the worker-centred approach set out in Mr. Petrie's report to the Board of Directors entitled *Restoring the Balance: A Worker-Centred Approach to Workers' Compensation Policy*.

The importance of the merits and justice of the case are discussed at length in the *Restoring the Balance* report. As we are reminded in the report, section 99 of the Act provides the foundation for all decisions made under this statute. Most importantly, section 99(2) which is the pivotal provision, states that "the Board must make its decision based upon the merits and justice of the case, but in so doing the Board must apply a policy of the board of directors that is applicable in that case." The edict to "apply a policy of the board of directors that is applicable in that case" is the result of Bill 49 that amended section 99 in 2002 at the behest of the employer community and to bring greater consistency to decision-making. Following this statutory change, the Board ushered in a new policy manual to reflect the legislative changes and focus decision-makers' attention on the application of policy and direction from the Board of Directors.

Very importantly, the new Policy Item #2.20 of the *Rehabilitation Services and Claims Manual*, Volume 2, stipulates that:

> *Each policy creates a framework that assists and directs the Board in its decision-making role when certain facts and circumstances come before them. If such facts and circumstances arise and there is an applicable policy, the policy must be followed.*
>
> *All substantive and associated practice components in the policies in this Manual are applicable under section 99(2) of the Act and must be followed in decision-making. The term "associated practice components" for this purpose refers to the steps outlined in the policies that must be taken to determine the substance of decisions. Without these steps being taken, the substantive decision required by the Act and policies could not be made. (Underlining added.)*

As Mr. Petrie rightly notes, "the change to section 99(2) has made policy binding and has placed a greater emphasis on the application of the policy and relatively less emphasis on consideration of the facts and circumstances." Thus, Board policy no longer simply provides "adjudicative guidance" but rather confines decision-makers within the narrower policy parameters thereby eviscerating the merits and justice of the case, that is, the individual circumstances. This problematic situation is exacerbated by using a computerized case management system "which guides the claim investigation and decision-making, sometimes without sufficient consideration of all the circumstances from the worker's perspective."

It is for this reason that Mr. Petrie recommended amending Policy Item #2.20 to explicitly incorporate the requirement in section 99(2) of the Act that, "the Board must make its decision based on the merits and justice of the case." Such an amendment, he states, "can provide for the adequacy of the investigation of the relevant facts and circumstances of the issue to be decided and take into consideration the evidence of the worker in all cases."

On May 31, 2018, the Board of Directors directed the PRRD to consider, through the existing policy development and consultative process, the proposed policy changes set out in Mr. Petrie's report

including those relating to the consideration of the merits and justice of the case (recommendation #1). While a final decision with respect to amending policy #2.20 in keeping with Petrie's report has yet to be made, the general thrust of Petrie's worker-centred report coupled with the support from the Board of Directors and Minister Harry Bains, strongly suggests that empowering decision-makers to exercise their discretion when considering the application of section 55 of the Act when adjudicating an application for a mental disorder would be a change in the right direction.

In support of this contention, I can do no better than to conclude with the words of Mr. Petrie:

> *A case management system is an important component of an efficient workers' compensation system to ensure a level of consistency to decision-making. However, where that system does not have sufficient flexibility to consider the merits and justice of the individual worker's case, it erodes the principle of fairness and equity that is integral to the worker community's confidence in the system. When the workers' compensation system fails to provide fair and equitable compensation benefits, especially to the most seriously injured and vulnerable workers, corrective action is required. Incorporating a more worker-centred approach within the case management system is the most effective approach to address these inequities.*

The BC Building Trades appreciates the opportunity to provide input on the Board's proposed changes to section 55 of the *Workers' Compensation Act* respecting the limitation period for filing a mental disorder application. Given the vulnerable constitution of those suffering from a mental disorder, it is our view that the Board must employ the most liberal adjudicative principles in keeping with a worker-centred approach when considering applications for mental disorders.

Thank you.

Sincerely,

Merrill James O'Donnell, M.A., LL. B.
Workers' Advocate

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