

COVID-19 and recent changes to the Workers Compensation Act and Board Policy

BCGEU Member Benefits department – December 3, 2020

Here are the highlights as far as COVID-19 is concerned. Not much has changed except for the inclusion of infection by communicable pathogens into Schedule 1.

Workers who suffer an occupational disease due to the nature of their employment are entitled to receive compensation under the terms set out in the Workers' Compensation Act (Act).

Occupational diseases are those diseases recognized and published by the Board as such. The Directors of the Workers Compensation Board (doing business as WorkSafeBC) have recognized infection by communicable viral pathogens as an occupational disease. COVID-19 falls within that category. This means that compensation for occupational disease is payable under section 137 of the Act when a worker suffers COVID-19 due to the nature of their employment.

There are two ways under the Act that a claim for occupational disease may be accepted by WorkSafeBC. The first, and easiest, is by "rebuttable presumption", while the second is on the weighing of the specific evidence in the case.

The Rebuttable Presumption

Those diseases to which the rebuttable presumption applies are set out in Schedule 1 of the Act. On July 22, 2020, the Board of Directors of WorkSafeBC approved amendments to Schedule 1 of the Workers Compensation Act (Act) to add a presumption for infections caused by communicable viral pathogens, which are the subject of a B.C.-specific emergency declaration or notice. COVID-19 presently meets that criteria, and so is now subject to the rebuttable presumption applicable to Schedule 1 of the Act.

Specifically, for the purposes of COVID-19, if a member is diagnosed as suffering from COVID-19 and the specific criteria regarding a BC-specific emergency declaration or notice¹ are met, ***and***, with respect to the employment:

- (a) there is a risk of exposure to a source or sources of infection significantly greater than that to the public at large,
- (b) the risk of exposure occurs during the applicable notice or emergency under column 1 of Schedule 1, and
- (c) the risk of exposure occurs within the geographical area of the applicable notice or emergency under column 1.

then it shall be presumed that the COVID-19 was due to the nature of the employment, unless the contrary is proven. Note that all three elements of the employment circumstances test must be satisfied for the rebuttable presumption to apply.

¹ (a) notice given under section 52 (2) of the Public Health Act; (b) a state of emergency declared under section 9 (1) of the Emergency Program Act; (c) a state of local emergency declared under section 12 (1) of the Emergency Program Act; (d) an emergency declared under section 173 of the Vancouver Charter.

The Board has explained the purpose of Schedule 1 and its rebuttable presumption in its policy:

Once included in Schedule 1, it is presumed in individual cases that fit the disease and process/industry description that the cause was work-related. A claim covered by Schedule 1 can be accepted even though no specific evidence of work relationship is produced. A review of the available medical and scientific evidence would establish a likely relationship between the disease and the employment. The listing in the Schedule avoids the effort of producing the evidence in every case.

Consequential amendments were also made to Item C4-28.00, Contagious Diseases, and Appendix 2 of the Rehabilitation Services & Claims Manual, Volume II to reflect the Schedule 1 amendment.

These amendments came into effect on October 26, 2020.

Proving the Case on the Basis of Evidence

The second way a claim for occupational disease, including COVID-19 can be accepted under the Act is when the evidence shows that the worker has an occupational disease, but it is not listed in Schedule 1, or if it is listed in Schedule 1, the circumstances of the employment do not satisfy the criteria in column 2 of Schedule 1. In such case, the rebuttable presumption does not apply, and the Board will investigate to determine whether the occupational disease (for purpose of this discussion COVID-19) was due to the nature of the worker's employment. The occupational disease is due to the nature of the worker's employment if the employment was of causative significance in producing the disease. Causative significance means more than a trivial or insignificant aspect. The Board will conduct a detailed investigation of the worker's circumstances including information about the worker, the worker's diagnosed condition, and the worker's workplace activities. The Board recognizes that expert medical evidence is important in this investigation, but states in its policy:

...the presence or absence of expert evidence supporting or opposing a causal link is relevant and will generally be given weight by the Board, but it is not determinative of causation; causation can be inferred from other evidence. In every case, the Board decides whether the evidence supports a finding of causation based on a weighing of the evidence. If the evidence before the Board does not support a finding that the disease is due to the nature of the worker's employment, the Board's only possible decision is to deny the claim.

The evidence will be weighed using the standard of "as likely as not", which is unique to the Act, and imposes less of a burden on the worker than the standard civil test of "more likely than not".

Preventative Measures/Self Isolation

The Board maintains its position that it will not pay disability wage loss payments to workers for preventative time loss from work. In order to receive temporary wage loss on a claim for COVID-19, there must be medical evidence that confirms the diagnosis. A speculative possibility that a worker has contracted COVID-19 is not sufficient to establish entitlement to temporary disability wage loss compensation. It may be that the employer, or government, has established a plan to provide income for

persons who have been forced to self-isolate or otherwise remain away from work for preventative reasons, but the Board has no legislated mandate to provide such funds.

Members who have reason to believe they have contracted COVID-19 through work should report it ASAP to their employer, and should file an application for compensation, including as many particulars as possible, with WorkSafeBC. Members who have disability coverage under their collective agreement should also apply for coverage under their respective plans. It may well be that the member has a genuine disability for which they have coverage under the collective agreement, but that disability does not fall within the scope of the Act. By applying to both at the same time, members can improve their chances of obtaining faster benefit coverage under one or the other.