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Dear Ms. Kim:

RE: Adding Diseases Caused by Communicable Viral Pathogens, including COVID-19 to Schedule 1 of the Workers' Compensation Act

INTRODUCTION

The BC Building Trades Council appreciates the opportunity to provide feedback to the Policy, Regulation and Research Division ("PRRD") of the Workers' Compensation Board ("Board") with respect to the discussion paper on *Adding Diseases Caused by Communicable Viral Pathogens including COVID-19 to Schedule 1 of the Workers' Compensation Act*.

The BC Building Trades represents over thirty-five thousand unionized construction workers who are members of 25 local craft unions. Working with construction companies, the Council leverages the most out of development for all stakeholders, advances the economic prosperity of the province, provides superior training opportunities, and protects the health and safety of our members. Our highly skilled workers make up approximately 55 percent of the non-residential construction labour force. Hence our tag line: *We Build BC!*

Since the COVID-19 outbreak was publicly announced in March 2020, the BC Building Trades have been at the forefront of pushing the Board to uphold as well as establish the new targeted prevention and compensation mechanisms to ensure the health, safety and equitable compensation of our members. This resulted in progressive steps being taken by both Prevention Services and Compensation Services.

For the last couple of months the BC Building Trades has been working with our colleagues at the BC Federation of Labour as well as the workers' representatives on the Policy, Practice and Consultative Committee ("PPCC") with the aim of creating a legislative presumption to ensure our workers in general, and our members in particular,

will be compensated if they contract COVID-19 while working. This, of course, was to be expected given that construction was deemed an essential service by the BC Government.

Fortunately, on April 20, your Board of Directors directed the PRRD to amend Schedule 1 of the Act to add a presumption for COVID-19 (or potentially more broadly coronaviruses or respiratory communicable diseases) on an expedited basis. While the BC Building Trades was initially elated with this news and engaged with the PPCC consultations afterwards in an effort to hammer out solid language, the proposed language is unsatisfactory and must be revised if workers are to receive the necessary protection.

As mentioned, the government decided from the outset of this pandemic that construction was an essential service. The BC Building Trades supported the government's edict and tens of thousands of our members continued to ply their trades throughout the province despite the life-threatening nature of the COVID-19 pandemic. In return, our members rightfully expect that their work environments will be maintained in keeping with precautionary health and safety prevention protocols and compensation will be paid if they contract the disease at work.

THE PROBLEM TO BE ADDRESSED

The problem to be addressed is there is no presumption specific to COVID-19 claims set out in Schedule 1 of the Act. Amendments to *Schedule 1* are required to create a new presumption related to COVID-19 and similar diseases, specific to a specific industry or process. According to the PRRD, "adding a presumption to Schedule 1 of the Act would ensure WorkSafeBC would not be required to produce or analyze similar evidence of work-relatedness in every case, by establishing a formal institutional memory for diseases such as COVID-19."

Currently, as noted in the discussion paper, "if the worker's occupational disease is one identified in Schedule 1 and the worker was employed in the corresponding process or industry described in the Schedule, then work causation is presumed unless the contrary is proved." This means that a claim covered by Schedule 1 can be accepted even though no specific evidence of work causation is produced. The presumption can be rebutted, however, if the evidence shows the occupational disease was not due to the worker's employment. According to the PRRD, "the primary purpose of Schedule 1 is to avoid the repeated effort of producing and analyzing medical and other evidence of work causation where WorkSafeBC has concluded, based on the scientific research, that a disease is specific to a particular industry or process." *Unfortunately, the PRRD's proposed language does not achieve this primary purpose.*

THE PRRD'S PROPOSED LANGUAGE

The results from the expedited review of the expert medical and scientific research informed how the PRRD would describe the two aspects of a disease in Schedule 1:

1. The description of the disease in Column 1; and

2. The description of the corresponding process or industry for the purposes of the worker's employment in Column 2.

If the disease fits the Column 1 description, the disease is considered to satisfy the occupational disease requirement under the Act.

Given the expedited nature of proposed amendment to Schedule 1 of the Act coupled with the 6-month timeline before this legislation will be effective, the PRRD has resolved that describing the disease in Schedule 1 as "COVID-19" would be of limited value because COVID-19 may no longer be the subject of a public health emergency and the Schedule 1 presumption would not apply to other similar diseases which may arise in future.

The proposed language for *Column 1* describes 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) notice given under section 52(2) of the *BC Public Health Act* (a public health emergency in respect of a regional event);
 - b) a state of emergency declared under section 9(1) of the *BC Emergency Program Act*;
 - c) a state of local emergency declared under section 12(1) of the *BC Emergency Program Act*;
 - d) an emergency declared under section 173 of the *Vancouver Charter*.

For *Column 2*, the PRRD is proposing to amend the Schedule to include the corresponding description of process or industry as one that meets all the following requirements:

- 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.

THE PROBLEMS REMAINING

Immediate Action is Required

There are several shortcomings in the changes proposed by the PRRD. The first shortcoming is outside the PRRD's purview, but they can convey the shortcoming to the BC Government. Precisely, the Board of Directors motion stipulates that the presumptive language be added to Schedule 1 of the Act within 6 months. This is an expedited process; in regular circumstances this process takes anywhere from 18 to 24 months. Be that as it may, the government can take steps under their emergency legislation to implement the amended Schedule 1 sooner than 6 months and the COVID-19 crisis presses upon them to do so. *Desperate times require desperate measures.* Workers on the frontlines who contract COVID-19

need this presumptive and its concomitant coverage immediately. It is of the utmost importance that the BC government uses its emergency powers to bring the presumptive language into effect as soon as possible. This means taking measures to implement the changes now.

Column 1 – Description of Disease

Under the PRRD's proposal, there are two main elements of Column 1 respecting the description of the disease: it must be caused by communicable viral pathogens, and subject of one or more emergency statutes (or the Vancouver Charter).

With respect to the communicable viral pathogens, we see the logic of this. It captures viral pathogens broadly instead of focusing solely on COVID-19 thereby ensuring that unknown and potentially dangerous pathogens will be captured moving forward.

The second element in Column 1 necessitates the provincial government to declare a state of emergency for the presumptive clause to apply. In the unique case of Vancouver, they must employ their Charter. Declaring a state of emergency for an infectious disease recognizes that there is a serious risk of infection and the presumption should apply. This, too, makes logical sense.

However, an addition to Column 1 is required to "fill" the potential gap where workers develop an infectious viral disease prior to a statutory declaration or after the emergency is lifted. Moreover, workers may be exposed to a serious novel virus that does not meet the government's threshold to impose a state of emergency, but still threatens the life of workers. In such cases, the presumption should apply if the virus is present in the worker's workplace. This should be stipulated in Column 2. Therefore, the BC Building Trades recommends adding "a novel virus" to the description of the disease in Column 1.

Column 2 – Description of the Process or Industry

As the PRRD explains in their proposal, for "a disease set out in Column 1, if the worker's employment meets the description of the process or industry set out in Column 2, then the work causation requirement is presumed, unless the contrary is proved." After viewing the research provided by the Rapid Reviews which concluded that there was no strong evidence of an association between workers in a specific occupation and a greater risk of contacting COVID-19 or another infection, the PRRD resolved to propose statutory language for "exceptional circumstances" where one or more of the BC emergencies are declared and some workers find themselves at "significantly greater risk of exposure than the public at large." The BC Building Trades finds fault with this element of the proposal.

This language that requires a risk of exposure to infection "significantly greater than the public at large" is dangerously obscure and restrictive. Obscure, because there is no way of knowing how it will be interpreted by Board case managers. Restrictive, because, in the context of a pandemic, a wide swath of people who are compelled to work will be a risk but may not be captured by this language.

Currently, the Board is adjudicating COVID-19 claims on a case-by-case basis. The whole purpose of the presumption is to remove the necessity to investigate each and every claim on a case-by-case basis. Yet, this proposed language clearly pushes infectious disease claims in that direction. Coupled with the other stipulations of the Schedule 1 proposed by the PRRD, this “significantly greater” requirement eviscerates the purpose of the Schedule 1 amendment. If the goal of the legislative change is to enable people who are working in threatening infectious contexts to be relieved of the burden of proof – and certainly the other elements of the PRRD’s proposed language set the parameters for only serious infectious diseases – why is it necessary that the risk of exposure be significantly greater than the public at large? Advancing this proposal will ensure the final presumptive product is nothing more than a toothless paper tiger.

Building and construction workers work on myriad different kinds of jobsites. Some jobsites are big and expansive, while others are small; some have many crafts working together for a long period of time, while others have a singular craft and are short in duration; some are well managed and put a premium on their workers’ health and safety, while others are fly-by-night operations that are just one step ahead of the sheriff (i.e., prevention officers) and don’t give a damn about anything other than the maximization of profit. There is, however, one constant for every worker on every jobsite during a communicable disease outbreak: they are at greater risk than those who have remained at home. Therefore, the PRRD should remove the language necessitating a “significantly greater risk” and replace it with a clause specifying that all workers working outside of the home are covered by the presumption. Coupled with the existing proposed language, this is an equitable way to ensure that workers, whether working in construction, health care, or services, are protected by Schedule 1.

The second element of the PRRD’s proposal with respect to Column 2 is that the risk of exposure occurs during the applicable notice or emergency under Column 1. This language is too narrow and restricts the application of the presumption. Looking at what happened in British Columbia starting in 2020 shows us the problems with this element of the proposed presumptive clause. Consider. The first COVID-19 case in this province was confirmed January 28, 2020, and the first WCB COVID-19 claim filed on March 12, 2020. Yet, the World Health Organization did not declare COVID-19 a pandemic until March 12; BC’s Public Health Emergency was not declared until March 17; and the state of emergency was not promulgated pursuant to the *Emergency Program Act* until March 18. Not surprisingly, the governmental and statutory wheels took time to shift into gear; bureaucratic actors and tools cannot be expected to respond in a timely fashion to a pandemic.

Workers who had contracted the COVID-19 virus prior to the imposition of the states of emergency and they will be doing so after the government lifts the state of emergency. The presumption must be structured in such a way to ensure these at-risk workers are captured. Moreover, there is a strong possibility that a novel virus posing a serious threat to our members may not rise to the level compelling the government authorities to pass emergency orders in the first place. The Schedule 1 presumptive clause must address these possibilities. To do so, the BC Building Trades recommends that the presumption should apply if the virus is present in the workers’ workplace.

Finally, the PRRD is proposing that the risk of exposure must occur within the geographical area of the applicable notice or emergency. This causes a potential problem for our members who may leave the province for a short period of time prior to a government-imposed restriction on travel and bring the virus back with them. In such a case, the worker is not covered by the presumption because he was out of the applicable geographical area. Our Workers' Compensation System should not be able to turn their backs on these unfortunate workers who, if not compensated for in their home province, will find themselves entangled in a bureaucratic provincial cross-border nightmare.

CONCLUSION

The unprecedented nature and lack of scientific clarity surrounding the current COVID-19 pandemic raises pressing medical, political, legislative, and moral issues. The Worker's Compensation Board has been thrown into a medical no man's land where solid answers from the scientific experts are few and far between. In such a context it is of the utmost importance that the Board of Directors errs on the side of inclusion instead of exclusion when amending Schedule 1 of the Act to add a presumption for COVID-19 or more broadly coronaviruses or respiratory communicable diseases.

The BC Building Trades believes that our recommendations coupled with some of the PRRD's proposed language for Schedule 1 will make for a better presumptive provision. These recommendations echo those of the BC Federation of Labour which we fully support. It is of the utmost importance that the presumptive legislation be passed at the earliest opportunity to ensure our members are fairly compensated.

Thank you for the opportunity to provide feedback on this important matter.

Sincerely,



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

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MoveUP

Enclosure:

Discussion Paper - *Adding Diseases Caused by Communicable Viral Pathogens, including COVID-19 to Schedule 1 of the Workers' Compensation Act, May 29, 2020*