SUBMISSION TO THE

WORKERS COMPENSATION BOARD

MENTAL DISORDERS

POLICY ITEM C3-13.00

(Workers Compensation Act Section 5.1)

BC BUILDING TRADES POSITION

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British Columbia and Yukon Territory Building and Construction Trades Council

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PREFACE

The British Columbia and Yukon Territories Building and Construction Trades Council ("BC Building Trades") represents unionized construction trades workers in myriad contexts. Our members include construction labourers, ironworkers, electricians, roofers, plasterers, cement masons, sheet metal fabricators, bricklayers, heat and frost insulators, and many others in building and construction. There are 40,000 highly skilled unionized construction trades workers throughout British Columbia and the Yukon.

The decimation to the Workers Compensation System resulting from the 2002 amendments to the *Workers Compensation Act* have created increasing financial, physical, psychological, emotional, and workplace hardships on workers. The BC Building Trades' opposition to the BC Liberals and their draconian changes to the Act are well known. Labour, which is the source of all value, cannot be sacrificed on the altar of private enterprise if the so-called historic compromise is to function over the long term.

The *Workers Compensation Amendment Act*, 2011 ("Bill 14") was enacted on May 31, 2012, and will come into effect July 1, 2012. Among other things, this new legislation amended section 5.1 of the *Workers Compensation Act* regarding mental stress and disorders. In order to provide guidance to their officers on the implementation of the new section 5.1, the Board has drafted a new policy on mental stress/disorders and initiated a public consultation.

This document sets out the BC Building Trades position with respect to the new section 5.1 of the Act as well as the Board's recent proposed policy on mental disorders, that is, Policy Item C3-13.00 of the *Rehabilitation Services and Claims Manual*, Volume II.

INTRODUCTION

The BC Building Trades see both positives and negatives in the new section 5.1 of the *Workers Compensation Act* as well as the proposed policy C3-13.00 on mental disorders.

On the positive side, the government, compelled by the British Columbia Court of Appeal in *Plesner* v. *BC Hydro and Power Authority*, has revised elements of the language of the former section 5.1 of the Act so as not to offend section 15(1) of the *Canadian Charter of Rights and Freedoms*. Specifically, they have eliminated the requirement that the mental stress be an acute reaction to a sudden and unexpected traumatic event arising out of the worker's employment by

striking this language of the former section 5.1(a). As required, the proposed policy no longer mentions this requirement.

Also to its credit, the Board has changed all references to the term "mental stress" to "mental disorder". The former term belittled the nature of psychological injuries.

On the negative side, however, the new section 5.1 of the Act is highly problematic as are many aspects of the Board's proposed policy that reflects it. The BC Building Trades' main concerns with both the law and the policy are set out below.

BACKGROUND

THE LAW – BILL 14 – SECTION 5.1

Prior to the recent amendments brought in by Bill 14, section 5.1 of the *Act* stated:

Section 5.1

> (1) Subject to subsection (2), a worker is entitled to compensation for mental stress that does not result from an injury for which the worker is otherwise entitled to compensation, only if the mental stress
>
> > a) is an acute reaction to a sudden and unexpected traumatic event arising out of and in the course of the worker's employment,
> >
> > b) is diagnosed by a physician or a psychologist as a mental or physical condition that is described in the most recent American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders at the time of the diagnosis, and
> >
> > c) is not 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.
>
> (2) The Board may require that a physician or psychologist appointed by the Board review a diagnosis made for the purposes of subsection (1)(b) and may consider that review in determining whether a worker is entitled to compensation for mental stress.
>
> (3) Section 56(1) applies to a physician or psychologist who makes a diagnosis referred to in this section.
>
> (4) In this section, "psychologist" means a person who is registered as a member of the College of Psychologists of British Columbia established under section 15(1) of the *Health Professions Act* or a person who is entitled to practise as a psychologist under the laws of another province.

As a result of Bill 14, the above section 5.1(1)(a) has been repealed and a worker is entitled to compensation only if the mental disorder:

a) either

(i) is a reaction to one or more traumatic events arising out of and in the course of the worker's employment, or

(ii) is predominantly caused by a significant work-related stressor, including bullying or harassment, or a cumulative series of significant work-related stressors, arising out of and in the course of the worker's employment.

Therefore, the new section 5.1 of the Act reads, in its entirety, as follows:

Section 5.1:

(1) Subject to subsection (2), a worker is entitled to compensation for a mental disorder that does not result from an injury for which the worker is otherwise entitled to compensation, only if the mental disorder

(a) either

(i) is a reaction to one or more traumatic events arising out of and in the course of the worker's employment, or

(ii) is predominantly caused by a significant work-related stressor, including bullying or harassment, or a cumulative series of significant work-related stressors, arising out of and in the course of the worker's employment,

(b) is diagnosed by a psychiatrist or psychologist as a mental or physical condition that is described in the most recent American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders at the time of the diagnosis, and

(c) is not 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.

(2) The Board may require that a psychiatrist or psychologist appointed by the Board review a diagnosis made for the purposes of subsection (1)(b) and may consider that review in determining whether a worker is entitled to compensation for a mental disorder.

(3) Section 56(1) applies to a psychiatrist or psychologist who makes a diagnosis referred to in this section.

(4) In this section:

"psychiatrist" means a physician who is recognized by the College of Physicians and Surgeons of British Columbia, or another accredited body recognized by the Board, as being a specialist in psychiatry;

"psychologist" means a person who is registered as a member of the College of Psychologists of British Columbia established under section 15(1) of the *Health Professions Act* or a person who is entitled to practise as a psychologist under the laws of another province.

DISCUSSION OF THE LAW – BILL 14 – SECTION 5.1

Going Beyond the De Minimis Range – "Predominant Cause"

When Bill 14 was introduced into the BC Legislature for First Reading, the proposed language of section 5.1(1)(a)(ii) did not include the word "predominantly". Specifically, the provision read:

> (ii) a significant work-related stressor, or a cumulative series of significant work-related stressors, arising out of and in the course of the worker's employment.

Changing this provision to make mental disorders compensable only if, in addition to the stringent requirements of section 5.1, the worker's disorder can be proven to be *predominantly caused* by a significant work-related stressor creates a major hurdle for people suffering from mental disorders.

Already the language of section 5.1 is overly restrictive. Under the former as well as the existing provision the worker must be diagnosed by a psychiatrist or psychologist as having a mental or physical condition described in the most recent American Psychiatric Association's *Diagnostic and Statistical Manual of Mental Disorders* ("DSM"). Furthermore, the Board may appoint its own psychiatrist or psychologist to review the external diagnoses.

The new section 5.1 employing the word "predominantly" is so restrictive that we believe it offends section 15(1) of the *Canadian Charter of Rights and Freedoms* which provides that:

> Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

Given the complexity of psychological disabilities arising out of employment as well as the vulnerability of people suffering from mental disorders, the courts will be more than justified to

find this new provision discriminatory. Clearly, requiring that the disorder be *predominantly caused by* a significant work stressor is far more difficult than applying the "causative significance" test that applies to other types of injuries and occupational illnesses. It is well established that the accepted injury need not be the only cause or even the most significant cause of a subsequent injury or condition, for the said injury or condition to be compensable. These matters were discussed in *Schulmeister* v. *BC Workers Compensation Appeal Tribunal*, (2007 BCSC 1580) and *Chima* v. *BC Workers Compensation Appeal Tribunal* (2009 BCSC 1574). The standard causative significance test was also discussed by the Workers Compensation Appeal Tribunal in 2010 (WCAT 2010 014482). Summarizing a number of earlier WCAT as well as court decisions, the Panel stated:

> It is not necessary that the employment have been the sole cause, the predominant cause, or even a major cause of the disability, in order to establish employment causation.... It is sufficient that the employment was of some causative significance, which was more than negligible or trifling (de minimis) in nature.

Simply put, the rule consistently applied is that a work incident need not be the predominant cause of a mental stress injury, only of causative significance beyond the de minimis range. With the standard changed to "predominant cause" via Bill 14, workers will find it exceedingly difficult (until the new section is deemed ultra vires by the courts!) to meet the Board's standard, particularly if they suffer from a pre-existing psychological condition or are predisposed to psychological injury.

Furthermore, how will this new draconian provision square with the obligations of the Board and the Workers Compensation Appeal Tribunal under sections 99(3) and 250(4) of the Act? Both provisions state that if the evidence supporting different findings on an issue is evenly weighted, they must resolve the issue in the worker's favour. How can a worker ever be "favoured" when the statute is littered with layer upon layer of provisions that tilt the balance against the injured worker? What happened to the civil standard of a balance of probabilities? Realistically speaking, how will workers prove that the probabilities are in their favour - or are equally balanced - that their mental disorder was "predominantly caused by a significant work-related stressor arising out of and in the course of employment? The answer, of course, is "with much difficulty" and "very rarely indeed".

DISCUSSION ON THE PROPOSED POLICY – C3-13.00

Given the far reaching changes implemented by Bill 14, the Board's proposed Policy Item C3-13.00 has been redrafted in its entirety. The BC Building Trades find several problems with the Board's new policy.

Replacing Physician with Psychiatrist

Under the current policy the worker's physician or a psychologist can diagnosis their mental stress/disorder with reference to the DSM. In contrast, in the Board's proposed policy all references to physicians are replaced with psychiatrist. This is problematic.

Physicians or general practitioners who represent a patient usually possess intimate knowledge of their patient's medical including mental condition. Such knowledge is invaluable when diagnosing the existence or non-existence of a mental disorder. The proposed exclusion of such medical expertise from a worker's evaluation is yet another effort by the Board to hold "all the cards" and, thereby, to ensure the worker "leaves the table" empty-handed.

Does the Worker have a DSM Diagnosed Mental Disorder?

Part A of the Board's proposed policy reads:

> Section 5.1 requires more than the normal reactions to traumatic events or significant work-related stressors, such as being dissatisfied with work, upset or experiencing distress, frustration, anxiety, sadness or worry as those terms are widely and informally used.

The above sentence should be struck from Policy Item C3-13.00 because it connects the notion of "normal reactions" to "traumatic events or significant work-related stressors". A person does not and cannot have a "normal reaction" to a traumatic event or significant work-related stressor. As a result, this proposed policy language is not supported by the enabling section 5.1 of the Act. Moreover, this issue is captured and supported by the enabling statute by way of Part C of the proposed policy which simply states that "all workers are exposed to normal pressures and tensions at work which are associated with the duties and interpersonal relations connected with the worker's employment".

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

Under Part B of the current proposed policy, the Board states that:

> In all cases, the one or more events, stressor or cumulative series of stressors, must be identifiable. The worker's subjective statements and response to the event or stressor are considered; however, this question is not determined solely by the worker's subjective belief about the event or stressor. The Board also verifies the 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 sources of information should be expressly added to the last sentence of the aforementioned paragraph.

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

Part C of the proposed policy, if approved, will assist decision-makers to determine whether an interpersonal conflict between a worker and his or her co-workers or customers is "significant". The relevant provisions read as follows:

> A work-related stressor is considered "significant" when it exceeds the intensity and/or duration expected from the normal pressures or tensions of the worker's employment.
>
> 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.]
>
> Examples of significant work-related stressors may include exposure to workplace bullying or harassment.

Conflict is defined too narrowly in this context because it will only be deemed significant by the Board if it "results in behavior that is considered threatening and abusive". A mental disorder may arise from a conflict that does not result in a particular behavior that is threatening or abusive. And the term "considered" applies yet another layer of discretion onto a convoluted matrix, giving Board officers another tool to exercise discretionary power to limit workers' entitlements. As a result, the middle paragraph above should be deleted from the proposed policy.

General interpretative guidance with respect to the significance and/or traumatic nature of a mental disorder would be aided by reference to, among other sources, the twelve psychosocial risk factors in the *Guarding Minds at Work* report. As noted in their document:

> Guarding Minds @ Work (GM@W) is an evidence-based strategy that assists employers in protecting and promoting psychological safety and health in the workplace. GM@W provides a comprehensive set of resources employers can use to effectively address the impact of 12 psychosocial risk (PSR) factors known to have a powerful impact on organizational health, the health of individual employees, and the financial bottom line. The PSRs were identified by researchers from the Consortium for Organizational Mental Healthcare (COMH) in the SFU Faculty of Health Sciences on the basis of extensive research and a comprehensive review of empirical data related to national and international best practices. The determination of the factors also reflects existing and emerging Canadian case law and legislation.

The BC Building Trades believes that the risk factors identified by GM@W such as the absence of psychological support or protection, supportive organizational structures, effective workload management, leadership, civility and respect in the workplace are indicative of jobs that are prone to trauma and significant work-related stressors.

Causation

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?

As already argued, we believe section 5.1(a)(ii) of the Act that introduces the "predominantly caused by" test offends the *Canadian Charter of Rights and Freedoms* section 15(1), is contrary to the British Columbia Supreme Court decisions in *Schulmeister* v. *BC Workers Compensation Appeal Tribunal* and *Chima* v. *BC Workers Compensation Appeal Tribunal*, and undermines myriad decisions by the Workers Compensation Appeal Tribunal. Therefore, the BC Building Trades will have no truck or trade with the Board's proposed policy which only serves to lend further support to an insupportable statutory provision.

CONCLUSION

The key legislative change promulgated by Bill 14 with respect to mental disorders needing to be *predominantly caused* by a significant work-related stressor discriminates against those suffering from a mental disability contrary to the *Canadian Charter of Rights and Freedoms* as well as goes counter to the "significant causation" test established by myriad courts and WCAT Panels. The Board's proposed Policy Item C3-13.00 which reflects and bolsters this legislative change offends the same law, cases, and policy. It also offends the BC Building Trades.

Other elements of the proposed policy, discussed above, possess a few positives and several shortcomings that can be more easily rectified.

We appreciate the opportunity to bring our concerns and issues to your attention.